2019 IL App (2d) 180935-U
No. 2-18-0935
Order filed September 23, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SEBASTIAN FILLMAN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 15-DT-818 Honorable Anthony V. Coco, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Birkett and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of DUI: the trial court could infer that defendant drove, as he owned the vehicle and was found alone nearby with the keys, and that defendant was under the influence, as he exhibited the standard indicia; (2) the State proved defendant guilty beyond a reasonable doubt of resisting a peace officer, as defendant did not merely refuse to cooperate but repeatedly obstructed the officers' performance of their duties.

¶ 2 Defendant, Sebastian Fillman, appeals his convictions of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2014)) and resisting a peace officer (720 ILCS 5/31-1(a) (West 2014)). He contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was initially charged with multiple counts, including DUI, resisting a peace officer, driving off the roadway (625 ILCS 5/11-704(c) (West 2014)), failure to give aid or information (*id.* § 403), and operating an uninsured motor vehicle (*id.* § 3-707). A bench trial was held.

¶ 5 At trial, Bensenville police officer Saul Herrera testified that, on March 31, 2015, he responded to a single-vehicle accident and observed a Hummer H2 crashed into decorative bricks about one foot off of the sidewalk near some buildings. The empty vehicle was on the sidewalk, and there was no one in the immediate vicinity. Herrera then observed defendant walking away about 100 feet from the accident. Defendant held keys and a cell phone and, when Herrera approached in his vehicle, defendant picked up his pace. Herrera stopped defendant and saw that the keys bore a Hummer insignia. When defendant put his phone down, Herrera also saw that defendant had pictures of the accident on the cell phone screen. Defendant told Herrera that he did not know who owned the vehicle, but Herrera later used the keys that defendant was carrying to successfully start it. An open bottle of beer was found inside of it.

¶ 6 Defendant was agitated and almost confrontational when questioned about the accident. His eyes were bloodshot and glassy, and he had a strong odor of alcohol emanating from his breath. Defendant's speech was slurred, he had trouble standing, and he swayed. Herrera was concerned that defendant would fall and directed him to sit on a ledge while they talked. Based on his experience and training as a police officer, which included a 40-hour course on detecting drunk drivers, Herrera opined that defendant was under the influence of alcohol. Herrera admitted that the odor of alcohol is indicative only of consumption of alcohol and not how much was consumed.

¶ 7 Defendant spoke in broken English. Herrera was able to communicate with him, but a Polish-speaking officer was called for assistance. That officer testified that defendant told him that he had been drinking with a friend and that a friend was driving the Hummer. Defendant refused to provide any further information and refused to complete field sobriety tests.

¶ 8 Herrera testified that defendant did not resist when placed in handcuffs. However, he also testified that, once defendant was placed under arrest, defendant yelled, screamed, and kicked an officer. At the police station, defendant refused to walk to the booking room and lay on the ground and screamed. Eventually officers picked him up and dragged him to the booking room. Defendant yelled "doctor, doctor" and pretended to be asleep.

¶ 9 After defendant tried to hang himself with a blanket in a cell, officers tried to move him to a different cell that did not have a blanket. Defendant went into a shower area and refused to move. When officers physically moved defendant, he lunged toward an officer and grabbed one of the officer's hands. Another officer then stunned defendant with a Taser. Defendant fell to the ground, screamed, and kicked an officer. He ignored repeated commands to stop and was stunned with the Taser two more times.

¶ 10 Officer Christopher Jones also responded to the accident and provided testimony similar to that of Herrera. Jones testified that defendant admitted to drinking that night at a friend's garage but was unable to provide the person's name or address. Defendant told Jones that someone else was driving the vehicle. Jones determined that defendant was the registered owner of the vehicle. He testified that he read the Warning to Motorists to defendant and that defendant refused to provide a breath sample. Jones described defendant's behavior as highly intoxicated. Defendant's counsel asked if defendant could have been mentally ill instead of drunk, and Jones responded that defendant could have been both.

¶ 11 Officer Labuz provided testimony similar to that of Herrera and Jones. Labuz added that, when officers tried to put defendant in a different cell, defendant lunged back into the officers, pushing Labuz and Jones. Defendant tried to grab the Taser and kicked Labuz. Labuz believed that the kick was a voluntary reaction and not a jerk reaction from the Taser. A retired police officer, William Pelarenos, testified for defendant, but was not certified as an expert, and the court sustained objections to his testimony. Video from the police station was admitted into evidence.

