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2012 IL App (3d) 110283-U

Order filed May 8, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-11-0283
	)	Circuit No. 08-CF-1330
SCOTT A. ROSSOW,	)	
	)	Honorable
Defendant-Appellant.	)	Edward Burmila, Jr.,
	)	Judge, Presiding

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Carter and McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The evidence was sufficient to sustain defendant's conviction for aggravated driving under the influence. State presented expert testimony which established defendant, who had a blood alcohol concentration of 0.127, as the driver of the vehicle when an accident occurred, killing his two passengers. The evidence also established that Rossow's jury trial waiver was knowing and voluntary as the trial court determined.

¶ 2 Defendant Scott Rossow was found guilty following a bench trial of four counts of aggravated driving under the influence and sentenced to a 13-year term of imprisonment. He appealed. We affirm.

¶ 3

## FACTS

¶ 4 Defendant Scott Rossow was charged on May 21, 2008, with four counts of aggravated driving under the influence (DUI). 625 ILCS 5/11-501(a)(1), (2) (West 2008). The charges resulted from a December 2006, vehicle accident in which Rossow's brother, David Sauseda, and Rossow's friend, Christopher Sommers, were killed and Rossow was seriously injured. On the date scheduled to begin the jury trial, defense counsel informed the trial court that Rossow wanted to waive his jury trial right and proceed before the bench. The following exchange occurred.

“THE COURT: Mr. Rossow, your attorneys advised me that you wish to waive your right to a jury trial and proceed with this case as a bench trial?

DEFENDANT: Yes, your Honor.

THE COURT: You have an absolute Federal constitutional right to a trial by jury, 12 people would be selected randomly from the community to determine your guilt or innocence.

In a bench trial, the judge alone would make that decision. The jury's verdict would have to be unanimous. Do you understand that? But that's a right that you can waive. Once you waive it, once you give it away, it's gone; and it's gone forever, you can't get it back. Do you understand that?

DEFENDANT: Yes, your Honor.

THE COURT: The practical affect [*sic*] of waiving that right would be a bench trial and it will be before me. Do you understand

that?

DEFENDANT: Yes, your Honor.

THE COURT: That's what you want to do?

DEFENDANT: Yes, your Honor.

THE COURT: Do you have a written waiver, is that your signature, sir?

DEFENDANT: Yes, your Honor.

THE COURT: All right. Show that the Court finds the defendant's waiver of his right to a jury trial to be knowing and intelligently entered into, executed in writing, and accepted by the Court and the matter will now proceed as a bench trial."

¶ 5 A bench trial ensued. Mokena police officer Kimberly Exton testified that she encountered the crash site around 4:21 a.m., while on patrol. She noticed debris on the road side and saw a vehicle wrapped around a tree. Car parts and other debris littered the area. She called for assistance and investigated the scene. It was single car accident involving a Corvette, which was owned by Sauseda. She noticed Sommers's body first. It was northwest at the rear of the vehicle, with his duffel bag at his feet. She next found Sauseda's body on the other side of a clump of trees to the southeast of the vehicle. Sauseda's sweater was pulled over his head and he wore no other clothing. He was missing the lower part of his legs, which were located in the passenger compartment of the Corvette, along with his pants and shoes. Rossow was laying within a foot to the right of Sauseda. He was severely injured but alive.

¶ 6 A Will County deputy coroner testified that she responded to the accident site. The lividity

of Sommers's and Sauseda's bodies was consistent with the position in which they were found at the scene. The forensic pathologist testified that Sommers died from multiple blunt force trauma due to a motor vehicle crash. He sustained 26 external injuries caused by scraping motions along his body, and 18 internal injuries, including trauma and crushing injuries to both sides of his front chest. Death would have been instantaneous, based on a severe broken neck. Sommers had no alcohol in his system. Sauseda died from multiple blunt injuries of the neck, pelvis and the amputation of his lower legs due to a motor vehicle crash. Death would have been instantaneous. Sauseda had a blood alcohol concentration (BAC) of 0.193. Stipulated testimony established Rossow's alcohol serum rate was .150 when he was tested at the hospital while treated for his injuries, which converts to 0.127 BAC.

¶ 7 Steven Kirsch, a Will County sheriff's deputy, testified for the State as an expert in accident reconstruction. He responded to the accident site and assessed the condition of the vehicle and the debris field. He also assessed the roadway and found four distinct tire marks measuring 188 feet, which indicated that the vehicle lost control and was in a counterclockwise yaw before it left the roadway. The vehicle hit a tree 44 feet from the roadway. The tree intruded into the passenger area approximately three feet. He recovered the vehicle's data recorder and obtained a printout from it. The device recorded the vehicle's speed at 99 mph at 5 seconds before the crash; 103 mph at 4 seconds; 106 mph at 3 seconds; 103 mph at 2 seconds, and 98 mph at 1 second. The data recorder also established that the vehicle's brakes were activated one second before impact and that the driver had not been wearing the seatbelt.

