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2011 IL App (3d) 090867-U

Order filed September 21, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois
Plaintiff-Appellee,)	
v.)	Appeal No. 3-09-0867
)	Circuit No. 08-DT-214
ANNA ADKINSON,)	Honorable
Defendant-Appellant.)	Rebecca Steenrod, Judge, Presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* In driving under the influence case, the appellate court held that the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt. In addition, the appellate court held that certain comments made by the prosecutor in closing arguments were not improper and therefore did not excuse the defendant's forfeiture of the issue.

¶ 2 The defendant, Anna Adkinson, was convicted of driving under the influence (625 ILCS 5/11-501(a)(2) (West 2008)) and driving while license revoked (625 ILCS 5/6-303 (West 2008)), and was sentenced to two years of probation. On appeal, the defendant argues that: (1) the State failed to prove her guilty beyond a reasonable doubt of driving under the influence; and (2)

improper and prejudicial comments made by the prosecutor during closing arguments denied her a fair trial. We affirm.

¶ 3

FACTS

¶ 4 At trial, officer John Lutz, a 17-year veteran of the Bartonville police department, testified that on May 18, 2008, he observed a pickup truck commit a lane violation in that it "crossed over the hash mark, the whole half a truck length over and then back into its lane of traffic." The truck pulled into the parking lot of a gas station and parked across two parking spots. He approached the truck and spoke to the defendant, who had been driving the truck. The defendant had an odor of alcohol on her breath and was slurring her speech. He called the county sheriff's department to the scene.

¶ 5 Detective Tammy Maher, a 21-year veteran of the Peoria County Sheriff's Department, testified that she was dispatched to the scene. She was accompanied by deputy Matt Mathias. Maher testified that she approached the truck and spoke to the defendant, who had a strong odor of alcohol on her breath. Maher asked the defendant if she had been drinking, and the defendant "told me she'd had two beers, and then she talked about visiting a cemetery, and she started crying and was extremely upset." Over the course of the events at the gas station, Maher observed an unsteady gait in the defendant as well as slurred speech.

¶ 6 Maher asked the defendant to perform some field sobriety tests. The defendant said she did not think she could pass the tests due to her numerous health issues, which included a bandaged right ankle, pain in both of her wrists, only one lung, and heart issues. Nevertheless, the defendant agreed to take the tests.

¶ 7 Maher testified that she had the defendant perform the walk-and-turn and one-leg-stand

field sobriety tests.¹ With regard to the former, Maher testified that the defendant failed on at least four of the clues, including stepping off the line, failing to count to nine, failing to walk heel-to-toe, and failing to turn properly. With regard to the latter, she gave the defendant the choice as to which ankle to lift. The defendant lifted her bandaged right ankle, but counted to 19 and skipped to 30, did not count the remaining numbers, did not keep her foot up, swayed, and raised her arms for balance. The defendant failed both of the tests. Maher also testified that the defendant was unable to complete the finger-to-nose test. Maher also stated that the officers took the defendant's alleged physical ailments into account when they watched her perform the tests, although the defendant was administered the same tests as any non-injured individual. Afterward, Maher arrested the defendant for driving under the influence and driving while license revoked.

¶ 8 Maher also testified that she requested the defendant to take a breath test. Initially, the defendant agreed to take the test. However, when Maher attempted to administer the test after a 20-minute observation period, the defendant refused to take the test.

¶ 9 A DVD recording of the events at the gas station was introduced into evidence. The DVD recording did not contain any audio. It showed the area of the parking lot in which the defendant parked the truck and performed the field sobriety tests. The pavement in that area appeared to be flat and no slick areas were visible in the area in which the defendant performed the field sobriety tests. The parking lot also appeared to be well-lit.

¶ 10 For the defense, Tracy Houser testified that she was the passenger in the truck driven by the defendant on the night in question. She was at a bar that night with the defendant for an hour

¹ Mathias assisted in the administration of the tests. Mathias was in training.

or two. She drank two or three beers and observed the defendant drink one beer, although she was unsure whether the defendant finished it. Houser testified that the defendant parked the truck off to the side of the lot because they had to look for a card to use to purchase gas. She also testified that she did not believe the defendant's speech was slurred that night.

¶ 11 During closing arguments, the prosecutor stated the following with regard to the field sobriety tests administered to the defendant:

"Now, even if you find that she might have some health problems other than the Ace wrap, the ankle, um, this was taken into account when she was given those field sobriety tests, okay? We're talking about standardized field sobriety tests, the National Traffic Safety Administration, created by them, standardized by them, graded by the officers. They discounted those tests, and let's not forget the walk-and-turn. Four clues is what she showed, and actually Deputy -- or Detective Maher was pretty generous, she said at least four clues, but four clues. What were those? Didn't walk heel to toe, improper turn, improper number of steps, stepped off the line.

How many of those can we discount because of a bad heart, because of one lung, because of a bad ankle? Really only one, stepping off the line. You can see in the video, you can't see her feet, but you can see how long her strides are, she's not trying to walk heel to toe. You can see how many of her steps she takes. It's wrong. You can see that she turns improperly.

These are all mental mistakes, ladies and gentlemen, they're not physical mistakes that are attributable to the injuries that she claims to have. They're

mental mistakes, and that is part of the definition of being under the influence, mental ordinary care. Consider that.

