2011 IL App (5th) 090449-U

NO. 5-09-0449

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Effingham County.
	)	
v.	)	No. 09-CF-34
	)	
LARRY J. RINE,	)	Honorable
	)	John P. Coady,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Chapman and Justice Spomer concurred in the judgment.

O R D E R

¶ 1 *Held*: Sufficient evidence existed for the jury to find that the defendant was in physical control of a motor vehicle and was, therefore, guilty of driving while license was revoked. In addition, a police officer's testimony that indicated that she had previous contact with the defendant did not deny the defendant a fair trial.

¶ 2 Following a trial by jury, the defendant, Larry J. Rine, was convicted of driving while his license was revoked and was sentenced to a term of four years of imprisonment in the Illinois Department of Corrections. On direct appeal, the defendant contends that he was not proven guilty beyond a reasonable doubt and that he was denied a fair trial, based on a police officer's testimony that implied that she had previous contact with the defendant, thereby suggesting previous bad acts. For the reasons that follow, we affirm the defendant's conviction and sentence.

¶ 3 FACTS

¶ 4 The defendant's conviction for driving while his driver's license, permit, or

privilege to operate a motor vehicle is suspended or revoked (625 ILCS 5/6-303 (West 2008)) stems from inferences the jury made from evidence surrounding an officer's routine stop to provide motorist assistance in early 2009. The following evidence was adduced at the defendant's trial.

¶ 5 Officer Laura Kinkelaar of the Effingham police department testified concerning the events leading up to the defendant's arrest. At approximately 8 p.m. on January 22, 2009, the officer was on routine patrol when she saw a disabled 1998 Ford Windstar van in the roadway at the intersection of Fayette and Maple Streets in Effingham, Illinois. The officer stopped to offer motorist assistance. She activated her cruiser's overhead lights as she pulled up behind the disabled vehicle.

¶ 6 The sole person on the scene at that time was the defendant, whom the officer testified she knew as Jud. The defendant was standing on the opposite side of the intersection using his cell phone.

¶ 7 When the officer inquired as to what had happened to the vehicle, the defendant replied that it had stalled on him. He told the officer that he thought that the vehicle's alternator or transmission went out. The defendant made no other comment concerning whether he was the driver, and the officer never asked if he was the driver. The officer asked the defendant if he had a preference for a towing service, and he responded that he would prefer Niebrugge towing. The defendant did not mention that anyone else was seeking help or towing services. At the officer's request and with her assistance, the defendant moved the van out of the intersection and into an empty lot off the public roadway. The officer testified that she assumed the defendant had the vehicle's keys because he was able to put the car into neutral.

¶ 8 After moving the vehicle, the officer asked the defendant for his identification. He provided her with his Illinois identification card, marked as exhibit 1 at the trial,

and the officer asked the defendant to "stay put" while she moved her police vehicle. When the officer returned to the van after moving her vehicle, the defendant was no longer at the scene. After a short search for him, she checked his identification and found that his driving privileges had been revoked. The vehicle was then towed, and the officer wrote in her tow report that the vehicle was abandoned. The officer then returned to the station and telephoned the owners of the vehicle, Carl and Lola Martin.

¶ 9 Lola Martin (Martin) testified that on the day of the incident, the vehicle had been parked in a Walmart parking lot with its keys left underneath the seat. She explained that her husband drove a truck and that he customarily parked the van in the parking lot and left the keys underneath the seat when he left in his truck. She testified that the defendant lived with her and her husband and that he "possibly" knew that her husband placed the keys underneath the seat.

¶ 10 Martin testified that she received a telephone call from Officer Kinkelaar about the abandoned vehicle and that she told the officer that she would try to locate the defendant and inquire if he would meet with the officer. Martin then telephoned the defendant and told him that he should speak to Officer Kinkelaar and that she would give him a ride to meet the officer if he needed one. The defendant told Martin that he had not driven her van and that he would not speak with the officer. He refused to tell Martin where he was and refused to turn himself in.

