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IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAR. 8 2002

STATE OF NORTH DAKOTA

State of North Dakota,)
)
Plaintiff,)
)
vs.)
)
John Lee Stewart,)
)
Defendant.)

Supreme Court No.'s 20010283 &
20010284

District Court No.'s 00-K-373 & 00-K-374

APPEAL FROM JUDGMENT OF CONVICTION
ENTERED UPON A JURY VERDICT OF THE DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

BRIEF OF APPELLANT

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I. STATEMENT OF CASE

On October 10, 2000, a one vehicle roll-over accident occurred north of Bottineau, North Dakota. The occupants of the vehicle were the alleged driver, John Stewart (hereinafter "the Defendant"), Mitch Lafromboise and Mike Krogen. Mike Krogen was thrown from the vehicle and subsequently died from injuries he received in the accident. The Defendant was charged with Driving Under the Influence and Aggravated Reckless Driving. Officer Reid Greenwood of the Bottineau County Sheriffs Office investigated the accident scene.

On October 29, 2001 a twelve-member jury was convened and the Defendant was convicted of Driving Under the Influence and Aggravated Reckless Driving. On November 8, 2001, the court sentenced the Defendant to serve 90 days incarceration on the Driving Under the Influence charge, and to one year of incarceration on the Aggravated Reckless Driving charge, to be served concurrently to the Driving Under the Influence sentence. Notice of appeal was filed on November 13, 2001.

II. STATEMENT OF FACTS

On October 10, 2000 the Defendant picked Mitch Lafromboise up between 8:00 and 9:00 p.m. Appendix at 21 (T. 540). Mr. Lafromboise observed that the Defendant did not appear intoxicated or smell of alcohol at this time. Appendix at 28 (T. 559). The Defendant and Mr. Lafroimboise then went driving around in the hills north of Bottineau for 30 or 40 miles. Appendix at 22 (T. 541).

Mr. Lafromboise was not concerned with the Defendant's driving and the Defendant was in control of the car. Appendix at 28-29 (T. 559-560). The Defendant and Mr. Lafromboise stopped at Mike Krogen's home for approximately 15 minutes and Mr. Lafromboise and Mr. Krogen had a couple of drinks. Appendix at 22 (T. 541). The Defendant did not have anything to drink at Mr. Krogen's residence. Appendix at 30 (T. 561).

The Defendant, Mr. Lafromboise and Mr. Krogen then went driving around and stopped at the Dockside bar. Appendix at 23 (T. 543). Neither the Defendant, nor Mr. Lafromboise nor Mr. Krogen consumed alcohol while traveling from Mr. Krogen's residence to the Dockside bar. Appendix at 27 (T. 558). Mr. Lafromboise and Mr. Krogen entered the Dockside bar to purchase offsale. Appendix at 24 (T. 544). The Defendant never entered the Dockside bar. Appendix at 29 (T. 560). The three individuals then left the Dockside Bar and the accident occurred shortly thereafter. Appendix at 25-26 (T. 545-546). None of the offsale purchased at the Dockside Bar was consumed prior to the accident. Appendix at 29 (T. 560).

The Bottineau County Sheriff's Office was notified of the accident at 11:09 p.m. on October 10, 2000. Appendix at 19-20 (T. 267-268). Bottineau County Deputy Sheriff Reid Greenwood responded to the accident and arrived at the accident scene approximately 10 minutes after the accident had been reported to the Bottineau County Sheriff's Office. Id.

The Defendant testified on his own behalf at trial. On cross-examination,

the State sought to impeach the Defendant by introducing the Defendant's prior convictions for Unauthorized Use of a Motor Vehicle, Judgment date December 31, 1991 (State's Exhibit # 23); Unlawful Possession of a Firearm, Judgment date September 30, 1992 (State's Exhibit # 24); and Reckless Endangerment, Judgment date March 29, 1996 (State's Exhibit # 25). Appendix at 9, 13, 15, 31 & 32 (T. 665-666).

