

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-08-198
 :
 - vs - : OPINION
 : 8/29/2011
 :
 NATHANIEL J. MANSOUR, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY AREA III COURT
Case No. TRD 0905543

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011-6057, for plaintiff-appellee

James R. Hartke, 917 Main Street, Suite 400, Cincinnati, Ohio 45202, for defendant-appellant

HUTZEL, J.

{¶1} Defendant-appellant, Nathaniel J. Mansour, appeals his conviction in the Butler County Area III Court for one count of speeding in violation of R.C. 4511.21, a minor misdemeanor. For the reasons set forth below, we affirm the decision of the trial court.

{¶2} On September 30, 2009, Officer Charles Murphy of the West Chester Police Department was operating a Stalker Dual SL radar device from a stationary position directed towards westbound traffic at the corner of West Chester Road and Revere Run in Butler County. This particular portion of the road is located in a residential area and the posted speed limit was 35 m.p.h. Murphy testified that he observed Mansour's vehicle crest the top of the hill coming towards him, travelling at a rate he initially estimated to be in excess of the posted speed limit. The vehicle entered the radar field and Officer Murphy received a reading that Manour's vehicle was traveling 46 m.p.h., eventually increasing to a speed of 50 m.p.h. as it came down the hill. Officer Murphy initiated a traffic stop and issued Mansour a citation for speeding in violation of R.C. 4511.21.

{¶3} Mansour entered a plea of not guilty and a bench trial was held on April 30, 2010. The trial court took the matter under advisement, and in an entry dated June 29, 2010, found Mansour guilty of speeding. Mansour was fined \$60 and ordered to pay court costs.

{¶4} Mansour appeals the trial court's decision, raising five assignments of error for our review.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRS TO THE PREJUDICE OF APPELLANT MANSOUR BY FINDING MANSOUR GUILTY OF SPEEDING BEYOND A REASONABLE DOUBT, WHERE THE OFFICER TESTIFYING DID NOT INTRODUCE INTO EVIDENCE ANY CREDENTIALS TO PROVE HIS QUALIFICATIONS AND TRAINING ON THE STALKER RADAR UNIT."

{¶7} Within this assignment of error, Mansour argues that while Officer Murphy testified as to his training on the Stalker Radar unit and his time as a radar instructor, the

state failed to introduce documentation into evidence to prove these credentials. According to Mansour, this court should therefore strike the officer's testimony.

{¶8} We begin by noting that Mansour raises the issue of the officer's credentials for the first time on appeal. Pursuant to Evid.R. 103, Mansour has therefore forfeited all but plain error on appeal. Crim.R. 52(B); *State v. Kline*, Warren App. No. CA2004-10-125, 2005-Ohio-4336, ¶10; *State v. Gellenbeck*, Fayette App. No. CA2008-08-030, 2009-Ohio-1731, ¶24, ¶27. Plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights or influenced the outcome of the proceedings. *State v. Blanda*, Butler App. No. CA2010-03-050, 2011-Ohio-411, ¶20, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Appellate courts are admonished to notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Barnes* at 27, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. Accordingly, an appellate court will not reverse a trial court's decision on plain error grounds unless the outcome of the trial would have been different absent the alleged error. *State v. Stout*, Warren App. No. CA2010-04-039, 2010-Ohio-4799, ¶56.

{¶9} At trial, Officer Murphy was questioned about his radar training and the specific device in use on the date in question, testifying as follows:

{¶10} "PTL. MURPHY: It is the stalker dual SL.

{¶11} "PROSECUTOR: Okay. Have you been trained on that?

{¶12} "PTL. MURPHY: I have.

{¶13} "PROSECUTOR: Okay. Do you have any kind of certification regarding radar and speed detection training?

{¶14} "PTL. MURPHY: I have been trained through the Ohio Peace Officers training academy as a radar instructor.

{¶15} "PROSECUTOR: Okay.

{¶16} "PTL. MURPHY: I taught at Scarlet Oaks radar for about 2 years."

{¶17} When Mansour's counsel later questioned Officer Murphy as to his radar experience, he testified:

{¶18} "PTL. MURPHY: * * * I've been operating radar for 20, 20 years."

{¶19} Mansour argues that this evidence was not sufficient absent documentation certifying his training. This argument is without merit. This court has never required the introduction of documentary proof of certification into evidence to prove an officer's qualifications and training on a radar unit. Officer Murphy testified that he was trained on the Stalker Dual SL radar. He further testified that he has been trained as an instructor on radar use, and in fact taught this for two years. Finally, the officer stated that he had 20 years of experience in operating a radar device. Therefore, the trial court did not err when it concluded that there was sufficient evidence that Officer Murphy was qualified to operate the device. *Cincinnati v. McDaniel*, Hamilton App. No. C-070034, 2008-Ohio-703, ¶10.

