FIFTH DIVISION
July 24, 2015

No. 1-14-0063

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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.	)	No. 37036886
	)	
FABRAY COLLINS,	)	Honorable
	)	Linzey D. Jones,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment affirmed over defendant's challenge to the sufficiency of the evidence, and his contention that the circuit court committed reversible error by defining the concept of reasonable doubt and reducing the State's burden of proof.

¶ 2 Following a jury trial, defendant Fabray Collins was convicted of driving with an alcohol concentration in his breath of .08 or more, and sentenced to 24 months of conditional discharge. On appeal, defendant challenges the sufficiency of the evidence to sustain his conviction, and contends that the court erroneously instructed the jury on the State's burden of proof, which, he claims, is a structural error requiring reversal.

¶ 3 Defendant was charged with driving under the influence of alcohol (DUI), and driving while the alcohol concentration in his blood or breath was .08 or more. At his jury trial, Illinois State Trooper Matthew Renderman testified that at 2:04 a.m. on August 27, 2011, he was travelling southbound in a marked police vehicle on Interstate 94 near Michigan City Road, and observed defendant driving a SUV. After seeing defendant swerve over the lane line five times and come very close to striking a passing vehicle, Trooper Renderman pulled defendant over at 159th Street, walked up to his car, and asked defendant for his driver's license and proof of insurance. Defendant provided such, but during this exchange Trooper Renderman noticed that defendant's breath smelled of alcohol and that his eyes were glassy and blood shot, which indicated the possibility that defendant was under the influence of alcohol.

¶ 4 Trooper Renderman testified that he asked defendant whether he consumed alcohol, and he stated that he was falling asleep behind the wheel. The second time he asked that question, defendant said he was tired, and the third time, defendant told him that he had consumed two beers, and was coming from a reunion at 35th Street and Archer Avenue.

¶ 5 Trooper Renderman then asked defendant to exit the vehicle to perform standard field sobriety tests. He had defendant perform the walk-and-turn test which required defendant to walk with one foot in front of the other, and while he was giving defendant the instructions for the test, defendant had difficulty holding his balance, but he passed the test. When Trooper Renderman asked defendant to perform the one-leg stand test, defendant told him that he was unable to do so due to arthritis, and the trooper reported that he was polite and good natured at all times.

¶ 6 Trooper Renderman further testified that he asked defendant if he consumed any other alcohol, and he responded that he also had a Long Island iced tea. He then placed defendant

under arrest, and at the police station, read him the warnings to motorists. He then observed him for the next 20 minutes to make sure he did not ingest anything or vomit which would affect the validity of a breathalyzer test.

¶ 7 Trooper Renderman testified that he is certified to administer the breathalyzer test, and the machine used does a self-check each time it is operated to ensure that it is working properly. The Trooper noted that the machine he was going to use to conduct the breathalyzer test last conducted a self-accuracy test on August 1, 2011.

¶ 8 After the 20-minute period, the trooper asked defendant to perform the breathalyzer test, and he did at 3:24 a.m. This test indicated that the alcohol concentration in defendant's breath was .135, which was over .08, and considered a DUI. Trooper Renderman testified that if a sufficient reading is made, he is not required to ask defendant to submit to more than one breathalyzer test. Based on his personal and professional experience, Trooper Renderman believed defendant was under the influence of alcohol.

¶ 9 Illinois State Trooper Dennis Sheldon testified that he is a breath alcohol technician, and his responsibilities include calibrating, certifying, maintaining, and repairing any breath alcohol instruments. The breathalyzer machines automatically certify themselves for accuracy the first day of every month, and he periodically comes out to personally check them every 62 days. He did not come out in 2011 to certify the machine in question, but there is no difference between his certification and the automatic certification. The certification for accuracy involves providing a sample of .082 of dry gas, which is done either automatically or by a technician. The dry gas sample is a mixture of nitrogen and ethanol, and if the machine does not properly test it, the machine will flag itself so that it is taken out of service.

¶ 10 The defense then called Bobby Ray Trice, who is a minister and has been a friend of defendant for 40 years. On August 27, 2011, he saw defendant at their high school reunion banquet. Defendant arrived there at 10:15 p.m., and Trice did not notice anything unusual about defendant's eyes, or his speech. Trice testified that defendant was sober, and that he only saw him drink one beer before he left at 11:45 p.m. At that time, there was nothing unusual about defendant's gait.

¶ 11 Trice acknowledged that he did not see defendant before 10:15 on the evening in question, and did not know if he had anything to drink before that time. Trice also did not see defendant after 11:45 p.m.

¶ 12 During closing arguments, counsel argued that the State's case rests on the results of a single breath test, and that nothing done scientifically is done once, but, rather, it is the essence of science that there be replication. The State objected, and the court sustained the objection. Counsel then presented a similar argument, and the court again sustained the State's objection. Counsel then argued:

> "You decide what's proof beyond a reasonable doubt. You decide. Nobody here is going to comment on what is needed to prove reasonable doubt. That's your decision. You decide whether or not there should have been a second test. That's your right. That's why you are here."