Defendant's prior conviction for Unauthorized Use of a Motor Vehicle was offered into evidence by the State (State's Exhibit # 23). Appendix at 31 (T. 665). Defendant's prior conviction for Unlawful Possession of a Firearm was offered into evidence by the State (State's Exhibit # 24). Appendix at 37 (T. 678). Defendant's prior conviction for Reckless Endangerment was offered into evidence by the State (State's Exhibit # 25). Appendix at 38 (T. 679)

The Defendant objected to the introduction of all three prior convictions, Appendix at 35 (T. 675). The court stated that the Defendant did not have to object to admission when each of the Defendant's prior convictions was introduced into evidence, since the court considered Defendant to have already objected to the admission of each, and the court considered Defendant's objection to be a standing objection to the convictions being introduced into evidence. Appendix at 36 & 38 (T. 676 & 679).

The court allowed the prior convictions into evidence because the prior convictions were "within the ten year period." Appendix at 34 (T. 674 line 14). The court also allowed the prior convictions because the Defendant's credibility

was put into issue by the Defendant putting forth a mechanical failure defense. Appendix at 34-35 (T. 674-675) Finally, the court stated that some of the prior convictions "may be somewhat relevant . . . to the character of the charges, but they do involve in two cases motor vehicles." Appendix at 34 (T. 674 lines 17-19).

IV. ISSUES

- I. DID THE INTRODUCTION OF DEFENDANT'S PRIOR CRIMINAL CONVICTIONS CONSTITUTE AN ABUSE OF DISCRETION THAT PREJUDICED SUBSTANTIAL RIGHTS OF THE DEFENDANT?

- II. WAS THERE SUFFICIENT EVIDENCE THAT DEFENDANT WAS UNDER INFLUENCE OF ALCOHOL WHEN HE WAS DRIVING?

V. LAW AND ARGUMENT

I. THE INTRODUCTION OF DEFENDANT'S PRIOR CRIMINAL CONVICTIONS CONSTITUTES AN ABUSE OF DISCRETION AND PREJUDICED SUBSTANTIAL RIGHTS OF THE DEFENDANT.

The Defendant's prior convictions for Unauthorized Use of a Vehicle, Unlawful Possession of a Firearm and Reckless Endangerment did not involve dishonesty or false statement, State v. Eugene, 340 NW2d 18, 32 (N.D. 1983)¹, and therefore are only admissible, if admissible at all, under North Dakota Rules of Evidence 609(α)(i). Id. at 33.

Prior convictions not admissible under North Dakota Rules of Evidence 609(α)(ii) may still be admissible under North Dakota Rules of Evidence 609(α)(i) if the court determines that the "probative value of the convictions outweigh[s] their prejudicial effect to the accused." State v. Murchinson, 541 NW2d 435, 442 (N.D. 1995). When weighing the probative value against the prejudicial effect under Rule 609(α)(i), the court must consider:

1. the impeachment value of the prior crime;
2. the point in time of the conviction and the witness' subsequent history;

¹ As used in North Dakota Rules of Evidence 609(α)(ii), crimes involving "dishonesty or false statement" are limited "to those crimes that bear directly upon the accused's propensity to testify truthfully, that is, 'crimes that involve some element of misrepresentation or other indicum of a propensity to lie and not to those crimes which, bad as they are, do not carry with them a tinge of falsification.'" State v. Eugene, 340 NW2d 18, 32 (N.D. 1983).

3. The similarity between the past crime and the charged crime;
4. The importance of the defendant's testimony;
5. The centrality of the credibility issue.

State v. Murchinson, 541 NW2d 435, 442 (N.D. 1995) (quoting State v. Gefroh, 495 NW2d 651, 656-57 (N.D. 1993) quoting State v. Fuller, 379 NW2d 289, 290 (N.D. 1985)). "The prosecution bears the burden of persuading the court that the probative value of admitting evidence of a prior conviction outweighs its prejudicial effect." State v. Eugene, 340 NW2d 18, 33 (N.D. 1983).

