2012 IL App (4th) 111054-U

NO. 4-11-1054

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 29, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
PETER J. SCHWARTZ,	)	No. 10CF1542
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The State presented sufficient evidence for a rational trier of fact to find defendant guilty of aggravated driving under the influence of alcohol (625 ILCS 5/11-501(d)(1)(A) (West 2008)).

(2) The trial court did not err by failing, *sua sponte*, to provide the jury with Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. Supp. 2003) (hereinafter, IPI Criminal 4th No. 3.15 (Supp. 2003)).

(3) The trial court erred in ordering defendant to pay restitution to the Macon County Sheriff's Department pursuant to section 11-501.01(i) of the Illinois Vehicle Code (625 ILCS 5/11-501.01(i) (West 2008)).

¶ 2 In April 2011, a jury found defendant, Peter J. Schwartz, guilty of driving under the influence of alcohol and aggravated driving under the influence of alcohol. In May 2011, the trial court sentenced defendant to four years in prison for aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(1)(A) (West 2008)) with presentence custody credit for

the period between October 16, 2010, and May 19, 2011. The court also ordered defendant to pay various fines and fees, including a $162.63 restitution charge pursuant to section 11-501.01(i) of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/11-501.01(i) (West 2008)). Defendant appeals, arguing the State's evidence was insufficient to prove him guilty of aggravated DUI, the court erred by failing to *sua sponte* provide the jury with IPI Criminal 4th No. 3.15 (Supp. 2003), and the court erred in ordering defendant to pay a DUI emergency response restitution charge of $162.63. We affirm defendant's conviction but vacate the $162.63 restitution charge.

¶ 3 I. BACKGROUND

¶ 4 In October 2010, the State charged defendant with two counts of aggravated DUI (625 ILCS 5/11-501(d)(1)(A), (d)(1)(G) (West 2008)) and driving while license revoked or suspended with three prior convictions for driving while license revoked or suspended (625 ILCS 5/6-303(d-3) (West 2008)).

¶ 5 In April 2011, defendant proceeded to a jury trial *pro se*. Andrew Hastings testified he was working at the Steak-n-Shake drive-through window in Forsyth, Illinois, on October 15, 2010, and observed an old brownish-colored Chevy truck come through at approximately 11:30 p.m. Defendant was driving the truck. A female was in the passenger seat of the truck. Hastings testified he saw the same truck later that night pulled over about 250 feet from the restaurant. On cross-examination, Hastings testified a small chance existed he made a mistake in identifying defendant and defendant's truck. However, Hastings said only approximately 30 to 45 minutes elapsed after the truck went through the drive-through until the police asked him to identify the vehicle. Hastings conceded the drive-through was not well-lit,

but enough light is present to see a vehicle in the drive-through and people inside a vehicle.

¶ 6 Deputy Chad Wayne of the Macon County sheriff's department testified he was on duty at approximately 11:30 p.m. on October 15, 2010, in Forsyth. Wayne testified he observed a dark brown or red pickup truck that was in motion in the southbound lane of U.S. Route 51 pull to the right, extinguish its lights, and come to a complete stop. Wayne testified he proceeded northbound on U.S. Route 51, made a U-turn, and approached the truck from the rear. Wayne testified he saw a silhouette of the driver's side door open. He did not see the passenger side door open. However, he acknowledged the vehicle was out of his sight for at least "a second or so." As he turned around and pulled behind the truck, he saw a man with a gas can on the driver's side of the vehicle putting gas in the truck. No one was moving into or out of the truck at that time.

¶ 7 A female passenger was sitting on the bench seat toward the passenger's side. Wayne admitted the woman could have moved anywhere in the vehicle upon seeing him. The female passenger did not have a valid driver's license. Wayne testified he did not see defendant in the truck. The truck was not registered in defendant's name. The keys were inside the truck.

¶ 8 Wayne testified defendant had a strong odor of alcohol on his breath. Wayne also testified the volume of the conversation varied. When defendant was defensive or agitated, his voice got louder. In addition, defendant's speech was slurred and his eyes were red and glassy. Wayne testified he did not notice anything about the way defendant was standing. However, defendant leaned on the vehicle several times. Wayne's observations led him to believe defendant was probably under the influence of alcohol. Wayne observed a bag containing food from Steak-n-Shake in the truck.

¶ 9 During the stop, Deputy T.W. Houk and Deputy Jesse Owens arrived on the scene. Wayne asked Houk to check for information at the Steak-n-Shake restaurant, located approximately 200 feet from where the truck was stopped. Defendant denied he was driving. The State introduced the video recording of the stop and played it for the jury.

