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2013 IL App (3d) 120294-U

Order filed November 6, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

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. 3-12-0294
)	Circuit No. 11-CF-1352
)	
HENRY L. GIBSON,)	Honorable
)	Daniel J. Rozak,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Wright and Justice Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The trial court conducted an adequate inquiry into defendant's posttrial claims of ineffective assistance of trial counsel; and (2) the State's evidence establishing defendant's intoxication was admissible.
- ¶ 2 After a jury trial, defendant, Henry L. Gibson, was convicted of aggravated driving while under the influence of alcohol (625 ILCS 5/11-501(a)(2), (d)(2)(E) (West 2010)) and aggravated driving while license suspended (625 ILCS 5/6-303(d-4) (West 2010)). The court sentenced him to concurrent sentences of six and two years' imprisonment, respectively. Defendant appeals,

¶ 7 Defendant exited his SUV carrying a beer can. He approached Lopez and asked what she was cooking. Lopez ignored him. He opened Lopez's trash can and threw the beer can inside. Lopez was scared because defendant was being loud and invading her personal space. Lopez's daughter came outside and asked if Lopez was okay. Lopez signaled her daughter to get the phone. Lopez called the police.

¶ 8 Officer Stephen Mau testified that he arrived on the scene and saw defendant standing outside the SUV with money in his hand. An older woman and a child were inside the SUV. Mau noticed that defendant's eyes were bloodshot, his speech was slurred, and his breath had a strong smell of alcoholic beverage. Lopez informed Mau about the interaction that had occurred with defendant. Mau took defendant to a nearby parking lot to administer field sobriety tests.

¶ 9 Defendant failed every sobriety test he was administered. Mau first administered a horizontal gaze nystagmus (HGN) test. Mau testified that, prior to administering the HGN test, defendant appeared to be able to move his eyes normally. However, during the HGN test, defendant explained that he could not perform the test because of a "nerve problem." Defendant explained that the nerve problem affected only his eyes.

¶ 10 Defendant also failed a walk-and-turn test, a one-leg stand test, and a preexit finger test. Prior to the walk-and-turn test, defendant claimed he could not perform it because he also had a nerve problem in his legs. Defendant was unable to accurately recite the alphabet from the letter C through P, nor count backwards from 86 to 67. Mau testified that in general, defendant had a difficult time following instructions and was combative.

¶ 11 After defendant failed the tests, Mau arrested him. In Mau's opinion, defendant was under the influence alcohol. A recording of the stop taken from Mau's squad car was admitted

into evidence and published to the jury. Defendant refused a blood-alcohol test at the police station. When asked at the station if he had any health problems, defendant did not mention anything about a nerve problem.

¶ 12 Officer Eric Bernhard testified that he arrived on the scene with Mau. Bernhard addressed the SUV's passengers while Mau administered field sobriety tests. There was a child and an adult female in the SUV. Bernhard testified that in his opinion the adult female was intoxicated. Defense counsel objected to the relevance of the testimony. The court overruled the objection. Bernhard testified that the woman was slurring her speech and emotionally unstable, happy one moment and crying the next. Bernhard found two nearly empty beer cans in the SUV. The State rested.

¶ 13 Defense counsel informed the court that defendant did not wish to testify. The court then questioned defendant to ensure that his choice was voluntary. The court informed defendant of his right to testify and that nobody, including his lawyer, could take that right away from him. Defendant stated that he understood. The court asked whether defendant and his lawyer had discussed the decision not to testify. Defendant stated that they had. The court asked whether defendant had been promised anything to not testify, or had been threatened or coerced not to testify. Defendant responded that he had not. The court then asked whether defendant had any questions about his right to testify. Defendant responded that he did not. The court asked, "After discussing it with your attorneys several times, after what I just told you, do you still wish to not testify in this case?" The defendant responded, "Yes, sir." The defense presented no evidence.

¶ 14 The jury returned guilty verdicts on both charges.

¶ 15 Defendant filed a *pro se* motion for a new trial, alleging, *inter alia*, that counsel provided

ineffective assistance by: (1) not establishing that defendant's medical condition caused him to fail the field sobriety tests; (2) not allowing defendant to testify; (3) failing to file a motion to suppress; and (4) failing to file a pretrial motion to dismiss.

