[Cite as *State v. Hennessey*, 2020-Ohio-5232.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

| | | |
|---|---|---|
| STATE OF OHIO, | : | |
| Appellee, | : | CASE NO. CA2020-01-002 |
| | : | O P I N I O N |
| - vs - | | 11/9/2020 |
| | : | |
| KEVIN T. HENNESSEY, | : | |
| Appellant. | : | |

CRIMINAL APPEAL FROM CLERMONT COUNTY MUNICIPAL COURT
Case No. 2019TRC12326

D. Vincent Faris, Clermont County Prosecuting Attorney, Nicholas Horton, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103, for appellee

W. Stephen Haynes, Clermont County Public Defender, Robert F. Benintendi, 302 East Main Street, Batavia, Ohio 45103, for appellant

**PIPER, J.**

**{¶1}** Appellant, Kevin Hennessey, appeals his conviction in the Clermont County Municipal Court for operating a vehicle while under the influence of alcohol ("OVI").

**{¶2}** At approximately 1:00 p.m. on an August afternoon, a family left a restaurant after eating lunch. They entered their pickup truck to leave and noticed a van backing into the parking spot immediately in front of their truck. The van did not stop and backed into

their truck. Hennessey, the driver of the van, exited his vehicle and asked what happened. The family noticed that Hennessey had a strong odor of an alcoholic beverage about his person and that he was unsteady on his feet, using his van as support as he walked. When the family called police, Hennessey became agitated and hurled expletives at the family.

**{¶3}** An officer arrived and also noted that Hennessey had an odor of an alcoholic beverage about his person, had bloodshot eyes, slurred speech, and that his face was red and blotchy. The officer asked Hennessey how much alcohol he had consumed that day, and Hennessey stated he had not consumed any, but had consumed ten to 12 beers the night before. The officer then administered field sobriety tests, which indicated the likelihood of Hennessey's intoxication. The officer arrested Hennessey for OVI, and Hennessey subsequently refused to take a breathalyzer test.

**{¶4}** Hennessey pled not guilty to the charges and was held while he awaited trial. Two days before the trial was to commence, it was discovered that an assistant prosecutor had listened to phone calls between Hennessey and his attorney that were recorded at the jail. The next day at the final pretrial hearing, the state indicated that the assistant prosecutor was immediately separated from the case and did not share any information with the prosecutor who would try the case for the state. Hennessey's counsel indicated that he would be filing a motion to dismiss the charges. However, the trial court indicated that it would continue the trial until it could more thoroughly consider the motion to dismiss. At that time, Hennessey decided not to file the motion to dismiss and chose to move forward with trial.

**{¶5}** After the trial occurred, the jury found Hennessey guilty. The trial court then sentenced Hennessey to 180 days in jail and suspended his driver's license for three years. Hennessey now appeals his conviction, raising the following assignments of error.

**{¶6}** Assignment of Error No. 1:

**{¶7}** THE TRIAL COURT ERRED IN ENTERING A FINDING OF GUILTY UPON THE JURY'S VERDICT BECAUSE SUCH VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

**{¶8}** Hennessey argues in his first assignment of error that his conviction was against the manifest weight of the evidence.

**{¶9}** A manifest weight of the evidence challenge examines the "inclination of the greater amount of credible evidence, offered at a trial, to support one side of the issue rather than the other." *State v. Thomin*, 12th Dist. Butler Nos. CA2019-11-188 and CA2019-12-199, 2020-Ohio-4625, ¶ 18. To determine whether a conviction is against the manifest weight of the evidence, this court must look at the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving the 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. *State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, ¶ 168.

**{¶10}** While a manifest weight of the evidence review requires this court to evaluate credibility, the determination of witness credibility is primarily for the trier of fact to decide. *State v. Baker*, 12th Dist. Butler No. CA2019-08-146, 2020-Ohio-2882, ¶ 30. This court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Morgan*, 12th Dist. Butler Nos. CA2013-08-146 and CA2013-08-147, 2014-Ohio-2472, ¶ 34.

**{¶11}** Hennessey was convicted of OVI in violation of R.C. 4511.19(A)(2), which prohibits one who has been convicted of OVI within the last 20 years of operating a vehicle while under the influence and refusing to submit to a test to determine his or her blood alcohol content at the time of operating the vehicle.

**{¶12}** After reviewing the record, we find that Hennessey's conviction is not against the manifest weight of the evidence. The state presented testimony from the matriarch of the family whose pickup truck was struck by Hennessey on the day he was arrested. The mother testified that on the day in question, Hennessey's van hit the front of their pickup truck despite the fact that they honked the horn to warn him of their presence.

**{¶13}** The mother testified that she could smell the odor of an alcoholic beverage emanating from Hennessey's person, he was stumbling when he walked, and that he became upset and was "cursing" them when she decided to call 9-1-1. She also testified that Hennessey "had to keep using the vehicle when he went back and forth to put his hand on it to even walk that short distance."

**{¶14}** The state also presented testimony from the arresting officer. The officer testified that as soon as he approached Hennessey, he could smell the odor of an alcoholic beverage emanating from Hennessey's person and that Hennessey's eyes were bloodshot. The officer testified that Hennessey's face was blotchy and red, and that Hennessey denied any physical condition that would impair his ability to take field sobriety tests.

