FIRST DIVISION
September 8, 2015

No. 1-13-2964

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 11 MC1 502245;
	)	TW250802
	)	
NYLUS STANTON,	)	Honorable
	)	Steven Bernstein,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Justices Delort and Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for DUI and failure to stop at a stop sign is affirmed where the trial court did not err in giving a non-IPI instruction to the jury addressing defendant's consciousness of guilt from his refusal to submit to sobriety and chemical testing, and the state presented sufficient evidence to support his conviction for DUI beyond a reasonable doubt.

¶ 2 Defendant, Nylus Stanton, appeals his conviction after a jury trial of driving under the influence (DUI) and failure to stop at a stop sign, and his sentence of 24 months' conditional

discharge. Defendant appeals only his conviction for DUI. On appeal, defendant contends (1) the trial court erred in using a non-Illinois Pattern Jury Instruction (IPI) that addressed whether to infer defendant's consciousness of guilt from his refusal to submit to sobriety or breathalyzer tests; (2) his trial counsel was ineffective for failing to object to the non-IPI instruction; and (3) he was not proved guilty beyond a reasonable doubt of DUI where he showed no impairment when he walked or spoke, and did not swerve when he drove. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court sentenced defendant on August 22, 2013. Defendant filed a notice of appeal on September 16, 2013. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. Mar. 20, 2009).

¶ 5 BACKGROUND

¶ 6 Defendant was charged with one count of DUI, three counts of failure to stop at a stop sign, and two counts of obstructing a peace officer. At his jury trial, Chicago police officer Tim Ronneberg testified that he and his partner, Officer Tegtmeier, were driving a marked police car westbound on West 14th Street in Chicago, Illinois, around 1:10 am on August 2, 2011. They saw a blue Ford pickup truck as they reached the intersection of West 14th Street and South Springfield Avenue. The truck failed to stop at the intersection, even though a stop sign was posted there. The truck then drove along West 14th Street and made a right turn on South Harding Avenue. Although there was a stop sign at this intersection, the truck did not make a stop. They followed the truck as it drove north on South Harding Avenue. A stop sign was

posted at the intersection of South Harding Avenue and West 13th Street, for all northbound traffic. As the truck neared the intersection, it slowed but did not come to a complete stop. After the truck failed to stop at the third stop sign, the officers activated their lights and pulled it over. As the truck pulled toward the curb between two parked cars, it hit the curb.

¶ 7 Officer Ronneberg stated that he has been a police officer for four and a half years, and received DUI training at the academy. As a police officer, he has made over 500 arrests for DUI. Officer Tegtmeier testified that he has been a Chicago police officer for six years and received training at the academy in DUI detection and arrests. He also has participated in more than 500 DUI arrests. Both officers stated that hitting the curb and disobeying traffic laws are signs of possible impairment.

¶ 8 Officer Ronneberg approached the passenger side of the truck while Officer Tegtmeier approached the driver's side. The passenger side window was down and they observed defendant in the driver's seat talking on his cell phone. Officer Tegtmeier tapped on the driver's side window to get defendant to roll down the window, but defendant instead exited the vehicle. Defendant continued to talk on his cell phone and Officer Tegtmeier asked him five times to end the conversation before defendant ended the call. Defendant was "agitated and hostile" and his eyes were bloodshot. He smelled strongly of alcohol as he spoke to the officers. Officer Tegtmeier asked defendant for his driver's license and defendant shuffled through the cards in his wallet, passing over his license twice before giving it to the officer. Officer Tegtmeier stated that difficulty finding one's license is also a sign of impairment.

¶ 9 The officers prepared to administer field sobriety tests but defendant stated, "no, no, I ain't going to do any of that." They placed defendant into custody because they "didn't feel that he was safe to drive" based on their observations. As Officer Tegtmeier escorted defendant to

the police car, defendant's pants fell down and they helped him pull up his pants. Officer Tegtmeier took defendant to the station while Officer Ronneberg drove defendant's truck to the station. Although defendant cooperatively exited the police car at the station, as they approached the door to the building defendant "stiffened his arms and began to pull away." He partially escaped the officer's grasp before the officer restrained him against a car.

