

2012 IL App (2d) 101324-U  
No. 2-10-1324  
Order filed August 14, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE VILLAGE OF MUNDELEIN,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08-DT-3578
	)	
VIRIDIANA SANCHEZ-ROBLES,	)	Honorable
	)	Joseph R. Waldeck,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HUDSON delivered the judgment of the court.  
Justices Zenoff and Burke concurred in the judgment.

**ORDER**

*Held:* (1) The State provided sufficient evidence to corroborate defendant's confession that she had been driving (and thus had committed two DUI offenses), as her sister testified that defendant possessed the keys to the vehicle (and the jury could have discredited her sister's accompanying explanation for why defendant possessed the keys though had not been driving); (2) the trial court erred in failing to question the potential jurors on their understanding and acceptance of the Rule 431(b) principles, and the error was reversible under the plain-error rule because the evidence was closely balanced.

¶ 1 Following a jury trial, defendant, Viridiana Sanchez-Robles, was convicted of driving with a blood alcohol concentration of 0.08 or more (625 ILCS 5/11-501(a)(1) (West 2008)) and driving while under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2008)). The trial court

sentenced her to one year of court supervision. On appeal, defendant argues that (1) her conviction must be reversed under the *corpus delicti* rule; (2) she is entitled to a new trial because the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007); and (3) the \$300 public defender fee assessed against her must be vacated because she was not provided proper notice. For the reasons that follow, we reverse and remand for a new trial.

¶ 2

## BACKGROUND

¶ 3 At defendant's jury trial, Officer Richard Wilfenger of the Mundelein police department gave the following testimony. At approximately 4:40 a.m. on November 29, 2008, he heard a dispatch from the Libertyville police department reporting a disabled vehicle on Butterfield Road between Golf and Allanson Roads. The jurisdictions of the Vernon Hills, Libertyville, and Mundelein police departments converge in that area. Wilfenger proceeded to the area and, when he arrived, determined that the vehicle was, in fact, within the Mundelein police department's jurisdiction.

¶ 4 The vehicle, a silver Dodge minivan, was stopped in the right lane next to the curb. It appeared that the vehicle had struck something on the right side, and its two right tires were shredded, indicating that it had been driven on flat tires. There was also a small amount of antifreeze coming from under the engine. There were no people around the vehicle. The vehicle was locked, but Wilfenger was able to look through the windows. He did not observe any evidence of alcohol; there were no cups, bottles, or cans in or around the vehicle.

¶ 5 Although Wilfenger did not speak to anyone at the scene, he spoke to defendant later at the police station. He asked her who had been driving the vehicle, and she stated that she had. He also asked if the vehicle belonged to her, and she stated that it did.

¶ 6 Officer Shannon Holubetz of the Vernon Hills police department testified as follows. In the early morning hours of November 29, 2008, he responded to a Libertyville police department dispatch to check jurisdiction. When he arrived on the scene, he observed a broken-down minivan on Butterfield Road with two flat tires. During his shift, he would drive down Butterfield Road every 30 minutes. During his last pass before responding to the dispatch, he did not observe the minivan parked in the road.

¶ 7 While speaking with the Libertyville officers who were on the scene, Holubetz told them that he would visit nearby businesses in an attempt to locate the vehicle's occupants. Holubetz proceeded to the Citgo gas station located approximately one-quarter of a mile south of the vehicle. When he entered the gas station, he observed four people speaking with the clerk. Among them was defendant. None of the individuals possessed any alcohol. Holubetz asked the group if they knew who owned the vehicle on Butterfield Road, to which they responded that it belonged to them. Holubetz then asked who was driving, and defendant responded that she was. Over a hearsay objection, the trial court allowed Holubetz to testify that no one else in the group responded to the question of who was driving.

¶ 8 Holubetz notified the Mundelein police department that he had located the vehicle's occupants. When Officer Rachel Schletz of the Mundelein police department responded to the gas station, Holubetz identified defendant as the person who had admitted to driving the vehicle.

¶ 9 Schletz gave the following testimony. At approximately 5 a.m. on November 29, 2008, she responded to the Citgo gas station in response to Holubetz's report that he had located the vehicle's occupants. Inside, she observed four people—three females and one male—in addition to the station's clerk. None of the people possessed any alcohol. Schletz spoke with all four of them. Two

of them—one of the females and the male—appeared to be under the influence of alcohol and were under the age of 21. Both were placed under arrest. Schletz also spoke with Yomali Sanchez, defendant's sister. Schletz did not observe any indication that Yomali had consumed alcohol.