¶ 11 On cross-examination, Martin testified that she had seen the defendant "taking the van" with a licensed driver on more than one occasion. She testified that no one was supposed to drive the van without permission and that no one had permission to take the van from the Walmart parking lot on the day of the incident.

¶ 12 The defendant was charged with driving while his license was revoked and

obstructing a peace officer. The charge of obstructing a peace officer was dismissed prior to the trial. At the trial, the defendant waived his right to counsel and represented himself *pro se* with a public defender serving as his standby counsel. The defendant did not object to the officer's testimony that she knew defendant by his middle name, Jud.

¶ 13 ANALYSIS

¶ 14 On appeal, the defendant first contends that the State failed to prove his guilt beyond a reasonable doubt because the State failed to prove that he was in actual physical control of the vehicle. We hold that the defendant's proximity to the vehicle, his comments to the officer about the vehicle and towing preference, and his flight from the scene all support the inference that he was in actual physical control of the vehicle. Therefore, we affirm his conviction

¶ 15 When reviewing the sufficiency of the evidence supporting a criminal conviction, the court will not readily set aside the decision of a jury. *People v. Ward*, 215 Ill. 2d 317, 322 (2005). The court will not substitute its judgment for that of the fact finder on questions involving the assessment of the credibility of the witnesses, the weight given to their testimony, the resolution of conflicts in the evidence, and the inferences from that evidence. *People v. Evans*, 124 Ill. App. 3d 634, 640 (1984). In examining the sufficiency of the evidence, the court's relevant inquiry is whether any reasonable trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the offense proven beyond a reasonable doubt. *People v. Amigon*, 239 Ill. 2d 71, 77 (2010). In making its decision, a trier of fact is allowed to make reasonable inferences. *People v. Turner*, 375 Ill. App. 3d 1101, 1103 (2007). A conviction may be based on circumstantial evidence as long as it satisfies the elements of the offense beyond a reasonable doubt.

People v. Hall, 194 Ill. 2d 305, 330 (2000). The trier of fact need not be satisfied beyond a reasonable doubt with regard to every link in the chain if the circumstantial evidence taken as a whole satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Hall*, 194 Ill. 2d at 330.

¶ 16 To obtain a conviction for driving while license is revoked, the prosecution must prove, beyond a reasonable doubt, that the defendant operated or was in actual physical control of a motor vehicle while his license was revoked. 625 ILCS 5/6-303 (West 2008). The fact that the defendant's license was revoked at the time of the incident is not contested on appeal. Instead, the defendant argues that the prosecution failed to show that he was in actual physical control of the vehicle. It is undisputed that the defendant did not drive during the time he was observed by the officer and that the vehicle was disabled when the officer arrived at the scene. However, in order to show actual physical control of a motor vehicle, the State need not produce evidence that the defendant was driving or even that he intended to put the vehicle in motion. *City of Naperville v. Watson*, 175 Ill. 2d 399, 402 (1997).

¶ 17 The issue of actual physical control is a question of fact to be decided on a case-by-case basis. *People v. Cummings*, 176 Ill. App. 3d 293, 295 (1988). Four factors have generally been seen as relevant in deciding if a person is in actual physical control of a vehicle: (1) whether the defendant was positioned in the driver's seat, (2) whether the defendant possessed the ignition key, (3) whether the defendant was alone in the vehicle, and (4) whether the vehicle's doors were locked. *People v. Davis*, 205 Ill. App. 3d 431, 435 (1990).

¶ 18 The defendant claims that since he meets none of the four factors listed in the *Davis* case, the jury could not have inferred that he was in actual control of the vehicle and, therefore, could not have found him guilty of driving with a revoked license. We

disagree. The defendant cites *People v. Slinkard* as an example of the four-factor test, but even the *Slinkard* court stated that while the factors can provide a guideline in determining whether a defendant exercised physical control over a vehicle, the list is not exhaustive. *People v. Slinkard*, 362 Ill. App. 3d 855, 859 (2005). Likewise, the court in *Davis* stated that the existence or absence of those facts was not controlling; the absence of the four factors does not mandate a conclusion that the State failed to prove physical control over a vehicle beyond a reasonable doubt. *Davis*, 205 Ill. App. 3d at 436.

