2012 IL App (4th) 100794-U

Filed 2/27/12

NO. 4-10-0794

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
TROY N. HUMPHREY,	)	No. 10CF175
Defendant-Appellant.	)	
	)	Honorable
	)	Richard P. Klaus,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial court did not abuse its discretion in declaring a mistrial without first reading the *Prim* instruction to the jury in defendant's first trial where the jury had deliberated for approximately five hours and the only issue was whether defendant was driving under the influence of alcohol.

(2) Defendant was not deprived of a fair trial by remarks made in the State's closing argument where defendant failed to demonstrate those remarks were sufficiently prejudicial to warrant a new trial.

(3) The evidence presented at trial was sufficient to prove defendant guilty of driving under the influence of alcohol beyond a reasonable doubt.

(4) We accept the State's concession defendant is entitled to additional monetary credit for time spent in presentence custody.

¶ 2 In August 2010, a jury convicted defendant, Troy N. Humphrey, of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(1)(H) (West 2008). In September 2010, the trial court sentenced him to 24 months' probation, with 39 days in jail.

¶ 3 Defendant appeals, arguing (1) trial court abused its discretion by declaring a mistrial in defendant's first trial, which ended after jurors indicated they were deadlocked, without first reading the *Prim* instruction to the jury (see *People v. Prim*, 53 Ill. 2d 62, 74-75, 289 N.E.2d 601, 608-09 (1972)); (2) he was deprived of a fair trial by remarks made in the State's closing argument; (3) the evidence was insufficient to prove defendant guilty beyond a reasonable doubt of DUI; and (4) he is entitled to additional monetary credit for time spent in presentence custody. We affirm as modified and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In February 2010, the State charged defendant, by information, with aggravated DUI (625 ILCS 5/11-501(d)(1)(H) (West 2008)), alleging he was in physical control of a motor vehicle while under the influence of alcohol in violation of section 11-501(a)(2) of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/11-501(a)(2) (West 2008)) and not in possession of a driver's license. During trial, the parties stipulated defendant "did not possess a driver's license."

¶ 6 Defendant's first and second jury trials each ended in a mistrial because the jury could not reach a unanimous verdict.

¶ 7 During defendant's third trial, Zachary Mikalik, a City of Urbana police officer, testified he was responding to a theft-of-services call from dispatch on November 7, 2009, when he observed a vehicle swerving "out of its lane of traffic, almost striking another vehicle." Mikalik also testified he observed the vehicle making a left turn without using a turn indicator. Mikalik followed the vehicle and continued to observe it "drifting out of its own lane of traffic" and "actually crossing over the traffic line." At one point, the vehicle came to an abrupt stop and nearly struck the vehicle in front of it. Mikalik testified the vehicle swerved in and out of its lane

enough times Mikalik decided to divert from the dispatch call and initiate a traffic stop.

¶ 8 Mikalik testified when defendant rolled down the window Mikalik could detect "the strong odor of an alcoholic beverage" coming from the vehicle. Defendant did not appear to be paying any attention while Mikalik was explaining why he had stopped defendant. Instead, defendant was "looking down and not concentrating." When Mikalik asked defendant if he understood what he had just told him, defendant replied by saying, "he didn't understand a word." Defendant was also holding "wadded-up money" in both of his hands. When Mikalik asked defendant for his driver's license, defendant lifted the cash up and asked, "how are we going to handle this?" Defendant eventually handed Mikalik a Minnesota state identification card. Defendant told Mikalik he was "coming from the nudie bar." While defendant initially told Mikalik he only had one beer to drink that night, defendant later told Mikalik he drank two beers. Mikalik observed defendant had "bloodshot eyes" and exhibited "slurred and deliberate speech."

¶ 9 Mikalik explained there was an officer on duty who was specifically designated to handle traffic violations and DUIs. As a result, City of Urbana police officer Matthew Mecum arrived at the scene and took over the stop. Mecum testified defendant's eyes were bloodshot and defendant was slurring his speech. The State introduced People's exhibit No. 3, defendant's booking photo, which Mecum testified showed defendant with bloodshot eyes.

