2012 IL App (1st) 110378-U

SIXTH DIVISION
May 25, 2012

No. 1-11-0378

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. YP 547 380
	)	
SCOTT A. BRINKMAN,	)	The Honorable
	)	Hyman I. Riebman,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *Held*: The court did not abuse its discretion in overruling an objection to a portion of a video where a police officer asked defendant if he had any prior DUI arrest; it was not other-crimes evidence where defendant denied having any prior arrest and where there was no other evidence at trial concerning prior arrests or convictions and the court was apparently unaware of any prior DUI arrest or case until sentencing. There was sufficient evidence that defendant was driving under the influence of alcohol despite defense evidence explaining his gait and balance, where the officer testified to smelling alcohol on his breath, he had bloodshot and

glassy eyes and slurred speech, he refused chemical testing, and there was other behavioral evidence of impairment.

¶ 2 Following a bench trial, defendant Scott Brinkman was found guilty of driving under the influence of alcohol (DUI) and sentenced to one year of conditional discharge with 240 hours' community service and $2,095 in fines and fees. On appeal, defendant contends that the court erred in admitting into evidence a portion of a video in which a police officer asked him if he had previously been arrested for DUI. He also contends that there was insufficient evidence to convict him beyond a reasonable doubt.

¶ 3 At trial, police officer Kevin Finnen testified that, at about 2 a.m. on Saturday, April 3, 2010, he radar-timed defendant's car traveling at 59 miles per hour (mph) on a road with a posted 40-mph speed limit. Officer Finnen followed defendant's car and saw him fail to make a complete stop at a stop sign before making a right turn, and so he signaled defendant to stop. Defendant pulled into the driveway of a house and stopped, then exited his car. As defendant walked from his car, Officer Finnen saw him walking with difficulty; that is, he seemed "unsure of his balance." When asked for his license, defendant leafed past it as he sorted through his various cards, and Officer Finnen pointed this out to him. Defendant thanked Officer Finnen, referring to him as "hun." As defendant answered Officer Finnen's questions, his speech was slurred and he was swaying rather than standing still. Officer Finnen smelled a strong odor of alcohol on defendant's breath and saw that his eyes were bloodshot and glassy. Defendant stated that he was parked in the driveway of the home of a particular friend, but while that friend appeared at the scene, it was not in fact her home. Defendant refused to participate in any of the suggested field sobriety tests, which included reciting the alphabet as well as a balance- or

walking-related test. Officer Finnen concluded that defendant was under the influence of alcohol, and indeed that his intoxication was "extreme." The stated bases for this opinion were the "strong odor of alcoholic beverage upon his breath," slurred speech, and glassy and bloodshot eyes as well as his "inability to stand still" or maintain his balance. Officer Finnen thus arrested defendant. As he was being arrested, defendant again addressed Officer Finnen as "hun," then apologized for doing so. He also admonished himself to "shut up" and said "I am stupid." At the police station, defendant refused a breath alcohol test.

¶ 4 There was a video camera in Officer Finnen's police car, and the parties stipulated to the admission of the video of defendant's traffic stop. Both defendant and his counsel told the court that they had already viewed the video. However, as the video was shown, the defense objected to a portion thereof where the officer asked defendant about prior arrests. The objection made no reference to whether defendant in fact had a prior DUI arrest. The State argued that, because defendant therein denied any prior DUI arrest, the video was not a prejudicial admission. The court agreed, adding that the defense should have asked for any potentially objectionable portion of the video to be redacted before trial. The video was then played to its end.

¶ 5 On cross-examination, Officer Finnen admitted that the video indicated that the stop was at about 3 a.m. but explained that the video was erroneous and the stop was at 2 a.m. Before he was stopped, defendant did not cross the median line, strike the curb, or commit any other error but the speeding and the rolling stop. As he was questioned, he was polite and cooperative and did not act in an unusual manner. He told Officer Finnen that he had been at a club that evening. When the handcuffed defendant had to go into the back seat of the police car, he had some difficulty but was able to do so. On redirect, Officer Finnen testified that he was holding

defendant as he arrested him for fear that he would fall and hurt himself, although he admitted on recross that he did not hold up defendant for much of the traffic stop.

