

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-1639-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-104

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM H. ROBERTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

Before Nettlesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. William H. Roberts appeals from a judgment convicting him of operating while intoxicated (fifth offense), operating after revocation (fourth offense) and obstructing an officer, all as a repeat offender, and from an order rejecting his challenge to his sentence. We affirm.

¶2 Roberts seeks a new trial in the interests of justice because the real controversy was not tried due to three errors: (1) the circuit court did not engage in the *State v. Kruzycki*, 192 Wis. 2d 509, 524-27, 531 N.W.2d 429 (Ct. App. 1995), test for admitting prior convictions for impeachment purposes; (2) the arresting deputy was improperly permitted to testify to Roberts's four prior OWI convictions; and (3) during closing argument, the State erroneously asserted that Roberts had testified to his four prior OWI convictions when that evidence was offered by the State through the arresting officer. Roberts argues that these errors deprived him of a fair trial and made the real issue in controversy his bad character, not whether he was driving the vehicle.

¶3 We agree with the State that even if we assume some degree of error in one or all of these claims, Roberts is not entitled to a new trial in the interests of justice. All of these alleged errors are collateral to the real issue: who was driving the vehicle. When he was arrested, Roberts claimed that his friend "Mike" drove the vehicle away from the tavern where they had been drinking. The vehicle broke down, and Mike went for help. Roberts testified at trial that Mike was driving the vehicle. Roberts contended that he was in the backseat on the driver's side when he exited the vehicle after the vehicle stopped.

¶4 A witness testified that he was driving behind the Roberts vehicle when it stopped, and that he saw only Roberts exit the vehicle. Roberts exited from the driver's side. A sheriff's deputy called to the scene of the disabled vehicle testified that Roberts smelled of alcohol and showed other signs of intoxication. Roberts admitted to the deputy that he had been drinking and that he was driving from a tavern where he had been drinking. The deputy arrested Roberts after he failed field sobriety tests. A blood test revealed that Roberts had a .155% blood alcohol level.

¶5 Roberts moved the circuit court for a new trial in the interests of justice. The circuit court denied the motion. He now asks this court to grant him that relief by exercising our authority under WIS. STAT. § 752.35 (1999-2000)¹ because the jury was distracted from the real controversy of whether he was driving the vehicle.

¶6 In order to grant a new trial under WIS. STAT. § 752.35, we must conclude that the real controversy was not tried. In his appellant's brief, Roberts recognizes that the real controversy was whether he was driving the car. We agree. We conclude that there was overwhelming evidence that he was doing so, and the real issue was put before the jury. The driver of the vehicle behind Roberts's disabled vehicle testified that Roberts was the only one in the car and he exited from the driver's side. The arresting deputy testified that Roberts told him that he was driving. Roberts testified that as the vehicle became disabled, "I [threw] it into neutral" and coasted to the side of the road. The circuit court observed that the evidence was overwhelming and that Roberts's credibility was damaged by his testimony, not his prior OWI convictions.

¶7 Our confidence in the outcome of the trial is not shaken by Roberts's three allegations of error. Therefore, we deem it unnecessary to address those allegations individually.

¶8 Roberts also challenges the proof of his prior offenses for purposes of enhancing his sentence for obstructing an officer. The information alleged three misdemeanor bail jumping convictions in October 1997 and two in March

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

1999. The court sentenced Roberts to two years in prison for obstructing, an enhanced sentence for the crime.

¶9 Under WIS. STAT. § 939.62(2), an actor is a repeat offender if the actor was convicted of a misdemeanor on three separate occasions during the five-year period immediately preceding the commission of the crime for which the actor is being sentenced. A defendant may be sentenced as a repeat offender “[i]f the prior convictions are admitted by the defendant or proved by the state.” WIS. STAT. § 973.12(1).

¶10 Roberts concedes that there was adequate proof of his two March 1999 convictions. However, he argues that the proof of his 1997 convictions, one of which is necessary to make him a repeat offender with three prior misdemeanor convictions, was inadequate.

¶11 At sentencing, the only proof of the prior convictions appeared in the presentence investigation report (PSI). Roberts did not contest the facts set forth in the PSI, and he concedes that a PSI may constitute prima facie evidence of prior convictions. *State v. Caldwell*, 154 Wis. 2d 683, 695, 454 N.W.2d 13 (Ct. App. 1990). The PSI listed three 1997 convictions. These convictions occurred within five years of the January 2000 obstruction charge in this case.² Therefore, they are a sufficient basis for imposing an enhanced sentence.

² Roberts argues that the presentence investigation report does not make clear when in 1997 he was convicted of the misdemeanors. Regardless of when in 1997 these convictions occurred, it is undisputed that they occurred within five years of the January 2000 obstructing charge in this case. WIS. STAT. § 939.62(2).

¶12 Notwithstanding Roberts’s contention that he appealed the 1997 misdemeanor convictions, there is no evidence that the convictions have been reversed. Therefore, they are available to enhance the obstructing conviction. WIS. STAT. § 939.62(2) (the prior convictions must “remain of record [and be] unreversed”). The State met its burden to demonstrate three prior, unreversed misdemeanor convictions within the requisite time period. *State v. Goldstein*, 182 Wis. 2d 251, 260, 513 N.W.2d 631 (Ct. App. 1994) (State has burden of establishing defendant’s status as repeat offender for purposes of enhanced sentence).

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

