[Cite as *State v. Wood*, 2018-Ohio-875.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2016-CA-69
	:	
v.	:	Trial Court Case No. 16-CR-143
	:	16-CR-144
MICHAEL A. WOOD	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)
	:	

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O P I N I O N

Rendered on the 9th day of March, 2018.

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FROELICH, J.

{¶ 1} In each of two cases that were tried together, Michael A. Wood was found guilty by a jury in the Clark County Court of Common Pleas of two counts of operating a vehicle while under the influence of alcohol or drugs (OVI) (R.C. 4511.19(A)(1)(a) and (A)(2)) (Clark C.P. Nos. 16 CR 143 and 16 CR 144). The jury also found in each case that Wood had been previously convicted of five prior OVI offenses within the previous 20 years. The sentence imposed in each case was the same: the counts of OVI were merged, and the trial court sentenced Wood to 24 months in prison for OVI and imposed an additional one year on the prior convictions specification, to be served consecutively; the court also fined Wood $2,500 and suspended his driving privileges for 10 years in each case. The trial court's judgments do not specify whether the sentences in the two cases were to run concurrently or consecutively, but the judge stated at the sentencing hearing that they were to run concurrently, and this is the presumption under R.C. 2929.41(A).

{¶ 2} Wood appeals, raising five assignments of error.

Weight of the Evidence

{¶ 3} In his first assignment of error, Wood argues that the trial court's judgment in each case was against the manifest weight of the evidence, because the video of the traffic stop from the police officers' lapel cameras did not support the conclusion that he had been impaired. He asserts that, "because the best evidence of impairment was the video footage, the jury, without doubt, lost its way * * *" in convicting him.

{¶ 4} When reviewing an argument challenging the weight of the evidence, " '[t]he 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which evidence weighs heavily against the conviction.' " *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

Case No. 16 CR 143 (Offense of February 2, 2016)

{¶ 5} Officer John Betts of the German Township Police Department testified that he observed a white Oldsmobile drive past Northwest High School while working the second shift (3 - 11 p.m.) on February 2, 2016; it was rainy and dark. According to Officer Betts's radar, the Oldsmobile was travelling at 70 mph in an area where the speed limit was 55 mph. Betts initiated a traffic stop, and the driver, Wood, turned left onto Lawrenceville Drive before stopping. However, Wood stopped his car very near the corner, such that Betts's cruiser was "sticking out in the intersection" when he pulled behind Wood. Betts initially approached the car and asked Wood to pull up further, which Wood did. Betts moved his cruiser out of the intersection, then approached Wood's car a second time.

{¶ 6} When he approached the car a second time, Betts detected a "strong odor of marijuana." Wood had a state identification card, but no driver's license or insurance. Betts testified that Wood had a lit cigarette in his hand; from the officer's training, he suspected that the cigarette may have been intended to mask other odors, such as alcohol or marijuana.

{¶ 7} Betts testified that, when backup arrived, Wood was removed from his car and patted down for officer safety; Wood was compliant during this process. Betts observed multiple open containers of alcohol on the passenger seat and floorboard when Wood stepped out of the car; one Bud Light container had liquid still inside. Betts also observed that Wood's eyes were "very red" and "very bloodshot and glassy," and his speech was "a little slurred." Wood claimed the cans were for scrap metal, and he denied that he had been drinking alcoholic beverages. Wood refused to comply with Officer Betts's request that he (Wood) perform field sobriety tests.

{¶ 8} Over the radio, Officer Betts's supervisor, Corporal Joshua Perry, instructed Betts to transport Wood to Springfield Regional Hospital for a blood test, and Betts did so. At the hospital, Betts attempted to read BMV Form 2255 to Wood, but Wood interrupted him several times and claimed he did not understand what Betts was reading. Betts started to read the form a second time, and again Wood made "multiple interruptions" and "sarcastic remarks." Betts testified that Wood made a crude comment to a female emergency medical technician and repeatedly and expressly refused to submit to the blood test. When Wood was subsequently transported to the police station, he asked for fast food for his "inconvenience and harassment."

{¶ 9} Officer Betts testified that he wore a body camera during his interaction with Wood, pursuant to the police department's standard of practice. When portions of the video were played at trial, Betts testified that the evidence of impairment demonstrated by the video was Wood's swaying, "head bobbing," and sluggish speech. Betts also suggested that another officer who was assisting him (Betts) at the scene provided physical support for Wood when Wood was out of the car.

