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2014 IL App (3d) 121038-U

Order filed November 4, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Henry County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-12-1038
)	Circuit Nos. 11-DT-206 and 11-TR-3633
MARK L. BEESON,)	Honorable
Defendant-Appellant.)	Ted J. Hamer, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Trial court did not commit plain error in admitting expert accident reconstruction testimony where expert's opinion was beyond the ken of an average juror. (2) Court's questioning of defense witness during bench trial did not deprive defendant of due process and was not plain error.

¶ 2 Defendant, Mark L. Beeson, was charged with driving while under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2010)) and improper lane usage (625 ILCS 5/11-709 (West 2010)) following a one-car accident on Interstate 80. At the ensuing bench trial, Master

Sergeant Lloyd Murphy testified that defendant's speech, behavior, and appearance indicated that defendant was intoxicated. Murphy's testimony also included his reconstruction of the accident, in which he opined based on tire mark patterns that defendant's front left tire had blown out after the van collided with the retaining wall. Connie Weimer, passenger in the van driven by defendant, refuted much of Murphy's testimony. In particular, Weimer testified that the accident was caused by a tire blowout, which occurred before the vehicle hit the retaining wall.

Following the State's cross-examination of Weimer, the court asked Weimer a number of questions regarding the accident as well as her and defendant's alcohol consumption prior to the accident. The court found defendant guilty on both counts. Defendant appeals, arguing that Murphy's reconstruction of the accident was inadmissible. Defendant also contends that the court's questioning of Weimer was improper and violated his due process rights. We affirm.

¶ 3

FACTS

¶ 4

On the evening of July 17, 2011, defendant was involved in a one-car accident in the eastbound lanes of Interstate 80. Defendant was subsequently charged with driving while under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2010)) and improper lane usage (625 ILCS 5/11-709 (West 2010)). The matter proceeded to a bench trial on August 29, 2012.

¶ 5

The State's first witness was David Carter. Carter testified that for six years, ending in March of 2011, he worked as a sheriff's deputy in Colorado. While in that position, Carter was trained in the detection of intoxication. Carter listed some of the indicators of intoxication that he was trained to look for, including slurred speech, an inability to walk in a straight line, and the odor of alcohol.

¶ 6

On the night of defendant's accident, Carter was driving behind the van driven by defendant at a distance of approximately a quarter of a mile. Carter testified that the van

suddenly swerved right into the retaining wall, then crossed all lanes of traffic and hit the left-side retaining wall. The van then once again crossed over both lanes of traffic before coming to rest on the right shoulder.

¶ 7 Carter testified that he observed no apparent cause of the van's initial swerve to the right: "I did not see a blowout, I did not see an animal, I didn't see anything come out from underneath the van. Nothing. I didn't see anything that would reasonably cause a van to have any trouble to begin with, let alone a reaction like that." Carter explained on cross-examination that if there had been a blowout, he would have seen rubber, debris, and the air exiting the tire at high pressure. This knowledge derived from his history of racing cars as a youth, as well as his personal experiences with blown out tires on the interstate. He did not observe any of those signs prior to the van's swerve to the right. Carter also could not tell if a tire had blown out after hitting one of the walls, though once the van was stopped he observed that the left front tire was flat. Carter did not know what caused the accident.

¶ 8 When the van came to a stop, Carter pulled up behind the van, exited his truck, and approached the van to check on the occupants. Carter testified that as he approached the vehicle, a woman exited from the passenger seat and asked him repeatedly if he would give her a ride home. Upon reaching the passenger side of the vehicle, the passenger door was open, and Carter noticed the odor of alcohol. Defendant was sitting in the driver's seat.

¶ 9 Carter returned to his truck to call 911. When Carter was in the driver's seat of his truck, defendant exited his vehicle and approached Carter's truck. Carter testified that defendant "said that they had simply had an argument and told me that I could leave." Carter noted that defendant smelled of alcohol and was staggering both as he approached Carter's truck and also

when he walked back to the van. Carter observed nothing on the pavement that would hinder defendant's gait.

