[Cite as *State v. Lewis*, 2010-Ohio-4288.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-138**
- vs -	:	
JAMES J. LEWIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000764.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, James J. Lewis, appeals from the September 24, 2009 judgment entry of the Lake County Court of Common Pleas, in which he was sentenced for operating a vehicle under the influence of alcohol ("OVI") and aggravated vehicular assault.

{¶2} On January 26, 2009, appellant was indicted by the Lake County Grand Jury on four counts: count one, OVI, a felony of the fourth degree, in violation of R.C. 4511.19(A)(1)(a), with a specification pursuant to R.C. 2941.1413; count two, OVI, a

felony of the fourth degree, in violation of R.C. 4511.19(A)(2), with a specification pursuant to R.C. 2941.1413; and counts three and four, aggravated vehicular assault, felonies of the third degree, in violation of R.C. 2903.08(A)(1). On January 30, 2009, appellant filed a waiver of the right to be present at his arraignment and the trial court entered a not guilty plea on his behalf.

{¶3} On February 20, 2009, appellant filed two motions: a motion to dismiss the indictment, challenging the use of his prior convictions for the purpose of enhancement by appellee, the state of Ohio; and a motion to suppress, claiming that the police lacked reasonable suspicion or probable cause to stop and arrest him. The state filed a brief in opposition on February 27, 2009. On March 12, 2009, appellant filed a supplemental motion to dismiss and/or suppress. The state filed a supplemental brief in opposition on March 26, 2009. Hearings were held on March 30, 2009 and April 27, 2009. Pursuant to its May 27, 2009 judgment entry, the trial court denied appellant's motions to dismiss and suppress.

{¶4} The matter proceeded to a jury trial, which commenced on August 18, 2009.

{¶5} Prior to the start of trial, count two was dismissed.

{¶6} At the trial, testimony revealed that on December 4, 2008, appellant was driving his SUV with a plow eastbound on Route 20 in Perry Township, Lake County, Ohio. Kathy Makcen ("Makcen") testified for the state that she was driving on Route 20 and observed an SUV matching the description of appellant's vehicle swerve and leave its lane of travel on more than one instance. Makcen indicated that the driver of the SUV stopped to make a left turn into the driveway of the Lake Breeze Motel and crashed into a car filled with five teenagers. Although Makcen did not see the crash,

she heard it, at which time she turned around and saw that the SUV was gone and the other vehicle involved in the collision was in the middle of the road.

{¶7} Gary Lee Dell ("Dell"), appellant's neighbor and an EMT, testified for the state that he recognized the sound of appellant's SUV on the evening at issue, heard it stall, and saw it stopped on Route 20. Dell watched as appellant's SUV started up again, made the left turn, and collided with the other car. Dell immediately ran to the victim's vehicle and provided assistance. He found the driver of that car, Kari Skartved ("Skartved") unconscious, gushing blood, and not breathing. Dell assisted Skartved until rescue workers arrived at the scene and cut her free from her car. Skartved sustained injuries, including an open depressed skull fracture which required brain surgery to repair. Skartved lost part of her brain and pieces of skull and a titanium mesh was used to cover the opening in her head.

{¶8} Kara Mangosh ("Mangosh"), a back seat passenger in Skartved's vehicle, testified for the state that Skartved and the front seat passenger were smoking marijuana. According to Mangosh, when appellant's SUV began to turn, Skartved turned toward the right to try to avoid the crash, however, they were hit by the SUV. After the collision, appellant got out of his vehicle, fell to the ground, then approached the teenagers. Appellant asked them to not call the police. Mangosh said that appellant was stumbling around and appeared to be intoxicated. Appellant got back in his SUV and left the scene.

{¶9} Kyle Slater ("Slater"), another back seat passenger in Skartved's vehicle, testified for the state that he saw appellant get out of his SUV after the accident. Slater sustained a vertical laceration on his forehead, as well as an injury to his arm/wrist.

{¶10} Several officers responded to the scene and searched for appellant's SUV. Deputy Kevin Raico ("Deputy Raico"), with the Lake County Sheriff's Department ("LCSD"), testified for the state that two vehicles with plows were spotted, one cold to the touch, the other (appellant's vehicle) was warm and displayed some signs of recent damage. While processing the scene, the officers saw appellant stagger out of the woods near the vicinity where his SUV was parked. Appellant was asked to stop, however, he continued to walk away. The officers caught up with him and appellant was taken to the ground. According to Deputy Raico and Lieutenant Michael Reed ("Lieutenant Reed"), also with the LCSD, appellant appeared intoxicated, as his breath smelled of alcohol, his speech was slurred, his eyes were bloodshot and glassy, he had trouble maintaining his balance, and he seemed confused. The officers did not perform any field sobriety tests, but did search his pockets and found the key to his SUV. Appellant was placed under arrest and transported to the station. He refused a breath test.