{¶ 10} Cpl. Perry testified that he met Officer Betts at Springfield Regional Hospital on February 2, 2016. Perry described Wood as "extremely belligerent, yelling, kind of out of control." He also stated that there was a strong odor of alcohol in the hospital room where Wood had been waiting. Perry described Wood as "combative" during Officer Betts's reading of the BMV form related to chemical tests.

{¶ 11} Wood argues that the video recording of the February 2 incident contradicts certain aspects of the officers' testimony and the jury's conclusion that he was impaired. For example, Wood claims that the video showed he "had no trouble maintaining his balance and that an officer was holding him only part of the time." But Wood's argument acknowledges that the officer was holding Wood part of the time, which is consistent with the testimony at trial. Moreover, because the video camera was attached to Officer Betts's uniform, and Betts was moving during most of his encounter with Wood, the video does not provide definitive evidence as to whether Wood was swaying or standing still.

{¶ 12} Wood describes his conduct in the video as "cooperat[ive] in a belligerent manner" and "no more than angry," whereas the officers described his conduct as "extremely belligerent," "combative," "uncooperative," and "kind of out of control." These are, perhaps, nuanced distinctions, and it was for the jury to decide the extent to which Wood's behavior indicated impairment. Wood's characterization of his behavior was not the only reasonable interpretation of the video evidence. The jury was permitted to weigh the video together with all other evidence to conclude whether Wood was impaired.

Case No. 16 CR 144 (Offense of March 17, 2016)

{¶ 13} German Township Police Officer Katy Finney testified that, on March 17, 2016, she was working second shift with her partner when they pulled their cruiser behind a white Oldsmobile on Snyder Domer Road and noticed that the license validation sticker was obstructed. Finney also noticed "lane violations" as the Oldsmobile traveled down the road. Finney described the lane violations as "back and forth in the lane," "crossing [the] center line," and "touching that fog line;" she later stated that the car's tires touched the lines rather than crossing them.

{¶ 14} Finney initiated a traffic stop, but after Wood pulled over, he "wouldn't acknowledge [her] presence," talking on the phone and smoking a cigarette with the driver's window rolled up. Finney asked Wood to step out, and he complied. She detected an odor of alcoholic beverage, saw that he had bloodshot and glassy eyes, and noted that his speech was slurred. At first, Wood would not provide his name. Finney's supervisor, Cpl. Joshua Perry, responded to the scene, and he was able to identify Wood. Wood refused to perform field sobriety tests.

{¶ 15} Cpl. Perry also testified at trial as to his involvement with Wood's March 17 traffic stop. Perry stated that he was not the first officer at the scene, but that he arrived very soon after the stop and was able to identify Wood for Finney after he refused to give his name or identification. Perry described Wood as "combative and uncooperative." Perry further stated that Wood had a "brand new cigarette" which he refused to extinguish until the third time he was asked to do so; to Perry, this behavior suggested that Wood was trying to cover up another smell. After refusing to perform field sobriety tests, Wood was read his rights and transported to the highway patrol post for a breath test.

{¶ 16} The jury viewed the body camera recording of Finney's partner.

{¶ 17} Perry did not accompany Wood and Finney to the highway patrol post; instead, he stayed with Wood's vehicle to await a tow truck. Perry conducted an inventory of the car, which included multiple open beer containers on the front passenger floor board.

{¶ 18} As Officer Betts's supervisor, Perry had reviewed photos of Wood's car from the traffic stop on February 2, 2016. He testified that the same brand of beer was present in the car on March 17. Perry did not know if any of the cans were the same, but he testified that there were more containers in the car on March 17 than there had been on February 2; 17-19 cans were collected from the car on March 17. Some of the containers were within reach of the driver and were cold to the touch.

{¶ 19} With respect to the March 17 incident, Wood again argues that the video from the body camera "clearly" shows that he was cooperative, although "annoyed and unwilling to provide information due to a pretextual stop." He also asserts that the video failed to show any lack of balance, head bobbing, or other indicia of impairment. Although the video does not show obvious signs of lack of coordination or balance, it shows Finney's interaction with Wood from the perspective from her partner's body camera (from the passenger side of the car) when Wood stepped out of vehicle. Officer Finney testified to indicia of impairment such as bloodshot and glassy eyes and slurred speech, and she commented on the video that Wood looked "wobbly" when he stepped out. Moreover, what Wood characterizes as "annoyed" cooperation, including his initial refusals to extinguish his cigarette and to identify himself, might reasonably be viewed by others as a lack of cooperation. Again, this was a question for the jury to decide.

