2018 IL App (4th) 150954-U

NO. 4-15-0954

FILED
February 8, 2018
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.	)	Macon County
ALAN N. BANNING,	)	No. 14DT318
Defendant-Appellant.	)	
	)	Honorable
	)	Robert C. Bollinger,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Holder White and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court held the following: (1) the evidence was sufficient to prove defendant guilty of driving under the influence; (2) trial counsel was not ineffective for failing to object to the introduction of testimony about a field sobriety test; and (3) the jury was not tainted by a prospective juror's statements about the presumption of innocence.

¶ 2 In July 2014, the State charged defendant, Alan N. Banning, with driving under the influence of a drug or combination of drugs (625 ILCS 5/11-501(a)(4) (West 2014)). After an October 2015 trial, the jury found defendant guilty, and the trial court later sentenced him to 12 months of probation.

¶ 3 Defendant appeals, raising the following arguments: (1) the evidence was insufficient to prove defendant guilty beyond a reasonable doubt of driving under the influence of a drug or combination of drugs; (2) defendant was denied his right to effective assistance of counsel because trial counsel failed to object on foundation grounds to an officer's testimony about

conducting a horizontal gaze nystagmus (HGN) test; and (3) defendant was denied his right to an impartial jury because of a prospective juror's comments about the presumption of innocence. We disagree and affirm defendant's conviction.

¶ 4 I. BACKGROUND

¶ 5 A. The Charges

¶ 6 In July 2014, the State charged defendant with driving under the influence of a drug or combination of drugs (625 ILCS 5/11-501(a)(4) (West 2014)), along with various other traffic offenses that were later dismissed. In June 2015, the trial court joined defendant's case for driving under the influence with his related case for unlawful possession of a controlled substance (720 ILCS 570/402 (West 2014)) (Macon County case No. 14-CF-1354). (Case No. 14-CF-1354 is not at issue in this appeal.)

¶ 7 B. The Jury Trial

¶ 8 In October 2015, both charges proceeded to a jury trial.

¶ 9 1. *Voir Dire*

¶ 10 The trial court called the venire for questioning, and all venire members were present in the same room during questioning. While the court was questioning the first venire member according to Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), the following exchange occurred:

> "THE COURT: Now, do each of you understand and accept the principle that the defendant *** is presumed innocent of the charges against him.
>
> You will need to answer verbally to these questions.
>
> Mr. Carr, do you understand and accept that principle?
>
> PROSPECTIVE JUROR CARR: No.

THE COURT: You do not?

CARR: No.

THE COURT: And what is it that you don't understand about that?

CARR: That he is presumed innocent?

THE COURT: Yes.

CARR: That he's had reasonable grounds to believe—probable cause that he is here.

THE COURT: Okay. All right. A defendant in every case comes into court presumed innocent.

Do you understand that?

CARR: No, sir, I don't. He's had some involvement or he wouldn't be here.

THE COURT: Just because a person is charged with a crime does not take away their presumption of being innocent of the crime they are charged with.

All right. I am going to move on."

One other venire member stated that he did not understand and accept that defendant was presumed innocent. During later questioning, prospective juror Carr revealed that he was a retired police detective.

¶ 11 Defense counsel later questioned Carr about the presumption of innocence, as follows:

"DEFENSE COUNSEL: Is there anyone who would hold that against him or does believe he must be guilty of something because he is sitting there?

Mr. Carr, *** the judge asked you about that, correct?

CARR: Yes.

DEFENSE COUNSEL: And the basis of that is primarily because you were a police officer for so long, is that correct?

CARR: That's correct.

DEFENSE COUNSEL: I appreciate your honesty. The goal of this is to get a fair and impartial jury. So, if you have an opinion one way or the other, the honesty is important. We want to know these things. So, please, I appreciate that.

Mr. Carr, let me ask you this, and I will ask this on down the line.

At the end of the case, if you were chosen to sit on this jury, if the State failed to prove [defendant] is guilty beyond a reasonable doubt, would you find him not guilty?

CARR: I would have to say no.

DEFENSE COUNSEL: You would not find him not guilty if the State failed to prove their case?

CARR: No."

Carr and the other juror who did not understand and accept the presumption of innocence were later dismissed for cause, by agreement of the parties.

