2014 IL App (2d) 130057-U
No. 2-13-0057
Order filed September 29, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHAEL MANNING, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 10-CF-1815 Honorable Patrick L. Heaslip, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant showed no plain error or ineffective assistance of counsel as to the trial court's failure to instruct the jury on the definition of "under the influence": the error was not structural, and, given the evidence, there was no reasonable probability that, knowing the definition, the jury would have acquitted defendant of driving under the influence.

¶ 2 Defendant, Michael Manning, appeals from his convictions of aggravated driving under the influence of alcohol (ADUI) (625 ILCS 5/11-501(a)(2) (West 2010)) (three prior convictions) and aggravated driving with a revoked license (ADWLR) (625 ILCS 5/6-303 (West 2010)) (revocation for DUI, prior conviction of DWLR). He asserts that the court committed

plain error when it declined to give specific answers to two questions from the jury, and, in particular, declined to provide a definition of "under the influence." In the alternative, he asserts that counsel was ineffective when he acquiesced in the court's giving a nonspecific answer to those questions. We hold that the error in the instructions did not affect the fundamental fairness of the trial and that the evidence was not so closely balanced that the error prejudiced defendant. Thus, there was no plain error. We further hold that, because there was no prejudice, there also was no ineffective assistance of counsel. We therefore affirm defendant's convictions.

¶ 3 I. BACKGROUND

¶ 4 A grand jury indicted defendant on a count of bribery (720 ILCS 5/33-1(a) (West 2010)), a count of ADUI, and a count of ADWLR; a minor traffic count (failure to wear a seatbelt) was also pending. Defendant had a jury trial.

¶ 5 The State's first witness, Officer Paul Seitz of the Cherry Valley police department, testified about his traffic stop of defendant. He told the jury that, on June 16, 2010, at 6:51 p.m., he was on patrol in a marked squad car. He saw a blue Buick Regal that was in a left-turn lane make a U-turn on a red light. He followed the car without activating his siren or emergency lights. He was about 20 feet from the car as it made a turn, and he could see into the car well enough to tell that the driver was the only person in the car and was not wearing a seat belt. Further, he could confirm that defendant was the driver. The car pulled into a gas station parking lot.

¶ 6 Seitz intended to make a traffic stop of defendant. However, before he did, something in a nearby intersection caught his eye. A man was standing near a vehicle stopped in the intersection and was waving as if to attract Seitz's attention to a pit-bull-type dog. Seitz drove over and tried to call the dog to his car.

¶ 7 While Seitz was in the intersection, defendant got out of his car and walked to the intersection, calling to the dog. As defendant got close, Seitz "detected an odor of an alcoholic beverage" on defendant's breath and noticed that defendant's eyes were watery and bloodshot, that defendant's speech was slurred, and that defendant swayed as he stood. Defendant picked up the dog and turned to leave, but Seitz told him to stay where he was. Defendant responded by swearing at Seitz while continuing to walk away; he went to his car and put the dog in it.

¶ 8 Seitz, after radioing a back-up request to his partner, approached defendant's car and directed defendant to sit on the curb. Defendant complied, but swore at Seitz, calling him a "fuckin' punk," when Seitz asked for defendant's driver's license.

¶ 9 After Seitz's partner, Officer Simon Avery, arrived, Seitz asked defendant to do field sobriety tests. Defendant refused. Avery told him to turn around to listen to Seitz. Defendant told Seitz, "Do what you have to do." Seitz arrested defendant for DUI.

¶ 10 Seitz searched defendant's pockets, finding a packet wrapped in black electrical tape, which proved to contain a roll of cash. Avery opened the tape and started counting the money while Seitz went to his car to use the computer. When Seitz returned, Avery told Seitz that defendant tried to bribe him.

¶ 11 Seitz secured defendant in the back of the squad car and took him to the Cherry Valley police station. At 8:01 p.m., Avery asked defendant to submit to a breath test; defendant refused.

¶ 12 Avery testified that he arrived at the gas station in response to Seitz's radioed request. He watched as Seitz directed defendant to take various actions; defendant was uncooperative. Avery noticed that defendant had "an odor of an alcoholic beverage on his breath" and "his eyes were bloodshot and watery[,] he swayed while he was standing," and that "he had to lean against his vehicle for support."

¶ 13 Avery participated in the search of defendant and was the one who counted the money. Defendant had $5,199.07 in cash. While Seitz was in his car, Avery and defendant had a conversation that Avery interpreted as defendant offering the cash, or some part of it, as a bribe to let defendant go free.

