2014 IL App (2d) 120699-U
No. 2-12-0699
Order filed January 21, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ERIC S. HUBBARD, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 10-CF-841 Honorable Theodore S. Potkonjak, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in preventing defendant from arguing in closing that a driving abstract was unreliable because it was prepared by an unidentified person, as defendant submitted no evidence to rebut the presumption that the abstract was accurate; in any event, any error was harmless, as such argument, being speculative, would not have changed the outcome; (2) we vacated defendant's successive (and thus unauthorized) DNA analysis fee.

¶ 1 After a jury trial, defendant, Eric S. Hubbard, was convicted of one count of felony driving while his license was suspended (DWLS) (625 ILCS 5/6-303(d-4) (West 2010)) and sentenced to five years' imprisonment. On appeal, defendant contends that (1) the trial court erred in

restricting his closing argument; and (2) the fees charged for collecting and testing his DNA (see 730 ILCS 5/5-4-3 (West 2010)) must be vacated. We affirm in part and vacate in part.

¶ 2 Defendant was charged by information with two counts of felony DWLS and two counts of aggravated fleeing or eluding a peace officer (625 ILCS 5/11-204.1(a)(1) (West 2010)). Later, he was indicted on these charges. The date of the alleged offenses was March 2, 2010. Before trial, the State moved *in limine* to admit a certified copy of defendant's driving abstract, per section 2-123(g)(6) of the Illinois Vehicle Code (Code) (625 ILCS 5/2-123(g)(6) (West 2010)):

> "Any certified abstract issued by the Secretary of State or transmitted electronically by the Secretary of State pursuant to this Section, to a court or on request of a law enforcement agency, for the record of a named person as to the status of the person's driver's license shall be prima facie evidence of the facts therein stated and if the name appearing in such abstract is the same as that of a person named in an information or warrant, such abstract shall be prima facie evidence that the person named in such information or warrant is the same person as the person named in such abstract and shall be admissible for any prosecution under this Code and be admitted as proof of any prior conviction or proof of records, notices, or orders recorded on individual driving records maintained by the Secretary of State."

¶ 3 The State's motion asserted that the trial court could take judicial notice of the charging documents to establish that defendant's name and identifying information therein were the same as in the abstract; that no more foundation was needed to admit the abstract; and that any issues as to the abstract's correctness would go only to its weight as evidence, not its admissibility. The trial court reserved its ruling on the issue.

¶ 4 On defendant's motion, the trial court severed the first DWLS charge from the remaining three counts and held a jury trial on those counts first. At this trial, the State sought to introduce People's exhibit No. 6, a one-page document signed by the Secretary of State and dated July 29, 2010. The document's heading recited that the Secretary of State certified that the information attached was "a true and accurate copy of pertinent documents from the driver's license file of the individual identified herein." The body of the document listed the name "Eric S. Hubbard" with a date of birth, driver's license number, and address. It stated that three "Statutory Summary Suspension" orders were entered effective July 12, 1999, December 24, 2002, and May 4, 2005. It next stated, "Termination Dates: Remains in Effect," and then, "Statutory Summary Suspensions Were in Effect on: 03-02-10." Finally, the document stated, "The originals of attached pertinent documents are now on file and a matter of record in this office."

¶ 5 Defendant's attorney, Eric Rinehart, objected that the document did not have an "embossed seal" and could have been "a summary of what somebody else has looked at." He continued, "In other words, somebody else has looked at a computer screen or looked at records and then they have *** typed up this information. I think I have a right to ask those people where they were out late the night before? Were they drinking too much caffeine? Were they tired that day?" The prosecutor responded that both Illinois Rule of Evidence 902 (eff. Jan. 1, 2011), which codified the common-law business-records exception to the hearsay rule, and section 2-123(g)(6) allowed the admission of the abstract. The trial court admitted the abstract as self-authenticating. During the trial, the State moved to publish the abstract to the jury. Rinehart objected that the abstract listed prejudicial information other than that defendant's license was suspended as of March 2, 2010. The judge offered to "redact[] those dates." Rinehart agreed to publishing a redacted photocopy of the abstract.