The State did not articulate how Defendant's conviction almost ten years ago for Unauthorized Use of a Motor Vehicle or Defendant's conviction almost nine years ago for Unlawful Possession of a Firearm were relevant to any issue before the court. Rather, the State argued that the probative value of Defendant's prior convictions dealt with the behavior of the Defendant in the prior convictions, compared to the Defendant's behavior surrounding the current charges. Appendix at 33 (T. 667). By the State's own argument, the introduction of these prior convictions served only to demonstrate that the Defendant had a propensity to recklessly operate motor vehicles in a criminal manner, and that he acted in conformity therewith in committing the alleged Driving Under the Influence and Aggravated Reckless Driving.

The State argued only two of the five factors that the court is required to consider in admitting prior convictions under Rule 609(a)(i): the similarity of Defendant's prior convictions to the current charges, and the centrality of the

Defendant's credibility issue. The State argued that the Defendant's prior conviction for Reckless endangerment involved a motor vehicle and facts that were very similar to the current charges. Appendix at 33 (T. 667). "However, similarity between a prior conviction and the crime charged militates against admitting the prior conviction under Rule 609(a)(i)" because of the potential prejudice to the Defendant. State v. Eugene, 536 NW2d 692, 695-96 (N.D. 1995) (emphasis added).

The Defendant's credibility was not the central issue in this case. The central issues in the case were first, whether the Defendant was under the influence of intoxicating liquor to a degree that rendered him incapable of safe driving; and second, whether the Defendant drove without due caution and circumspection so as to endanger the life or property of another and the Defendant's driving caused injury to another person. See, Criminal Complaints Appendix at 5 & 6. Since the crimes the Defendant was charged with allegedly committing do not involve dishonesty or false statement, Id. at 32, the central issues of the case do not change even when the Defendant testifies on his own behalf. It isn't a matter of the Defendant's testimony versus that of the testimony of another witness, But See, Id. at 34 and State v. Bohe, 447 NW2d 277, 281 (N.D. 1989). There were numerous other witnesses and facts presented by the state, and the jury was free to give each witness, and all evidence, the weight it felt appropriate, if any.

The most important factor a court must consider when determining

whether to admit a Defendant's prior convictions is the danger of unfair prejudice. The danger of prejudice increases when the prior conviction and the crime charged are of a similar nature, and a jury is more likely to use the evidence for purposes other than impeachment, and "regard the prior convictions as evidence of a propensity to commit crime or of guilt." State v. Eugene, 536 NW2d at 696 (quoting United States v. Shapiro, 565 F.2d 479, 481 (7th Cir. 1977)). The court mechanically applied Rule 609(a)(i) since the court did not consider the danger of unfair prejudice to the Defendant that would occur when Defendant's prior convictions were admitted into evidence, but instead admitted the prior convictions simply because they occurred within ten years but . Appendix at 34 (T. 674).

A "trial court should 'explicitly articulate its balancing process' in the record" and make an explicit finding which demonstrates that the court "did not just apply NDREv 609(a)(i) mechanically." State v. Murchinson, 541 NW2d at 442 (quoting State v. Eugene, 536 NW2d at 695). "A trial court abuses its discretion if the record does not 'show that the trial court meaningfully or appropriately considered the relevant factors' when it weighed the prior conviction's probative value and the prejudicial effect." Id.

The court did not explain the required factors, and the court did not "expressly articulate" how it balanced those factors. Appendix at 34-35 (T. 674-675). Rather, the court mechanically applied Rule 609(a)(i) and allowed the prior convictions because it was "guided" by Rule 609, because Rule 609 allows

ten years, and because the prior convictions were "within the ten year period." Id. The court did not mention the decreased impeachment value of the Illegal Possession of a Firearm conviction, or its lack of similarity to the current Driving Under the Influence and Aggravated Reckless Driving charges. The court did not articulate or specifically find that the Defendant's testimony was important to his defense, and the court made no finding of the importance of the Defendant's credibility. Instead, the court simply stated that "some of those cases may be somewhat relevant, some may not" and that since the Defendant put forth a mechanical failure defense, his credibility was put into issue. Appendix at 34 (T. 674 lines 17-25). Finally, the court did not consider that Defendant's most recent conviction for Reckless Endangerment was over five years ago, or that Defendant's conviction for Unauthorized Use of a Motor Vehicle was, at the time of trial, nearly two months away from being ten years ago, which would have made such conviction inadmissible. The court did not "meaningfully exercise its discretion in admitting the prior convictions" and it failed to articulate its balancing process in admitting the prior convictions for impeachment of Defendant's testimony under Rule 609(a)(i). State v. Eugene, 536 NW2d 692, 696 (N.D. 1995).

