2013 IL App (3d) 120069-UB

Order filed September 30, 2013
Modified Upon Denial of Rehearing November 5, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	Appeal No. 3-12-0069
v.	)	Circuit No. 10-CF-1769
THOMAS GATZ,	)	Honorable Amy Bertani-Tomczak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The evidence was sufficient for the trier of fact to reject the defendant's involuntary intoxication defense and find the defendant guilty of aggravated DUI.

¶ 2 The defendant, Thomas Gatz, was convicted of aggravated driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(a), (d)(1)(C) (West 2010)). He was sentenced to 24 months' conditional discharge and 480 hours of community service. On appeal, the defendant argues that the State failed to prove his guilt of aggravated DUI beyond a reasonable doubt. We

affirm.

¶ 3 FACTS

¶ 4 The defendant was charged by indictment with two counts of aggravated DUI. The defendant filed an answer to discovery that contained an affirmative defense of involuntary intoxication. See 720 ILCS 5/6-3 (West 2010).

¶ 5 In October 2011, the case proceeded to a bench trial. Michael Pauly testified that he was a Joliet police officer. On July 27, 2010, he was dispatched to the scene of an accident around 10:30 p.m. A gray Honda Civic that was driving eastbound on Jefferson Street had crossed into the westbound lanes and collided with an oncoming Pontiac and Toyota. When Pauly arrived at the scene, the injured had already been transported to the hospital.

¶ 6 Pauly then went to the hospital, where he spoke with Gail Darm, Lauren Eklund, and the defendant. Pauly noted that each of these individuals was receiving treatment. Pauly spoke with the defendant around 11 p.m. He noticed that the defendant was wearing only his underwear and smelled strongly of an alcoholic beverage. In addition, the defendant's eyes were glassy, red, bloodshot, and watery. At the time, the defendant was slipping in and out of consciousness and mumbling incoherently, but he did tell Pauly that he had not been drinking. However, one of the nurses reported that the defendant said he had had a few drinks. From his observations, Pauly opined that the defendant was under the influence of alcohol.

¶ 7 Darm testified that on the day of the incident, around 10:30 p.m., she was driving westbound on Jefferson Street when she saw an eastbound Honda weaving in and out of traffic. Eventually, the car in front of Darm swerved to avoid the Honda. Darm attempted to avoid a collision, but was hit in her right-passenger side by the Honda.

¶ 8 Eklund testified that on July 27, 2010, she was driving west on Jefferson Street and her friend, Valerie DeCamp, was riding in the passenger seat. Around 10:30 p.m., Eklund saw the two cars in front of her swerve and another car drive at her head-on. Eklund swerved and was hit in the driver's side by the oncoming vehicle. Eklund and DeCamp were taken from the scene by ambulance.

¶ 9 DeCamp's testimony about the incident was consistent with Eklund's. A phlebotomist employed at Provena Saint Joseph Medical Center testified that around 12 a.m. on July 28, 2010, she performed a DUI blood draw on the defendant.

¶ 10 At the conclusion of this testimony, the parties entered a number of stipulations, which included the following: (1) the defendant's DUI blood draw, analyzed at the Illinois State Police crime laboratory, registered a blood alcohol content of 0.103; (2) a hospital blood draw registered the defendant's blood alcohol content at 0.107; (3) the defendant's urine sample tested positive for the presence of zolpidem; and (4) the defendant was the driver of the 2010 Honda Civic involved in the accident. The State also admitted a transcript of proceedings from the defendant's earlier DUI acquittal in case No. 10-DT-742 and rested.

