IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28667-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
TRAVIS LEE LOCKIE,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. ─ Travis L. Lockie appeals his felony conviction for driving under the influence (DUI). He contends the trial court erred in refusing his stipulation to the crime element of 4 prior DUI convictions in the prior 10 years. Under settled law, the court did not err in refusing his stipulation to a crime element. Additionally, we reject Mr. Lockie's claims in his statement of additional grounds for review (SAG). We affirm.

FACTS

On Super-Bowl Sunday, Washington State Patrol Trooper Steve Shiflett saw the driver of a vehicle take a left turn out of a casino parking lot, strike a plastic traffic post, and swing wide into the outside lane of a four-lane road. Trooper Shiflett pulled behind the car as the driver turned right and again made a wide turn, crossing over the

centerline. Trooper Shiflett turned on his emergency lights, and the driver "made a big-time jerk to the right," driving over the curb and onto the sidewalk. Report of Proceedings at 55. The driver continued down the sidewalk for another 20 feet before coming to a stop.

The trooper contacted the driver, Mr. Lockie, and smelled an overwhelming odor of alcohol on his breath. Mr. Lockie's eyes were bloodshot and watery, and his speech was heavily slurred. He denied drinking any alcohol. Upon exiting the vehicle, Mr. Lockie was unsteady on his feet and his balance was off. Mr. Lockie failed three field sobriety tests. He refused a breathalyzer test.

The State charged Mr. Lockie with felony DUI, based on 4 prior DUI convictions within 10 years; second degree driving while license suspended; and operating a vehicle without an ignition interlock device. He was arraigned April 9, 2009, and the case was continued a number of times. The day before trial, Mr. Lockie pleaded guilty to counts two and three. The DUI trial began on November 10, 2009.

On the day of trial, Mr. Lockie offered to stipulate to the four prior DUIs. The State responsively argued the 4 prior DUIs within 10 years was an element of felony DUI that must be proved. The trial court initially proposed Mr. Lockie make the stipulation, the State would not present any evidence of the prior convictions, and the State would be able to refer to the convictions in proving all crime elements. Defense counsel objected. The court then rejected the stipulation and allowed the State to

prove each crime element. During trial, the State offered the four judgment and sentences

relating to the prior DUIs as exhibits. The jury found Mr. Lockie guilty. He appealed.

ANALYSIS

A. Stipulation

The issue is whether the trial court erred by allowing the State to present evidence of Mr. Lockie's prior DUI convictions after he offered to stipulate to the convictions. Mr. Lockie contends the court was bound by his stipulation and should not have allowed the State to present evidence of the prior convictions.

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). Under RCW 46.61.502(6)(a), DUI is elevated from a gross misdemeanor to a felony if the defendant has "four or more prior offenses within ten years." Whether a person has four prior DUI offenses is an essential element of the crime of felony DUI. *State v. Chambers*, 157 Wn. App. 465, 475, 237 P.3d 352 (2010). The State must prove each element of the crime charged. *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002).

This court has held a defendant is not entitled to a stipulation removing an element of an offense from the jury's consideration. *State v. Gladden*, 116 Wn. App. 561, 563, 66 P.3d 1095 (2003). In *Gladden*, the defendant's charge of communicating with a minor for immoral purposes required proof of a prior conviction for a felony sex

offense. The *Gladden* court reasoned he could not stipulate to the deletion of that element and prevent the jury from hearing evidence relating to his prior sex offense. *Id.* at 565-66. "[T]he prejudicial nature of evidence regarding prior convictions must be balanced against the crucial role that elements, even prior conviction elements, play in the determination of guilt." *State v. Roswell*, 165 Wn.2d 186, 195, 196 P.3d 705 (2008) (approving *Gladden*). *In Old Chief v. United States*, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), the Court held because a defendant may be prejudiced by evidence of a prior conviction, the defendant may stipulate to the conviction and prevent the State from introducing details to the jury. But, a stipulation deleting an element from the jury's consideration is not appropriate. *Roswell*, 165 Wn.2d at 195.

Mr. Lockie's 4 DUI convictions in the prior 10 years was an element of his felony DUI charge that the State was required to establish for conviction. Thus, the trial court had tenable grounds to admit the evidence. Mr. Lockie objected when the court offered to "sanitize" the prior offenses by limiting the State's reference to them. He now argues the court's original plan was "an appropriate way for the stipulation to be handled." Br. of Appellant at 6. While this suggests invited error, we need not consider that legal theory. *See State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006) (under invited error doctrine a party may not set up error at trial and then complain about the error on appeal), *review denied*, 169 Wn.2d 1002, 236 P.3d 205 (2010).

B. Evidence Sufficiency

The next issue is whether sufficient evidence supports Mr. Lockie's felony DUI conviction. He contends the evidence presented is merely speculative and, therefore, insufficient to support his conviction. We disagree.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

A person is guilty of felony DUI, (1) "if the person drives a vehicle within this state . . . [w]hile the person is under the influence of or affected by intoxicating liquor." RCW 46.61.502(1)(b). And, (2) the individual "has four or more prior offenses within ten years." RCW 46.61.502(6)(a). The existence of the four prior convictions is undisputed. Thus, the remaining question is if the State presented sufficient evidence to allow any rational trier of fact to find Mr. Lockie operated a motor vehicle while under the influence of intoxicating liquor beyond a reasonable doubt. It did.

Trooper Shiflett saw Mr. Lockie leave a casino, strike a plastic post with his vehicle, take wide turns, cross the centerline, and then drive on the sidewalk for 20

feet. When he approached Mr. Lockie, the trooper smelled alcohol on Mr. Lockie's breath, saw his eyes were bloodshot, and noted his speech was heavily slurred. Mr. Lockie then failed three field sobriety tests. This evidence is sufficient for a rational trier of fact to find Mr. Lockie was intoxicated and supported his felony DUI conviction.

C. Statement of Additional Grounds

First, Mr. Lockie, pro se, contends his speedy trial rights were violated. Trial must start 60 days after arraignment if the defendant is in jail, or 90 days after arraignment if the defendant is not in jail. CrR 3.3(b)(1), (2). Mr. Lockie was incarcerated for another matter. Nevertheless, the record shows both parties requested several continuances. The mere fact the court allowed continuances, however, does not demonstrate Mr. Lockie's right to a speedy trial was violated. *See* CrR 3.3(e)(3) (delays granted for certain continuances are excluded in computing time for trial). Based on our record, no speedy trial right violation is shown.

Second, Mr. Lockie contends he received ineffective assistance of counsel because counsel went against his advice in allowing his trial date to be continued and not insisting on a speedy trial. To prevail on a claim of ineffective assistance of counsel, Mr. Lockie must show that (1) his trial counsel's performance was deficient and (2) this deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Mr. Lockie relies on alleged conversations not in our record to establish deficient performance. A personal restraint petition is the appropriate

procedure to raise a claim of ineffective assistance of counsel based on matters outside the record. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995). In any event, defense counsel moved forward with trial without two witnesses against her better judgment because Mr. Lockie insisted they proceed to trial without an additional continuance. Given this record, ineffective assistance of counsel has not been established.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Brown, J.

WE CONCUR:

_____ _____
Kulik, C.J. Siddoway, J.