2017 IL App (1st) 150245-U

No. 1-15-0245

Order filed October 26, 2017

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 14 C2 20094
	)	
SUSAN GARCIA,	)	Honorable
	)	Marguerite A. Quinn,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court correctly found defendant guilty of aggravated driving under the influence of alcohol. The admission at trial of unobjected hearsay evidence not erroneous, and trial counsel was not ineffective for not objecting. Mittimus corrected to properly reflect offense, and erroneous fee vacated.

¶ 2 Following a 2014 bench trial, the trial court found defendant Susan Garcia (also known as Susan Pack) guilty of aggravated driving under the influence of alcohol (ADUI) and sentenced to four and one-half years' imprisonment. Defendant contends that the trial evidence was

insufficient to convict her beyond a reasonable doubt. She also contends that the trial court erred in admitting inadmissible hearsay into evidence at trial, and that trial counsel was ineffective for not objecting to it. Lastly, she contends that one of her fees is erroneous and must be vacated, and that the mittimus must be corrected to properly reflect her offense. For the reasons stated below, we correct the mittimus, vacate the fee in question, and otherwise affirm the judgment below.

¶ 3 Defendant was charged with three counts of ADUI based on a blood-alcohol concentration (BAC) of 0.08 or more, allegedly committed on or about December 26, 2013. Count 1 alleged that she had three prior DUI convictions, Count 2 alleged that she committed the offense when she did not have a license or permit to drive, and Count 3 alleged that she committed the offense when her driving privileges were revoked or suspended for a prior DUI offense.

¶ 4 At trial, Dever Kelly testified that he was driving home from work at about 8:30 p.m. on the day in question when an orange car "flew past me and flew in front of me, and then I struck" it. The orange car had approached his truck on his right side at high speed, and he noticed that the driver was a woman and the front-seat passenger was a man. After the front of Kelly's truck struck the driver's door of the orange car, Kelly pulled to the side of the road, exited his truck, and saw that its front end was severely damaged. He also saw that the orange car was on the median of the road and both occupants were still inside it. When he went over to offer assistance, he saw a man exit the passenger side of the orange car and a woman still seated in the driver's seat. At trial, Kelly identified defendant as the driver of the orange car. Kelly spoke with the man who exited the car; the man said that "he and the car was loaded" and "they need to get out of here and there's insurance in the glove box and that I'll figure it out and sort it out myself."

Defendant exited the orange car by the passenger door, because of the damage to the driver's door, and then she and the man walked away. Kelly believed that defendant was intoxicated, based on slurred speech, how she walked, and "the smell" of alcohol. When the police arrived, Kelly told an officer what happened – the orange car cut him off, then its occupants fled – and pointed to defendant and the man walking towards a nearby store. Kelly saw the officer approach defendant and the man, and Kelly confirmed for the officer that they were the occupants of the orange car and in particular defendant was its driver.

¶ 5 On cross-examination, Kelly testified that it was dark that night, he was driving at about 40 miles per hour just before the incident, and he was not paying attention to the orange car until it passed him. When he gave his account to the officer, he mentioned that a woman was driving the orange car.

¶ 6 Matthew Kindle, a friend of defendant, testified that he and defendant drank beer at her home on the night in question but he could not recall how many beers he, or she, drank. When they left defendant's home to buy more beer, they left in an orange car with defendant driving and Kindle as the passenger. Before they reached the store, "this kid hit us." When the orange car stopped moving, Kindle and defendant exited it and walked to a nearby store so they would not be in the road when they called the police. Kindle did not recall speaking with Kelly. He did not recall having to help defendant walk to the store. On cross-examination, Kindle testified that he recalled little about the incident or the time preceding it. Trial counsel asked Kindle if he was driving the orange car, but Kindle denied it.

¶ 7 Des Plaines police officer Jimmy Armstrong testified that he responded on the night in question to the report of an accident. When he arrived at the reported location, he saw an orange car in the median of the road and a truck on the side of the road. Kelly flagged down Armstrong

and told him that he had been driving the truck. Kelly pointed to two people walking briskly towards a nearby store and said that the woman was the driver. Armstrong followed the two people and, when he reached them, asked if they had been involved in the accident. "They replied no." At trial, Armstrong identified defendant and Kindle as the two people in question. Defendant denied to Armstrong that she had been in the orange car, but had merely been providing assistance. However, Kelly pointed out defendant and identified her as the driver, and defendant had broken glass in her hair and on her clothing. Armstrong believed her to be intoxicated, as her eyes were bloodshot and glassy, her speech was slurred, and her attitude was "slightly aggressive." However, because defendant reported being injured, Armstrong called an ambulance for her rather than conducting field sobriety testing.

