State of Ohio, Plaintiff-Appellee, v. Thomas P. Kaufman, Defendant-Appellant.

No. 99AP-1366

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

November 9, 2000, Rendered

PRIOR HISTORY: [*1] APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Reversed; cause remanded.

COUNSEL: Ron O'Brien, Prosecuting Attorney, and Joyce S. Anderson, for appellee.

John W. Keeling, Assistant Public Defender, for appellant.

JUDGES: DESHLER, J., BOWMAN and KENNEDY, JJ., concur.

OPINION BY: DESHLER

OPINION:

(REGULAR CALENDAR)

DECISION

DESHLER, J. Defendant-appellant, Thomas P. Kaufman, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. Appellant was indicted on a single count of driving under the influence ("DUI") in violation of R.C. 4511.19. Because the state alleged three prior DUI convictions within the preceding six years, the charge became a felony of the fourth degree under R.C. 4511.99(A)(4)(a). Appellant was arrested following a one-car accident on June 9, 1998. The state presented the testimony of a bystander, Arnold Sloan, who at the time of the accident resided in Blacklick on Reynoldsburg-New Albany Road. On the night in question, Sloan testified he was home watching television when he heard a loud noise recognizable as a car collision. Leaving the house, he saw a car disabled [*2] on the railway tracks, as well as a trail of debris leading from a point where the car appeared to have struck some landscaping timbers in front of a church. Approaching the vehicle, Sloan saw that the headlights were on but that the engine was not running. The front and underside of the vehicle appeared to be severely damaged from striking either the railway tracks or the landscaping timbers. Appellant was sitting in the driver's seat and asked Sloan for assistance in removing the car from the tracks. Appellant's speech was slurred, he smelled strongly of alcohol, and otherwise appeared intoxicated. Sloan told appellant that he would go get help, and returned to his house to call 911. He then returned to the vehicle, having been absent perhaps two minutes, and found appellant had exited the car and was standing by the left front quarter panel. Within about five minutes the authorities arrived and Sloan gave a statement. On cross-examination, Sloan testified that, in his opinion, the car was immobilized by the damage it had suffered, and that he did not observe any attempt by appellant or anyone else to start the vehicle and try to move it. The state also presented the testimony of [*3] Ohio State Highway Patrol Trooper Elton Lee, the first law enforcement officer on the scene of the accident. Trooper Lee testified that as he drove northbound on Reynoldsburg-New Albany Road, he observed a disabled vehicle on the railway tracks. As he approached, he saw appellant sitting on the hood of the car. Appellant initially stated that "a friend" had been driving and wrecked the car, then disappeared. Trooper Lee noticed that appellant was unsteady on his feet, his face was flushed, speech slurred, and eyes glassy. Based on his assessment of appellant's impaired condition, Trooper Lee placed appellant in the back of his cruiser, and checked on the radio to determine whether the Franklin County Sheriff's Department had a deputy on the way. While waiting for a deputy to arrive, Trooper Lee noted the trail of debris and automotive fluids leading back from the wreck to a point where the car had apparently left the road and struck some landscaping timbers. Soon thereafter Deputy Stewart, from the Franklin County Sheriff's Department, arrived at the scene. Trooper Lee assisted Deputy Stewart in administering a field sobriety test, in which appellant demonstrated significant impairment. [*4] Trooper Lee used Deputy Stewart's camcorder to record some of the results of the field sobriety test, and the resulting videotape was authenticated and entered into evidence. Trooper Lee stated that, based upon his professional and personal experience, appellant would have tested at least twice the legal limit if he had consented to a breathalyzer test. On cross-examination, Trooper Lee testified that he had not personally confiscated appellant's keys, nor observed anyone else take the keys, and in his opinion the vehicle was so disabled that there