¶ 10 When Officer Tegtmeier took defendant into the station, he requested that a breathalyzer operator come to test defendant. Officer Salih Ferozovic came to assist and when he saw defendant, he noticed that defendant's breath smelled strongly of alcohol and that he had bloodshot eyes. Defendant, however, refused to take the breathalyzer test. Officer Ferozovic noted that defendant was "using profanity, being loud, confused, crying." Officer Tegtmeier also observed defendant's behavior at the station and stated that in his training and experience, alternating moods is a sign of possible impairment.

¶ 11 At the station, Officer Ronneberg inventoried one of four 12-ounce beer cans still containing some liquid which he found in defendant's truck. The beer can was admitted into evidence without objection. Also, the officers' police car was equipped with a video camera which recorded their interaction with defendant during the traffic stop. No audio was recorded. The video showed defendant's truck run three stop signs before hitting a curb when he was pulled over by the officers. Officer Tegtmeier is talking to defendant before he ended his cell phone conversation, and defendant is shown shaking his head and refusing sobriety tests. The video also showed defendant's pants falling down as he was escorted to the police car.

¶ 12 Officer Ronneberg testified that based on his experience and training, defendant was under the influence. He based his opinion on defendant's inability "to drive appropriately, his inability to follow directions, simple instructions, that he had beer cans in the back of his truck

that still had liquid contents in them, his bloodshot, glassy eyes, the aroma of alcohol emitting from his breath, his agitated behavior, [and] his refusal to submit to standard field sobriety tests." Officer Tegtmeier testified that based on his experience and training, defendant was under the influence of alcohol on the evening he was arrested. He based his opinion on "the totality of the way he was handling his vehicle and conducting himself," the strong smell of alcohol on his breath, his bloodshot eyes, his alternating moods, the fact defendant's pants fell down during the stop, and that he continued to be loud and upset at the police station.

¶ 13 On cross-examination, Officer Ronneberg stated that the beer cans were placed in the truck recently because liquid was still inside and if the cans had been there a day or two they would be dry. He stated that alcohol itself has no odor, he did not know how much alcohol defendant had consumed, and that defendant was not swaying or slurring his speech, and did not appear disheveled. On cross-examination, Officer Tegtmeier stated that he issued tickets only for running stop signs, and not for straddling lines or improper lane usage. He stated that he did not ask defendant for an explanation of why his eyes were bloodshot or if they were usually bloodshot. Officer Tegtmeier also stated that he could not tell from the odor of alcohol on someone's breath how much he had to drink or how recently he drank the alcohol.

¶ 14 The parties stipulated that defendant refused to take a breath test. The State then rested and defendant moved for a directed verdict. The trial court denied the motion and defendant rested without presenting evidence.

¶ 15 The trial court held a jury instruction conference. The State requested a negative inference instruction, and offered a non-IPI instruction patterned after a Massachusetts instruction. Defense counsel did not object to the instruction, but did have an issue with the use of "may" in the last paragraph. He argued that he did not "think the word should be may. If

the previous sentence says such evidence is never enough, then you should not find the defendant guilty on such evidence alone rather than may because that could be confusing to a juror." The trial court asked defense counsel if he preferred the use of "shall or something to that effect" and defense counsel responded, "I would prefer will not or shall not but I'm willing to concede should not." The following jury instruction was read to the jury:

> "If the People have proved that the defendant did fail to submit to testing, you may consider whether such actions indicate a feeling of guilt by the defendant and whether, in turn, such feelings of guilt might tend to show actual guilt on this charge. You are not required to draw such inferences, and you should not do so unless they appear to be reasonable in light of all the circumstances of this case.
>
> If you decide that such inferences are reasonable, it will be up to you to decide how much importance to give them. But you should always remember that there may be numerous reasons why an innocent person might do such things. Such conduct does not necessarily reflect feelings of guilt. Please also bear in mind that a person having feelings of guilt is not necessarily guilty, in fact such feelings are sometimes found in innocent people.
>
> Finally, remember that, standing alone, such evidence is never enough by itself to convict a person of a crime. You should not find the defendant guilty on such evidence alone, but you may consider it in your deliberations, along with all the other evidence."

The trial court asked defense counsel whether he had "[a]ny problem with that? Do you just want to change that order?" Defense counsel answered, "All right, thank you, Judge."

