2012 IL App (2d) 111305-U
No. 2-11-1305
Order filed August 20, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BELINDA HERNANDEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 10-DT-0838 Honorable Bruce W. Lester, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

Held: The record contained sufficient evidence for a rationale trier of fact to find defendant guilty of DUI beyond a reasonable doubt. However, because the trial court applied the incorrect burden in determining whether defendant was guilty of failing to reduce speed to avoid an accident, we vacated that conviction. Therefore, we affirmed in part, vacated in part, and remanded the case.

¶ 1 Following a bench trial, defendant, Belinda Hernandez, was found guilty of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2010)) and failing to reduce speed to avoid an accident (625 ILCS 5/11-601(a) (West 2010)). Defendant now appeals, contending that the State failed to prove her guilty of both offenses beyond a reasonable doubt. For the reasons set

forth below, we affirm defendant's conviction for DUI but vacate her conviction for failure to reduce speed, and remand.

¶ 2 I. Background

¶ 3 The record reflects that, on May 25, 2010, defendant was involved in a traffic accident with another motorist. Police were dispatched to the accident scene, and following an investigation, the police requested defendant to perform a variety of field sobriety tests. Defendant was thereafter arrested and transported to the police station. The State later charged defendant with DUI and failure to reduce speed to avoid an accident.

¶ 4 A bench trial commenced on November 26, 2011. The State first called Ewelin Wolowicz, the other motorist involved in the traffic accident. Wolowicz testified that she was in her vehicle, waiting in the left lane to execute a left turn into a gas station when "[a]ll of the sudden, I heard a real big boom and I felt my body going forward." Wolowicz testified that paramedics treated her at the scene of the accident.

¶ 5 The State next called Officer Scott Hromadka. Hromadka testified that he was on duty as a police officer for the Elgin police department and responded to the scene of the accident. Hromadka testified that he arrived in uniform and in a marked patrol car, and spoke with defendant. Hromadka testified that defendant told him that a white vehicle had cut her off, causing her to strike the other vehicle. Hromadka testified that, during his conversation with defendant, he observed that defendant's eyes were glassy and "a strong odor of an alcoholic beverage [was] coming from [defendant's] breath when she spoke to me." Hromadka asked defendant if she had been drinking alcohol, and defendant responded that she had a Long Island iced tea at the Grand Victoria casino.

¶ 6 Hromadka testified that defendant agreed to submit to field sobriety tests. Hromadka testified that he received training in DUI detection while at the police academy, approximately six years ago.

Hromadka testified that he has had refresher and advanced DUI detection training, which involved using the National Highway Traffic Safety Administration (NHTSA) manual for DUI arrests, and that he passed a test during his training to demonstrate that he was capable of administering field sobriety tests. Hromadka asked defendant to perform a series of field sobriety tests under the gas station's overhanging lights and read defendant instructions for the field sobriety tests from the Standardized Field Sobriety Test booklet issued by the Illinois State Police.

¶ 7 Hromadka testified that the first field sobriety test he administered was the horizontal gaze nystagmus (HGN) test. Hromadka explained that this test involved using a lighted indicator, such as a pen, to see whether the eyes tracked equally between both eyes, and explained further the other indicators he looked for during the test. Hromadka testified that defendant passed that test because she exhibited only two out of the six clues, and exhibiting four clues was necessary for failure. The trial court took judicial notice that, under prevailing case law, the test "is exclusively used for the detection of alcohol [and] [i]t has nothing to do with impairment *** ."

¶ 8 Hromadka testified that he next administered the "walk-and-turn" test. Hromadka testified that he explained the test and demonstrated it for defendant. Hromadka testified that he looks for clues indicating intoxication while subjects perform the test, which involves taking nine steps walking heel to toe, making a pivoted turn, and walking nine steps back, while keeping their arms at their sides and counting the steps aloud. Hromadka testified that he observed defendant was unable to maintain her balance while he instructed her on the test; she was unable to walk heel to toe; she brought her arms from her side for balance; and she made an improper turn. Hromadka testified that defendant failed that test because she exhibited five of the eight indicators of possible intoxication.

¶ 9 Hromadka testified that he next administered the "one-legged-stand" test. Hromadka testified that he explained the test to defendant and demonstrated it for her. The test involved standing with both feet next to each other, and when instructed, lifting one foot from the ground and counting until the person is instructed to stop, while not using arms for balance. Hromadka testified that defendant swayed on one leg; she hopped at one point to maintain her balance; and she put her foot down four times during the test. Hromadka testified that defendant failed the test, exhibiting all four indicators of possible intoxication. Hromadka testified that, based on his experience and professional opinion, he believed that defendant was under the influence of alcohol and was unfit to drive. Hromadka testified that he arrested defendant for DUI of alcohol and transported her to the police station. Hromadka testified that, at the station, defendant refused to take a breath test.

