

[Cite as *State v. Greer*, 2010-Ohio-1418.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92910

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD GREER

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-518157 and CR-514200

BEFORE: Stewart, J., McMonagle, P.J., and Cooney, J.

RELEASED: April 1, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Richard Greer, appeals from a judgment of the Cuyahoga County Court of Common Pleas convicting him of aggravated vehicular assault, vehicular assault, driving under the influence of alcohol or drugs, and resisting arrest. For the reasons that follow, we reverse.

{¶ 2} Appellant was indicted on two counts of aggravated vehicular assault and two counts of vehicular assault with driving under suspension (“DUS”) specifications, driving under the influence (“DUI”) of alcohol or drugs, theft of a motor vehicle, and resisting arrest. The charges arose out of a motor vehicle crash in which the car appellant was driving struck and injured two pedestrians.

{¶ 3} At approximately 10:00 a.m. on August 1, 2008, appellant was driving northbound on East 105th Street when his car crossed left of center, went up on the sidewalk, and struck two pedestrians and a dog. One of the victims, Angello Johnson, suffered two broken legs and fractured bones in his back. The other victim, Preston Thompson, testified that he suffered a fractured foot, although the medical evidence indicated otherwise.

{¶ 4} According to witnesses, appellant was driving at a “high rate of speed” and, after striking the pedestrians, exited the car and started to leave the scene. Thompson testified he chased after appellant, grabbed his arm, and directed him back to the scene. Thompson testified appellant “was slurrish and slow. His eyes were glossy, jumpy eyes, and he had a funny

smell.” Thompson said appellant smelled like “PCP” or “wet,” which Thompson said he had smelled before and “was not uncommon” in his neighborhood.

{¶ 5} The first officer on the scene, Officer Arkley, testified that he received a call about an accident and was told that people had been hit and the driver had fled the scene. He responded and found a car stopped in the street and fire and EMS personnel attending to a few people. Witnesses directed him to appellant as the driver. Officer Arkley stated that when he tried to take appellant’s arm to lead him over to the patrol car, appellant pulled away from him. He had to pull appellant down to the ground and, with the help of several Cleveland firefighters, handcuff appellant in order to control him. Appellant was placed in an ambulance.

{¶ 6} Officer Howard conducted the investigation. He testified that appellant was read his *Miranda* warnings in the ambulance and was also informed that police were investigating a possible operating a vehicle under the influence (“OVI”) and felony vehicular assault. He testified that appellant’s eyes were “very glassy, jaundice color, yellow,” that “he reeked of his breath and person of marijuana,” and had a “smell of a chemical protruding from his breath and clothing.” After refusing medical treatment, appellant was taken to a police car and questioned about the accident. Appellant stated that he had not had any alcohol but had smoked “wet” and

marijuana that morning. Officer Howard testified that he was unable to administer a field sobriety test or have appellant sign any of the forms because he felt he could not safely remove appellant's handcuffs. He stated that appellant told him that if he "took the handcuffs off," the police officers on the scene "were going to have to kill him."

{¶ 7} Appellant was taken to the hospital where intake records indicate that appellant denied having any medical condition or being under medication for a medical condition. Blood tests revealed no alcohol intoxication, and hospital records show that a drug screen was ordered, but there are no test results in the file. Medical personnel notes indicate appellant was confused, uncooperative, combative, and "smelled of marijuana." While restrained at the hospital for "detoxing," appellant told another police officer that he had "smoked a blunt" earlier that morning.

{¶ 8} The jury found appellant guilty on one count each of aggravated vehicular assault and vehicular assault with driving under suspension specifications, driving under the influence, and resisting arrest. The trial court sentenced appellant to prison terms of four years on the aggravated vehicular assault count and three years on the vehicular assault count, to be served consecutively. Appellant was sentenced to time served on the DUI and resisting arrest counts. Appellant timely appeals, raising four errors for our review.