{¶ 20} Although some of the video evidence might have been subject to more

than one interpretation, the jury did not clearly lose its way and create a manifest miscarriage of justice in either case in concluding that Wood had operated a vehicle under the influence of alcohol or drugs.

Venue and Jurisdiction

{¶ 21} In the third section of his first assignment of error, Wood argues that his convictions were against the manifest weight of the evidence because no evidence was presented as to jurisdiction and venue in either case. In his second assignment, he argues that the trial court erred in failing to dismiss his case "for lack of venue and jurisdiction." Wood's discussion of these issues refers to his Crim.R. 29 motion for a directed verdict at the close of the State's case and his motion to dismiss at the close of all the evidence, but we note that Wood did not raise the issue of jurisdiction or venue in either of these motions. In fact, he never raised these issues before or at trial. After the jury was instructed, he renewed his prior Crim.R. 29 motion (which had not raised the issue of jurisdiction or venue) out of the hearing of the jury, and "add[ed] [that] the State had failed to prove venue"; in response, the State asked the trial court to take judicial notice that certain landmarks mentioned in the testimony of the police officers were in Clark County. In reiterating its decision to overrule the motion to dismiss, the court found that, based on the landmarks and intersections referenced in the testimony, "the jury could find beyond a reasonable doubt both events occurred within Clark County, Ohio."

{¶ 22} Ohio's common pleas courts are endowed with "original jurisdiction over all justiciable matters * * * as may be provided by law." Ohio Constitution, Article IV, Section 4(B); *Bank of Am., N.A. v. Kuchta,* 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 20. R.C. 2931.03 states that "[t]he court of common pleas has original

jurisdiction of all crimes and offenses," with certain exceptions not relevant here. "Where it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present." *Jimison v. Wilson,* 106 Ohio St.3d 342, 2005-Ohio-5143, 835 N.E.2d 34, ¶ 11 (additional citations omitted).

{¶ 23} Article I, Section 10 of the Ohio Constitution and R.C. 2901.12 require that "evidence of proper venue must be presented in order to sustain a conviction for an offense." *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 20. "It is not essential that the venue of the crime be proven in express terms, provided it be established by all the facts and circumstances in the case, beyond a reasonable doubt, that the crime was committed in the county and state as alleged in the indictment." *Id*. at ¶ 19, quoting *State v. Dickerson*, 77 Ohio St. 34, 82 N.E. 969 (1907), paragraph one of the syllabus. Circumstantial evidence may be used to establish venue. *State v. May*, 2015-Ohio-4275, 49 N.E.3d 736, ¶ 24 (8th Dist.); *see also State v. Brown*, 2d Dist. Clark No. 16 CA 53, 2017-Ohio-8416, ¶ 33.

{¶ 24} If there were sufficient evidence, including circumstantial evidence, that Wood's offenses occurred in Clark County, Ohio, his arguments with respect to jurisdiction and venue must fail.

{¶ 25} Wood correctly observes that none of the witnesses expressly stated that the offenses occurred in Clark County. However, Officer Betts testified that he worked for German Township "here in Springfield," that he initiated the February 2, 2016 traffic stop in front of Northwest High School, and that Wood stopped his car on Lawrenceville Drive. Additional German Township officers responded to the scene, and Wood was

transported to Springfield Regional Hospital. Officer Finney, also of the German Township Police Department, testified that on March 17 she stopped Wood on Snyder Domer Road, that Cpl. Perry (her supervisor) also arrived quickly at the scene, and that Wood was eventually transferred to the Clark County Jail. In Wood's own testimony, he stated that the February stop occurred by Northwest High School and that, in March 2016, he had been on Hominy Ridge Road prior to his traffic stop.

{¶ 26} The roads and buildings mentioned in the testimony at Wood's trial were not specifically identified as located in Clark County. However, the indictments state that the offenses occurred in Clark County, and the jury was instructed that, among other things, it must find that the offenses occurred in Clark County. Based on the evidence presented, we agree with the trial court that the jury could have reasonably found, beyond a reasonable doubt, that the offenses were committed in Clark County, Ohio, as alleged in the indictment. The trial court did not err in allowing the case "to proceed to deliberation," as Wood claims.

{¶ 27} The first and second assignments of error are overruled.

Evidence of Prior Convictions

{¶ 28} In his third assignment of error, Wood contends that two of his prior convictions of OVI were "unconstitutional" and "uncounseled," and therefore were inadmissible against him in support of the prior convictions element. He claims that the trial court erred in not allowing his attorney to "develop [this] issue through cross-examination" of Cpl. Perry, who testified about the certified copy of Wood's "driving record" from the Ohio Bureau of Motor Vehicles (Exhibit 18), which listed Wood's prior convictions. He also asserts that the jury "undeniably" relied on the evidence of prior

convictions in finding Wood guilty in this case, because of "the lack of evidence of impairment."