¶ 8 On cross-examination, Armstrong testified that, when he spoke with defendant and Kindle, Kindle said that he was driving the orange car. Armstrong went to the hospital after defendant was taken there, but he denied asking a physician to have defendant's blood drawn. On redirect examination, Armstrong testified that he did not see any glass on Kindle's person or clothing. On recross-examination, he testified that he did not see Kindle shake himself off.

¶ 9 Nurse Armando Comas testified that he was working in a hospital emergency room on the night in question when defendant was brought there by ambulance. Comas identified defendant at trial as the woman he treated that night. When defendant arrived, Comas noticed "that she had the smell of alcohol" and her speech was slurred. Defendant was refusing care, but a physician found that she was "altered" or unable to decide for herself and so ordered that she be treated including drawing her blood for testing. Comas explained that, for patients from car accidents, blood testing is done to determine whether any symptoms are attributable to alcohol or some other cause requiring treatment. Comas drew the blood, first cleaning the area with soap

rather than alcohol to avoid contaminating the results, and the blood sample was labeled and "sent off" for testing. When he received the test results, defendant's blood serum level was "285" which indicated to Comas that she was intoxicated and should be treated accordingly. While defendant was in the emergency room with Comas for about two hours, she "was notably intoxicated. She was refusing all care [and] we constantly had to coax her to calm down."

¶ 10 On cross-examination, Comas testified that slurred speech could result from head trauma. When asked if the smell of alcohol is sufficient to assess intoxication, Comas replied "[i]t's a good signifier" but admitted that the assessment cannot be made by smell alone. Comas reiterated that defendant's blood test was ordered by a physician, not the police. Comas did not speak with any police officer, nor did he see the physician speaking with any officer.

¶ 11 The State's Attorney offered into evidence a "Notice of Disclosure" stating that "the defendant's serum alcohol level of 285 mg/dl of ethanol which equals .241 grams of ethanol in 100 milliliters of serum has been converted from serum to whole blood by dividing it with the correction factor of 1.18 pursuant to 20 Illinois Administrative Code, Chapter II, part 1286. The defendant's whole blood alcohol level equals .241 g/dl." After ascertaining from trial counsel that he had seen the Notice of Disclosure, the court admitted it into evidence. The State also offered into evidence a certified copy of defendant's driving record indicating that her license was revoked on the day in question, and a certified copy of a vehicle record indicating that the orange car was registered to Pablo Garcia at a specified address. Trial counsel acknowledged that both documents are self-authenticating, and the court admitted them into evidence without objection.

¶ 12 Trial counsel made objections to certain testimony during the State's examination of Kelly, Armstrong, and Comas. However, counsel did not object when the State elicited from Comas the result of the blood testing and the Notice of Disclosure.

¶ 13 Defendant testified that, on the night in question, she took the drugs Ambien and Alprazolam for an oncoming illness including a migraine and vomiting. She also drank a "20-ounce Maxx," an "8% beer," or "probably" one and a half bottles thereof. At some point, Kindle came to her home on foot. After they spoke for a few minutes, he asked if they could go buy beer at a store several blocks away. She demurred that she does not drive and pointed out to Kindle the keys to the orange car. The orange car was her son's car, and she could not drive it because it had a manual transmission but she never learned to drive such a car. Among the various modifications her son had made to the car were tinted side windows, "as dark as you can get legally." Defendant and Kindle went to the store in the orange car, with Kindle driving. As she was ill and not driving, she was not paying attention when the car was struck. Panicked, she exited the car as soon as she was coherent. Kelly was not standing by the car when she exited. As neither defendant nor Kindle had brought a cellphone, they walked over to the store to phone the police. Officers spoke with her there, and she was taken to the hospital by ambulance. There, she refused to have her blood drawn, but "they must have medicated me because I don't remember after that." On cross-examination, she denied having glass on her after the collision and denied telling Armstrong that she had not been in the orange car. She admitted that, while at the hospital, she was "making statements about suicidal ideations" and was "not making clear decisions."

¶ 14 During closing argument, trial counsel argued that defendant admitted to drinking alcohol on the night in question but "[t]he issue is *** whether there was driving." Counsel argued at

length that the State had not proven beyond a reasonable doubt that defendant was driving on the night in question. Following arguments, the court found defendant guilty of all three counts of ADUI. The court expressly found that she was driving the orange car based on Kelly's credible testimony. The court also noted the testimony of Armstrong and Comas that defendant was intoxicated. The court found that defendant's account was not credible.

¶ 15 Defendant's posttrial motion alleged insufficiency of the trial evidence and that the court should not have sustained State objections or denied defense objections, but made no reference to the instant claim. Trial counsel stood on the written motion, and the court denied it. Following a sentencing hearing, the court sentenced defendant to four and one-half years' imprisonment on Count 1, and imposed fines and fees. Defendant's unsuccessful postsentencing motion challenged her prison sentence but not her fines and fees.