¶ 19 For example, in *Slinkard*, a police officer found the defendant outside his home standing by a vehicle he owned that had been involved in an earlier hit-and-run accident. The defendant met none of the four factors and stated that his mother, who was also standing outside the house, had been driving the vehicle when the accident occurred. The court held that the evidence was sufficient for the trier of fact to find that the defedant was in actual control of the vehicle based on the defendant's proximity to the vehicle and other circumstantial evidence. *Slinkard*, 362 Ill. App. 3d at 857-58.

¶ 20 In the present case, the defendant was the only person on the scene standing within a close proximity to the vehicle. The defendant did not name another individual as the driver, either at the scene or at the trial. The defendant also responded to the officer's questions about what happened to the vehicle by stating that it had stalled on him, and he diagnosed the vehicle's problem to the officer as either the vehicle's alternator or its transmission. When asked, he told the officer what towing service he preferred. This evidence was sufficient for the jury to find that the defendant was in actual physical control over the vehicle. *People v. Younge*, 83 Ill. App. 3d 305, 307-09 (1980) (the defendant was found on the side of the road past a

disabled vehicle and admitted to an officer that he was driving).

¶ 21 The defendant also argues that, unlike the facts in *Slinkard*, he is not the owner of the car and that he only used the car with the permission of the owners. In *Slinkard*, the defendant owned the vehicle, a fact that the court noted in analyzing the sufficiency of the evidence. *Slinkard*, 362 Ill. App. 3d at 858. In the present case, although the defendant did not own the vehicle, he was the only person on the scene, he lived with the vehicle's owners, and he had previously ridden in and borrowed the vehicle with a licensed driver. He told the officer that the vehicle stalled on him because of its alternator or transmission. The jury could have concluded from this evidence that the defendant was the driver of the vehicle when it stalled.

¶ 22 Finally, the defendant's flight from the scene when the officer went to move her vehicle and check the defendant's identification also supported an inference that he was guilty of driving while his license was revoked. Flight from the scene of a crime does not automatically raise a presumption of guilt; rather, it is a circumstance that may be considered by the jury in connection with all the other evidence as tending to prove guilt. *People v. Wallace*, 100 Ill. App. 3d 424, 428 (1981). Here, the defendant states that he was not obligated to stay on the scene because he was not under arrest at the time he left. However, the jury could have, nonetheless, reasonably inferred that the defendant fled the scene because of consciousness of guilt, *i.e.*, because he knew the officer was about to discover that his license was revoked. This was the decision to be made by the trier of fact and not this court, because it is not the appellate court's role to retry the defendant on appeal. *Slinkard*, 362 Ill. App. 3d at 857.

¶ 23 From the evidence presented by the prosecution, the jury could have determined that the defendant was in physical control of the vehicle before and at the

time it became disabled. Viewing the trial evidence in the light most favorable to the State, we conclude that the defendant's guilt was proven beyond a reasonable doubt.

¶ 24 Next, the defendant claims that he was denied a fair trial when the prosecution elicited evidence that suggested that he had previous contact with the police, thereby implying that he had committed other bad acts. Specifically, at the trial, the police officer testified that she arrived on the scene, asked the defendant what had happened, and had him move the vehicle from the intersection. She then requested and received the defendant's identification. The defendant takes issue with the following testimony concerning his identification:

"Q: Did it [the defendant's identification] verify the name of this defendant as being Larry Rine?

A: Yes. I know him by Jud is his middle name."

¶ 25 The defendant did not object to this testimony at the trial or raise any issue concerning the testimony in a posttrial motion. Therefore, the defendant's argument on appeal is forfeited. The defendant asks us to review the testimony under the plain error rule, but we believe that the testimony was harmless at best and, therefore, does not constitute plain error.

