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2012 IL App (3d) 110749-U

Order filed November 27, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-11-0749
	)	Circuit No. 09-CF-1101
ROBERTO RODRIGUEZ,	)	
	)	Honorable
Defendant-Appellant.	)	Edward Burmila, Jr.,
	)	Judge, Presiding

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

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**ORDER**

¶ 1 *Held:* The trial court erred in admitting irrelevant evidence, but the error was harmless, and it properly denied Rodriguez's motion for a mistrial and his claims of ineffective assistance of counsel.

¶ 2 Defendant Roberto Rodriguez was convicted by a jury of aggravated driving while license revoked, aggravated driving under the influence of alcohol at a time when his license was revoked, and aggravated driving under the influence of alcohol. He appealed his convictions. We affirm.

¶ 3 **FACTS**

¶ 4 Defendant Roberto Rodriguez was charged with aggravated driving while under the influence of alcohol, aggravated driving under the influence of alcohol while license revoked, and aggravated driving while license revoked. 625 ILCS 5/11-501(a)(1), (d)(2)(C);(a)(2), (d)(1)(G); 6-303(d) (West 2009). A jury trial took place.

¶ 5 Crest Hill deputy police chief Edward Clark testified. He was on patrol on May 13, 2009, and observed Rodriguez stopped at a traffic light. Because Rodriguez's vehicle was over the stop line at the intersection, Clark proceeded to follow him. Clark observed Rodriguez cross the lines indicating the outside and inside lanes of traffic and the vehicle's brake lights come on when unnecessary. When Clark observed the vehicle strike a curb, he activated the squad's lights and pulled over Rodriguez, who was alone in the vehicle. Rodriguez handed Clark insurance information and stated he did not have a valid driver's license. Clark observed that Rodriguez smelled strongly of alcohol, had bloodshot and glassy eyes, and mumbled and slurred speech. Rodriguez told him he was on his way home from Gusto's, a nearby tavern, and admitted that he drank two beers while there.

¶ 6 Clark asked Rodriguez to exit the vehicle and perform field sobriety tests. Clark did not have to assist Rodriguez out of the vehicle and did not support him as he walked. Rodriguez stated he did not have any medical conditions or leg or back problems that would interfere with his ability to perform the tests. Rodriguez first performed the horizontal gaze nystagmus (HGN) test and exhibited six cues indicating the presence of alcohol in his system. Rodriguez also unsuccessfully performed the one-legged stand test and the walk-and-turn test. Clark noted four cues on the one-legged stand test and six cues on the walk-and-turn test. In each instance, two cues are sufficient to indicate impairment. A recording of Rodriguez executing the field sobriety tests was played for the jury.

¶ 7 Clark further testified that he arrested Rodriguez, and when searching him incident to the

arrest, he found four beer tokens in Rodriguez's jean pocket. Rodriguez objected to this testimony on the basis of relevance and the State made an offer of proof. The trial court overruled Rodriguez's objection, determining that while the tokens would generally not be relevant, here Rodriguez told Clark he had two beers, and the State could "argue by inference that his conduct, as described by the officer, could not be produced by merely two beers." The trial court further stated:

"And if the defendant was less than honest and forthright with the officer about where he had been drinking, they could certainly make the argument that the defendant was trying to mask the amount of alcohol that he had consumed by not being truthful about where he had consumed by not being truthful about where he had been.

I think that, given the fact that the officer is unaware of Spivey's but does know about Bobby's, and it's within a short radius of where he first saw the defendant and where he made the traffic stop, the jury could conclude that he was trying to be deceptive about where he had been drinking to prevent the officer from finding out exactly how much he had to drink. And that is a reasonable inference that could be drawn."

¶8 After Rodriguez's objection was overruled, Clark testified that one beer token was for Spivey's Tap in Coal City and three tokens were for Bobby's Tap, which was located a block further down the road from where Rodriguez was stopped. The Spivey's token indicated it was "good for one six-pack" and the Bobby's tokens indicated they were good for a bottle of beer. The tokens were not dated. Clark did not ask Rodriguez whether he had been to either Spivey's or Bobby's that day and

he did not know when Rodriguez obtained the tokens. Possession of the tokens is not illegal. Lastly, Clark testified that Rodriguez's license was revoked at the time of the stop.

¶ 9 Following Clark's testimony, a preliminary jury instruction conference took place. To determine which instructions would be needed, the trial court engaged in the following discussion with Rodriguez:

“THE COURT: Mr. Rodriguez, there's a question that I must put to you, and I'll allow you to think about it tonight and give me an answer tomorrow.

You have an absolute right to remain silent. You do not have to say anything. As a result the decision as to whether or not you testify in this case is completely up to you.