¶ 10 The State's next witness was Murphy. Murphy testified that when he arrived at the scene of the accident and asked defendant what happened, defendant responded that they had gotten a flat tire. Murphy noticed a strong odor of alcohol when defendant spoke. Murphy also observed that defendant's eyes were glassy and bloodshot. Defendant told Murphy that another man had been driving, and that the van had hit a curb. Defendant initially told Murphy that the driver had gotten a ride after the accident, though he later told Murphy that the driver had run away from the accident scene. Defendant was verbally combative toward both Murphy and Weimer, repeatedly calling Weimer a "stupid f-in' bitch." It was Murphy's opinion that defendant was under the influence of alcohol. This opinion was based upon his observations of defendant, defendant's denial that he was driving the van, and the fact that there was no apparent legitimate reason for the accident.

¶ 11 After placing defendant under arrest, Murphy reviewed the accident scene. Murphy's training in this field included accident investigation classes in the police academy, as well as the military. Murphy testified that he had been through advanced accident scene investigation, occupant kinematics, vehicle dynamics, accident reconstruction one, and accident reconstruction two.

¶ 12 The State introduced into evidence eight photographs of the accident scene taken by Murphy. Murphy explained how the tire marks on the road and scrape marks along the retaining walls indicated the van's route of travel: first into the right-side wall, then across into the left-side wall, then back to the right shoulder. Murphy testified that there were no tire marks leading into the right-side retaining wall. Similarly, there were no tire marks indicative of a flat tire as the car

traveled from the right-side retaining wall to the left-side retaining wall. He explained that the tire marks left by the van as it came off the left-side retaining wall indicated that the van was, at that point, driving on a flat tire:

"There's a certain pattern a tire makes if the tire's flat and you're driving on it. Up until that point, there was no flat tire marks. After that, you could clearly see where he was driving on a flat tire and went across the road and stopped on the right-hand side."

Murphy further explained the type of pattern that a flat tire leaves on a road, describing it as "a weave into the marks in the road." Based on his investigation, Murphy could not discern a legitimate reason for the accident. He opined that the damaged left front tire was a result, rather than a cause, of the accident.

¶ 13 The defense's lone witness was Weimer. Weimer testified that she was with defendant at a picnic in a park on the day of the accident. The two had previously been in a relationship, but were just friends at that time. Over the course of their time at the park, defendant had "maybe two or three" cans of beer. Weimer was always in defendant's sight while the two were at the park.

¶ 14 Weimer testified that immediately preceding the accident she heard a loud pop. It was at that point the van began swerving back and forth across the road. After the accident, an individual pulled up behind the van, but did not get out of his vehicle. Weimer told this person she believed she and defendant "had a blowout." The person was still there when Murphy arrived. Weimer also told Murphy that she believed there had been a blowout, and included this in her written statement.

¶ 15 On cross-examination, Weimer went into greater detail regarding the time she spent at the

park that day. The State's line of questioning focused on how and when Weimer got to the park, what Weimer did while at the park, and the size of the park. When asked about the accident, Weimer reiterated that she heard a pop, the bystander did not get out of his car, and the bystander was still on the scene when Murphy arrived. She also testified that she did not ask the bystander for a ride home.

¶ 16 The court then examined Weimer. The court began by asking Weimer about the events from earlier in the day:

"Q. Ms. Weimer, what time did you say you got there?"

A. Between 11:30 and noon, about that time.

Q. And you got a ride from some girlfriends?

A. Yes, Angie and Sylvia.

Q. Was [defendant] already there?

A. Yes, he was.

Q. So you don't know what he would have had to drink before you got there?

A. No.

Q. And how many people would you say were in your immediate area?

A. There was probably 15, 20 people, I would say. ***

Q. Okay. Did [defendant] sit next to you when you ate?

A. Yes.

Q. Did he play frisbee when you played frisbee?

A. Yes, he did.

Q. Did he swing in the swing when you did that?

A. Yes, he did.

Q. But you weren't in a dating relationship at all—

A. No.

Q. —at that time?

A. We were just friends still."

The court also asked Weimer about the details regarding Carter, including whether Weimer remembered the type of car Carter drove, whether Carter approached the van, and whether Weimer asked Carter for a ride. Weimer answered these questions in conformity with her previous testimony. Finally, the court asked Weimer about the cause of the accident: "You say you heard a pop before the accident; did you hear where that came from?" Weimer responded that she only remembered a loud pop followed by a swerving, and did not indicate that she remembered where the pop came from.