¶ 10 During cross-examination, Hromadka admitted that he did not observe defendant commit any traffic violations or witness the accident. Hromadka acknowledged that he spoke with defendant after she spoke with paramedics. Hromadka admitted that he observed the air bag from defendant's vehicle had deployed and agreed that defendant's contact with the air bag could have caused defendant's eyes to appear glassy. Hromadka admitted that defendant's speech was fair, her clothes were orderly, and she was not stumbling or falling down.

¶ 11 Hromadka further agreed that the field sobriety tests he administered were valid only if administered in the prescribed manner. Hromadka admitted that the HGN test was the most reliable field test. Hromadka admitted that defendant passed the HGN test but that she was not free to leave after that because he asked her to perform other field sobriety tests. Hromadka testified that, when administering field sobriety tests, he reads the same instructions from a booklet every time. Hromadka recited the instructions for the walk-and-turn test, and admitted that there were two stages of that test.

¶ 12 The State rested, and defendant testified on her own behalf. Defendant testified that she was driving her car at approximately 30 miles per hour when a truck coming out of a gas station crossed through her lane. Defendant testified that, when the truck cleared her view, Wolowicz's vehicle, which was traveling northbound ahead of her, was at a stop. Defendant testified that she was able to slow down "a little," but not enough to prevent the accident. Defendant testified that her air bag deployed, hitting her in her chest and face. Defendant testified that she declined medical assistance, but testified that she was sore in the front of her chest, her muscles were stiff, and that she was hurt.

¶ 13 Defendant admitted that she had consumed a Long Island iced tea earlier in the evening. Defendant testified that she had a conversation with Hromadka. Defendant testified that she complied with the field sobriety tests. Defendant testified regarding the shoes she was wearing that night, which were submitted into evidence. The trial court noted that the shoes had a rubber foundation, were a casual shoe with a "somewhat pointy toe; very attractive shoe; a wider [heel] on the top of the shoe." The trial court further noted that the shoes did not have spiked heels and that the heels of the shoes were "approximately one-and-one-half inches with a [base heel] of about a quarter inch."

¶ 14 Defendant testified that she cooperated with Hromadka during the field sobriety tests and told him that her chest was beginning to hurt from the air bag deploying. Defendant testified that she believed that she performed the tests "to the best that I could" in light of her medical condition. Defendant testified that she had a bad back, but did not inform Hromadka because he did not ask. Defendant testified that Hromadka did not ask or give her an opportunity to remove her shoes. Defendant testified that, although she consumed an alcoholic beverage, she was not intoxicated and was polite, cooperative, and followed instructions.

¶ 15 On cross-examination, defendant admitted that she had been wearing the shoes previously admitted into evidence when she was driving the car and when walking around the casino. Defendant admitted that Hromadka read instructions for the field sobriety tests from a booklet. On redirect examination, defendant testified that Hromadka did not ask her when she had last consumed alcohol prior to the accident.

¶ 16 Defendant rested after testifying.

¶ 17 Following closing arguments, the trial court found defendant guilty of both counts. In its oral ruling, the trial court noted that the case "turn[ed] upon" Hromadka's and defendant's testimony. The trial court noted that, upon arriving on the scene and speaking with defendant, Hromadka smelled a strong odor of alcohol and noticed that defendant's eyes were glassy. The trial court noted that defendant told Hromadka that she had a Long Island iced tea to drink and at that point, Hromadka "ha[d] every basis in the world *** to do those field-sobriety tests." Specifically, with respect to the HGN test, the trial court concluded that "we don't need this *** test to determine whether or not alcohol had *** been ingested. *** [W]e have that."

¶ 18 Regarding the field sobriety tests, the trial court noted that Hromadka testified that defendant was not able to keep the proper distance between her heels and toes during the walk-and-turn test. The trial court stated that, while it would give the result of that test "a little [bit] less of weight" because Hromadka did not specify which steps in the test defendant failed to walk heel to toe, it would not exclude the test because "she stepped off the line[,] [s]he had improper balance[,] [s]he *** did not turn." The trial court noted that there was specificity as to how Hromadka conducted the test. Regarding the one-legged-stand test, the trial court noted that the uncontested evidence demonstrated that defendant swayed and used her arms for balance. The trial court further emphasized that defendant had to put her foot down four times during the test.

