

2013 IL App (2d) 121179-U
No. 2-12-1179
Order filed August 8, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Jo Daviess County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-100
)	
JUSTIN J. APPEL,)	Honorable
)	William A. Kelly,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The State proved defendant guilty beyond a reasonable doubt of DUI where circumstantial evidence showed that defendant was driving a vehicle while under the influence of alcohol; defendant's conviction of obstructing a peace officer was reversed where the State failed to prove the mental state of knowledge at the scene and where defendant was successfully placed under arrest at the hospital, so that his leaving the hospital would have been the crime of escape, a charge of which he was acquitted.

¶ 2 Defendant, Justin J. Appel, appeals from convictions of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(2)(B) (West 2010)) and obstructing a peace officer (720 ILCS 5/31-1 (West 2010)), entered following a jury trial in the circuit court of Jo

Daviess County. Defendant contends that the State's evidence did not prove him guilty beyond a reasonable doubt. We affirm in part and reverse in part.

¶ 3 On September 1, 2011, the State filed an amended information in which the State charged defendant with aggravated driving under the influence of alcohol (count I) in that defendant knowingly drove a 2001 Jaguar on Derinda Road at Hanover Road, Derinda Township, while defendant was under the influence of alcohol and that defendant had “previously committed the same or similar offense for a third or subsequent time.” Count II charged defendant with escape (720 ILCS 5/31-6(c) (West 2010)) in that defendant, while in the lawful custody of Illinois State Trooper Brooke Jones for a misdemeanor offense, “intentionally escaped Brooke Jones.” Count III charged defendant with obstructing a peace officer in that he knowingly “obstructed the performance of Brooke Jones of an authorized act within her official capacity, being the arrest of [defendant], knowing Brooke Jones to be a peace officer engaged in the execution of her official duties, in that [defendant] hid under his vehicle, was ordered to come out and refused [,] then [defendant] fled on foot and was apprehended and taken to the hospital where he removed his own intravenous equipment and again fled on foot.”

¶ 4 At trial, the following witnesses testified.

¶ 5 John J. Flynn

¶ 6 Flynn lived with his wife at 1796 East Hanover Road, 70 yards from its intersection with Derinda Road, in Elizabeth, Illinois. On September 20, 2010, his wife awakened him shortly after midnight. Flynn awakened to “lights in [his] bedroom.” He opened the blinds and looked out. A vehicle was “in the driveway” revving its engine. Flynn dressed, turned on the outside lights, and

went outside. The car was “back” by the driveway “over [his] rock wall.”¹ The car’s engine was running, and someone was behind the wheel. The person was revving the motor, trying to get the car off the rocks. Flynn was unable to identify defendant as the person in the car.

¶ 7 When Flynn went into his yard, the “gentleman” shut off the car and got out. Because Flynn had to leave for work at 4:30 that morning, he suggested to the gentleman that he call someone to come get him and worry about the car the next day. Besides Flynn and the man with the car, there was no one else around the vehicle. Because it was dark, Flynn could not see any marks in his yard showing how the car ended up on the rocks. Flynn said that in daylight the next day, “there might have been some beat down grass.” The car had broken a decorative yard light when it struck the rocks. At the man’s insistence, Flynn called for a wrecker, but no one would come unless the police were called. Flynn waited outside with the man for approximately an hour, until a state trooper arrived. Flynn was 8 to 10 feet away from the man during this time.

¶ 8 When the trooper came on the scene, the man went “back” underneath the car “like he was pulling the rocks out from underneath the car.” Flynn sat on the rock wall while the trooper wrote down the VIN number of the car on the rocks, tried talking to the man, and then went back to her car. When the trooper got into her car, the man came out from under the car and “took off.” He ran past Flynn and “out of the light and in the backyard.” It was too dark for Flynn to see him.

¶ 9 Flynn’s backyard was obstructed by flowerbeds, and it was approximately 500 or 600 feet from his garage to the back of his yard. At the back property line there was a woven wire fence

¹Photographs show a retaining wall constructed of large flat stones next to the driveway. The stones were in a single layer in the area where the car was caught up on the wall.

topped with barbed wire that was 4 ½ or 5 feet tall. Flynn saw the man again, later, when the sheriff's police and emergency personnel removed the man from a ditch behind the fence.