¶ 14 Avery stayed on the scene after Seitz left, waiting for animal control and a tow truck. While he was waiting, no "civilian" approached him about the car or the dog.

¶ 15 The State moved for the admission of defendant's driving abstract. Upon its admission, the State rested.

¶ 16 Defendant moved for a directed verdict as to the DUI and the bribery charge. The court denied the motion.

¶ 17 Defendant's daughter, Cecelia Manning, testified for defendant. In June 2010, Manning was living with defendant. The blue Buick was hers, but defendant paid for it. During the later part of the day on June 16, 2010, both she and defendant were at home. Defendant was watching television and had had "a couple" of beers. At about 6 p.m., defendant decided that he wanted to eat at a particular restaurant. The two set out, with Manning driving and defendant giving directions. With them in the car was Manning's dog, then about a year old.

¶ 18 At some time when she was driving, the dog jumped out of the car. Asked why she did not notice when this happened, she said:

> "My dad—he had some drinks so he was just being himself. I was pretty quiet, pretty annoyed with him. After he has some drinks, he gets kind of annoying so…."

¶ 19 When she realized that the dog was missing, she turned around. She made several more turns and then pulled the car into the gas station parking lot, intending to search for the dog on foot. She was gone for something like an hour. When she got back to the lot, her car was gone.

¶ 20 Under cross-examination, Manning agreed that defendant could be belligerent and short-tempered.

¶ 21 Defendant also testified. On June 16, he had come home from work (by bicycle, he implied) and had had a few beers. He gave a description of the drive to get dinner and of the dog's escape that was essentially consistent with Manning's. Soon after Manning walked away to look for the dog, he thought that he saw someone on the "meridian" waving his hands, so he walked over to investigate.

¶ 22 As he got to where the person was waving, he saw the dog. A police officer arrived in a squad car at about the same time. Defendant had had a hard day, so even when he heard the officer calling to him, he picked up the dog and left. He was angry the whole time, swore at Seitz more than once, and called both officers "butt fuckers."

¶ 23 He interpreted his conversation with Avery as Avery's soliciting a bribe. He testified that he told the officers more than once that he had not been the one driving.

¶ 24 In rebuttal testimony, Seitz said that at no time during the encounter did defendant ever say that he was not the one driving. Avery testified similarly.

¶ 25 During their deliberations, the jury sent the court two questions. One: "Please define under the influence? Does it mean legal limit or just drinking[?]" Two: "If a breathalyzer is refused[,] what is the reasonable presumption [illegible] the law[,] if any?"[1] The court proposed the following response: "These issues are for you to determine using the jury instructions that have been given to you and applying them to the evidence that was presented at trial." Both attorneys agreed that this was a proper response. Concerning the meaning of "under the

[1] The court and the parties apparently took the illegible word to be crossed out. However, we see the word "of" superimposed on the word "by" or vice versa.

influence," the court asserted, "there is no approved definition." The State added, "In fact, in this state, I believe the case law says, there—we cannot define it," and the court responded, "Right. Exactly." Defense counsel approved the suggested language. As the jury received it, the response was, "These are issues for you to determine using the jury instructions that have been giving [*sic*] to you and applying them to the evidence presented at trial."

¶ 26 The jury found defendant not guilty of bribery, not guilty of the minor traffic count (failure to wear a seatbelt), guilty of ADWLR, and guilty of ADUI.

¶ 27 Defendant filed a motion for a new trial, but did not raise any issue relating to the jury instructions or the jury's questions. The court held the sentencing hearing before taking up the motion. The court imposed sentence and denied the motion. Defendant timely appealed.

¶ 28 II. ANALYSIS

¶ 29 On appeal, defendant asserts that the court committed plain error when it omitted the proper definition of "under the influence" from the jury instructions and then gave an uninformative answer to both of the jury's questions. Specifically, he notes that "under the influence" is defined in the Illinois Pattern Jury Instructions: "A person is under the influence of alcohol when, as a result of drinking any amount of alcohol, his mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care." Illinois Pattern Jury Instructions, Criminal, No. 23.29 (4th ed. 2000). He argues that the error was plain error both because the evidence was so closely balanced that the error prejudiced him (first-prong plain error) and because it affected the fundamental fairness of the trial (second-prong plain error), but he relies on the plain-error standard in *People v. Hopp*, 209 Ill. 2d 1 (2004). He argues in the alternative that counsel should not have acquiesced in the improper answer and that counsel was

therefore ineffective. On this point, at defendant's request, we consider *People v. Falco*, 2014 IL App (1st) 111797, a decision filed after the parties briefed the appeal.