¶ 17 Following closing arguments, the court found defendant guilty of both driving under the influence and improper lane usage. In delivering its ruling, the court commented that it found Carter to be a more credible witness than Weimer. The court pointed out that Carter had more experience in situations like the matter at hand than the average person would. The court also found that there had been no mechanical issues or blowout that caused the accident. The court reasoned that, therefore, the accident may have been caused by defendant's being under the influence of alcohol.

¶ 18 The court sentenced defendant to 24 months' probation and 180 days in jail. Defendant appeals.

¶ 19 ANALYSIS

¶ 20 On appeal, defendant first argues that Murphy's expert accident reconstruction testimony

was inadmissible because the testimony was not beyond the ken of the average juror. Further, defendant contends that the trial court's examination of the defense's lone witness, Weimer, deprived defendant of his due process right to a fair trial.

¶ 21 Defendant failed to raise an objection regarding either of these issues in the trial court, and likewise failed to raise either issue in a posttrial motion. Because the issues are thus considered forfeited for the purposes of appeal (*People v. Colyar*, 2013 IL 111835, ¶ 27), we cannot review them unless they are deemed to be plain error. *People v. Rippatoe*, 408 Ill. App. 3d 1061, 1066 (2011). "The plain-error doctrine is a narrow and limited exception" to this rule. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The first step in plain error analysis is determining whether an error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009). This error must be "clear or obvious" in order for the analysis to proceed. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 22 I. Admissibility of Murphy's Expert Reconstruction Testimony

¶ 23 Decisions of whether to admit expert testimony are a matter of the trial court's sound discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). Absent an abuse of that discretion, a reviewing court will not disturb the trial court's ruling. *Id.* Interpretations of supreme court rules, however, are matters of law, and will be reviewed *de novo*. *People v. Marker*, 233 Ill. 2d 158, 162 (2009).

¶ 24 A. Standard for Admissibility of Reconstruction Testimony

¶ 25 In a series of cases from the mid-1990s, our supreme court held that expert accident reconstruction testimony is only admissible where the testimony is "beyond the ken of the average juror." *Zavala v. Powermatic, Inc.*, 167 Ill. 2d 542, 546 (1995); *Watkins v. Schmitt*, 172 Ill. 2d 193, 204-07 (1996). Relying upon these cases, defendant posits that whether expert

testimony is "beyond the ken of the average juror" remains the controlling standard, and that Murphy's testimony in the present case does not meet that standard.

¶ 26 The State, in turn, cites to the Illinois Rules of Evidence in arguing that the "beyond the ken" standard is no longer applicable. In pertinent part, Rule 702 of the Illinois Rules of Evidence dictates:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ill. R. Evid. 702 (eff. Jan. 1, 2011).

Thus, the State maintains, expert testimony—including that of Murphy here—is admissible so long as it will assist the trier of fact.

¶ 27 The Illinois Rules of Evidence, effective January 1, 2011, were not adopted in order to create new laws of evidence, but to "codify the preexisting common law rules of evidence." *People v. Leach*, 2012 IL 111534, ¶ 66 n.1; see also Ill. R. Evid., Committee Commentary (eff. Jan. 1 2011) ("[T]he Committee incorporated into the Illinois Rules of Evidence the current law of evidence in Illinois whenever the Illinois Supreme Court or the Illinois Appellate Court had clearly spoken on a principle of evidentiary law within the last 50 or so years."). The "beyond the ken" standard for the admissibility of expert testimony was applied by our supreme court as recently as 2010 (*Becker*, 239 Ill. 2d at 237), and has been continually applied by appellate courts even after the effective date of the Illinois Rules of Evidence (*E.g.*, *Lorenz v. Pledge*, 2014 IL App (3d) 130137, ¶ 26; *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 88).