¶ 10 Mecum testified defendant told him he had two beers at the bar. Mecum requested defendant recite the alphabet, beginning at the letter "E" and stopping at the letter "T." Defendant responded by telling Mecum that Mecum was "attempting to trick him" and he "would start wherever he wanted to." At that point, according to Mecum, defendant began reciting the alphabet from the letter "A" and continued through the letter "J." (The video shows, however,

defendant stopped at the letter "T" as instructed.) Per Mecum's request, defendant then correctly counted backward from 72 to 57. However, Mecum was still concerned about defendant's ability to drive, so he asked defendant to step out of the vehicle and perform the "one-legged-stand" test. Mecum instructed defendant to begin counting. However, defendant

> "began counting one, two, three, four, instead of one thousand one, one thousand two, one thousand three. On the count of 14[,] he raised his arms up, held them out at shoulder level, [and] began hopping on his right foot. Count of 17 he stopped, put his arms back down, and then when he hit 20 he raised his arms up again and continued hopping. And that's at, I believe around the count of 20 or 24 is when he was leaning backwards, away from me, and to the right."

Mecum testified hopping and raising one's arms away from one's waist are indicators of impairment.

¶ 11 Mecum then administered the "walk-and-turn test," which Mecum testified defendant failed. According to Mecum's testimony,

> "During the first nine steps [defendant] did not touch his heel to his toe. On steps two, three, four, and five, when he reached the turn he pivoted almost in an about face fashion, where he picked up his right foot and pivoted backwards, as opposed to just keeping his left foot planted. He brought both feet together after conducting the turn, and then took nine steps back. On [the] step behind he didn't touch his

heel to his toe."

At that point, Mecum believed defendant was intoxicated and arrested him for DUI.

¶ 12 Following defendant's arrest, defendant became "most belligerent" and "upset" with the police. Defendant told Mecum he had no right to stop him in the first place and the only reason he was arrested was because he was black. Defendant also thanked Mecum a number of times for arresting him because that meant "he was going to get paid for the arrest." Defendant then worked the handcuffs up underneath his legs and got the handcuffs around to his front, despite being asked not to. Defendant also hooked the handcuff chain up behind his neck so his hands were up by his neck. Defendant was instructed several times to take his hands down. However, defendant refused to do so until they were in the booking area. Once in the booking area, defendant observed an officer with a Taser in its holster on his belt. Defendant laid "spread-eagled" on the ground and began screaming "at the top of his lungs" he did not want to be tased. Mecum testified it took telling defendant 20 or 30 times he was not going to be tased before defendant got up and took a seat in the booking chair. Mecum then took defendant to the room where the Breathalyzer machine was located. However, defendant repeatedly ignored Mecum's requests for a breath sample. Mecum eventually informed defendant continuing to ignore the request would be taken as a refusal to submit a breath sample. Defendant did not submit a breath sample.

¶ 13 Defendant's friend, Asa Gregory Pettit, testified he was with defendant the evening of defendant's arrest. Pettit testified they were playing video games at defendant's house for approximately three hours. Pettit testified they did not have anything to drink during the time they were at the house. Pettit accompanied defendant to the bar, where he observed defendant

drink two beers.

¶ 14 Defendant testified he was at the bar for a few hours and had two beers. Defendant maintained he crossed the lane line because of potholes in the road. Defendant also testified he did not perform the alphabet test the way Mecum had instructed because

> "I wanted to, you know, give him an idea of a demonstration of what he wanted me to do. I asked him, like what do you want me [to do?] A, B, C, D, E, F, G, H, I, J, you know, which letter do you want me to stop at? Then he said T, and then I went ahead and performed the task [from A to T]."

Defendant admitted he might have hopped twice during the"one-legged-stand" test but it was because he "figured that putting [his] foot down was failing" and he could hold his balance. Defendant also testified his walk-and-turn test substantially looked like what Mecum demonstrated it should look like.

