2016 IL App (2d) 150082-U
No. 2-15-0082
Order filed May 12, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-971
DEANDRE D. BUTLER,	)	Honorable Mark L. Levitt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's DUI conviction affirmed.

¶ 2 On July 30, 2014, after a bench trial, defendant was found guilty of aggravated driving under the influence (DUI) (625 ILCS 5/11-501(d)(2)(B) (West 2008)) and two traffic offenses (failure to reduce speed to avoid an accident and illegal transportation of alcohol). Defendant appeals, arguing that: (1) the trial court failed to consider all of the testimony and evidence before finding him guilty; (2) the State failed to prove his guilt beyond a reasonable doubt; (3) the court erred in admitting expert witness testimony from a police officer (Officer Brian Carey),

as well as hearsay conversations therein; and (4) the court erred in denying defendant's motion *in limine* to exclude a police report (from Sergeant John Ward) and a video (made by Officer Carey). For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On March 27, 2010, at roughly 2:30 a.m., a three-vehicle accident occurred on Route 132 near the Gurnee Mills East and West Drives intersection in Gurnee. One vehicle was found in the grass, while a dark blue Mercedes ML 350, driven by defendant, was in a "T-bone" position in the road with the third vehicle. Defendant was initially tried and convicted in 2011. However, defendant's motion for a new trial was granted. Defendant's second bench trial commenced on June 16, 2014, and proceeded over various dates, concluding on July 30, 2014.

¶ 5 A. State's Case

¶ 6 At trial, Shannon Mira testified that, on March 27, 2010, around 2:20 a.m., she was driving around 30 to 40 miles per hour in the left lane on Grand Avenue in Gurnee. A Mercedes SUV with a distinctive side logo drove up behind her at a high rate of speed and, at the last moment, changed lanes to pass her in the right lane. Mira estimated that the Mercedes was traveling around 60 to 70 miles per hour. She watched the Mercedes travel through the intersection at Grand Avenue and Dilley's Road, and the camera light went off because the vehicle drove through the red light. The Mercedes continued out of sight. Mira started looking for her phone to call the police. As she continued, however, Mira came across three vehicles, including the Mercedes that had passed her, that had been in an accident. She dialed 911 and walked up to the scene. When she first walked up to the vehicles, the driver of the Mercedes was "slumped over." Later, when she returned to defendant's car, he was getting out of his car and

Mira smelled a strong smell of cologne. That evening, over the course of five hours, Mira had consumed three bottles of beer.

¶ 7 Lori Collins testified that, on March 26, 2010, she worked at Toby's Bar and Grill. Defendant came in that evening; she knew defendant, as he would periodically come to Toby's. At the time of trial, Collins could not recall whether defendant ordered a drink. However, she agreed that, at a prior proceeding, she had testified under oath that defendant ordered the "usual Heineken and Hennessy."

¶ 8 Sergeant Ward testified that he had known defendant for 16 or 17 years through work contacts,[1] and Ward estimated that he had previously seen defendant around 100 times, professionally and socially. At the accident scene, Ward noticed that defendant's speech was slurred, he smelled of alcohol when he spoke, his eyes were droopy, bloodshot, and glassy, and he swayed slightly as he stood. Also present on the scene were three police officers, Andy Mytnik, Brian Funke, and Ben Munji, whom Ward assigned various tasks: Mytnik, crash scene investigation; Funke, evidence technician; and Munji, DUI investigation. Ward did not hear defendant say he had any injuries that would prevent him from performing the tests, although Ward noticed that defendant had a small cut on his head.

¶ 9 Ward next saw defendant at the booking station, where defendant exhibited mood swings. According to Ward, defendant was hostile toward the officers and he would frequently alternate between crying, being angry, and being cooperative. Defendant commented that, if they tried to draw his blood, they would have a "silverback" on their hands and they would need to call "NIPAS" (Northern Illinois Police Alarm System, which deals with riot control and emergency

[1] Defendant worked for a private security company and, at times, he and Ward worked the same areas.

response) to help. Ward opined, based on his training and experience, that defendant was intoxicated. Ward agreed that he was present with defendant in the booking room for only six minutes. He further agreed that he did not write his report about the incident until more than two years after the accident because he did not want it to be inconsistent with the reports of other officers. Ward took no notes in the field.

¶ 10 Munji testified that, at the accident scene, defendant said he was simply turning when the other vehicles hit him. Defendant said he had one drink at Friday's, but then corrected and said he had a drink at Toby's and food at Friday's. Munji noticed that defendant was bleeding from his head, and he asked defendant if he had any injuries. Defendant said no. Munji testified that, when he first encountered defendant at the accident scene, he had bloodshot, watery eyes, slurred speech, swayed while standing, and had an odor of alcohol coming from his mouth. When Munji asked defendant if he had consumed any alcohol that evening, defendant replied that he was "all fucking sober now." When Munji asked defendant to take field sobriety tests, defendant declined, saying that he did not feel comfortable doing so. Munji placed defendant in handcuffs; defendant then agreed to take the tests and purportedly failed them.[2] Ultimately, defendant was handcuffed and taken to the Gurnee police department. Defendant declined a breath test.

¶ 11 Defendant was at the police station from around 3:16 a.m. through 4:43 a.m. Munji agreed that, in his report, he said that defendant was emotionally unstable, angry, aggressive, and sobbing at the station. He agreed, however, that most of that time, he was alone with defendant, never felt the need to call for assistance, and he turned his back on defendant several times. Around 4:45 a.m., Munji took defendant to the hospital. According to Munji, defendant told the

[2] We do not discuss the details and alleged fallibility of those tests because the trial court ultimately did not find them to have any evidentiary value.

nurse at the hospital that she would have to deal with the "silverback." Munji brought defendant back to the station around 6 a.m. and gave him *Miranda* warnings.

