

ORIGINAL

NO. 286673-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

NOV 02 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON, Respondent

v.

TRAVIS LEE LOCKIE, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00316-9

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

MEGAN A. BREDEWEG, Deputy
Prosecuting Attorney
BAR NO. 37847
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ISSUES PRESENTED

- 1. Did the trial court err in failing to enter a stipulation as to the defendant's prior convictions?**

- 2. Was there sufficient evidence presented at trial to convict the defendant of Felony Driving Under the Influence?**

STATEMENT OF RELEVANT FACTS

On February 2, 2009, Trooper Steve Shiflett of the Washington State Patrol was on routine patrol. (RP 11/10/09, 46.) He observed a car at the intersection of westbound 1st Ave and State Route 397 in Kennewick, Washington. (RP 11/10/09, 53). He watched the car make a left turn onto SR 397 and strike a plastic delineator post before swinging wide into the right lane. (RP 11/10/09, 53-44). Trooper Shiflett pulled behind the car as it turned right onto Gum Street, and again made a wide turn, crossing two feet over the centerline. (RP 11/10/09, 54). Trooper Shiflett turned on his emergency lights, and the car veered to the right, driving over the curb and onto the sidewalk. (RP 11/10/09, 55). The car continued down the sidewalk for another 20 feet before coming to a rest. (RP 11/10/09, 55).

Trooper Shiflett contacted the driver and smelled a strong odor of intoxicants. (RP 11/10/09, 56). The driver's eyes were bloodshot and watery, and his speech was heavily slurred. (RP 11/10/09, 56). He had

difficulty locating his driver's license, and was finally identified as the defendant by an Oregon ID card. (RP 11/10/09, 55-6). The defendant denied having consumed any alcohol. (RP 11/10/09, 77-78). He also denied committing any traffic infractions. (RP 11/09/10, 56). Trooper Shiflett showed him that he was parked on the sidewalk, and he stated he was just trying to get to the shoulder so that 'regular drivers' could get by. (RP 11/10/09, 56). Trooper Shiflett asked the defendant what he meant by 'regular drivers,' but he would not answer. (RP 11/10/09, 56).

Trooper Shiflett also observed that the defendant was unsteady on his feet, his balance was off, and he could still smell the odor of alcohol on the defendant even after the defendant was out of the car. (RP 11/10/09, 57). The defendant agreed to perform standardized field sobriety tests. (RP 11/10/09, 57). He displayed six of six clues on the horizontal gaze nystagmus test, seven of eight clues on the walk and turn test, and four of four clues on the one-leg stand. (RP 11/10/09, 57-60). The defendant was placed under arrest for Driving Under the Influence based on the totality of the circumstances. (RP 11/10/09, 60). Trooper Shiflett observed the defendant's attitude change from cooperative to argumentative. (RP 11/10/09, 61). Trooper Shiflett felt that the defendant was extremely impaired. (RP 11/10/09, 62).

The defendant was initially charged with Felony Driving Under the Influence, based on having four prior convictions for Driving Under the Influence within ten years, Driving While Suspended in the Third Degree, and Violation of an Ignition Interlock Device. (CP 1-2, 3-4). He was arraigned April 9, 2009, and the case was continued a number of times. (CP 9, 13, 14, 18, 19, 21, 22, 26, 27). The case was called ready for trial on November 9, 2009. (CP 40). The defendant pled guilty to Counts two and three¹ prior to the beginning of trial. (CP 29-37).

Prior to trial, defense counsel made a motion in limine to prevent reference to the defendant's prior convictions for Driving Under the Influence. (RP 21-2). The defense counsel stated that the defendant would stipulate to his prior convictions, or in the alternative requested a bifurcated hearing. (RP 10/09/09, 22). The trial court heard argument as to how the stipulation should be handled. (RP 10/09/09, 22-31). The trial court stated that the stipulation would not be allowed, and that the State would have to prove the defendant's prior convictions. (RP 10/09/09, 31.) The defendant was found guilty. (CP 116). This appeal follows. (CP 118).

¹ Count 2-Driving While License Suspended or Revoked in the Second Degree; Count 3-Ignition Interlock Violation - First Amended Information.

ARGUMENT

1. The trial court did not err in failing to accept the defendant's proposed stipulation.

The defendant contends that the trial court erred in refusing to accept a stipulation to the defendant's prior convictions. (Appellant's Brief at 1). This argument fails because the method proposed by the defendant was legally insufficient.

The defendant was charged with Felony Driving Under the Influence. (CP 1-2). A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state while the person is under the influence of or affected by intoxicating liquor or any drug. RCW 46.61.502(1)(b). Driving Under the Influence "is a class C felony punishable under chapter 9.94A RCW... [if] the person has four or more prior offenses within ten years as defined in RCW 46.61.5055." RCW 46.61.502(6). Prior convictions are an element of the offense of Felony Driving Under the Influence. *State v. Castle*, 156 Wn. App. 539, 543, 234 P.3d 260 (2010). The State is required to prove each element of a charged offense beyond a reasonable doubt. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995).