¶ 10 Deputy Houk of the Macon County Sheriff's Department testified he assisted Deputy Wayne during the DUI investigation, arriving within two minutes of the initiation of the stop. Houk stated defendant had slurred speech and was loud and combative. According to Houk, he could smell a moderate odor of alcohol on defendant from approximately 5 feet away. Houk did not notice anything about defendant's eyes but testified defendant was swaying while speaking to Deputy Wayne. Houk also testified he spoke to Hastings at the Steak-n-Shake.

¶ 11 Macon County Sheriff's Deputy Jesse Owens, a field sobriety testing instructor, stated defendant appeared to have slight difficulty walking. According to Owens, when defendant was standing still, Owens observed defendant swaying and detected a strong odor of alcoholic beverage on defendant’s breath. Defendant told Owens he had consumed two, 40-ounce beers that night but denied he was driving the truck. Owens did not ask defendant about when he consumed the 80 ounces of beer that night. Defendant refused all field sobriety tests. Thereafter, defendant was arrested for driving under the influence and placed in the back of Owens's squad car. Subsequently, defendant also refused a breath test.

¶ 12 Defendant neither testified nor called any witnesses on his behalf.

¶ 13 The jury found defendant guilty of DUI and aggravated DUI, and not guilty of driving while license revoked. Thereafter, defendant filed a motion for new trial, which the trial court denied.

¶ 14 In May 2011, the trial court sentenced defendant to four years in prison for aggravated DUI (625 ILCS 5/11-501(d)(1)(A) (West 2008)) with presentence custody credit for the period between October 16, 2010, and May 19, 2011. The court also ordered defendant to pay various fines and fees, including a $162.63 restitution charge pursuant to section 11-501.01(i) of the Vehicle Code (625 ILCS 5/11-501.01(i) (West 2008)).

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 A. Sufficiency of the Evidence

¶ 18 Defendant first argues the evidence was insufficient to prove his guilt beyond a reasonable doubt because the State's evidence failed to establish defendant was both driving and under the influence of alcohol. We will not reverse a conviction based on the sufficiency of the evidence unless, after viewing the evidence in the light most favorable to the State, no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Pollock*, 202 Ill. 2d 189, 217, 780 N.E.2d 669, 685 (2002).

¶ 19 A person commits the offense of DUI when he drives or is in physical control of a vehicle while under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2008). A defendant is under the influence of alcohol when, as a result of consuming alcohol, his physical or mental faculties are so impaired as to reduce his ability to act and think with ordinary care. *People v. Hostetter*, 384 Ill. App. 3d 700, 712, 893 N.E.2d 313, 322 (2008).

¶ 20 The State can use circumstantial evidence to prove a defendant was driving under the influence. *Hostetter*, 384 Ill. App. 3d at 712, 893 N.E.2d at 323. For example, the State is allowed to introduce a defendant's failure to submit to a breathalyzer test. *People v. Garriott*,

253 Ill. App. 3d 1048, 1051, 625 N.E.2d 780, 783 (1993). In addition, an arresting officer's credible testimony can be sufficient by itself to sustain a conviction for driving under the influence. *Hostetter*, 384 Ill. App. 3d at 712, 893 N.E.2d at 323.

¶ 21 Defendant argues the videotape of the incident does not establish he was slurring his words or that he was swaying as the police officers testified. Although defendant told the police he drank two, 40-ounce beers that night, defendant argues the State did not establish when he drank those beers that evening. Further, defendant argues the State presented no evidence with regard to his driving, nor any evidence regarding field sobriety or breath test results. In addition, defendant argues the State presented no witnesses he was in actual physical control of a vehicle while on U.S. Route 51. With regard to Hastings's testimony defendant was driving the truck when it went through the Steak-n-Shake drive-through, defendant argues his identification was "vague, doubtful, and uncertain."

¶ 22 When viewed in a light most favorable to the State, the State presented sufficient evidence for a rational trier of fact to find defendant guilty of DUI. First, defendant admitted to the police he had consumed two, 40-ounce beers that night. Regardless of defendant's argument the State did not pin down the exact time he consumed these beers, a rational trier of fact could have easily concluded it was near the time of the police encounter. The police officers testified defendant's breath smelled of alcohol, a point defendant does not contest.

¶ 23 The State also presented evidence defendant's speech was slurred, his eyes were red and glassy, he swayed while he was standing, and he was argumentative and loud. While defendant argues the videotape does not reflect his speech was slurred or that he was swaying, the jury apparently disagreed. Further, the jury apparently found the police officers' testimony

regarding their observations on the scene more credible than defendant's explanation of what the videotape did or did not show. Further, unlike the members of this court, the jury was able to compare the clarity of defendant's voice in court—because he represented himself—with his voice on the tape. Finally, the State presented evidence defendant refused to submit to field sobriety testing and a breathalyzer test after he was arrested for DUI. Based on this evidence, a rational trier of fact could have found defendant was under the influence.