¶ 15 Defendant acknowledged he talked over Mecum while Mecum was asking defendant to submit a breath sample but maintained Mecum never gave him the chance to submit a sample. According to defendant's testimony, he is "always trying to get [his] point across" and doesn't "stop talking until [he] get[s] finished completing the idea." Defendant testified he was "talking first" when Mecum started reading him something and that was why he talked over Mecum. However, defendant testified he never refused the breath test.

¶ 16 At the conclusion of defendant's third trial, the jury convicted defendant of aggravated DUI.

¶ 17 In September 2010, the trial court sentenced defendant as stated.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues (1) the trial court abused its discretion where it found manifest necessity existed for a mistrial without first reading the *Prim* instruction to the jury, (2) the prosecutor made improper statements during closing argument, (3) the evidence was insufficient to prove defendant guilty beyond a reasonable doubt of DUI, and (4) he is entitled to additional monetary credit for time spent in presentence custody.

¶ 21 A. Whether the Trial Court Erred in Declaring a Mistrial

¶ 22 During the deliberations following defendant's first trial, the jury sent the trial court a note stating, "Your Honor: we are deadlocked at 6-6. We do not see a prospect for a unanimous verdict. Could you please advise us?" Defendant's trial counsel requested the trial court give the jury the *Prim* instruction. However, the court denied the request. Specifically, the court found that considering

> "the procedural history of the case in the court's assessment and the length of time that the jury has deliberated, and the truly deep division of the jury suggests to the court at least that the jurors have assiduously already done that which the *Prim* instruction calls upon them to do, and this doesn't appear to the court to be a situation in which we have got one or two sort of intractable or passive aggressive jurors who are impeding rational deliberations. It seems to the court that we have just got twelve honest reasonable people who respectively harbor *bona fide* positions, and so I'm simply not

convinced that giving this *Prim* instruction will do anything but again place the jury in the position they are already in."

Instead, the court responded to the jury's note as follows:

"Dear Foreperson Murphy and Members of the Jury: The court has received your note and informs the jury as follows: If the jury is truly deadlocked, and if it is the considered position of the jury that further deliberation is not reasonably likely to lead to a unanimous verdict, the usual course is for a court to declare a mistrial. In that event the case would be retried at a later date before a different jury.

The court also has the option of recessing deliberations of the jury for the evening and directing the jury to return for further deliberations tomorrow morning. Whether that course would be productive is for the jury to decide.

The case is now in the hands of the jury and the court will defer to the collective judgment of the jury. Please discuss which of the two options the jury wishes to pursue and notify the court officer of your decision in writing.

If any member of the jury should have any further questions, please don't hesitate to forward them through the court officer."

While defense counsel requested the *Prim* instruction be given, once the court made clear it would not give it, counsel approved the wording of the court's proposed response.

¶ 23 Approximately 11 minutes later, the jury sent the trial court a note stating, "Your Honor: We believe we are truly deadlocked; it seems impossible to us to move six votes. Further deliberation is not reasonably likely to result in a unanimous verdict." The trial court confirmed the contents of the note with the jury foreperson in the presence of the jury. Thereafter, the court declared a mistrial over defendant's objection.

¶ 24 Defendant argues the trial court abused its discretion where it declared a mistrial without first reading the *Prim* instruction to the jury. Defendant thus maintains his retrial violated the constitutional guarantee against double jeopardy. We disagree.

¶ 25 A State may not place a defendant in jeopardy twice for the same offense. *Arizona v. Washington*, 434 U.S. 497, 503 (1978); U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10. However, the double-jeopardy clause "does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding." *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982). The Illinois Supreme Court has stated "whether a defendant may be retried after a mistrial has been declared without the defendant's request depends on whether there was a manifest necessity for the mistrial." *People ex rel. Roberts v. Orenic*, 88 Ill. 2d 502, 508, 431 N.E.2d 353, 356 (1981). "The classic example of 'manifest necessity' is a hung jury." *People v. Pondexter*, 214 Ill. App. 3d 79, 84, 573 N.E.2d 339, 343 (1991).

