2016 IL App (2d) 150351-U
Nos. 2-15-0351 & 2-15-0356 cons.
Order filed January 22, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DALE MORRISSEY, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of Lake County. Nos. 14-DT-293 14-TR-14163 Honorable David C. Lombardo, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved defendant guilty of two counts of driving under the influence of alcohol beyond a reasonable doubt based upon the same transactional facts but failed to prove defendant guilty of illegal transportation of alcohol beyond a reasonable doubt. The count regarding a blood alcohol level was merged into the general prohibition of DUI by the single sentence delivered by the trial court. Accordingly, we reverse the conviction for transportation of alcohol and affirm the conviction for driving while under the influence of alcohol.

¶ 2 Defendant, Dale Morrissey, was charged by citation and complaint with two counts of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(1),(2) (West 2012) (case No. 14-DT-293)), and with illegal transportation of alcoholic liquor in a motor vehicle (625

ILCS 5/11-502 (West 2012) (case No. 14-TR-14163)). The cases were tried together without a jury, and the trial court convicted defendant of all three offenses. Defendant filed an appeal for the DUI convictions (No. 2-15-0351) and a separate appeal for the illegal transportation of alcohol conviction (No. 2-15-0356), which we consolidated for review. We affirm in part and reverse in part.

¶ 3 I. BACKGROUND

¶ 4 At trial, Erica Corbine-Weichmann testified that her kitchen has a big picture window that faces a lake. On February 18, 2014, the roads in her neighborhood had been plowed and salted and were ice free, but there was a snowbank about "four feet high" that blocked access to the lake. Corbine-Weichmann happened to be looking out of her kitchen window between 5:30 and 6:00 p.m., when she observed a dark blue van on the snowbank. She saw defendant exit the driver's side door and stumble through the snow, the pile, and then he walked on the road, and "he was stumbling." She did not see anyone else exit the van. Corbine-Weichmann testified that "[Defendant] couldn't even walk. He was falling over and stumbling." Corbine-Weichmann did not see the van crash. She called 911 to report the incident. Within three or four minutes after she noticed the van, Corbine-Weichmann observed four to five people arrive at the scene with a tow truck, an SUV, and a golf cart, and she saw defendant leave in the golf cart.

¶ 5 Tania Anderson, a neighbor of defendant's, saw defendant's van drive by her house between 5:30 and 6:00 pm. Anderson and her son heard squealing tires. Anderson did not see the van crash into the snowbank, but her son did. Anderson and her son took their truck to check on defendant. She noticed defendant was stuck in the snowbank. She knew defendant had a bad leg and she and her son helped defendant out of the snowbank.

¶ 6 Defendant told Anderson that he wanted to use his truck to pull his van out. Although

Anderson did not see defendant consume any alcohol, she asked for his car keys because "[h]e seemed intoxicated at the time." About 15 minutes after the accident, another neighbor arrived and drove defendant home in a golf cart. The police then arrived at the scene. An hour after taking defendant's keys, Anderson remembered they were in her pocket and she gave them to Lake County sheriff's deputy James Yanecek.

¶ 7 Deputy Yanecek had been dispatched to defendant's home earlier that day, around 3:30 p.m., in response to a domestic dispute. Deputy Yanecek believed that, at that time, defendant appeared intoxicated. He described him as having red, glassy eyes and a strong odor of alcohol emanating from his breath. Defendant told Deputy Yanecek that he drank some beers because he was upset over the breakup with his girlfriend. Other than the odor of alcohol, Deputy Yanecek included no other details about defendant's intoxication in his initial accident report because he did not find it relevant to the domestic incident. Before Deputy Yanecek left defendant's home, he told defendant that he should probably stop drinking.

¶ 8 Deputy Yanecek testified that he responded to the 911 dispatch at 5:44 p.m. He described the main roads as fine, but the gravel side road maintained by the township had snow and was ice-covered. Deputy Yanecek noted that there was a dark blue van in a snowbank, and the van was just short of falling into the lake. Deputy Yanecek recognized the van as the one which had been parked in defendant's driveway earlier that day. He saw three beer bottles in the center console area inside the van, one of which was open. Neighbors told Deputy Yaneck that someone drove defendant home in a golf cart. Deputy Yanecek went to defendant's house and met him at the doorway. Deputy Yanecek did not know that defendant suffered from a leg disability.