was no possibility of appellant attempting to drive away from the crash site. The state then called Franklin County Sheriff's Deputy Roland Stewart. Deputy Stewart testified that on the night in question, he was on patrol and was dispatched to the scene of appellant's accident. Upon arrival at the scene, he found appellant in the back seat of Trooper Lee's cruiser, and obtained as much information from Trooper Lee about the circumstances as he could. Deputy Stewart then interviewed appellant to further ascertain what had happened. Appellant explained at that time that he had picked up a hitchhiker, who was driving at the time of the accident. [*5] After the accident, appellant asserted, the hitchhiker had fled on foot down the railroad tracks. Deputy Stewart noticed, as had Trooper Lee, that appellant smelled strongly of alcohol and appeared seriously impaired. Based on his observations, Deputy Stewart administered a horizontal gaze nystagmus test, which indicated intoxication. Appellant also performed poorly on various other aspects of the field sobriety test. Based on the damage inflicted in the collision, Deputy Stewart concluded that the vehicle could not be pushed from the road, and he contacted a tow truck. Appellant refused to take a breathalyzer test, despite being advised that he was subject to a one-year administrative license suspension for the refusal. On cross-examination, Deputy Stewart testified that he had not personally taken the car keys from appellant, nor had he seen anyone else do so. The state then proceeded to introduce documents and present witnesses in order to establish the previous DUI convictions of appellant, a necessary element of the offense of which he was charged. To this effect, the state introduced as exhibits three prior DUI sentencing entries reflecting appellant's prior convictions. The [*6] first witness presented by the state to establish the prior convictions was Wanda Sprick, an investigator with the Ohio Bureau of Motor Vehicles. Ms. Sprick authenticated a copy of appellant's driving record, reflecting three DUI convictions on February 4, 1994, June 5, 1995, and December 11, 1995. The first conviction was entered in Portsmouth, Ohio, and the last two were entered in Pike County Court in Waverly, Ohio. Over objection, Ms. Sprick testified that appellant was under license suspension at the time of each conviction. The court then reconsidered and granted defense counsel's request that the jury be instructed to disregard the testimony relating to prior suspensions of appellant's license. The state also presented testimony of Tammy Flannery, a Deputy Clerk at Portsmouth Municipal Court. Ms. Flannery authenticated a sentencing entry, traffic citation, and statement of facts on appellant's prior DUI conviction in that court. Theresa Parmeter, a Deputy Clerk with the Pike County Court, similarly testified to authenticate records pertaining to appellant's two previous DUI convictions in that court. The state then presented the testimony of the two arresting officers in appellant's [*7] three prior DUI cases. Prior to this testimony, counsel for appellant objected, contending that testimony regarding the circumstances of the prior arrests, and appellant's conduct on those occasions, would be highly prejudicial and not probative of the fact of the convictions themselves. The prosecution argued, to the contrary, that it was necessary to establish beyond a reasonable doubt the identity of appellant as the person convicted in the prior offenses, and that the circumstances of those offenses would demonstrate the arresting officers' firm recollection of appellant as the person arrested. Appellant's counsel stated on the record that appellant would not contest identity in the previous cases. The trial court nonetheless overruled appellant's objection to this testimony by the arresting officers, and permitted testimony about the facts and circumstances of the arrests sufficient to establish appellant's identity. Trooper Donald Edgington, of the Ohio State Highway Patrol post in Portsmouth, Ohio, testified regarding a DUI arrest of appellant in 1994 leading to the conviction in Portsmouth Municipal Court. Trooper Edgington testified that he was dispatched to the scene of a [*8] one car accident. On the way, his dispatcher notified Edgington that bystanders had observed the driver firing a shotgun next to the wrecked car. When Trooper Edgington arrived at the scene, appellant initially denied being the driver of the car, but passengers in the wrecked car identified appellant as the driver of the wrecked vehicle. Trooper Edgington identified appellant in open court as the person he had arrested on that occasion. In order to further establish Trooper Edgington's identification of appellant, the prosecution questioned him regarding the salient features of the arrest. He testified that appellant made statements at the scene to the effect that he had previously resisted arrest. In addition, appellant kept dropping into "a karate stance" so that Trooper Edgington had to "continually walk around, not allowing [himself] to be a target." When Trooper Edgington attempted to place appellant in a position to be handcuffed, appellant gripped the side of the police vehicle which he was leaning against, put his feet against the tire, and forcefully shoved himself back against Trooper Edgington. At the close of Trooper Edgington's testimony, counsel for appellant renewed [*9] his objection to the entire line of questioning and moved to strike. The trial court again overruled the objection. With respect to the two 1995 DUI convictions in Pike County, Ohio, the state called Trooper John Howard of the State Highway Patrol, the arresting officer in both cases. Trooper Howard testified that he particularly recalled the second occasion upon which he had stopped appellant, because at that time appellant had given him a false identity, giving the name and driver's license information of his brother. After the state rested, the defense also rested without presenting any witnesses. Counsel for appellant did object to the definition of "operation" given in the jury instructions, but the trial court did not modify the

instructions in this respect. After deliberating for some time, the jury submitted the following note to the judge seeking clarification of the definition of "to operate" for purposes of operating the vehicle while intoxicated:

*** What constitutes being capable of causing a car to be put in motion? (i.e. just being in Driver's seat or does he have to have keys, too?)