If you have a conversation with your lawyer and your lawyer urges you to testify and tells you that it would be in your best interest to testify and you don't want to testify, you don't have to testify.

If on the other hand your lawyer tells you I don't want you to testify, it's a big mistake, don't say anything, and you don't want to follow his advice and you want to testify anyway, you can testify.

Do you understand that?

DEFENDANT RODRIGUEZ: Yes.

THE COURT: So the decision is yours. I want you to think about that and I will ask you tomorrow whether you have decided whether or not you want to testify. And you can certainly talk to Mr. Napolski [defense counsel]

about that decision. I'm not telling you not to following [*sic*] his advice.

Do you understand?

DEFENDANT RODRIGUEZ: Okay.”

¶ 10 The trial resumed the following day. Ryan Dobczyk, a patrol officer for Crest Hill, testified that he acted as the secondary officer for the traffic stop. He assisted in administering the field sobriety tests, and based on Rodriguez's performance, he believed that Rodriguez was impaired. Following the arrest, he transported Rodriguez to the police station and booked him. Rodriguez refused to perform the Breathalyzer. The State's exhibits were entered into evidence without objection and the State rested. Rodriguez's motion for a directed verdict was heard and denied. The trial court then addressed Rodriguez regarding his right to testify. It reminded Rodriguez of the trial court's prior admonishment. At defense's counsel's request, the trial court allowed Rodriguez to consult with counsel. Rodriguez then informed the trial court that he would not testify.

¶ 11 The defense rested and the State made its closing argument, explaining the elements of the three counts against Rodriguez. After discussing aggravated driving while license revoked (count III) and aggravated driving under the influence of alcohol (count I), the State said as follows, in relevant part.

“That leaves the final count which is aggravated driving while under the influence of alcohol while license revoked, Count Number II.

Ladies and gentlemen, the only difference between that case and aggravated driving while license suspended – or excuse me, aggravated driving while under the influence is an additional third proposition the State must prove, which is he drove his vehicle, he drove his vehicle while under the

influence of alcohol; and third, that he drove his vehicle at a time when his license was revoked.

Basically, if you find the defendant – the State has proven their case beyond a reasonable doubt of Count III, aggravated driving while license revoked. If you find that we have proven beyond a reasonable doubt aggravated driving under the influence as charged under Count I, then you must return a verdict of guilty as to Count II as well.”

¶ 12 The trial court *sua sponte* interrupted the State and admonished the jury: “Ladies and gentlemen, there are no circumstances under which you must return a verdict of guilty; that decision is up to you.” After jury instructions were presented, Rodriguez moved for a mistrial based on the State’s closing argument comments that the jury must find him guilty on count II. The trial court denied the motion, finding that its curative instruction to the jury was sufficient to remedy any harm from the State’s improper comments. The jury thereafter returned guilty verdicts on all three charges.

¶ 13 Rodriguez filed a posttrial motion, arguing the beer tokens were improperly admitted into evidence, the trial court erred in denying his motion for a mistrial based on the State’s comments in closing argument, and his trial counsel was ineffective. In the alternative, Rodriguez sought a judgment notwithstanding the verdict. A hearing took place on Rodriguez’s motion. Rodriguez testified that he met with his trial counsel three times, that his wife was present with him on each occasion, and that an interpreter was present at one meeting. Defense counsel never said Rodriguez’s wife would testify. He never met with trial counsel to discuss whether he would testify and or to prepare his testimony. Wanda Rodriguez testified that she had spent the entire day of her husband’s arrest with him and did not see him drink any alcohol. She was driving in a vehicle ahead of her

husband, but circled back and witnessed him perform the field sobriety tests. She repeatedly told trial counsel she wanted to testify but he told her she would not be a witness.

¶ 14 Paul Napolski, Rodriguez’s trial counsel, testified that throughout the pendency of the case, he met with Rodriguez and that the meetings were conducted in English. He did not observe that Rodriguez had trouble understanding the conversations. An interpreter was used in later meetings per Rodriguez’s request. He did not call Wanda as a witness because her testimony was not relevant. Moreover, she told him that she did not arrive at the scene of the stop until after Rodriguez was arrested. He reviewed possible testimony with Rodriguez. The decision whether Rodriguez should testify was left to Rodriguez, who voluntarily decided not to testify.

¶ 15 The trial court found that “the defendant absolutely understood that the decision [to testify] was his;” and that the decision that Wanda would not testify was trial strategy, not ineffective assistance. The trial court further found that because the evidence supported the jury’s verdict, Rodriguez’s motion for a judgment notwithstanding the verdict could not be granted. The trial court took under advisement whether it erred in denying Rodriguez’s mistrial motion. Additional arguments were held on that issue. The trial court acknowledged the magnitude of the improper remarks, noting that their effect was to trivialize the burden of proof. However, it determined that its curative instruction “insulated the defendant from any prejudice that would have inured to him from that statement.” The trial court denied Rodriguez’s posttrial motion and sentenced him to a three-year term of imprisonment for aggravated driving under the influence of alcohol and a concurrent one-year term for aggravated driving while license suspended. Rodriguez appealed.

