COURT OF APPEALS
DECISION
DATED AND RELEASED

January 16, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-3225-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES D. SCHERR,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

WEDEMEYER, P.J. James D. Scherr appeals from a judgment entered after a jury convicted him of causing death by operation of a vehicle with a blood alcohol concentration of .08% or more, contrary to §§ 940.09(1)(b), and 340.01(46m)(b), STATS., and one count of duty upon striking a person, contrary to § 346.67(1), STATS. Scherr claims: (1) the trial court erred when it concluded that prior convictions are an element of the crime with which Scherr

was charged; (2) the trial court erred by ruling that it could not accept a partial jury waiver on one element of the crime; and (3) the trial court erred in admitting the evidence of prior convictions without balancing its prejudicial effect pursuant to § 904.03, STATS. Because prior convictions are an element of the crime committed, because the trial court was never specifically asked to rule on a motion for partial jury waiver and Scherr did not personally assert his desire to waive a jury determination on this element, and because the evidence of the prior convictions was not more prejudicial than probative, we affirm.

I. BACKGROUND

On February 1, 1993, while traveling on South Kinnickinnic Avenue in the City of Milwaukee, Scherr struck a pedestrian with his automobile. He did not stop. At the time of the incident, Scherr's blood alcohol concentration was .251%. The pedestrian died as a result of the impact. Scherr had two or more OMVWI convictions before the incident in this case.

Scherr was located, arrested and charged. The case was tried to a jury, which convicted Scherr. He now appeals.

II. DISCUSSION

A. Prior Convictions as an Element.

Scherr first contends that the trial court erred in telling the jury that his two prior convictions were an element of homicide by intoxicated use of a vehicle. This court recently addressed this issue in ***State v. Ludeking***, 195 Wis.2d 132, 536 N.W.2d 392 (Ct. App. 1995) and held that prior convictions are an element of the crime with which Scherr was charged. *See* ***id.*** at 136, 536 N.W.2d at 394 (prior "operating a motor vehicle while intoxicated" convictions are an element of the offense of driving with a prohibited alcohol concentration under §§ 346.63(1)(b) and 340.01(46m)(b), STATS.). Accordingly, we summarily reject Scherr's argument on this issue.

B. Partial Waiver of Jury Trial.

Scherr also claims that the trial court erred in denying his request for partial jury waiver on the element of "two or more prior convictions." We reject this claim because our review of the record demonstrates that Scherr did not actually offer to waive his right to a jury trial on this element, but rather argued that this was an issue of law for the court to decide.

The record demonstrates that Scherr's counsel's argument with respect to this issue was:

> Your Honor, it is the position of the defense that the .08 percent BAC must be applied by the Court *as a matter of law* if the defendant has prior convictions, but fall within the terms of the statute.
>
> Obviously then the Court must make findings in that respect. And it was my thought that in conjunction with [the prosecutor] we would submit and stipulate to a certified copy of the defendant's driving record in that respect which the court could base the finding. The actuality is that the net affect of that on a jury should only be that they hear an instruction from the court to the affect that the .08 percent is the appropriate level for them to find in order to find the defendant guilty of that particular subsection of [the] statute.
>
> I do not believe discussion of prior convictions, the defendant should be made nor need be made as an article of proof for a jury to consider.
>
> ....
>
> I am concerned though, in that there are a number of analogous statutes dealing with operating while intoxicated and operating under revocation and suspension and other analogous offenses where in

> the fact and prior suspensions or convictions is not presented to a jury.
>
> But rather, it's a law that the court may consider, must consider those items on sentencing as a matter of findings, *matters of law. I would think that a conviction is quintessentially or not quintessentially an issue of law. ... I don't know that something that is so intrinsically an issue of law really should be an issue for a jury to look at.*
>
> *It simply doesn't strike me as an appropriate matter of fact for juries to make decisions on.*

(Emphasis added.) These excerpts reflect the entirety of Scherr's argument on this issue. As is clear from the excerpts, at no time was there a request to waive a jury trial on this element. Rather, the argument asserted that this element was a question of law for the court and not a question of fact for the jury. Further, the record does not contain a personal waiver from Scherr.

Although a defendant may waive the right to a jury trial on an element of the crime charged, in order to do so, the defendant must make an express personal jury waiver. ***State v. Villarreal***, 153 Wis.2d 323, 324, 450 N.W.2d 519, 520 (Ct. App. 1989). The record in this case demonstrates that Scherr did not personally waive his right to a jury determination on this issue and, therefore, it would have been error for the trial court to take this element away from the jury. *See* ***id.*** at 332, 450 N.W.2d at 523.

