

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-257

MARCH TERM, 2003

	}	APPEALED FROM:
	}	
	}	District Court of Vermont, Unit No. 2, Chittenden
State of Vermont	}	Circuit
	}	
v.	}	
	}	DOCKET NO. 2122-4-01 Cncr
Kimberly Lafleur	}	
	}	Trial Judge: Michael S. Kupersmith and Helen Toor,
	}	Jury Draw
	}	

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a jury verdict finding her guilty of driving while intoxicated (DWI), third offense. She claims the trial court committed plain error by failing to enter a mistrial after the prosecutor informed the jury about defendant's two prior DWI convictions during jury selection. We reverse and remand for a new trial.

In April 2001, the State charged defendant with DWI, third offense after a traffic stop in Milton, Vermont. At the outset of jury selection on December 10, 2001, the court informed the potential jurors that defendant was charged with DWI, but that she was presumed innocent. Following the court's introductory remarks, the prosecutor addressed the jury pool. After his greeting, the prosecutor stated that "[t]his is a case where the State has charged the Defendant, Ms. Lafleur, with DWI, third offense." The parties proceeded to question members of the jury pool, and a jury was eventually selected that day. Trial was scheduled for December 20, 2001.

At trial, the question of defendant's sobriety at the time of the April traffic stop was contested. Defendant testified and presented an innocent explanation for her performance on the sobriety tests the police officer asked her to execute. Defendant also offered evidence impeaching the reliability of the Datamaster breath test results. After hearing all of the evidence, the jury convicted defendant.

After the guilty verdict, the court informed the jury that the case was not yet over. The court told the jury that it still had to determine whether defendant had been convicted of the same crime twice before. The court explained that normally juries are not informed of similar prior convictions because "in deciding whether or not an individual was under the influence on this particular occasion, we don't want you to know that he or she has been found guilty of essentially the same offense on any prior occasion." Immediately, one of the jurors told the court that during jury selection, "we all heard it said that there were prior convictions." The trial judge stated that he was unaware that the jury had been made aware of the prior convictions already, "but in any event, it doesn't change the situation now where the issue of these prior convictions is going to be presented to you." Defense counsel asked to approach the bench and the parties conferred with the judge, but the record does not disclose what was said during the conference. The court responded:

Well, apparently this came out at the time of voir dire and, I mean, I was not involved in the voir dire and it might very well be that one of you two said it or it might be that the judge read the entire information and the judge said it. I don't know, but that was the time to say it. Now, what's in the record is in the record and I suppose it's possible that might give you a little basis for appeal on

something a little later on, but right now, we're going to go forward with this particular issue.

The court did not inquire further about the disclosure of defendant's DWI record or its impact on the jury. Before the jury received evidence of defendant's prior convictions, defendant moved for a mistrial. The court denied the motion. The jury eventually found that defendant had two previous convictions for DWI. After the court denied defendant's post-trial motion for a new trial, defendant appealed her conviction to this Court.

On appeal, defendant claims it was plain error for the court to proceed to trial after the jury had been told about her prior convictions for the same crime. It is only the extraordinary and rare case in which plain error will be found. State v. Ross, 152 Vt. 462, 468 (1989). The error must be obvious and must affect the defendant's substantial rights. Id. We will reverse where failure to recognize the error will result in a miscarriage of justice or where the error is so serious that it strikes the heart of defendant's constitutional rights. State v. Davignon, 152 Vt. 209, 222 (1989). This is one of those extraordinary cases.

It is well-settled that evidence of a defendant's prior convictions for the same crime is generally inadmissible because of the likelihood of jury prejudice. See Reporters Notes, V.R.E. 404(b); State v. Cameron, 126 Vt. 244, 250 (1967). In State v. Cameron, we addressed Vermont's recidivist statute concerning the offense of driving with a suspended license (DLS). In that case, we concluded that the jury may not hear evidence of the defendant's prior DLS convictions before rendering a verdict on the principal offense. We explained:

To project the issue of the accused's former conviction(s) into the trial for a subsequent offense, before verdict, practically deprives the respondent of the legal presumption of innocence, inevitably prejudices the jury against him, and takes from him his constitutional right to be convicted only by the judgment of his peers and due process of law.

126 Vt. at 250. For those same reasons, it is obvious error for the jury to be made aware of a defendant's prior convictions for DWI before the jury renders a verdict on the principal offense. See State v. Bushey, 142 Vt. 507, 510-11 (1983) (reversing DWI conviction because prosecutor elicited testimony about defendant's two prior DWI convictions).

The error alone does not, however, cast doubt on a jury's guilty verdict or make questionable the fairness of the trial because curative measures exist to ensure the defendant's right to a fair and impartial jury. Upon learning of the error, the trial court may voir dire the jury to determine the existence and extent of prejudice caused by the premature release of information about the defendant's prior conviction, and may issue an admonishment or other cautionary instruction to the jury to disregard the information in its deliberations. See State v. Onorato, 142 Vt. 99, 106-07 (1982) (court resolved question of jury bias flowing from disclosure that proceeding was defendant's second trial by general inquiry to jury about prejudice).

In this case, the record demonstrates that at least two jurors recalled the prosecutor's statement about defendant's prior convictions. Nevertheless, the court did nothing to assess the potential impact the prosecutor's statement had on the jury at any time during the proceeding. Indeed, even after defendant moved for a mistrial, the trial judge made no effort to determine exactly what occurred during the jury selection process to satisfy himself that defendant had received a fair trial on the principal offense by an unbiased jury.

Citing the limited nature of the prosecutor's remark, the State argues that reversal of defendant's conviction is not warranted here because the court instructed the jury that its verdict must be based on the evidence in the record only, counsel's comments were not evidence, and defendant was presumed innocent of the charges. The State also points to the evidence of guilt presented to the jury in support of its argument. We conclude that the court's general instructions to the jury were not sufficient to assure us that defendant's prior convictions played no role in the jury's deliberation. That is particularly so in this case where the parties hotly disputed the extent of defendant's sobriety on the night in question. See Bushey, 142 Vt. at 511 (reversal required where record shows sharply contested DWI prosecution and prosecutor elicited evidence of defendant's prior DWI convictions). As we noted in State v. Onorato, absent some examination of the jury by the trial court upon discovering the possibility of jury prejudice, "the trial judge lacks a basis for determining if any prejudice exists, and consequently this Court has no record from which it can determine if the jury was fair and unbiased." Onorato, 142 Vt. at 106. Accordingly, defendant's conviction must be reversed and the matter remanded for a new trial.

Reversed and remanded.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned