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# IN THE COURT OF APPEALS OF INDIANA

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| CLIFFORD C. RILEY, JR., | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 69A01-0609-CR-373 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE RIPLEY SUPERIOR COURT
The Honorable James Morris, Judge
Cause No. 69D01-0412-FD-181

**August 24, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Clifford C. Riley, Jr. ("Riley") appeals his conviction for Operating a Motor Vehicle While Privileges are Suspended, a Class D felony. Because the evidence showing that Riley was intoxicated at the time he was driving and became involved in an accident was intrinsic to the crime for which Riley was being tried, the trial court did not abuse its discretion in admitting this evidence at trial. In addition, because Riley did not attempt to present any evidence at trial that he was in the "habit" of not driving after his license was suspended—and, therefore, there was no offer to prove on this issue—there is no evidentiary determination for us to review on appeal. Accordingly, we affirm the trial court.

## Facts and Procedural History

On the evening of December 8, 2004, Carlene Weiler ("Weiler") was driving through the intersection at State Roads 46 and 129 in Batesville, Indiana, when a Hyundai turned in front of her and collided with the truck she was driving. Weiler had a green light at the time of the collision. Officer David Abel ("Officer Abel") from the Batesville Police Department arrived on the scene shortly thereafter and found Riley, whose driver's license had been suspended, sitting in the driver's seat of the Hyundai with his feet outside the vehicle. Riley told Officer Abel that he was at the intersection waiting for the light to change and that when the arrow turned green, he turned left and struck Weiler's truck. There was no arrow at this particular intersection.

During the course of this conversation, Officer Abel detected the odor of alcohol emanating from Riley. As a result, Officer Abel had Officer Jerry Taul ("Officer Taul"),

who in the meantime had arrived on the scene, investigate whether Riley had been drinking. Officer Taul observed that Riley smelled of alcohol, had glassy and bloodshot eyes, had slurred speech, and was clumsy and unsteady. Officer Taul administered three standardized field tests, all of which Riley failed. Officer Taul then administered a preliminary breath test, which Riley also failed. Riley, who told Officer Taul that he had been driving, was handcuffed and taken to the hospital for a blood draw. The investigation into whether Riley was intoxicated was videotaped on Officer Taul's in-car camera.

The State charged Riley with Count I: Operating a Vehicle While Intoxicated as a Class A misdemeanor; Count II: Operating a Motor Vehicle While Privileges are Suspended, a Class D felony[1]; Count III: Operating a Vehicle with a Controlled Substance, a Class C misdemeanor; and Count IV: Operating a Vehicle While Intoxicated as a Class C misdemeanor. The trial court bifurcated the charges, and the State chose to proceed on Count II first.

Before Riley's jury trial on Count II, the State filed a motion in limine to prevent Riley from presenting evidence that he was in the "habit" of not driving after his license was suspended. The trial court granted this motion, ruling: "There shall be no mention of alleged 'habit' evidence until a hearing can be held outside the presence of the jury." Appellant's App. p. 110. Riley did not attempt to present any "habit" evidence at his jury trial. Riley, however, presented evidence that he was not driving at the time of the accident and that the person who was driving the Hyundai had threatened Riley with

[1] Ind. Code § 9-30-10-16.

harm if Riley told the police who had been driving the car. Over Riley's objection, the trial court allowed the State to present evidence that Riley was intoxicated, including testimony from the officers and the videotape. The jury found Riley guilty of Count II: Operating a Motor Vehicle While Privileges are Suspended, a Class D felony, and the trial court sentenced him to two and a half years with one year suspended. Riley now appeals.

## Discussion and Decision

Riley raises two issues on appeal. First, he contends that the trial court erred in allowing the State to present evidence of his intoxication. Second, he contends that the trial court committed fundamental error in not allowing him to present evidence that he was in the "habit" of not driving after his license was suspended.

