[Cite as *State v. Kulasa*, 2012-Ohio-6021.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 11AP-826
v.	:	(C.P.C. No. 10CR-07-3966)
Ethan J. Kulasa,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 20, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Russell S. Bensing, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Ethan J. Kulasa, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} Around 7:00 a.m. on the morning of February 4, 2010, Michael Griffith was stopped in his car on Worthington Woods Boulevard at the intersection of Worthington Galena Road. Griffith called 911 to report that "a drunk" hit the rear end of his car. (Tr. 67.) The call was recorded. Griffith gave the 911 operator the license plate number of the car that hit him because he thought the car was going to leave the scene. Griffith then yelled stop twice and, after an audible commotion, the phone call ended.

{¶ 3} That same morning, Nicole Carey was stopped in her car at the same intersection. She saw a tan or light gold SUV pulling up to the intersection with what she thought was a garbage bag underneath it. When the SUV turned right onto Worthington Galena Road, she could see that there was a body beneath the vehicle. The SUV stopped for a second after running over the body, but then proceeded to speed away down the road. Another witness, Rosemary Llewellyn, also saw the SUV speeding down Worthington Galena Road. After the SUV drove away, she also saw a body lying on the side of the road. Griffith died from multiple blunt force injuries resulting from being dragged by the SUV.

{¶ 4} Because the police suspected that they had the license plate number for the vehicle that hit Griffith, a Columbus police officer went to the address associated with that plate number. Appellant's father lived at that address. The person at home when the officer arrived did not know the whereabouts of the vehicle. However, shortly after the officer left the house, appellant's father called the officer and told him that appellant and the vehicle were at appellant's mother's house on Rosaberry Run in Worthington, Ohio. The officer went to that address and found appellant's SUV parked in a parking lot. The officer also found appellant inside his mother's apartment. Appellant was lying on the floor, incoherent and smelling of alcohol. He admitted to the officer that he had been drinking and told the officer that "maybe" he was involved in an accident. Subsequent investigation revealed that the SUV's driver's side turn signal was not positioned properly and that fragments of amber glass consistent with the driver's side turn signal were found on the rear of Griffith's car. There was also a fresh scuff mark on the front bumper of the SUV.

{¶ 5} The police later spoke to appellant's friend, Dustin Cox. Over the course of multiple interviews with police, Cox revealed that he and appellant had been out together the night before the crime. Around 10:00 p.m., appellant picked Cox up in appellant's gold Toyota 4Runner and they drove to a party in Delaware, Ohio where they only stayed for about an hour. Appellant then drove Cox to another party in a condominium complex called Park Club. That party was less than a mile north of the scene of the fatal incident. They stayed at the Park Club party until about 6:45 a.m. the next day, when according to Cox, he and appellant left the party together. Appellant drove the Toyota 4Runner and

turned south onto Worthington Galena Road to take Cox to his house, which was located just west of the intersection of Worthington Galena and Worthington Woods Boulevard. Appellant was driving "swervy" and Cox had to grab the steering wheel to keep him straight. (Tr. 109.) After appellant turned right onto Worthington Woods, Cox said that appellant punched him in the ear. Cox was upset, so he asked appellant to stop the car and let him out. Appellant turned right into an apartment complex driveway called Landings Loop, where Cox got out of the car and began to walk home. This was right around 7:00 a.m. Appellant was still parked in his car as Cox walked away.

{¶ 6} As a result of Griffith's death, a Franklin County Grand Jury indicted appellant with two counts of aggravated vehicular homicide in violation of R.C. 2903.06, one felony count of failure to stop after an accident in violation of R.C. 4549.02, and two counts of operating a vehicle under the influence of alcohol or drugs in violation of R.C. 4511.19. Appellant entered a not guilty plea to the charges and proceeded to a jury trial.

{¶ 7} At the trial, the parties stipulated that appellant was legally intoxicated the morning of the accident and that the vehicle which killed Griffith was the Toyota 4Runner registered to appellant's father. The disputed issue at trial was the identity of the driver of the 4Runner at the time of the crime. The state argued that appellant was the driver of the SUV, while appellant attempted to portray Cox as the driver. Cox denied driving the car. (Tr. 179.)