¶ 10 Schletz asked defendant if she was the driver of the vehicle left on Butterfield Road, and defendant said that she was. Schletz asked if defendant had been the only driver of the vehicle, and defendant stated that she had. According to defendant, they were driving home to Rockford from a party in Elgin when they got lost. Schletz observed that defendant's breath smelled strongly of alcohol and that her eyes were glassy and bloodshot. In response to Schletz's question of whether she had had anything to drink, defendant stated that she had consumed three beers before leaving the party in Elgin but had not consumed any alcohol since then.

¶ 11 Schletz took defendant outside and had her perform several field sobriety tests, including a balance test, finger-to-nose test, one-leg-stand test, and walk-and-turn test. Based on Schletz's experience, Schletz believed that defendant failed each of these tests. Schletz then placed defendant under arrest.

¶ 12 Both defendant and Yomali were transported to the Mundelein police station, although Yomali was transported there simply because she needed to obtain a ride home. While at the station, Schletz administered a Breathalyzer to defendant, which revealed that defendant had a blood alcohol concentration of 0.095. During a post-arrest interview, Schletz asked defendant what she had been doing for the last three hours, to which defendant responded that she had been driving. She also stated again that she had consumed three beers while at the party in Elgin. Schletz asked if she was, at the time of the interview, under the influence of drugs or alcohol. Defendant stated that, while she was not under the influence of drugs, she was under the influence of alcohol. Based on her

experience and observations of defendant, Schletz agreed with the assessment that defendant was under the influence of alcohol.

¶ 13 Yomali testified as follows. On November 29, 2008, she attended a family party in Elgin with defendant (her sister) and her cousin. They remained at the party from approximately 6 or 7 p.m. to approximately 2 a.m. Although defendant consumed alcohol at the party, Yomali did not. Because defendant was drunk, Yomali drove home, even though she did not have a valid driver's license at the time. Yomali did not believe that it was illegal or inappropriate for her to drive without a license.

¶ 14 As she was driving home to Rockford, Yomali got lost and began to experience a problem with the right wheels. She pulled the vehicle over to the side of the road. All four of the occupants proceeded to the nearby gas station so that Yomali could call her father for help. While at the gas station, a male and a female police officer with yellow hair arrived and began to ask the group questions. Although Yomali was present when defendant told the officers that she had been driving, she did not interject, because the female officer was screaming at her that she was drunk and needed to tell the truth. Yomali thought that, if she told the officers that she had been driving, she would get in trouble. During this time, defendant asked for the van keys from Yomali, who had them in her purse. Yomali gave the keys to defendant, who subsequently gave them to the officers. While at the gas station, a judge administered to Yomali an oath to tell the truth, just like the judge did at trial. In addition, the officers administered a Breathalyzer to her at the gas station.

¶ 15 Yomali was then transported to the police station, where she was administered another Breathalyzer test. While at the police station, she was never in the same room as defendant. Yomali never told any of the officers that she was the one who had been driving the vehicle.

¶ 16 On rebuttal, Schletz gave the following testimony. She was the only female officer who responded to the gas station, and she is a brunette. She did not have different colored hair at the time of the incident. Although Yomali was brought to the Mundelein police station, she remained in the lobby the entire time. She was never brought to any of the interview rooms. The only Breathalyzer machine in the station is located in the DUI processing room, which is where defendant was located when she was brought to the station.

¶ 17 The jury returned guilty verdicts on both counts. Following an unsuccessful motion for judgment notwithstanding the verdict or for a new trial, defendant was sentenced to one year of court supervision. She then brought this timely appeal.

¶ 18 ANALYSIS

¶ 19 Defendant first contends that the Village failed to prove her guilty beyond a reasonable doubt because it failed to present sufficient evidence to satisfy the *corpus delicti* rule. We review claims of insufficient evidence to determine “ ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant’s guilt. *Collins*, 106 Ill. 2d at 261. It is not the function of this court to retry the defendant. *Collins*, 106 Ill. 2d at 261. The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence, and this court will not substitute its judgment for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

¶ 20 However, a criminal conviction may not be based solely on an uncorroborated extrajudicial confession. *People v. Holmes*, 67 Ill. 2d 236, 240 (1977). There must be some evidence independent of the confession tending to show that the crime did occur. *People v. Phillips*, 215 Ill. 2d 554, 576 (2005). The corroborating evidence itself need not prove the existence of the crime beyond a reasonable doubt. *Phillips*, 215 Ill. 2d at 576. The confession and the corroborating evidence must be considered together to decide whether the defendant was proved guilty beyond a reasonable doubt. *Phillips*, 215 Ill. 2d at 576.

¶ 21 To prove defendant guilty of both counts, the State had to establish that defendant was driving the vehicle while under the influence of alcohol and with a blood alcohol concentration of 0.08 or more. 625 ILCS 5/11-501(a)(1), (a)(2) (West 2008).

