2017 IL App (1st) 150976-U

No. 1-15-0976

September 29, 2017

Second 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.	)	Nos. YB-237-587
	)	YB-237-588
	)	YB-237-589
	)	YB-237-590
	)	YB-237-591
	)	
JONATHAN SALMERON,	)	Honorable
	)	Stanley L. Hill,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justice Mason concurred in the judgment.
Justice Hyman dissented.

ORDER

¶ 1 *Held*: Defendant's conviction for driving under the influence of alcohol and cannabis affirmed over his contention that the State failed to prove him guilty beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant Jonathan Salmeron was convicted of following too closely, disobeying a stop sign, improper lane usage, driving without insurance, and driving under the combined influence of alcohol and cannabis (625 ILCS 5/11-501(a)(5) (West 2014)) and sentenced to 24 months' supervision on the conviction for driving under the influence. On appeal, he contends the State failed to prove him guilty beyond a reasonable doubt of driving under the combined influence of alcohol and cannabis. For the following reasons, we affirm.

¶ 3 At trial, Berwyn police officer Robert Brenka testified that he was on duty in a marked squad car on June 14, 2014, at approximately 4:54 a.m. While driving, Brenka noticed a vehicle driving "extremely close" to his back bumper. Brenka verified that he was driving the speed limit, 25 miles per hour, and then pulled to the side of the road. The vehicle passed him, and Brenka followed.

¶ 4 Brenka observed the vehicle drive through a stop sign without stopping. The vehicle was driving 10 miles per hour in a 25 mile-per-hour zone. It intermittently drifted out of its lane into the lane for oncoming traffic. When the vehicle drifted, it overcorrected and nearly hit cars parked on the right side of the street. Brenka activated his emergency lights and stopped the vehicle.

¶ 5 The vehicle "curbed" properly, and Brenka approached the driver's side window. Defendant was driving and there were no other people in the vehicle. After Brenka explained why he pulled defendant over, defendant was apologetic and acknowledged that it was "disrespectful" for him to closely follow the police vehicle. Defendant also stated that he was going to pick up his girlfriend and pointed north. However, the address he gave Brenka was south of where Brenka had stopped defendant. Upon Brenka's request, defendant produced his

driver's license. He also produced a "non-owner SR 22 only insurance card," which did not list any vehicles. The vehicle insurance that defendant produced was expired.

¶ 6 Brenka noticed a strong alcoholic odor from defendant's breath. He also observed that defendant's eyes were bloodshot and his pupils were "very large." When Brenka asked defendant about his large pupils, defendant responded "that he had smoked cannabis earlier and uses Clear Eyes to try and resolve that." Upon hearing this, Brenka asked defendant to exit his vehicle to perform standardized field sobriety tests.

¶ 7 Brenka was trained in 2007 in the administration of standardized field sobriety tests and had taken four or five advanced courses since his initial training. He explained the various tests to defendant prior to administering them. Brenka first administered the Horizontal Gaze Nystagmus (HGN) test. Defendant exhibited six out of six cues, indicating he consumed alcohol. Brenka next administered the walk-and-turn test, which defendant passed. Finally, Brenka administered the one-leg-stand test. Defendant failed that test by exhibiting three out of four possible cues, including raising his arms four times, putting his foot down, and continually swaying.

¶ 8 Following defendant's performance, Brenka placed defendant into custody and transported him to the police station where he read defendant the "Warning to Motorists." Defendant refused both a breathalyzer test and the opportunity to provide a urine sample.

¶ 9 Brenka was a police officer for seven years. As an officer, he observed people under the influence of alcohol "hundreds" of times and observed people under the influence of cannabis "at least a hundred" times. In his personal experience, he observed people under the influence of alcohol "at least a hundred" times. Based on his training and experience, it was Brenka's opinion

that defendant was operating his vehicle under the influence of alcohol and drugs and could not safely operate the vehicle. Brenka based his opinion on his initial observations of defendant following the squad car too closely, running a stop sign, driving under the speed limit, and swerving in his lane. Brenka additionally based his opinion on defendant's statements that he had been drinking and using cannabis prior to the traffic stop, as well as defendant's refusal to submit to the breathalyzer test and provide a urine sample.

¶ 10 On cross-examination, Brenka acknowledged that defendant did not hit anything while driving and was not slurring his words. He further acknowledged that defendant did not fumble with or drop his insurance cards or license. Defendant did not say when he consumed alcohol or smoked cannabis; he only stated he had done those things "earlier," but Brenka did not know the exact time frames.

¶ 11 When defense counsel asked whether Brenka was aware that pupils dilate in low lighting, Brenka answered, "sure," and acknowledged the traffic stop occurred around 5 a.m. He also acknowledged that he did not recover beverage containers, cannabis, or drug paraphernalia in defendant's car.