¶ 16 The jury found defendant guilty of DUI, but not guilty of obstructing a peace officer. The trial court found defendant guilty of three counts of failure to stop at a stop sign.

Defendant moved for a new trial which the trial court denied. The trial court sentenced defendant to 24 months' conditional discharge. Defendant filed this timely appeal.

¶ 17 ANALYSIS

¶ 18 Defendant argues that the trial court abused its discretion in giving the jury a non-IPI instruction. Defendant acknowledges that he did not preserve this issue for review because he did not object to the instruction at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for review a party must object at trial and raise the issue in a posttrial motion). He urges this court to review the issue as plain error. Defendant, however, not only failed to object to the instruction, he affirmatively acquiesced to instructing the jury with the non-IPI instruction. Although he challenged the use of the word "may" in the last paragraph, the trial court changed the word to "should" and both parties agreed to the change. "Plain-error analysis applies to cases involving procedural default, * * * not affirmative acquiescence." *People v. Bowens*, 407 Ill. App. 3d 1094, 1101 (2011). Furthermore, a party cannot complain of error which he induced the court to make or to which he consented. *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). We find that defendant has affirmatively waived review of this issue on appeal.

¶ 19 Even on the merits, defendant cannot prevail under the plain error doctrine. To obtain relief under this doctrine, defendant must first show that an error occurred. *People v. Roman*, 2013 IL App (1st) 102853, ¶ 19. The trial court has discretion to instruct the jury with a non-IPI instruction. *People v. Simms*, 192 Ill. 2d 348, 412 (2000). The trial court, however, abuses its discretion if the instruction tendered is not an accurate statement of the law, or is confusing or misleading. *People v. Pollack*, 202 Ill. 2d 189, 211-12 (2002). As a general rule,

if an appropriate IPI instruction exists on a subject, the IPI must be used. *Simms*, 192 Ill. 2d at 412.

¶ 20 Defendant contends that it was error for the trial court to use the non-IPI instruction because it addressed an area of law already covered by the IPI, specifically by IPI Criminal 3.02, which instructs jurors that they may make reasonable inferences from circumstantial evidence. IPI Criminal 3.02 states that "Circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of the [defendant]. Circumstantial evidence should be considered by you together with all the other evidence in the case in arriving at your verdict." Although this instruction generally addresses how jurors should consider circumstantial evidence in a case, it does not specifically address the consideration of defendant's refusal to submit to alcohol testing. Therefore, the trial court did not err in giving the instruction so long as it was a clear and accurate statement of the law. See *Pollack*, 202 Ill. 2d at 211-12.

¶ 21 In *People v. Jones*, 214 Ill. 2d 187, 201 (2005), our supreme court noted that section 11-501.2(c)(1) of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/11-501.2(c)(1) (West 2010), "eliminates any advantage a DUI arrestee might hope to gain from refusing chemical testing." The section provides that if a DUI arrestee refuses to submit to such testing, evidence of his refusal is admissible in his prosecution for DUI. *Id.* See also *People v. Edwards*, 241 Ill. App. 3d 839, 843 (1993) (defendant's refusal to submit to blood testing is relevant and admissible in a DUI prosecution since it has "some tendency to indicate a consciousness of guilt"). The non-IPI instruction used here addressed whether defendant's refusal to submit to testing could be considered by jurors as defendant's consciousness of guilt. The instruction was an accurate statement of the law.

¶ 22 Defendant, however, argues that the instruction is neither simple nor brief, and it places undue emphasis on this particular type of circumstantial evidence "while ignoring other indications of intoxication." We find nothing in the instruction that is confusing or misleading. In fact, the instruction clearly instructs the jurors not to place undue emphasis on this particular type of circumstantial evidence. Although the instruction consisted of three paragraphs, two of those paragraphs cautioned the jury that such evidence could indicate something other than guilt and that such evidence alone is not sufficient to convict defendant of DUI, both beneficial to defendant. The trial court did not err in giving the non-IPI instruction to the jury.