¶ 10 On cross-examination, Flynn testified that he did not see any alcoholic containers around the car. Flynn agreed that he did not see the car being driven or moved. The car was stuck on the rocks. In the period before the trooper arrived, the man was repeatedly under the car, trying to get it free from the rocks. Flynn testified that he did not hear the man under the car say anything to the trooper while she was asking him a few questions and asked him to come out from beneath the car. Flynn said that when the man “took off,” the trooper jumped out of her car “right away” and gave chase. She said to Flynn, “He didn’t do what I think he did.” Flynn testified that he never heard the trooper give the man any orders or directions.

¶ 11 Trooper Brooke Jones

¶ 12 On September 20, 2010, Jones was dispatched at approximately 1:30 a.m. to the location of Derinda Road and Hanover Road to a “one vehicle crash where the driver was possibly intoxicated.” When she arrived, she saw a black Jaguar stuck on a rock retaining wall. The only person present, other than Flynn, was underneath the Jaguar. She went over to the Jaguar and said, “Sir, will you come on out here and talk to me for a minute?” According to Jones, the man said, “F—you, I’m not f—ing drunk.” Jones testified that she was within an arm’s reach of the man, whose speech was slurred and thick-tongued, and she smelled the odor of an alcoholic beverage. Jones said she replied, “All I want to do is talk to you for a minute about what happened.” The man said nothing in response. Jones then spoke with Flynn “for a couple minutes” about what he had seen and then Jones returned to her squad car to call in some information. She again got out of her car and approached the Jaguar. She testified, “I just kept asking him to just come on out and talk to me for

a minute. I just wanted to know what happened prior to me getting there.” The man lay silent under the Jaguar.

¶ 13 Jones got back into her squad car to run the Jaguar’s license plate, when Flynn alerted her that the man “took off.” Jones, using a flashlight to see where she was going, “went running after him.” According to Jones, the man was 50 feet ahead of her, “staggering all over the place.” Jones closed to within 30 feet, when the man leaped over a barbed wire fence and fell about 20 feet down a ravine. Jones called for assistance and an ambulance. When the paramedics arrived, they placed the man on a backboard and transported him in an ambulance.

¶ 14 Jones testified that she went up to Derinda Road and saw two skid marks on the road. She said they were “maybe” 10 feet long and were “probably” a quarter mile north of Hanover Road. They traveled southbound and turned west toward the Flynn property. Jones said she also saw two skid marks “that came all the way down [Flynn’s] yard to where the vehicle actually ended up.” In response to the prosecutor’s question, “Were there marks in the grass?” Jones said, “Yes, ma’am.” Jones testified that she documented the skid marks as part of her traffic crash report.

¶ 15 Jones testified that she then drove to Galena, Illinois, to the hospital where the man was taken. At the hospital, she was informed that the man was undergoing a CT scan. By this time, Jones had identified the man as defendant through his driver’s license that was in his wallet. Jones testified that she believed that defendant had been driving the Jaguar. Jones said that she never recovered any keys from the Jaguar and never saw any keys in the car.

¶ 16 When defendant was placed in an ER room, after his CT scan, Jones issued a citation to him for driving under the influence of alcohol. Jones testified that defendant was unconscious when she issued the citation. There was no response from defendant “whatsoever.” According to Jones, she

came back into his room once he was awake and told defendant that he was not free to leave and that he was under arrest. Jones testified that defendant said, “F–you . I’m getting the f– out of here.” Defendant then pulled out his IV and asked that his catheter be removed. Jones left the room, went to the front desk, and asked that the East Dubuque police be called for assistance. While Jones was at the front desk, she saw defendant go out the hospital’s front door and start running. Jones told him he was not free to leave, and she “went running after him.” It was dark out, and Jones did not locate defendant.

¶ 17 On cross-examination, Jones admitted that she testified at the preliminary hearing that the last conversation she had with defendant was when he was under the car at Flynn’s place. Also at the preliminary hearing, Jones testified that she talked to defendant again at the hospital when she placed him under arrest, but that “he was still passed out when [she] technically arrested him.” She admitted that she did not testify to any further conversations after defendant regained consciousness in the hospital, but she said she was not asked that question at the preliminary hearing. Jones, after being confronted with her traffic crash report, also admitted that she did not include any information about skid marks in it. Jones further admitted that she had no measurements of skid marks nor any physical correlation between the skid marks and the Jaguar’s tires. Although Jones placed defendant under arrest at the hospital, she testified that she told him, as he was running through Flynn’s backyard, that he was under arrest for resisting and obstructing.