The State objected, and the court sustained it. Counsel then stated that it is the jury's right to decide whether there is reasonable doubt. The court then interrupted counsel and stated:

> "No, I think that counsel has forced the Court to say something to the jury at this point.

> The law does not require any sort of additional test. This is what the law – the test that was given is the test that is required by law. No additional tests are required by law."

Counsel then stated that the law requires you to be convinced beyond a reasonable doubt and if that takes more than one test, then it takes more than one test. The State objected again and requested a side bar. The court responded, "[n]o, I don't think we need a sidebar. You continue in this way, there will be a problem."

¶ 13 At the close of evidence and argument, the jury found defendant not guilty of DUI, but guilty of driving while having an alcohol concentration in his breath of more than .08. Defendant filed a motion for a new trial, alleging, in relevant part, that the court committed reversible error when it refused to allow him to argue that a single breath test reading in excess of .08 was insufficient to prove his guilt beyond a reasonable doubt. He further alleged that the court committed reversible error when it instructed the jury during closing argument that one breath test result in excess of .08 was sufficient evidence to constitute proof beyond a reasonable doubt, and that the State was not required to prove anything more than a single breath test result in excess of .08.

¶ 14 Counsel also told the court that two breathalyzer tests were required at one point in Illinois and that it is simply not scientific to do anything without the benefit of replication, asserting that science necessitates two tests. Counsel alleged that historically, when two tests were conducted, there was never the same result, and that makes sense because blood alcohol concentrations tend to go up and down. Counsel asserted that it is difficult to show what someone's blood alcohol concentration is at the time they are driving, and that a single test is

meaningless. Counsel further asserted that he should have been allowed to argue this to the jury and that the court threatened him with contempt when he was arguing the standard of proof. Counsel noted that there is a State Police regulation requiring only a single breathalyzer test, but the reasons for that are economics and because the results would not be the same if there were two tests. This regulation, however, does not trump the fact that the case has to be proven beyond a reasonable doubt. Counsel maintained that he has the right to suggest to the jury that there should be a second test to prove defendant guilty beyond a reasonable doubt.

¶ 15 The State responded that the evidence sufficiently showed that defendant was driving with a blood alcohol concentration of .135, and that a proper foundation was laid for the breathalyzer report. The State further noted that the court did not comment on what reasonable doubt means, but, rather, merely clarified the law so there was no confusion on it.

¶ 16 Counsel replied that the court's instruction during closing argument was a "flat out statement, that you are about to tell them something that they are supposed to follow." Counsel asserted that it is not their business to decide what the jurors are thinking when it comes to reasonable doubt. The jurors are entitled to find that one test is insufficient to prove defendant's guilt beyond a reasonable doubt.

¶ 17 The court denied defendant's motion. In doing so, the court noted that counsel did not bring in any expert testimony and "wants to argue based on his own assessment of the law the science but without any evidence in the record." The court stated that counsel was asking the jury to "purely speculate" based on argument which had no support in the record where no expert testimony was presented calling into question the validity of the test. The court also noted that it

did not specifically address the reasonable doubt standard, but, rather, was concerned that counsel was asking the jury to speculate without any supporting expert testimony.

¶ 18 On appeal, defendant first challenges the sufficiency of the evidence to sustain his conviction. He contends that there is no authority for the proposition that the State has met its burden by proving the breathalyzer test showed a reading of .08 or more or that such proof is all the law requires.

¶ 19 When defendant challenges the sufficiency of the evidence to sustain his conviction the proper standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). This standard recognizes the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt of guilt. *Campbell*, 146 Ill. 2d at 375. For the reasons that follow, we do not find this to be such a case.

¶ 20 To sustain defendant's conviction, the State was required to show that he was driving a vehicle while the alcohol concentration in his breath was .08 or more. 625 ILCS 5/11-501(a)(1) (West 2012). Here, the evidence shows that defendant had three alcoholic beverages and then got in his car. While he was driving his vehicle at 2:04 a.m., a State Trooper observed him weaving out of his lane numerous times, almost striking a passing vehicle. Defendant was pulled over, and the trooper observed that his breath smelled of alcohol and that his eyes were bloodshot and glassy. Defendant took a breathalyzer test at 3:24 a.m. at the police station, which revealed an

alcohol concentration of .135, which is well over the .08 level specified in the statute. Accordingly, there was sufficient evidence for the jury to conclude that defendant was driving while the alcohol concentration in his breath was .08 or more. *People v. Caruso*, 201 Ill. App. 3d 930, 943 (1990); 625 ILCS 5/11-501(a)(1) (West 2012).