¶ 26 A trial court "may properly declare a mistrial and discharge a jury when it is apparent the jury is hopelessly deadlocked." *People v. Cole*, 91 Ill. 2d 172, 175, 435 N.E.2d 490, 491 (1982). If the trial court determines the jury is "hopelessly deadlocked," it may discharge the jury, and the State may retry the defendant "without violating the double[-]jeopardy clauses of

the Illinois and United States Constitutions (U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10)." *People v. Largent*, 337 Ill. App. 3d 835, 843, 786 N.E.2d 1102, 1109 (2003); *Pondexter*, 214 Ill. App. 3d at 84, 573 N.E.2d at 343. The decision whether to grant a mistrial falls within the sound discretion of the trial court. *People v. Nieves*, 193 Ill. 2d 513, 525, 739 N.E.2d 1277, 1283 (2000).

¶ 27 In *Prim*, the supreme court was concerned with tailoring an instruction appropriate to guide, but not coerce, a jury unable to reach a verdict. *People v. Cowan*, 105 Ill. 2d 324, 328, 473 N.E.2d 1307, 1309 (1985). A *Prim* instruction informs the jury of the following: (1) a jury verdict must be unanimous; (2) the jury has a duty to deliberate; (3) jurors must impartially consider the evidence; and (4) jurors should not hesitate to reexamine their views and change their opinions, if they believe them to be erroneous, so long as the change is not solely because of the opinion of fellow jurors or for the mere purpose of returning a verdict. *People v. Chapman*, 194 Ill. 2d 186, 222, 743 N.E.2d 48, 70 (2000); *Prim*, 53 Ill. 2d at 74-75, 289 N.E.2d at 608-09. Specifically, the *Prim* instruction states the following:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your

deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case." *Prim*, 53 Ill. 2d at 75-76, 289 N.E.2d at 609.

¶ 28 However, a trial court's decision not to give a *Prim* instruction does not require reversal. *People v. Wilcox*, 407 Ill. App. 3d 151, 164, 941 N.E.2d 461, 473 (2010); *People v. Wolf*, 178 Ill. App. 3d 1064, 1066, 534 N.E.2d 204, 205 (1989) (citing *People v. Palmer*, 125 Ill. App. 3d 703, 712, 466 N.E.2d 640, 648 (1984) (trial court's failure to give *Prim* instruction to deadlocked jury is not reversible error)). Further, " 'In determining how long a jury should be permitted to deliberate before a mistrial is declared and the jury is discharged, no fixed time can be prescribed, and great latitude must be accorded to the trial court in the exercise of its informed discretion.' " *Largent*, 337 Ill. App. 3d at 843, 786 N.E.2d at 1109 (quoting *Wolf*, 178 Ill. App. 3d at 1066, 534 N.E.2d at 205). Instead, a court should make these determinations based upon such factors as the length of time already spent in deliberation and the complexity of the issues before the jury. *Chapman*, 194 Ill. 2d at 222, 743 N.E.2d at 70; *Cowan*, 105 Ill. 2d at 328, 473 N.E.2d at 1309.

¶ 29 In his brief, defendant argues the jury had not been deliberating for very long and the issues it had to determine were "complex." We disagree. In this case, the jury deliberated for

approximately five hours. See *Wolf*, 178 Ill. App. 3d at 1066, 534 N.E.2d at 205 (no error found where the trial court declared a mistrial without giving the *Prim* instruction after just two hours of jury deliberations). Further, the only issue in this case was whether defendant was under the influence of alcohol. The evidence consisted of two witnesses for the State, two witnesses for the defense, and a video. In addition, the jury did not indicate the existence of one or two lone holdout jurors. Instead, the jury indicated it was "deadlocked at 6-6" and did not "see a prospect for a unanimous verdict."

¶ 30 Instead of giving the *Prim* instruction, the trial court asked the jurors whether they thought it would be productive to continue deliberations or whether they believed they were truly deadlocked. The jurors responded they believed they were "truly deadlocked" and further deliberations were "not reasonably likely to result in a unanimous verdict." The court accepted the jury's response and declared a mistrial. Based on the facts and circumstances here, including the length of deliberations and the simplicity of the issue considered by the jury, the court's decision to find a hung jury and to declare a mistrial was not an abuse of discretion. Thus, defendant's retrial did not violate the constitutional prohibition against double jeopardy.