{¶ 8} The jury found appellant guilty of all charges. The trial court sentenced appellant to consecutive prison terms of eight years for the first count of aggravated vehicular homicide, five years for the second count, two years for the felony count of failure to stop after an accident, and six months for each of the OVI counts. For sentencing purposes, the trial court merged the two aggravated vehicular homicide counts into one as well as the two OVI counts for a total prison sentence of 10 and one-half years.

{¶ 9} Appellant appeals and assigns the following errors:

> Assignment of Error No. 1: The trial court erred in excluding evidence that a witness had made prior inconsistent statements.
>
> Assignment of Error No. 2: The trial court erred in sustaining a motion in limine to bar defense counsel from arguing inferences to the jury.

> Assignment of Error No. 3: The trial court erred in failing to merge the offenses of aggravated vehicular homicide, leaving the scene of an accident, and operating a motor vehicle while under the influence of alcohol.

II. The trial court's exclusion of Cox's prior inconsistent statements

{¶ 10} Appellant argues in his first assignment of error that the trial court erred by excluding extrinsic evidence of prior statements made by Dustin Cox that were inconsistent with his trial testimony. We disagree.

{¶ 11} Pursuant to Evid.R. 613(B), extrinsic evidence of a witness' prior inconsistent statements is admissible for purposes of impeachment if both of the following apply:

> (1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;
>
> (2) The subject matter of the statement is one of the following:
>
> (a) A fact that is of consequence to the determination of the action other than the credibility of a witness;
>
> (b) A fact that may be shown by extrinsic evidence under Evid. R. 608(A), 609, 616(A), 616(B);
>
> (c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence.

{¶ 12} Thus, under Evid.R. 613(B), a party may introduce extrinsic evidence of a witness' prior inconsistent statement to impeach the witness' credibility. In order for extrinsic evidence of a prior inconsistent statement to be offered into evidence, however, a proper foundation must be established. Evid.R. 613(B). *In re M.E.G.*, 10th Dist. No. 06AP-1256, 2007-Ohio-4308, ¶ 37, citing *Fowler v. Coleman*, 10th Dist. No. 04AP-248, 2005-Ohio-1518. " 'When extrinsic evidence of a prior inconsistent statement * * * is offered into evidence pursuant to Evid.R. 613(B), a foundation must be established through direct or cross-examination in which: (1) the witness is presented with the former statement; (2) the witness is asked whether he made the statement; (3) the witness is

given an opportunity to admit, deny or explain the statement; and (4) the opposing party is given an opportunity to interrogate the witness on the inconsistent statement.' " *State v. Mack*, 73 Ohio St.3d 502, 514-15 (1995), quoting *State v. Theuring*, 46 Ohio App.3d 152, 155 (1st Dist.1988). "If a witness denies making the statement, a proper foundation has been laid, and the evidence does not relate to a collateral matter, extrinsic evidence is admissible." *Fowler* at ¶ 19, quoting *State v. Riggins*, 35 Ohio App.3d 1 (8th Dist.1986), paragraph two of the syllabus. If a witness admits having made the contradictory statements, then extrinsic evidence is not admissible. *In re M.E.G.*; *State v. Hill,* 2d Dist. No. 20028, 2004-Ohio-2048, ¶ 40.

{¶ 13} A trial court's ruling on an Evid.R. 613(B) issue, like other evidentiary rulings, is reviewed for an abuse of discretion. *State v. Mulvey*, 7th Dist. No. 08 BE 31, 2009-Ohio-6756, ¶ 67, citing State *v. Reiner*, 89 Ohio St.3d 342, 357-58 (2000), reversed on other grounds, *Ohio v. Reiner*, 532 U.S. 17 (2001). An abuse of discretion indicates that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Brady,* 119 Ohio St.3d 375, 2008-Ohio-4493, ¶ 23. Although we note that no court has the authority, within its discretion, to commit an error of law. *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶ 70.