¶ 18 On redirect, Jones testified that she started writing her report the day after the incident and that she did not “put every detail in there.” On re-cross, Jones admitted that she did not include in her seven-page field report, which was something other than her traffic crash report, that she had told defendant that he was under arrest as he was running through the backyard. She agreed that she

wrote 10 paragraphs about what had occurred in the backyard but did not mention that she told defendant he was under arrest. She admitted that defendant did not appear to have heard her when she told him in the backyard that he was under arrest. When defense counsel asked to admit Jones's traffic crash report into evidence, Jones said that the report counsel had was not the same report that the State Police retained in its files. She claimed that counsel's copy was what was given to the public and that the traffic crash report retained by the State Police contained "full information." In further redirect, Jones testified that there was no diagram on the report she was shown by defense counsel but that she had diagrammed the route the Jaguar traveled in "my report."

¶ 19 Richard Robinson

¶ 20 Richard Robinson was a paramedic on the ambulance that transported defendant from the ditch to the hospital in Galena. Robinson testified that defendant was not responsive at all at the scene. "He did not respond to us. He didn't respond when we talked to him or to stimulus or that sort of thing." Robinson assisted with placing defendant on the backboard and noted a smell of ethyl alcohol on defendant. In the ambulance, defendant responded to no stimuli.

¶ 21 Joann Robinson

¶ 22 Joann Robinson was a paramedic on the ambulance that responded to the scene in Flynn's backyard. She testified that she did not recall whether she smelled anything unusual about the patient. She also testified that the patient did not regain consciousness at all.

¶ 23 Michelle Miller

¶ 24 Michelle Miller was a registered nurse who was working in the emergency room when defendant was admitted. She was the nurse who was assigned to defendant's care. According to Miller, defendant was feigning unconsciousness. She said that he had muscle control, whereas

unconscious patients are “flaccid,” meaning there is no voluntary muscle control. Miller testified that defendant smelled of alcohol. When defendant was given a CT scan, he kept his arms across his chest. According to Miller, a truly unconscious person’s arms would fall to his or her sides. During the scan itself, defendant moved his feet and lifted his hand up and opened an eye. Miller reported her observations to the attending doctor, who obtained a response from defendant by using smelling salts. Defendant sat up and took out his IV. Defendant had the catheter in his hand when Miller told him, “You can pull that out if you want to but I wouldn’t advise it.” Defendant said, “Fine, do what you want.” Miller then removed the catheter. Defendant put on his clothes and left the hospital with a steady gait. According to Miller, Trooper Jones was “in and out” of defendant’s room, but she was not present when Miller removed the catheter.

¶ 25 On cross-examination, Miller testified that defendant removed his monitor leads and IV “aggressively,” but that he was not combative with her, except that he swore.

¶ 26 Arica Schmidt

¶ 27 Schmidt was the hospital’s lab manager. She identified the State’s exhibit number 13 as the lab results for defendant. The exhibit showed that the attending doctor had defendant’s blood drawn at 4:08 a.m. on September 20, 2010. The court admitted exhibit number 13 as a business record.

¶ 28 Lucas Barker

¶ 29 Barker was a deputy with the Jo Daviess County sheriff’s department on September 20, 2010. Shortly after he began his shift, he was dispatched to the area of West Council Hill Road near Ford Road. The nature of the dispatch was that a subject matching defendant’s description was walking on the roadway in that location. At that time, defendant was wanted. Barker spotted defendant and took him into custody.

¶ 30 The State rested. Defendant moved for a directed verdict. The court denied the motion with respect to everything but a charge that defendant's blood alcohol content was in excess of .08.² The court ruled that the State had presented no expert to convert the alcohol number on exhibit 13 to a percentage of alcohol concentration in defendant's blood and that the lay jury was not able to do such a conversion. Defendant rested without presenting witnesses. The jury found defendant guilty of driving under the influence of alcohol and obstructing a peace officer. The jury acquitted defendant of the escape charge. After the court denied defendant's posttrial motion, it sentenced defendant to two years of probation and 180 days of periodic imprisonment, which was stayed until November 20, 2012. Defendant was also fined and given other conditions of probation. In addition, defendant was required to pay restitution of \$500 to the Elizabeth Community Ambulance. Defendant filed a timely appeal.