{¶ 29} The Supreme Court of Ohio has addressed the circumstances and manner in which a prior OVI conviction may be attacked for purposes of a penalty enhancement. In *State. v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314, 903 N.E.2d 618, the court stated:

> "Where questions arise concerning a prior conviction, a reviewing court must presume all underlying proceedings were conducted in accordance with the rules of law and a defendant must introduce evidence to the contrary in order to establish a prima-facie showing of constitutional infirmity." With respect to "uncounseled" pleas, we presume that the trial court in the prior convictions proceeded constitutionally until a defendant introduces evidence to the contrary. Thus, we conclude that for purposes of penalty enhancement in later convictions under R.C. 4511.19, after the defendant presents a prima facie showing that the prior convictions were unconstitutional because the defendant had not been represented by counsel and had not validly waived the right to counsel and that the prior convictions had resulted in confinement, the burden shifts to the state to prove that the right to counsel was properly waived.

Id. at ¶ 6, quoting *State v. Brandon,* 45 Ohio St.3d 85, 543 N.E.2d 501(1989), syllabus.

{¶ 30} Moreover, the supreme court expressly rejected the suggestion that a prima facie showing that prior convictions were unconstitutional can be made "merely by stating that the defendant had not been represented in the prior convictions and that the

convictions had resulted in confinement," as Thompson had argued. The court noted that, because "a person has a constitutional right to represent himself or herself[,] * * * it is not possible to establish a constitutional infirmity merely by showing that a person did not have counsel." *Id*. The State does not have the burden of proving that a defendant was represented or had validly waived representation in proceedings that form the basis of convictions being used to enhance a subsequent OVI charge unless the defendant has made a prima facie showing that he or she was "uncounseled" in the prior convictions. *Id*. at ¶ 7.

{¶ 31} In this case, Wood testified at trial, but he did not testify or attempt to testify about the circumstances under which he entered his prior pleas, including his claim in his brief that two of his prior convictions were "unconstitutional" and "uncounseled." Moreover, he acknowledged his prior convictions, as reflected in Exhibit 18. Exhibit 18 indicates that Wood entered a guilty or no contest plea in each of the prior OVI cases, but it does not contain any information about Wood's representation by counsel or his waiver of the right to counsel. Wood did not offer any other evidence with respect to his representation in the prior cases.

{¶ 32} In the cross-examination of Cpl. Perry, defense counsel asked whether Perry knew if Wood was represented by counsel in his prior DUI cases, but the trial court sustained the State's objection to this question, finding that it was not relevant. Notwithstanding whether the question was relevant, in response to a follow-up question, Perry made it clear that he knew nothing about Wood's prior convictions. Counsel was not prevented from developing this issue through examination of Cpl. Perry, since Perry had no knowledge beyond the facts reflected in Exhibit 18.

{¶ 33} Wood's case is factually distinguishable from *State v. Troyer*, 5th Dist. Holmes No. 15 CA 18, 2016-Ohio-3090, a case on which he relies. In *Troyer*, the trial and appellate courts had before them extensive evidence about the defendant's prior pleas to domestic violence, including transcripts of his arraignments and plea hearings and his signed waivers of counsel. The trial court rejected Troyer's argument that his prior convictions could not be used to enhance the charge and sentence in the current case because the pleas were uncounseled. But, after reviewing all of the evidence, the appellate court concluded that the plea colloquy in one of the prior cases "was insufficient to establish the constitutionality of appellant's uncounseled plea" for purposes of the enhancement of the charge then before it; it remanded for resentencing. Because Wood did not present any evidence about the circumstances under which he entered his prior pleas to OVI offenses, *Troyer* does not support Wood's argument that his prior convictions likewise should not have been relied upon to enhance his offense and sentence.

{¶ 34} In sum, Wood presented no evidence that his prior convictions suffered from any constitutional infirmity. At most, defense counsel's questions of Cpl. Perry (and Wood's argument on appeal) might suggest that he may not have been represented by counsel in some of his prior OVI cases. However, as discussed in *Thompson*, the absence of legal representation does not, in itself, establish that Wood's constitutional rights were violated or that his pleas were invalid. If Wood sought to challenge the use of any or all of his prior convictions to enhance the penalty in this case, he should have presented a prima facie case that his pleas in those cases did not comport with his constitutional rights. Neither the trial court nor this court is compelled to conduct a "simple search of the public record" of his prior cases, as Wood suggests, and there is no basis

for us to conclude that such a search would have verified his claims.

