[Cite as *State v. McCumbers*, 2010-Ohio-6129.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 25169
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MARK E. MCCUMBERS	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 10 3239

DECISION AND JOURNAL ENTRY

Dated: December 15, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} On multiple occasions, Mark E. McCumbers has been arrested for operating a motor vehicle while under the influence of alcohol or drugs. He has appealed his most recent felony convictions, arguing they should have been only misdemeanor offenses because the convictions were enhanced based on insufficient evidence of three prior convictions for the same offense. This Court affirms the convictions because they are based on sufficient evidence.

BACKGROUND

{¶2} The State charged Mr. McCumbers with four counts arising from two separate arrests for driving while under the influence of alcohol. The first two counts arose from his arrest on September 27, 2008. The State charged Mr. McCumbers with operating a vehicle while under the influence of alcohol, a violation of Section 4511.19(A)(1)(a), and refusal to submit to chemical tests under Section 4511.19.1, a violation of Section 4511.19(A)(2). The final two

counts alleged identical violations occurring on April 4, 2008. The offense level of each count was enhanced to a fourth degree felony due to prior-conviction specifications, alleging that Mr. McCumbers had been convicted of or pleaded guilty to five or more similar violations in the past twenty years. See R.C. 2941.14.13.

{¶3} At his bench trial, Mr. McCumbers stipulated to the essential elements of operating under the influence for all four counts, but challenged the sufficiency of the State's evidence of prior convictions necessary to enhance the offense level via the specifications. He did not object to the admission of a certified copy of his driving record from the Bureau of Motor Vehicles, which reflected five prior convictions for operating a vehicle under the influence of alcohol. He did object, however, to the admission of various journal entries allegedly reflecting prior convictions for operating under the influence in Akron and Barberton. He based his objection on various errors apparent on the faces of the journal entries that allegedly call the validity of the convictions into doubt under Rule 32(C) of the Ohio Rules of Criminal Procedure. See *State v. Baker*, 119 Ohio St. 3d 197, 2008-Ohio-3330, at syllabus.

{¶4} Mr. McCumbers moved for acquittal under Rule 29 of the Ohio Rules of Criminal Procedure and rested his case without offering any evidence. The trial court denied the motion for acquittal because it found that Mr. McCumbers had failed to rebut the State's evidence of prior offenses. See R.C. 2945.75(B). The trial court found Mr. McCumbers guilty of all four counts and specifications. It merged the two counts from each date of arrest and sentenced him to two years of prison with two additional years suspended on the condition that he serve three years of community control.

SUFFICIENCY OF THE EVIDENCE

{¶5} Mr. McCumbers' sole assignment of error is that his convictions are based on insufficient evidence of three prior convictions used to enhance the current charges from misdemeanors to fourth-degree felonies. Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. We must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced the average finder of fact of Mr. McCumbers' guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶6} At trial, Mr. McCumbers stipulated to the validity of his 1993 conviction in the Municipal Court of New Philadelphia. Over his objection, the trial court admitted traffic citations and journal entries from Barberton Municipal Court tending to prove that Mr. McCumbers pleaded guilty to charges of driving under the influence on August 14, 1993, and June 1, 2001, and documents from Akron Municipal Court tending to prove Mr. McCumbers pleaded guilty to a similar charge in January 2006. The trial court also admitted certified copies of documents from Akron Municipal Court tending to prove that Mr. McCumbers was convicted of driving under the influence in March 1993. Mr. McCumbers did not deny that the records pertained to him, he argued only that technical errors in the journal entries invalidated the convictions for purposes of enhancing the offense level in this case. In addition to the court documents, the trial court considered certified copies of Bureau of Motor Vehicle records containing Mr. McCumbers' name, date of birth, and social security number. Mr. McCumbers admitted the records were his. The Bureau of Motor Vehicle records and the court documents submitted by the State reflected the same five prior convictions for operating under the influence.

{¶7} On appeal, Mr. McCumbers has argued that three of the journal entries submitted by the State fail to prove prior convictions because they contain errors under Rule 32(C) of the Ohio Rules of Criminal Procedure. Mr. McCumbers has challenged the sufficiency of the exhibits numbered three, four, and five. Exhibit three is a set of documents from the Barberton Municipal Court, including traffic tickets issued to Mr. McCumbers and a document labeled, "Judgment Entry." The entry indicates that Mr. McCumbers "[e]ntered [a] [p]lea of [g]uilty" to a charge of "[d]riving [w]hile [u]nder the [i]nfluence of [a]lcohol" on August 14, 1993. Exhibit number four includes a traffic citation and another document from Barberton Municipal Court, dated June 2001. That document indicates that Mr. McCumbers "[e]ntered [a] [p]lea of [g]uilty to" a charge of "[d]riving [w]hile [u]nder the [i]nfluence of [a]lcohol." Exhibit five is a series of documents from Akron Municipal Court, indicating that, in case number 06TRC00270, Mr. McCumbers was charged with operating a black Jeep on South Arlington Road in Springfield Township while under the influence of alcohol on January 2, 2006. The document from that case labeled "Journal Entry" indicates that Mr. McCumbers entered a plea of guilty on January 24, 2006.