¶ 12 2. *The Evidence*

¶ 13 Decatur police officer Brett Hill testified that on the evening of July 15, 2014, he responded to a report of a suspicious vehicle. Hill followed the vehicle, which was traveling at a "very slow" speed before turning "into a corn field" without signaling. Hill later clarified that defendant pulled into an access lane that led into the cornfield. The vehicle then returned to the roadway and continued travelling at a slow speed while "swerving" within the south-bound lane

multiple times. Hill eventually initiated a traffic stop on the vehicle.

¶ 14 Hill testified that defendant was driving the vehicle. As Hill approached the vehicle, he heard yelling and saw defendant leaning over as if having a conversation with someone in the passenger seat. However, defendant was the only person in the vehicle. Defendant told Hill he was coming from GB Oil, which Hill explained was no longer in business.

¶ 15 Hill testified further that he performed the (HGN) test on defendant. Hill explained that the HGN test monitors involuntary movements of the eyes as the eyes track up-and-down and left-to-right. When Hill performed the HGN test on defendant, Hill noticed that defendant had no "resting nystagmus," meaning that his eyes did not twitch or flutter as defendant looked straight ahead. However, defendant had a "significant amount" of "vertical nystagmus," meaning involuntary movements that occurred as defendant moved his eyes up and down. Hill explained that the HGN test could detect impairment from any substance, not merely alcohol. Based on the results of the HGN test, Hill suspected that defendant was impaired. Hill did not ask defendant to perform the one-legged-stand or walk-and-turn tests.

¶ 16 On cross-examination, Hill clarified that the HGN test did not perfectly predict impairment because some people have a natural nystagmus that occurs when they are not impaired. In addition, Hill described in detail how he conducts HGN tests. Hill explained that a nystagmus can also occur in a person as a result of a head injury. Hill learned about the HGN test and how to properly conduct one during his training to become a police officer.

¶ 17 Hill testified further that as he interacted with defendant, defendant made strange comments, including stating that "he had made the letter 'S' in 1964." In addition, defendant was "disheveled" in appearance and was wearing a basketball jersey backward. Hill found a pill bottle on defendant's person that had defendant's name on its label. The label provided that the bot-

tle contained white oval pills. Hill looked in the bottle and noticed that it contained two pink pills and one purple pill. Hill then arrested defendant and placed him in the back of Hill's squad car. While in the back of Hill's car, defendant was "very animated." Defendant was yelling, appearing to have a conversation with himself. On cross-examination, Hill testified that he interacted with defendant a few months after his arrest and that defendant's behavior at that time was much more relaxed. Hill also stated that defendant's small pupil size indicated that he was impaired.

¶ 18 Hill testified further that his squad-car camera recorded his stop of defendant's vehicle. The State played several snippets from the squad-car-camera recording, which contained both audio and video. The State offered those clips into evidence as the State's exhibit No. 1, which the court admitted without objection. The recording showed Hill and another officer performing a traffic stop of defendant's vehicle. Defendant's speech appeared slurred. Defendant denied consuming alcohol or any drugs. Hill conducted an HGN test. In addition, Hill performed a portable breath test on defendant, which was negative for alcohol. After Hill found the pills, defendant claimed that he had a prescription for them. Hill eventually arrested defendant for driving under the influence.

¶ 19 Hill testified further that defendant was taken to the Macon County jail, where a video camera recorded his actions. Video and audio from that camera was shown to the jury and admitted as State's exhibit No. 2. The recording shows defendant talking to himself, although the content of his statements is mostly unintelligible. Some individual words are notable, but defendant's statements are incoherent and nonsensical. The volume of his voice fluctuates between a low murmur and yelling. In general, defendant appears agitated.

¶ 20 Consistent with the video, Hill testified that defendant continued talking to himself at the intake area of the jail. Hill testified that defendant said "something related to how

Jimmy Carter and slavery went together." Hill testified that defendant refused to provide a urine sample at the jail.

¶ 21 The parties stipulated that the pink pills found on defendant contained amphetamine, a controlled substance. The parties stipulated further that approximately 48 hours after defendant's arrest, he submitted to a urinalysis test, which did not indicate the presence of any drugs or controlled substances. Further, the parties stipulated that amphetamines are detectable by urinalysis from between 24 to 96 hours after ingestion.