¶ 12 The trial court found defendant guilty of DUI, failure to give aid or information, operating an uninsured motor vehicle, resisting or obstructing a peace officer, and driving off the roadway. As to DUI, the court found that there was circumstantial evidence that defendant drove the vehicle, because he was the registered owner and was near it with its keys in his hand. The court expressed concern about the lack of field sobriety tests, but also noted a complete lack of evidence that defendant was mentally ill instead of drunk. Based on the testimony and video, the court found that defendant's suicide attempt was fake and noted that defendant's belligerent behavior, walking away from the accident scene, and refusal to submit to a breath test showed consciousness of guilt.

¶ 13 Defendant moved for a new trial, arguing in part that the charges of operating an uninsured motor vehicle and failure to give aid or information were not proven beyond a reasonable doubt. The State conceded that those convictions should be vacated because defendant was not asked for proof of insurance and the accident did not involve any other people. The court granted the motion as to those convictions and denied it as to the others. The record does not include a transcript or substitute of the hearing on that motion. Defendant was

sentenced to two years of probation, 240 hours of community service, and a fine of $180. He appeals.

¶ 14 II. ANALYSIS

¶ 15 Defendant first contends that the State failed to prove him guilty of DUI. He argues that there was insufficient evidence that he was driving the vehicle or that he was intoxicated. He also argues that the court showed a pattern of misremembering the evidence as shown by its mistake of entering convictions of operating an uninsured motor vehicle and failure to give aid or information.

¶ 16 Section 11-501(a)(2) of the Illinois Vehicle Code provides that "an individual 'shall not drive or be in actual physical control of any vehicle within this State while' such individual is 'under the influence of alcohol.' " *People v. Gordon*, 378 Ill. App. 3d 626, 631 (2007) (quoting 625 ILCS 5/11-501(a)(2) (West 2014)). "Accordingly, the prosecution was required to establish that defendant 'was in actual physical control' of his car while he was 'under the influence.' " *Id.* (citing *People v. Long*, 316 Ill. App. 3d 919, 926 (2000)). "A defendant is guilty of driving under the influence if the prosecution proves that a driver was under the influence of a drug or alcohol to a degree that rendered him incapable of driving safely." *Id.* at 631-32.

¶ 17 On a challenge to the sufficiency of the evidence, we must determine 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 offense proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. The reviewing court will not retry the defendant or substitute its judgment for that of the trier of fact on issues pertaining to conflicts in testimony, the credibility of witnesses, or the weight of the evidence. *Id.* A criminal conviction may also be based solely on circumstantial evidence. *People v. Brown*, 2013 IL 114196, ¶ 49. We will reverse a

conviction only where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992).

¶ 18 A conviction of driving under the influence may be based solely on credible testimony from the arresting officer. *Gordon*, 378 Ill. App. 3d at 632. "To prove [that the] defendant was under the influence of alcohol, the prosecution must establish that [the] defendant was less able, either mentally or physically, or both, to exercise clear judgment, and with steady hands and nerves operate an automobile with safety to himself and to the public." (Internal quotation marks and citations omitted.) *Id.* "Scientific proof of intoxication is unnecessary to sustain a conviction for driving under the influence where there is credible testimony from the arresting officer." *Id*. A defendant's refusal to take a test designed to determine the defendant's blood-alcohol content is admissible and may be used to argue the defendant's consciousness of guilt. *People v. Johnson*, 218 Ill. 2d 125, 140 (2005).

¶ 19 Here, there was ample evidence that defendant was under the influence of alcohol. Defendant admitted to drinking alcohol. Multiple officers testified that defendant's eyes were bloodshot and glassy, he had a strong odor of alcohol emanating from his breath, his speech was slurred, he had trouble standing, and he swayed. Defendant was directed to sit on a ledge out of fear that he would fall. Defendant refused field testing and, contrary to his assertion that the record does not show that he was asked to submit to a breath test, there was testimony that he did indeed refuse such a test.