¶ 12 Officer Thomas Woodruff testified that, around 3:30 a.m. on March 27, 2010, he assisted Munji with the booking process. Woodruff knew defendant from prior work experience. When Woodruff sat down at the computer across from defendant (a table separated them and Munji was sitting next to Woodruff), defendant asked for his cell phone, then asked for it a second time in a loud voice. Woodruff responded that it was Munji's decision. Woodruff asked defendant questions, including his phone number, and defendant yelled that he had nothing to say to Woodruff. "At that point[,] he called me a hater and he always knew I was a hater." Woodruff testified that defendant had never said anything like that to him previously. It was mentioned that defendant would have to go to the hospital for a blood draw, and defendant said that he was not going to go willingly and that they needed to call NIPAS because he was going to fight, he did not care if he was "tased" or pepper sprayed, "and when it was time to go to the hospital he wanted me to put a hand on him." Defendant was excited, and they tried to calm him down. Other times, defendant started to cry. Woodruff testified that he followed Munji and defendant to the hospital; defendant went willingly to the hospital. When it was time to leave the hospital, they were getting defendant into Munji's squad car and defendant said "Alcohol aside, I'm sober now. These cuffs hurt." Woodruff agreed that he did not include these statements in his first report.

¶ 13 Funke testified that he responded to the accident scene. When he approached the black Mercedes, which had a dealer sign on the door, he saw an open Heineken beer bottle on the front passenger floorboard. The bottle was on its side, there was liquid on the floor around it, and the vehicle smelled like beer. Funke took photographs of the scene, but he did not photograph the

bottle or collect it. He explained that it was his first time taking pictures of an accident as an evidence technician, and he had never "had an evidence tech collect a bottle from DUI or accident related case." He agreed, however, that it was not his first DUI investigation and that, prior to March 27, 2010, he had been an evidence technician for five or six years. Despite not taking pictures or collecting it, Funke testified that he remembered the bottle being in the vehicle. He also testified that he wrote it on the inventory sheet for the vehicle's contents.

¶ 14 A video from a traffic camera admitted into evidence shows defendant's vehicle running a red light at Route 132 and Dilley's Road shortly prior to the accident.

¶ 15 Over defendant's objection, Officer Brian Carey was accepted as an expert in accident investigation and reconstruction. Carey inspected the three vehicles involved in the accident, and he investigated the scene, marking the roadway, grass, and curbs for tire marks and vehicle fluids. In his opinion, defendant's vehicle impacted the first vehicle, leaving a gouge mark on the pavement, at which point the first vehicle rotated away and defendant's vehicle proceeded forward into the second vehicle.

¶ 16 Carey reviewed the Dilley's Road traffic camera video, which he testified showed defendant driving at a high rate of speed, between two lanes, and running a red light. Carey explained that he reviewed still frames of the traffic camera video, with each frame representing three-hundredths of one second. By considering the length of the vehicle and the still video frames, he was able to calculate how much time it took for the vehicle to advance to the next frame in the video. Using two methods, Carey opined that defendant's vehicle was traveling faster than the speed limit, around 75 to 85 miles per hour, through the Dilley's Road intersection, which is around one mile away from the accident scene. "And by high rate of speed, we're not talking about just ten or twenty over. It was considerably and noticeably more

than the speed limit." Carey did not know the exact speed of defendant's vehicle when it struck the other vehicles. However, by viewing the three vehicles involved and the damage to them, there was a "high velocity impact." Further, Carey testified there were no skid marks at the scene of the accident, indicating that defendant's vehicle did not attempt to brake before striking the first vehicle. Carey agreed that one possible explanation for the fact that there were no signs of braking could be that defendant was asleep before the accident. Carey testified that he saw the Heineken bottle in defendant's car and photographed it a few days later.

¶ 17 Carey also spoke with Mira and the drivers of the two other vehicles involved in the accident, Tyler Santi and Filberto Patino. Carey agreed that those interviews were "very important" in forming his expert opinion on how the accident happened. Patino explained he was in a left-hand lane when he was impacted on the passenger side. Carey testified to tire marks, curb marks, and a fluid trail that confirmed what Patino told Carey. The first time Carey spoke with Santi, Santi related that he was stopped at the intersection, saw a car coming up behind him quickly, so he accelerated and was hit a few seconds later. He estimated that he was driving 10 to 15 miles per hour when hit in the middle of the intersection. That explanation did not comport with the physical evidence. Specifically, Carey's physical inspection of the accident scene reflected that the impact happened farther west of the intersection than Santi's vehicle would have been able to travel within a few seconds prior to impact. Accordingly, Carey met with Santi again at the police station and showed him a diagram of the scene and where the accident occurred. Santi explained that he accelerated normally through the intersection, looked behind him, and then saw the vehicle speeding up behind him; he "floored it" about one or two seconds before impact. He agreed he might have been driving around 45 miles per hour at the time of the accident. The court ordered the State to lay a proper foundation for the conversation,

which Carey said contributed to his expert opinion, and, thereafter, overruled defendant's foundation objection.

¶ 18 In November 2012 (*i.e.*, around 32 months after the accident), Carey made two videos with his squad car equipment, traveling at least part of the route defendant traveled before the accident. The first video depicted the route, driven within the speed limit. The second video depicted the route driven at a high rate of speed. The purported purpose of the videos was to show the trial court the road conditions as they existed at the time of the accident. Carey testified that the road conditions in 2012, in terms of route, lane markings, grade, curves, stoplights, and speed limit were the same as when the accident occurred in 2010. Defendant moved *in limine* to exclude the videos. The trial court granted the motion in part, ordering the State to choose one video to present. The State chose and presented through Carey the video made within the speed limit. The court overruled defendant's renewed and continuing objection to the video at trial.