{¶ 14} Here, appellant claims that Cox made several statements during his testimony that were inconsistent with prior statements he made to the police. Specifically, appellant claims that: Cox first told the police that he last saw appellant at 8:00 p.m. the night before the incident, but testified that he was with appellant up until just before the incident; Cox did not tell the police during his first interview about seeing a neighbor when he got home the morning of the incident but testified that he saw the neighbor that morning; Cox did not admit to being at the second party at Park Club until his second interview with police, and he did not originally tell police that he got out of appellant's car because appellant punched him.

{¶ 15} At trial, however, appellant's counsel questioned Detective Stephen Boggs, who interviewed Cox twice after the incident, only about two prior statements that would be inconsistent with Cox's testimony: that Cox did not tell Boggs that he and appellant were coming from the Park Club party the morning of the incident (Tr. 292), and that Cox did not tell him that he got out of appellant's car because appellant punched him. (Tr.

295.) Counsel did not attempt to introduce any other extrinsic evidence of Cox's other purported prior inconsistent statements and, therefore, our consideration is so limited. The trial court refused to allow questions concerning these two prior statements.[1]

{¶ 16} In an attempt to lay a proper foundation for the admission of the statements, trial counsel cross-examined Cox about the two statements he gave to Boggs. When asked if he told Boggs that he and appellant were coming from a party in Delaware or Park Club, Cox was at first unclear about what he told Boggs. He ultimately testified that "there is no reason why I shouldn't have told him that we were at that [Park Club] party. I thought I did. If I didn't, my apologies." (Tr. 134.) He assumed he did not tell Boggs about the Park Club party "because I was told I didn't" and that Cox "didn't mean to not mention the party. * * * I wish I had of mentioned it." When asked whether the second party was not important enough to mention, he replied "I think I did. I am sorry for not." (Tr. 135-36.) In fact, before counsel's cross-examination, the state asked Cox why he did not mention the Park Club party to police when they first questioned him. (Tr. 123.) Similarly, when asked if he told Boggs that he got out of appellant's car because appellant punched him, Cox was at first unsure: "Well, if I didn't tell them, that is – I thought I did tell them." (Tr. 142.) Later, however, he apologized for not mentioning the punch until his second interview with Boggs. (Tr. 143.)

{¶ 17} Based on the entirety of Cox's testimony, the trial court did not abuse its discretion when it concluded that Cox essentially admitted at trial that he did not originally tell police of the Park Club party or that he left the car because appellant punched him. This admission renders extrinsic evidence of Cox's prior statements inadmissible. *State v. Farris*, 2d Dist. No. 2003 CA 77, 2004-Ohio-5980, ¶ 29 (extrinsic evidence of prior statement not admissible where witness admits inconsistency between statement and trial testimony). Accordingly, the trial court did not err when it refused to admit extrinsic evidence of Cox's prior inconsistent statements, and we overrule appellant's first assignment of error.

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[1] We recognize that the trial court relied on an incorrect reason to exclude the evidence. Nevertheless, we will review the trial court decision based on the legal guidelines set forth above and in Evid.R. 613(B).

III. The trial court's resolution of the State's pre-trial motion in limine

{¶ 18} In his second assignment of error, appellant attacks the trial court's decision to grant the state's pretrial motion in limine. Specifically, the state asked the trial court to instruct appellant's trial counsel that he could not make statements during voir dire or opening arguments that appellant did not remember anything of the accident. Appellant's trial counsel did not disagree, but argued that he should be able to argue to the jury during closing arguments that it could infer from appellant's intoxication that he "very well may not have known anything about what happened." (Tr. 22.) The trial court granted the state's motion in limine and instructed appellant's trial counsel not to tell the jury that appellant did not remember anything of the accident.

{¶ 19} Appellant now claims that the trial court's decision prevented him from arguing to the jury in closing argument that it could infer that appellant was so drunk the morning of the accident that he could not have been the person driving the SUV when it hit Griffith's car. We first note that this was not the trial court's decision. The trial court refused to allow appellant's trial counsel to argue that appellant did not remember anything of the accident. The decision has nothing to do with appellant's ability to drive a car that morning. Regardless, appellant has failed to preserve this issue for appeal.