¶ 6 Dr. Terry Smith, physician and chiropractor, testified that defendant had been his patient for about eight years as his knees and shoulders were in poor condition. Specifically, Dr. Smith had treated defendant's knees for sprains, ruptures, "shredding and bone-on-bone," bursitis, and degenerative osteoarthritis. In particular, defendant's knees had to be drained of excess fluid four or five times in the year preceding the (October 2010) trial. A June 2010 magnetic-resonance image (MRI) of his right knee revealed sprain of one ligament and chronic rupture of another, along with a "bone-on-bone" situation; that is, the bones of the right knee no longer had cartilage between them. This would cause "repeated bouts of inflammation *** and pain" from having "no more cushioning every time he takes a step." In turn, this would cause a limp, as one shifted weight to reduce the pain, and indeed defendant had such a limp as long as Dr. Smith knew him. The MRI also revealed softening of defendant's knee cap, so that if he sat down or stood for 10 minutes or more, the knee would "take a few steps to get going" in a more normal manner. Dr. Smith opined that, if defendant stood for about 5 or 10 minutes, then began to walk again, his gait or ability to walk would be negatively affected.

¶ 7 On cross-examination, Dr. Smith admitted that defendant's poor knee health would not cause an odor of alcohol on his breath nor affect his speech. Though defendant's MRI was taken months after his arrest, Dr. Smith explained that he could not have developed his condition even in a year's time but only by "many years of chronic abuse to the knee," although it could become aggravated in a shorter period.

¶ 8 Defendant chose not to testify, and, following closing arguments, the court found him guilty of DUI. The court summarized the evidence, noting that the officer had the opportunity to observe defendant before forming his opinion that, while defendant was cooperative, his balance was unsteady and his speech was slurred. The court found that, upon viewing the video evidence, it was apparent that defendant was "thick-tongued," speaking slowly and generally not in complete sentences, and more to the point it was apparent that "defendant had been drinking, although he doesn't admit it." The court found that defendant's intoxication was so apparent from the video that while the judge hardly "ever make[s] a face" upon seeing or hearing "horrible" evidence, "I actually winced" upon viewing this video. The court expressly found that field sobriety testing would not have helped the officer make a determination as to whether defendant was under the influence of alcohol. The court also specifically found that the cause of defendant's observed conduct "wasn't just his knees," stating that, while a person with bad knees doesn't "move that very well" upon exiting a car, he doesn't "have that look. A person who is intoxicated has that look. That is what [defendant] had." Lastly, the court noted that defendant had believed erroneously that he was parked in his friend's driveway, referred to the officer as "hun," apologized for that, and told himself to "shut up," all serving as "some indication that [his] mental or emotional faculties are affected."

¶ 9 During arguments in aggravation and mitigation, the court learned that defendant had a prior DUI offense and thus had to be sentenced as a second-time offender. The court was apparently unaware of the earlier DUI case until after trial: the court asked if defendant was going to be considered a first offender for sentencing purposes, and upon being told that he was not, the court replied, "I don't think so. Tell me about defendant's record, if any." The court

sentenced defendant as stated above. Defendant did not file a post-trial motion, and this appeal timely followed.

¶ 10 Defendant first contends that the court erred in admitting into evidence, over his objection, the portion of the video in which the officer asked him if he has been arrested for DUI.