¶ 12 There was no video of defendant performing the field sobriety tests. Defendant did not fall during any of the tests. The HGN test tests for possible alcohol consumption, but does not test for intoxication. Defendant was polite to Brenka when he declined to provide a urine sample. Brenka acknowledged he was not a drug recognition expert.

¶ 13 After the State rested, the defense stated it had no live witnesses. The parties stipulated to the foundation of defendant's booking video, and the court admitted the video into evidence without objection. The video was published and the court stated on the record it was reviewing

the video, which did not have sound. Officer Brenka narrated the video. He described that in the video, he was standing between defendant and the booking officer, who was completing intake paperwork. The defense rested after the video was published.

¶ 14 Following arguments, the court briefly recited the evidence and found defendant guilty of following too closely, disobeying a stop sign, improper lane usage, driving without insurance, and driving under the combined influence of alcohol and cannabis. Defendant filed a motion to reconsider, arguing that the State presented no evidence regarding the effects of drugs, Brenka's training, skills, or experience regarding drugs, or Brenka's qualifications to render an opinion as to defendant's intoxication from drugs. The court, in ruling on the motion, extensively compared the facts of the case to those of *People v. Bitterman*, 142 Ill. App. 3d 1062 (1986). The court concluded that, based on *Bitterman*, an expert opinion, such as that of a qualified police officer, regarding whether a defendant is under the influence of cannabis is unnecessary where, as here, there is direct evidence of intoxication from cannabis. The court found that there was direct evidence in this case because defendant admitted to smoking cannabis, and rejected defense counsel's argument that it was not direct evidence just because defendant stated he smoked "earlier" rather than while he was driving. Thus, the court denied defendant's motion to reconsider.

¶ 15 With respect to the counts of following too closely, disobeying a stop sign, and improper lane usage, the court sentenced defendant to supervision. For the driving without insurance charge, the court sentenced defendant to a "sentence of conviction" and a $500 fine, and noted it was his second insurance violation within a five-year period. Finally, the court sentenced defendant to 24 months' supervision and a fine of $1,644 for the driving under the combined

influence of alcohol and drugs count. Defendant filed a motion to reconsider sentence, which the court denied. This appeal followed.

¶ 16 On appeal, defendant challenges only the sufficiency of the evidence for his conviction for driving under the combined influence of alcohol and cannabis. Specifically, defendant contends that there was no evidence that he was under the influence of cannabis because he did not admit to being under the influence at the time he was driving, there was no evidence presented regarding whether cannabis would render a person incapable of driving safely, and there was no evidence that Officer Brenka was trained or qualified to render an opinion regarding whether defendant was under the influence of cannabis.

¶ 17 On a challenge to the sufficiency of the evidence, we inquire " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis omitted.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In so doing, we draw all reasonable inferences in favor of the State (*Davison*, 233 Ill. 2d at 43), and we do not retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). We will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 18 To prove the offense of driving under the combined influence of alcohol and other drugs, the State must prove the defendant "consumed alcohol, ingested some other drug or drugs, and be under the combined influence of both" and that "the alcohol and the other drug or drugs,

acting together, render the person incapable of driving safely." *People v. Vanzandt*, 287 Ill. App. 3d 836, 845 (1997); 625 ILCS 5/11-501(a)(5) (West 2014). "It is axiomatic that the other drug or drugs must have some intoxicating effect, either on its own or because of being combined with alcohol." *Id* at 845.

¶ 19 The State need not present scientific evidence of intoxication where there is testimonial evidence provided by a credible witness. See *People v. Gordon*, 378 Ill. App. 3d 626, 632 (2007). "[A] layman is competent to testify regarding intoxication from alcohol, because such observations are within the competence of all adults of normal experience." *Vanzandt*, 287 Ill. App. 3d at 845. With regard to drugs, "the testimony of police officers that a defendant was under the influence of drugs would be sufficient, provided that the officers had relevant skills, experience, or training to render such an opinion." *Id.* However, a defendant's admission may provide direct evidence of intoxication and sustain a conviction. See *Bitterman*, 142 Ill. App. 3d at 1065.

¶ 20 Here, defendant does not challenge the sufficiency of the evidence regarding his intoxication due to alcohol. Rather, he contends only that the evidence was insufficient to show he was under the influence of cannabis. There is no dispute that defendant was operating the vehicle, and Officer Brenka's testimony regarding defendant's erratic driving and failure of two field sobriety tests showed he was incapable of operating the vehicle safely. Intoxication is a question for the trier of fact, here the trial court, to resolve on the basis of having assessed the credibility of the witnesses and the sufficiency of the evidence. *People v. Janik*, 127 Ill. 2d 390, 401 (1989). In addition to the evidence indicating defendant was under the influence of alcohol, the State's evidence showed that Brenka observed defendant had bloodshot eyes and dilated

pupils, which defendant attributed to smoking cannabis "earlier," prompting him to use Clear Eyes "to try to resolve that." See *Bitterman*, 142 Ill. App. 3d at 1065 (finding that a defendant's admission may provide direct evidence of intoxication and sustain a conviction). Once arrested, defendant additionally refused to submit to urine or breathalyzer tests. See *People v. Morris*, 2014 IL App (1st) 130512, ¶ 20 ("A defendant's refusal to submit to chemical testing shows a consciousness of guilt."). We are unpersuaded by defendant's argument that his admission that he smoked cannabis "earlier" negates the inference that he was under the influence at the time he was arrested. Considering the totality of the circumstances, including defendant's driving, admission of using cannabis, and "large pupils," the trier of fact could reasonably infer defendant was under the influence of cannabis at the time of his arrest. *Siguenza-Brito*, 235 Ill. 2d at 228 (it is the responsibility of the trier of fact to draw reasonable inferences from the evidence).