¶ 22 Defendant contends that, absent improper hearsay, the only evidence that she was driving the vehicle was her statement to police. According to her, evidence of her companions' silence in response to Holubetz's question of who was driving was improper hearsay and should not be considered as corroboration for her statements that she was driving. Hearsay—an out-of-court statement offered for the truth of the matter asserted—is generally inadmissible. *People v. Tenney*, 205 Ill. 2d 411, 432-33 (2002). Where an out-of-court statement is admitted for a purpose other than to prove the truth of the matter asserted, the statement does not constitute hearsay. *People v. Banks*, 237 Ill. 2d 154, 180 (2010).

¶ 23 At trial, defendant objected to the testimony of her companions' silence, but the trial court overruled the objection, allowing the testimony on the grounds that it was not being offered for the truth of the matter asserted but simply to demonstrate whether anyone made a statement. On appeal, the Village maintains this position with respect to Yomali's silence, arguing that her lack of response

to Holubetz's question reflects on her claim at trial that she was driving, as she did not make such a claim when initially given the opportunity to do so by Holubetz. When limited to the purpose of impeachment, Yomali's silence was not hearsay, as it was not offered for the truth of the matter asserted. As such, however, it also cannot serve as corroborative evidence of defendant's statement that she was driving, because it was not admitted as substantive evidence.

¶ 24 With respect to the silence of defendant's other two companions, the Village does not contend on appeal that the testimony about their silence was properly admitted for a purpose other than the truth of the matter asserted. Rather, the Village contends only that the silence of the other two companions did not constitute hearsay because it was not conduct intended as an assertion. We disagree. "[N]onverbal conduct intended as an assertion—nodding, pointing, and the sign language of the mute—may be classified as hearsay, if it was done for the purpose of deliberate communication." *People v. Jackson*, 203 Ill. App. 3d 1, 13 (1990). Although there was no affirmative statement by defendant's other companions, their silence in response to Holubetz's question of who was driving the vehicle and their failure to contradict defendant's response that she was driving must have been intended as an assertion that it was defendant and not any of them who was driving the vehicle. One would expect that, when faced with a direct question by a police officer of who was driving, the driver of the vehicle would speak up while those who were not driving would remain silent to indicate that they were not. Unlike Yomali's failure to respond to Holubetz's question, the other companions' silence did not reflect on any later claims that they were driving, as no evidence was presented that they ever made any such claims. No purpose other than proving the truth of the matter asserted was served by the admission of Holubetz's testimony regarding the silence of the other companions, and the trial court should have sustained defendant's hearsay

objection in that regard. Accordingly, evidence of the silence of defendant's other two companions cannot be considered corroborating evidence, because it was improper hearsay. See *People v. Lesure*, 271 Ill. App. 3d 679, 682 (1995) (hearsay evidence could not serve as corroborating evidence for the purpose of *corpus delicti*).

¶ 25 Absent the evidence of defendant's companions' silence in response to Holubetz's question, defendant claims, the Village failed to present any evidence corroborating her admission that she was driving the vehicle. The Village disagrees, citing evidence that defendant owned the vehicle, never recanted her admission or claimed that someone else was driving, took field sobriety tests and the Breathalyzer, and possessed the keys to the vehicle. We disagree that the evidence that defendant owned the vehicle, failed to recant her admission, and took field sobriety tests and a Breathalyzer was corroborative of her admission. However, we do agree with the Village that defendant's possession of the vehicle keys was corroborative of her admission.

¶ 26 First, the only evidence that defendant owned the vehicle was her statement to police that she was the owner of the vehicle. The corroborating evidence must be independent of the confession. *Phillips*, 215 Ill. 2d at 576. Thus, defendant's statement that she owned the vehicle cannot serve as corroborating evidence, as it was made as part of her admission to police. Moreover, the purpose of requiring corroborating evidence is to "assure the truthfulness of the confession and [to] recognize[] that the reliability of a confession 'may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past.'" *People v. Willingham*, 89 Ill. 2d 352, 359 (1982) (quoting *Smith v. United States*, 348 U.S. 147, 153 (1954)). This purpose is not

served if the corroborating evidence is simply another admission made by the defendant while under the same potential pressures and strains of a police investigation.

¶ 27 Similarly, relying on defendant's failure to recant her admission or to make a claim that someone else was driving is nothing more than another way of saying that defendant admitted she was the driver—the very statement that requires corroboration. As defendant's appellate counsel put it during oral arguments, what defendant did not say in her statement cannot be used to corroborate what she did say.

¶ 28 The Village also contends that the fact that defendant submitted to field sobriety tests and the Breathalyzer indicates that defendant was likely the person driving, as a person who had not been driving would be unlikely to submit to those tests. No such implication can be read into defendant's compliance with the officers. To read guilt into compliance with police requests would penalize any defendant who did not resist arrest.

