No. 1-09-3239

FIFTH DIVISION
February 4, 2010

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 9760
	)	
JAVIER TELLET a/k/a JAVIER TELLEZ,	)	Honorable
	)	John J. Moran, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

O R D E R

HELD: Judgment affirmed where the trial court's erroneous admission of hearsay evidence amounted to harmless error and defendant forfeited any argument based on the best evidence rule.

Following a bench trial, defendant Javier Tellet, a/k/a Javier Tellez, was convicted of aggravated driving under the influence of alcohol (DUI) and, based on his criminal history,

was sentenced to seven years' imprisonment. On appeal, defendant contends that the trial court erred when it admitted testimony regarding a store receipt that had not been introduced into evidence, thereby violating the hearsay and best evidence rules.

At trial, Chicago police officer Gilbert Lucio testified that he was on patrol in the early morning of May 11, 2009, when he observed a pickup truck driven by defendant weaving and straddling two lanes of traffic. Defendant rapidly pulled the truck to the side of the road leaving its tail end sticking out into a traffic lane. Defendant then exited, walked to the back of the truck and urinated.

As Officer Lucio approached defendant, he smelled a strong odor of alcohol "as if he had been drinking all day." The officer also observed that defendant's eyes were red and glassy and noticed that his speech was slurred. Defendant was unable to produce a driver's license or insurance information, and sat on the curb with his head in his hands. Minutes later, Officer Tim Walter arrived to conduct a field sobriety test.

Officer Walter testified that defendant had difficulty maintaining his balance and had a strong odor of alcohol on his breath. Defendant refused to submit to the field sobriety tests and was arrested. Officer Walter recovered an empty can of beer from the bed of defendant's truck that was sitting in a puddle of beer.

At the station, Officer Walter advised defendant of his rights and after asking him about his drivers license, defendant replied " 'I am f***ing drunk, it's my fault, not yours. I have never had a license. I have been here 15 years. I don't have the papers to get a license.' " Defendant admitted that he had been operating a motor vehicle and that he had drunk "one big beer." Officer Walter asked defendant whether he was under the influence of alcohol and he again replied "I am f***ing drunk."

Defendant's driving abstract indicated that he had never had a valid driver's license and that he had four prior DUI convictions. Officer Walter testified that, in his experience as a police officer, he had encountered thousands of persons who are under the influence of alcohol and, in his opinion, defendant was under the influence of alcohol that morning.

Officer Walter further testified that he searched defendant and recovered a store receipt from his pocket. Defense counsel objected to testimony about the receipt, noting that "[u]nless the State is going to tender this receipt, I would object to any testimony about it since we haven't received it." The State responded that the "inventory is part of all the discovery that's been tendered to counsel" and that the receipt is in the inventory. Based on this representation, the court allowed the testimony.

Officer Walter then testified that the store receipt showed the purchase of two 12-packs of beer with a time and date stamp from the evening before the arrest. On cross-examination, Officer Walters testified that he inventoried an empty beer can and "prisoner personal papers." On redirect, Officer Walter explained that he provided a summary of these personal papers, which included a store receipt from Cermak Produce for two 12-packs of beer purchased the evening before the arrest.

Officer John MacLaren testified that he attempted to administer a breathalyzer test to defendant, but that he refused. He also observed that defendant's eyes were bloodshot and glassy and that he smelled strongly of alcohol.

Based on this evidence, the court found defendant guilty of aggravated DUI. Defendant filed a posttrial motion arguing, *inter alia*, that the court erred when it overruled his hearsay objection related to the store receipt. The court denied the motion and sentenced defendant to seven years' imprisonment.

On appeal, defendant contends that the trial court erred in admitting testimony of the contents of the store receipt into evidence because the receipt was never introduced at trial, and thus the officer's testimony regarding its substance violated both the hearsay and best evidence rules.

Initially, the State responds that defendant forfeited these issues for failing to raise them at trial and in a posttrial

motion. Defendant replies that defense counsel's trial objection to Officer Walter's testimony supported a hearsay objection, and, thus preserved that issue for review; and that the best evidence issue may be reviewed under plain error because the evidence is closely balanced and relied on Officer Walter's credibility.