{¶ 35} We discussed and rejected Wood's argument that there was no evidence of impairment under the first assignment of error, above. Thus, we find no merit to his argument that the jury's improper reliance on his prior convictions is the only explanation for his convictions in these cases.

{¶ 36} Finally, Wood argues that evidence of his prior convictions for OVI should have been excluded under Evid.R. 403 and 404(B), which preclude unduly prejudicial evidence and evidence of prior bad acts offered to prove character or to "show action in conformity therewith." Because he did not object to the admission of this evidence at trial, we review for plain error.

{¶ 37} In order to constitute plain error, the error must be an obvious defect in the trial proceedings, and the error must have affected substantial rights. *State v. Norris*, 2d Dist. Montgomery No. 26147, 2015-Ohio-624, ¶ 22; Crim.R. 52(B). Plain error should be noticed "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus; *State v. Singleton*, 2d Dist. Montgomery No. 26889, 2016-Ohio-5443, ¶ 45.

{¶ 38} Wood's offenses, which would have been misdemeanors on a first offense, were charged as felonies of the fourth degree because of his five prior OVI convictions within 20 years.[1] As such, the existence of five or more prior convictions *was*

[1] Many years ago we held in *State v. Allen*, 2d Dist. Montgomery No. 9633, 1986 WL 6107 (May 29, 1986) that the trial court had erred in reading a stipulation of prior DUI convictions to the jury. However, at that time, when one was prosecuted under R.C. 4511.19 as a repeat offender, prior convictions were "not an element of the offense" and did not elevate the offense to one of more serious degree. *Id*. at * 2, citing *State v. Raper*,

an element of the offense, which the State was required to prove. Under such circumstances, the prior convictions are not unduly prejudicial "other acts" evidence under Evid.R. 403 or 404(B). *See, e.g., State v. Leigh*, 6th Dist. Ottawa No. OT-16-28, 2017-Ohio-7105, ¶ 14 (where prior convictions are an element of an offense, they are not "other acts" evidence under Evid.R. 404(B)); *State v. Rodriguez*, 9th Dist. Summit No. 26858, 2014-Ohio-911, ¶ 4 ("[w]hen a prior conviction is an element of the charged offense, it may be admitted into evidence for the purpose of proving that element."); *State v. Herron*, 8th Dist. Cuyahoga No. 99110, 2013-Ohio-3139, ¶ 21, citing *State v. Henderson,* 58 Ohio St.2d 171, 173, 389 N.E.2d 494 (1979). ("Where a prior conviction elevates the degree of a subsequent offense, the prior conviction is an essential element that the state must prove beyond a reasonable doubt."); *see also* R.C. 2929.13(G)(2) and R.C. 2941.1413.

{¶ 39} Moreover, Cpl. Perry's testimony about the prior convictions and the certified copy of the convictions that was admitted as Exhibit 18 revealed only the most basic information establishing his prior convictions (i.e., the offense, the dates of the offense and conviction, the court in which the case was resolved, Wood's plea and the fact of his conviction). Similarly, these prior offenses were mentioned only very briefly by the State in opening statement and closing argument, as elements that the State would prove or had proven. No details were provided.

{¶ 40} In this way, Wood's case is distinguishable from *State v. Creech*, 150 Ohio St.3d 540, 2016-Ohio-8440, 84 N.E.3d 981, in which the State was allowed to present detailed information about the specific circumstances surrounding prior convictions and

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2d Dist. Montgomery No. 8847, 1984 WL 3277, * 5-6 (Dec. 21, 1984). The law has changed.

a pending indictment in opening statements, trial testimony, exhibits submitted to the jury, and closing argument – after the defendant had offered to stipulate to any of the three disabilities under which he had been charged. Under those circumstances, the supreme court held that the danger of unfair prejudice to the defendant outweighed the value and necessity of allowing the prosecution to present the evidence; the fact of the qualifying conviction alone is what matters. *Id*. at ¶ 24 - ¶ 28, citing *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). Here, there is little difference in terms of impact on the jury between the information that might have been contained in a stipulation and the basic fact of Wood's prior convictions as set forth in Perry's testimony and Exhibit 18.

{¶ 41} Because Wood's prior convictions were elements of the offenses with which he was charged and the jury was not presented with information about those offenses which may have been unduly prejudicial, the evidence of these convictions did not violate Evid.R. 403 or 404(B), and there was no error, plain or otherwise, in their admission.