The one-leg stand, didn't count right, 19 to 30, it's what she got to. It's not attributable to an ankle, it's not attributable to a bad heart, it's not attributable to a bad lung.

Arms up for balance. Well, here's the thing, if you raise your arms up for balance while you are stepping, while you're losing your balance and stepping, that's two clues, okay? But she's not thinking because she could have had one just by falling -- by just putting her foot down and not using her arms for balance, but she's not thinking. Mental ordinary care."

¶ 12 The jury found the defendant guilty on both charges. The defendant was later sentenced to two years of probation. The defendant appealed.

¶ 13 ANALYSIS

¶ 14 The defendant's first argument on appeal is that the State failed to prove her guilty beyond a reasonable doubt of driving under the influence. Specifically, the defendant argues that the officers were not credible witnesses and that the field sobriety tests were not performed under conditions that ensured the reliability of the results.

¶ 15 When a defendant challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is not the function of this court to retry the defendant. *People v. Robinson*, 368 Ill. App. 3d 963, 983 (2006).

¶ 16 As charged in this case, an individual commits driving under the influence when he or she drives or is in actual physical control of any vehicle while under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2008). In such cases, the State is required to prove that the defendant "was under the influence of alcohol to a degree that rendered him incapable of driving safely." *People v. Weathersby*, 383 Ill. App. 3d 226, 229 (2008).

"Credible testimony from the arresting officer is sufficient to sustain a conviction for driving under the influence of alcohol; no scientific proof of intoxication need be offered in order to sustain the conviction. *People v. Elliott*, 337 Ill. App. 3d 275, 281 (2003). Relevant evidence of the defendant's mental and physical impairment includes but is not limited to testimony by an officer as to the defendant's appearance, speech, or conduct, testimony that the officer detected the odor of an alcoholic beverage on the defendant's breath, and testimony that the defendant failed a field sobriety test." *Robinson*, 368 Ill. App. 3d at 983.

¶ 17 Our review of the record in this case reveals that the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt of driving under the influence. Police officer testimony indicated that the defendant admitted to drinking two beers, and she had a strong odor of alcohol on her breath and her speech was slurred. She failed the walk-and-turn and one-leg-stand field sobriety tests. She also refused to submit to a breath test. See *People v. Jones*, 214 Ill. 2d 187, 201-02 (2005) (holding that the refusal to take a breath test can indicate consciousness of guilt). Further, contrary to the defendant's suggestions, the DVD recording does not reveal any problems with the slope and condition of the pavement or the lighting of the

area. Under these circumstances, we hold that a rational trier of fact could indeed have found the essential elements of the crime proven beyond a reasonable doubt.

¶ 18 The defendant's second argument on appeal is that improper and prejudicial comments made by the prosecutor during closing arguments denied her a fair trial. Specifically, the defendant claims that the evidence did not support the prosecutor's claim that the officers gave her a "discount" on the tests for her alleged physical ailments, and that the prosecutor's inference that the defendant's mistakes on the field sobriety tests were mental errors.

¶ 19 Initially, we note that the defendant has forfeited this issue for review because she did not object to the allegedly improper comments at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, the defendant requests this court to review the matter for plain error. Under the plain-error doctrine, we must first determine whether error in fact occurred. *People v. Frank-McCarron*, 403 Ill. App. 3d 383, 395 (2010).

¶ 20 A prosecutor is granted wide latitude in closing arguments (*People v. Wheeler*, 226 Ill. 2d 92, 123 (2007)), which includes drawing reasonable inferences from the evidence (*People v. Kliner*, 185 Ill. 2d 81, 151 (1998)). When a defendant challenges the comments made by a prosecutor in closing arguments, we view closing arguments in their entirety and the comments in context to determine whether the comments engendered substantial prejudice such that it cannot be determined whether the comments dictated the guilty verdict. *Wheeler*, 226 Ill. 2d at 122-23. "If the jury could have reached a contrary verdict had the improper comments not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Wheeler*, 226 Ill. 2d at 123.

¶ 21 Our review of the record reveals that the prosecutor's comments were reasonable given the context in which they appeared. Testimony elicited at trial indicated that the defendant was given the choice to perform the field sobriety tests and she agreed to perform them, despite her alleged physical ailments. We do not agree with the defendant that the prosecutor's comments conflicted with Maher's testimony; Maher stated that the defendant's physical ailments were in fact considered when the field sobriety tests were administered—even though the defendant was given the same tests as any non-injured individual—and the prosecutor's comment acknowledged that the defendant's alleged physical ailments were taken into consideration. Furthermore, the prosecutor's comment with regard to the defendant making "mental" mistakes was not improper, as the evidence indicated that the defendant in fact made mental mistakes on the field sobriety tests, including the inability to follow directions to walk heel-to-toe. In addition, the prosecutor's comments in this regard were intended to dispel any notion that the defendant's alleged physical ailments were to blame for her performance on the tests. When viewed in light of the entirety of the closing argument and the context in which the comments appeared (*Wheeler*, 226 Ill. 2d at 122)), we hold that the prosecutor's comments with regard to the field sobriety tests did not constitute error. Accordingly, the defendant is not entitled to have her forfeiture of the issue excused. See, e.g., *People v. McGee*, 398 Ill. App. 3d 789, 798 (2010).

¶ 22

CONCLUSION

¶ 23 The judgment of the circuit court of Peoria County is affirmed.

¶ 24 Affirmed.