¶ 30 The State argues that the failure to specifically answer the questions did not deprive defendant of a fair trial, and thus was not plain error. In doing so, it tacitly concedes that the jury instructions improperly omitted the instruction defining "under the influence" and that the answer given in response to the jury's question regarding the definition of "under the influence" was incorrect.

¶ 31 Initially, we assume that the court's answer, as it applied to the question about the under-the-influence standard, was error, but we note that the answer was not error as it applied to the question about presumptions arising from the refusal of a breath test. We then conclude that no plain error occurred as to the question about the under-the-influence standard. Because no structural error occurred, there was no second-prong plain error. Further, assuming for the sake of argument that *Hopp* permits a first-prong analysis, because the evidence was such that no prejudice was possible, no first-prong error occurred. Finally, the lack of possible prejudice precludes reversal based on ineffective assistance of counsel.

¶ 32 Our analysis here assumes for the sake of argument that defendant is correct that the court erred both in originally omitting the definition of "under the influence" and in refusing to provide a definition in response to the first of the jury's questions. This assumption is consistent with the State's concessions. We do note that the jury's first question showed that it was contemplating two possible standards: blood alcohol content above the legal limit and "just drinking," neither of which was proper. The pattern-instruction definition requires "mental or physical faculties [that] are so impaired as to reduce [the driver's] ability to think and act with ordinary care." Illinois Pattern Jury Instructions, Criminal, No. 23.29 (4th ed. 2000). Moreover,

we have held that evidence is sufficient to sustain a DUI conviction if the State shows that a driver "was under the influence of alcohol to a degree that rendered him incapable of driving safely." *People v. Weathersby*, 383 Ill. App. 3d 226, 229 (2008).

¶ 33 We hold that no error occurred in the court's answer as to the second question, relating to whether any presumption arose from defendant's refusal to take a breath test. The general rule governing a court's response to questions from a jury is that the court has discretion to provide no answer:

> "A trial court may exercise its discretion and properly decline to answer a jury's inquiries where the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or if the giving of an answer would cause the court to express an opinion which would likely direct a verdict one way or another." *People v. Childs*, 159 Ill. 2d 217, 228 (1994).

However, a court has a duty to resolve confusions of law:

> "[T]he trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. [Citation.] This is true even though the jury was properly instructed originally. [Citation.] When a jury makes explicit its difficulties, the court should resolve them with specificity and accuracy." *Childs*, 159 Ill. 2d at 229.

¶ 34 The court's response as to the second question fell within the range of its discretion. The jury asked, "If a breathalyzer is refused[,] what is the reasonable presumption [illegible] the law[,] if any?" The court responded, replying to both questions, "These are issues for you to determine using the jury instructions that have been giving [*sic*] to you and applying them to the

evidence that was presented at trial." The second question is not entirely clear—the suggestion is perhaps that the jury had an idea that refusal of breath testing has a particular legal significance. However, any fair interpretation of the question was fully addressed by an answer stating that all law the jury was to apply was to be found in the jury instructions.

¶ 35 We now turn to defendant's claim that the error here was plain error. "The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Defendant properly concedes that he did not preserve the claim that the court erred in refusing to specifically answer the questions, such that he can prevail only under a plain-error analysis.

¶ 36 Illinois law recognizes two categories of plain error. First-prong plain error comprises errors that, because the evidence is closely balanced, might have affected the outcome, and second-prong plain error comprises errors that so seriously affect the fairness of the trial that they are presumptively prejudicial. According to the supreme court:

> "[Plain error occurred if] (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 37 As defendant recognizes, the supreme court in *Hopp* discussed the specific problem of error in jury instructions. The *Hopp* court stated that "the erroneous omission of a jury instruction rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so

as to severely threaten the fairness of the trial." *Hopp*, 209 Ill. 2d at 8. Arguably, that holding suggests that a jury-instruction omission can be only second-prong plain error. However, the particular omission in this case cannot be such error.