¶ 9 Deputy Yanecek believed that defendant was "extremely intoxicated." He described

defendant as having red, bloodshot eyes and a strong odor of alcohol on his breath. Defendant's clothes were wet, and defendant did not have his cane. To Deputy Yanecek, defendant appeared more intoxicated than he did when he first saw defendant earlier that day. Before, defendant was able to carry on a conversation even though he was upset over the situation with his girlfriend. Subsequent to that, defendant had trouble maintaining his balance and he mumbled his speech; at times, he was unintelligible. Defendant admitted to Deputy Yanecek that he drove the van, drank some beers, and had two to three shots of Jameson whiskey between 5 a.m. and noon.

¶ 10 Because Deputy Yanecek learned defendant had fallen, he asked defendant to be checked by the medical technicians who had arrived by ambulance. Defendant agreed. While defendant was in the ambulance, defendant told Deputy Yanecek that the van "just didn't turn when he went to turn." Deputy Yanecek did not have defendant perform any sobriety tests due to weather and safety concerns about defendant's medical condition. Deputy Yanecek admonished defendant of his *Miranda* rights before he was transported by ambulance to the hospital.

¶ 11 Defendant did not refuse the blood draw and urine sample while at the hospital. The result of the blood test showed a blood alcohol content (BAC) of 0.204. The legal limit is below 0.08. See 625 ILCS 5/11-501(a)(1) (West 2012).

¶ 12 In his defense, defendant testified that he drove his van onto the side of the road around 5:30 p.m. on February 18, 2014. He did not realize the corner was sheer ice and he could not stop the van as he turned. His van then picked up speed going downhill, and he drove it into the snow. Defendant stated that, when he stepped out of his van, the snow nearly reached his knees and the depth of the snow made it difficult for him to walk. Anderson offered to take the keys to defendant's van so she could give them to a neighbor with a tow truck. Defendant claimed, however, that Anderson gave them to his ex-girlfriend, who then stole the photography

equipment from his van.

¶ 13 Defendant stated that he drank several days before the incident and denied drinking earlier that day or being impaired at the time of the accident. He testified that he drank beers after the accident and denied telling Deputy Yanecek that he started drinking at 5 a.m. Defendant further denied that he volunteered to go the hospital. He believed that it was mandatory. His blood was drawn at the hospital about 8:30 p.m. Defendant denied giving the police or the hospital permission to draw his blood.

¶ 14 As to the evidence regarding the charge of illegal transportation of alcohol, the court found that the State had met its burden beyond a reasonable doubt. The court stated:

> "Everyone has admitted that they either saw the defendant driving or with the defendant's own testimony that he drove that van, he drove it into the snow, and when the van was found, photographs were taken showing a beer bottle on its side, a beer bottle open and then a closed bottle."

¶ 15 As to the evidence regarding DUI, the judge noted Anderson's testimony that she wanted to take defendant's keys because she feared that defendant was intoxicated and should not be driving. The judge cited Deputy Yanecek's opportunities to observe defendant twice that day and that both times, Deputy Yanecek saw signs that defendant had been intoxicated. The court further rejected defendant's testimony that he went to his neighbor's home after the accident. Noting that it was possible for defendant to have another drink when he got home after the accident, the judge stated: "I am convinced by the evidence that you were impaired at the time that you were behind the wheel." The fact that defendant's BAC was 0.204, more than twice the legal limit, further supported the conclusion that defendant was impaired when he was driving the van. Accordingly, the court found defendant guilty of the offense of driving under the

influence of alcohol both because of the blood alcohol, which was in excess of .08, but also based on the fact that he was too impaired to safely operate his motor vehicle.

¶ 16 Following sentencing, defendant timely appeals.

¶ 17 II. ANALYSIS

¶ 18 A. Sufficiency of the Evidence

¶ 19 Defendant first contends that the State failed to prove he was under the influence of alcohol pursuant to section 11-501(a)(2) of the Illinois Vehicle Code (625 ILCS 5/11-501(a)(2) (West 2012)) at the time he was driving his van.

¶ 20 Where there is a challenge to the sufficiency of the evidence, the appropriate standard of review 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.' " (Emphasis omitted.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We may not substitute our judgment for that of the factfinder on questions involving the weight of the evidence, the credibility of the witnesses, or the resolution of conflicting testimony. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). We will reverse a conviction only when the evidence is so improbable, unreasonable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 21 To sustain a conviction under section 11-501(a)(2) of the Vehicle Code, the State must prove that the defendant was (1) in actual physical control of a vehicle and (2) under the influence of alcohol at the time. 625 ILCS 5/11-501(a) (2) (West 2012).