¶ 28 Indeed, though Rule 702 does not duplicate the precise "beyond the ken" language, it may still be read as incorporating the standard. In *Zavala*, the supreme court examined the

history of the "beyond the ken" standard in the context of expert reconstruction testimony. *Zavala*, 167 Ill. 2d at 546. Analyzing a number of earlier cases, the court concluded that "[t]hose cases stand simply for the principle that expert reconstruction testimony is proper *** if what the expert offers is '*knowledge and application of principles of science beyond the ken of the average juror.*' " (Emphasis added.) *Id.* (quoting *Plank v. Holman*, 46 Ill. 2d 465, 471 (1970)). This expanded iteration of the "beyond the ken" standard is reflected in Rule 702's requirement of "scientific, technical, or other specialized knowledge." Ill. R. Evid. 702 (eff. Jan. 1, 2011). That such specialized knowledge is beyond the ken of the average juror is implicit.

¶ 29 We therefore hold that in order for expert testimony to be admissible, that testimony must include scientific, technical, or other specialized knowledge beyond the ken of the average juror.

¶ 30 B. Whether Murphy's Testimony Was Beyond the Ken of the Average Juror

¶ 31 An expert opinion is beyond the ken of the average juror¹ if it is "too sophisticated for the average juror to arrive at independently." *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 410 (2005) (citing *Watkins*, 172 Ill. 2d at 206). Expert testimony, of course, covers a wide spectrum. At one end of that spectrum, courts have held that expert witnesses may not testify to matters of the most common sense. See *Becker*, 239 Ill. 2d at 235. In *Hernandez v. Power Construction Co.*, 73 Ill. 2d 90, 99 (1978), for example, the court excluded expert testimony that guardrails could prevent a person from falling off a scaffold, noting that there was "nothing complicated or difficult to comprehend." Similarly, in *Kimble*, the court found that an expert's

¹ Though the trier of fact in the case *sub judice* was the trial court, the standard remains whether the testimony was beyond the ken of the average juror. See, e.g., *Becker*, 239 Ill. 2d 215; *People v. Ethridge*, 243 Ill. App. 3d 446 (1993).

opinion that the plaintiff would not have been able to move if a 4,000-pound steel bar had rolled on top of his foot was not beyond the ken of an average juror. *Kimble*, 358 Ill. App. 3d at 410.

¶ 32 At the other end of that spectrum, courts are quick to admit expert testimony where the opinion proffered is thoroughly beyond common knowledge. In medical malpractice cases, for example, courts will hold as a matter of course that expert testimony regarding medical procedures or physiology is beyond the ken of the average juror, without any significant analysis. See, e.g., *Holzrichter*, 2013 IL App (1st) 110287, ¶ 88; *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 59 (2000).

¶ 33 In the context of expert accident reconstruction testimony, earlier supreme court decisions held that such testimony was inadmissible where there were eyewitnesses to the accident, unless the expert testimony was strictly necessary. E.g., *Plank*, 46 Ill. 2d at 471. This approach was abandoned by *Zavala*, where the court held that "[w]hether to admit expert reconstruction testimony, eyewitness or not, turns on the usual concerns of whether expert opinion testimony is appropriate generally." *Zavala*, 167 Ill. 2d at 546. In that case, the plaintiff testified that his fingers had been cut off by a drill press equipped with a reamer. Despite this eyewitness account, the trial court admitted expert testimony that the drill press could not have severed the plaintiff's fingers because, *inter alia*, the reamer did not have a cutting edge. This opinion was based upon the expert's testing of the machine. The supreme court found that the expert's opinion was "certainly 'beyond the ken of the average juror' and was proper notwithstanding [the plaintiff's] own testimony." *Id.*

¶ 34 The next year, a divided supreme court noted that, after *Zavala*, "the existence of eyewitness testimony is not *the conclusive factor* in determining whether accident reconstruction testimony is admissible." (Emphasis added.) *Watkins*, 172 Ill. 2d at 206. In *Watkins*, three

eyewitnesses agreed that a truck was traveling at a reasonable speed at the time of an accident. Two of these witnesses were disinterested, while the other was the defendant-driver. An expert then testified that, based on his analysis of the truck's tire marks, the truck was going significantly faster than the witnesses estimated. The *Watkins* court held that the expert's opinion was inadmissible. *Id.* at 206-07. Although the court had noted that the availability of eyewitnesses was "not the conclusive factor," its analysis made clear that, counter to the holding in *Zavala*, eyewitness testimony was an important factor:

"In this case, three eyewitnesses who had a reasonable opportunity to observe the accident, and sufficient driving experience, gave their speed estimates all within a 20- to 35-mile-per-hour range. Even without defendant Schmitt's testimony, there are two disinterested eyewitnesses who had a fair opportunity to observe Schmitt's speed.