¶ 31

ANALYSIS

¶ 32

I. Driving Under the Influence of Alcohol

¶ 33 Defendant first argues that the evidence was insufficient to prove him guilty of driving under the influence of alcohol beyond a reasonable doubt, because (1) no evidence indicated that he drove or was in actual physical control of the Jaguar that was stuck on the rocks; (2) the only evidence of impairment was an odor of alcohol, which was insufficient to convict; and (3) there was no evidence that he was driving on Derinda Road while under the influence of alcohol. A criminal conviction

²The parties and the court were of the belief that defendant was charged with DUI as having a blood alcohol content of .08, but neither the original nor the amended information charged that offense.

will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of a defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In considering a challenge to the sufficiency of the evidence, it is not this court's function to retry the defendant. *Collins*, 106 Ill. 2d at 261. Rather, the relevant inquiry is whether, after 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. *Collins*, 106 Ill. 2d at 261. Under this standard, all reasonable inferences from the evidence must be allowed in the State's favor. *People v. Baskerville*, 2012 IL 111056, ¶ 31. The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from the evidence, and this court will not substitute its judgment for that of the trier of fact. *People v. Slinkard*, 362 Ill. App. 3d 855, 860 (2006).

¶ 34 A. Evidence That Defendant Drove or Was in Actual Physical Control of the Vehicle

¶ 35 Section 11-501(a)(2) of the Illinois Vehicle Code (Code) 625 ILCS 5/11-501(a)(2) (West 2010)) provides that a person "shall not drive or be in actual physical control of any vehicle within this State while under the influence of alcohol." The offense includes two elements: (1) the defendant must be driving a vehicle; and (2) the defendant must be intoxicated while driving. *People v. Lurz*, 379 Ill. App. 3d 958, 967 (2008). Commonly referred to as the *corpus delicti* of the offense, the State must prove both elements in order to convict. *Lurz*, 379 Ill. App. 3d at 967. "Driving" includes both the actual operation of a moving vehicle and the circumstance of being "in actual physical control" of the vehicle, even though the vehicle may not be moving. *People v. Clark*, 47 Ill. App. 3d 568, 570 (1977). The State can prove defendant guilty of DUI by using circumstantial evidence. *People v. Hostetter*, 384 Ill. App. 3d 700, 712 (2008).

¶ 36 Here, defendant assumes that the evidence was insufficient to prove that he drove a vehicle while he was under the influence of alcohol, prompting him to direct his arguments to whether the evidence proved that he was in actual physical control of the nonmoving vehicle that was stranded on the rocks. Defendant ignores altogether Flynn's testimony. Flynn did not identify defendant as the man he saw behind the wheel, but the only reasonable inference the jury could draw was that the man was defendant. In making its decision, the trier of fact is allowed to make reasonable inferences. *People v. Turner*, 375 Ill. App. 3d 1101, 1103 (2007). Flynn testified that there was no one else around the vehicle. Flynn conversed with the man and sat with him for approximately an hour before Jones's arrival. According to Flynn, there was only one man with the vehicle, who was under the vehicle when Jones got there, and who was positively identified as defendant through Jones and other witnesses.

¶ 37 Flynn's wife, whom Flynn described as a light sleeper, woke Flynn at a little after midnight. When Flynn looked through his bedroom blinds, he saw a car with its headlights on, revving its engine. Flynn turned on the outside lights and went outside. When he approached the car, he saw the driver behind the wheel. In coming to rest on the rocks, the car had broken a yard light. The driver shut off the engine and got out of the vehicle. The jury could have reasonably drawn the following inferences from this evidence: (1) the car was moving when it struck the yard light and the rocks, and (2) defendant was driving the car.