¶ 22 Defendant testified that he pulled over into the cornfield access path because he burned his hand on a cigarette lighter. Defendant told the officer he had been at GB Oil because that was the former name of the Thornton's gas station he was coming from. Defendant testified that he told Hill about making an "S" because "I scribed something in 1964 when I was two years old that was like pertinent to copyright law" and "I was looking through like a King James bible, and I had seen the same inscription that I had written in '64 in that King James Bible." Defendant explained that he had "no idea" why he told Hill about the inscription, except for possibly creating a legal record—for copyright purposes, apparently—that he had written it.

¶ 23 Defendant testified further that he was talking to himself because he went into shock after being pulled over. His shock resulted from defendant seeing his grandson die earlier that month coupled with the memory of police beating him in the 1970's. Defendant testified that he found the two pink pills in his backyard and placed them in his pill bottle so that no children would find them. Defendant was planning to deliver the pills to a pill-destruction center. Defendant testified that he refused the urinalysis test at the jail because he was unable to urinate at the time.

¶ 24 The jury found defendant guilty of driving under the influence and not guilty of

possession of a controlled substance. After a November 2015 sentencing hearing, the trial court sentenced defendant to 12 months of probation.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, defendant raises the following arguments: (1) the evidence was insufficient to prove defendant guilty beyond a reasonable doubt of driving under the influence of a drug or combination of drugs; (2) defendant was denied his right to effective assistance of counsel because trial counsel failed to object on foundation grounds to Hill's testimony about the HGN test; and (3) defendant was denied his right to an impartial jury because of prospective juror Carr's comments about the presumption of innocence. We disagree and affirm defendant's conviction.

¶ 28 A. Sufficiency of the Evidence

¶ 29 1. *Statutory Language and the Standard of Review*

¶ 30 Due process requires that the State prove beyond a reasonable doubt the existence of every element of the charged offense. *People v. Lucas*, 231 Ill. 2d 169, 178, 897 N.E.2d 778, 784 (2008). "It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts." *People v. Bradford*, 2016 IL 118674, ¶ 12, 50 N.E.3d 1112. When reviewing a challenge to the sufficiency of the evidence, we ask whether, 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. Wheeler*, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007).

¶ 31 The offense of driving under the influence of a drug or combination of drugs occurs when a person does the following: "(1) drives or is in actual control of a vehicle (2) while

under the influence of any drug or combination of drugs (3) to a degree that he or she is incapable of driving safely." *People v. Ciborowski*, 2016 IL App (1st) 143352, ¶ 108, 55 N.E.3d 259; 625 ILCS 5/11-501(a)(4) (West 2014).

¶ 32 2. *This Case*

¶ 33 In this case, the evidence supported the inference that defendant was under the influence. He made a strange maneuver in his vehicle by turning into a farm access path and then quickly returning to the road. Defendant testified that he took that action because he had burned himself on a cigarette lighter. The jury heard that explanation and, as the trier of fact, was free to conclude that it was far-fetched. Throughout his interaction with police, defendant's behavior was extremely odd and suggested impairment. Defendant continually made nonsensical statements. His mannerisms were animated and the tone and volume of his voice fluctuated unpredictably. In particular, the video and audio taken from the jail leave the impression that defendant was impaired. In that recording, defendant makes nonsensical statements to himself. Meanwhile, he uses his hands to gesture wildly, and fluctuates between barely audible murmuring to loud yelling. In addition, Hill testified that the results of the HGN test suggested impairment. The evidence was sufficient to prove beyond a reasonable doubt that defendant was impaired.

¶ 34 Less overwhelming evidence was presented to establish that defendant was under the influence *of a drug or combination of drugs*. However, the evidence was nonetheless sufficient to prove defendant guilty beyond a reasonable doubt. Most telling was that defendant was arrested with amphetamine pills in his possession. Although a urinalysis test conducted approximately two days later was negative, the stipulated evidence revealed that amphetamine can leave a person's system within 24 hours. The urinalysis therefore did not rule out the use of amphetamine. In addition, the portable breath test administered to defendant during the traffic stop was

negative for alcohol. From that evidence, the jury could infer that defendant's obvious impairment resulted from the amphetamine found in his possession. The fact that defendant did not admit to ingesting amphetamine did not prevent the jury from inferring as much.

