[Cite as *State v. Matz*, 2009-Ohio-3048.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. William B. Hoffman, J.
-vs-	:	
	:	
DEBRA K. MATZ	:	Case No. 08COA021
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Municipal Court, Case No. 2008TRC1522AB
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 23, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DAVID M. HUNTER 1213 East Main Street Ashland, OH 44805	JOSEPH P. KEARNS, JR. P.O. Box 345 153 West Main Street Ashland, OH 44805

Farmer, P.J.

{¶1} On March 4, 2008, Ohio State Highway Patrol Trooper Andrew Topp was dispatched to a possible automobile crash. When Trooper Topp arrived at the scene, he observed a vehicle partially off the roadway into a field. The driver of the vehicle was appellant, Deborah Matz. Upon investigation, appellant was cited for operating a motor vehicle under the influence of alcohol, refusal to take a chemical test, with a prior conviction within 20 years, pursuant to R.C. 4511.19(A)(1)(a) and (A)(2).

{¶2} A jury trial commenced on July 9, 2008. The jury found appellant guilty as charged. Appellant elected on the (A)(1)(a) charge and the (A)(2) charge was nollied. The trial court sentenced appellant to one hundred eighty days in jail.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED BY NOT GRANTING APPELLANT'S MOTION TO DISMISS DUE TO THE STATE NOT PROVING VENUE."

II

{¶5} "THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE REGARDING APPELLANT'S PRIOR CONVICTIONS."

I

{¶6} Appellant claims the trial court erred in denying her Crim.R. 29 motion for acquittal for failing to prove venue. We disagree.

{¶7} Crim.R. 29 governs motion for acquittal. Subsection (A) states the following:

{¶8} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

{¶9} The standard to be employed by a trial court in determining a Crim.R. 29 motion is set out in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus:

{¶10} "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶11} It is axiomatic that in order for the jurisdiction of the trial court to attach, the state has the burden of establishing that the crime occurred within the trial court's jurisdiction. *State v. Headley* (1983), 6 Ohio St.3d 475. The *Headley* court noted at 477, "Although it is not a material element of the offense charged, venue is a fact which must be proved in criminal prosecutions unless it is waived by the defendant. *State v. Draggo* (1981), 65 Ohio St.2d 88, 90, 418 N.E.2d 1343 [19 O.O.3d 294]. The standard of proof is beyond a reasonable doubt, although venue need not be proved in express terms so long as it is established by all the facts and circumstances in the case. *State v. Dickerson* (1907), 77 Ohio St. 34, 82 N.E. 969, paragraph one of the syllabus."

{¶12} As noted in appellant's App.R. 9(E) statement filed with this court on February 11, 2009, appellant made a motion to acquit for failing to prove venue at the conclusion of the state's case. The trial court overruled the motion.

{¶13} Trooper Topp, with the Ashland Patrol Post, testified his contact with appellant occurred on Township Road 63, just south of State Route 302. T. at 33. Trooper Topp testified to the following upon arriving on the scene:

{¶14} "A. There was a dark green Ford Thunderbird at township Road 36, the north and south roadway. It runs between State Route 302 and U.S. Route 250. There's a, Ford Thunderbird had been on the west side of the roadway, perpendicular to Township Road 63." T. at 34.

{¶15} Appellant "lived on State Route 302 just east of Redhaw," two and one-half miles from the scene. T. at 39. Appellant was attempting to go home after work. T. at 38-39, 57. Following her arrest, Trooper Topp took appellant to the Ashland County Sheriff's Office. T. at 53.

{¶16} Although there was no definitive statement as to venue in Ashland County, we find there was sufficient direct evidence of the geographical location to establish venue under a Crim.R. 29 standard. Construing the evidence in a light most favorable to the state, there was testimony on the exact location of the incident to establish venue. Furthermore, during the direct testimony of a defense witness, appellant's co-worker, Thomas Phillips, it was established that the incident occurred in Ashland County. T. at 101.

{¶17} Upon review, we find the trial court did not err in denying appellant's Crim.R. 29 motion for acquittal for failing to establish venue.