{¶20} Accordingly, Mansour's first assignment of error is overruled.

{¶21} Assignment of Error No. 2:

{¶22} "THE TRIAL COURT ERRS TO THE PREJUDICE OF APPELLANT MANSOUR BY FINDING MANSOUR GUILTY OF SPEEDING BEYOND A REASONABLE DOUBT, WHERE THE STATE FAILED TO ESTABLISH A FOUNDATION OF THE GENERAL ACCURACY AND RELIABILITY OF THE STAKER [SIC] RADAR DEVISE USED TO RECORD MANSOUR'S SPEED."

{¶23} In his second assignment of error, Mansour argues that the state failed to establish a foundation for the accuracy and reliability of the Stalker Radar in general, and more specifically under the circumstances of this case.

{¶24} Officer Murphy testified that on the morning of September 30, 2009, he was operating a Stalker Dual SL radar device. The evidence at trial was uncontroverted that this particular device operates using the Doppler radar principal and is capable of functioning from a stationary or moving position. Officer Murphy testified that he was using the radar in the stationary mode at the time he acquired Mansour's speed with the device.

{¶25} The admissibility of readings from stationary radar devices was considered by the Ohio Supreme Court in *East Cleveland v. Ferell* (1958), 168 Ohio St. 298. In that case, the court acknowledged that the principles of the Doppler effect, which underlie the operation of stationary radar devices, had been long established. The court cited decisions from other states in which the general reliability of stationary radar devices had been recognized by the courts. The Ohio Supreme Court concluded that "readings of a radar speed meter may be accepted in evidence, just as we accept photographs, X rays, electroencephalographs, speedometer readings, and the like, without the necessity of offering expert testimony as to the scientific principles underlying them." *McDaniel*, 2008-Ohio-703, ¶6, quoting *Ferell* at 303.

{¶26} According to the testimony at trial, the radar device utilized by Officer Murphy operated on the Doppler principal and was in stationary mode at the time Mansour's speed was acquired. In accordance with the Ohio Supreme Court's holding in *Ferell*, expert testimony was therefore unnecessary to establish a foundation for the general reliability and accuracy of the Stalker Dual SL radar device in stationary mode. The present case is differentiated from our holding in *State v. Sparks*, Warren App. No. CA2010-09-087, 2011-Ohio-2344. In that case, a specific model of a laser speed detection device was in question. Unlike stationary Doppler radar, the general admissibility of radar devices has not been ruled upon by the Ohio Supreme Court.

Accordingly, this court in *Starks* held that judicial notice of a radar device using laser technology is device specific. *Id.* at ¶25. The general admissibility of devices incorporating the Doppler principal under *Ferrell* has been limited to devices operating in stationary mode, as was the case under the present set of facts. *State v. Gellenbeck*, Fayette App. No. CA2008-08-030, 2009-Ohio-1731.

{¶27} Mansour next argues that the State failed to prove that the radar device was reliable and accurate under the specific circumstances of this case. Officer Murphy, however, testified to the efforts undertaken to ensure that the radar was working properly on the day in question. He stated that when he turns the radar on, it goes through and passes a self-test on its own. Following this, Officer Murphy testified that he performed a two tuning fork process for conducting a stationary calibration check. He indicated that both tuning forks registered the correct speeds when completing this check. Following this, Officer Murphy successfully conducted the tests for both the moving and same lane modes of radar.

{¶28} Ohio courts have held that, "when two tuning forks are used to ascertain the accuracy of the radar unit, additional proof of the accuracy of the tuning forks is not necessary. This is because each tuning fork corroborates the accuracy of the other, and it is highly unlikely that the radar unit and each tuning fork would be inaccurate to the same degree." *State v. Bechtel* (1995), 24 Ohio App.3d 72, 73. We are persuaded by this reasoning, and we therefore conclude that Officer Murphy's testimony was sufficient to establish that the device was working accurately and reliably on the day of the citation.

{¶29} Accordingly, Mansour's second assignment of error is overruled.

{¶30} Assignment of Error No. 3:

{¶31} "THE TRIAL COURT ERRS TO THE PREJUDICE OF APPELLANT MANSOUR BY FINDING MANSOUR GUILTY OF SPEEDING BEYOND A

REASONABLE DOUBT, WHERE THE TRIAL COURT ACCEPTED OFFICER MURPHY AS AN EXPERT IN VIOLATION OF CRIM. R. 16 AND WITHOUT SUBMISSIONS OF ANY CREDENTIALS OR CERTIFICATIONS."

{¶32} Mansour argues that because Officer Murphy was not declared as an expert in the state's response to discovery, nor were credentials or certificates submitted in his support, the trial court erred in accepting him as an expert.