The introduction of Defendant's prior convictions prejudiced substantial rights of the Defendant. No other prior convictions, other than the three Defendant complains of, were admitted into evidence. But See, Id. at 696 (introduction of a prior conviction held to be harmless error since the defendant

did not object to its admission); State v. Bohe, 447 NW2d 277, 282 (N.D. 1989) (erroneous admission of Defendant's two prior theft convictions found to be harmless error since nine other prior burglary convictions were properly admitted to impeach the Defendant).

Defendant's prior convictions for Unlawful Use of a Motor Vehicle and for Reckless Endangerment are similar to the current charges of Driving Under the Influence and Aggravated Reckless Driving since both involve a the operation of motor vehicle used in a criminal activity, since both contain an element that involves risk of harm or injury to the rights or safety of another person, and since both contain a reckless element. The admission of prior convictions that are similar to currently charged crimes is obviously prejudicial. State v. Fuller, 379 NW2d 289, 290 (N.D. 1985), See also, State v. Bohe, 447 NW2d 277, 283, (N.D. 1989) (Levine, Justice, dissenting) ("similar-crime convictions are inherently prejudicial and unfair and should be admitted only if there is a compelling reason other than to show the bad character of the defendant and one which outweighs the obvious prejudice."). Therefore, since the trial court mechanically applied Rule 609(α)(i), the Defendant asks this Court to hold that the admission of Defendant's three prior convictions constitutes prejudicial error which requires reversal of the judgment of conviction.

II. THERE IS INSUFFICIENT EVIDENCE THAT THE DEFENDANT WAS UNDER THE INFLUENCE OF ALCOHOL WHEN HE WAS DRIVING.

Defendant was charged with violating North Dakota Century Code

Section 39-08-01(1)(b). See, Appendix at 5. "Under subsection (b), a defendant may be convicted of DUI if the state proves beyond a reasonable doubt that 'the defendant was driving a vehicle upon a public highway . . . while . . . under the influence of intoxicating liquor so as 'not to possess the clearness of intellect and control of himself that he would otherwise have.'" State v. Miller, 530 NW2d 652, 655 (N.D. 1995) (quoting State v. Kimball, 361 NW2d 601, 603 (N.D. 1985). It is well settled law in North Dakota that the "results of an intoxilyzer test are not necessary to sustain a conviction under Section 39-08-01(1)(b)." State v. Pollack, 462 NW2d 119, 122 (N.D. 1990). See also, State v. Shipton, 339 NW2d 87, 88-89 (N.D. 1983) (North Dakota law does not require a chemical test to support a DUI conviction).

"'Under the influence of intoxicating liquor' covers not only the well-known and easily recognized conditions of intoxication but also covers any abnormal mental or physical condition which is the result of indulging, to any extent, in the use of intoxicating liquor. . . . A person may be 'under the influence of intoxicating liquor' within the meaning of [Section 39-08-01(1)(b)] even though he is not intoxicated." State v. Galvekee, 138 NW2d 663, 667 (N.D. 1965). The amount of liquor consumed is immaterial. Id.

