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2012 IL App (3d) 100558-U

Order filed April 24, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Plaintiff-Appellee,

v.

DAVID VIKTORA,

Defendant-Appellant.

) Appeal from the Circuit Court  
) of the 12th Judicial Circuit,  
) Will County, Illinois,  
)  
) Appeal Nos. 3-10-0558 and 3-10-0559  
) Circuit Nos. 09-DT-777, 09-TR-43289, and  
) 09-TR-43291-93  
)  
) Honorable  
) Rick Mason,  
) Judge, Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Justices Carter and Lytton concurred in the judgment.

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**ORDER**

¶ 1 *Held:* (1) The record reveals defendant signed a written jury waiver which was discussed in open court; (2) the evidence supports defendant's conviction for driving under the influence of alcohol beyond a reasonable doubt; and (3) defendant's multiple convictions do not violate the one-act, one-crime doctrine.

¶ 2 After a bench trial, the court found defendant, David Viktora, guilty of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2008)), reckless driving (625 ILCS 5/11-503(a) (West 2008)), driving without a valid driver's license (625 ILCS 5/6-101 (West

2008)), speeding (625 ILCS 5/11-601(b) (West 2008)), and illegal operation of an all-terrain vehicle (ATV) on a roadway (625 ILCS 5/11-1426 (West 2008)). Defendant appeals, arguing that: (1) he did not waive a jury trial in open court; (2) the evidence was insufficient to prove him guilty beyond a reasonable doubt; and (3) all of his convictions, except for the most serious offense, must be vacated under the one-act, one-crime doctrine. We affirm.

¶ 3

### FACTS

¶ 4 Defendant was arrested on the night of May 3, 2009, after driving an ATV erratically on a roadway in Crete, Illinois. Initially, the case was assigned to Judge Brian Barrett. Defendant made a jury demand on May 22, 2009. On July 24, 2009, the court appointed the public defender to represent defendant on all pending charges. On September 25, 2009, defendant filed a demand for speedy trial. After defendant failed to appear for a jury trial on January 20, 2010, the court issued a warrant for his arrest. On February 2, 2010, with defendant present in court before Judge Livas, defense counsel requested the warrant to be quashed. Judge Livas reset the hearing on the defendant's motion to quash for February 3, 2010, before Judge Barrett.

¶ 5 Following a hearing on February 3, 2010, Judge Barrett recalled the warrant over the state's objection and continued the matter for trial. According to the clerk's minute entry and the form order signed by Judge Barrett, the court continued the matter to May 25, 2010 for a jury trial.

¶ 6 The record from May 25, 2010 shows defendant and his attorney stood before Judge Rick Mason who indicated, for the record, that defendant's court file already contained a written jury waiver. Referring to the written jury waiver in open court, Judge Mason specifically asked whether defendant waived the right to have a jury trial while in open court. Defense counsel

responded to the court's inquiry by stating defendant previously waived his right to a jury trial in open court before Judge Barrett. Defendant was present during this exchange between counsel and Judge Mason and defendant did not contradict defense counsel's assertion. The written waiver, dated May 25, 2010, is contained in the record on appeal and bears defendant's signature.

¶ 7 At trial, police officer Scott Pieritz testified he responded to a report of an ATV traveling on a roadway at a high rate of speed. Pieritz clocked defendant at 60 miles-per-hour in a 35 mile-per-hour zone. Pieritz then pursued defendant for approximately one-half mile, but could not catch him. While in pursuit, Pieritz observed defendant drive in both traffic lanes. After, defendant began driving towards Pieritz, Pieritz positioned his car to block the roadway, turned on his overhead lights and siren, and pointed his spotlight at defendant. Defendant continued to drive towards the roadblock at a high rate of speed but swerved at the last minute to avoid hitting Pieritz's police car. Defendant lost control of the ATV and crashed in a ditch.

¶ 8 Pieritz stated that after the crash, defendant attempted to flee the scene on foot and had to be forcibly taken to the ground and wrestled into handcuffs. Pieritz noted defendant exhibited carefree behavior, had bloodshot eyes and mumbled speech, and his breath smelled of alcohol. As Pieritz walked defendant from the ditch to his car, defendant stumbled and required assistance walking.

¶ 9 Police sergeant Robert Krainik testified he also observed defendant driving recklessly on an ATV, on the night of defendant's arrest. Krainik assisted Pieritz in blocking the roadway as defendant drove towards their location and eventually crashed in a ditch. Krainik reported that defendant resisted the officers' attempts to put him in handcuffs. Krainik stated he could smell alcohol on defendant's person, from 1½ feet away.

¶ 10 Emergency medical technician Tom Wagner testified he treated defendant in an ambulance on the way to the hospital. Defendant told Wagner he had six to eight drinks before his arrest. Wagner noted defendant smelled of alcohol and had a small laceration on the back of his head. At the hospital, defendant was treated for his injuries and observed by Pieritz. Defendant refused analysis of his breath, blood, and urine for alcohol content.

¶ 11 During his trial, defendant testified he drank three to four beers during the day of the accident, another beer with his dinner, and a final beer around 9 p.m. Shortly after defendant consumed the last beer, he decided to ride an ATV. Defendant admitted he was driving fast on the roadway, but denied driving erratically. He said he crashed because he swerved to miss Pieritz's car. Additionally, he testified he only required assistance walking because the officers were holding him and he was handcuffed.

¶ 12 The trial court found defendant guilty of DUI, reckless driving, driving without a valid driver's license, speeding, and illegal operation of an ATV on a roadway.