¶ 22 Defendant does not dispute he physically controlled his van. Rather, he contends that there was no credible evidence to prove he was under the influence of alcohol at the time.

Defendant argues that there was no evidence of his consumption of alcohol that day other than his own statements that he had no alcohol until after the accident.

¶ 23 To be "under the influence of alcohol," a defendant must be "under the influence to a degree that renders the driver incapable of driving safely." *People v. Love*, 2013 IL App (3d) 120113, ¶ 34. Circumstantial evidence may be used to prove this. *People v. Eagletail*, 2014 IL App (1st) 130252, ¶ 36. The testimony of a single, credible police officer alone may sustain a conviction for driving under the influence of alcohol. *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 24.

¶ 24 We first note that Deputy Yanecek's testimony directly contradicts defendant's statement that he had no alcohol until after the accident. Deputy Yanecek, who the trial court considered credible, saw defendant twice on the day of the offense, once approximately two hours prior to the accident and again about 20 minutes after the accident. Both times, Deputy Yanecek described defendant as being intoxicated. The second time, Deputy Yanecek believed defendant appeared more intoxicated than he did the first time he saw him; defendant's eyes were red and bloodshot, a strong odor of alcohol emanated from defendant's breath, defendant had trouble maintaining his balance, and he mumbled his words. Moreover, Corbine-Weichmann's and Anderson's observations of defendant after the accident, and the BAC result, which was well over twice the legal limit, supported Deputy Yanecek's observations. In addition, there were beer bottles found in defendant's van, defendant admitted to Deputy Yanecek that he had driven the van, drank some beer, and drank two to three shots of whiskey between 5 a.m. and noon. Accordingly, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found defendant was driving while under the influence of alcohol.

¶ 25 Defendant relies on *People v. Flores*, 41 Ill. App. 3d 96 (1976), in support of his

argument that the evidence was insufficient to sustain his conviction. In *Flores*, the defendant testified that he only drank alcohol after the accident, and he presented a corroborating witness at trial. The court noted that the only evidence the defendant did not drink after the accident was the officer's testimony that the defendant made such an admission. *Id*. at 101. The court held that this admission was insufficient in light of the other testimony of post-accident drinking to satisfy the State's burden. *Id*. at 102. In the present case, unlike in *Flores*, defendant did not produce contradicting evidence to corroborate that defendant drank alcohol only after the accident. More importantly, unlike in *Flores*, in this case there was other evidence presented that showed defendant was intoxicated before and immediately after the accident.

¶ 26 Defendant also cites *People v. Clark*, 123 Ill. App. 2d 41 (1970), to bolster his claim that any stumbling or balance issues he had were attributable to his medical condition and that his bloodshot eyes were consistent with crying over the loss of his girlfriend. However, none of these characteristics would affect his driving into a snow bank, smelling strongly of alcohol, mumbling his speech, or a BAC result of .204.

¶ 27 Defendant also challenges his conviction under section 11-501(a)(1) of the Vehicle Code, in which the State must prove actual physical control of a vehicle with a BAC of .08 or more. 625 ILCS 5/11-501(a)(1) (West 2012). Again, defendant does not contest he drove the van. Rather, defendant contends there was no evidence that the BAC test was the result of alcohol consumed by him prior to the accident since he had testified that he drank alcohol after the accident. We agree with the State that the evidence presented concerning the impairment charge under section 11-501(a)(2) creates a reasonable inference that, at the time of the accident, defendant's BAC was at least .08.

¶ 28 *The Village of Bull Valley v. Winterpacht*, 2012 IL App (2d) 101192, is instructive on this point. In that case, the defendant raised a similar argument. She claimed the State failed to show what her blood alcohol content was when she was driving; that retrograde extrapolation testimony was required in order to show that her blood alcohol content was at or above .08 at the time she was driving. *Id* ¶ 11. We held that, given the tests were taken approximately two hours after she was driving and still showed a result over twice the statutory limit, extrapolation evidence was not required. Rather, the jury could make reasonable inferences from the evidence, which included evidence that the defendant had admitted to drinking and had shown signs of intoxication that improved over time. Those facts corroborated the reasonable inference that, at the time of the accident, the defendant's blood alcohol level was similar to, if not higher than, what it was tested at two hours later. This evidence was sufficient to find the defendant guilty beyond a reasonable doubt. *Id* ¶ 15. The same reasonable inferences can be drawn from the evidence in the present case. Accordingly, we find the evidence sufficient to prove defendant's conviction under section 11-501(a)(1) beyond a reasonable doubt.