**{¶15}** The officer described the manner in which he administered the field sobriety tests to Hennessey, noting that Hennessey had difficulty holding his head still during the horizontal gaze nystagmus test. After multiple failed attempts at following directions, Hennessey was eventually able to complete the test and exhibited six of six clues of impairment. The officer also testified that Hennessey was ultimately unable to perform the walk and turn test because he began to fall and was unable to stand without stumbling. The officer also testified that Hennessey refused to take the breathalyzer test.

**{¶16}** Hennessey testified in his own defense and told the jury that the reason he was unable to perform the field sobriety tests successfully was because he had suffered a

stroke in 2010, which effected the strength he has in his extremities. He also testified that he had not consumed alcohol on the day in question.

**{¶17}** The jury was in the best position to judge the credibility of Hennessey's testimony, as well as the testimony of the state's witnesses. By virtue of its verdict, the jury found the state's witnesses credible, and did not believe Hennessey when he testified that he did not consume alcohol on the day in question. We will not disturb that credibility determination on appeal.

**{¶18}** After reviewing the record, we do not find that the jury clearly lost its way or created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. As such, Hennessey's conviction is not against the manifest weight of the evidence and his first assignment of error is overruled.

**{¶19}** Assignment of Error No. 2:

**{¶20}** THE TRIAL COURT COMMITTED PLAIN ERROR IN NOT DISQUALIFYING THE OFFICE OF THE CLERMONT COUNTY PROSECUTOR THEREBY VIOLATING APPELLANT'S RIGHTS OF DUE PROCESS.

**{¶21}** Hennessey argues in his second assignment of error that the trial court committed plain error by permitting the Clermont County Prosecutor's Office to try his case after an assistant prosecutor heard recordings of phone calls between Hennessey and his attorney.

**{¶22}** As conceded by Hennessey, his choice to move forward with trial rather than file a motion challenging the prosecutor's right to try the case forfeited all but plain error. An alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Stojetz*, 84 Ohio St.3d 452, 455 (1999). Notice of plain error must be taken with utmost caution, under exceptional circumstances

and only to prevent a manifest miscarriage of justice. *State v. Baldev*, 12th Dist. Butler No. CA2004-05-106, 2005-Ohio-2369, ¶ 12.

**{¶23}** A decree disqualifying a prosecutor's office should only be issued by a court when actual prejudice is demonstrated. *Desmond v. State*, 7th Dist. Mahoning No. 2018 MA 00138, 2020-Ohio-181. In making the determination, relevant factors may include, 1) the type of relationship the disqualified prosecutor previously had with a defendant, 2) the screening mechanism, if any, employed by the office, 3) the size of the prosecutor's office, and 4) the involvement the disqualified prosecutor had in the case. *State v. Morris*, 5th Dist. Stark No. 2004CA00232, 2005-Ohio-4967, ¶ 15. Prejudice will not be presumed by an appellate court where none is demonstrated. *State v. Freeman*, 20 Ohio St.3d 55 (1985).

First, the record demonstrates that the assistant prosecutor who listened to the recorded phone calls had no prior relationship with Hennessey. While the prosecutor overheard the phone calls, he did not use the contents of the phone calls in any aspect of the state's case against Hennessey because he immediately distanced himself from the case and had no participation in the case moving forward.

**{¶24}** Second, the prosecutor who heard the phone calls screened himself immediately and did not share the information he heard with the prosecutor who took over the case for the state. Although the prosecutor informed his supervisor that he had heard the phone calls, he did not inform his supervisor of the contents of the phone calls or what specific information he obtained by listening to the phone calls. Thus, the prosecutor who tried the case did not have his preparation tainted in any way.

**{¶25}** Third, the prosecutor's office was large enough that it had enough prosecutors that a different prosecutor was able to step into the role and take over the case. The size of the prosecutor's office thus allowed the assistant prosecutor who listened to the calls to step away from the case and have no further involvement.

**{¶26}** Fourth, once the assistant prosecutor disqualified himself, he had no involvement in the case whatsoever and the state moved forward fully with a different prosecutor. Upon balancing these factors, it is clear that Hennessey did not suffer any prejudice from the previous prosecutor hearing the recorded phone calls.

**{¶27}** Nor can Hennessey show plain error where there is no indication in the record as to what information was overheard during the phone calls that would have resulted in a different outcome had the phone calls not been heard by the prosecutor. Hennessey claimed his failure of the field sobriety testing was due to a previous stroke. However, and even if his stroke had been discussed during the phone calls, the jury still heard testimony regarding Hennessey's bloodshot eyes, odor of an alcoholic beverage emanating from his person, and blotchiness on his face. The jury also heard Hennessey's testimony and could judge his credibility with or without any discussion between Hennessey and his attorney before the trial began.

**{¶28}** Also, the fact remains that Hennessey had the ability to file a motion to dismiss, or in the alternative a motion to disqualify the prosecutor's office, but voluntarily chose to move forward with the trial instead of waiting for the trial court to consider his motion. After reviewing the record, we find no plain error. Hennessey's second assignment of error is, therefore, overruled.

**{¶29}** Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, J., concur.