In response to this question, the judge told the jurors to refer to the prior [*10] definition of "operate" given in their instructions. After further deliberation, the jury then returned a verdict of guilty. The trial court sentenced appellant to a term of twelve months incarceration to be served in a state institution. Appellant has timely appealed and brings the following four assignments of error:

ASSIGNMENT OF ERROR NUMBER ONE:

THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE, OVER OBJECTION, TO INTRODUCE SPECIFIC DETAILS OF THE DEFENDANT'S PRIOR CONVICTIONS THAT WERE EXTREMELY PREJUDICIAL AND IMPROPERLY OFFERED TO PROVE PRIOR BAD ACTS OF THE DEFENDANT AND AS EVIDENCE OF BAD CHARACTER IN VIOLATION OF THE RULES OF EVIDENCE AND THE DEFENDANT'S RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW. ASSIGNMENT OF ERROR NUMBER TWO: THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT ON ALL MATTERS OF LAW NECESSARY FOR THE JURY TO CONSIDER ON THE ISSUE OF WHETHER THE DEFENDANT WAS OPERATING A VEHICLE WHEN IT FAILED TO PROPERLY ANSWER THE JURY'S REQUEST FOR ADDITIONAL INSTRUCTIONS OF THE LAW ON THE ISSUE OF OPERATION. THE COURT FURTHER ERRED WHEN IT RESPONDED TO THE QUESTION POSED BY THE JURY WITHOUT THE DEFENDANT BEING PRESENT. ASSIGNMENT OF ERROR NUMBER THREE: THE TRIAL [*11] COURT ERRED WHEN IT ALLOWED THE STATE, OVER OBJECTION, TO INTRODUCE IMPROPER HEARSAY EVIDENCE INDICATING THAT THE DEFENDANT WAS THE DRIVER OF THE VEHICLE. ASSIGNMENT OF ERROR NUMBER FOUR: THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT, A FIRST TIME FELONY OMVI OFFENDER, TO A PRISON TERM AND WHEN IT IMPOSED A MANDATORY TWELVE-MONTH SENTENCE IN VIOLATION OF LAW.

R.C. 4511.99(A)(4)(a) provides that if a defendant charged with DUI has been convicted of or pleaded guilty to three or more prior DUI offenses within six years of the current offense, the latest offense will constitute a felony of the fourth degree. It is apparent from the record in the present case that the prosecution and counsel for appellant had discussed stipulating to his three prior DUI convictions, but that by the time of trial appellant or his counsel were unwilling to do so. The state was thus required at trial, as an element of the offense to which appellant was charged, to establish beyond a reasonable doubt his three prior convictions. Appellant contends that the evidence presented by the prosecution at trial went far beyond what was required to establish the prior convictions, [*12] by delving extensively into the circumstances surrounding the arrests. Appellant argues that the state thus introduced highly prejudicial "other acts" evidence which was of no probative value in establishing the prior convictions, and painted appellant in such a bad light that the jury's ability to convict appellant solely on the facts of the offense with which he was charged would have been tainted. The state contends, to the contrary, that in order to prove the fact of the prior convictions beyond a reasonable doubt, it was essential to establish appellant's identity as the person both arrested and convicted in those prior offenses. The state thus argues that it was necessary to present the testimony of the arresting officers regarding the circumstances of the arrest, in order to firmly establish their personal recollection of appellant as the person arrested. Evid.R. 404(B) provides that evidence of other crimes, wrongs, or acts, although not admissible to prove character, may be admissible for the purpose of showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Even where evidence is admissible under Evid.R. 404(B), [*13] it may otherwise be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. "Other acts" of evidence is particularly susceptible of presenting these dangers, because the jury may use the evidence for the impermissible purpose of assessing character: "In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crime, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility." I McCormick, *Evidence,* Sec. 190 (4th Ed. 1992). "Even if 'other acts' evidence is probative of an essential element of the charged offense, the evidence should not be admissible unless that element is a disputed issue in the particular case." I Giannelli Snyder, *Evidence,* Sec. 404.14, at 254. This view is reflected in Ohio cases. Because Evid.R. 404(B) codifies [*14] an exception to the general rule of common law barring all "other acts" evidence, it "must be construed