{¶ 20} A ruling on a motion in limine is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of an evidentiary issue. *State v. Sayler*, 10th Dist. No. 08AP-625, 2009-Ohio-1974, ¶ 34, citing *State v. Grubb*, 28 Ohio St.3d 199, 201-02 (1986). A preliminary ruling has no effect until it is acted upon at trial. *State v. Chandathany,* 9th Dist. No. 02CA0081-M, 2003-Ohio-1593, ¶ 5. When the trial court bars evidence by granting a motion in limine, the opposing party must proffer the evidence during trial so that the court can make a final ruling. *Grubb* at 202-03; *Chandathany* at ¶ 5; *State v. Bobo,* 9th Dist. No. 21581, 2004-Ohio-195, ¶ 4-6. Otherwise, the appellate court has nothing to consider, and the evidentiary issue has not been preserved for appeal. *Chandathany* at ¶ 6; *Bobo* at ¶ 6.

{¶ 21} Prior to closing argument, appellant's trial counsel did not proffer what he wanted to argue to the jury, nor did he otherwise request the trial court to reconsider its previous ruling. Thus, appellant did not preserve this issue for appeal. *See Grubb* at 202-

03; *Chandathany* at ¶ 5-6; *Bobo* at ¶ 6. Accordingly, we overrule appellant's second assignment of error.

IV. R.C. 2941.25 and the Merger of Allied Offenses of Similar Import

{¶ 22} In his final assignment of error, appellant argues that his offenses were allied offenses of similar import that should have merged for purposes of sentencing. Initially, we note that appellant did not raise the merger issue at sentencing, and has therefore forfeited this argument on appeal absent plain error. *State v. Taylor,* 10th Dist. No. 10AP-939, 2011-Ohio-3162, ¶ 34, citing *State v. Sidibeh,* 192 Ohio App.3d 256, 2011-Ohio-712 ¶ 55 (10th Dist.); *State v. Elmore,* 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 127. A trial court commits plain error, however, when it imposes multiple sentences for allied offenses of similar import. *State v. Gibson,* 10th Dist. No. 10AP-1047, 2011-Ohio-5614, ¶ 47, citing *State v. Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31.

{¶ 23} R.C. 2941.25, Ohio's multiple count statute, provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 24} To determine whether offenses are allied and of similar import and therefore subject to merger, "the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 48, citing *State v. Blankenship*, 38 Ohio St.3d 116, 119 (1988); *Gibson* at ¶ 48-49.

{¶ 25} If the offenses can be committed by the same conduct, then "the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act,

committed with a single state of mind.' " *Johnson* at ¶ 49, quoting *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50. If the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. *Johnson* at ¶ 51. However, if the answer to both questions is in the affirmative, then the offenses are allied offenses of similar import and will be merged. *Taylor* at ¶ 38; *Johnson* at ¶ 50.

{¶ 26} To commit aggravated vehicular homicide in this case, appellant must have operated a motor vehicle while under the influence and proximately caused Griffith's death as a result. R.C. 2903.06(A)(1)(a). To commit the failure to stop after an accident charge in this case, appellant must have failed to stop and remain at the scene of an accident that resulted in a death. R.C. 4549.02(B). We assume without deciding that it is possible to commit these offenses with the same conduct. We must then determine whether appellant in fact committed these offenses by the same conduct.

{¶ 27} Appellant contends that his one act of driving away from the scene of the initial collision was the conduct that supported his convictions for aggravated vehicular homicide as well as the failure to stop after an accident. We disagree. His act of fleeing from the first collision did not cause both of these offenses. Under the facts of this case, appellant committed the offense of aggravated vehicular homicide by hitting Griffith with his car and dragging him under the car. It was appellant's subsequent act of fleeing the scene of that incident, not the initial rear-end collision, that led to his failure to stop conviction because it was the second incident that caused Griffith's death, not the first collision. His flight from the scene after he hit and dragged Griffith was a separate act that occurred after the conduct that caused Griffith's death. Thus, appellant did not commit the two offenses by a single act with a single state of mind. Accordingly, the offenses do not merge. *Johnson*. We overrule appellant's third assignment of error.

V. Conclusion

{¶ 28} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.