¶ 16 On appeal, defendant contends that the trial court erred in admitting inadmissible hearsay into evidence at trial – Comas's testimony to defendant's blood serum level – and that trial counsel was ineffective for not objecting to it. Defendant admits that she did not preserve this contention, as trial counsel did not object at trial nor challenge the admission of the evidence in the posttrial motion. However, she contends that we may consider this claim under the plain-error doctrine and as an ineffective assistance claim.

¶ 17 The plain error doctrine is not a general saving clause preserving all errors that affect substantial rights regardless of whether they were brought to the trial court's attention, but a narrow and limited exception to the general rule that unpreserved claims are forfeited. *People v. Maxey*, 2016 IL App (1st) 130698, ¶ 33. A plain error is a clear and obvious error that (1) occurred when the evidence was so closely balanced that the error alone threatened to change the result, or (2) was so serious that it affected the fairness of the defendant's trial and challenged the

integrity of the judicial process. *Id.* The defendant bears the burden of showing plain error, and the first step in plain-error analysis is determining whether an error occurred. *Id*., ¶ 34.

¶ 18 It is well-established that hearsay evidence admitted without an objection is given its natural probative effect. *People v. Ramsey*, 205 Ill. 2d 287, 293 (2002); *People v. Harris*, 2012 IL App (1st) 100077, ¶ 26. As our supreme court has stated, "the failure to object to hearsay not only waives the issue on appeal, but allows the evidence to be considered by the trier of fact and to be given its natural probative effect." *Ramsey* at 293. As to that natural probative effect here, we find that Comas's testimony – defendant's blood serum level in a test ordered on the night of the incident by a physician for medical reasons was "285" and indicated intoxication – is reliable inculpatory evidence when taken in context of the other trial evidence. Defendant cites *People v. Harmon*, 2012 IL App (3d) 110297, which found error in a DUI case where the only trial evidence regarding BAC was that the defendant's serum ethanol intoxication level was "221 on admission" to a hospital and the trial court inferred the unit of measurement for that level. "The State, in this case, did not present *any* evidence concerning the unit of measurement employed by the hospital when calculating defendant's level of alcohol present in his blood serum." (Emphasis in original.) *Id.*, ¶ 16. In contrast, Comas's testimony of an intoxicated "285" serum level was put into context – 285 milligrams of ethanol per deciliter of serum – by the Notice of Disclosure.

¶ 19 Because Comas's testimony and the Notice of Disclosure are so closely related on the key issue of defendant's BAC, we note that the Notice of Disclosure was admitted into evidence without objection. Indeed, the trial court gave counsel a clear opportunity to object by asking him if he saw the Notice of Disclosure – he replied that he did – so that we conclude that trial counsel consciously chose not to object to the Notice of Disclosure. While trial counsel did not stipulate to the Notice of Disclosure, we believe that counsel's decision falls under the invited

error doctrine. Under that doctrine, a party cannot acquiesce to the manner in which the trial court proceeds and later claim on appeal that the trial court's actions constituted error. *People v. Cox*, 2017 IL App (1st) 151536, ¶¶ 69-70, 73. Invited error encompasses errors that a party brought about or participated in. *Id*., ¶ 73. Had trial counsel objected to either Comas's testimony or the Notice of Disclosure, the State could have easily remedied the present issue by introducing the blood test results into evidence – defendant acknowledges that the test results themselves are admissible – by calling the hospital employee who conducted the testing.

¶ 20 Comas testified that he obtained the "285" blood serum level from a test performed on defendant on the night in question at the hospital. It is reasonable to infer that the State's Attorney in preparing the Notice of Disclosure was referencing the same blood test results. With the unobjected hearsay evidence admitted for its natural probative effect, which in this particular case was reliable and inculpatory, we find no error in the admission of the unobjected hearsay and thus no plain error. This leaves us with defendant's ineffective-assistance argument.

¶ 21 Claims of ineffective assistance of counsel are evaluated under a two-prong test whereby a defendant must show both that (1) counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that the outcome of the trial or proceeding would have been different absent counsel's errors. *People v. Manning*, 241 Ill. 2d 319, 326 (2011). In showing deficient performance, a defendant must overcome the strong presumption that counsel's action or inaction may have been the product of sound trial strategy. *Id*. at 327.