{¶ 42} Wood's third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 43} In his fourth assignment of error, Wood contends that he was denied the effective assistance of counsel in the following ways: 1) trial counsel failed to file a motion to suppress evidence; 2) trial counsel failed to file a motion in limine "on the issues associated with the prior convictions"; 3) trial counsel did not investigate and present evidence about whether Wood's prior convictions were counseled or uncounseled; and 4) trial counsel did not stipulate to Wood's prior convictions.

{¶ 44} We review alleged instances of ineffective assistance of trial counsel under the two-pronged analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Supreme Court of Ohio in *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688.

{¶ 45} To establish ineffective assistance of counsel, a defendant must demonstrate both that trial counsel's conduct fell below an objective standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the outcome of the case would have been different. *See id*.; *Bradley* at 142. Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. *State v. Cook*, 65 Ohio St.3d 516, 524-525, 605 N.E.2d 70 (1992); *State v. Fields*, 2017-Ohio-400, 84 N.E.3d 193, ¶ 38 (2d Dist.).

{¶ 46} With respect to a motion to suppress evidence, Wood argues that trial counsel should have sought to suppress "the unlawful arrests and evidence obtained during the illegal detentions." His brief does not contain any support for his assertions that the arrests were unlawful or the detentions illegal, nor does it make clear why trial counsel should have been "aware of the necessary arguments based on his position at trial" that the officers lacked a "reasonable articulable suspicion of impairment to conduct field sobriety tests."

{¶ 47} Wood also argues that trial counsel should have filed a motion to suppress

when he learned for the first time at trial that, on the evening of March 17, 2016, the police had received an anonymous tip about a white Oldsmobile with an intoxicated driver traveling on Snyder Domer Road. Neither the defense nor the prosecutor had been informed of this tip prior to trial. It was first mentioned by Officer Finney on cross-examination, when asked how Cpl. Perry had arrived at the scene so quickly. Cpl. Perry was subsequently examined about it in voir dire (prior to his testimony before the jury), after defense counsel filed a motion to dismiss Case No. 16-CR-144 (the March 17 offense) and for a mistrial in Case No. 16-CR-143 (the February 2 offense).

{¶ 48} Because trial was underway when this detail was revealed, and the jury had already heard Officer Finney's testimony about it, trial counsel cannot be faulted for failing to file a motion to suppress. Trial counsel requested dismissal on Case No. 16-CR-144 at the end of Officer Finney's testimony, based on a breach of the discovery rules. Because this occurred at the end of the day, the court invited counsel to file written motions the next day, which defense counsel did. The court then heard arguments from the parties before overruling the motions. The trial court concluded that the information in question had not adversely affected the presentation of Wood's defense, because it primarily explained the speed with which Perry arrived at the traffic stop. The court found that dismissal was not warranted, noting that the State had not used the information in its case in chief. The defense was then allowed to voir dire Cpl. Perry about the tip outside the presence of the jury, and the defense eventually cross-examined Perry about the tip as well, and attempted to imply that the tip was the reason for the stop, rather than the reasons testified to by Officer Finney. Defense counsel's handling of this issue did not deny Wood the effective assistance of counsel.

{¶ 49} Under the third assignment of error, we discussed Wood's failure to offer any evidence at trial to support his assertion on appeal that some of his prior convictions for OVI may have resulted from "uncounseled," unconstitutional pleas. Because there is no evidence in the record of this case to support this assertion, we cannot conclude that counsel acted ineffectively in failing to raise the issue either by evidence at trial or in a motion in limine. Arguments relying on evidence outside the record may potentially be raised in postconviction proceedings.

{¶ 50} Finally, Wood argues that counsel was ineffective in failing to stipulate to his prior convictions, which "should [have been] kept from the Jury"; he asserts that a stipulation would have "in all probability" led to a different outcome.

{¶ 51} Wood incorrectly assumes that a stipulation would have kept all information about his prior convictions from the jury. Certain separate offenses may be severed for trial, where prejudicial evidence required to support one offense, such as having weapons under disability, is not relevant to other offenses. But the elements of a single offense generally cannot be severed, such that some elements are found by the jury and others are found by the trial court. A stipulation would have presented the information to the jury in a different way, but the jury would nonetheless have learned of the prior convictions.

