

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

**Appeal No. 03-0402-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00CF000141

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK J. ZIMMERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marinette County:
CHARLES D. HEATH, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Mark Zimmerman appeals from a judgment convicting him of operating a motor vehicle while under the influence of an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

intoxicant as a fourth offense, contrary to WIS. STAT. § 346.63(1)(a). The sole issue on appeal is whether the trial court erroneously exercised its discretion by admitting impeachment evidence of prior crimes after Zimmerman had stipulated to the crimes as an element of the prohibited alcohol offense. We affirm the judgment.

¶2 Initially, the State charged Zimmerman with a fourth offense of OWI, fourth offense of operating with a prohibited blood alcohol content, and some other offenses not relevant to this appeal. With respect to the operating with a prohibited blood alcohol content offense, the State had to prove that at the time of the incident, Zimmerman had two or more OWI-related offenses, which then subjected him to a prohibited alcohol concentration of 0.08%. Shortly before the jury trial on these charges, the court accepted Zimmerman's stipulation with the State that he had three prior convictions for operating a motor vehicle while intoxicated or with a prohibited blood alcohol concentration. The State and Zimmerman agreed that the purpose of the stipulation was to prevent the jury from hearing about these prior alcohol-related convictions while at the same time establishing his prior record.

¶3 However, during the trial at a sidebar conference, the court ruled the State could impeach Zimmerman's credibility with two of the OWI offenses by asking him if he had been convicted of any crimes and, if so, how many times. After the sidebar conference, in response to defense counsel's questions and without identifying the offenses, Zimmerman admitted that he been convicted twice.² The jury found him guilty.

² After the sidebar, defense counsel privately discussed the results of the conference with Zimmerman and then asked him the following:

(continued)

¶4 The sole issue on appeal is whether the circuit court erred by allowing the State to impeach Zimmerman with the two prior OWI convictions after the court had accepted his stipulation.³ Whether to allow prior conviction evidence of impeachment purposes under WIS. STAT. § 906.09 is within the trial court's discretion. *See State v. Kruzycski*, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995). In reviewing discretionary decisions, we consider only whether the circuit court reasonably exercised its discretion, regardless of how we may have made the ruling. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶5 As Zimmerman's appellate counsel correctly observes, this case presents a clash between two legal principles. On one hand, when, as here, a defendant is charged with an offense where the number of prior OWI-related offenses is an element of the crime, a defendant may stipulate to that element and bar the admission of evidence of his prior convictions. *See State v. Alexander*, 214 Wis. 2d 628, 651, 571 N.W.2d 662 (1997). On the other hand, WIS. STAT. § 906.09(1) creates the general rule that prior convictions are admissible for the purpose of attacking a witness's credibility. In turn, this latter rule is limited by

Q. Mr. Zimmerman, have you ever been convicted of a crime before?

A. Yes.

Q. How many times?

A. Twice.

³ The State argues Zimmerman failed to object to the court's ruling to allow the impeachment evidence and, therefore, has waived this issue. However, the record establishes that before trial, defense counsel filed a motion in limine seeking to exclude the State from impeaching Zimmerman with his prior convictions. The motion set forth Zimmerman's position that any evidence of his prior convictions, including for impeachment, should be excluded in light of his stipulation. Thus, we reject the State's argument Zimmerman failed to preserve this issue for appeal.

§ 906.09(2), which provides that the convictions may be excluded if their probative value is substantially outweighed by the danger of unfair prejudice.

¶6 The issue in this case hinges on the exercise of the circuit court's discretion when concluding the impeachment evidence was not substantially outweighed by its unfair prejudicial effect. As a threshold matter, Zimmerman concedes the impeachment evidence is relevant. However, to be excludable, the relevant evidence must not be simply prejudicial. Nearly all of the State's evidence is prejudicial to the defendant in some way. *See State v. Murphy*, 188 Wis. 2d 508, 521, 524 N.W.2d 924 (Ct. App. 1994). To be excludable, the evidence must be unfairly prejudicial.