¶ 29 Yomali's testimony that defendant possessed the keys to the vehicle, however, does provide some corroboration for defendant's admission that she was driving. See *People v. Lurz*, 379 Ill. App. 3d 958, 972 (2008) (finding that there was independent evidence corroborating the defendant's admission that he was driving the vehicle, in part because the defendant had the vehicle keys in his pocket). Defendant argues that, because the only evidence that defendant possessed the vehicle keys was Yomali's testimony, to believe that defendant possessed the keys to the vehicle one must also believe Yomali's testimony that the keys came into defendant's possession because Yomali gave them to her once she (Yomali) finished driving. We disagree. The jury could have believed that defendant had possession of the keys while also believing that Yomali's explanation of how defendant obtained the keys was fabricated in an effort to protect defendant. See *People v. Adams*,

394 Ill. App. 3d 217, 232 (2009) (“The jury was free to pick and choose which portions of [the witness’s] testimony it found credible.”). Because the corroborating evidence need not prove beyond a reasonable doubt that the crime occurred but only tend to show that a crime did, in fact, occur (*Phillips*, 215 Ill. 2d at 576), we conclude that the evidence that defendant possessed the keys to the vehicle was sufficient, if minimal, corroborating evidence to satisfy the *corpus delicti* rule.

¶ 30 Defendant also argues on appeal that the trial court’s failure to question potential jurors in accordance with Rule 431(b) entitles her to a new trial. Defendant did not, however, object during *voir dire*, nor did she raise the issue in her written posttrial motion. Accordingly, defendant has forfeited review of this issue. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (“Both a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial” (emphases in original)).

¶ 31 Acknowledging that she failed to preserve this issue for review, defendant urges us to review the issue under the plain-error doctrine. Under the plain-error doctrine, we may review a forfeited error when either (1) “the evidence in a case is so closely balanced that the jury’s guilty verdict may have resulted from the error and not the evidence” or (2) “the error is so serious that the defendant was denied a substantial right, and thus a fair trial.” *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant bears the burden of persuasion under both prongs. *Herron*, 215 Ill. 2d at 187. Generally, the first step in the plain-error analysis is to determine whether any error occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008).

¶ 32 Rule 431(b) provides:

“The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent

of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. Sup. Ct. R. 431(b) (eff. May 1, 2007).

¶ 33 During *voir dire*, the trial court failed to ask any of the potential jurors about their understanding and acceptance of any of the four principles. Defendant contends that this was error. The Village agrees, as do we. As Rule 431(b) requires the trial court to question potential jurors about their understanding and acceptance of all four principles (*People v. Thompson*, 238 Ill. 2d 598, 607 (2010)), the trial court erred in failing to ask any of the potential jurors about any of the principles.

¶ 34 Having concluded that error occurred, we must now determine whether that error is reversible under the plain-error doctrine. Defendant contends that the trial court's violation of Rule 431(b) constituted reversible error because the evidence presented at trial was closely balanced. We agree.

¶ 35 "Whether the evidence is closely balanced is, of course, a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable doubt challenge." *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). Review under the closely balanced standard "errs on the side of fairness and grants a new trial even if the evidence was otherwise sufficient to sustain a conviction." *People v. Cosmano*, 2011 IL App (2d) 101196, ¶ 75. As discussed above, aside from

defendant's admission that she was driving, there was only minimal other evidence tending to show that defendant was driving. No one observed defendant driving, and she was found with three other people, all of whom had been riding in the vehicle with her. More significantly, Yomali testified that she was the one who drove, because she was the only one who had not consumed any alcohol. Her lack of alcohol consumption was corroborated by Schletz's testimony that Yomali was the only one who appeared to have not consumed any alcohol. Although there was evidence that defendant turned the keys over to the police, Yomali testified that she initially had the keys because she was driving and that she gave them to defendant only after defendant requested them. Given Yomali's testimony that she was driving, Schletz's testimony that Yomali was sober, and the minimal evidence suggesting that defendant was driving, we conclude that the evidence was closely balanced. Thus, the trial court's failure to comply with Rule 431(b) was reversible error, and defendant is entitled to a new trial.

¶ 36 Because we are reversing defendant's conviction and remanding for a new trial, we need not address whether the public defender fee imposed as a part of defendant's sentence should be vacated.

¶ 37 We further determine that remand for a new trial would not violate defendant's double jeopardy rights. The village presented sufficient evidence to sustain defendant's convictions. Although the evidence was close, it was sufficient to allow a rational trier of fact to find defendant guilty beyond a reasonable doubt. Accordingly, double jeopardy does not bar a retrial. See *People v. Gonzalez*, 2011 IL App (2d) 100380, ¶ 28.

¶ 38 CONCLUSION

¶ 39 For the reasons stated, the judgment of the circuit court of Lake County is reversed and the matter is remanded for a new trial.

¶ 36 Reversed and remanded.