{¶18} Assignment of Error I is denied.

II

{¶19} Appellant claims the trial court erred in admitting State's Exhibit 4 regarding a prior conviction for OMVI. Appellant claims the exhibit contained irrelevant evidence such as a notation that the conviction was her third offense for DUI, her BAC test was .181, and the terms of the sentence.

{¶20} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶21} Evid.R. 401 defines "relevant evidence" as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 402 provides:

{¶22} "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible."

{¶23} We agree the notation, the results of the BAC test, and the sentence were not relevant to the issue at hand. However, we find the admission to be harmless. We note harmless error is described as "[a]ny error, defect, irregularity, or variance which

does not affect substantial rights shall be disregarded." Crim.R. 52(A). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right.

{¶24} The trial court twice cautioned the jury about using State's Exhibit 4 for limited purposes, first when the exhibit was introduced and then again during final jury instructions, respectively:

{¶25} "THE COURT: All right, yes. I have some things I have to instruct the jury on at this time. First of all, State's Exhibit 4 is a certified copy of the record of conviction of Mrs. Matz, the conviction taking place on August 4th, 2003. You will notice some things that are blacked out on this particular exhibit. You are instructed not to speculate as to what might have been there that has been blacked out. There's a legal reason for that being done.

{¶26} "This evidence is what is called limited purpose evidence. You'll have with you in the jury room, State's Exhibit 4, which is a certified copy of the record of Defendant's conviction for operating a vehicle while under the influence of alcohol in Ashland Municipal Court on August 4th, 2003. This exhibit and the fact that the Defendant's prior conviction for OVI is admitted for the sole and limited purpose of proving that the Defendant had a prior conviction for this offense within 20 years, which is an essential element of the charge of OVI, refusal, prior conviction within 20 years, which is section 4511.19A(2).

{¶27} "Now this is important. The fact that Defendant's prior conviction for OVI cannot be used by you in determining whether or not the Defendant was operating a vehicle while under the influence of alcohol on March 4th, 2008, which is the date of this

offense. And you'll have with you a copy of that instruction with you in the jury room also when you retire to deliberate." T. at 55-57.

{¶28} "THE COURT: ***You will have with you in the jury room State's Exhibit 4, which is a certified copy of the record of Defendant's conviction for operating a vehicle while under the influence of alcohol in Ashland Municipal Court on August 4th, 2003. This exhibit and the fact of Defendant's prior conviction for OVI is admitted for the sole and limited purpose of proving that the Defendant had a prior conviction for this offense within 20 years, which is an essential element of the charge of OVI refusal, prior conviction within 20 years, which I'll be instructing you on a little bit later. The fact of Defendant's prior conviction for OVI cannot be used in determining whether or not the Defendant was operating a vehicle under the influence of alcohol on March 4th, 2008, what this case is all about." T. at 181-182.

{¶29} Upon review, we find the two cautionary charges given to the jury, coupled with the lack of legibility of some aspects of the exhibit, cured any prejudice the irrelevant portions may have produced. Further at the close of the jury charge, if the redacted errors were not omitted, it was defense counsel's duty to bring it to the trial court's attention.

{¶30} Assignment of Error II is denied.

{¶31} The judgment of the Municipal Court of Ashland County, Ohio is hereby affirmed.

By Farmer, P.J.

Gwin, J. concurs,

Hoffman, J. concurs separately.

s/SHEILA G. FARMER

s/W. SCOTT GWIN

JUDGES

SGF/sg 521

Hoffman, J., concurring

{¶32} I concur in the majority's analysis and disposition of Appellant's second assignment of error. I concur in the majority's disposition of Appellant's first assignment of error, but disagree with its reason for doing so.