*** The speed estimates from these three eyewitnesses, along with the evidence of skid marks, clearly formed a sufficient basis upon which a jury could make its own conclusions."² *Id.* at 207.

¶ 35 In the case at hand, defendant contends that Murphy's reconstruction of the accident, and the opinions drawn therefrom, were not beyond the ken of the average juror. Defendant argues that Murphy "simply traced a line visible to anyone." We disagree with this characterization. Based on his extensive training, Murphy knew that a flat tire leaves a specific pattern of tire marks on the road. Murphy was able to identify that pattern and, based on its placement on the

² Joined by Justice Nickels, Justice Heiple dissented with this portion of the court's opinion, pointing out its inconsistency with the court's previous ruling in *Zavala*. *Watkins*, 172 Ill. 2d at 212-13 (Heiple, J., specially concurring in part and dissenting in part, joined by Nickels, J.).

been pursued, a judge has a duty to interpose and avoid the miscarriage of justice either by suggestions to counsel or an examination conducted by the judge himself." *Id.* (citing *People v. Franceschini*, 20 Ill. 2d 126, 132 (1960)). Indeed, an "extensive examination may be justified if the court has reason to believe that a witness is not telling the truth." *People v. Wesley*, 18 Ill. 2d 138, 155 (1959). Although the appropriateness of a court's line of questioning generally depends on the circumstances of the case (*People v. Palmer*, 27 Ill. 2d 311, 315 (1963)), the questioning must be done " 'in a fair and impartial manner, without showing bias or prejudice against either party.' " *People v. Jackson*, 409 Ill. App. 3d 631, 647 (2011) (quoting *People v. Marino*, 414 Ill. 445, 450 (1953)).

¶ 41 The danger of prejudice flowing from a court's questioning of a witness is lessened where the questioning takes place during a bench trial rather than a jury trial. See *People v. Murray*, 194 Ill. App. 3d 653, 658 (1990) (citing *Palmer*, 27 Ill. 2d at 315)). In order to demonstrate a prejudice in a bench trial, a defendant must show that "the tenor of the court's questioning indicates the court has prejudged the outcome before hearing all of the evidence." *People v. Smith*, 299 Ill. App. 3d 1056, 1063 (1998).

¶ 42 In the present case, the court's questioning of Weimer displayed no prejudice, and gave no indication that the court had prejudged the outcome of the case. The court's initial series of questions concerned when Weimer arrived at the park in relation to defendant and how acute her observations of defendant were once at the park. These questions were surely designed to determine the accuracy of Weimer's assertion that defendant was not drinking. This is entirely fair territory for the trial court. See *Palmer*, 27 Ill. 2d at 314 (trial court has "the right to question witnesses in order to elicit the truth or to bring enlightenment on material issues which seem obscure").

¶ 43 The court's questions concerning Carter and the cause of the accident, similarly, were unbiased attempts to elicit the truth. At that point in the trial, the court had heard conflicting testimony, and an attempt to resolve those conflicts by further questioning Weimer was proper. See *Franceschini*, 20 Ill. 2d at 132. Even if the court's inquiry is read to indicate skepticism of Weimer's testimony, the court, as the trier of fact, must make the ultimate determinations of a witness's credibility. *E.g.*, *People v. Brown*, 2013 IL 114196, ¶ 73. Indeed, a belief that Weimer was being untruthful would actually serve to *justify* an extensive examination. See *Wesley*, 18 Ill. 2d at 155. The court's examination of Weimer did not betray a bias or prejudice, and certainly not to a level to indicate that the court had prejudged the outcome of the case.

¶ 44 Once again, because we find that the trial court's questioning of Weimer was not in error, we will not proceed any further in our plain error analysis.

¶ 45 CONCLUSION

¶ 46 The judgment of the circuit court of Henry County is affirmed.

¶ 47 Affirmed.