### I. Admission of Intoxication Evidence

Riley contends that the trial court erred in allowing the State to present evidence of his intoxication because it violates Indiana Evidence Rule 404. The admission of evidence is within the sound discretion of the trial court. *Holden v. State*, 815 N.E.2d 1049, 1053 (Ind. Ct. App. 2004), *trans. denied*. We will reverse the trial court only for an abuse of discretion. *Id.* A trial court abuses its discretion when its evidentiary ruling is clearly against the logic, facts, and circumstances presented. *Id.* at 1053-54.

Indiana Evidence Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident . . . ." Rule 404(b) "serves to prohibit a jury from making the 'forbidden inference' that because of a defendant's criminal propensity, he committed the charged act." *Burnside v. State*, 858 N.E.2d 232, 242 (Ind. Ct. App. 2006) (quoting *Bald v. State*, 766 N.E.2d 1170, 1173 (Ind. 2002)). However, Rule 404(b) does not bar evidence of uncharged criminal acts that are "intrinsic" to the charged offense. *Id.* (citing *Lee v. State*, 689 N.E.2d 435, 439 (Ind. 1997), *reh'g denied*). Other acts are "intrinsic" if they occur at the same time and under the same circumstances as the crimes charged. *Holden*, 815 N.E.2d at 1054. By contrast, the paradigm of inadmissible evidence under Rule 404(b) is a crime committed on another day in another place—evidence whose only apparent purpose is to prove the defendant is a person who commits crimes. *Wages v. State*, 863 N.E.2d 408, 411 (Ind. Ct. App. 2007), *reh'g denied*, *trans. denied*. "Evidence of happenings near in time and place that complete the story of the crime is admissible even if it tends to establish the commission of other crimes not included among those being prosecuted." *Id.* (quotation omitted).

Here, Riley was being tried for Operating a Motor Vehicle While Privileges are Suspended. In order to obtain this conviction, the State was required to prove that Riley operated a motor vehicle. *See* Ind. Code § 9-30-10-16. At trial, Riley's theory of defense was that someone else was driving the Hyundai and that he was merely a passenger. Riley objected when the State introduced the intoxication evidence, but the trial court admitted the evidence because it served to show that Riley was, in fact, the driver of the

Hyundai.[2] The fact that Riley was intoxicated when driving the Hyundai was intrinsic to the offense for which Riley was being tried, operating a motor vehicle while privileges are suspended. It occurred at the same time, at the same place, and under the same circumstances. It was, in fact, the very circumstance under which Riley was driving. In addition, the evidence of Riley's intoxication completed the story of the crime in that it showed that Riley was driving the Hyundai, as he was intoxicated and there was an accident. The trial court did not abuse its discretion in admitting the intoxication evidence.

## II. Exclusion of "Habit" Evidence

Next, Riley contends that the "trial court fundamentally err[ed] in denying [him] the opportunity to present evidence that he was not in the habit of driving[.]" Appellant's Br. p. 15. As noted above, before trial, the State filed a motion in limine to prevent Riley from presenting such evidence at trial. The trial court granted the motion, ruling that "[t]here shall be no mention of alleged 'habit' evidence until a hearing can be held outside the presence of the jury." Appellant's App. p. 110. At trial, however, Riley never attempted to present any "habit" evidence. So, there was neither a hearing on the issue nor an offer to prove.

Rulings on motions in limine are not final decisions and, therefore, do not preserve errors for appeal. *Swaynie v. State*, 762 N.E.2d 112, 113 (Ind. 2002). Absent a ruling excluding the evidence accompanied by a proper offer of proof, there is no basis for a claim of error. *See Hollowell v. State*, 753 N.E.2d 612, 615-16 (Ind. 2001) (citing Ind.

[2] Before trial, Riley filed a motion in limine regarding the intoxication evidence. The trial court denied the motion, ruling that the evidence was admissible because it was "part of the facts of what went on . . . ." Tr. p. 62.

Evidence Rule 103(a)). Here, the trial court was simply not given the opportunity to make a ruling at trial on the "habit" evidence. Accordingly, there is no evidentiary determination for us to review.

Affirmed.

ROBB, J., and BRADFORD, J., concur.