No. 1-09-1551

FIFTH DIVISION
May 20, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 08 C5 50465
CHRISTOPHER BERG, Defendant-Appellant.	)	Honorable Colleen McSweeney Moore, Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon concurred in the judgment.

O R D E R

HELD: Trial court did not abuse its discretion when it allowed testimony regarding the arresting officer's observation of an odor of alcohol on defendant and when it sustained an objection from the State; judgment affirmed.

Following a jury trial, defendant was found guilty of one count of aggravated fleeing or attempting to elude a police officer. He was then sentenced to 24 months' probation and ordered to attend anger management class. On appeal, defendant contends that the circuit court abused its discretion when it

allowed testimony that the arresting officer detected an odor of alcohol on defendant at the time of his arrest, and when it sustained a State objection regarding a question about the whereabouts of defendant's mother, who was deceased at the time of trial.

Prior to trial, defendant filed a motion in *limine* seeking to bar the State from introducing any and all statements regarding alcohol intake by defendant, the odor of alcohol on defendant's breath, defendant's consumption of alcohol on the day of the offense, and past DUI charges. The State responded that it would not "get into" defendant's DUI background. However, the State argued that the court should allow the officer's testimony as to the odor of alcohol as "part of the arrest procedure" and "the officer's own observations of the [d]efendant." The court ruled that the testimony regarding the odor of alcohol on defendant's breath would be allowed. The court also noted that defendant was not charged with DUI, and therefore, a police officer's testimony as to his observation of a "moderate odor of alcohol" would not rise to the level of proof of any crime. Rather, the testimony concerned the officer's observations that day.

At trial, Oak Lawn police officer Thomas Culhane testified that in the early morning hours of June 21, 2008, he was sitting in his parked police car facing east in the 4900 block of 97th

Street. At that time, he observed defendant approach in his car, then turn suddenly to avoid hitting him. The officer followed defendant, who at that point was traveling at about five miles per hour. Defendant then accelerated rapidly through a stop sign, causing the car's tires to "squeal." Officer Culhane activated the emergency lights on his car and attempted to stop him. Defendant, who was traveling in a residential area, accelerated to about 50 miles per hour and failed to stop at two stop signs. At one point, defendant suddenly stopped his car, pulled to the side of the road at an angle, then drove off, again causing the tires to "squeal." Officer Culhane followed the car to the driveway of defendant's home.

Officer Culhane testified that he ordered defendant out of the car a number of times, but defendant did not comply. Ultimately, defendant opened the car door and said "what the f**k," but he did not leave the car; instead he stared "blankly" at Culhane. Officer Culhane grabbed defendant by the arm and attempted to pull him from the car. Unable to do so, he then grabbed defendant by the hair, pulled him out, and placed him on the ground. Defendant continued to struggle with Culhane, who eventually was able to arrest him and place him in handcuffs. During the struggle, Officer Culhane observed that defendant "appeared to be breathing heavily" and he "could smell a moderate odor of an alcoholic beverage coming from his person." Defense

counsel objected to this testimony, but the court overruled the objection.

Officer Culhane further testified that, at the police station, he observed defendant in a holding cell, yelling loudly and "wildly" swinging his fists. The only statement defendant made was that the officer "arrested me for pulling in my driveway." At one point, Culhane referred to defendant's holding cell as the "drunk tank." A defense objection to this remark was sustained, the remark was stricken, and the jury was instructed to disregard it.

On cross-examination, defense counsel asked Officer Culhane whether he had charged defendant with DUI or had come to a conclusion that defendant was not impaired. The State objected to both of these questions and the court sustained the objections.

Defendant recalled Officer Culhane during his case-in-chief, and the officer testified that he did not perform field sobriety tests, read a "warning to motorists" to defendant, or charge defendant with DUI. Culhane also testified that he had intended to investigate whether defendant was involved in a DUI offense, but he did not wish to risk a fight with defendant, who had been "screaming and punching in the air" while in the holding cell.

Defendant testified that, after being out until 1:30 a.m. at a White Sox fan appreciation dinner, he twice attempted to call

his ailing mother, but she did not answer the telephone. Because of his worry for his mother, he "drifted" toward Culhane's police car that morning and "flagged" the officer to come with him by motioning his arm at the officer. He slowed down until he saw Officer Culhane following him. Defendant slowed at two stop signs to about two or three miles per hour and made sure that the intersection was clear before proceeding. He denied traveling at 50 miles per hour when Culhane was following him. Once in his driveway, Culhane pulled him from his car, told him to "shut the f**k up," punched him in the face, and threw him to the ground.

Defendant denied drinking alcohol that day and testified that Culhane did not ask him to perform any field sobriety tests. On redirect, defense counsel asked defendant "[w]here's your mom today?" The State objected without argument and defense counsel did not respond to the objection. The court sustained the objection and defense counsel did not argue the ruling.

The jury found defendant guilty of aggravated fleeing or attempting to elude a police officer. The court subsequently denied defendant's post-trial motions, in which he raised the propriety of the court's ruling on the motion in *limine* and its sustaining of the State's objection to defense counsel's question about defendant's mother.