¶ 29 B. Transportation of Open Liquor

¶ 30 Defendant next contends that the State failed to prove him guilty of the illegal transportation of alcohol beyond a reasonable doubt. Defendant argues, *inter alia*, that there was no evidence the bottles in his van actually contained alcohol. Defendant did not cite authority in support of this contention. Usually, failure to cite relevant authority in support of a bare argument will not merit consideration of an issue on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. Jan 1, 2016). However, the State did not respond to the argument either. Regardless, we will address those issues which are necessary for a just result. See *In re Marriage of Winters*, 160 Ill. App. 3d 277, 281 (1987).

¶ 31 To sustain a conviction for the illegal transportation of alcohol, there must be evidence that one transported, carried, possessed, or had any alcoholic liquor in the passenger area of a motor vehicle that was not in its original package and with the seal broken. 625 ILCS 5/11-502(a) (West 2012).

¶ 32 Deputy Yanecek testified that, when he peered into defendant's van, he noticed an "[o]pen beer and an unopened beer and another beer laying [*sic*] across the center console." The photograph of the inside of defendant's van introduced into evidence by the State depicts two unopened beer bottles and one open beer bottle in the passenger compartment. The two unopened beer bottles do not constitute open liquor under section 11-501(a). See *People v. Nadermann*, 309 Ill. App. 3d 1016, 1021 (2000).

¶ 33 Additionally, the State introduced no evidence that the open beer bottle contained anything. Usually, the cases point out that there was some liquid in the bottle or can, which the officer opines is some type of an alcoholic beverage. See, *e.g.*, *People v. Angell*, 184 Ill. App. 3d 712, 714 (1989) (officer seized two open beer cans, each of which contained liquid, and opined that liquid in cans was beer). Here, the record is silent on what, if anything was in the open bottle. Possession of empty beer bottles is not proscribed by the statute. A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009). The evidence adduced at trial was insufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant committed the offense of illegal transportation of alcohol. Accordingly, we must reverse this conviction.

¶ 34 C. Same Act

¶ 35 Defendant last contends that both DUI convictions cannot stand when they were based on

the same act. He contends that the conviction for driving with a BAC of .08 or more should be vacated.

¶ 36 The State first notes that defendant forfeited his claim of error by failing to raise it at sentencing but that, under the second prong of the plain error analysis, we may consider defendant's argument. See *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). In addressing defendant's contention, the State agrees that a defendant may not be convicted of multiple offenses arising out of a single physical act. See *People v. Harvey*, 211 Ill. 2d 368, 389 (2004); *People v. Latto*, 304 Ill. App. 3d 791, 806-07 (1999) (multiple convictions for DUI based on same act of drunk driving violate one-act, one-crime principle). However, although defendant was found guilty of both charges, defendant received only one sentence. Thus, the State observes that the trial court properly merged defendant's two DUI counts into one.

¶ 37 The record bears this out. Defendant was sentenced on one count of DUI, where the fines and costs are only imposed one time. Defendant points to the minute order showing a finding of guilty on both counts. It is not improper for a trial court to find a defendant guilty of multiple counts charged in the alternative. These multiple counts will then merge into one conviction and sentence on the most serious charge. See *People v. Gordon*, 378 Ill. App. 3d 626, 642 (2007). That is what happened here.

¶ 38 III. CONCLUSION

¶ 39 In sum, the State proved defendant guilty of two counts of driving under the influence of alcohol beyond a reasonable doubt based upon the same transactional facts but failed to prove defendant guilty of illegal transportation of alcohol beyond a reasonable doubt. The count regarding a blood alcohol level was merged into the general prohibition of DUI by the single sentence delivered by the trial court. Thus, we reverse the conviction for transportation of

alcohol and affirm the conviction for driving while under the influence of alcohol. Accordingly, the judgment of the circuit court of Lake County is affirmed in part and reversed in part.

¶ 40 Affirmed in part and reversed in part.