{¶11} After the close of the state's case-in-chief, appellant filed a motion for acquittal pursuant to Crim.R. 29, which was overruled by the trial court.

{¶12} Steve Loecy ("Loecy"), appellant's supervisor, testified for appellant that appellant had worked for him for about twenty years. On the day at issue, Loecy indicated that he and appellant left work at about 4:30 p.m. and went to a bar for drinks. According to Loecy, appellant left the bar after two beers and he appeared to be fine.

{¶13} Appellant did not renew his Crim.R. 29 motion for acquittal at the conclusion of all the evidence.

{¶14} Following the trial, the jury found appellant guilty of counts one, three, and four.

{¶15} Pursuant to its August 24, 2009 judgment entry, the trial court deferred sentencing and referred the matter to the Adult Probation Department for a presentence investigation and report, and a victim impact statement.

{¶16} Pursuant to its September 24, 2009 judgment entry, the trial court sentenced appellant to the following: twenty-four months in prison on count one; four years on the specification to count one; five years on count three; and four years on count four, all to be served consecutively for a total of fifteen years. The trial court ordered appellant to pay a mandatory fine in the amount of $1,350, and $61,675.71 in restitution to the victims. The trial court also suspended appellant's driver's license for life, assessing his driving record six points. It is from that judgment that appellant filed a timely appeal, asserting the following assignments of error for our review:

{¶17} "[1.] THE TRIAL COURT ERRED WHEN IT OVERRULED [APPELLANT'S] MOTION TO DISMISS THE INDICTMENT WHERE THE LEVEL OF OFFENSE WAS INCREASED DUE TO PREVIOUS UNCONSTITUTIONAL CONVICTIONS, IN VIOLATION OF [APPELLANT'S] DUE PROCESS RIGHTS AND RIGHTS TO COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

{¶18} "[2.] THE TRIAL COURT ERRED TO THE PREJUDICE OF [APPELLANT] WHEN IT DENIED HIS MOTION FOR ACQUITTAL MADE PURSUANT TO CRIM.R. 29(A).

{¶19} "[3.] THE TRIAL COURT ERRED TO THE PREJUDICE OF [APPELLANT] WHEN IT RETURNED A VERDICT OF GUILTY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶20} **First Assignment of Error:**

{¶21} In his first assignment of error, appellant argues that the trial court erred by overruling his motion to dismiss the indictment because the level of offense was increased due to previous unconstitutional convictions in violation of his due process rights and right to counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution.

{¶22} **Three Issues:**

{¶23} Appellant presents the following three issues under his first assignment of error: (1) "The trial court erred in failing to dismiss the enhanced DUI charge where the State failed to prove that counsel was properly waived on one of the predicate convictions[;]" (2) "The trial court erred when it allowed the State to introduce five prior OVI convictions where the record from the plea does not show that the defendant was advised of the effect of his plea[;]" and (3) "The trial court erred when it allowed the State to introduce the 1995 OVI conviction where the record from the plea did not show that the circumstances surrounding the offense were explained to the court when it accepted the no contest pleas."

{¶24} Preliminarily, we note that we review a trial court's decision on a motion to dismiss pursuant to a de novo standard of review. *State v. Wendel* (Dec. 23, 1999), 11th Dist. No. 97-G-2116, 1999 Ohio App. LEXIS 6237, at 5. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711.

{¶25} Under this assignment of error, appellant attempts to collaterally attack his prior convictions. Here, appellant's present OVI charge rose to the level of a fourth

degree felony based upon his five prior DUI convictions within the previous twenty years. The prior convictions were listed as having occurred in 1989, 1993, 1995, 1999, and 2004. Appellant alleges that his 1995 conviction was obtained without the benefit of counsel. He also maintains that he was not advised of the effect of his pleas and that the circumstances surrounding his offenses were not explained when the trial court accepted his pleas in his prior convictions.