¶ 11 The defendant called Haidari Shikari to testify. Shikari stated that he was a psychiatrist and had treated patients for sleeping disorders. His treatments included prescribing sleep aid medications. Shikari was familiar with the sleep aid Ambien and the generic form, zolpidem. He stated that some patients who took these drugs performed simple or complex activities after falling asleep. The activities included: eating, talking, making a telephone call, and driving without recollection or voluntary control. However, Shikari noted that "[t]hese side effects are not very common[.]" Shikari postulated that the involuntary activities some patients experienced

were the result of the medication shutting off the memory and judgment neurons in their brains while the neurons involving motor conduct remained active. Shikari supported this theory with examples from various articles. One such example was a March 8, 2006, New York Times article entitled "Some Sleeping Pill Users Range Far Beyond Bed[.]" The article described a Denver area nurse who took Ambien, fell asleep, and awoke to find that she had driven a car and was under arrest. The nurse also learned after her arrest and return home that she had drunk wine without any recollection.

¶ 12 Shikari admitted that he had not examined the defendant and he had not met the defendant until the day of his testimony. However, Shikari opined that, based on the articles, police report, and his 37 years of psychiatric experience, the defendant could have driven his car with no memory of driving afterwards. The fact that the defendant was wearing only his underwear in the car indicated that he had no voluntary control or judgment at the time he was driving. The lab results indicated that the defendant had taken Ambien or zolpidem. It was possible that Ambien induced activities outside of a person's voluntary control and judgment and, if that had occurred, such a person would not be able to substantially appreciate the criminality of his alleged actions.

¶ 13 On cross-examination, Shikari stated that the Ambien bottle has warning labels, and the dispensing pharmacist distributes a flier with the side effect warnings to the patient. Shikari also agreed that his opinion was based on articles from the New York Times, Wall Street Journal, and other sources. Shikari had not participated in any of the studies he used to form his opinion, but had read the articles and agreed with their findings. Shikari agreed that every patient reacts differently to the prescribed medication, and he reiterated that he had never had any contact with

the defendant.

¶ 14 The defendant testified that on the date of the incident he was employed as a firefighter-paramedic in the village of River Forest. The defendant was scheduled to work a 24-hour shift, starting at 7:30 a.m. on Wednesday, July 28, 2010. Prior to this date, the defendant had been taking Ambien as a sleep aid pursuant to a prescription. On July 27, 2010, the defendant took one 10-milligram Ambien pill, got undressed, and went to sleep in his second floor bedroom around 9 p.m. The defendant's next memory was waking up in the hospital at about 6 a.m. on July 28, 2010, with fractured ribs and hemothorax, as well as a concussion. The defendant did not consume alcohol before going to bed on July 27, 2010, but he kept a bottle of vodka in the door of his refrigerator on the first floor of his house. He also kept his car keys in a kitchen cabinet above his stove.

¶ 15 The defendant stated that he was acquitted of a prior DUI charge that stemmed from an April 28, 2010, incident. On that date, the defendant took an Ambien, but he did not feel tired and decided to go for a drive around 10 p.m. The defendant left the house, drove around the neighborhood, began to feel sleepy, and decided to return home. While the defendant was driving home, he reached for a spit cup that he had dropped. The defendant then felt an impact and looked up to see that he had driven off the road and hit several light poles.

¶ 16 Prior to the July 27, 2010, incident, the defendant had not experienced major cognitive issues, apart from minor memory lapses, while taking Ambien. Approximately two months after the April 28, 2010, incident, the defendant's doctor renewed his prescription. The defendant did not recall that his doctor had warned him of the side effects of Ambien, and he had not read the warnings that came with the prescription. Before the July 27, 2010, incident, the defendant did

not know that Ambien could cause him to involuntarily drink alcohol and drive. The defendant discontinued taking Ambien after the July 27, 2010, incident.

¶ 17 On cross-examination, the defendant stated that when he returned home after the incident, the vodka bottle in his refrigerator was around half to three-quarters full and there was not "much [vodka] missing from it, if any."

¶ 18 After closing arguments, the court found that the defendant's expert testimony was unrebutted, but noted that Shikari never spoke with the defendant, and testified only that there were articles to support the possibility that Ambien caused the defendant to drink alcohol and drive. The court also stated that it "had the opportunity to view the credibility of [the defendant's] testimony as it relates to this event and the other events." The court concluded that the State had satisfied its burden of proof and found the defendant guilty of aggravated DUI. The court sentenced the defendant to 24 months' conditional discharge, 480 hours community services, and fines, fees and costs. The defendant appeals.