¶ 31 B. Alleged Improper Statements

¶ 32 Defendant argues he was deprived of a fair trial by remarks made in the State's closing argument of his third trial.

¶ 33 All defendants are entitled to a fair trial free from prejudicial comments by the prosecution. *People v. Barker*, 298 Ill. App. 3d 751, 757, 699 N.E.2d 1039, 1043 (1998). However, prosecutors are given wide latitude in closing arguments. *People v. Hester*, 271 Ill. App. 3d 954, 957, 649 N.E.2d 1351, 1355 (1995).

> "In closing argument, counsel may make a fair comment upon the evidence, present the evidence in the light most favorable to his case, and draw inferences from the evidence. However, he may not misrepresent the evidence or argue facts not in evidence." *Lambie v. Schneider*, 305 Ill. App. 3d 421, 429, 713 N.E.2d 603, 609 (1999).

When considering a claim of improper closing arguments, the comments must be considered in the context of the closing arguments as a whole. *People v. Taylor*, 345 Ill. App. 3d 1064, 1081, 804 N.E.2d 116, 129 (2004). "[T]he reviewing court must indulge in every reasonable presumption that the trial court properly exercised its discretion in determining the propriety of the remarks." *Taylor*, 345 Ill. App. 3d at 1081, 804 N.E.2d at 129. A court will reverse a judgment because of improper closing arguments only if the defendant identifies remarks made by the prosecutor that were (1) improper and (2) so prejudicial that real justice was denied or the jury may have reached its verdict because of the error. *People v. Evans*, 209 Ill. 2d 194, 225, 808 N.E.2d 939, 956 (2004).

¶ 34 In his first citation of error, defendant claims the State misstated the evidence regarding Pettit's testimony by stating the following:

> "[Pettit] also testified that he'd only been with [defendant] for a number of hours. [Pettit] had no idea what the defendant had done before ten o'clock."

Defendant objected, arguing the statement "misstates the evidence." However, the trial court overruled defendant's objection and stated "That's for the jury to decide."

¶ 35 On cross-examination, Pettit was asked if he met defendant "around 9:30, ten

o'clock that night." Pettit answered, "Probably right around there, 8:30 to nine o'clock." Thus, Pettit's testimony shows he could have met defendant as early as 8:30 or as late as 10:00 p.m. The prosecutor's statement argued the possibility that Pettit had no idea what defendant had done prior to 10 p.m. The prosecutor's statement was reasonable considering the nature of Pettit's testimony. The jury heard Pettit testify, and it is the duty of the jury to resolve any inconsistencies in testimony and determine issues of credibility. The State's comments regarding the credibility of Pettit's testimony were not improper.

¶ 36 In defendant's next citation of error, the State told the jury the following during closing argument:

> "Weigh [those other inconsistencies] when you weigh the defendant's side of the story. Because [defendant is] the only one telling you he only had two beers."

The trial court overruled defendant's objection.

¶ 37 Defendant testified he "didn't drink at home" and had "only two" beers while at the bar for "a few hours." Pettit also testified defendant did not drink at home, but the two drank a "couple of drinks" at the bar. Pettit later testified defendant had two beers while at the bar. Thus, the prosecutor incorrectly stated defendant was "the only one who's telling you he had only two beers." However, the prosecutor's remarks were not so prejudicial that justice was denied nor can we say the jury may have reached its verdict because of an error. First, the jury heard both defendant and Pettit's testimony regarding the number of beers defendant had that night. Further, the number of beers defendant and Pettit testified defendant consumed was not the only evidence presented relating to defendant's intoxication. Moreover, the trial court's jury

instructions stated closing arguments are not evidence and the jury should disregard any argument not based on the evidence. See *People v. Barney*, 111 Ill. App. 3d 669, 677-678, 444 N.E.2d 518, 524 (1982).