¶ 21 Defendant, however, contends that the State was required to prove that he was driving a vehicle at the time the alcohol concentration in his blood was .08 or more. The fact that defendant was tested an hour and twenty minutes later does not establish that his alcohol concentration was less than .08. *Caruso*, 201 Ill. App. 3d at 942-43; *People v. Thorson*, 145 Ill. App. 3d 764, 766-67 (1986). In addition, the minimum 20 minute delay requirement in administering the breathalyzer test is to ensure the accuracy of it. 625 ILCS 5/11-501.2 (West 2012); 20 Ill. Adm. Code § 1286.310 (2015). This is a strict liability offense where the State was only required to prove that defendant was driving and his alcohol concentration was .08 or more (*Thorson*, 145 Ill. App. 3d at 767), and did so on the evidence presented and the inferences therefrom. In sum, the totality of the circumstances provided sufficient evidence for the jury to conclude that defendant was driving a vehicle while the alcohol concentration in his breath was .08 or more (*Caruso*, 201 Ill. App. 3d at 943), in violation of the statute.

¶ 22 Defendant next contends that the circuit court committed reversible error when it prohibited counsel from arguing during closing argument that a single breath test reading in excess of .08 was insufficient to prove defendant guilty beyond a reasonable doubt while at the same time instructing the jury that the test that was given was the test required by law and that no additional tests were required. Defendant asserts that in doing so the court effectively defined the concept of reasonable doubt, reduced the State's burden of proof, directed the jury to presume

from a single test result that the concentration of alcohol in his blood or breath at the time of driving was .08 or more, and committed a structural error requiring reversal.

¶ 23 We observe that section 11-501.2 of the Illinois Vehicle Code (625 ILCS 5/11-501.2(a) (West 2012)) provides that the chemical analysis of a person's breath *to be considered valid* under the provisions of this section shall be performed according to the standards promulgated by the Department of State Police (State Police). (Emphasis added.) According to the State Police standards, a breath test shall consist of *only one breath analysis reading*, based on the instrument's internal operational calculations. (Emphasis added.) 20 Ill. Adm. Code 1286.310 (eff. June 30, 3004). The court thus correctly informed the jurors that the law provides for only one test, and properly sustained objections to counsel's closing argument that more than one test was required to be deemed valid.

¶ 24 This provision, contrary to defendant's contention, does not reduce the State's burden of proof, nor run afoul of the Supreme Court's ruling in *In re Winship*, 397 U.S. 358, 364 (1970), that defendant has a constitutional right to be proved guilty of the charged offense beyond a reasonable doubt. Here, the court did not reduce the State's burden of proof by correcting counsel's misstatement of the law.

¶ 25 The circuit court correctly pointed out that defendant was presenting argument that was unsupported by the record, where no expert testimony was presented indicating that more than one test was required to deem the breathalyzer test result valid. *People v. Carlson*, 98 Ill. App. 3d 873, 877 (1981). The expert testimony that was presented indicated that the breathalyzer machine is certified monthly for accuracy, and would be removed from service if it was not accurate. No such inaccuracy was established at trial, nor expert testimony presented to establish

the argument set forth by defense counsel. Accordingly, we find no error by the court in sustaining the objections made by the State regarding those portions of defendant's closing argument which stated, without foundation, that science calls for more than one test in order for the results to be valid.

¶ 26 Furthermore, and contrary to defendant's further contention, the court's admonishment to the jury during closing argument did not suggest to the jury that it could overlook the fact that the test was not taken while defendant was driving his car. The court merely corrected counsel's misstatement of the law by informing the jury that the law only requires one test. See 625 ILCS 5/11-501.2(a) (West 2012); 20 Ill. Adm. Code 1286.310 (eff. June 30, 3004). The court did not state that the breathalyzer test result proves that defendant's alcohol concentration in his breath at the time of driving was .08 or more.

¶ 27 Defendant, nonetheless, cites *People v. Turman,* 2011 IL App (1st) 091019, ¶25, in support of his contention that the circuit court defined reasonable doubt. In *Truman*, 2011 IL App (1st) 091019, ¶25, the court improperly instructed the jurors that they should "collectively determine" what reasonable doubt means. Here, by contrast, the court did not advise the jurors such, but rather, corrected counsel's unsupported misstatement of the law that science requires more than one test to establish defendant's guilt beyond a reasonable doubt. This does not equate to defining reasonable doubt or reducing the State's burden of proof. Moreover, the court's admonishment in question did not even mention reasonable doubt to the jury or improperly define it. *People v. Downs*, 2015 IL 117934, ¶19. Accordingly, we find no reversible or structural error warranting reversal.

¶ 28 Defendant also contends, for the first time in his reply brief, that he was deprived of his right to a jury trial where the court essentially directed the jury's finding. Since this issue was not raised in the opening brief, it is waived and may not be raised in the reply brief, in oral argument or on petition for rehearing. *People v. Polk*, 2014 IL App (1st) 122017, ¶49, citing Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Defendant has also not argued for plain error review, and has therefore forfeited it. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010).

¶ 29 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.