2015 IL App (4th) 130641-U

NO. 4-13-0641

FILED
February 24, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DARIUS M. ERVING,	)	No. 12CF276
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pope and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant forfeited any issue pertaining to the exclusion of evidence regarding his intoxication by failing to make an offer of proof or otherwise preserve the claim of error.

¶ 2 Following a trial, a jury found defendant, Darius M. Erving, guilty of resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2010)). Defendant appeals, asserting that the trial court erred when it refused to admit evidence of his intoxication. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 21, 2012, the State charged defendant by information with resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2010)). The following evidence was presented at defendant's jury trial.

¶ 5 Chris Chambers, a police officer for the city of Champaign, testified that at approximately 2 a.m. on February 19, 2012, he was patrolling outside the "big bar district area."

Officer Chambers observed a large crowd at Hometown Pantry, located at the 700 block of South Sixth Street. As he approached the area, two males ran from the crowd and he saw another man lying on the ground who appeared to have been battered. He ordered the two men to stop but they did not comply. Officer Chambers and another officer pursued the men.

¶ 6 Justin Prosser, a police officer for the city of Champaign, testified he was on patrol at approximately 2 a.m. on February 19, 2012. He was investigating a "hit and run" in the 600 block of South Sixth Street when he heard of the fight at Hometown Pantry over his police radio. Officer Prosser began walking south toward Hometown Pantry when he saw a man running north who was being chased by two police officers. Officer Prosser identified the man as defendant. As defendant approached, Officer Prosser yelled at him to stop. Officer Prosser testified defendant "stopped suddenly and fell down." Officer Prosser stated, "it looked like he was trying to get back up, so I got on top of him" and said, "police, stay down." Defendant did not obey his command to stay down. According to Officer Prosser, defendant "was continuing to try to get back up. I was trying to get a good grip on him. During the, I guess, struggle, he kind of lifted his head back up and the back of his head hit the top of my lip." Officer Prosser testified "it hurt" when defendant's head hit his face, but it was not incapacitating. However, defendant was able to get away from him and continue running. Officer Prosser chased after defendant and eventually apprehended him. Officer Prosser testified he was wearing his standard police uniform at the time of the incident.

¶ 7 Defendant testified on his own behalf. He stated that in the early morning hours of February 19, 2012, he witnessed a physical altercation between four people. Defendant testified that two police officers showed up at the scene of the altercation and started spraying people with mace, so he ran.

¶ 8 Prior to witnessing the altercation, defendant testified he drank "two different pints of liquor" with a friend. When defense counsel asked whether defendant could be more specific as to what he was drinking, the prosecutor objected on the basis of relevance and the trial court sustained the objection.

¶ 9 Defendant further testified that after he had been running for five or six seconds, he "ran into *** one of the officers," whom he identified as Officer Prosser. Defendant stated that when he made contact with Officer Prosser, he did not realize he was a police officer because it was a "quick collision." Defendant testified he did not notice Officer Prosser was in uniform. After making contact with Officer Prosser, defendant stated he "was scared" and took off running again. Counsel then asked defendant, "[a]t some point in time, did you realize that this person that you made contact with was a police officer?" Defendant responded, "I assumed 'cause it happened like—I don't know. I was, I was intoxicated, so—." At this point, the prosecutor objected and a sidebar was held off the record. At the conclusion of the sidebar, the trial court sustained the objection and instructed the jury to "disregard that last response."

¶ 10 During the jury instruction conference, the prosecutor proposed giving a modified jury instruction that voluntary intoxication was not a defense to the charge of resisting a peace officer. Defense counsel objected, asserting he did not raise voluntary intoxication as an affirmative defense because voluntary intoxication was not a defense to a general-intent crime. The court sustained the objection, stating as follows:

> "At this point, I don't believe there's enough evidence before the jury to make it an issue. I think you're getting into the dangerous proposition of don't think about pink elephants when they're not in the case, so the parties aren't going to be permitted to

> argue anything about intoxication or what effect it played in these events."

¶ 11 Thereafter, defendant was found guilty of resisting a peace officer.

¶ 12 On March 14, 2013, defendant filed a posttrial motion, asserting that "evidence of [his] voluntary intoxication ought to have been allowed in order to discuss, and potentially defeat the State's required proof with respect to the element of KNOWLEDGE." At the hearing on the motion, the trial court stated as follows:

> "There is a suggestion here that the Defendant wished to introduce the question of voluntary intoxication as it pertained to his knowledge that the individual was a law enforcement officer. [Defendant] chose to exercise his right to testify. He had answered in his testimony that he had earlier with respect to the altercation taking place seen two officers that showed up. He was able to describe the number of people involved in the altercation, and he also testified that while he didn't realize they were peace officers later on he indicated he assumed they were so any suggestion that his intoxication was of such a nature that he wouldn't have known they were police officers is disputed by his own testimony and again voluntary intoxication is not relevant as a defense for the reasons stated forth in the statute and as the Court previously had ruled so the motion *** is denied."