{¶26} This court stated in *State v. Nadock*, 11th Dist. No. 2009-L-042, 2010-Ohio-1161, at ¶20-21:[1]

{¶27} "When the state attempts to use a prior conviction to enhance the degree of a subsequent charge, the defendant may attack the use of that conviction for enhancement by alleging a constitutional infirmity. *State v. Armbruster*, 3d Dist. No. 9-03-15, 2004-Ohio-289, at ¶6, citing *State v. Lamer* (June 28, 2001), 10th Dist. No. 00AP-1204, 2001 Ohio App. LEXIS 2872. A defendant asserting such a constitutional challenge must level an objection to the use of the prior conviction and present adequate evidence to establish a prima facie constitutional infirmity. *State v. Adams* (1988), 37 Ohio St.3d 295, ***, paragraph two of the syllabus. Absent a prima facie showing, an appellate court shall presume all underlying proceedings were conducted pursuant to the applicable rules of law. *State v. Brandon* (1989), 45 Ohio St.3d 85, ***, syllabus.

{¶28} "With this procedure in mind, however, the only constitutional infirmity that a criminal defendant may allege to collaterally challenge a prior penalty-enhancing conviction is the denial of the fundamental right to be represented by counsel. *State v.*

1. This writer dissented on other grounds.

Dowhan, 11th Dist. No. 08-L-064, 2009-Ohio-684, at ¶12, citing, *State v. Culberson*, 142 Ohio App.3d 656, 662-663, ***; see, also, *Brandon*, supra, at 86; *Custis v. United States* (1994), 511 U.S. 485, 496, ***; (wherein the Supreme Court expressly refused to extend the right to attack collaterally prior convictions used for sentencing enhancement beyond the right to have appointed counsel. Id. at 496). Such an infirmity '"(***) consists of a conviction obtained without the assistance of counsel, or its corollary, an invalid waiver of the right to counsel."' *Armbruster*, supra, at ¶7, quoting *Culberson*, supra." (Parallel citations omitted.)

{¶29} Irrespective of the merit of appellant's foregoing allegations, including that his previous convictions were unconstitutional, they are barred by res judicata.

{¶30} The doctrine of res judicata provides that "'a final judgment of conviction *bars the convicted defendant from raising* and litigating in any proceeding, except an appeal from that judgment, *any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.*'" *State v. Jenkins* (1987), 42 Ohio App.3d 97, 99, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, 180. (Emphasis sic.)

{¶31} Clearly, appellant had the opportunity to collaterally challenge the alleged uncounseled conviction in 1995. Whether he, via counsel, did so or not, at this point, is of no moment, as the 1995 case is over and final. See *State v. Mariano*, 11th Dist. No. 2008-L-134, 2009-Ohio-5426, at ¶14. At issue in this matter is his latest 2009 conviction of OVI. However, assuming arguendo that appellant could collaterally attack the conviction he now challenges, we will address his three issues.

{¶32} **First Issue:**

{¶33} The Supreme Court of Ohio, in *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, at ¶9, set forth the following standard in relation to uncounseled convictions:

{¶34} "Generally, a past conviction cannot be attacked in a subsequent case. However, there is a limited right to collaterally attack a conviction when the state proposes to use the past conviction to enhance the penalty of a later criminal offense. A conviction obtained against a defendant who is without counsel, or its corollary, an uncounseled conviction obtained without a valid waiver of the right to counsel, has been recognized as constitutionally infirm. *** *Brandon* [supra, at] 86, ***; *Nichols v. United States* (1994), 511 U.S. 738, ***." (Parallel citations omitted.)

{¶35} More recently, the Supreme Court of Ohio, in *State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314, at ¶7, explained the *Brooke* decision, stating:

{¶36} "*** [N]either 2945.75 nor *Brooke* requires the state to prove that [the defendant] had been represented or that he had validly waived representation. According to *Brooke*, the state does not have the burden of proving that [the defendant] had been represented or that he had validly waived representation unless [the defendant] makes a prima facie showing that he had been 'uncounseled' in his prior convictions - that is, that he had not been represented and that he had not validly waived representation. *** A bald allegation of constitutional infirmity is insufficient to establish a prima facie showing with respect to an 'uncounseled' plea."

{¶37} In the instant matter, to meet his burden, appellant is required to show both that he was unrepresented by an attorney and he did not make a valid waiver of his right to counsel. *Thompson*, supra, at ¶6. Here, appellant establishes that he was unrepresented by counsel with respect to his 1995 conviction. However, appellant fails

to set forth a prima facie case alleging his previously alleged uncounseled conviction was unconstitutional, thus, the burden never shifted to the state to prove its constitutionality.

{¶38} The record shows that appellant waived his right to counsel in his 1995 case. Although no transcripts or recordings of the proceeding exist, court pleadings include a written, signed waiver of counsel by appellant, which is sufficient for a finding of a knowing, voluntary, and intelligent waiver under *Brooke*. Appellant's 1995 conviction was properly used for the purpose of enhancement under both a "petty" and "serious" offense analysis.

{¶39} Appellant's first issue is without merit.