¶ 38 Such an instruction tends to cure any prejudice from improper remarks. *People v. Garcia*, 231 Ill. App. 3d 460, 469, 596 N.E.2d 1308, 1315 (1992); see also *People v. Bratton*, 178 Ill. App. 3d 718, 726, 533 N.E.2d 572, 578 (1989) ("Instructions of this sort by the trial court decrease the likelihood that improper remarks in the prosecutor's closing argument rose to the level of plain error"). In *Bratton*, this court also stated a court must presume the jurors followed the trial court's instructions. *Bratton*, 178 Ill. App. 3d at 726, 533 N.E.2d at 578. Therefore, any influence or prejudice caused by the State's incorrect statement was likely cured by the court's instructions. Moreover, nothing in the record before us indicates the jury was influenced or prejudiced to the extent defendant was denied a fair and impartial trial. As a result, any impropriety in the State's closing argument does not warrant a new trial.

¶ 39 In defendant's final citation of error, the prosecutor stated the following:

> "Why isn't he taking the breath test? It has nothing to do with he wanted to tell his side of the story. It has everything to do with he knows what the result will be. He knows he'll be over the limit."

The trial court overruled defendant's objection.

¶ 40 It is permissible for the State to argue defendant's state of mind in this context because a defendant's refusal to submit to breath testing may be considered proof of his "consciousness of guilt." See *People v. Garstecki*, 382 Ill. App. 3d 802, 813, 890 N.E.2d 557,

565 (2008)*; People v. Garriott*, 253 Ill. App. 3d 1048, 1052, 625 N.E.2d 780, 784 (1993) (a driver's refusal to submit to a breath test is relevant because it implies he believes he is intoxicated). Accordingly, the State's comments regarding defendant's refusal to submit to a breath test were not improper.

¶ 41 C. Sufficiency of the Evidence

¶ 42 Defendant argues the evidence was insufficient to convict him of DUI. Specifically, defendant contends alternative explanations exist to explain why he was observed swerving and why he performed poorly on the field sobriety tests.

¶ 43 When reviewing a challenge to the sufficiency of the evidence, in a criminal case, the relevant inquiry is whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 169 Ill. 2d 132, 152, 661 N.E.2d 287, 296 (1996). It is the responsibility of the trier of fact to determine the credibility of witnesses and the weight their testimony carries, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259, 752 N.E.2d 410, 425 (2001). A court of review will not overturn the verdict of the fact finder "unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *People v. Milligan*, 327 Ill. App. 3d 264, 267, 764 N.E.2d 555, 558 (2002).

¶ 44 To support a conviction for aggravated DUI, the State must prove beyond a reasonable doubt an individual drove or was in actual physical control of a vehicle while that individual is under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2008)), and (2) the individual committed the violation while he did not possess a driver's license (625 ILCS 5/11-

501(d)(1)(H) (West 2008)). The parties stipulated at trial defendant did not possess a valid driver's license at the time of his arrest. Thus, the only issue before the jury was whether defendant was guilty of DUI.

¶ 45 To prove a defendant guilty of DUI, the State must show the defendant was unable to " 'think or act with ordinary care' " as a result of consuming alcohol. *People v. Diaz*, 377 Ill. App. 3d 339, 344, 878 N.E.2d 1211, 1216 (2007) (quoting Illinois Pattern Jury Instructions, Criminal, No. 23.29 (4th ed. 2000)). However, to obtain a DUI conviction, the State need not present chemical evidence from a Breathalyzer or a blood test. *Diaz*, 377 Ill. App. 3d at 344-45, 878 N.E.2d at 1216. Instead, "the credible testimony of the arresting officer may be sufficient to prove the offense." *Diaz*, 377 Ill. App. 3d at 344-45, 878 N.E.2d at 1216. The State may also prove a defendant guilty of DUI based upon circumstantial evidence. *Diaz*, 377 Ill. App. 3d at 345, 878 N.E.2d at 1216. "Circumstantial evidence is proof of certain facts and circumstances from which the fact-finder may infer other connected facts which usually and reasonably follow from the human experience and is not limited to facts that may reasonably have alternative, innocent explanations." *Diaz*, 377 Ill. App. 3d at 345, 878 N.E.2d at 1216-17.