{¶ 52} Moreover, as discussed under the third assignment of error, the State did not present details about these prior convictions in a manner that was unduly prejudicial. Cpl. Perry provided the most detailed testimony, with specific dates as to each prior offense. The other officers were aware of Wood's prior offenses, but did not testify about them with any specificity. Thus, the failure to stipulate did not lead to prolonged

testimony about Wood's record.

{¶ 53} Courts must be circumspect about the admission of evidence of prior bad acts, for whatever purpose.

> Recognition to the prejudicial effect of prior-convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act. It is surely engrained in our jurisprudence that an accused's reputation or criminal disposition is no basis for penal sanctions. Because of the possibility that the generality of the jury's verdict might mask a finding of guilt based on an accused's past crimes or unsavory reputation, state and federal courts have consistently refused to admit evidence of past crimes except in circumstances where it tends to prove something other than general criminal disposition.

Spencer v. Texas, 385 U.S. 554, 575, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967) (Warren, C.J., concurring in part and dissenting in part.). However, as we found above, the prior convictions in this case were admitted as an element of the offenses, not to show general or specific criminal disposition. Wood was not denied the effective assistance of counsel due to counsel's handling of his prior convictions.

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

Joinder

{¶ 55} In his fifth assignment of error, Wood asserts that the trial court erred in trying his two cases together, because the presentation to the jury of the evidence in both cases "clearly resulted in convictions on all charges in both cases." As with many of

Wood's other arguments, this argument is premised, in part, on his belief that there was no other explanation for his convictions.

{¶ 56} The State argues that Wood failed to show any prejudice and did not object at trial, such that we review only for plain error. It also contends that the offenses were of the "same or similar character," that joinder of such offenses is favored under the law, that the evidence was simple and direct, and that there was an "overlapping witness" (Cpl. Perry), all of which supported joinder of the offenses.

{¶ 57} Pursuant to Crim.R. 8(A), joinder of multiple offenses is permitted when the charged offenses are "of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." As a general rule, joinder of offenses is favored to prevent successive trials, to minimize the possibility of incongruous results in successive trials before different juries, to conserve judicial resources, and to diminish inconvenience to the witnesses. *State v. Wild*, 2d Dist. Clark No. 2009 CA 83, 2010-Ohio-4751, ¶ 9, citing *State v. Torres*, 66 Ohio St.2d 340, 343, 421 N.E.2d 1288 (1981).

{¶ 58} If it appears that a party will be prejudiced by the joinder of indictments, a party may request severance of offenses for trial, and a court may grant severance or provide other relief "as justice requires." Crim.R. 14. Woods opposed the State's motion for joinder prior to trial, but he did not file a motion to sever, as permitted by Crim.R. 14. We see no meaningful distinction in this case between the defendant's opposition to a motion for joinder under Crim. R. 8(A) and the filing of a defense motion to sever under Crim.R. 14.

{¶ 59} A claim of prejudice may be negated by showing that evidence of each crime joined at trial is simple and direct. *State v. Lackey*, 2015-Ohio-5492, 55 N.E.3d 613, ¶ 49 (2d Dist.), citing *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 50. "[W]hen simple and direct evidence exists, an accused is not prejudiced by joinder regardless of whether the evidence is admissible as other-acts evidence." (Internal citations omitted.) *State v. Coley*, 93 Ohio St.3d 253, 260, 754 N.E.2d 1129 (2001), citing *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990).

{¶ 60} We review the trial court's ruling on joinder for an abuse of discretion. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 58; *State v. Webster*, 8th Dist. Cuyahoga No. 102833, 2016-Ohio-2624, ¶ 42. The defendant " 'bears the burden of proving prejudice and of proving that the trial court abused its discretion in denying severance.' " *Dean* at ¶ 60, quoting *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 29.

{¶ 61} Wood's memorandum in opposition to the State's motion for joinder was very short. In it, he acknowledged that, where the evidence is simple and direct, joinder is proper. Wood also stated in his memorandum, without elaboration or explanation of prejudice, that where evidence of one offense would not be admissible in a trial of another offense, the offenses should not be joined.

{¶ 62} The offenses were of the same character, since they both alleged impaired driving, a test refusal, and five prior violations. The evidence in Wood's cases was simple and direct. There were two distinct incidents, and with respect to each, the arresting officer testified about the course of events and the bases for his or her belief that Wood was driving under the influence. Videos of portions of each stop were also

played for the jury. There was little possibility that the jury would confuse the two incidents to Wood's prejudice.