C. § 904.03, STATS.

Finally, Scherr argues that the trial court should have engaged in a § 904.03, STATS., balancing test and should have concluded that introducing his two prior convictions was unfairly prejudicial. We do not agree. The fact that Scherr had prior convictions was an element of the charged offense. The fact that prior convictions existed was the only evidence of this element of the offense. In these circumstances, this type of evidence should not be excluded pursuant to § 904.03, STATS., as a matter of law. *See* ***State v. Grande***, 169 Wis.2d

422, 428, 485 N.W.2d 282, 283 (Ct. App. 1992) (holding as a matter of law that the only evidence of an element of an offense cannot be unfairly prejudicial or misleading to a jury). Further, the evidence of the prior convictions, suspensions or revocations that was actually presented to the jury was very general in nature and was followed by a cautionary instruction.

As the trial court amply reasoned:

> One of the things the jury has to find as the third element of the offense is that at the time the defendant operated the vehicle he had two or more convictions, suspension[s] or revocations as counted under an appropriate statute and then there is additional cautionary language that should be given at the request of the defendant which is that evidence has been received that defendant had prior convictions[,] suspensions or, this was received as relevant to the status of the defendant's driving record which is an issue in this case. It must not be used for any other purpose.

As noted, the information given to the jury regarding the priors was simply that Scherr had two or more prior convictions, suspensions or revocations. The jury was not informed of any of the circumstances surrounding those convictions, they were not even told that the convictions were for drunk driving, and they were not even told whether the priors were convictions, suspensions or revocations. In addition, the trial court issued a cautionary instruction to the jury that the evidence of Scherr's prior violations was "received as relevant to the status of his driving record, which is an issue in this case and it must not be used for any other purpose." Based on the foregoing, we conclude that the probative value of Scherr's prior convictions was not outweighed by any unfair prejudice.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 94-3225-CR (C)

SCHUDSON, J. (*concurring*). With the recent decision in ***State v. Ludeking***, 195 N.W.2d 132, 536 N.W.2d 392 (Ct. App. 1995), it is now settled that prior convictions constitute an element of homicide by intoxicated driving. It is also well-settled that a defendant has "the right to a jury determination" of each element of a criminal charge. ***State v. Villarreal***, 153 N.W.2d 323, 450 N.W.2d 519, 522 (Ct. App. 1989). Neither ***Ludeking*** nor ***Villarreal***, however, addresses whether a defendant has the right to waive a jury trial on one of the elements of a criminal charge, in the absence of consent by the State.[1]

In ***Singer v. United States***, 380 U.S. 24 (1965), the Supreme Court pondered but did not determine "whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." ***Id.*** at 37. In ***State v. Cook***, 141 Wis.2d 42, 413 N.W.2d 647 (Ct. App. 1987), we quoted that passage from ***Singer*** but also did not determine whether such circumstances might exist. ***Cook***, 141 Wis.2d at 46, 413 N.W.2d at 649. Here, I believe, we encounter such circumstances.

Charged with homicide by intoxicated driving, Scherr could reasonably believe that a jury, informed of the undisputed fact that he has two prior convictions for intoxicated driving, would be unable to fairly evaluate the disputed facts and issues in the case. Thus, to preserve his right to trial by a fair and impartial jury, Scherr should have been allowed to waive his right to a jury trial on that element.

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[1] In ***State v. Villarreal***, 153 Wis.2d 323, 450 N.W.2d 519 (Ct. App. 1989), however, we did state:

> The state notes that the Criminal Jury Instructions Committee suggests that submission of the dangerous weapon element to the trial court rather than the jury can be proper. We have no disagreement with this suggestion. Just as the parties to a criminal action may waive a jury trial, we see no reason why they should not be permitted to waive a jury trial as to a portion of the action.

Id. at 330, 450 N.W.2d at 523; *see also* § 972.02(1), STATS. (defendant's waiver of jury trial requires court approval "and the consent of the state" (emphasis added)).

The majority concludes that Scherr "did not actually offer to waive his right to a jury trial on this element, but rather argued that this was an issue of law for the court to decide." Majority slip op. at 3. I disagree. Although defense counsel argued that the issue was one for the court, he *also* argued that "the court must make findings in that respect," and "could base the findings" on the parties' stipulation. The trial court rejected his arguments, thus precluding what otherwise would have become Scherr's formal, personal jury waiver on one element. Under these circumstances, I conclude that Scherr did offer to waive his right to a jury trial on the element of his prior convictions.

In this case, however, I conclude that the trial court's error was harmless because the jury did not learn of Scherr's two prior convictions for intoxicated driving. Contrary to the implication of Scherr's arguments on appeal, the jury was not informed of the nature of his prior convictions. Accordingly, I concur.