State v. Roswell contains a lengthy discussion regarding evidence of prior convictions when such evidence is an element of the charged offense. It states in pertinent part:

In *Old Chief v. United States*, 519 U.S. 172, 191, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), the United States Supreme Court recognized that a defendant may be prejudiced by evidence regarding a prior conviction and held that he may stipulate to the fact that he has a prior conviction in order to prevent the State from introducing evidence concerning details of the prior conviction to the jury. However, the Court in *Old Chief* did not hold that a jury must be completely shielded from any reference to the prior offense, only that when a defendant stipulates to a prior conviction the court must accept the stipulation and shield the jury from hearing evidence that led to the prior conviction. *Id.* at 191 n. 10, 117 S.Ct. 644. In *State v. Gladden*, 116 Wash.App. 561, 566, 66 P.3d 1095 (2003), Division Three of the Court of Appeals distinguished *Old Chief* and held that a defendant cannot stipulate to the existence of an element and remove it completely from consideration by the jury. Both cases recognize that the prejudicial nature of evidence regarding prior convictions must be balanced against the crucial role that elements, even prior conviction elements, play in the determination of guilt.

State v. Roswell, 165 Wn.2d 186, 195, 196 P.3d 705 (2008).

The *Roswell* Court goes on to state that bifurcation of the to convict instructions is permissible but not required. *Id.* at 197. Courts have long held that when a prior conviction is an element of the crime charged, it is not error to allow the jury to hear evidence on that issue. *Id.* at 197, citing *Pettus v. Cranor*, 41 Wash.2d 567, 568, 250 P.2d 542 (1952) (citing *State v. Tully*, 198 Wash. 605, 89 P.2d 517 (1939)). Furthermore, the *Roswell*

Court recognizes different methods to reducing the prejudice which attaches to evidence of prior convictions. *Id.* at 198.

The defendant informed the court that he would stipulate to his prior convictions or in the alternative, requested bifurcation. Counsel argued that the stipulation would result in the element not being referred to at all. (RP 10/09/09, 28). The trial court clearly agreed that methods could be used that would reduce the prejudice from the evidence of the defendant's prior convictions. (RP 10/09/09, 29). Defense counsel continued to disagree with the method of reducing prejudice from the prior convictions. (RP 10/09/09, 30-31). Essentially, the defendant did not want to enter a stipulation so much as bifurcate out any mention of his prior convictions at all to the jury. At this point, the trial court determined that it would not accept a stipulation, which was not done according to law. (RP 10/09/09, 31). The trial court did not err in this case.

2. The State presented sufficient evidence to support the conviction of the defendant for Felony Driving Under the Influence.

The defendant contends that insufficient evidence was presented to prove him guilty of Felony Driving Under the Influence because Trooper Shiflett did not take a medical history. (RP 10/09/09, 62-63). However,

this argument fails. The standard of review for whether sufficient evidence is presented to support a conviction is well defined:

In determining whether sufficient evidence supports a conviction, “[t]he standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.” *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Under this standard, we resolve all inferences in favor of the State. *State v. Smith*, 104 Wn.2d 497, 507, 707 P.2d 1306 (1985). An inference is a logical deduction or conclusion that the law allows, but does not require, following the establishment of the basic facts. *State v. Jackson*, 112 Wn.2d 867, 874, 774 P.2d 1211 (1989) (quoting 5 K. Tegland, Wash.Prac., *Evidence* § 65, at 127-28 (2 ed. 1982)). When no direct evidence is presented regarding a material element of the crime, a reviewing court looks to whether there is adequate circumstantial evidence from which a jury could reasonably determine that the element is proven. *State v. Bailey*, 52 Wn.App. 42, 51, 757 P.2d 541 (1988), *affirmed*, 114 Wn.2d 340, 787 P.2d 1378 (1990).

State v. Maxey, 63 Wn. App. 488, 491, 820 P.2d 515 (1991).

In evaluating the sufficiency of the evidence on appeal, the court is obliged to defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom. *State v. Hays*, 81 Wn. App. 425, 430, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Furthermore, circumstantial evidence is considered as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 637, 618 P.2d 99 (1980).

In the case at bar, the State provided ample evidence of each element of the crime of Felony Driving Under the Influence. The only contested element was the question of whether or not the defendant was under the influence of or affected by intoxicating liquor. The State proved that the defendant committed several traffic violations, was unable to perform standardized field sobriety tests, and by the officer's observations, was extremely impaired. Sufficient evidence was presented to prove Felony Driving Under the Influence beyond a reasonable doubt.

CONCLUSION

The trial court did not err in refusing to accept a stipulation which the defendant made contrary to law. Sufficient evidence was presented to convict the defendant of Felony Driving Under the Influence. The defendant received a fair trial. Therefore, the defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 1st day of November 2010.

ANDY MILLER

Prosecutor



MEGAN A. BREDEWEG, Deputy

Prosecuting Attorney

Bar No. 37847

OFC ID NO. 91004

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Respondent,

NO. 286673

vs.

DECLARATION OF SERVICE

TRAVIS LEE LOCKIE,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on November 1, 2010.

Kenneth H. Kato
Attorney at Law
1020 N. Washington Street
Spokane, WA 99201-2237

- U.S. Regular Mail, Postage Prepaid
- Legal Messenger
- Facsimile

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- Facsimile

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on November 1, 2010.



PAMELA BRADSHAW