¶ 19 Carey transported defendant to bond court at around 9:45 a.m. on March 27, 2010. Defendant was sore and needed assistance into the squad car. Carey smelled a faint-to-moderate odor of alcohol coming from defendant's breath. Carey submitted a report about the transport five weeks after it took place. Carey could not recall whether he spoke to co-officers before writing the report. He testified that Ward did not order him to write it and that he worked on it over time, keeping it in his inbox until he submitted it. Carey does not always write transport reports, but decided to do so here because defendant still smelled of alcohol seven hours after the accident.

¶ 20 B. Defendant's Case

¶ 21 Craig Hathaway testified that he is friends with defendant and, on March 26, 2010, they met for dinner at Risotto's restaurant. Defendant ordered water with dinner. Hathaway took note of this because he had offered to buy defendant a drink, but defendant declined. Hathaway testified that the two would usually order beer or wine, but defendant said he had somewhere to go after dinner. Defendant left the restaurant before Hathaway, explaining he had a family issue to address. Hathaway has known defendant for several years, and defendant in no way seemed impaired or intoxicated, he did not order any alcohol while with Hathaway, and he did not smell of alcohol. Another friend, William Gibson, testified that he was at Risotto's restaurant on March 26, 2010, and he had a brief conversation with defendant in the bar area. Defendant did not order any drinks from the bar that evening, nor was he intoxicated or exhibiting any signs of intoxication.

¶ 22 Defendant's brother, Roger Butler, testified that, on March 26, 2010, he was with defendant. Roger had been arguing with their mother and called defendant to come over. After arriving, defendant repeatedly said he was tired and he drove them in the Mercedes to get a bite to eat. The Mercedes smelled like cologne. They went to Toby's, and defendant parked near the door. They sat at the bar, and Roger wanted to try a Long Island iced tea. Defendant ordered that drink for Roger and ordered himself Hennessy. Roger tried, but did not like, his drink, so he asked defendant whether he wanted it, instead of the Hennessy. However, the bartender saw that Roger did not like the Long Island iced tea, so she put a napkin over it and offered him a Heineken. Defendant did not drink the entire Hennessy. They ordered food, but an announcement came over the speaker for defendant to move his car. Roger walked out to the car with the Heineken in his hand, and, shortly after, defendant followed him outside. They sat in the car and spoke for awhile, and then defendant drove Roger back to their mother's apartment.

Roger testified that defendant was not drunk, had only sipped his drink before he had to move the car, and defendant did not bring his drink with him. Roger testified that defendant drove well and did not nod off. Roger left the Heineken, only partially consumed, in the vehicle's console. Defendant reiterated to Roger that he was tired and, once inside the apartment, he fell asleep in a chair. Roger tried to wake defendant three times before leaving. Roger confirmed at trial that he is currently serving a sentence for two felony convictions.

¶ 23 Defendant's mother, Pearl Butler, confirmed that, on March 26, 2010, she had repeatedly telephoned defendant, asking him to come over because she had been arguing with Roger. Defendant arrived around 9 p.m., appeared tired, and said he was tired. Defendant and Roger left the apartment and returned around 11 p.m. Pearl testified that defendant's speech was not slurred and he did not smell of alcohol. Defendant said he was tired, and he fell asleep. Pearl watched television while defendant slept on the couch. She noticed that, at around 1:45 a.m., defendant's snoring stopped and he had stopped breathing, so she tried to wake him and said his name loudly. Defendant had previously told Pearl about his sleeping problems and that he was being tested by a doctor. When Pearl was finally able to wake defendant, he sat up and had a hard time catching his breath. Defendant left Pearl's apartment around 2 a.m.

¶ 24 Officer Andy Mytnik was the first responding officer at the accident scene. Mytnik is friends with defendant. When he approached defendant's car, defendant was slowly exiting the vehicle. Mytnik asked defendant if he was ok, and defendant did not answer. Mytnik asked defendant a second time, and defendant stated, "I don't know." Mytnik asked defendant how the accident happened, and defendant did not answer. Mytnik asked defendant a second time, and defendant responded, "I don't know." Mytnik testified that blood was dripping from defendant's head onto his face and clothing. Mytnik said that defendant was dazed, disoriented, and was

slow to react. Mytnik did not notice any slurring of speech, nor did he detect any odor of alcohol coming from defendant's breath. Mytnik told defendant to stay in his vehicle and that an ambulance was coming. The windshield of defendant's vehicle was shattered, the airbag had deployed, and a cloud of dust came out of the vehicle when defendant opened the door. Later, on the front passenger floorboard of defendant's car, Mytnik found an open bottle of Heineken beer lying in a pool of liquid that smelled like beer.

¶ 25 Defendant's overarching theory of the case was that the accident resulted not from alcohol consumption but, rather, from his sleep apnea. Defendant's sleep apnea physician and an expert in sleep medicine and closed head injuries testified in defendant's case. In sum, they explained that defendant suffers from severe sleep apnea, which results in interrupted night sleep and excessive daytime sleepiness. Defendant's witnesses explained that, as a consequence of his sleep apnea, defendant was sleep deprived, and, because he was awoken from sleep before driving, he more likely than not continued in and out of sleep stages while driving. It is possible to drive while fading in and out of sleep, as driving is an automatic task.