¶ 8 Michael DiTallo, a certified accident reconstruction expert, testified for the State. To analyze the accident, he reviewed the police and autopsy reports, police photographs and diagrams, medical records, and the vehicle's crash data recorder. He inspected the Corvette. The vehicle had two seats

and a small hatchback area behind the seats. The hatchback was covered by glass, with a small window around the side. The vehicle's t-roof was also glass. He visited the accident site in 2008. He took measurements and photographs. His analysis indicated that the Corvette began to yaw counterclockwise as it traveled down the roadway. After leaving the road, the vehicle struck a tree just behind the right front wheel, forcing the seats to shift toward the passenger door and the passenger door to pop out of the vehicle. He opined that the force of the impact caused the front seat occupants to be thrown through the passenger door. None of the occupants were wearing seatbelts.

¶ 9 DiTallo recreated the vehicle's travel and applied various scientific principles to determine the path the occupants followed after impact. He created a diagram based on the information he had gathered. Using Newton's law, he opined that Sauseda had been sitting in the passenger seat, based on the following factors and analyses: Sauseda's trajectory; the principle direction of force; occupant kinematics; availability to exit the vehicle; Sauseda's injuries; and the physical evidence left in the passenger seat. He also concluded that Sommers was the person seated in the hatchback. His conclusion was based on the extent of Sommers's injuries, including the presence of glass on his body, and the direction he would have moved based on the point of impact. He further opined that Rossow was the driver. This conclusion was based on elimination and the fact that the seat was further away from the impact, resulting in fewer injuries to Rossow. He would expect that a person in the hatch area would rest in a different location than the front seat occupants. He did not consider what effect would have occurred had the occupants struck an object in the car or outside of it because there was no evidence to support the theory.

¶ 10 Michael Cowser, a certified accident reconstructionist, testified as an expert witness for Rossow. He reviewed photographs of the accident scene and of the vehicle's occupants, police

reports, scene mapping done by the Will County sheriff's department, and lab reports and photographs regarding the occupants' injuries, as well as DiTallo's report. In his opinion, there was insufficient information to determine within any degree of scientific certainty where the occupants had been seated prior to the crash. He considered that several outside forces, including vehicle parts, glass, and trees could have changed the occupants' trajectories. He opined that it was "possible the final rest positions may have been changed from the occupant ejection patterns prior to final rest." In his view, the impacted tree or branches might have changed the "final rest positions" for Rossow and Sommers. He did not visit the accident scene or view the vehicle.

¶ 11 The trial court found Rossow guilty. He filed a motion for a new trial. Attached to the motion was Rossow's affidavit in which he averred that he had consistently desired a jury trial; that on the day of his bench trial, defense counsel informed him that "they had information that the trial judge would not believe testimony of the accident reconstruction expert;" that he agreed to waive his jury trial right "[b]ased upon the representations of my attorneys;" and that, had he know that his attorneys did not have the claimed "inside" knowledge, he would not have waived his right to a jury trial. The trial court denied the motion and thereafter sentenced Rossow to a term of imprisonment of 13 years for each of the four counts, with the sentences to run concurrently. He appealed.

¶ 12

#### **ANALYSIS**

¶ 13 The issues Rossow raises on appeal are whether he was proven guilty beyond a reasonable doubt of aggravated DUI and whether he knowingly and voluntarily waived his right to a jury trial.

¶ 14 We begin with Rossow's challenge to the sufficiency of the evidence. He argues that the State failed to prove that he was driving the vehicle when the accident occurred, which is an essential element of its case. He disputes the conclusions of the State's accident reconstructionist and offers

the opinion of his expert, who concluded that the evidence did not support a determination as to who was driving the vehicle. Specifically, he argues that the conclusion of the State's expert that he was the driver was based on guess and conjecture and cannot sustain his conviction.

¶ 15 A person shall not drive or be in actual physical control of any vehicle while (1) his blood alcohol concentration is 0.08 or above; or (2) under the influence of alcohol. 625 ILCS 5/11-501(a)(1), (2) (West 2006). To sustain a conviction under section 11-501(a)(1), the State must prove that (1) the defendant drove the vehicle; and (2) his BAC was over the statutory limit. *People v. Caruso*, 201 Ill. App. 3d 930, 937 (1990). To sustain a conviction under section 11-501(a)(2), the State must prove two elements: (1) the defendant was driving the vehicle; and (2) the defendant was under the influence of alcohol. *People v. Lurz*, 379 Ill. App. 3d 958, 967 (2008).