To be in violation of Section 39-08-01(1)(b), a person must be under the influence of intoxicating liquor at the time they are driving. North Dakota Century Code 39-08-01(1)(b). Mr. Lafromboise testified that when the Defendant picked him up between 8:00 and 9:00 p.m., that the Defendant did

not appear impaired, he did not smell of alcohol and he did not appear to be intoxicated. Appendix at 28 (T. 559). The Defendant and Mr. Lafromboise drove around in the hills north of Bottineau for 30 - 40 miles before stopping at Mike Krogen's home, and Mr. Lafromboise felt the Defendant was in control of the car and was not concerned with the Defendant's driving. Appendix at 22, 28 & 29 (T. 541 & 559-560). The Defendant did not have anything to drink at Mike Krogen's home, Appendix at 30 (T. 561), the Defendant did not have anything to drink at the Dockside Bar, Appendix at 29 (T. 560), and none of the alcohol purchased at the Dockside Bar by Mr. Lafromboise and Mr. Krogen was consumed prior to the accident. Id.

The accident occurred sometime between 8:00 or 9:00 p.m. and 11:09 p.m. on October 10, 2000, because the Defendant picked Mitch Lafromboise up between 8:00 and 9:00 p.m., Appendix at 21 (T. 540), and the accident was reported to the Bottineau County Sheriff's Office at 11:09 p.m. Appendix at 19-20 (T. 267-268). There is no evidence in the record to establish the time of Defendant's driving or that he was under the influence at that time. Numerous witnesses called by the state testified that the Defendant smelled of alcohol and acted intoxicated after the accident occurred; however, none of these witnesses observed the Defendant driving or observed the Defendant prior to the accident, and none of these witnesses testified that the Defendant was intoxicated at the time he was driving when the accident occurred. Officer Greenwood and ambulance personnel did not observe the Defendant driving,

and they did not arrive at the accident scene, and would not have had an opportunity to observe the Defendant, until anywhere from 10 minutes to one hour after the accident occurred. It is pure speculation to infer that the Defendant was under the influence of alcohol at the time the accident occurred.

In Pavek v. Moore, 1997 ND 77, 562 NW2d 574, state highway patrol trooper Rist was conducting safety inspections at a Minot scale when civilian inspector Senn asked Rist to investigate Pavek's sobriety. Pavek v. Moore, 1997 ND 77 ¶2, 562 NW2d 574. Trooper Rist performed field sobriety tests on Pavek and concluded that Pavek had been drinking. Id. Trooper Rist "placed Pavek under arrest and noted the time of driving as 5:45 p.m. Rist never saw Pavek driving." Id. (emphasis added). Pavek's driving privileges were suspended after an administrative hearing. Id. at ¶3. The district court reversed the suspension holding that "the report and the decision of the hearing officer are based upon an assumption rather than evidence,' because Rist never saw Pavek actually driving." Id.

On appeal, the Court found that the "exact time of driving was placed in question . . ." and that "there was no other evidence from Rist or from Senn, the civilian inspector, to establish the time of driving." Pavek v. Moore, 1997 ¶19, 562 NW2d 574. The Court then held that the time of Pavek's driving could not be inferred from the facts in evidence "because there is no evidence as to the length of time Pavek was at the scale before Senn made the request to Rist." Id.

at ¶10. The Court affirmed the district court's decision. Id. at 11.

Similarly, it cannot be assumed that the Defendant was under the influence of alcohol at the time he was driving, when the accident occurred. An inference or assumption is not sufficient to establish a violation of Section 39-08-01(1)(b). Rather, Section 39-08-01(1)(b) requires facts which prove that the Defendant was under the influence of alcohol at the time he was driving. Such facts are not contained within the record and the Court should reverse the judgment of conviction.

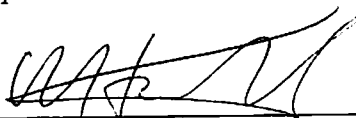
CONCLUSION

The court mechanically applied North Dakota Rule of Evidence 609(a)(i). The court did not "meaningfully exercise its discretion in admitting the Defendant's prior convictions" and the court failed to articulate its balancing process in admitting the prior convictions. The introduction of Defendant's prior convictions prejudiced substantial rights of the Defendant.

There are no facts in the record to show that the Defendant was under the influence of alcohol when he was driving, at the time of the accident. An inference or assumption is not sufficient to establish a violation of Section 39-08-01(1)(b).

For these reasons, the judgments of conviction should be reversed.

Respectfully submitted this 8th day of March, 2002.



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