¶ 46 In this case, Officer Mikalik testified he observed defendant's vehicle swerving in and out of its lane and almost striking other vehicles. While defendant testified he was trying to avoid potholes, Mikalik did not observe any hazardous road conditions or any other vehicles weaving into the other lane of traffic. Mikalik also testified defendant had failed to use his turn indicator when making a left turn. Upon stopping defendant's vehicle, Mikalik smelled a "strong odor of an alcoholic beverage." Both Mikalik and Mecum testified defendant had "bloodshot eyes" as well as "slurred and deliberate" speech. Mikalik testified defendant admitted coming

from a bar and drinking beers. According to Mecum's testimony, defendant performed poorly on three of the four field-sobriety tests administered. Moreover, defendant repeatedly ignored Mecum's requests to submit a breath sample. As previously stated, a defendant's refusal to submit to a breath test after his arrest constitutes circumstantial evidence of his consciousness of guilt. See *Garstecki*, 382 Ill. App. 3d at 813, 890 N.E.2d at 565; *Garriott*, 253 Ill. App. 3d at 1052, 625 N.E.2d at 784 (jury may infer driver refused to submit to a breath test because he knew it would confirm he was intoxicated).

¶ 47 The jury in this case heard testimony from the State's witnesses as well as defendant's testimony. The jury weighed the witnesses' testimony and made credibility determinations. The police squad car video was also presented and viewed by the jury. It is the jury's function "to assess the credibility of witnesses, weigh the evidence presented, resolve conflicts in the evidence, and draw reasonable inferences from the evidence." *People v. Moss*, 205 Ill. 2d 139, 164, 792 N.E.2d 1217, 1232 (2001). Viewing the evidence in the light most favorable to the State, the evidence in this case was not so unreasonable, improbable, or unsatisfactory that it created a reasonable doubt of defendant's guilt. See *People v. Wheeler*, 226 Ill. 2d 92, 115, 871 N.E.2d 728, 740 (2007) ("a conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt"). The evidence presented was sufficient to find defendant guilty of DUI.

¶ 48 D. Defendant's Credit Against Fines

¶ 49 Defendant argues he is entitled to additional monetary credit for time spent in presentence custody. Specifically, defendant contends he is entitled to $5 per day for each of the 39 days he spent in custody. Defendant maintains he is entitled to a $195 credit against his

$1,000 DUI fine for time spent in presentence custody. The State concedes defendant's argument, and we accept the State's concession.

¶ 50 Sentence credit against a fine is governed by section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2008)), which provides in relevant part:

> "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine." 725 ILCS 5/110-14(a) (West 2008).

¶ 51 In this case, the record shows defendant spent 39 days in custody prior to sentencing. At sentencing, the trial court imposed a DUI fine of $1,000. However, the record does not show defendant received any monetary credit against that fine. We note the State requests the $195 should be credited against defendant's $200 DNA analysis charge (see 730 ILCS 5/5-4-3(j) (West 2008)). However, our supreme court has recently held that charge is not a fine and thus not subject to offset by presentence credit. See *People v. Johnson*, 2011 IL 111817, ¶ 28, 959 N.E.2d 1150, 1156 (2011) (DNA analysis charge is not subject to offset by presentence credit pursuant to section 110-14(a) because the charge is not a fine). Accordingly, we find defendant is entitled to a total of $195 ($5 per day for 39 days spent in custody) against the $1,000 DUI fine. We remand for issuance of an amended judgment of sentence so reflecting.

¶ 52 III. CONCLUSION

¶ 53 For the foregoing reasons, we affirm the trial court's judgment as modified. We remand with directions to modify the sentencing judgment to reflect a $195 credit against his $1,000 DUI fine. Because the State successfully defended a portion of the criminal judgment, we grant the State its $75 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 54 Affirmed as modified; cause remanded with directions.