{¶40} **Second Issue:**

{¶41} Appellant cites to and notes that this court considered this exact issue in *State v. Clevenger*, 11th Dist. No. 2001-L-160, 2002-Ohio-5515. Appellant's reliance on *Clevenger*, however, is misplaced. In that case, this court held that an uncounseled misdemeanor conviction cannot be used to enhance a sentence in a later conviction and that an uncounseled conviction is one where the defendant was not represented by counsel nor made a knowing and intelligent waiver of counsel. Id. at ¶15. In the present case, again, the record establishes that appellant knowingly and intelligently waived counsel.

{¶42} The Fourth District, relying on *State v. Porter* (1976), 49 Ohio App.2d 227, succinctly explained the following in *State v. Southers* (Nov. 23, 1988), 4th Dist. No. 88 CA 10, 1988 Ohio App. LEXIS 4648, at 3-4:

{¶43} "There appears to be no duty in Ohio to inform a defendant pleading guilty of the possible enhancement of sentences resulting from future crimes, nor can this

court see why there should be such a duty. A trial court judge should not be required to anticipate recidivist behavior by a defendant who enters a guilty plea in that court. To be sure, a defendant is entitled to be advised of the effect of his guilty plea so that it can be shown that the plea was knowingly and voluntarily made. But it begs the question to argue that a defendant who pleads guilty would not be aware that if he gets convicted of the same offense again it is going to go harder on him the second time around."

{¶44} Applying the foregoing to the case sub judice, we note that there was no duty for the trial court to inform appellant before accepting his plea that the plea could be used to enhance any subsequent offenses. Thus, the trial court did not err by allowing the state to use appellant's prior convictions for the purpose of enhancement.

{¶45} Appellant's second issue is without merit.

{¶46} **Third Issue:**

{¶47} R.C. 2937.07 provides, in pertinent part: "[a] plea to a misdemeanor offense of 'no contest' or words of similar import shall constitute a stipulation that the judge or magistrate may make a finding of guilty or not guilty from the explanation of the circumstances of the offense." Thus, an explanation of the circumstances surrounding an offense is necessary before a court may find a defendant guilty of a misdemeanor offense. However, when portions of the transcript necessary for the resolution of assigned errors are not in the record, the reviewing court has no choice but to presume the validity of the lower court's proceedings and affirm. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶48} Here, there is no transcript from appellant's 1995 case. All that we have is appellant's self-serving statement that no evidence was put on the record before he was

found guilty by the trial court. We note that appellant could have, but failed to create a proper record in accordance with App.R. 9(C) or (D).

{¶49} Appellant's third issue is without merit.

{¶50} Appellant's first assignment of error is not well-taken.

{¶51} **Second Assignment of Error:**

{¶52} In his second assignment of error, appellant contends that the trial court erred by denying his Crim.R. 29(A) motion for acquittal.

{¶53} We note again that appellant did not renew his Crim.R. 29 motion at the conclusion of all the evidence. In *State v. Miller*, this court recognized that "[a] split of authority exists on whether [an appellant] is permitted to argue insufficiency of the evidence where he has not renewed his Crim.R. 29 motion." *State v. Miller*, 11th Dist. No. 2004-P-0049, 2005-Ohio-6708, at ¶67, citing *State v. Murray*, 11th Dist. No. 2003-L-045, 2005-Ohio-1693, at ¶42; *State v. Shadoan*, 4th Dist. No. 03CA764, 2004-Ohio-1756, at ¶16; and *State v. Jones* (2001), 91 Ohio St.3d 335, 346. See, also, *State v. Perry*, 11th Dist. No. 2004-L-077, 2005-Ohio-6894, at ¶31 (holding that a defendant's not guilty plea preserves an argument relating to the sufficiency of the evidence for appeal.) Therefore, for purposes of this appeal, we will proceed as if appellant has not waived his constitutional right to challenge the sufficiency of the evidence and will address his second assignment of error on its merits.

{¶54} With regard to a Crim.R. 29 motion, in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, the Supreme Court of Ohio established the test for determining whether a Crim.R. 29 motion for acquittal is properly denied. The Supreme Court stated that "[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to

whether each material element of a crime has been proved beyond a reasonable doubt." Id. at syllabus. "Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state." *State v. Patrick*, 11th Dist. Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, at ¶18.

{¶55} As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at 13-14:

{¶56} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶57} "'"(***) The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*. ***"'

{¶58} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' *** '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.' ***" (Emphasis sic.) (Citations omitted.)