¶ 6 In closing argument, the prosecutor asserted in part that the abstract left no doubt that defendant's license had been suspended at the time of the alleged offenses. Rinehart did not disagree, contending only that the State had failed to prove identity. The jury acquitted defendant of all three charges. The cause proceeded to the trial on the remaining count of felony DWLS. We summarize the proceedings there.

¶ 7 Waukegan police officer Drew Summers testified as follows. On March 2, 2010, he was getting gas for his personal car at a Citgo station at Belvidere and Glen Rock Roads when he saw defendant pull up at the island next to his. Another person exited a car, walked up to defendant's car, made a hand-to-hand exchange with defendant, returned to his car, and drove away. Defendant then exited his car and walked into the station, passing in front of Summers and making eye contact with him. Summers drove off, following the other car. Summers did not see defendant's car exit the station. The next day, Summers viewed a surveillance video of the station for when defendant had been there. The video was admitted into evidence and played during Summers's testimony.

¶ 8 The State moved to admit People's exhibit No. 2, the "long-form driving abstract." This was the same document as People's exhibit No. 6 in the first trial. The State argued that, because Summers had testified that he recognized defendant, Eric Hubbard, and the abstract named "Eric Hubbard" and had the Secretary of State's seal, it was admissible under Illinois Rule of Evidence 902 and section 2-123(g)(6) of the Code. Defendant objected. The following colloquy ensued:

> "MR. RINEHART: *** It doesn't have to do with the redactions. I agree with the redactions that only focus on the March 2nd date. But I don't think that this is the same kind of document with the raised seal or with the—you know, the seal is not raised. I think

it's not the sort of blue and orange self-authenticating document that we see—at other times, Judge. I think this document is not—is not sufficient.

THE COURT: But I have one. I have one in the file that is self-authenticating which as—attaches all of his information on it. Now, I can give him that. You know what I'm saying? It is what it is, counsel.

MR. RINEHART: Right.

MR. HUMKE [assistant State's Attorney]: And that—People's Exhibit 2 has not been modified. I also have People's Exhibit 2A which is the same abstract that was admitted in the trial of the other counts where there was—

THE COURT: Where's the original? Where's the original?

MR. HUMKE: That—the original of People's Exhibit 2 is right there. I re-numbered [*sic*] it People's Exhibit 2. That's the number—that's what—how it was presented to us, how it was sent to us.

THE COURT: Okay. This is the original piece of paper that came from the Secretary of State.

MR. HUMKE: Yes. And we requested a long-form driving abstract.

THE COURT: Okay. So you have a version that's copied.

MR. HUMKE: Yes. I can present that, Your Honor, too. I have labeled—I have People' Exhibit 2A that was photocopied during the last trial with whiting out the—where there was [*sic*] different suspensions in effect.

THE COURT: Okay.

MR. RINEHART: I certainly—I certainly want that information redacted. So I'm just generally objecting to that."

¶ 9 People's exhibit No. 2 is identical to People's exhibit No. 2A before any redactions. The judge noted that the document had the certification statement by the Secretary of State, and he explained, "[T]he notaries don't use crimped ones anymore. They use a stamp so that when you photocopy, it comes up photocopied." Rinehart stated, "[N]ot getting into the form of the document, the only other objection I would make *** would be *** that this document *** was prepared by somebody in anticipation of litigation to use against Mr. Hubbard in a criminal proceeding, and that I don't get to cross examine [*sic*] this clerk or [Secretary of State Jesse] White about how he's sure that he's got the records lined up." The judge responded, "That's why it's a self-authenticating document."