In order to preserve an issue for review, defendant was required to make a contemporaneous objection and raise it in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The record here shows that after the State asked Officer Walter about the store receipt on direct examination, defense counsel objected that the State had not tendered the receipt. The State responded that the receipt was part of the inventory, and the trial court allowed the inquiry. On cross-examination, Officer Walter noted that his report indicated only "prisoner papers," but on redirect, he noted that a paragraph of his report described the receipt. Given this ambiguity, we find that defendant's contemporaneous objection to the receipt, and the specific inclusion of the hearsay objection in his posttrial motion, was sufficient to preserve the hearsay issue for review. However, defendant made no comparable reference to his best evidence argument; and we, therefore, find that he has forfeited review of that issue. *Enoch*, 122 Ill. 2d at 186.

Hearsay evidence is in-court testimony of an out-of-court statement, which is offered to establish the truth of the matter

contained in the statement. *People v. Vasser*, 331 Ill. App. 3d 675, 685 (2002). Here, it appears from the record that the State was attempting to inquire about the receipt in order to challenge defendant's claim that he consumed "one big beer." In doing so, however, it is clear that the State intended to elicit testimony from Officer Walter through the information on the receipt that defendant had purchased two 12-packs of beer the previous evening. We, thus, agree with defendant that this constitutes inadmissible hearsay evidence and that the court erred in allowing it. *Vasser*, 331 Ill. App. 3d at 685.

Nonetheless, we find that this error does not require reversal. Admission of hearsay evidence is harmless if there is no reasonable possibility the verdict would have been different had the hearsay been excluded. *People v. Sample*, 326 Ill. App. 3d 914, 925 (2001), citing *People v. McCoy*, 238 Ill. App. 3d 240, 249 (1992).

The record shows that defendant was charged with aggravated DUI, an offense that may be proved by circumstantial evidence. *People v. Weathersby*, 383 Ill. App. 3d 226, 229 (2008). In addition, the credible testimony of an arresting officer has been found sufficient to sustain a conviction for DUI; no scientific proof of intoxication is necessary. *People v. Sturgess*, 364 Ill. App. 3d 107, 115 (2006).

Here, three police officers testified as to defendant's state of intoxication that morning. Defendant Officer Lucio testified that defendant smelled "as if he had been drinking all day," had glassy and red eyes, and slurred speech. Officers Walter and MacLaren corroborated Lucio's testimony as to defendant's eyes, speech, and odor, and also testified that he had trouble maintaining his balance.

An officer's testimony in a DUI case as to a defendant's appearance, speech, conduct, odor of alcohol is relevant evidence of a defendant's mental and physical impairment. *Sturgess*, 364 Ill. App. 3d at 115. The officers' account of defendant's erratic driving, his physical appearance and demeanor, and defendant's admissions that he was "f***ing drunk," provided overwhelming evidence of defendant's guilt of the charged offense. *Sturgess*, 364 Ill. App. 3d at 115. Accordingly, we conclude that the error in admitting the hearsay evidence as to his purchase of two 12-packs of beer was harmless beyond a reasonable doubt. *Sample*, 326 Ill. App. 3d at 925.

Despite the forfeiture of his best evidence argument, defendant urges us to conduct plain error review. This court may review for plain error where the evidence in a case is closely balanced and the verdict may have resulted from the error or where the error is so serious that it may have impacted

defendant's substantial rights. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005).

Here, defendant solely argues that the evidence is closely balanced and consisted only of the testimony of the police officers because there was no physical or scientific evidence. As noted above, the credible testimony of the arresting officer and the others who assisted him, is sufficient to sustain a DUI conviction; scientific proof is not required. *Sturgess*, 364 Ill. App. 3d at 115. We have already found that the evidence in this case was more than sufficient to satisfy the elements of the DUI charge, and is thus not closely balanced. We, therefore, find no basis for relaxing defendant's forfeiture of this evidentiary issue, and affirm the judgment of the circuit court of Cook County.

Affirmed.