¶ 26 Moreover, photographs suggested that, when his vehicle crashed, defendant's head might have hit the windshield. Further, there was evidence that he might have initially lost consciousness (*e.g.*, Mira saw him slumped over the wheel when she first arrived). The photos in the record show blood on defendant's head, eye, and shirt, as well as his vehicle's cracked windshield, broken glass with a substance that appears to be blood, and a deployed air bag. In addition, a photo shows a laceration on defendant's knee. Defendant's experts testified that defendant's perceived lack of cooperation, inarticulate speech, difficulty comprehending or following instructions, difficulty maintaining balance, lack of memory, and unstable emotional status, are all symptoms consistent with someone who has suffered a closed head injury.

¶ 27 The nurse that treated defendant at the hospital charted that he was cooperative, but also that he refused a blood draw. Testimony from the emergency room physician included that defendant complained of shoulder, hand, back, and knee pain, and had lacerations, bruising, and swelling on his face, right eye, and the back of his head. When defendant presented at the hospital, he rated his pain as a 10 on a scale of 1 to 10, with 10 being extreme pain. Defendant did not recall the accident and believed he lost consciousness. The physician testified that defendant did not appear to be intoxicated and so noted in her medical report. She explained that she did not recall defendant slurring his speech, having difficulty following commands, or presenting decreased alertness, all signs she would look for to determine if a patient is intoxicated. Further, because defendant did not appear intoxicated, the physician did not perform a blood alcohol test. Defendant was diagnosed with a closed head injury, sprained shoulder, bruising and swelling of his right hand, abrasions and sprain of the left knee and was given a knee immobilizer and prescription pain relief and muscle relaxants.

¶ 28 One of defendant's expert witnesses, Dr. Henry Lahmeyer, conceded that impairment could be caused by sleepiness, alcohol, or a combination of both. Similarly, the symptoms defendant exhibited could have been caused by closed head injury, alcohol consumption, or both. He agreed that defendant told him he drank some Hennessy prior the evening of the accident and that the cracked windshield could have resulted from an object in the car hitting the window, as opposed to defendant's head. Moreover, Dr. Lahmeyer agreed that, even if defendant was asleep when he approached Mira's vehicle at a high rate of speed, the "close call" would have jerked him awake; the accident took place approximately one mile away from that lane change. However, Dr. Lahmeyer opined that there was a 95% probability that the symptoms defendant

displayed were due to closed head injury, and that, in his opinion, defendant should have received immediate medical treatment before going to the police station.

¶ 29 C. Trial Court Rulings

¶ 30 The parties concluded presenting evidence on July 25, 2014. On July 30, 2014, the trial resumed for closing arguments. Immediately thereafter, the court noted that, although it heard evidence over several days and witnesses were called out of order, it had "gone over them," listened carefully to counsel's closing arguments, and reviewed the charging instrument. The court stated, "It is clear to me and [*sic*] no uncertain terms that before the accident in the evening preceding this accident that [defendant] was at various times engaged in the consumption of alcoholic beverages." The court found that the evidence reflected "strong minimization" about what occurred, but the court was left with "absolutely no doubt" that defendant consumed alcohol.

¶ 31 The court continued that it relied heavily on the testimony of Mira and police officers Ward, Carey, Munji, and Woodruff. The court noted that Mytnik's testimony was an outlier, but it did not give as much weight to his testimony because his time with defendant at the accident scene was limited. According to the court, there was "absolutely no question" that defendant was in control of the vehicle and driving it at a high rate of speed immediately prior to the collision. The court did not find helpful the evidence concerning field tests, which would have been inconclusive at best, and, instead, stated that the evidence concerning defendant's intoxication went well beyond defendant's performance on those tests. The court noted the testimony of the officers at the scene, booking station, and transport to the bond hearing reflected their observations of defendant, which were consistent with the court's finding of "intoxication to an extreme level," including "drastic mood swings ranging from aggressive to upset, his

various levels of cooperation, his assertions regarding the way he believed he was being treated all point me to the inescapable conclusion that [defendant] consumed alcohol. There is no question in my mind, the accident was caused by what appears to be abhorrent driving."

¶ 32 The court addressed defendant's evidence, noting that his experts testified that defendant "certainly" suffers from a "sleep disorder that *may have contributed* but in no way *accounts* for what occurred that evening." (Emphasis added.) Further, the court stated, "In my view, credible clear evidence from all of the witness[es] are that he was in clear control of that vehicle, that he made a series of moves immediately prior to the accident which were inconsistent with somebody who would have been asleep at that time." Finally, the court noted that it had observed the booking room video, which it found reflected "observable impairment," as corroborated by the testimony of the various officers. The court concluded that the cause of the "tragic occurrence was alcohol intoxication in a severe form." The court found defendant guilty of aggravated driving under the influence, as well as the two tickets charged.

¶ 33 Defendant moved for a judgment notwithstanding the verdict or, alternatively, a new trial. After hearing argument, the court addressed defendant's contention that it had essentially ignored his case because it ruled without reviewing the exhibits and videos, which were in the parties' possession, and it did not make any credibility findings concerning defendant's witnesses. The court stated:

> "[T]he Court heard and considered the entirety of the evidence in making the rulings that I made. The purpose of commenting is so the record is clear as to the basis for my finding [defendant] guilty, that I found him guilty, not to comment on evidence that I deemed irrelevant or unreliable or not supported sufficiently in the record, certainly

> not meant in any way to disparage the defense, maybe to soothe feelings for avoiding, rather, commenting unfavorably on what I deemed to be not credible evidence."

The court provided defendant with an opportunity to supplement the record with any other evidence that he wished to bring to the court's attention before it ruled on the motion.