¶ 35 Considering the evidence in the light most favorable to the State, a rational trier of fact could have found defendant guilty of driving under the influence of a drug or combination of drugs.

¶ 36 B. HGN Test

¶ 37 Defendant argues that he was denied his right to effective assistance of counsel because trial counsel failed to object on foundation grounds to Hill's testimony about the HGN test.

¶ 38 1. *Ineffective Assistance of Counsel*

¶ 39 To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) the defendant was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 702 (1984).

¶ 40 There is a strong presumption that counsel's action or inaction was the product of sound trial strategy. *People v. Davis*, 2014 IL App (4th) 121040, ¶ 19, 22 N.E.3d 1167. Matters of trial strategy are generally immune from claims of ineffective assistance of counsel. *Id.* "Whether to object to matters such as foundation for evidence is, by and large, a matter of trial strategy." *People v. Probst*, 344 Ill. App. 3d 378, 387, 800 N.E.2d 834, 843 (2003); see also *People v. Diaz*, 377 Ill. App. 3d 339, 349-50, 878 N.E.2d 1211, 1220-21 (2007) (trial counsel's failure to object to foundation of HGN test was matter of trial strategy).

¶ 41 To establish prejudice, a defendant must show a reasonable probability that, ab-

sent the alleged deficient performance of counsel, the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319, 326-27, 948 N.E.2d 542, 546-47 (2011). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 42 2. *Admissibility of HGN Tests*

¶ 43 An officer who has been properly trained and who follows procedures may give expert testimony about the results of an HGN test and "may use the HGN test results as a part of the basis for his opinion that the defendant was under the influence and impaired." *People v. McKown*, 236 Ill. 2d 278, 306, 924 N.E.2d 941, 957 (2010). Accordingly, to lay a proper foundation for HGN test results, the State must demonstrate that (1) the officer who administered the test was properly trained and (2) the test was properly administered. *Diaz*, 377 Ill. App. 3d at 349-50.

¶ 44 3. *This Case*

¶ 45 Defendant has established neither the deficient performance nor the prejudice necessary to establish a claim of ineffective assistance of counsel. His claim of ineffective assistance of counsel therefore fails.

¶ 46 As to deficient performance, we conclude that counsel's decision not to object to the foundation of the HGN test was a matter of trial strategy. Counsel may have reasonably refrained from objecting so that the State did not provide additional testimony about an interaction that was not flattering to defendant. Counsel very well might have thought it best to devote as little time as possible to this issue. That decision by counsel was a matter of trial strategy immune to a challenge on ineffective-assistance grounds.

¶ 47 Further, defendant has failed to establish prejudice. Assuming, *arguendo*, that the

foundation for the HGN test was lacking, defendant's objecting to that foundation would not have changed the outcome of the trial. That is true for two reasons. First, had counsel objected, the State could have immediately cured the foundational problem by asking further questions about Hill's familiarity with the test procedures. See *id.* at 350 (concluding that a foundational objection would have merely resulted in additional foundational testimony). Second, even if defendant had successfully kept the HGN test results from being admitted, the remaining evidence of defendant's impairment was more than sufficient for the jury to find defendant guilty. Because no reasonable probability exists that defendant's objection would have changed the outcome of the trial, defendant has failed to establish the prejudice necessary to succeed upon a claim of ineffective assistance of counsel.

¶ 48 C. Impartial Jury

¶ 49 Defendant argues that he was denied his right to an impartial jury because of prospective juror Carr's comments about the presumption of innocence. We disagree.

¶ 50 1. *Plain Error*

¶ 51 Defendant concedes that he forfeited this issue by failing to object during *voir dire*. We therefore review this issue under the plain-error doctrine.

¶ 52 Under the plain-error doctrine, we may reverse based on a forfeited error under two circumstances: (1) " 'a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error' " or (2) " 'a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.' " *People v. Sebby*, 2017 IL 119445, ¶ 48 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410 (2007).

¶ 53 Defendant argues that this error is reversible under either prong of the plain-error doctrine. We choose to first determine whether any error occurred at all. *Sebby*, 2017 IL 119445, ¶ 49.