¶ 21 Moreover, we are unpersuaded by defendant's contention that the evidence was insufficient because there was no evidence presented regarding Brenka's qualifications to offer an opinion regarding whether defendant was under the influence of cannabis. As the trial court correctly noted, where there is direct evidence concerning defendant's drug usage, *i.e.*, his own admission, "the opinion of a qualified police officer that defendant was under the influence of drug or drugs [is] unnecessary." *Bitterman*, 142 Ill. App. 3d at 1066. Accordingly, we find that there was ample evidence for the trial court to find defendant guilty beyond a reasonable doubt of driving under the combined influence of alcohol and cannabis.

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

¶ 23 Affirmed.

¶ 24 JUSTICE HYMAN, dissenting.

¶ 25 The State presented evidence that Salmeron had used cannabis at some point before his arrest. But the State did not present evidence that Salmeron was actually under the influence of that cannabis, to the point that it, combined with the influence of alcohol, rendered him incapable of driving safely. I would find the evidence insufficient to convict, and so I dissent.

¶ 26 Salmeron was convicted under 625 ILCS 5/11-501(a)(5) (West 2015), which prohibits driving while "under the combined influence of alcohol, other drug or drugs, or intoxicating compound or compounds to a degree that renders the person incapable of safely driving." The State must prove that the defendant is under the influence of *both* alcohol and a drug. (emphasis in original) *People v. Bitterman*, 142 Ill. App. 3d 1062, 1064 (1986); *People v. Vanzandt*, 287 Ill. App. 3d 836, 845 (1997) ("it is axiomatic that the other drug or drugs must have some intoxicating effect, either on its own or because of being combined with alcohol"). This is an essential element of the charge. *Bitterman*, 142 Ill. App. 3d at 1064.

¶ 27 Section (a) (5) requires a finding that Salmeron was actually under the influence of alcohol and drugs, unlike statutes which do not require the State to prove impairment, but only usage. Cf. *People v. Way*, 2017 IL 120023, ¶¶ 23-28 (if person charged under DUI statute prohibiting driving when blood alcohol concentration is above legal limit, State need not prove that person was impaired by alcohol consumption). Without that proof that the usage influenced Salmeron's ability to drive safely, the conviction cannot stand. See *In re Winship*, 397 U.S. 358, 364 (1970) (Constitution protects defendant against conviction except on proof beyond reasonable doubt of "every fact necessary to constitute the crime with which he is charged").

¶ 28 The majority conflates the evidence of usage and the evidence of influence. While the evidence of usage is undoubtedly an important component of finding that a defendant was

driving under the influence, it is not sufficient on its own accord. *Vanzandt*, 287 Ill. App. 3d at 845. We can certainly infer that Salmeron had used cannabis at some point, since he admitted to doing so, but there was no evidence regarding when he used the cannabis or the amount he consumed, and no evidence that Salmeron was influenced by his cannabis usage.

¶ 29 This case is not like *Bitterman*, where the defendant answered affirmatively when a police officer asked if he had been smoking or was under the influence of marijuana. 142 Ill. App. 3d at 1063. The *Vanzandt* court relied on this very fact to distinguish *Bitterman*, and found the evidence insufficient to convict. 287 Ill. App. 3d at 845 ("Unlike the defendant in *Bitterman*, however, Vanzandt never admitted 'being under the influence' of insulin.").)

¶ 30 Officer Brenka observed that Salmeron was unable to operate the vehicle safely, but that's only one element of the crime. Because he was not a drug recognition expert, Officer Brenka was unable to parse whether that inability stemmed at all from cannabis usage, or was attributable solely to his alcohol consumption. See *People v. Foltz*, 403 Ill. App. 3d 419, 425 (2010) (where police officer did not have necessary experience or training in drug recognition, officer's testimony was insufficient to prove that defendant was under combined influence of alcohol and drugs). The HGN test could not reveal cannabis influence. The driving behavior that Officer Brenka observed—tailgating the squad car, swerving, running a stop sign—was just as easily attributable to the influence of alcohol as the influence of cannabis.

¶ 31 Because the State failed to prove this essential element of the crime, I would find that the evidence was insufficient to convict Salmeron. *Winship*, 397 U.S. at 364.