{¶59} "*** [A] reviewing court must look to the evidence presented *** to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable

doubt." *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065, 1999 Ohio App. LEXIS 3333, at 8. The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶60} In the present case, appellant is challenging his convictions for OVI, pursuant to R.C. 4511.19(A)(1)(a), and aggravated vehicular assault, pursuant to R.C. 2903.08(A)(1).

{¶61} R.C. 4511.19(A)(1)(a) provides: "[n]o person shall operate 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."

{¶62} Again, the evidence here establishes the following: appellant was driving his SUV with a plow eastbound on Route 20. Makcen testified that she observed an SUV matching the description of appellant's vehicle swerve and leave its lane of travel on more than one instance. Makcen indicated that the driver of the SUV stopped to make a left turn and crashed into a car filled with five teenagers. Dell testified that he saw appellant's SUV make a left turn and collide with the car driven by Skartved. Mangosh testified that when appellant's SUV began to turn, Skartved turned toward the right to try to avoid the crash, however, they were hit by the SUV. After the collision, appellant got out of his vehicle, fell to the ground, then approached the teenagers. Appellant asked them to not call the police. Mangosh said that appellant was stumbling around and appeared to be intoxicated. Appellant got back in his SUV and left the scene.

{¶63} Deputy Raico testified that two vehicles with plows were spotted, one cold to the touch, the other (appellant's vehicle) was warm and displayed some signs of recent damage. While processing the scene, the officers saw appellant stagger out of the woods near the vicinity where his SUV was parked. Appellant was asked to stop, however, he continued to walk away. The officers caught up with him and appellant was taken to the ground. According to Deputy Raico and Lieutenant Reed, appellant appeared intoxicated, as his breath smelled of alcohol, his speech was slurred, his eyes were bloodshot and glassy, he had trouble maintaining his balance, and he seemed confused. Appellant refused a breath test.

{¶64} Pursuant to *Schlee*, supra, considering the evidence in a light most favorable to the prosecution, the jury could have found appellant guilty of OVI beyond a reasonable doubt.

{¶65} In addition, R.C. 2903.08(A)(1) states:

{¶66} "(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in any of the following ways:

{¶67} "(1) (a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;

{¶68} "(b) As the proximate result of committing a violation of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance;

{¶69} "(c) As the proximate result of committing a violation of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance."

{¶70} R.C. 2901.01(A)(5) defines "serious physical harm to persons" as any of the following:

{¶71} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶72} "(b) Any physical harm that carries a substantial risk of death;

{¶73} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶74} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶75} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶76} In the case sub judice, the evidence establishes that Slater suffered serious physical harm in the collision. According to Slater, when he saw the snowplow coming towards him, he thought he was going to die; he was flung forward in the collision and hit his head on the back of the seat; paramedics placed him on a backboard and braced his neck; he suffered a two inch cut on his head and a sprained arm; his head wound was glued back together at the hospital; his scar, a permanent disfigurement, was a result of the collision; and he experienced pain in his wrist and head for about a week.

{¶77} In addition, the emergency room physician, Dr. Barbara Jordan ("Dr. Jordan"), testified for the state that she treated Slater after the collision. Dr. Jordan indicated that Slater sustained a significant, permanent forehead laceration and an injury to his hand/thumb area.

{¶78} The testimony of both Slater and Dr. Jordan establishes evidence of "serious physical harm to persons" under R.C. 2901.01(A)(5).

{¶79} Pursuant to *Schlee*, supra, considering the evidence in a light most favorable to the prosecution, the jury could have found appellant guilty of aggravated vehicular assault beyond a reasonable doubt.

{¶80} Appellant's second assignment of error is without merit.

{¶81} **Third Assignment of Error:**

{¶82} In his third assignment of error, appellant alleges that the trial court erred by returning a verdict of guilty against the manifest weight of the evidence.

{¶83} As this court stated in *Schlee*, supra, at 14-15:

{¶84} "***'[M]anifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶85} "'In determining whether the verdict was against the manifest weight of the evidence, "(***) the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of witnesses and determines 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 and a new trial ordered. (***)"' (Citations omitted.) ***" (Emphasis sic.)

{¶86} A judgment of a trial court should be reversed as being against the manifest weight of the evidence "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶87} With regard to the manifest weight of the evidence, we note that the jury is in the best position to assess the credibility of witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Here, the jury chose to believe the state's witnesses. Based on the evidence presented, we cannot say that the jury clearly lost its way in finding appellant guilty of OVI and aggravated vehicular assault.

{¶88} Pursuant to *Schlee* and *Thompkins*, supra, the jury did not clearly lose its way in convicting appellant of OVI and aggravated vehicular assault.

{¶89} Appellant's third assignment of error is without merit.

{¶90} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed. The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.