¶ 19 The trial court further concluded that it considered defendant's refusal to take a breath test "for purposes of consciousness of guilt." The trial court noted that defendant's refusal to take a breath test in combination with a strong odor of alcohol and her "two very solid flunks *** on the field[]sobriety tests." The trial court also addressed defendant's shoes and noted that they were not "ladies high heels, dress shoes," but instead were "casual dress shoes that have somewhat of a descending heel." The trial court noted that there was no testimony that defendant asked to take the field sobriety tests without wearing her shoes. The trial court concluded "[s]o if I honestly look at this *** there is no reasonable doubt here. There is a finding of guilty."

¶ 20 With respect to its finding of guilt that defendant failed to reduce her speed to avoid an accident, the trial court stated:

> "[T]he surrounding circumstantial evidence of the absence of skid marks, and *** defendant's own indication of what occurred here also leads to a lower burden of proof for the traffic matter, which is proof by a preponderance of the evidence."

¶ 21 Defendant timely appealed.

¶ 22 II. Discussion

¶ 23 The two issues in this appeal are whether the State failed to prove defendant guilty of DUI beyond a reasonable doubt and of failure to reduce speed to avoid an accident beyond a reasonable doubt. Defendant argues that Hromadka's testimony was not credible and that the field sobriety tests were invalid because the tests failed to follow NHTSA standards. Defendant further argues that the field sobriety tests "should require the same quantum of proof as 'scientific evidence,' " and that "the other indicia of [her] intoxication have plausible explanations." Defendant's also contends that the trial court erred when it concluded that the State needed to prove only by a preponderance of the

evidence that defendant failed to reduce speed, and instead needed to prove her guilt beyond a reasonable doubt.

¶ 24 When reviewing a challenge to the sufficiency of the evidence in a criminal proceeding, the relevant question is "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 in original.) *Jackson v. Virginia,* 443 U.S. 307, 318-319 (1979). Reviewing courts apply this standard of review regardless of whether the evidence is direct or circumstantial, or whether defendant received a bench or a jury trial. *People v. Norris*, 399 Ill. App. 3d 525, 531 (2010). Further, circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *Id.* In applying this standard of review, a reviewing court is not permitted to substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. *People v. Sutherland*, 155 Ill. 2d 1, 17 (1992). Accordingly, when considering a sufficiency of the evidence challenge, we will not retry the defendant and will not reverse a conviction "unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of [the] defendant's guilt." *People v. Hires*, 396 Ill. App. 3d 315, 318 (2009) (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)).

¶ 25 In a prosecution for DUI, the State must establish that the defendant was in actual physical control of a vehicle at a time when he or she was under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2010). A defendant is guilty of DUI if the State proves that he or she was under the influence of alcohol to a degree that rendered her incapable of driving safely. *People v. Gordon,* 378 Ill. App. 3d 626, 631-32 (2007). The State may rely on circumstantial evidence to prove that the defendant was guilty of DUI. *People v. Diaz,* 377 Ill. App. 3d 339, 345 (2007). Moreover, in a bench trial, the trial court judge is presumed to have known and followed the law unless the record

indicates otherwise (*People v. Gaultney*, 174 Ill. 2d 410, 420 (1996)), and a conviction for DUI may be sustained based solely on the credible testimony of the arresting officer. *(People v. Janik*, 127 Ill. 2d 390, 402 (1989)).

¶ 26 In this case, the State presented sufficient evidence for a rational trier of fact to find defendant guilty of DUI beyond a reasonable doubt. Defendant does not challenge whether she was in actual physical control of the vehicle at the time of the crash. Therefore, we must determine only whether the evidence was sufficient for the trial court to find beyond a reasonable doubt that defendant was under the influence of alcohol to a degree that rendered her incapable of safely operating her vehicle. See *Gordon,* 378 Ill. App. 3d at 631-32.

¶ 27 Here, Hromadka testified that he smelled "a strong odor of an alcoholic beverage" coming from defendant's breath and that her eyes were glassy. In addition, defendant testified that she consumed a "Long Island iced tea." From this evidence, a reasonable trier of fact could have concluded that defendant consumed an alcoholic beverage. See *People v. Visor*, 313 Ill. App. 3d 567, 571 (2000) (describing a Long Island iced tea as containing tequila, rum, vodka, cognac, and gin). Hromadka further testified that, although defendant passed the HGN test, she failed two field sobriety tests. Specifically, Hromadka testified that defendant failed the walk-and-turn test because she was not able to walk heel to toe, she brought her arms from her side for balance, she made an improper turn, and she was unable to maintain her balance while he instructed her on the test. Hromadka testified that defendant also failed the one-legged-stand test because she swayed on one leg, hopped at one point to maintain her balance, and put her foot down four times during the test. Finally, the State presented evidence that defendant refused to take a blood-alcohol test at the police station, which a trier of fact can consider as evidence of consciousness of guilt. See *People v. Johnson*, 218 Ill. 2d 125, 140 (2005). Based on the foregoing, we conclude that the State's evidence