¶ 34 On November 5, 2014, the court denied defendant's posttrial motion. The court reiterated that it had reviewed its notes of all proceedings, the testimony of all witnesses, including experts, and all of the evidence. It stated, "I'll remind the parties that choosing not to address certain evidence does not as the defense contends mean that it was ignored or unheard, rather, that it simply was not worth in my estimation commenting on at that moment nor at this moment." Further:

> "And I have no doubt that [defendant] does in fact suffer from certain physical maladies and other limitations but his malady such as they were on the night of the accident, while they may have contributed in the events, they certainly don't excuse them, nor do they in any way disturb my view that all the credible evidence that was adduced at the trial support my ruling that the jury [*sic*] has proven [defendant] guilty beyond a reasonable doubt."

¶ 35 On December 8, 2014, the court sentenced defendant to 30 months of felony probation and 18 months of periodic imprisonment. Defendant moved to reconsider the sentence. On January 8, 2015, pursuant to an agreement with the State, the court converted defendant's periodic imprisonment to electronic home monitoring. Defendant appeals.

¶ 36 II. ANALYSIS

¶ 37 A. Trial Court's Consideration of Evidence Before Ruling

¶ 38 Defendant argues first that the trial court failed to consider his defense and the testimony of his trial witnesses and that it determined his guilt prior to the close of trial. Defendant notes that the court ruled immediately after closing arguments, without a recess and without the benefit of the nearly 50 exhibits that had been admitted into evidence during the nearly 10-day trial. Further, defendant contends that his argument is supported by the fact that the court barely mentioned his evidence and did not once mention his head injury, which was testified to by three medical experts and left undisputed by State. He asserts that the record affirmatively shows that the court failed to recall and consider crucial defense evidence before entering judgment, denying him due process and entitling him to a new trial. For the following reasons, we disagree.

¶ 39 A trial judge sitting as trier of fact must consider all matters in the record before deciding a case. *People v. Bowen*, 241 Ill. App. 3d 608, 624 (1992). However, "[t]he trier of fact in a bench trial is not required to mention everything-or, for that matter, anything-that contributed to its verdict." *People v. Curtis*, 296 Ill. App. 3d 991, 1000 (1998). Further:

> "In a jury trial, the jury provides no explanation whatsoever for its verdict. In a bench trial, even though it may be desirable for the trial court to explain its decision, the court's election not to comment or its failure to specifically mention certain portions of the testimony does not permit a defendant on appeal to claim that those portions not mentioned played no role in the court's determination. If the record contains facts which support an affirmance of the trial court's finding, the reviewing court may take those facts into account even if the trial court did not state it explicitly relied upon them." *Id.*

¶ 40 Defendant's argument here is based on the premise that, where the record *affirmatively* shows that the trial court failed to recall crucial defense evidence when entering judgment, a

defendant does not receive a fair trial. See *People v. Mitchell*, 152 Ill. 2d 274, 323 (1992). However, in the cases upon which defendant relies, the trial courts affirmatively recalled the opposite of the evidence presented. See, *e.g.*, *id.* (a suppression hearing wherein the defendant testified that he told police that he wanted to go inside his home, but they forced him into the squad car, took him to the station, and told him that they would not let him go until they got what they wanted from him; the trial court stated it could not recall any testimony that the defendant did not feel free to leave or that he asked to leave and was denied permission); *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75 (a bench trial wherein the defendant's expert said that the defendant could not be excluded as a potential contributor to the DNA evidence; the trial court recalled the defendant's expert as saying that "certainly it was" the defendant); *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1976) (a bench trial wherein the defendant was accused of hitting a police officer and the main issue was who hit whom first; the defendant testified the officer hit his head and blood was rushing from his head when the officer hit him again; in closing, defense counsel mentioned that defendant testified he was bleeding and the court interjected that it did not hear that, it heard nothing about defendant stating he was bleeding, and to "strike that out").

¶ 41 Here, defendant does not identify where the court made an affirmative misrecollection of crucial defense evidence. Rather, defendant relies on the fact that that the trial court ruled immediately following closing arguments and did not expressly find the defense witnesses lacking in credibility. Indeed, in his reply, defendant comments that the court failed to "actually discuss or analyze the extremely credible defense witnesses[.]" However, as noted above, not only is the court in a bench trial not required to explain the basis for its decision, its election not to comment or its failure to specifically mention certain portions of testimony does not provide

defendant with a basis to argue on appeal that the evidence was not considered. Moreover, if this record affirmatively shows anything relative to defendant's argument, it is that the court *did* consider all of the evidence in ruling. The court commented that the trial took place over several days and that it had "gone over" the evidence presented and listened carefully to the parties' arguments before ruling. As there were several days between the close of evidence (July 25, 2014) and when trial reconvened for closing arguments (July 30, 2014) there is no reason to dispute the court's statement. Moreover, the court expressly mentioned that defendant "certainly" suffered from health issues, including a sleep disorder. That statement necessarily reflects consideration of defendant's expert evidence and a decision that, although the experts were credible concerning the sleep apnea condition, the court was not persuaded that health conditions, as opposed to intoxication, were responsible for defendant's condition the evening of the accident. "In a bench trial, it is the job of the trial judge, sitting as the factfinder, to make determinations about witness credibility." *Williams*, 2013 IL App (1st) 111116, ¶ 76. Further, in response to defendant's posttrial motion, the court reiterated that it had considered all of the evidence before ruling, and that it had commented on the evidence that formed the basis of its ruling, not evidence that it did not find persuasive.

¶ 42 In sum, we reject defendant's argument that the record affirmatively reflects that the trial court did not consider or recall defense evidence or that it found him guilty before the close of trial. Rather, the record reflects that, before rendering its ruling, the court considered and weighed the evidence.