¶ 24 The State also presented enough evidence for a rational trier of fact to conclude defendant had been driving the truck. Deputy Wayne testified he only saw the driver's side door open. Defendant was the only person outside the truck. Further, the female passenger was not sitting in the driver's side of the vehicle when Deputy Wayne pulled behind the truck. Finally, Hastings testified defendant had been driving the truck when it went through the Steak-n-Shake drive through prior to the stop. The positive identification of a single witness who had ample opportunity to observe the defendant is sufficient to support a conviction. *People v. Piatkowski*, 225 Ill. 2d 551, 566, 870 N.E.2d 403, 411 (2007). While defendant complains Hastings's testimony was "vague, doubtful, and uncertain," the jury obviously found his testimony credible. Coupled with the open driver's door, defendant standing next to the truck on the driver's side, and his girlfriend sitting toward the passenger side of the truck, enough circumstantial evidence existed for a rational trier of fact to find defendant had been driving the vehicle.

¶ 25 B. Identification Jury Instruction

¶ 26 Defendant next argues the trial court erred by not, *sua sponte*, providing the jury with IPI Criminal 4th No. 3.15 (Supp. 2003), which states:

"When you weigh the identification testimony of a witness,

you should consider all the facts and circumstances in evidence, including, but not limited to, the following:

[1] The opportunity the witness had to view the offender at the time of the offense.

[2] The witness's degree of attention at the time of the offense.

[3] The witness's earlier description of the offender.

[4] The level of certainty shown by the witness when confronting the defendant.

[5] The length of time between the offense and the identification confrontation."

Defendant acknowledges he did not request this instruction nor did he raise this issue in a post trial motion. As a result, he forfeited this argument on appeal. However, defendant contends we should review this alleged error pursuant to the plain error doctrine.

¶ 27 Our supreme court has stated:

"Supreme Court Rule 451(c) *** provides that 'substantial defects' in criminal jury instructions 'are not waived by failure to make timely objections thereto if the interests of justice require.' 177 Ill. 2d R. 451(c). Rule 451(c) crafts a limited exception to the general rule to correct 'grave errors' and errors in cases 'so factually close that fundamental fairness requires that the jury be properly instructed.' *People v. Hopp*, 209 Ill. 2d 1, 7[, 805 N.E.2d 1190]

(2004), citing [*People v.*] *Thurman*, 104 Ill. 2d [326,] 329-30[, 472 N.E.2d 414 (1984)]; see *People v. Tannenbaum*, 82 Ill. 2d 177, 182[, 415 N.E.2d 1027] (1980). Rule 451(c) is coextensive with the 'plain error' clause of Supreme Court Rule 615(a), and we construe these rules 'identically.' *People v. Armstrong*, 183 Ill. 2d 130, 151 n.3[, 700 N.E.2d 960] (1998). Rule 615(a) provides: 'Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.' " *People v. Herron*, 215 Ill. 2d 167, 175-76, 830 N.E.2d 467, 473 (2005).

The plain error doctrine allows a court of review to consider a forfeited error when "either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Herron*, 215 Ill. 2d at 186-87, 830 N.E.2d at 479.

> "[A] jury instruction error rises to the level of plain error only when it 'creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.' [Citations.] The seriousness of the risk depends upon the quantum of evidence presented by the State against the defendant. The defendant need not prove that the error in the instruction actually misled the jury." *Herron*, 215 Ill. 2d at 193, 830 N.E.2d at 483.

¶ 28 Defendant argues IPI Criminal 4th No. 3.15 (Supp. 2003) should have been given because "Hastings's identification of the defendant was essential to the State's case." The State argues "the 'complexities and pitfalls' which might ordinarily attend an identification were simply not present and there was no need to instruct on the five identification factors" found in IPI Criminal 4th No. 3.15 (Supp. 2003).

¶ 29 Before determining whether the plain error doctrine applies to this case, we must first determine whether the trial court erred. We note this is not a case where the trial court incorrectly instructed the jury with regard to IPI Criminal 4th No. 3.15 (Supp. 2003). Our supreme court has found plain error where a trial court erred in the way it read IPI Criminal 4th No. 3.15 (Supp. 2003). *Herron*, 215 Ill. 2d at 191, 830 N.E.2d at 482. In that case, the defendant argued the trial court erred because it did not omit the bracketed "ors" from the instruction. *Herron*, 215 Ill. 2d at 187, 830 N.E.2d at 480. The supreme court stated: "[i]f the instruction initially directs jurors to consider all the facts and circumstances surrounding the identification, but then, through the use of the conjunction 'or,' directs jurors to consider one of five factors regarding the reliability of the identification, then the instruction contains an internal inconsistency." *Herron*, 215 Ill. 2d at 191, 830 N.E.2d at 482.