¶ 16

#### ANALYSIS

¶ 17 Rodriguez raises three issues on appeal: whether the trial court erred when it allowed

testimony regarding the beer tokens, denied his mistrial motion, and denied his posttrial motion alleging ineffective assistance of counsel.

¶ 18 The first issue is whether the trial court erroneously admitted testimony regarding the beer tokens that were found in Rodriguez’s pocket after his arrest. Rodriguez argues that the admission of testimony regarding the beer tokens prejudiced him and undermined his credibility. He maintains that, on the evidence presented at trial, the tokens were too remote to be relevant to the charges against him. He notes that the beer tokens were undated, that the arresting officer did not ask him whether he had been to Spivey’s or Bobby’s the day of his arrest, and that he did not admit to having patronized either establishment that day. Additionally, Rodriguez suggests that a language barrier prevented him from fully understanding Clark’s questions regarding the tokens. Lastly, Rodriguez maintains that the error was not harmless error as the beer token testimony effectively impeached his credibility without an opportunity for him to rebut the State’s claims.

¶ 19 Evidence is admissible when relevant to a disputed issue and the prejudicial effect from admitting the evidence does not substantially outweigh its probative value. *People v. Patterson*, 192 Ill. 2d 93, 115 (200). Evidence is admissible as relevant when it makes the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Patterson*, 192 Ill. 2d at 114-15. Probability is viewed in “the light of logic, experience, and accepted assumptions concerning human behavior.” *Patterson*, 192 Ill. 2d at 115. Evidence that is remote, uncertain, or speculative is not relevant and not admissible. *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993). This court reviews a trial court’s determination of the admissibility of evidence for an abuse of discretion. *Cloutier*, 156 Ill. 2d at 501.

¶ 20 We begin this discussion by addressing Rodriguez’s claim that he misunderstood Clark’s

questions to him regarding the beer tokens as a result of a language barrier. The facts do not support his claim. As discussed below, the testimony establishes that Clark did not question Rodriguez about the tokens. We reject his claim that he was hampered by a language barrier. Turning to his substantive argument, Rodriguez relies on *People v. Salgado*, 353 Ill. App. 3d 605 (2004), as support for his claim that the testimony regarding the beer tokens was improperly admitted. In that case, the defendant, who was convicted of unlawful possession of cannabis with intent to deliver, argued on appeal that he was denied a fair trial when the State introduced evidence that he posted a \$75,000 bail the day he was arrested. *Salgado*, 353 Ill. App. 3d at 606. Like Rodriguez argues here, the defendant argued that evidence was not relevant and prejudiced him. *Salgado*, 353 Ill. App. 3d at 609. This court agreed, finding that the evidence was irrelevant and prejudicial, as it invited the jury to speculate about how the bail funds were raised. *Salgado*, 353 Ill. App. 3d at 610. This court further found that because the defendant's credibility was a critical aspect of his defense, admission of the speculative evidence was not harmless error. *Salgado*, 353 Ill. App. 3d at 611.

¶ 21 Although *Salgado* is factually distinguished, it lends support to Rodriguez's contention that admission of the beer tokens allowed the jury to speculate about whether they supported the State's claim that he was impaired and trying to hide the amount of alcohol he drank. Evidence of the beer tokens, aside from the broad connection with alcohol and taverns, did not make the existence of the amount of alcohol Rodriguez drank the day of his arrest more or less probable. There was no testimony that Rodriguez had received the beer tokens that day or from whom or where he received them. The arresting officer did not ask Rodriguez about the tokens or whether Rodriguez had been to Spivey's or Bobby's the day of his arrest. Aside from the State's conjecture that the tokens indicated Rodriguez's alcohol impairment, the jury heard no evidence what the tokens represented

or how Rodriguez obtained them. Without supporting testimony connecting them to Rodriguez's impairment, the tokens were irrelevant. We find that the trial court erred in admitting them.

¶ 22 We further find the error was harmless error. An evidentiary error is harmless where there exists no reasonable probability the defendant would have been acquitted by the jury if the error had not occurred. *People v. Bowens*, 407 Ill. App. 3d 1094, 1111 (2011). The State presented ample evidence to support the jury's guilty verdicts. Clark testified that when he stopped Rodriguez, the defendant had been driving erratically, including braking unnecessarily, weaving outside the lanes, and hitting the curb. Rodriguez had bloodshot eyes, slurred speech and smelled strongly of alcohol. Rodriguez admitted to Clark that he drank two Miller Lite beers while at Gusto's. The videotape of Rodriguez taking and failing three field sobriety tests was played for the jury. Patrol officer Dobczyk testified that Rodriguez refused the Breathalyzer after his arrest. Evidence of revocation of Rodriguez's driving privileges was presented. On this evidence, there is no reasonable probability that the jury would have acquitted Rodriguez if the beers tokens had been excluded.