¶ 43 B. Sufficiency of the Evidence

¶ 44 Defendant argues next that the State failed to prove beyond a reasonable doubt that he was impaired by alcohol the night of the accident. He notes that Mira smelled cologne when she

approached his vehicle, and Mytnik, the first officer to approach defendant, noticed defendant's injuries, but no odor of alcohol on defendant's breath. Defendant further notes that the field sobriety tests were fallible and that the observations of Munji and Ward as to alcohol impairment were flawed because they did not eliminate beyond a reasonable doubt that those observations resulted from defendant's head injury, as testified to by defendant's experts and the treating physician. Further, defendant asserts that his witnesses accounted for his sobriety, with only his brother Roger testifying that defendant had only a few sips of Hennessy before leaving Toby's and that the Heineken found in defendant's vehicle was Roger's. Finally, defendant notes that the State did not introduce the booking room video; rather, defendant did, and that the court's interpretation of the video as reflecting severe intoxication is contrary to what is depicted on it.

¶ 45 When a defendant challenges the sufficiency of the evidence, the same standard of review applies to both jury trials and bench trials; specifically, 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 a crime beyond a reasonable doubt. *People v. Patterson*, 314 Ill. App. 3d 962, 969 (2000). "In a bench trial, the court is presumed to know the law, and this presumption may only be rebutted when the record affirmatively shows otherwise." *People v. Mandic*, 325 Ill. App. 3d 544, 546-47 (2001). Again, "[i]n a bench trial, it is the job of the trial judge, sitting as the factfinder, to make determinations about witness credibility," those credibility determinations are entitled to great deference, and they will rarely be disturbed on appeal *Williams*, 2013 IL App (1st) 111116, ¶ 76. We will not reverse a conviction unless the evidence is so improbable or unsatisfactory as to raise a reasonable doubt of defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 26 1(1985).

¶ 46 To sustain a DUI conviction under section 11-501(a), the State must prove beyond a reasonable doubt that the defendant was in physical control of a motor vehicle, was under the influence of alcohol at the time, and his or her ability to think or act with ordinary care was impaired by the alcohol consumption. See 625 ILCS 5/11-501(a)(2) (West 2010); *People v. Diaz*, 377 Ill. App. 3d 339, 344 (2007). The State may prove its case with circumstantial evidence. See *Diaz*, 377 Ill. App. 3d at 345.

¶ 47 Here, defendant's challenge to the sufficiency of the evidence is more fundamentally a request for this court to re-weigh the evidence. There is no question that defendant presented significant evidence in support of his case. However, much of defendant's argument on appeal concerns the weight to be given the evidence, in light of his theory of the case. For example, defendant asserts that, although the police smelled the odor of alcohol, the cause of the odor was "clearly" the bottle of beer that spilled in the car. Although defendant casts the issue as clear, the court rejected that argument, finding more persuasive the officers' testimony that the odor was coming from defendant's *mouth*. Further, defendant asserts that the court drew unsupported conclusions from the booking room video, which, according to defendant, showed no obvious signs of intoxication, let alone severe intoxication. This court has reviewed the video, and we agree that defendant's interpretation is not unreasonable. However, the trial court's interpretation is not entirely unreasonable either. The video, which has no sound, does not depict defendant stumbling or engaging in any obvious physical altercations with officers. However, it does reflect defendant, Munji, Woodruff, and Ward at various times talking, sitting at a table, and gesturing (albeit not necessarily wildly) with hand motions. Defendant's face is often turned away from the camera, and he occasionally wipes his face, which is not inconsistent with the officers' testimony that defendant was emotional, and in no way contradicts their testimony that

defendant said irrational things, such as that Ward was a "hater," that they would need to call NIPAS for a blood draw, and that they would be dealing with a "silverback." The trial court viewed the video in open court, with defense counsel pausing it to ask Munji questions; the court could have reasonably found credible Munji's version of what was happening in the video, including that, when defendant wiped his face, he was wiping away tears, as well as that the video was corroborated by the officers' testimonies of what occurred in the booking room.

¶ 48 Further, defendant asserts that Munji's and Ward's testimony concerning their observations and opinions that defendant was intoxicated should be discounted because of the evidence presented that he hit his head on the windshield and the resulting symptoms of apparent impairment more likely resulted from a head injury. Defendant relies on cases where evidence of a disability or injury rendered observations of intoxication discredited. See *People v. Winfield,* 15 Ill. App. 3d 688 (1973); *People v. Clark*, 123 Ill. App. 2d 41 (1970). However, this court must view the evidence in the State's favor. Even defendant's expert, Dr. Lahmeyer, who testified that he thought it 95% likely that defendant's symptoms resulted from head injury, admitted that the symptoms defendant exhibited could have been caused by closed head injury, alcohol consumption, or *both*. He agreed that defendant told him that he drank part of a Hennessy the evening of the accident, and he agreed that the cracked windshield could have resulted from an object in the car hitting the window, as opposed to defendant's head. Moreover, Dr. Lahmeyer agreed that, even if defendant was asleep when he approached Mira's vehicle at a high rate of speed, the "close call" would have jerked him awake; the accident took place approximately one mile away from that lane change. As such, the evidence presented by defendant did not exclude the possibility that defendant's physical ailments were not solely, if at

all, responsible and that, instead, alcohol consumption could have been the cause or could have contributed to defendant's inability to think or act with ordinary care.