{¶8} Under Section 4511.19 of the Ohio Revised Code, additional convictions for operating a vehicle while under the influence of alcohol carry increasing penalties and, eventually, increasing offense levels. Although initially a first-degree misdemeanor, a violation of Section 4511.19(A) increases to a fourth-degree felony after five violations. R.C. 4511.19(G)(1)(d). Under Section 2941.14.13, if the state wishes to charge a felony violation of Section 4511.19, it must specify that "within twenty years of the offense, [the defendant] previously has been convicted of or pleaded guilty to five or more equivalent offenses." R.C.

2941.14.13(A). The trial court convicted Mr. McCumbers of two felony violations of Section 4511.19(A) based on the prior-offenses specification described in Section 2941.14.13.

{¶9} If a prior offense increases the degree of the crime charged, then the prior offense becomes an essential element of the claim and the State has the burden to prove it beyond a reasonable doubt. *State v. Allen*, 29 Ohio St. 3d 53, 54 (1987) (citing *State v. Gordon*, 28 Ohio St. 2d 45, paragraph one of the syllabus (1971)). As Mr. McCumbers has pointed out, Section 2945.75(B)(1) of the Ohio Revised Code provides that, "[w]henever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction." Ohio courts, however, have held that Section 2945.75 is not an exclusive method for proving prior convictions. See, e.g., *State v. Pisarkiewicz*, 9th Dist. No. CA 2996-M, 2000 WL 1533916 at *2 (Oct. 18, 2000) (citing *State v. Frambach*, 81 Ohio App. 3d 834, 843 (1992)); see also *State v. Jarvis*, 11th Dist. No. 98-P-0081, 1999 WL 1313645 at *2 (Dec. 23, 1999) (witness testimony may be sufficient to prove prior convictions); *State v. Chaney*, 128 Ohio App. 3d 100, 105-06 (1998) (certified copies of docket sheets compared to current docket sheets may be sufficient to prove same person committed crimes); *State v. Cyphers*, 2d Dist. No. 97-CA-19, 1998 WL 184473 at *1 (Apr. 10, 1998).

{¶10} Mr. McCumbers has argued that the evidence offered by the State to prove three of his prior convictions was insufficient under Section 2945.75 because it did not meet the requirements of Rule 32(C) of the Ohio Rules of Criminal Procedure. Criminal Rule 32(C) describes what is required for a criminal "judgment of conviction." The Ohio Supreme Court has interpreted Criminal Rule 32(C) to require four elements: (1) the plea, verdict, or finding of the court on which the conviction is based; (2) the sentence; (3) the signature of the judge; and

(4) entry on the journal by the clerk of court. *State v. Baker*, 119 Ohio St. 3d 197, 2008-Ohio-3330, at syllabus. If one of these elements is lacking, the judgment is not appealable. *Id.*

STATE v. FINNEY

{¶11} In support of his argument that judgment entries that do not comply with Criminal Rule 32(C) cannot be used as proof of prior convictions for purposes of enhancing the offense level of a subsequent charge, Mr. McCumbers has cited *State v. Finney*, 6th Dist. No. F-06-009, 2006-Ohio-5770. In *Finney*, the Sixth District determined that the trial court had correctly granted the defendant's motion to dismiss the prior-offense specifications in the indictment due to insufficient evidence. *Id.* at ¶18. The Sixth District held that "the state was required to prove the prior convictions by providing a judgment of conviction executed in conformity with Crim.R. 32(C)." *Id.* In reaching that conclusion, the Court in *Finney* relied, at least in part, on *State v. Henderson*, 58 Ohio St. 2d 171 (1979). In *Henderson*, the Ohio Supreme Court held that, "[t]o constitute a prior conviction for a theft offense, there must be a judgment of conviction, as defined in Crim.R. 32(B), for the prior offense." *State v. Henderson*, 58 Ohio St. 2d 171, paragraph two of the syllabus (1979).