¶ 20 As to the finding that defendant was in actual physical control of the vehicle, four factors have been found instructive: "(1) whether the defendant was positioned in the driver's seat; (2) whether the defendant possessed the ignition key; (3) whether the defendant was alone in the vehicle; and (4) whether the vehicle's doors were locked." *People v. Slinkard*, 362 Ill. App. 3d

855, 859 (2005) (citing *People v. Davis*, 205 Ill. App. 3d 431, 435 (1990)). However, the list is not exhaustive and such facts or the absence of them is not controlling. *Id.* Thus, a defendant may be found guilty beyond a reasonable doubt when he was not inside the vehicle and denied driving at the scene. See *id.* at 858-59 (citing cases). A court is not bound to accept a defendant's contention that someone else drove the vehicle, and the fact that he owned the vehicle and was found near it is sufficient for the finder of fact to reasonably infer that he was its driver. *Id.* at 858.

¶ 21 Here, the trial court reasonably inferred that defendant was driving the vehicle. Defendant was found alone at the scene near the vehicle, carrying its keys. He was the registered owner of the vehicle and had photos of the accident on his cell phone. Defendant was walking away from the vehicle and picked up his pace when officers arrived, showing consciousness of guilt. Although he claimed that another was driving, that claim lacked credibility, given that defendant refused to provide any details about that person.

¶ 22 Defendant points to various minor inconsistencies in the testimony of several officers to argue that their testimony was not credible. But, "[a]s the finder of fact, it was the trial court's responsibility to resolve alleged inconsistencies and conflicts in the evidence, as well as to weigh the testimony and determine the credibility of the witnesses." *People v. Bannister*, 236 Ill. 2d 1, 18 (2009).

¶ 23 Defendant also contends that the trial court showed a pattern of misremembering evidence, based on its mistaken entering of convictions of operating an uninsured motor vehicle and failure to give aid or information. The trial court conceded that error when it heard defendant's postjudgment motion. But nothing shows that the trial court incorrectly remembered or misapplied the facts of the case in relation to defendant's remaining convictions. Indeed,

there is no transcript or substitute of the hearing on defendant's postjudgment motion. "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). The evidence was sufficient to prove defendant guilty of DUI beyond a reasonable doubt.

¶ 24 Defendant next contends that the State failed to prove him guilty beyond a reasonable doubt of resisting a peace officer. He argues that he did not commit a physical act of resistance and merely refused to cooperate.

¶ 25 "In order to show that a defendant is guilty of resisting a peace officer, the prosecution must demonstrate that the defendant knowingly resisted the peace officer or obstructed the officer in the performance of any authorized act within his or her official capacity." *Long*, 316 Ill. App. 3d at 927 (citing 720 ILCS 5/31-1(a) (West 1998)). Resisting requires some physical act that impeded or hindered an officer's duties, and mere argument with an officer is insufficient. See *People v. Nasolo*, 2012 IL App (2d) 101059, ¶ 8. Merely abusive language does not constitute resisting a peace officer. *Long*, 316 Ill. App. 3d at 927. In addition, a failure to cooperate is not necessarily the same as resisting. *People v. Stoudt*, 198 Ill. App. 3d 124, 127 (1990). However, passive acts that impede an officer's ability to perform his duties, such as by repeatedly refusing an officer's order to exit a vehicle, can constitute resisting. *People v. Ostrowski*, 394 Ill. App. 3d 82, 98 (2009). For example, in *Long*, there was sufficient evidence to sustain a conviction when the defendant struggled with officers who tried to handcuff her,

physically tried to get an officer to stop an attempt to remove the defendant's belt, kicked an officer in the shin, and went limp and had to be carried. *Long*, 316 Ill. App. 3d at 927.

¶ 26 Here, defendant did not merely argue with officers or merely refuse to cooperate with requests. Instead, defendant repeatedly obstructed officers in their ability to perform their duties. Once defendant was placed under arrest, defendant yelled, screamed, and kicked an officer. When officers tried to move defendant to a different cell, defendant went into a shower area and refused to move. Then, when officers physically moved defendant, he lunged toward an officer and grabbed one of the officer's hands. When defendant was stunned with a Taser, he tried to grab the Taser, screamed, and kicked an officer. There was testimony that his kick was voluntary. He then ignored repeated commands to stop. Thus, by refusing to move to a new cell and kicking an officer, defendant both obstructed officers in their performance of their duties and committed a physical act of resistance. Accordingly, the trial court reasonably found him guilty beyond a reasonable doubt of resisting a peace officer.

¶ 27 III. CONCLUSION

¶ 28 There was sufficient evidence to find defendant guilty beyond a reasonable doubt. Accordingly, the judgment of the circuit court of Du Page County is affirmed.

¶ 29 Affirmed.