¶ 49 We further note that the trial court found credible the officers' testimonies that defendant had bloodshot, watery eyes, a strong odor of alcohol on his breath, that he was emotional, had mood swings, and said irrational things. Defendant initially told Munji that he had one Heineken beer at Friday's. He later changed that to Toby's, and said he ate at Friday's, which was never corroborated by his witnesses, and the court could have reasonably considered the inconsistency in evaluating defendant's credibility at the scene. In addition, the officers testified that defendant commented that "alcohol aside, I'm sober now" and that he was "all fucking sober now." Carey testified that, seven hours after the accident, defendant's breath smelled of alcohol. Upon finding the aforementioned evidence credible, the court could have relied on it alone to support its verdict. See, *e.g.*, *People v. Janik*, 127 Ill. 2d 390, 402 (1989) ("A DUI conviction may be sustained based solely on the testimony of the arresting officer, if credible.").

¶ 50 However, additional circumstantial evidence, viewed in the State's favor, supports the court's finding of alcohol impairment. For example, the Dilley's Road camera video showed defendant driving at a high rate of speed, straddling two lanes, through a red light, which the court could have reasonably relied upon as circumstantial evidence of defendant's impairment, as well as the fact that there was no evidence that he applied brakes before crashing into the other vehicles. Defendant could argue that the failure to brake suggests that he was, in fact, asleep before the crash. However, there was evidence supporting the court's decision to reject that theory. Specifically, the court found that defendant "made a series of moves immediately prior to the accident which were inconsistent with somebody who would have been asleep at that time." The court, therefore, considered that defendant suffers from sleep apnea and found that,

while that condition might have contributed to the accident, it did not find credible the explanation that it was the sole contributing factor. Viewing the evidence in the State's favor, the court's finding is supported by Dr. Lahmeyer's testimony that defendant agreed he had some Hennessy before driving and that the "close call" with Mira wakened defendant shortly before the crash. Although defendant's witnesses testified that he did not drink with them or show signs of intoxication, the court stated that it found "strong minimization" in the testimony and it could have reasonably decided that, as they were defendant's friends and family, the credibility of those witnesses did not outweigh the other evidence. To the extent there was conflict in the evidence, it was the province of the factfinder, not this court, to resolve it. *Id*. In sum, viewing the evidence in the State's favor, we reject defendant's argument that the State failed to prove beyond a reasonable doubt impairment caused by alcohol consumption.

¶ 51 C. Expert Witness Testimony

¶ 52 Defendant argues next that the trial court erred in admitting as expert testimony Carey's estimations as to defendant's speed prior to impact. He asserts that nothing about Carey's testimony constituted expert opinion outside the observational ability of an average lay witness. Further, defendant argues that, although Carey testified to his conversations with accident witnesses Santi and Patino about how the accident occurred, there was no proper foundation laid for that hearsay testimony and the witnesses were not called at trial, in violation of defendant's sixth amendment right to cross examination. For the following reasons, we reject defendant's arguments.

¶ 53 Here, over defendant's objection, the trial court received Carey's testimony as an expert in the field of accident investigation and reconstruction. Although this issue is a close one, we conclude the court did not abuse its discretion in admitting Carey's expert testimony. The

decision whether to admit expert testimony rests in the sound discretion of the trial court and will not be reversed unless the decision was arbitrary, fanciful, or no reasonable person would agree with the court's position. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). "As with any type of expert testimony, reconstruction testimony will be admissible if the expert is qualified to render an opinion and the testimony will aid the fact-finder in the resolution of the dispute." *Morrison v. Reckamp*, 294 Ill. App. 3d 1015, 1020 (1998).

¶ 54 Defendant is correct that, in *Watkins v. Schmitt*, 172 Ill. 2d 193, 206 (1996), our supreme court held that, where there were eyewitnesses who had both a reasonable opportunity to view the accident and driving experience to offer their opinions about a vehicle's speed at the time of the accident, expert witness testimony on the issue of speed was properly excluded. The court expressed that "a lay person is not required to have any specialized knowledge in engineering or to perform scientific calculations to estimate the speed of an automobile." *Id.* at 207. Although the court held that, in light of eyewitnesses who were able to give their own estimates, the expert testimony of an officer as to speed was properly excluded, it further held that the officer should have been permitted to testify to any physical evidence he observed at his inspection of the accident scene. *Id.* at 208.

¶ 55 Here, we note first that Carey did not actually testify to defendant's speed at the time of the accident itself; he agreed he could not do so, other than to say there was a "high velocity impact." Second, unlike in *Watkins*, here, there were no accident eyewitnesses, namely, the occupants of the other vehicles in the accident, called at trial to give their estimates as to defendant's speed at the time of the collision. Thus, although defendant asserts that it was the State's burden to call those witnesses, we find their absence of little import as, technically, there

exists in the record neither expert *nor* lay witness testimony about defendant's speed *upon impact*.

¶ 56 Rather, Carey provided "expert" testimony concerning defendant's speed when he drove through the Dilley's Road intersection, around *one mile from the accident scene*. Carey reviewed the Dilley's Road traffic camera video, which he testified showed defendant driving at a high rate of speed, between two lanes, and running a red light. Carey explained that he reviewed still frames of the traffic camera video, with each frame representing three-hundredths of one second. By considering the length of the vehicle and the still video frames, he was able to calculate how much time it took for the vehicle to advance to the next frame in the video. Using two methods, Carey opined that defendant's vehicle was traveling faster than the speed limit, around 75 to 85 miles per hour, through the Dilley's Road intersection, which, again, is around one mile from the accident scene. "And by high rate of speed, we're not talking about just ten or twenty over. It was considerably and noticeably more than the speed limit."