{¶ 63} The case which Wood cites for the proposition that offenses should not be joined where evidence of one offense would not be admissible in a trial of another offense, *State v. Benner*, 40 Ohio St.3d 301, 306, 533 N.E.2d 701 (1988), does not so hold. Rather, *Benner* held that prejudice does not result from joinder "[w]here evidence of each of the joined offenses would be admissible at separate trials." (The case involved a series of rapes and murders or attempted murders, with certain similar features.) The supreme court's finding that prejudice is *not* demonstrated where evidence from multiple crimes would be admissible at separate trials cannot reasonably be construed as a presumption that prejudice does exist where the evidence of the other offenses would likely not be admissible in separate trials. Wood did not make any specific argument as to how he was prejudiced by the joinder of these cases.

{¶ 64} Of the three State's witnesses in this case, one of them, Cpl. Perry, testified regarding his involvement in both cases. Perry testified that he was the supervisor of both of the other officers and, as such, he had reviewed pictures of the containers found in Wood's car on each occasion; Perry testified about how the numbers of containers compared. Perry testified – arguably to Wood's benefit – that some of the alcoholic beverage containers in the car on March 17 may also have been in the car on February 2. Perry was also an officer on the scene of the March traffic stop, but interacted with Wood at the hospital after the February stop; at the March 17 stop, Perry was also able to identify Wood, who had refused to identify himself, based on their prior interactions.

{¶ 65} Joinder is favored and, in Wood's cases, it streamlined the presentation of

Cpl. Perry's testimony in similar cases. These facts, coupled with the simple and direct nature of the evidence, supported the trial court's decision to permit joinder. The jury was instructed – in opening statement by the prosecutor and in jury instructions by the court – that it was required to consider the offenses separately and distinctly.

{¶ 66} There is always a danger of a jury's inferences from the fact of prior convictions or another charge for the same offense. Justice Jackson famously said, in a conspiracy case, that "the naïve assumption that prejudicial effects can be overcome by instructions to the jury * * * all lawyers know to be an unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 93 L.Ed. 790 (1949). Similarly, referencing *Krulewitch*, Chief Justice Warren observed in *Spencer*, *supra*, "Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him." *Spencer*, 385 U.S. 554, 575, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967).

{¶ 67} Nonetheless, like most states, Ohio has consistently held that "juries are presumed to follow the court's instructions." *See, e.g, State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, *reconsideration granted and remanded for consideration of remaining assignments of error*, 133 Ohio St.3d 1512, 2012-Ohio-6209, 979 N.E.2d 1290. Wood has not demonstrated that the jury failed to follow these instructions or how he was prejudiced by the joinder; we cannot presume prejudice. Although Wood argues that there was no other explanation for his convictions, because they were against the manifest weight of the evidence, we rejected this argument, above.

{¶ 68} Moreover, if an objection to prejudicial joinder is not renewed at the close of the State's case or at the conclusion of the evidence, a defendant forfeits his ability to

raise the issue on appeal, and we review the matter only for plain error. *State v. McComb*, 2017-Ohio-4010, 91 N.E.3d 255, ¶ 51 (2d Dist.), citing *State v. Stargell*, 2016-Ohio-5653, 70 N.E.3d 1126, ¶ 12 (2d Dist.). Wood failed to renew his objection to the joinder of these offenses at the end of the State's case or at the end of trial. It is conceivable that, once he saw the manner in which the evidence was presented, he did not believe that the joinder had been prejudicial to him. Regardless, there was no error.

{¶ 69} We cannot find that the trial court abused its discretion in allowing these cases to be tried together, with the appropriate instructions to the jury.

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

Conclusion

{¶ 71} The judgments of the trial court will be affirmed.

HALL, J., concurs.

DONOVAN, J., concurring.

{¶ 72} I agree with the outcome of this case, but write separately to dispute the majority's suggestion that "elements of a single offense generally cannot be severed, such that some elements are found by the jury and others are found by the trial court." ¶ 51.

{¶ 73} I agree this statement is true as to elements such as mens rea, but in *State v. Riley*, 98 Ohio App.3d 801, 805, 649 N.E.2d 914 (2d Dist. 1994), this court seemingly embraced a defendant's right to keep a prejudicial element from the jury (in Riley's case a prior conviction for felony drug abuse) with a stipulation and jury waiver "for his protection in preventing the jury from possibly being prejudiced by the prior conviction."[2]

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[2] I recognize there exists contrary authority on this subject: *State v. Bibler*, 2014-Ohio-

. . . . . .

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3375, 17 N.E.3d 1154 (3d Dist.); *State v. Miller*, 12th Dist. Warren No. CA 2011-02-013, 2012-Ohio-997.