The court then sentenced defendant to 18 months' probation and 27 days in jail.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant asserts that the trial court erred when it refused to admit evidence of his intoxication. Specifically, he asserts evidence of his intoxication was relevant to the issue of whether he recognized Officer Prosser's status as a police officer—an element the State was required to prove. See 720 ILCS 5/31-1(a) (West 2010) (requiring the State to prove a defendant knowingly restricted or obstructed the performance of one *known* to be a police officer). The State contends that defendant has forfeited the issue because he failed to preserve the issue for appeal. Specifically, the State argues defendant did not make a record of what occurred at the sidebar following the State's objection to defendant's testimony that he "was intoxicated"—at the conclusion of which the court sustained the State's objection and instructed the jury to "disregard that last response."

¶ 16 "Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion." *People v. Caffey*, 205 Ill. 2d 52, 89, 792 N.E.2d 1163, 1188 (2001).

¶ 17 Here, we do not know the basis of the State's objection to defendant's testimony that he "was intoxicated" or the trial court's rationale in sustaining the objection since no transcript of the sidebar conference appears in the record. The basis of the State's objection to defendant's testimony that he was intoxicated could have been that it was given without an adequate foundation. If that was the State's objection, it would have been well-taken as defendant had not testified about the amount or type of alcohol he had consumed. That is certainly one possible scenario. However, without knowing the specifics of the State's objection or the court's basis for sustaining the objection, we are left to speculate as to what occurred in court and whether any error occurred.

¶ 18 "The responsibility for preserving a sufficiently complete record of the proceedings before the trial court rests with the defendant, as the appellant." *People v. Banks*, 378 Ill. App. 3d 856, 861, 883 N.E.2d 43, 48 (2007). "Where the record on appeal is incomplete, any doubts arising from that incompleteness will be construed against the defendant [citation] and every reasonable presumption will be taken in favor of the judgment below [citation]." *Id.* Given the state of the record, we must presume the trial court's decision to sustain the objection to defendant's testimony was proper.

¶ 19 Defendant also asserts the trial court erred when it sustained the State's relevance objection to the question, "When you say you were drinking two different pints of liquor, can you be any more specific for the jury as to what you were drinking?" Again, he argues that evidence of his drinking to intoxication would have been relevant to the issue of whether he knew at the time of the incident Officer Prosser was a police officer. "Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *People v. Patterson*, 192 Ill. 2d 93, 115, 735 N.E.2d 616, 629 (2000).

¶ 20 "When a defendant claims that he has not been given the opportunity to prove his case because the trial court improperly barred evidence, he 'must provide [the] reviewing court with an adequate offer of proof as to what the excluded evidence would have been.' " *People v. Pelo*, 404 Ill. App. 3d 839, 875, 942 N.E.2d 463, 493-94 (2010) (quoting *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 773, 771 N.E.2d 966, 970 (2002)). "An adequate offer of proof is the key to preserving a trial court's error in excluding evidence." *People v. Thompkins*, 181 Ill. 2d 1, 10, 690 N.E.2d 984, 988-89 (1998) (citing *People v. Andrews*, 146 Ill. 2d 413, 420-21, 588 N.E.2d 1126, 1131 (1992)). "The purpose of an offer of proof is to disclose to the trial

judge and opposing counsel the nature of the offered evidence and to enable a reviewing court to determine whether exclusion of the evidence was proper." *Andrews*, 146 Ill. 2d at 421, 588 N.E.2d at 1131. "The failure to make an adequate offer of proof results in a waiver of the issue on appeal." *Id.*

¶ 21 In this case, assuming, *arguendo*, the relevance of defendant's intoxication, defendant did not make an offer of proof as to the specific aspects of his intoxication evidence. He testified to drinking "two different pints of liquor" with a friend but it is unclear when the drinking occurred, the period of time the alcohol was consumed, the type of liquor defendant consumed, or the quantity defendant consumed (as opposed to the amount consumed by his friend). Nor is there any evidence in the record via an offer of proof of the effects of the alcohol defendant now claims he suffered. In short, defendant failed to make the necessary offer of proof which would allow this court the ability to judge the relevance of the proposed evidence. Therefore, we cannot conclude the trial court's decision to sustain the State's relevance objection was an abuse of discretion.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 24 Affirmed.