¶ 22 Here, defendant argues that no reasonable trial strategy could support counsel not objecting to Comas's testimony to defendant's blood serum level because it was the only evidence that defendant's BAC was 0.08 or more, a key element of the State's case. However, this court recently addressed a similar claim in *Cox*, where trial counsel did not object to the

State's certification that the defendant did not have a firearm owner's identification card (FOID) when the failure to have a valid FOID was an element of the offense. *Cox*, ¶¶ 2, 11. We concluded in *Cox* that:

> "the only way that defense counsel's decision not to object to the certification could possibly be ineffective assistance was if defendant actually had a FOID card and the certification was in error. Otherwise, counsel's decision to waive any objection to its admission was a matter of trial strategy. [Citation]. In the record before us, there is nothing to suggest that defendant had a FOID card and everything to suggest that the decision was a matter of trial strategy. Counsel's strategy, from start to finish at trial, was to contest whether defendant possessed a gun." *Id.*, ¶ 88.

¶ 23 Similar to *Cox*, trial counsel here advanced the defense that defendant was not driving the orange car, whether or not she was under the influence of alcohol at the time. Counsel attempted to elicit evidence from State witnesses supporting that theory, elicited such evidence from defendant, and argued that defense in closing argument. Moreover, as stated above, Comas's testimony and the Notice of Disclosure are reliable evidence of defendant's blood test results. There is nothing in the record before us to suggest that defendant's blood test result was other than 285 milligrams of ethanol per deciliter of serum. We conclude that defendant has failed to overcome the presumption that the lack of an objection to Comas's blood-test testimony (or the Notice of Disclosure) was the result of sound trial strategy.

¶ 24 Finally, defendant contends that the trial evidence was insufficient to convict her of ADUI beyond a reasonable doubt. On a claim of insufficiency of the evidence, we must determine whether, taking 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. Bradford*, 2016 IL 118674, ¶ 12. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence, and it is better equipped than this court to do so as it heard the evidence. *Id.*; *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We do not retry the defendant; that is, we do not substitute our judgment for that of the trier of fact on the weight of the evidence or credibility of witnesses. *Bradford*, ¶ 12. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Jonathon C.B.*, ¶ 60. 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, nor to find a witness was not credible merely because the defendant says so. *Id.* 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. *Bradford*, ¶ 12.

¶ 25 Here, taking the trial evidence in the light most favorable to the State as we must, we conclude that a reasonable trier of fact could convict defendant of ADUI. While defendant testified that she was not driving the orange car on the night in question, and Kindle had told Armstrong that he was driving, it is eminently reasonable to conclude that defendant was driving. Kelly's eyewitness testimony clearly places her behind the wheel before and after the collision, Kindle denied at trial that he was the driver, and Armstrong's testimony that he saw glass fragments on defendant while he saw none on Kindle place her in the driver's seat of the orange car when it was struck by Kelly's truck. As to the BAC evidence, nurse Comas's unobjected testimony – the results of defendant's blood serum test ordered on the night of the incident by a

physician for medical reasons were "285" and indicated intoxication – and the Notice of Disclosure are sufficient inculpatory evidence. As explained earlier, we need not elevate to reasonable doubt the possibility that the "285" was measured in units other than the milligrams of ethanol per deciliter of serum indicated by "285 mg/dl of ethanol" in the Notice of Disclosure. It is reasonable to infer that Comas and the Notice of Disclosure were referencing the same underlying blood test results with a 285 milligrams per deciliter serum level. We consider it a reasonable inference from Comas's testimony and the Notice of Disclosure that defendant had on the night in question 285 milligrams of alcohol per deciliter of blood serum, or a .241 whole-blood BAC as the Notice of Disclosure calculates according to the statutory conversion factor. As that considerably exceeds the 0.08 BAC in the statute and charges, we find the evidence sufficient to convict defendant of ADUI beyond a reasonable doubt.

¶ 26 Lastly, defendant contends that her $250 DNA fee must be vacated because she has already been assessed the fee upon a prior felony conviction, and that the mittimus must be corrected to properly reflect her offense.

¶ 27 Before addressing the merits, we note that defendant did not raise these issues in the trial court and thus forfeited them. However, we may correct the mittimus to conform to the trial court's oral pronouncement of its judgment. *People v. Jackson*, 2016 IL App (1st) 133823, ¶ 77. Regarding the fee issue, the State does not argue defendant's forfeiture and has thus forfeited a forfeiture challenge. *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 16.

¶ 28 The parties correctly agree that the $250 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2012)) should not have been assessed here because defendant was assessed the DNA fee upon a prior felony conviction. *People v. Marshall*, 242 Ill. 2d 285 (2011). The parties also correctly

agree that defendant was convicted of ADUI based on three prior DUI offenses, while the mittimus describes her offense as "AGG. DUI/5."

¶ 29 Accordingly, we direct the clerk of the circuit court to correct the mittimus to reflect that defendant was convicted of ADUI based on three prior DUI offenses. We vacate the $250 DNA fee and direct the clerk of the circuit court to correct the fines and fees order to reflect that vacatur. The judgment of the circuit court is otherwise affirmed.

¶ 30 Affirmed in part, vacated in part, mittimus and order corrected.