{¶33} I disagree with the majority's conclusion there was sufficient direct evidence of the geographical location to establish venue. While the geographical location of Appellant's vehicle was established by specific evidence – Township Road 63 just south of State Route 302, and Township Road 63 runs between State Route 302 and U.S. Route 250 – I find this falls short under Crim.R. 29 standards to establish that the geographical location is in Ashland County. I note Trooper Topp received the dispatch to the scene from the Mansfield Post of the Highway Patrol, not the Ashland Post.[1]

{¶34} I find this case distinguishable from *State v. Dickerson* (1907), 77 Ohio St.34. In *Dickerson*, the Ohio Supreme Court determined specific evidence establishing the offense took place in a particular township and county was sufficient to establish venue in the State of Ohio without specific mention of the State of Ohio. While I can understand trying a case in an Ohio county common pleas court which is established by evidence to be the same county in which the crime occurred is sufficient proof of venue the crime occurred in the State of Ohio, I am not persuaded references to township, state and national route numbers are sufficient to establish the county in which the offense occurred.[2] State and U.S. routes run through multiple counties. There was no

[1] Mansfield is in Richland County which borders Ashland County.

[2] I find Appellee's reliance on *State v. Wheat*, 2005-Ohio-6958, unpersuasive as *Wheat* involved a plain error analysis and there was specific evidence the vehicle in which

evidence what township Township Road 63 is located. Although I have no doubt Appellee's contention a look at the Ashland County map would indicate the location of Appellant's vehicle was in Ashland County, a map was not made part of the record, unlike *State v. McCoy*, 2006-Ohio-4745.

{¶35} As noted by the majority, Appellant chose to present a defense and one of her own witnesses established the incident occurred in Ashland County. While the majority fails to state the legal effect of this testimony, I presume it does so to suggest Appellant has waived the alleged error.

{¶36} There appears to be a split of authority among the appellate districts whether the presentation of a defense after the State has rested its case, waives any alleged error made by denying a Crim.R. 29 motion for acquittal made after the State's case.

{¶37} In *State v. Giolugli*, 2004-Ohio-2871, the First District ruled a defendant who presents evidence and testifies in his defense waives his right to challenge the sufficiency of the evidence at the close of the State's case.[3] In *State v. Collins* (1977), 60 Ohio App.2d 116, the Third District found the defendants waived any error as to the trial court's ruling on a motion for acquittal made at the close of the State's case by not then resting without submitting any evidence, and any deficiency in proof could be satisfied by evidence thereafter offered by either party. In *State v. Deboe* (1977), the

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Wheat was a passenger was stopped in Franklin County and the victim flagged down a police officer approximately one-half mile from the location of the stop, which was also located in Franklin County.

[3] One panel member concurred in judgment only.

Sixth District held an accused waives his right to a directed verdict of acquittal at the close of the State's case by thereafter introducing evidence.

{¶38} In contrast to those cases finding waiver, the Second District held in *State v. Parks* (1990), 56 Ohio App.3d 8, a defendant may present evidence in his defense without waiving his right to claim the trial court erred in denying his motion for judgment of acquittal at the close of the State's case, thereby overruling its earlier decision in *State v. Parks* (1992), 7 Ohio App.3d 276. In *State v. Brown* (1993), 90 Ohio App.3d 674, the Eleventh District found a defendant did not waive error arising from the trial court's denial of her motion for judgment of acquittal at the close of the State's evidence by introducing evidence herself, where the defendant renewed her motion for judgment of acquittal at the close of her own case.

{¶39} In find Judge Ford's analysis in *Brown* persuasive. Because the record herein fails to demonstrate Appellant renewed her motion for acquittal at the close of her case, I find she has waived the error.[4] Accordingly, I concur in the majority's decision to affirm the trial court's judgment.

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HON. WILLIAM B. HOFFMAN

[4] It was only after researching the waiver issue I found need to check the transcript to determine whether Appellant renewed her motion for acquittal at the close of all the evidence. I then discovered the record does not reflect a motion for acquittal was made at either the close of the State's case or at the close of Appellant's case. A review of Appellant's brief fails to reference where in the record the alleged error occurred. The majority and I have gratuitously addressed the assignment of error under Crim.R. 29.

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DEBRA K. MATZ	:	
Defendant-Appellant	:	CASE NO. 08COA021

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Ashland County, Ohio is affirmed. Costs to appellant.

s/SHEILA G. FARMER_____

s/W. SCOTT GWIN_____

s/WILLIAM B. HOFFMAN_____

JUDGES