¶ 10 The State again called Summers. He testified as follows. On March 2, 2010, at about 10 a.m., he stopped at the Citgo station. As he pulled in, he saw a blue Buick with two people inside; defendant was the driver. A third person exited another car and entered defendant's car; defendant looked around. About 10 seconds later, the other person exited. Defendant, still looking around, exited the Buick and entered the store, passing Summers and looking directly at him (as shown in the surveillance video). Summers had had no contact with defendant before March 2, 2010, but, since then, he had encountered him four or five times, including one long face-to-face talk during which defendant gave his date of birth.

¶ 11 At this point, the trial court admitted People's exhibit No. 2A into evidence. Rinehart made the "same objection as before." Summers continued, testifying that he had recently returned to the Citgo station and taken several photographs; the station was configured the same way as on March 2, 2010. The photographs were admitted into evidence. Summers then testified that, on March 2, 2010, he exited the station just as defendant was walking inside. Also, to enter or exit the station, a motorist must drive on a public highway.

¶ 12 In closing argument, the prosecutor told the jury that the surveillance video showed defendant exiting the Buick, walking past Summers, entering the station, and going to the counter. The jury could see that the person was defendant. The video also showed defendant walk out, pump gas, and drive away onto Glen Rock. Further, the abstract proved that defendant's license was suspended on March 2, 2010; Summers had testified that he recognized defendant from several encounters, and the name and date of birth on the abstract matched what defendant had told Summers. There was "no serious dispute" that defendant's license had been suspended on March 2, 2010. The "big fight" was over identity—but the video proved that the Buick's driver had been defendant.

¶ 13 Rinehart argued as follows. There was insufficient proof that defendant had driven the Buick on March 2, 2010. Summers had never seen defendant before that date, the video did not show the Buick pull in, and the fact that defendant was seen inside the station, even if it was defendant, did not prove that he had been driving that day. Also, the video did not show him driving away.

¶ 14 Rinehart then continued, "I want to talk briefly about the State's Exhibit—Judge, the abstract, may I? Mr. Humke?" The judge called a sidebar. The following colloquy ensued:

"THE COURT: We are not arguing the validity. I've already ruled that that's—

MR. RINEHART: The validity, no. Not the validity. I couldn't argue that.

THE COURT: Well, arguing whether or not to have—you're not arguing that they should have brought in someone from the Secretary of State's office.

MR. RINEHART: Well, that's what I was going to argue.

THE COURT: No. Before you even get into it, no. It's self-authenticating.

MR. RINEHART: But, Judge, it seems to me that the best evidence—

> THE COURT: No. What driving while license suspended case in the last—or how many years you've been practicing did they bring in someone from the Secretary of State to say that this is what—no."

Rinehart returned to his argument, asserting that the evidence of identity was insufficient.

¶ 15 The jury found defendant guilty. Defendant filed a posttrial motion, arguing in part that the trial court erred in admitting the abstract, because the document had not been computer-generated and "an unknown witness at the Secretary of State's office typed into a form the information that purports to show that the Defendant's license was suspended." Defendant's motion argued also that the trial court had abused its discretion in refusing to allow Rinehart to make arguments going to the weight or credibility of the driving abstract, thus granting " 'summary judgment' " to the State on an element of the offense, *i.e.*, that defendant's license was suspended on March 2, 2010.

¶ 16 At the hearing on defendant's motion, Rinehart argued that, because the abstract had been typewritten, he should have been allowed to cross-examine the person who had typed it. Further, he maintained, the court had erred in limiting his closing argument on that issue. The trial court denied the motion, the judge again noting that the abstract was self-authenticating. After the trial court sentenced defendant and denied his motion to reconsider sentence, he timely appealed.

¶ 17 On appeal, defendant argues first that the trial court erred in restricting his closing argument. He asserts that, although People's exhibit No. 2A was admissible, its probative value was still open to attack, such as by pointing out that it was typed, not computer-generated. He reasons that the trial court confused admissibility with credibility, unfairly limiting his right to make a closing argument.