{¶ 9} In his first assignment of error, appellant asserts that the trial court committed prejudicial error by admitting evidence of his prior convictions for driving under suspension and driving under the influence. The trial court, over appellant's objections, permitted the state to admit evidence of appellant's prior DUI and DUS convictions through testimony and certified copies of the judgments of conviction.

{¶ 10} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. Accordingly, we review a challenge to the admission of evidence under an abuse of discretion standard. The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 11} It is well-settled that evidence of prior convictions is prohibited except under narrow circumstances. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242. "The existence of a prior offense is such an inflammatory fact that ordinarily it should not be revealed to the jury unless specifically permitted under statute or rule. The undeniable effect of such information is to incite the jury to convict based on past misconduct rather

than restrict their attention to the offense at hand.” *State v. Allen* (1987), 29 Ohio St.3d 53, 506 N.E.2d 199.

{¶ 12} Evid.R. 404(B) excludes evidence of prior convictions except when offered “as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” The state contends that Evid.R. 404(B) permits the admission of evidence of appellant’s prior DUI convictions in this case because it was offered to show absence of mistake or accident on appellant’s part. We disagree. Appellant did not claim that he accidentally or mistakenly drove under the influence of alcohol or drugs. His defense was that he was not under the influence at all. Thus, evidence of the number of times appellant had been previously convicted of DUI is not in any way relevant to the question of whether he was under the influence when he crashed on August 1, 2008. The trial court’s admission of evidence of appellant’s prior convictions was improper and violated Evid.R. 404(B).

{¶ 13} Inadmissible evidence about a prior crime is prejudicial, unless the reviewing court finds beyond a reasonable doubt that it did not affect the outcome. *State v. Williams* (1988), 55 Ohio App.3d 212, 563 N.E.2d 346. Where evidence of past convictions has been improperly admitted, the question is whether, absent the disclosure of the past convictions to the jury, appellant would have been convicted. *Allen*, 29 Ohio St.3d at 550, citing *State v. Bayless* (1976), 48 Ohio St.2d 73, 357 N.E.2d 1035, paragraph seven of the

syllabus, vacated in part on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1155. Based upon the record before us, we cannot say conclusively that the evidence of the prior convictions for DUI did not affect the outcome in this case.

{¶ 14} The record contains no scientific or medical evidence of appellant being under the influence of alcohol or drugs at the time of the crash. The state's evidence consists of witnesses' observations as to appellant's appearance, smell, and behavior at the scene and at the hospital, coupled with police testimony that appellant made statements¹ that he had smoked a "blunt" or "wet" the morning of the crash. While it is possible that the state might have secured a conviction on this evidence alone, we cannot say conclusively that without the additional improper evidence of appellant's prior convictions for DUI, that he would beyond a reasonable doubt have been found guilty. Accordingly, we find the trial court's admission of evidence relating to appellant's prior convictions was prejudicial error. The first assignment of error is sustained, and the matter remanded for a new trial.

¹In appellant's second assignment of error, he argues that his trial counsel was ineffective for failing to file a motion to suppress these statements. However, because our resolution of the first assigned error disposes of the appeal, this argument will not be addressed.

{¶ 15} As our determination of the first assignment of error is dispositive of this appeal, we need not address the remaining errors.²

{¶ 16} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR

²Appellant's remaining assignments of errors are:

“ASSIGNMENT OF ERROR III:
THE TRIAL COURT ERRED BY CONVICTING AND SENTENCING APPELLANT OF BOTH AGGRAVATED VEHICULAR ASSAULT AND VEHICULAR ASSAULT BASED ON THE SAME INCIDENT AND THE SAME VICTIM IN VIOLATION OF OHIO'S ALLIED OFFENSE STATUTE AND THE STATE AND FEDERAL DOUBLE JEOPARDY CLAUSES.

“ASSIGNMENT OF ERROR IV:
APPELLANT'S CONSECUTIVE SENTENCES ARE CONTRARY TO LAW AND VIOLATIVE OF DUE PROCESS BECAUSE THE TRIAL COURT FAILED TO MAKE AND ARTICULATE THE FINDINGS AND REASONS NECESSARY TO JUSTIFY IT.”