¶ 13 ANALYSIS

¶ 14 I. Jury Trial Waiver

¶ 15 Defendant argues the record does not establish he signed the written jury waiver in open court. Therefore, defendant submits the waiver was not knowingly or understandably executed as required by section 103-6 of the Code of Criminal Procedure of 1993 (725 ILCS 5/103-6 (West 2008)). Defendant acknowledges he raises this issue for the first time on appeal and asks we conduct a plain error review of this issue.

¶ 16 Whether a defendant knowingly and understandingly waived his right to a jury trial is a question of law which we review *de novo*. *In re R.A.B.*, 197 Ill. 2d 358 (2001). Whether a jury

waiver is valid cannot be determined by application of a precise formula, but turns on the facts and circumstances of each case. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004).

¶ 17 A defendant validly waives his right to a jury trial only if he does so understandingly and in open court. 725 ILCS 5/103-6 (West 2008). Generally, a jury waiver is valid if it is made by defense counsel in defendant's presence in open court, without an objection by defendant. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004).

¶ 18 In this case, Judge Mason found a signed, written jury waiver in defendant's court file before he began the trial proceedings. The record on appeal also contains this signed jury waiver. Significantly, in an effort to ensure the jury waiver was valid, Judge Mason asked whether the signed jury waiver contained in the court file was executed in open court. Defense counsel assured the court defendant previously waived a jury trial in open court while before Judge Barrett. Clearly, Judge Mason was entitled to rely on defense counsel's statements, as an officer of the court. See *People v. Marquez*, 324 Ill. App. 3d 711 (2001) (trial court was entitled to rely on defense counsel's representation that an interpreter was not needed).

¶ 19 It may also be said the error, if any, was invited error, resulting from defense counsel's representations. See *People v. Carter*, 208 Ill. 2d 309, 319 (2003). Invited error is not subject to plain error review. See *People v. Patrick*, 233 Ill. 2d 62, 77 (2009). To allow defendant to successfully argue his written waiver was not executed in open court, in the face of trial counsel's assertions to the contrary, would offend notions of fair play and encourage duplicitous conduct. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). Based on this record, we agree Judge Mason properly concluded defendant waived his right to a jury trial, in open court, before another judge.

¶ 20

## II. Sufficiency of the Evidence

¶ 21 Next, defendant argues the State failed to prove him guilty beyond a reasonable doubt of DUI. We review the evidence in the light most favorable to the prosecution to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Reversal is warranted only if the evidence is so palpably contrary to the weight of the evidence or so unreasonable, improbable, or unsatisfactory as to justify reasonable doubt of defendant's guilt. *People v. Leach*, 398 Ill. 515, 524-25 (1948).

¶ 22 In the present case, defendant was convicted of DUI. Although defendant refused chemical blood alcohol content analysis, the evidence was sufficient to prove defendant's guilt for this offense. Testimonial evidence showed defendant had glassy and bloodshot eyes, mumbled speech, difficulty walking, and an odor of alcohol about his person, and admitted consuming between six and eight alcoholic drinks. See *People v. Casa*, 113 Ill. App. 2d 1 (1969) (police officer's testimony of defendant's physical condition was sufficient to convict defendant of DUI where defendant refused blood alcohol tests). The officers observed defendant driving in an erratic and dangerous manner. We conclude this evidence was sufficient to support the court's finding the state's evidence proved defendant guilty of DUI beyond a reasonable doubt.

¶ 23 III. One-Act, One-Crime

¶ 24 Finally, defendant argues his convictions for DUI, reckless driving, speeding, driving without a valid driver's license, and illegal operation of an ATV on a roadway were improper under the one-act, one-crime doctrine. The one-act, one-crime doctrine involves a two-step analysis. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, we must determine whether defendant's conduct involved multiple acts or a single act because multiple convictions are

improper if they are based on precisely the same act. *Id.* Second, if defendant's conduct involved multiple acts, we must determine whether any of the offenses are lesser-included offenses. *Id.* We limit our analysis to the first step of the one-act, one-crime doctrine, as neither party raised a lesser-included offense argument.

¶ 25 Based on the one-act, one-crime doctrine, multiple convictions cannot stem from offenses which share the same culpable act. *People v. DiPace*, 354 Ill. App. 3d 104, 115 (2004). In the present case, defendant's offenses share the common element of driving, but the act of driving, alone, is not unlawful. Here, defendant's DUI conviction required the act of driving a vehicle while intoxicated. 625 ILCS 5/11-501(a)(2) (West 2008). In comparison, defendant's reckless driving conviction required the separate act of driving with a willful or wanton disregard for the safety of persons or property, without any reference to intoxication. 625 ILCS 5/11-503(a) (West 2008). Similarly, defendant's convictions for no valid driver's license, speeding, and illegal operation of an ATV each required, without reference to intoxication, the following three separate acts: (1) driving a motor vehicle without a valid driver's license; (2) driving a motor vehicle above the posted speed limit; and (3) driving a specific type of vehicle, an ATV, on a roadway. 625 ILCS 5/6-101 (West 2008) (no valid driver's license requires the act of driving without a valid driver's license); 625 ILCS 5/11-601(b) (West 2008) (speeding requires the act of driving at a speed greater than the maximum speed limit); 625 ILCS 5/11-1426 (West 2008) (illegal operation of an ATV requires the act of operating an ATV on a roadway). Thus, we conclude the multiple convictions were properly based on separate acts which did not involve overlapping culpable acts.

¶ 26

#### CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 28 Affirmed.