MISSOURI COURT OF APPEALS
WESTERN DISTRICT

COMPLETE TITLE OF CASE:

STATE OF MISSOURI,

Respondent

v.

MICHAEL L. ELLMAKER.

Appellant

DOCKET NUMBER WD83026

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DATE: October 20, 2020

Appeal From:

Circuit Court of Platte County, MO
The Honorable James Walter Van Amburg, Judge

Appellate Judges:

Division Three
Gary D. Witt, P.J., Lisa White Hardwick and Thomas N. Chapman, JJ.

Attorneys:

Jeannie Willibey, Kansas City, MO — Counsel for Appellant

Attorneys:

Nathan Aquino, Jefferson City, MO — Counsel for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALSWESTERN DISTRICT

STATE OF MISSOURI, Respondent,
v.
MICHAEL L. ELLMAKER, Appellant.

WD83026 **Platte County**

Before Division Three Judges: Witt, P.J., Hardwick and Chapman, JJ.

Michael Ellmaker was convicted of driving while intoxicated following a jury trial in the Circuit Court of Platte County. The trial court found that Ellmaker was a habitual offender due to his six prior intoxication-related traffic offenses, entered a conviction for the class B felony of driving while intoxicated, and sentenced Ellmaker accordingly. Ellmaker appeals. In his first point, he argues that the trial court erred in finding that he was a habitual offender because the State's evidence was insufficient to prove that two of his prior convictions qualify as intoxication-related traffic offenses due to a 1996 amendment that narrowed the definition of "driving" such that it no longer includes "being in actual physical control" of a vehicle. In his second and third points, he argues that the court erred in permitting testimony and argument that referred to Ellmaker's post-arrest silence. The judgment is reversed, and the case is remanded.

REVERSED AND REMANDED.

Division Three holds:

(1) The trial court did not err in finding that the State's evidence was sufficient to prove that Ellmaker's prior convictions qualified as intoxication-related traffic offenses for purposes of sentence enhancement, where the evidence included DWITS and Department of Revenue records showing that Ellmaker was convicted for driving while intoxicated, and where Ellmaker presented no evidence or argument that these convictions were for conduct other than driving or operating.

(2) Testimony regarding Ellmaker's post-arrest silence was improperly admitted as substantive evidence of Ellmaker's guilt, where the State elicited testimony regarding Ellmaker's express refusal to answer question of whether he was under the influence, where this refusal concluded the interrogation, and where the State argued that this refusal was evidence of Ellmaker's guilt. This error was not harmless beyond a reasonable doubt.

Opinion by: Thomas N. Chapman, Judge October 20, 2020

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