COURT OF APPEALS
DECISION
DATED AND FILED

JANUARY 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-2657-CR
97-3355-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BUREN F. SPRAGUE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

ANDERSON, J. Given the overwhelming evidence that Buren F. Sprague was operating a motor vehicle while intoxicated (OMVWI), the trial court's erroneous exercise of discretion in admitting evidence of Sprague's prior convictions, suspensions or revocations did not contribute to his conviction for OMVWI in violation of § 346.63(1)(a), STATS., and operating a motor vehicle

with a prohibited alcohol concentration (OMVPAC) in violation of § 346.63(1)(b). Therefore, we affirm Sprague's third conviction for these offenses.

In the early morning hours of February 27, 1996, Walworth County Sheriff's Deputy Alan Gorecki noticed Sprague driving his truck in an erratic fashion, weaving within his lane of travel. When Gorecki saw the truck leave the roadway and go into the adjoining ditch, he decided to stop the truck and make sure that the driver was okay. Gorecki observed that when Sprague got out of the truck he had to use the truck to steady himself. When Gorecki confronted Sprague, he noted that Sprague had glassy, bloodshot eyes and a strong odor of intoxicants. Gorecki asked Sprague why he had gone into the ditch and Sprague replied with slurred speech that his female passenger had been playing around with him. Sprague admitted to Gorecki that he had been drinking. Gorecki looked through the driver's side window and saw a plastic cup with a brown substance and a white foamy top on the dashboard that he identified as beer and Sprague told him that it had been in the truck for three years.

After making these observations, Gorecki asked Sprague to recite the alphabet which he did successfully albeit with slurred speech. Sprague was then requested to perform several field sobriety tests which he failed to complete in the prescribed manner. At this time, Gorecki placed Sprague under arrest of OMVWI and took him to the local hospital so that a blood test could be performed. After Gorecki read Sprague the Informing the Accused form, he asked if Sprague would submit to a blood test and Sprague refused. When Sprague found out that Gorecki was going to force a blood draw, he became combative and

told the officer that he would fight before they could draw his blood.[1] Gorecki avoided a physical confrontation when he told Sprague that his concerns about a blood draw would be noted on the arrest report. When the medical technologist prepared to draw Sprague's blood, he was abusive and the technologist had to take time to calm him down. The blood samples were sent to the State Laboratory of Hygiene and the analysis established Sprague's blood-alcohol content at 0.101%.

Sprague was ultimately charged in a criminal complaint with his third offense OMVWI and OMVPAC. During the jury instruction conference preceding the trial, Sprague offered to stipulate that this was his third conviction, suspension or revocation to prevent the jury from being prejudiced by learning of his two prior drunk driving arrests. The State opposed the proposed stipulation unless the jury would be told that Sprague had agreed that he had two prior drunk driving convictions. The trial court refused to order the State to join in the stipulation.

Sprague appeals his conviction contending that the trial court erroneously exercised its discretion when it refused to accept his offer to stipulate to his prior drunk driving record. He relies upon ***Old Chief v. United States***, 519 U.S. ____, 177 S. Ct. 644 (1997), for the proposition that when prior convictions are an element of the crime charged, it is highly prejudicial to inform the jury of the defendant's prior record. The State counters that Sprague's argument was soundly rejected in ***State v. Ludeking***, 195 Wis.2d 132, 136, 536 N.W.2d 392, 394 (Ct. App. 1995), where this court held that because prior drunk driving convictions

[1] The forcible extraction of a blood sample is a reasonable search by Fourth Amendment standards. *See* ***State v. Krause,*** 168 Wis.2d 578, 583, 484 N.W.2d 347, 348 (Ct. App. 1992).

are elements of the crime under §§ 346.63(1)(b) and 340.01(46m)(b), STATS., they are properly admitted into evidence.

The issue presented by this appeal was squarely addressed by the Wisconsin Supreme Court and decided in favor of the argument made by Sprague. After examining the elements of the crime of a third offense OMVWI and the rationale of ***Old Chief***, the court concluded:

> Accordingly, we hold that when the sole purpose of introducing any evidence of a defendant's prior convictions, suspensions or revocations under Wis. Stat. s. 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.

State v. Alexander, No. 96-1973-CR, slip op. at 21 (Wis. Dec. 18, 1997).[2]

Following the lead of the supreme court, we next turn to the question of whether allowing any evidence regarding the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury was harmless error. The test for determining whether an error is harmless 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. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 232 (1985). The State's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction. *See* ***id.***

[2] The supreme court specifically overruled the language in ***State v. Ludeking,*** 195 Wis.2d 132, 536 N.W.2d 392 (Ct. App. 1995), relied upon by the State to support its contention that the trial court properly admitted evidence of Sprague's prior drunk driving convictions. *See* ***State v. Alexander***, No. 96-1973-CR, slip op. at 21-22 (Wis. Dec. 18, 1997).

We have previously summarized the credible evidence admitted at trial. In this case there is no reasonable possibility that the erroneous admission of evidence of Sprague's prior drunk driving convictions contributed to his conviction. We conclude that the trial court's error does not undermine our confidence in the outcome. *See* ***id.*** at 545, 370 N.W.2d at 232. Therefore, we affirm Sprague's conviction.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.