On appeal, defendant first contends that the trial court erred in permitting the State to introduce Officer Culhane's

testimony that defendant had an odor of alcohol on him at the time of the offense.

Evidentiary motions, such as motions in *limine*, are directed to the trial court's discretion, and a reviewing court will not disturb a trial court's evidentiary ruling absent an abuse of that discretion. *People v. Harvey*, 211 Ill. 2d 368, 398 (2004). An abuse of discretion will be found only when the trial court's ruling is fanciful, arbitrary, or where no reasonable person would take the view adopted by the court. *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

In this case, defendant was charged with aggravated fleeing or attempting to elude a police officer and the disputed evidence was intended as circumstantial evidence of defendant's commission of that offense. Evidence is relevant if it tends to make the existence of any fact of consequence in the action more or less probable than it would have been without the evidence. *People v. Ward*, 101 Ill. 2d 443, 455 (1984). A trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty, or possibly unfair prejudicial nature. *Ward*, 101 Ill. 2d at 455.

Here, we find no abuse of discretion by the trial court in allowing testimony from Officer Culhane about an odor of alcohol on defendant's person. *Harvey*, 211 Ill. 2d at 398. The record shows that the evidence was not admitted for purposes of showing

that defendant had a propensity for committing other crimes. Rather, the testimony as to the odor of alcohol constituted the officer's observations of defendant at the time of the arrest, and explained the circumstances surrounding defendant's arrest (*People v. Fauntleroy*, 224 Ill. App. 3d 140, 148 (1991)), the very purpose for which the trial court allowed the testimony.

Despite defendant's argument to the contrary, the record does not show that the State "repeatedly" referred to defendant's drinking. Officer Culhane testified on direct examination that he "could smell a moderate odor of an alcoholic beverage" on defendant at the time of the offense, testimony that was allowable within the parameters of the motion in *limine*. Defendant correctly asserts that, at one point, Officer Culhane referred to the holding cell in which defendant had been placed as the "drunk tank." However, defendant's objection to this remark was sustained, it was stricken, and the jury was instructed to disregard the remark, thereby curing its prejudicial effect (*People v. Ross*, 303 Ill. App. 3d 966, 983 (1999)). The State did not elicit further testimony from Officer Culhane in regards to the odor of alcohol on defendant at the time of the offense. The remaining references to drinking or the odor of alcohol that appear in the record were either elicited by defense counsel or were made by the State in response to defense counsel's examinations. Therefore, we find defendant's argument

to be without merit.

Defendant also argues that the admission of evidence regarding drinking "must be necessary to the prosecution of a case," and that it is prejudicial to admit such evidence when it is not relevant to the case at bar. We find no merit to this argument, particularly where defendant's cited cases are not relevant to the matter before us. In *Sullivan-Coughlin v. Palos Country Club*, 349 Ill. App. 3d 553 (2004), this court, in deciding a civil premises liability case, found that defendant waived the issue for failing to provide an offer of proof where no testimony could be presented that plaintiff was intoxicated. We are not faced with such an issue in this case. Defendant also cites *Addison v. People*, 193 Ill. 405 (1901) and *Parrish v. Donahue*, 110 Ill. App. 3d 1081 (1982), in support of his arguments. In *Addison*, the supreme court dealt with intoxication in regards to a specific intent crime. In *Parrish*, this court dealt with evidence of drinking as it related to a civil defendant's exercise of due care in a negligence matter. Neither case considered whether evidence of drinking is admissible in cases where the evidence is being presented for the purpose of describing the officer's investigation, the question presented to us in the immediate case.

Defendant next contends that the trial court committed reversible error when it prevented him from explaining his

mother's absence as a witness, arguing that her absence from the trial created a presumption that her testimony would be adverse to defendant.

We find that defendant has waived this contention by failing to provide an offer of proof. An offer of proof allows a reviewing court to determine whether evidence was properly excluded. *People v. Wood*, 341 Ill. App. 3d 599, 604 (2003). When evidence is refused, no appealable issue remains unless a formal offer of proof is made. *Wood*, 341 Ill. App. 3d at 604. An adequate offer of proof is made if counsel reveals, with particularity, the substance of the witness's anticipated answer. *Wood*, 341 Ill. App. 3d at 604. The offer serves no purpose if it does not establish to both trial and reviewing courts the admissibility of the testimony. *Wood*, 341 Ill. App. 3d at 604.

Here, the record shows that afer being cross-examined by the State on what, if any, concerns defendant had for his mother's health and safety that night, defense counsel asked, on redirect, a question about the current location of his mother. The State objected to this question and the trial court sustained the objection. Defendant did not raise any issue with this ruling, argue the objection, or present an offer of proof in support of the objected-to question. Therefore, defendant has waived this argument. *Wood*, 341 Ill. App. 3d at 604; see also *Betts v. Manville Personal Injury Settlement Trust*, 225 Ill. App. 3d 882,

909 (1992).

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.