¶ 38 Defendant challenges Jones's testimony regarding the skid marks she said she found on Derinda Road and in the grass in Flynn's yard, because she did not include them in her traffic crash report. Jones was thoroughly cross-examined on this point, and it was up to the trier of fact to resolve any conflicts in the evidence. Moreover, jurors can use their own common sense and

experience in life. *People v. Allen*, 376 Ill. App. 3d 511, 525 (2007). Cars generally have to be driven to a location. They do not appear out of thin air. Here, there was no evidence that the car arrived on the rocks by any other means except that it was driven there at enough speed to break a yard light and to climb onto a rock wall. Defendant was the only occupant of the car; he was the owner of the vehicle; and he was behind the wheel when Flynn first saw him what had to be moments after the impact. The jury may draw the reasonable inference that a vehicle's owner is its driver. *People v. Rhoden*, 253 Ill. App. 3d 805, 812 (1993). Consequently, we believe that the State proved that defendant was driving the vehicle. Accordingly, we need not address whether the evidence proved that defendant was in actual physical control of the nonmoving vehicle.

¶ 39 B. Evidence That Defendant Was Under the Influence of Alcohol

¶ 40 Count I of the amended information charged defendant with aggravated driving under the influence of alcohol, as follows:

“*** in violation of section 11-501(d)(2)(B) of Act 5 of Chapter 625 of the Illinois Compiled Statutes of said State, [Justin J. Appel] drove a 2001 Jaguar, with an Illinois registration number 743L641 on Derinda Road at Hanover Road, Derinda Township, Jo Daviess County, Illinois, while the defendant was under the influence of alcohol and the defendant had previously committed the violation of subsection (a), or a similar provision for a third or subsequent time.”

Where there is no reference in the charge to blood-alcohol content, the prosecution is for driving under the influence of alcohol under section 11-502(a)(2), which charges impairment. *People v. Hewitt*, 212 Ill. App. 3d 496, 502-03 (1991). Thus, we decline the State's inappropriate invitation

for us to do our own conversion of the hospital's alcohol screen to arrive at defendant's blood-alcohol concentration.³

¶ 41 To prove intoxication, the evidence must establish that the putatively intoxicated person not only consumed alcohol but also displayed some form of unusual behavior, or there must be opinion evidence from which the trier of fact can reasonably conclude that the person was intoxicated at the critical time. *Wade v. City of Chicago Heights*, 216 Ill. App. 3d 418, 429 (1991). A slight impairment that leads to a slight reduction in a motorist's ability to drive is sufficient to support a conviction. *Mills v. Edgar*, 178 Ill. App. 3d 1054, 1057 (1989).

¶ 42 Defendant first argues that Jones's video refutes her testimony that she was close enough to him to smell alcohol. Defendant did not include the video in the appellate record. Defendant is obligated to provide a sufficiently complete record for appellate review. *People v. Appelgren*, 377 Ill. App. 3d 137, 142 (2007). As we cannot view the video, we reject that argument.

¶ 43 Next, defendant cites *People v. Thomas*, 34 Ill. App. 3d 578, 580 (1975), for the proposition that the odor of alcohol alone is insufficient to prove that a person was intoxicated. Defendant points out that, here, Jones did not administer field sobriety tests; Flynn did not testify that defendant appeared intoxicated; and one of the paramedics did not recall whether she smelled the odor of alcohol on defendant. Thus, he concludes, the only evidence of intoxication was Jones's statement that she smelled alcohol and paramedic Richard Robinson's observation that he smelled the odor of alcohol. Defendant discounts Jones's testimony that his speech was slurred and thick-tongued on

³The State contends that the trial court erred in directing a verdict on the "charge" of driving under the influence of alcohol with a blood-alcohol concentration of .08 or more. Even if that offense had been charged, it is elementary that the State cannot appeal an acquittal.

the basis that Jones had never heard him speak before, and he asserts that the video shows Jones's inability to see him running through Flynn's backyard. Again, as defendant has not provided us with the video, we reject any arguments he makes concerning it. As for defendant's slurred, thick-tongued speech, there was no evidence to account for it other than intoxication, such as a speech impediment, a disease, or an injury.