¶ 11 Evidence that a defendant has committed crimes other than the one for which he is on trial may not be admitted for the purpose of demonstrating his propensity to commit crimes, but may be admitted for a proper purpose such as proving intent, identity, motive, or absence of mistake. *People v. Adkins*, 239 Ill. 2d 1, 22-23 (2010). Even if relevant to a purpose other than showing the mere propensity to commit crime, evidence of other crimes may be excluded if its probative value is outweighed by its prejudicial effect. *Id*. at 23. The admissibility of evidence at trial is a matter within the sound discretion of the trial court so that we will not overturn its decision absent a clear abuse of discretion. *Id*. at 23; *People v. Jackson*, 232 Ill. 2d 246, 265 (2009). Even the erroneous admission of other-crimes evidence is reversible only if the evidence was a material factor in the conviction. *Adkins*, 239 Ill. 2d at 23.

¶ 12 Here, we shall not find that defendant forfeited this issue by not raising it in a post-trial motion. First and foremost, he objected when the video was shown at trial, so that the parties argued, and the court ruled upon, the instant claim in the trial court. Also, while post-trial motions are *de rigeur* in felony cases, it is common in misdemeanor and traffic cases to – as in the instant case – proceed directly from trial to sentencing without a post-trial motion.

¶ 13 That said, we find no reversible error in defendant's claim. As the trial court stated, defendant did not admit to a prior DUI arrest during the video so that the video by itself was not other-crimes evidence. Though defendant argues that other-crimes evidence "carries with it a

high risk of prejudice in that it is overly persuasive to the trier of fact," he does not cogently explain how the court could have been overly persuaded of his guilt by his denial that he had been arrested previously. In this vein, he attempts to conjure the specter that "the inference from the question *** made it reasonable to assume that the officer had made a computer search which takes seconds which revealed that the defendant had been arrested before." However, the officer's testimony made absolutely no reference to having made any computer or records search, nor did the court even hint at making such an inference in its lengthy trial findings. In light of the absence of trial evidence of a prior DUI arrest or conviction, and in particular the court's apparent unawareness of any prior DUI arrest or conviction until sentencing, the court had no reason to be persuaded of anything more than that defendant gave an unremarkable answer to one of the officer's various questions. In sum, the court did not abuse its discretion in overruling an objection that would have reasonably appeared to be no more than an objection to the bare fact that the officer had asked defendant about prior arrests.

¶ 14 Defendant also contends that the evidence at trial was insufficient to convict him of DUI beyond a reasonable doubt.

¶ 15 A person commits DUI when he drives a vehicle under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2010). The State must prove that the defendant was under the influence of alcohol to a degree that rendered him incapable of driving safely, but it may use circumstantial evidence to do so. *People v. Weathersby*, 383 Ill. App. 3d 226, 229 (2008). Such circumstantial evidence may include a refusal to take a breath alcohol test, which is probative of consciousness of guilt. *Id*. at 230, citing *People v. Johnson*, 218 Ill. 2d 125, 140 (2005).

¶ 16 In assessing the sufficiency of evidence, the relevant question is whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). On review, we do not retry the defendant and we accept all reasonable inferences from the record in favor of the State. *Id*. The trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Jackson*, 232 Ill. 2d at 281. A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Beauchamp*, 241 Ill. 2d at 8.

¶ 17 Here, after reviewing the evidence in the light most favorable to the State, we conclude that a reasonable finder of fact could convict defendant of DUI beyond a reasonable doubt. We find sufficient evidence that defendant was driving under the influence of alcohol on the night in question independent of his gait or balance and absent any chemical testing for alcohol. First and foremost, the officer smelled alcohol on his breath, saw that his eyes were bloodshot and glassy, and heard his slurred speech. The circumstances corroborated that he had been drinking alcohol: at about 2 a.m. on a Saturday, he admitted that he had been to a club. He indicated consciousness of guilt by refusing a breath alcohol test. Last but certainly not least, there was behavioral evidence of his impairment: his reference to the officer as "hun" and apology indicating that it was not his usual behavior, his easily-discovered lie that he had no prior DUI arrests, his mistaken belief that he was parked in his friend's driveway, and his self-assessment at that time as demonstrated by his remonstrations that he was "stupid" and should "shut up."

¶ 18 Accordingly, the judgment of the circuit court is affirmed.

¶ 19 Affirmed.