¶ 18 A defendant's constitutional right to counsel includes the right to make a closing argument. *Herring v. New York*, 422 U.S. 853, 858 (1975); *People v. Farina*, 402 Ill. App. 3d 475, 483 (2010). However, the trial court retains broad discretion to limit the scope of closing argument. *Herring*, 422 U.S. at 862; *People v. Burnett*, 237 Ill. 2d 381, 389 (2010). Moreover, as the State notes and defendant concedes, the improper restriction of a defendant's closing argument is subject to harmless-error analysis. See *Frost v. Van Boening*, 692 F. 3d 924, 929-30 (9th Cir. 2012). We cannot say that the trial court abused its discretion here or that any error was prejudicial.

¶ 19 Defendant is correct that, in conceding that the abstract was admissible, he did not thereby forgo his right to attack the credibility or weight of the evidence. In *People v. Meadows*, 371 Ill. App. 3d 259 (2007), the defendant, who had been convicted of two offenses that required proof that is driving privileges had been revoked at the time, contended that the trial court had erred in admitting a copy of his driving abstract as proof of his prior convictions. *Id*. at 260. This court rejected the contention, holding that the abstract had been properly "certified" (625 ILCS 5/2-123(g)(6) (West 2004)). Although the defendant argued that the certification was not a guarantee of accuracy, we held that this went not to admissibility, but to weight. *Id*. at 263. We explained:

> "[T]he information a precertified abstract contains is not unchallengeable. Rather, *** a certified abstract is only 'proof' of a defendant's prior convictions. Once the State submits an abstract, a defendant always has the opportunity *to present evidence* to rebut the abstract's veracity. [Citation.] However, when a defendant fails to challenge the abstract's accuracy, the abstract's contents are deemed accurate. [Citation.]" (Emphasis added.) *Id.*

¶ 20 The problem for defendant here is that, having conceded that the abstract was admissible, he never presented evidence to rebut the presumption that the abstract was accurate. At the first trial, defendant objected to the admissibility of the abstract, based on the fact that part of it was typewritten and not computer-generated. At the second trial, he conceded the "validity" of the abstract. In his closing argument, he sought only to attack its weight. As best we can tell, the argument that he was barred from making was that, because an unidentified person typed in the statement that defendant's driving privileges had been suspended on March 2, 2010, the abstract should not be taken as proof beyond a reasonable doubt of that element.

¶ 21 We cannot say that defendant has demonstrated either an abuse of discretion or prejudice. Defendant never introduced any evidence of the circumstances under which the abstract was completed. Thus, it was not unreasonable for the trial court to restrict defendant to matters based on the evidence and not on guesswork about the dimly-known process by which the abstract, which was presumptively accurate, had been compiled.

¶ 22 Similarly, we cannot see a realistic possibility that, had the jury been invited to speculate on the significance of typewritten information versus computer-generated information, its verdict would have been different. We recognize that the abstract was the sole evidence of one element of the offense—that defendant's license had been suspended on the day of the alleged offense. However, the abstract was properly admitted and unambiguous. (We also note that, although defendant had been acquitted of a similar charge in his first trial, his closing argument focused exclusively on the other element of the offense—that he had been driving a vehicle on a public roadway.) Speculation without a basis in the evidence is insufficient to obtain reversal. Therefore, we reject defendant's first claim of error, and we affirm his conviction.

¶ 23 Defendant contends second that the trial court erred in assessing him a DNA analysis fee of $200 ($10 of which was to be retained by the circuit clerk). See 730 ILCS 5/5-4-3(j), (k)(2) (West 2010)). Defendant notes that he was assessed the $200 fee in a 2003 case that resulted in his conviction of obstruction of justice. See www.isp.state.il.us (visited July 13, 2013). The State concedes that defendant may not be assessed the fee a second time. See *People v. Marshall*, 242 Ill. 2d 285, 297-302 (2011). We vacate the $200 DNA assessment fee.

¶ 24 The judgment of the circuit court is affirmed in part and vacated in part.

¶ 25 Affirmed in part and vacated in part.