¶ 44 The evidence as a whole supports the conclusion that defendant was intoxicated. To prove that defendant was under the influence of alcohol, the prosecution must prove that the defendant was less able, either mentally or physically, or both, to exercise clear judgment, and with steady hands and nerves, operate an automobile with safety to himself and the public. *People v. Gordon*, 378 Ill. App. 3d 626, 632 (2007). Here, in addition to the odor of alcohol, there was evidence that defendant drove his vehicle onto the rock retaining wall, where it became stuck. There was no indication of mechanical failure that caused the vehicle to deviate from a roadway. Defendant's reply to Jones's request that he come out from under the car to talk to her was an expletive and the gratuitous statement, "I'm not f—ing drunk." The testimony of the arresting officer describing the defendant's condition and behavior at the scene is sufficient to sustain a conviction for DUI. *People v. Pena*, 170 Ill. App. 3d 347, 354 (1988). Jones further testified that defendant fled from her, staggering through the backyard (she illuminated him with her flashlight), and jumping over a fence and falling down a 20-foot ravine, where he was found passed out when the paramedics arrived. Flight is admissible to show consciousness of guilt and thereby guilt. *People v. Hart*, 214 Ill. 2d 490, 519 (2005). The evidence also established that defendant was intoxicated before he arrived at Flynn's. Defendant himself established through witnesses that there were no alcoholic beverage containers at the scene.

Therefore, defendant had to have become intoxicated prior to driving his vehicle onto Flynn's retaining wall.

¶ 45 C. Evidence That Defendant Drove on Derinda Road

¶ 46 Defendant claims that the State failed to meet its burden of proving beyond a reasonable doubt that he was driving on Derinda Road. Where an indictment charges all essential elements of an offense, other matters unnecessarily added may be regarded as surplusage. *People v. Collins*, 214 Ill. 2d 206, 219 (2005). A charging document alleging a criminal offense must meet five pleading requirements: (1) the name of the offense; (2) the statutory provision allegedly violated; (3) the nature and elements of the offense charged; (4) the date and county of the offense; and (5) the name of the accused. 725 ILCS 5/111-3 (West 2010); *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 87. Immaterial matters, or matters that, if omitted from an indictment, would not render it insufficient or cause damage to material averments, may be regarded as surplusage. *McCarter*, 2011 IL App (1st) 092864, ¶ 87. The State must prove every *element* of the offense charged beyond a reasonable doubt. *People v. McPeak*, 2012 IL App (2d) 110557, ¶ 5.

¶ 47 Here, the offense of DUI contains two elements: (1) defendant must be driving a vehicle, and (2) defendant must be intoxicated while driving. *Lurz*, 379 Ill. App. 3d at 967 (2008). Section 11-501 of the Code does not limit itself to persons driving on public highways. *People v. Foster*, 170 Ill. App. 3d 306, 310 (1988). Consequently, the allegation in the amended information that defendant was driving on Derinda Road was surplusage. Accordingly, defendant's argument that the State failed to prove this allegation beyond a reasonable doubt is without merit. Because the State proved beyond a reasonable doubt that defendant was driving a vehicle while under the influence of alcohol, the elements of the offense, we affirm the DUI conviction.

¶ 48

II. Obstructing a Peace Officer

¶ 49 Defendant's next argument is that he was not proved guilty beyond a reasonable doubt of the offense of obstructing a peace officer. The amended information charged defendant as follows:

“Justin J. Appel *** committed the [offense] of obstructing a peace officer in violation of section 31-1 of Act 5 of Chapter 720 of the Illinois Compiled Statutes of said State, in that [Justin J. Appel] knowingly obstructed the performance of Brooke Jones of an authorized act within her official capacity, being the arrest of Justin J. Appel, knowing Brooke Jones to be a peace officer engaged in the execution of her official duties, in that Justin J. Appel hid under his vehicle, was ordered to come out and refused then *** fled on foot and was apprehended and taken to the hospital where he removed his own intravenous equipment and again fled on foot.”

Section 31-1(a) of the Illinois Code of Criminal Procedure of 1961 (Criminal Code) provides that “a person who knowingly resists or obstructs the performance by one known to the person to be a peace officer *** of any authorized act within his official capacity commits a Class A misdemeanor.” 720 ILCS 5/31-1(a) (West 2010). The statute does not define the word “obstruct.” Our supreme court has held that “obstruct” encompasses physical conduct that literally creates an obstacle, as well as conduct the effect of which impedes or hinders progress. *Baskerville*, 2012 IL 111056, ¶ 19. Here, the act defendant allegedly obstructed was his arrest, both at the scene and later at the hospital. Essentially, the one count alleges two separate acts of obstructing. We will, therefore, analyze them separately.