that defendant was under the influence of alcohol to a degree that rendered her incapable of driving safely was not so improbable, unsatisfactory, or inconclusive that it created a reasonable doubt of defendant's guilt. See *Gordon*, 378 Ill. App. 3d at 633 (concluding that the defendant was proved guilty of DUI beyond a reasonable doubt).

¶ 28 In reaching our determination, we reject defendant's argument that Hromadka's testimony was not credible. Illinois law is well settled that, in reviewing the sufficiency of the evidence to sustain a verdict on appeal, a reviewing court will not substitute its judgment for that of the trier of fact when assessing the credibility of witnesses. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000) (noting that, in a bench trial, it is the trial court's responsibility to resolve conflicts in the testimony). Accordingly, we will not substitute our credibility assessment of Hromadka's testimony for that of the trial court's. Further, with respect to defendant's argument that Hromadka failed to administer the field sobriety tests in a manner consistent with NHTSA standards, the record reflects that the trial court considered the specificity of Hromadka's administration of the tests. Specifically, the trial court referenced Hromadka's testimony that defendant was unable to walk heel to toe during the walk-and-turn test and put her foot down four times on the one-legged-stand test. Defendant's argument does not persuade this court to overturn the trial court's discretion in evaluating the credibility of Hromadka's testimony.

¶ 29 Similarly, we also reject defendant's argument that plausible explanations existed for her "other indicia of intoxication." The record reflects that the trial court carefully considered defendant's testimony, including her testimony regarding the impact from the air bag and her shoes affecting the field sobriety tests. As noted, it is within the purview of the trial court to resolve conflicts in the testimony, and here, the trial court could have found Hromadka's testimony to be more credible than defendant's explanations. See *id.*

¶ 30 Moreover, we reject defendant's claim that "[t]his appeal represents a unique opportunity to discuss the quantum of evidence necessary to support a DUI [conviction] based on the evidence from the performance of field sobriety tests alone." As noted above, the State presented other evidence in addition to the results of defendant's field sobriety tests. This additional evidence included defendant's admission that she consumed an alcoholic beverage and Hromadka's testimony that he smelled a "strong odor of an alcoholic beverage" coming from defendant's breath.

¶ 31 Defendant next contends that the State failed to prove her guilty beyond a reasonable doubt for failing to reduce speed to avoid an accident. In support of this contention, defendant argues that the trial court applied the preponderance-of-the-evidence burden of proof instead of the correct beyond-a-reasonable-doubt burden of proof. The State acknowledged that the trial court applied the incorrect burden of proof; however, it maintains that the error was harmless.

¶ 32 Illinois reviewing courts have held that, where a violation of the Vehicle Code is charged, the burden of proof is the same as in any other criminal case. *People v. Mindock*, 128 Ill. App. 2d 196, 199 (1970). Thus, although a trial court is presumed to know the law and apply it properly, that presumption is rebutted when the record affirmatively shows the contrary. *Gaultney*, 174 Ill. 2d at 420; *People v. Kluxdal*, 225 Ill. App. 3d 217, 223 (1992). In the present case, the record affirmatively shows that the trial court applied the incorrect burden of proof by expressly stating that the circumstantial evidence "leads to a lower burden of proof for the traffic matter, which is proof by a preponderance of the evidence." See *Kluxdal*, 225 Ill. App. 3d at 223 (reversing a conviction because the record contained affirmative evidence that the trial court applied the wrong burden of proof). Accordingly, we vacate defendant's conviction and sentence for failure to reduce speed to avoid an accident and remand for a new trial on this charge.

¶ 33 In doing so, we note that, when we consider all of the evidence presented at trial, we find that the State presented sufficient evidence of defendant's guilt to protect defendant's constitutional right against double jeopardy. See *People v. Taylor*, 76 Ill. 2d 289, 309-10 (1979). We emphasize, however, that this determination is not binding on retrial and does not express an opinion concerning defendant's guilt or innocence for the failing-to-reduce-speed charge.

¶ 34 III. Conclusion

¶ 35 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed in part, vacated in part, and remanded for further proceedings consistent with this order.

¶ 36 Affirmed in part and vacated in part; cause remanded.