{¶12} The statutory language the Ohio Supreme Court interpreted in *Henderson*, however, differs significantly from the language at issue in this case. The theft statute considered in *Henderson* provided that a violation was a misdemeanor petty theft offense unless one of several conditions was satisfied. *Id.* at 172-73 (quoting former R.C. 2913.02(B)). The relevant condition in *Henderson* was that "if the offender has previously been convicted of a theft offense, then violation of this section is grand theft, a felony of the fourth degree." *Id.* at 173 (quoting former R.C. 2913.02(B)). Unlike the statutory language at issue in *Henderson*, the statutory language currently before this Court does not require proof of a prior conviction to

increase the offense level. Under Section 2941.14.13, a defendant may be convicted of a felony violation of the operating-under-the-influence statute if, "within twenty years of the offense, [he] previously has been convicted of or pleaded guilty to five or more equivalent offenses." R.C. 2941.14.13(A). In this instance, "the General Assembly placed 'convicted' on equal footing with a guilty plea[.]" *State ex rel. Watkins v. Fiorenzo*, 71 Ohio St. 3d 259, 260 (1994) (considering similar language in R.C. 2921.41(C)(1)).

{¶13} As this Court recently wrote, if evidence of a prior guilty plea is sufficient to enhance the level of the offense under the statute, it "seems unlikely" that the legislature intended the word "convicted" in the same phrase to require evidence to establish all the elements of Criminal Rule 32(C). *State v. Monteleone*, 9th Dist. No. 10CA009751, 2010-Ohio-5064, at ¶8. If it were otherwise, then the State would have a much higher burden to prove the prior offenses of a defendant who had historically had the foresight to plead no contest or not guilty, than it would to prove those of an offender who pleaded guilty to prior charges. *Id.* This Court does not believe that the General Assembly intended such a lopsided result. Therefore, we conclude that, as used in Section 2941.14.13(A), the word "convicted" refers only to a determination of guilt and not a judgment of conviction. See *id.* at ¶10. Contrary to Mr. McCumbers' argument, compliance with Criminal Rule 32(C) is not a prerequisite to proving a prior offense for purposes of increasing a subsequent charge under Sections 4511.19 or 2941.14.13. This is true for two reasons. First, the State may prove a prior conviction using evidence other than the sentencing entry from the prior case. Second, for the above described reasons, this Court believes that the General Assembly did not intend for the State to prove prior convictions by proving that the courts in each prior case had included all the elements required for satisfaction of Criminal Rule 32(C).

THE EVIDENCE

{¶14} In this case, the trial court, acting as trier of fact, reviewed certified copies of traffic tickets and sentencing entries indicating that Mr. McCumbers pleaded guilty in each of the three challenged cases, all of which had occurred within twenty years of the current offenses. Under the plain language of the specification statute, a guilty plea is sufficient to allow the State to use a prior offense to enhance the current charges. See R.C. 2941.14.13(A). Viewing the evidence in a light most favorable to the prosecution, exhibits three, four, and five could have convinced the average finder of fact beyond a reasonable doubt that, within the previous twenty years, Mr. McCumbers had pleaded guilty to three prior charges of operating a vehicle while under the influence of alcohol. See *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶15} In addition to the sentencing entries and traffic citations, the State presented Mr. McCumbers' records from the Bureau of Motor Vehicles evidencing convictions for operating a vehicle while under the influence of alcohol on the same five occasions between 1993 and 2006. Mr. McCumbers has argued on appeal, however, that "[t]he State's reliance on the BMV records . . . does not meet the requirements of . . . Section 2945.75." He has not explained how the records fail to meet the requirements of the statute. The General Assembly has determined that certified copies of BMV records are prima-facie evidence of the prior convictions referenced therein. See R.C. 2945.75(B)(2). Under the statute, Mr. McCumbers could have offered evidence to "rebut the prima-facie . . . evidence of prior convictions," but he did not do so. *Id.* Mr. McCumbers admitted the records were his and did not point to any evidence tending to show that he had neither pleaded guilty nor was found guilty of violating Section 4511.19(A) on the five prior occasions referenced in the records. The only evidence Mr. McCumbers pointed to

was the three sentencing entries, all of which supported the presumption raised by the BMV records. Viewed in a light most favorable to the State, the evidence admitted at the bench trial in this case could have convinced the average finder of fact that Mr. McCumbers had been convicted of or pleaded guilty to five or more offenses involving operating under the influence, as defined in Section 4511.18.1(A) of the Ohio Revised Code, within twenty years of the offenses for which he was tried. Mr. McCumbers' assignment of error is overruled.

CONCLUSION

{¶16} Mr. McCumbers' assignment of error is overruled because the evidence admitted at trial was sufficient to support his fourth-degree-felony convictions for operating a vehicle while under the influence of alcohol. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

JILL R. FLAGG, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.