against admissibility, and the standard for determining admissibility of such evidence is strict." *State v. Broom* (1988), 40 Ohio St. 3d 277, 281-282, 533 N.E.2d 682. Similarly, in a case more nearly on point with the facts before us, the court in *State v. Sutherland* (1994), 92 Ohio App. 3d 840, 637 N.E.2d 366, found that evidence of a defendant's prior drug conviction was admissible to prove an element of the current offense, but that it was prejudicial error for the prosecution to introduce details surrounding the commission of the prior offense:

*** Therefore, although the state was permitted, indeed required, to produce evidence of appellant's prior conviction in order to prove one element of the crime with which he was charged, permitting the [arresting officer] to elaborate on the intricate details served only to unfairly prejudice the jury against appellant, suggesting the inference that appellant had a propensity to commit the crime with which he was charged.

Id. at 847-848.

In the present case, the state [*15] introduced testimony that: (1) appellant was under license suspension at the time of several of his prior convictions; (2) that appellant had been seen discharging a shotgun into the air at the scene of an accident leading to one of his prior convictions; (3) that appellant had both threatened the arresting officer in his previous arrest and bragged on that occasion about his propensity to resist arrest; and (4) that appellant had initially given one arresting officer a false name and driver's license number. All of these facts can certainly be deemed highly prejudicial. Moreover, their probative value was nil, in light of the fact that counsel for appellant had stated on the record that identification in the prior DUI convictions would not be contested. Under the circumstances, the trial court should have adhered to the general rule in Ohio that when prior convictions are admissible for impeachment, enhancement or as elements of the offense, the evidence pertaining to the prior conviction is limited to the identity of the crime and the date and place of conviction. *State v. Covrett* (1993), 87 Ohio App. 3d 534, 622 N.E.2d 712. The state's argument that details of appellant's [*16] prior arrests were necessary to establish identity is viewed as feckless. We accordingly find that it was error for the trial court to permit such extensive testimony regarding the facts of appellant's prior convictions. Having found error, we further find that, in the context of the other evidence presented at appellant's trial, the "other acts" evidence admitted was so prejudicial as to deprive appellant of a fair trial. Under the circumstances, we cannot say that the error in the admission of "other acts" was harmless on the basis that there was no reasonable possibility that the testimony attributed to appellant's conviction. *State v. Lytle* (1976), 48 Ohio St. 2d 391, 358 N.E.2d 623. Although there were certainly sufficient facts from which a finder of fact could infer that appellant was driving the vehicle prior to the accident, the direct evidence before the trial court at best placed appellant behind the wheel of an inoperable vehicle with no keys in the ignition or on his person. Although appellant's statements at the scene regarding a phantom hitchhiker who had absconded with the keys after causing the accident are of dubious credibility at best, the jury's [*17] question submitted to the judge concerning the operability of the vehicle after the accident indicated that there was at least some question in the mind of the jurors whether appellant had been operating the vehicle. It is distinctly possible that the "other acts" evidence improperly admitted by the trial court regarding appellant's conduct during prior DUI arrests tipped a balance which otherwise would have leaned to acquittal. In conclusion, we therefore find that the trial court improperly admitting other acts evidence relating to the circumstances of appellant's prior arrests, beyond the bare facts of his convictions, and that this error was prejudicial. Appellant's first assignment of error is accordingly sustained. In light of our conclusion with respect to appellant's first assignment of error, appellant's second, third and fourth assignments of error are rendered moot. The judgment of the Franklin County Court of Common Pleas is accordingly reversed, and the matter shall be remanded for a new trial.

Judgment reversed;

cause remanded.

BOWMAN and KENNEDY, JJ., concur.