¶ 19 ANALYSIS

¶ 20 The defendant argues that the State failed to prove beyond a reasonable doubt that he voluntarily drank alcohol and drove because he presented sufficient evidence to raise the affirmative defense of involuntary intoxication based on the unwarned side effects of his prescription sleep aid. The defendant argues that the case is subject to a *de novo* standard of review because he raises a purely legal issue and the facts are not in dispute. The State argues that the case presents a factual challenge and therefore the standard from *People v. Collins*, 106 Ill. 2d 237 (1995), applies. We agree with the State. Applying the *Collins* standard, we will not disturb the findings of the trier of fact, unless, after examining the evidence in the light most

favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* It is not the function of this court to retry a defendant when considering the sufficiency of the evidence as the trier of fact is best equipped to judge the credibility of the witnesses. *People v. Wheeler*, 226 Ill. 2d 92 (2007). Additionally, the *Collins* standard applies to our review of the trier of fact's rejection of an affirmative defense. *People v. Hand*, 408 Ill. App. 3d 695 (2011).

¶ 21 In the present case, the parties' core dispute is whether the State sufficiently disproved the defendant's affirmative defense of involuntary intoxication. To raise an affirmative defense, the defendant must present some evidence in support thereon. 720 ILCS 5/3-2(a) (West 2010). After the defendant raises an affirmative defense, "the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense." 720 ILCS 5/3-2(b) (West 2010).

¶ 22 Generally, a person who is in an intoxicated or drugged condition is criminally responsible for his conduct unless his condition is involuntarily produced and deprives him of substantial capacity to either appreciate the criminality of his conduct or to conform his conduct to the requirements of law. 720 ILCS 5/6-3 (West 2010). Involuntary intoxication is an affirmative defense which exculpates an accused if the trier of fact believed that the elements of involuntary intoxication had been proven. *People v. Hari*, 218 Ill. 2d 275 (2006). In *Hari*, our supreme court expanded the involuntary intoxication defense to include individuals suffering from unexpected and unwarned adverse side effects of prescription medication. *People v. McMillen*, 2011 IL App (1st) 100366; see also *People v. Alberts*, 383 Ill. App. 3d 374 (2008).

¶ 23 In the instant case, the defendant presented some evidence to support the affirmative

defense of involuntary intoxication. However, viewing the evidence in the light most favorable to the State, we find that the defendant's evidence was refuted by the State's case-in-chief and its cross-examination of Shikari. Initially, we find our supreme court's decision in *Hari* instructive as to the requirements of a viable involuntary intoxication affirmative defense. In *Hari*, the defendant's involuntary intoxication defense was supported by the testimony of an evaluating physician, Robert Mitrione. Mitrione "testified at length about his interview with defendant" and opined that his diagnosis of involuntary Zoloft intoxication was a recognized disease within the DSM-IV. *Hari*, 218 Ill. 2d at 283. In comparison, Shikari provided an opinion based on secondary sources and his own experience, but stated that he had not interviewed the defendant. Shikari's nonspecific opinion was sufficient to raise an affirmative defense, but it was called into question by the State's cross-examination. During its questioning, the State emphasized the weaknesses in Shikari's opinion, including Shikari's statements that he had not conducted a study on the side effects of Ambien, that various individuals react differently to prescribed medications, and that he had not interviewed the defendant. Additionally, the State presented evidence that the defendant was involved in a car accident that injured others and his blood alcohol content was above the legal limit, and he admitted to a nurse that he had had a few drinks. As a result, the State's evidence was sufficient to disprove the defendant's voluntary intoxication defense and prove beyond a reasonable doubt that the defendant had committed the offense of aggravated DUI.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 26 Affirmed.