¶ 16 The State may prove by circumstantial evidence alone that the defendant was the vehicle's driver. *People v. Bennett*, 331 Ill. App. 3d 198, 203 (2002). Circumstantial evidence that proves the elements of the offense beyond a reasonable doubt may sustain a conviction. *People v. Turner*, 375 Ill. App. 3d 1101, 1103 (2007), quoting *People v. Pollock*, 202 Ill. 2d 189, 217 (2002). Absent eyewitness testimony or contrary evidence, a court may rely on the testimony of an accident reconstruction expert to determine facts such as the point of impact and the vehicle's probable path after impact. *People v. Davis*, 105 Ill. App. 3d 129, 134 (1982).

¶ 17 It is the responsibility of the trier of fact to determine witness credibility, weigh the evidence, decide what inferences it supports, and resolve any conflicts in the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). When considering a challenge to the sufficiency of the evidence, the standard of review is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261

(1985). This court will not reverse a conviction unless “the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant’s guilt.” *Ortiz*, 196 Ill. 2d at 259.

¶ 18 The State and Rossow both presented witnesses who were experts in the area of accident reconstruction. DiTallo, who testified for the State, determined that Rossow was the driver of the vehicle. He based his conclusion on various information, including police photographs, diagrams, and reports; autopsy reports; medical records; the Corvette’s crash data recorder; his examination of the accident scene and photographs he took there; and his inspection of the Corvette. Using this information, he created the path that the occupants took after impact. He based this determination on the individual’s injuries and certain laws of physics. Rossow’s expert, Cowsert, opined that there was insufficient information to determine who was driving the vehicle when it crashed. He submitted that unknown outside factors could have changed the trajectory of the vehicle’s occupants. The trial court, as fact finder, found DiTallo to be the more credible witness and accepted his conclusions. The evidence supports the trial court’s determination that Rossow was the vehicle’s driver and that he was guilty of aggravated DUI. Any rational trier of fact could have found that the State proved Rossow guilty beyond a reasonable doubt.

¶ 19 We next address whether Rossow knowingly and voluntarily waived his right to a jury trial. Rossow argues that the waiver of his right to a jury trial was not knowing and voluntary. He submits that he desired a jury trial, that his attorneys persuaded him that they had inside information that the trial court would not credit the testimony of the accident reconstruction expert, and that he waived his jury trial right based on their recommendation. He maintains that he had consistently demanded a jury trial until the day he waived his right to one based on his attorney misrepresentations.

¶ 20 A defendant is entitled to a jury trial unless he understandingly waives the right in open court.

725 ILCS 5/103-6 (West 2006). In criminal trials, the waiver should be in writing. 725 ILCS 5/115-1 (West 2006). A jury waiver must be knowingly and voluntarily made by the defendant to be valid. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). Whether a jury waiver is valid does not rest on any precise formula but depends on the facts and circumstances of the particular case. *Bannister*, 232 Ill. 2d at 66. The critical information for a defendant to understand when waiving his right to a jury trial is that the facts of the case will be decided by a judge rather than a jury. *Bannister*, 232 Ill. 2d at 69. Whether a defendant knowingly and voluntarily waived his right to a jury trial is a question of law which this court reviews *de novo*. *People v. Victors*, 353 Ill. App. 3d 801, 805 (2004).

¶ 21 The affidavit that Rossow submitted in support of his claim that his jury waiver was not knowing and intelligent provides that his attorneys knew he wanted a jury trial, and that they told him the judge would not believe the accident reconstruction expert's testimony, which he knew to be "an important factor in considering his innocence." He also averred that he would not have waived his jury trial right had he known that his attorneys did not have inside information on the trial judge. He further averred that his attorney indicated he should inform the trial court that he was not forced into waiving his jury trial right. Rossow's affidavit does not present any specifics as to what attorney or attorneys were involved in securing his jury waiver, who knew the trial judge's leanings, and which expert's information the trial court would not believe.

¶ 22 Moreover, the record reflects that Rossow was admonished by the trial court as to his understanding of his right to a jury trial and his waiver of that right, that he knew his right and wished to waive it. The trial court explained the difference between a bench and jury trial. Rossow submitted a written waiver and assured the trial court that it showed his signature. The trial court found "defendant's waiver of his right to a jury trial to be knowing and intelligently entered into, executed

in writing, and accepted by the Court.” We find that its finding was not in error.

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

¶ 24 Affirmed.