¶ 23 Since we find no error in giving the instruction to the jury, defendant's alternate argument that his trial counsel was ineffective for failing to object to the instruction likewise has no merit. See *People v. Sharp*, 2015 IL App (1st) 130438, ¶¶ 81-83 (since the instruction given to the jury was proper, defense counsel's failure to object to the instruction did not prejudice defendant and his claim of ineffective assistance of counsel cannot stand).

¶ 24 Defendant's final contention is that the State failed to prove him guilty of DUI beyond a reasonable doubt. In a challenge to the sufficiency of the evidence, the relevant inquiry is 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. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). A reviewing court will not overturn a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of defendant's guilt. *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007).

¶ 25 Defendant does not dispute that he was operating his vehicle, only that he was impaired while doing so. Pursuant to section 11-501(a)(2) of the Vehicle Code, a person "shall not drive or be in actual physical control of any vehicle within this State while under the influence of

alcohol." 625 ILCS 5/11-501(a)(2) (West 2010). Defendant is proved guilty of DUI if the State shows that he was under the influence of alcohol to such a degree that he was incapable of driving safely. *People v. Gordon*, 378 Ill. App. 3d 626, 631-32 (2007).

¶ 26 Whether a person is intoxicated is a question for the trier of fact after assessing the credibility of the witnesses and the sufficiency of the evidence. *People v. Janik*, 127 Ill. 2d 390, 401 (1989). Testimony that defendant's breath smelled of alcohol and that his eyes were bloodshot is relevant and admissible evidence in a DUI prosecution. *People v. Elliott*, 337 Ill. App. 3d 275, 281 (2003). Also relevant is evidence that defendant refused to submit to chemical testing. *People v. Garriott*, 253 Ill. App. 3d 1048, 1052 (1993) (defendant's refusal is circumstantial evidence of his consciousness of guilt). "A DUI conviction may be sustained based solely on the testimony of the arresting officer, if credible." *Janik*, 127 Ill. 2d at 402.

¶ 27 Officers Ronneberg and Tegtmeier testified that they had participated in more than 500 DUI arrests, and both received DUI training at the academy. In the early morning hours of August 2, 2011, they were driving in their police car when they noticed that the truck driven by defendant ran three stop signs. They activated their lights and as the truck pulled over it hit the curb. Defendant exited the vehicle and had to be told five times to end his cell phone call. The officers also observed that defendant was agitated and hostile. His breath smelled strongly of alcohol and his eyes were bloodshot. He had difficulty finding his driver's license. Defendant refused to submit to sobriety tests and the officers took him into custody because they believed he could not drive safely in his condition. As he was escorted to the police car, defendant's pants fell down. Four nearly empty beer cans were found in defendant's truck. Video from a camera in the police car corroborates the officers' testimony.

¶ 28 Furthermore, Officer Ferozovic testified that when he saw defendant at the police station, he noticed that defendant's breath smelled strongly of alcohol and that he had bloodshot eyes. Defendant refused to take the breathalyzer test at the station. Officer Ferozovic noted that defendant was "using profanity, being loud, confused, crying." Officer Tegtmeier also observed defendant's behavior at the station and stated that in his training and experience, alternating moods is a sign of possible impairment. The officers testified that in their experience, the totality of this evidence indicate that defendant was under the influence of alcohol. We find that the officers' testimony, viewed in the light most favorable to the State, supports defendant's conviction of DUI beyond a reasonable doubt. See *Gordon*, 378 Ill. App. 3d at 632 (scientific proof of intoxication not necessary where arresting officer provides credible testimony).

¶ 29 Defendant disagrees, arguing that it is reasonable to infer that he failed to stop at the stop signs because he was talking on his cell phone, and that he never swerved while driving, and was able to park his car without incident. He also argues that the smell of alcohol on one's breath does not indicate how recently alcohol was consumed, and that bloodshot eyes could be a sign of fatigue. He further argues that the beer cans found in defendant's truck only indicated that "someone, at some point in the recent past, had consumed four cans of beer." However, the trier of fact is responsible for determining the credibility of witnesses and the weight to be given their testimony, resolving any inconsistencies or conflicts in the evidence, and drawing reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). It is not obligated to accept the defendant's version of the events. *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001). The jury found the officers to be credible witnesses and, as discussed above, the evidence supports defendant's conviction of DUI beyond a reasonable doubt.

¶ 30 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 31 Affirmed.