¶ 38 In *Thompson*, the supreme court took note that, in *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009), it had "equated the second prong of plain-error review with structural error, [in that it had] assert[ed] that 'automatic reversal is only required where an error is deemed 'structural,' *i.e.*, a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *Thompson*, 238 Ill. 2d at 613-14 (quoting *Glasper*, 234 Ill. 2d at 197-98, quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005)). The Supreme Court has held that the omission of one of an offense's elements is not structural error. *Neder v. United States*, 527 U.S. 1, 10 (1999). Further, even an improper instruction on an element of an offense is not structural error. *Neder*, 527 U.S. at 11-12 (citing *Pope v. Illinois*, 481 U.S. 497, 499-501 (1987)). Thus, here, the failure to define the element of "under the influence" was not structural error.

¶ 39 Further, assuming for the sake of argument that *Hopp* permits a first-prong analysis, no first-prong error occurred here. Defendant argues that the evidence that his driving was impaired was weak: he asserts that the only evidence of impaired driving was the testimony of his illegal U-turn and that the jury's rejection of two charges shows that it deemed the officers' testimony to be less than fully credible. However, multiple lines of evidence supported defendant's impairment. Both officers testified to defendant's swaying. More strikingly, defendant's own witness, his daughter, testified that he became belligerent when drinking. The kind of belligerence defendant exhibited in his interchanges with the officers reflected impaired

judgment. Thus, it is not reasonably probable that the outcome would have been different here had the jury been informed of the proper standard.

¶ 40 As noted, under *Hopp*, the relevant question is whether the error "create[d] a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law." *Hopp*, 209 Ill. 2d at 8. Although the form of the jury's question concerning the definition of "under the influence" strongly suggests that the jurors did not understand that they were to decide whether defendant "was under the influence of alcohol to a degree that rendered him incapable of driving safely" (*Weathersby*, 383 Ill. App. 3d at 229), given the evidence here, no serious risk existed that the conviction was erroneous.

¶ 41 Defendant argues in the alternative that counsel's failure to seek proper answers to the jury's questions was ineffective. We do not agree. To succeed on a claim of ineffective assistance of counsel, a defendant must show both (1) that counsel's performance was objectively unreasonable; and (2) that it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006). Here, we need address only the prejudice prong of the *Strickland* standard. For the same reason that we concluded that no serious risk existed that the conviction was erroneous, we can conclude that defendant was not prejudiced by the actions of counsel.

¶ 42 The holding in *Falco* does not alter our conclusion.

¶ 43 In *Falco*, a jury found the defendant guilty of a count of possession of a firearm with defaced identification marks. *Falco*, 2014 IL App (1st) 111797, ¶ 1. At trial, the evidence showed that police made a traffic stop of defendant's car (which was driven by another) and found a rifle, its serial number scratched off, in the trunk. *Falco*, 2014 IL App (1st) 111797,

¶¶ 4-5. On appeal, he asserted that counsel had been ineffective for "failing to request an instruction that *** the State *** [had to] prove that defendant knowingly or intentionally possessed the firearm." *Falco*, 2014 IL App (1st) 111797, ¶ 17.

¶ 44 The *Falco* court held that the law required such an instruction. *Falco*, 2014 IL App (1st) 111797, ¶ 21. Without it, the jury might have plausibly inferred from the offense's description that the offense was a strict-liability offense. *Falco*, 2014 IL App (1st) 111797, ¶ 22. Further, "even if the jury were to glean that 'knowledge' is an implied element of the offense ***, it is likely there would be a question as to what component of the offense the element of knowledge applied: the possession or the defacement or both." *Falco*, 2014 IL App (1st) 111797, ¶ 22. "This is especially true[, as the] defendant's knowledge of the firearm in the trunk was clearly an issue critical to the charge[,] *** given defendant's denial of its presence and his denial of making any incriminating statements." *Falco*, 2014 IL App (1st) 111797, ¶ 22. According to the court, the failure to seek a proper instruction prejudiced the defendant because "[i]n order for the jury to determine whether defendant knowingly possessed the defaced firearm, the jury was required to be properly instructed." *Falco*, 2014 IL App (1st) 111797, ¶ 23.

¶ 45 We deem *Falco* distinguishable on its facts. Although the *Falco* court failed to make some parts of its prejudice analysis completely clear, we understand it to say that real doubt existed as to how the jury would have decided the knowledge element of possession of a firearm with defaced identification marks. Indeed, that reasoning is necessary to keep the holding in *Falco* consistent with *Strickland*'s prejudice standard. No such possibility of a different result existed here.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, we affirm defendant's convictions.

¶ 48 Affirmed.