¶ 50

A. Defendant's Acts at the Scene

¶ 51

1. Defendant Remains Under the Vehicle

¶ 52 At approximately 1:30 a.m., Jones was dispatched to a one-vehicle crash with a possibly intoxicated driver. Flynn had called the police because he could not get a wrecker to the scene without doing so. When Jones arrived, defendant was under his car, where he had gone before she arrived. Flynn testified that defendant repeatedly had gone under the car to try to free it from the rocks.

¶ 53 Jones testified that defendant was trying to free the Jaguar from the rocks when she first saw him. She approached defendant and said, “Sir, will you come on out here and talk to me for a minute?” Defendant said, “F–you, I’m not f–ing drunk.” Jones then said, “[All] I want to do is talk to you for a minute about what happened.” Defendant made no response. Jones reentered her car and then emerged and again talked to defendant. She testified that she “just kept asking him to just come on out and talk to [her] for a minute.” In response, defendant “just laid there.”

¶ 54 Disobeying a police officer’s lawful orders not to impede an authorized act and refusing orders to desist from behavior that impedes an authorized act is obstructing. *Sroga v. Weiglen*, 649 F. 3d 604, 608 (7th Cir. 2011) (driver jumped into car to prevent police from towing it and refused orders to get out of the car). Refusing an order to exit a vehicle and grabbing onto the steering wheel to demonstrate refusal is obstructing. *People v. Synnott*, 349 Ill. App. 3d 223, 224 (2004). In our case, unlike in *Sroga* and *Synnott*, it is clear from Jones’s testimony that she did not order defendant to come out from under the vehicle. Flynn testified that Jones did not issue any orders. More important, it is also clear that Jones did not attempt to arrest defendant at that point. Consequently, defendant did not obstruct an arrest by remaining under the car. Although defendant used profanity toward Jones, the first amendment protects profanity-laden speech directed at police officers. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987).

¶ 55

2. Defendant Flees Into the Backyard

¶ 56 Jones testified that when she returned to her squad car a second time, defendant took off running. It is undisputed that Jones had not told defendant that he had to remain in proximity to her or his car. It is also undisputed that defendant was not under arrest when he ran. On cross-examination, Jones testified that she told defendant that he was under arrest for obstructing while she was chasing him through the backyard. She admitted that she was about 50 feet behind him and that defendant did not acknowledge hearing her.

¶ 57 Obstructing a peace officer requires the mental state of knowledge. *People v. Kotlinski*, 2011 IL App (2d) 101251, ¶ 53. In the context of obstructing a peace officer, a person acts knowingly or with knowledge of the result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct. 720 ILCS 5/4-5(b) (West 2010); *Kotlinski*, 2011 IL App (2d) 101251, ¶ 54. “Knowledge,” for purposes of criminal liability, probes into what the accused was subjectively and consciously aware of. *Kotlinski*, 2011 IL App (2d) 101251, ¶ 54. Here, there is no evidence that defendant was aware that Jones placed him under arrest while he was running, so he could not have consciously been aware that continuing to run would obstruct her in the performance of her duties.

¶ 58

3. Defendant’s Acts at the Hospital

¶ 59 Jones admitted that defendant was unconscious when she arrested him for DUI at the hospital. However, she testified that she again told defendant that he was under arrest and not free to leave after he had been revived and was conscious. According to Jones, after she advised him that he was under arrest, defendant pulled out his IVs and had his catheter removed. Then, while Jones was at the front desk, defendant walked out of the hospital and disappeared. The legislature intended

section 31-1 of the Criminal Code to apply to those instances in which a police officer *attempts* to make an arrest but the subject runs away. *People v. Elsperman*, 219 Ill. App. 3d 83, 85 (1991). “[I]f a police officer has *succeeded* in making an arrest and the suspect then escapes from police custody, that criminal conduct is *** escape.”⁴ (Emphasis added). *Elsperman*, 219 Ill. App. 3d at 85-86. In our case, Jones succeeded in making the arrest before defendant fled from the hospital. Consequently, he was not guilty of obstructing. Because no rational trier of fact could have found that the elements of obstructing a peace officer had been proved beyond a reasonable doubt, we reverse defendant’s conviction on that charge.

¶ 60 For the foregoing reasons, we affirm defendant’s conviction of DUI and reverse his conviction of obstructing a peace officer.

¶ 61 Affirmed in part; reversed in part.

⁴The jury acquitted defendant of escape.