¶ 26 Whether a defendant has received a fair trial is a matter of law and is subject to a *de novo* review. *People v. Walker*, 403 Ill. App. 3d 68, 71 (2010). Illinois Supreme Court Rule 615(a), states as follows: "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." Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). The plain error rule requires an error affecting the substantial rights of the defendant. *People v. Herron*, 215 Ill. 2d 167, 178 (2005). The plain error rule allows a reviewing court

to address a forfeited error affecting substantial rights in two circumstances: (1) where the evidence in a case is so closely balanced that the jury's guilty verdict might have resulted from the error and not the evidence and (2) where the error is so serious that the defendant was denied a substantial right and the consideration of the forfeited error would uphold the validity of the judicial process. *Herron*, 215 Ill. 2d at 178-79.

¶ 27 The forfeited error in the present case concerns a police officer's testimony which implied that she was previously acquainted with the defendant. Evidence that an arresting officer was previously acquainted with a defendant does not necessarily imply a criminal record. *People v. Stover*, 89 Ill. 2d 189, 196 (1982). However, testimony of this nature may cause that implication and, for that reason, is better avoided, unless somehow relevant. *People v. Bryant*, 113 Ill. 2d 497, 514 (1986).

¶ 28 The defendant claims that the admission of the officer's testimony that she knew him by his middle name, Jud, was plain error because the evidence in this case is closely balanced. He argues that the only evidence that the State offered concerning the offense was his ambiguous statement that he made to the officer that the vehicle had stalled on him. The defendant also argues that the State's evidence consisted largely of assumptions made by the officer. We disagree. As we noted above, the defendant's sole presence on the scene, his comment to the officer, his statement of a preference in towing services, his flight from the scene after he had given the officer his identification card, and the vehicle owner's testimony concerning the defendant's familiarity with the vehicle were all pieces of the circumstantial evidence that the State presented. Unlike cases such as *Herron*, in the present case, there was no conflicting description of the defendant, no second party, and no conflicting evidence concerning the defendant's presence at the scene, near the

vehicle, when the officer arrived. *Herron*, 215 Ill. 2d at 173-74. Even though the evidence against the defendant was largely circumstantial evidence, it was not closely balanced under the first prong of the plain error rule.

¶ 29 Furthermore, with regard to the second prong of the plain error rule, the alleged error was not so prejudicial that it could have affected a substantial right. Because there was no objection to the officer's testimony, the defendant has the burden to show that the testimony was prejudicial. *Herron*, 215 Ill. 2d at 182.

¶ 30 The defendant relies on cases such as *Bryant* and *Stover* where improper police testimony supported findings of plain error. As with the current case, those cases involved the improper admission of evidence that an officer had previous knowledge of the defendant. However, those cases are distinguishable. Similar to *Bryant*, the officer in the present case made the comment during her testimony without direct provocation from the prosecution. *Bryant*, 113 Ill. 2d at 514. However, unlike in *Bryant*, the officer mentioned that she knew the defendant's middle name only once during direct examination, and the State did not mention this testimony at any point during its arguments. In *Bryant*, the prosecution reiterated the testimony to the jury twice in the prosecutor's closing argument. *Bryant*, 113 Ill. 2d at 514.

¶ 31 The prosecutor's question in the present case was not directly probative of the officer's previous knowledge of the defendant, as it was in *Stover*. In *Stover*, the prosecutor directly asked whether the officer had been acquainted with the defendant prior to the incident, the defendant objected to the question, the court overruled the objection, and the officer answered in the affirmative. *Stover*, 89 Ill. 2d at 193. In the present case, the prosecution asked the officer whether or not the identification that the defendant had given her matched his name. The officer answered in the affirmative and volunteered that she knew the defendant by his middle name, Jud.

Furthermore, in both *Bryant* and *Stover*, the courts reversed the defendants' convictions based on multiple trial errors, not based solely on evidence of an officer's previous acquaintance with the defendant. *Bryant*, 113 Ill. 2d at 512-13; *Stover*, 89 Ill. 2d at 196. In the present case, the officer's testimony concerning her knowledge of the defendant's middle name was ambiguous in nature given the context of the question and the record as a whole and did not constitute plain error.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the defendant's conviction and sentence are affirmed.

¶ 34 Affirmed.