¶ 57 We do not think that the court necessarily needed "expert" testimony to view the videotape and see defendant's rate of speed and that his vehicle was straddling two lanes when it ran the red light. Nor was "expert" testimony that defendant can be seen driving "noticeably more than the speed limit" in the video necessarily required. However, we do think Carey's process of reviewing still shots of the video and applying calculations based on the frame length and size of defendant's vehicle to provide an estimate of how fast defendant actually drove through that intersection was likely helpful to the trial court. Further, even if Carey's testimony is considered in a "non-expert" light, it corroborated Mira's lay witness testimony, which defendant tried to suggest was not credible due to her own alcohol consumption that night, about defendant's speed before driving through the red light. Finally, Carey was properly allowed to

testify about his inspection of the three vehicles involved in the accident, the scene, and his review and markings of the roadway, grass, and curbs for tire marks and vehicle fluids. Accordingly, although it is close, we do not agree that the court's decision to admit Carey's expert testimony was arbitrary, fanciful, or an abuse of its discretion. However, even if Carey's testimony ultimately should not have been considered as "expert" testimony, it remained admissible as lay testimony, and we presume that a trial court in a bench trial only considers proper evidence. See *People v. Stack*, 311 Ill. App. 3d 162, 173 (1999).

¶ 58 We also reject defendant's challenges to Carey's testimony concerning his conversations with eyewitnesses Santi and Patino. Defendant points to the trial court's findings that: defendant was driving at a high rate of speed immediately prior to the collision; the evidence pertaining to the accident scene was consistent with that observation; and the accident was caused by abhorrent driving, as reflecting that the court relied heavily upon inadmissible hearsay evidence from eyewitnesses Santi and Patino presented through Carey's testimony.

¶ 59 We disagree with defendant's conclusion. First, we think defendant's characterization that Carey testified "extensively" to his conversations with Santi and Patino is an overstatement. In any event, Carey testified about his accident investigation and explained that, in the course of his investigation, his conversations with the other parties to the accident confirmed what he found physically at the accident site. As to Patino, Carey explained that Patino's description of what happened was corroborated by physical evidence. As to Santi, Carey testified that Santi's initial description of the accident did not match the physical evidence, so Carey spoke with Santi a second time. In our view, this evidence concerned Carey's investigative process, not the truth of the alleged statements proffered by either Carey or Santi. We note that defendant objected to this testimony at trial based on foundation, not hearsay, and, therefore, we may consider a

hearsay challenge to this evidence as forfeited. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). In any event, the facts and data that contribute to an opinion may be disclosed, not for the truth of the matter asserted, but for purposes of explaining the opinion. *People v. Williams*, 238 Ill. 2d 125, 143 (2010). To the extent the court "improperly" heard that Santi saw defendant approaching him at a high rate of speed, that description was effectively cumulative to the testimony provided by Mira. The trial court's findings defendant references were supported by other evidence in the record, such as Mira, the video of defendant driving through the red light at a high rate of speed, and the photographs of the damaged vehicles and scene. In sum, we reject defendant's arguments.

¶ 60 D. Motion *In Limine*

¶ 61 Defendant's final argument is that the trial court erred in denying his motion *in limine* to exclude the video that Carey made, two years after the accident, to show the road and route at issue in the accident. In addition, defendant challenges Sergeant Ward's report as being remote in time and self-serving. He asserts that Ward should not have been permitted to testify to the contents of that report.

¶ 62 A trial court's ruling on a motion *in limine* regarding the introduction or exclusion of evidence is reviewed under an abuse-of-discretion standard. *People v. Kirchner*, 194 Ill. 2d 502, 539 (2000). We conclude there was no abuse of discretion here. Defendant's theory of the case suggested that he was asleep at the wheel or in various stages of consciousness when the accident took place. The State offered two videos of the road and route as demonstrative aids for the trial court to use in assessing the credibility of defendant's explanation that the road, curves, lights, etc. could be driven while asleep. The court, in its discretion, reserved ruling on the motion, stating that it would first hold a foundational hearing. After holding a foundational hearing, the

court required the State to choose only one video, which was the one driven within the speed limit and was presented at trial.

¶ 63 Defendant claims that the video should have been excluded because it was too remote in time from the accident. However, that alleged weakness was known to the trial court. Indeed, the court ruled that, since the case was not being tried by a jury, it was "capable of ascertaining that evidence which is appropriate and that evidence which is not" and that defense counsel was "more than an able cross examiner" who could point out weaknesses in the evidence. Further, although defendant asserts that the test drive did not serve as an authentic replica of defendant's path or that the route was physically the same as the night of defendant's arrest, Carey testified that the road conditions were, in fact, the same, and defendant does not point to any specific road conditions in the video that were different from those that existed the night of the accident, nor does he dispute that at least part of the route in Carey's video was what he traveled the night of the accident. As such, we cannot find the court abused its discretion in denying defendant's motion to exclude the video.

¶ 64 For similar reasons, we reject defendant's challenge to Sergeant Ward's police report, which was created more than 2½ years after the incident and was allegedly self-serving. First, the alleged weaknesses of the report were known to the trial court and the court stated that defendant would be allowed wide latitude in cross-examination on these issues. Second, the report was never entered into evidence. Defendant asserts that Ward should not have been permitted to testify to the contents of the report, but the State did not ask Ward about his report at trial; *defendant did*. And, in doing so, defendant again pointed out the alleged weaknesses. Defendant cannot complain of error that was invited by him. *People v. Benka*, 117 Ill. App. 3d 221, 224 (1983). As such, defendant's argument fails.

¶ 65 III. CONCLUSION

¶ 66 For the reasons stated, we affirm the judgment of the circuit court of Lake County. Further, as part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 67 Affirmed.