¶ 30 Our supreme court has held a trial court "bears the burden of seeing that the jury is instructed on the elements of the crime charged, on the presumption of innocence and on the question of burden of proof"— even if defendant does not ask for instructions on these issues—to ensure a fair trial. *People v. Parks*, 65 Ill. 2d 132, 137, 357 N.E.2d 487, 489 (1976). However, defendant offers no authority for his argument we should find the trial court erred in not giving IPI Criminal 4th No. 3.15 (Supp. 2003) when no one asked the court to do so. As a

result, defendant forfeited this argument pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008).

¶ 31 Even assuming, *arguendo*, the trial court erred in not, *sua sponte*, giving this instruction, the error would not be reviewable under the plain error doctrine. The lack of this instruction did not create a serious risk defendant would be wrongly convicted. See *Herron*, 215 Ill. 2d at 193, 830 N.E.2d at 483.

¶ 32 C. DUI Emergency Response Restitution

¶ 33 Defendant next argues the trial court erred in ordering defendant to pay $162.63 for DUI emergency response restitution pursuant to section 11-501.01(i) of the Vehicle Code (625 ILCS 5/11-501.01(i) (West 2008)) because an emergency response was not made in this case. Section 11-501.01(i) states:

> "In addition to any other fine or penalty required by law, an individual convicted of a violation of Section 11-501 *** whose operation of a motor vehicle *** while in violation of Section 11-501 *** proximately caused an incident resulting in an appropriate emergency response, shall be required to make restitution to a public agency for the costs of that emergency response. The restitution may not exceed $1,000 per public agency for each emergency response. As used in this subsection (i), 'emergency response' means any incident requiring a response by a police officer, a firefighter carried on the rolls of a regularly constituted fire department, or an ambulance." 625 ILCS 5/11-

501.01(i) (West 2008).

The State argues defendant forfeited this issue by not raising it in a post-sentencing motion. However, a sentence that does not conform to a statutory requirement is void and may be attacked at any time. *People v. Thompson*, 209 Ill. 2d 19, 27, 805 N.E.2d 1200, 1205 (2004).

¶ 34 The State also argues the restitution order was proper. We disagree. In *People v. Korzenewski*, 2012 IL App (4th) 101026, ¶ 28, 970 N.E.2d 90, 99-100, this court held a routine traffic stop does not constitute " 'an appropriate emergency response' " under section 11-501.01(i) of the Vehicle Code (625 ILCS 5/11-501.01(i) (West 2008)). In *Korzenewski*, the police encounter began as a routine traffic stop because defendant was speeding, driving 49 miles per hour in a 30-mile-per-hour speed zone. Relying on our supreme court's decision in *Gaffney v. Board of Trustees of the Orland Fire Protection District*, 2012 IL 110012, ¶ 64, 969 N.E.2d 359, 373, this court stated:

> "Because speeding in this case was not 'an unforeseen circumstance involving imminent danger,' defendant did not proximately cause an incident requiring an emergency response and the restitution to the Decatur police department is not authorized under section 11-501.01(i) of the Vehicle Code. To interpret the emergency response statute as the State wants us to would result in a finding that any person who is pulled over by a police officer for the violation of any traffic law and is ultimately charged with driving under the influence could be required to make restitution to the police department that initiated the traffic stop.

> This result was clearly not intended by the legislature. Accordingly, we vacate the $133 restitution order." *Korzenewski*, 2012 IL App (4th) 101026, ¶ 31, 970 N.E.2d at 100.

¶ 35 In the case *sub judice,* Deputy Wayne initiated the encounter with defendant in this case because defendant's truck was pulled off on the side of the highway. Defendant did not proximately cause an incident requiring an emergency response. As a result, we find the trial court erred in ordering defendant to pay $162.63 in emergency response restitution to the Macon County Sheriff's Department pursuant to section 11-501.01(i) of the Vehicle Code (625 ILCS 5/11-501.01(i) (West 2008)) and vacate the $162.63 restitution order.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm defendant's conviction but vacate the $162.33 restitution order. As part of our judgment, because the State successfully defended a portion of the criminal judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 38 Affirmed in part and vacated in part.