{¶33} On direct examination by the state, Officer Murphy testified only to factual matters surrounding the case. The testimony provided by the officer that resulted in the state seeking to admit him as an expert was necessitated by the line of questioning engaged in by Mansour. The state at no point asked for Officer Murphy to testify as an expert once he was admitted as such, and therefore Mansour was the only party to elicit such testimony. Under the invited error doctrine, which is applied when defense counsel is "actively responsible" for the trial court's alleged error, a litigant is not entitled to "take advantage of an error which he himself invited or induced" the court to make. *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, ¶27; *State v. Williams*, Butler App. No. CA2006-03-067, 2007-Ohio-2699, ¶27. As a result, we find that any error the trial court may have made in its decision to accept Officer Murphy as an expert at trial was induced by Mansour himself, and therefore, is not reversible under the invited error doctrine. See *State v. Thomas*, Butler App. No. CA2006-03-041, 2006-Ohio-7029, ¶43.

{¶34} Accordingly, Mansour's third assignment of error is overruled.

{¶35} Assignment of Error No. 4:

{¶36} "THE TRIAL COURT ERRS TO THE PREJUDICE OF APPELLANT MANSOUR BY FINDING MANSOUR GUILTY OF SPEEDING BEYOND A REASONABLE DOUBT, WHERE MANSOUR SHOWS AT TRIAL UNDER THE CURRENT CIRCUMSTANCES, THE SPEED WAS NEITHER EXCESSIVE NOR

UNREASONABLE FOR THE ROAD CONDITIONS. THE TRIAL COURT TREATED THE VIOLATION AS A PER SE VIOLATION INSTEAD OF A PRIMA FACIE VIOLATION."

{¶37} In essence, Mansour argues that the trial court was not provided with sufficient evidence to find that the speed was unreasonable, and therefore he was not guilty of speeding. An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Carroll*, Clermont App. Nos. CA2007-02-030 and CA2007-03-041, 2007-Ohio-7075, ¶117. After examining the evidence in a light most favorable to the prosecution, the appellate court must then determine if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶38} There was considerable evidence introduced at trial regarding whether Mansour's speed was unreasonable:

{¶39} "PROSECUTOR: * * * And in your opinion was 50 miles per hour reasonable at a quarter til 3:00 in the morning in this area?

{¶40} "PTL. MURPHY: Do I think it's reasonable? I don't think it's reasonable because the posted speed limit is 35 miles an hour. There's reasons for that.

{¶41} "* * *

{¶42} "PTL. Murphy: * * * It's the middle of the night, he's coming down a hill, there's limited visibility at night. There are driveways all along that section of the road. Somebody could walk out of the driveway, drive out of a driveway. There's a cross street at the bottom of the hill. Somebody could blow a stop sign. There are all any number of possibilities that could happen and that's why we limit the speed. * * * "

{¶43} Given this testimony, and construing the evidence most favorably for the State, we find there to be sufficient evidence for the trial court to have found that Mansour was travelling at an unsafe or unreasonable speed for the road conditions.

{¶44} Accordingly, Mansour's fourth assignment of error is overruled.

{¶45} Assignment of Error No. 5:

{¶46} "THE TRIAL COURT ERRS TO THE PREJUDICE OF APPELLANT MANSOUR BY NOT GRANTING MANSOUR'S MOTION FOR A JUDGMENT OF ACQUITTAL UNDER CRIM. R. 29 AT THE CLOSE OF THE STATE'S CASE, WHERE THE PROSECUTION DID NOT SUSTAIN ITS BURDEN AND DID NOT PROVE ALL OF THE ELEMENTS OF THE CHARGE BEYOND A REASONABLE DOUBT, AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶47} Our review of a trial court's denial of a Crim.R. 29 motion for acquittal is governed by the same standard as that used for determining whether a verdict is supported by sufficient evidence. *State v. Rodriguez*, Butler App. No. CA2008-07-162, 2009-Ohio-4460, ¶60. Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The standard for appellate review of the sufficiency of evidence was discussed under the fourth assignment of error and is applied here accordingly.

{¶48} Mansour argues that the evidence was insufficient to establish that he was speeding because of the following: the state failed to introduce into evidence documentation to prove Officer Murphy's credentials as to his qualifications and training on the Stalker radar; the state failed to establish a foundation as to the general accuracy and reliability of the Stalker radar and its reliability and accuracy under the specific circumstances of this case; the state failed to declare Officer Murphy as an expert in the state's discovery response and failed to submit any credentials or certificates to support

his expert status; and the state did not offer any evidence to show Mansour was driving at a speed that was unreasonable for the conditions or circumstances.

{¶49} These arguments are merely a restatement of the first four assignments of error. Having overruled each of these assignments, we find there to be sufficient evidence for the trial court to have found beyond a reasonable doubt that Mansour was guilty of speeding in violation of R.C. 4511.21.

{¶50} Accordingly, Mansour's fifth assignment of error is overruled.

{¶51} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.