¶7 The term “unfair prejudice,” as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. *Alexander*, 214 Wis. 2d at 642. Unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. *Id.*

¶8 Zimmerman reasons that because he was standing trial for the OWI charges, there was a likelihood the jury inferred from this impeachment evidence that he was a repeat drunk driver and, therefore, the court erred by concluding the evidence was not unfairly prejudicial. In support of his argument, he cites *Alexander* where the supreme court held:

[I]n a case where the defendant is charged with driving with a prohibited alcohol concentration and the jury is informed that he or she has two or more prior convictions, suspensions or revocations, it is highly probable that the jury will infer that the prior offenses are driving offenses and likely OWI offenses.

Alexander, 214 Wis. 2d at 644. The court further held:

[W]hen the sole purpose of introducing any evidence of a defendant's prior convictions, suspensions or revocations under Wis. Stat. § 343.307(1) is to prove the status element and the defendant admits to that element, its probative value is far outweighed by the danger of unfair prejudice to the defendant. We hold that admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury in this case was an erroneous exercise of discretion.

Id. at 651.

¶9 Zimmerman admits that *Alexander* did not involve the admission of prior unidentified convictions for purposes of impeachment. Instead, the issue was whether the circuit court erroneously exercised its discretion when it admitted evidence of the element of two or more prior convictions, suspensions or revocations under WIS. STAT. § 343.307(1) and submitted the element to the jury when the defendant fully admitted to the element, and the purpose of the evidence was solely to prove that element. Nonetheless, Zimmerman reasons the supreme court's balancing of prior conviction evidence in *Alexander* is important here because it concluded that evidence of prior OWI-related conviction evidence was unfairly prejudicial.

¶10 Notably, Zimmerman premises his argument on the idea that use of the prior convictions for impeachment purposes led the jury to believe he was convicted of prior offenses for operating a motor vehicle while intoxicated. From that premise, he implies when a defendant in an OWI trial is impeached by having to admit that he or she has been previously convicted of a crime, the jury is led to conclude that the prior criminal conviction must have been alcohol related. If we were to adopt this logic, the State would always be prevented from using any prior

conviction impeachment evidence against a defendant testifying in an OWI trial. We decline to adopt this logic.

¶11 Here, it is also critical that the nature of the prior convictions was never disclosed to the jury. After the sidebar conference, defense counsel asked Zimmerman if he was ever convicted of a crime. When Zimmerman answered yes, defense counsel then asked how many, to which Zimmerman answered two. No other reference was made to the prior convictions in the trial. Thus, we fail to see how the court erroneously exercised its discretion when Zimmerman had to admit that he had been previously convicted twice for unidentified crimes. As did the trial court, we see no unfair prejudice.

¶12 In any event, even if we were to conclude it was error to allow the impeachment evidence in this case, it was harmless error. The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the State. The State's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). The analysis focuses on "whether the error 'undermine[s] confidence in the outcome.'" *Id.* at 545 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

¶13 In this case, we are satisfied that the error, if it was error, was harmless as it does not undermine our confidence in the outcome of the trial. The arresting officer testified that he first noticed Zimmerman's vehicle because it had no attached front plate and one rear registration plate. After activating his overhead lights, the officer observed Zimmerman's vehicle make a right hand turn, jump a curb and come to a stop. When the officer approached the car, he

detected an odor of intoxicants coming from inside the car and observed that Zimmerman's eyes were very bloodshot and his speech was slurred. Zimmerman also admitted that he had been at a tavern earlier where he had consumed four or five beers. When Zimmerman explained that he was unable to do the walk-and-turn test because he suffered from Tinnitus, an imbalance of fluid on the inner ear affecting a person's steadiness and balance, the officer placed him under arrest for OWI and took him to a hospital where the results of Zimmerman's blood test indicated .178 grams of alcohol per 100 milliliters of blood. That is over twice the prohibited alcohol concentration of .08%.

¶14 Given that the impeachment evidence was only a very small part of the testimony and in light of the totality of the evidence presented at the trial, there is no reasonable possibility that requiring Zimmerman to admit that he had been convicted previously twice of an unnamed crime contributed to his conviction. The error, if it was error, was harmless. Therefore, we affirm the conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