¶ 23 We next consider whether the trial court erred in denying Rodriguez's motion for a mistrial. Rodriguez argues that the State's improper comments in its closing argument served to prejudice him in a manner necessitating his motion for mistrial be granted, and that the trial court's failure to grant the motion was error.

¶ 24 The granting of a mistrial is appropriate where "an error of such gravity has occurred that the defendant has been denied fundamental fairness such that continuation of the proceedings would defeat the ends of justice." *People v. Nelson*, 235 Ill. 2d 386, 435 (2009). The State is afforded great latitude in closing argument and reversal is not required for improper remarks where they do not result in substantial prejudice to the defendant. *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994). A prompt

curative instruction by the trial court usually remedies any potential prejudice associated with the State's improper remarks. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 88. This court will not reverse a trial court's denial of a motion for a mistrial absent an abuse of discretion. *Nelson*, 235 Ill. 2d at 435.

¶ 25 Here, during closing arguments, the State improperly argued to the jury that if it found Rodriguez guilty on counts I and III, it must find him guilty on count II as well. The trial court immediately interrupted the State's closing and admonished the jury that "there are no circumstances under which you must return a verdict of guilty; that decision is up to you." Jury instructions also directed the jury that closing arguments were not evidence. The trial court's prompt curative instruction remedied any prejudice that would have resulted from the State's comments and the jury instructions reinforced the admonishment. The impropriety of the State's comments did not amount to a grave error denying Rodriguez fundamental fairness. Contrary to Rodriguez's claim, the isolated remark was not a material factor in his conviction. As discussed above, the State presented substantial evidence to support the guilty verdicts. We find that the trial court did not abuse its discretion when it denied Rodriguez's request for a mistrial.

¶ 26 The final issue is whether the trial court erred when it denied Rodriguez's posttrial motion alleging that he was provided ineffective assistance of counsel. Rodriguez complains that his trial counsel failed to present a defense, other than through cross-examination of the State's witnesses. He also complains that he and his wife both wanted to testify for the defense but were prevented from doing so by trial counsel. According to Rodriguez, the trial court should have granted his posttrial motion alleging ineffective assistance.

¶ 27 To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that

his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by the unreasonable performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). The defendant is required to satisfy both prongs of the *Strickland* test to sustain a claim of ineffective assistance. *People v. Clendenin*, 238 Ill. 2d 302, 317-8 (2010). To establish that his counsel's performance was deficient, a defendant must overcome a strong presumption that counsel's conduct was the product of sound trial strategy. *People v. Manning*, 241 Ill. 2d 319, 327 (2011) (quoting *People v. Smith*, 195 Ill. 2d 179, 188 (2000)). "Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *Id.* The decision whether to call a witness to testify is usually a matter of trial strategy. *People v. Logan*, 352 Ill. App. 3d 73, 83 (2004). On the other hand, whether a defendant should testify is one of only a few trial decisions that belong solely to the defendant. *Clendenin*, 238 Ill. 2d at 318.

¶28 According to Rodriguez, defense counsel's trial tactics amounted to ineffective assistance. His claim is without merit. Testimony at the posttrial motion hearing established that Rodriguez's wife, Wanda, was not a credible witness. Trial counsel testified Wanda informed him that she did not arrive at the scene until after Rodriguez was arrested and thus could not have witnessed the stop or her husband perform the field sobriety tests. Wanda testified she was with Rodriguez all day and that he did not drink any alcohol, contrary to his admission that he drank two Miller Lite beers at Gusto's. Moreover, because she was the defendant's wife, Wanda's testimony would be subject to a bias claim. Counsel's decision not to present Wanda as a witness did not amount to ineffective assistance of counsel. In addition, the trial record establishes that Rodriguez knowingly and intelligently waived his right to testify. The trial court admonished him, as set forth above, at the pretrial jury instruction conference. The trial court specifically told Rodriguez that he could testify or not testify, even if his

decision was contrary to his attorney's advice. The following day, the trial court recessed the proceedings so that Rodriguez could again consult with trial counsel about his potential testimony. When the trial resumed, Rodriguez unequivocally waived his right to testimony. His decision not to testify was not the result of ineffective assistance of counsel. We find that because Rodriguez failed to demonstrate that his trial counsel was ineffective, the trial court did not err when it denied his motion for a new trial.

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

¶ 30 Affirmed.