¶ 54 2. *Right to an Impartial Jury*

¶ 55 The Illinois and United States constitutions guarantee the right to a trial before an impartial jury. Ill. Const. 1970, art. I, § 8; U.S. Const., amends. VI, XIV. "The purpose of *voir dire* is to assure the selection of an impartial panel of jurors who are free from bias or prejudice." *Kingston v. Turner*, 115 Ill. 2d 445, 464, 505 N.E.2d 320, 328 (1987). Due process requires a jury willing to decide a case "solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

¶ 56 To ensure an impartial and unbiased jury, Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) requires the trial court to ensure that all jurors understand and accept four principles, including that "the defendant is presumed innocent of the charge(s) against him or her." But a failure to comply with Rule 431(b) "does not automatically result in a biased jury." *People v. Thompson*, 238 Ill. 2d 598, 610, 939 N.E.2d 403, 411 (2010).

¶ 57 Defendant relies heavily on *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997). That case involved a jury trial for sexual conduct with a minor. *Id.* at 631. The first prospective juror was a social worker for child protective services. *Id.* at 631-32. During *voir dire*, that prospective juror stated that she would have difficulty being impartial because "sexual assault had been confirmed in every case in which one of her clients reported such an assault." *Id.* at 632. As the trial court continued to question her, she made three more statements that during her three years in child protective services, she was not aware of any child who had lied about being sexually assaulted. *Id.* The prospective juror later stated that she had taken child psychology courses. *Id.* All

of her statements were made in front of the rest of the venire. *Id.* The defendant moved for a mistrial, arguing that the prospective juror's statements had tainted the venire. *Id.* The court denied that motion but struck the prospective juror for cause. *Id.*

¶ 58 The case came before the Ninth Circuit on appeal from the denial of the defendant's federal petition for habeas corpus. *Id.* at 631. The appellate court concluded that, at a minimum, the trial court should have conducted further *voir dire* to determine whether the venire had been "infected" by the prospective juror's "expert-like statements." *Id.* at 633. The appellate court determined the following:

> "Given the nature of [the prospective juror's] statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted ***.
>
> ***
>
> *** To force a defendant to trial, over his objections, before such a jury, when an unbiased jury can be impaneled without any substantial loss to the court or the prosecution, serves no legitimate interest." *Id.*

The court declined to conclude whether the error rose to the level of structural error. *Id.* at 634. Nonetheless, the court concluded that the error was not harmless and required vacating the defendant's conviction. *Id.*

¶ 59 Defendant argues that under the logic of *Mach*, the trial court should have *sua sponte* declared a mistrial. However, we conclude that *Mach* is distinguishable from the present case.

¶ 60 In this case, Carr's comments did not have the "expert-like" quality of the prospective juror's comments in *Mach*, where the prospective juror explained that she had worked

for three years in child protective services and had never encountered an alleged child sexual abuse victim who had lied about the alleged abuse. She made that statement in front of the other jurors four separate times. Those statements arguably bolstered the credibility of the alleged child victim and prevented the jury from deciding the case based on the evidence before it.

¶ 61 In contrast, in this case, Carr merely stated his opinion that defendant "had some involvement or he wouldn't be here." Carr also later stated that he was a retired police detective. However, Carr's statements did not rise to the level of the prospective juror's statements in *Mach*. Carr did not say, "I was a detective for several years, and, in my experience, every criminal defendant we arrested was guilty." Instead, Carr stated that he believed defendant had "some involvement" and, as a result, he could not presume defendant innocent.

¶ 62 In a criminal case, the State must have probable cause to charge a defendant with a crime. However, despite that fact, jurors must agree to presume a defendant's innocence and require that the State meet its burden of proof beyond a reasonable doubt to convict. Carr answered honestly that he could do no such thing. However, the other prospective jurors stated that they could decide the case fairly based on the evidence before them. We conclude that Carr's comments did not taint the other venire members such that a mistrial should have been declared, and the trial court's failure to instruct the remaining jurors regarding Carr's remarks did not come close to constituting plain error.

¶ 63 III. CONCLUSION

¶ 64 For the foregoing reasons, we affirm the trial court's judgment.

¶ 65 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(a) (West 2016).

¶ 66 Affirmed.