¶ 16 The court addressed defendant's motion in open court prior to sentencing. The court initiated a conversation with defendant:

"Sir, go ahead, tell me why your counsel was ineffective. You said he failed to submit defendant's medical records and there was no motion to suppress. I think you have alleged also that you didn't testify. If I missed anything, you tell me. Otherwise, let me hear your argument."

Defendant and the court engaged in extensive back-and-forth questioning as defendant explained his contentions. The court asked defendant follow-up questions when necessary to clarify defendant's arguments. After hearing defendant's arguments, the court denied the motion.

¶ 17 The trial court sentenced defendant to six years' imprisonment for aggravated driving while under the influence of alcohol and two years' of imprisonment for aggravated driving while license suspended. The sentences were ordered to run concurrently. Defendant appeals.

¶ 18 ANALYSIS

¶ 19 A. *Krankel* Hearing

¶ 20 Defendant first claims on appeal that the trial court did not perform an "adequate inquiry" into defendant's posttrial *pro se* claims of ineffective assistance of counsel, as required by *People v. Krankel*, 102 Ill. 2d 181 (1984), and *People v. Moore*, 207 Ill. 2d 68, 78 (2003). Defendant argues that one claim in particular did not receive the attention it deserved: that counsel was ineffective for failing to present evidence of defendant's medical condition, where such medical

condition made it difficult for defendant to complete field sobriety tests.

¶ 21 When a defendant raises posttrial claims of ineffective assistance of counsel, the trial court must conduct an inquiry into those claims. The purpose of the inquiry is to determine whether the claims have merit such that new counsel should be appointed to argue the claims in the trial court. *Moore* describes the following procedure for evaluating the *pro se* claims:

"[W]hen a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed."
Moore, 207 Ill. 2d at 77-78.

In *Moore*, the trial court was found to have conducted an inadequate inquiry where it "did not consider defendant's motion *at all*." (Emphasis added.) *Id.* at 80. The *Moore* court held only that *Krankel* and its progeny require "some type of inquiry into the underlying factual basis" (*Id.* at 79), which may in some cases be accomplished by a "brief discussion between the trial court and the defendant." *Id.* at 78.

¶ 22 In the present case, the trial court exceeded the requirements of *Moore*. The trial record contains 25 pages in which the court inquires into defendant's claims of ineffective assistance of counsel. During that inquiry, the court addresses each of defendant's claims in turn, asking questions when necessary to clarify defendant's arguments. In particular, the court questions defendant about his claim that counsel failed to admit defendant's medical records. Defendant stated that up until a few days before his arrest, he had been taking prescription medication for

his "nerves." The medication was making him dizzy, so he stopped taking it. Defendant argued that counsel should have introduced defendant's nerve condition as evidence that he was not capable of completing the field sobriety tests. The court understood defendant to be arguing that the side effects from his medication caused dizziness, which resulted in him not being able to complete the tests. The court then rejected defendant's claim because he was not taking his medication at the time of the tests and therefore would not have been suffering from any side effects.

¶ 23 We find that the trial court's inquiry into defendant's claims was adequate. The court repeatedly asked defendant to explain how his medical records would have established that defendant could not pass the field sobriety tests. Defendant never explained what his "nerve problem" was, how the problem affected his ability to perform field sobriety tests, or what information his medical records would have contained. The trial court repeatedly attempted to extract this information from defendant, to no avail. Although the court may have misunderstood some details of defendant's claim, the court adequately investigated into the claim's factual basis. During that investigation, defendant provided no facts that would establish a meritorious claim of ineffective assistance.

¶ 24 B. Evidentiary Issues

¶ 25 Defendant next argues that the State "improperly attempted to bolster" evidence of defendant's intoxication in the following ways: (1) Lopez offered an expert opinion as to defendant's intoxication without having been qualified as an expert witness; (2) the evidence about the passenger's intoxication was irrelevant; and (3) during closing argument, the prosecutor offered his personal opinion as to defendant's intoxication.

¶ 26

1. Lopez's Opinion Testimony

¶ 27 Lopez testified to her opinion that defendant was under the influence of alcohol.

Defendant argues that Lopez's opinion was an expert opinion, and, as a result, it was error to allow her testimony without first qualifying her as an expert witness. Defendant failed to object to Lopez's testimony or raise the issue in a posttrial motion. Therefore, the claim is forfeited, and we review under the plain error doctrine. First, we must determine if error occurred. *People v. Piatkowski*, 225 Ill. 2d 551 (2007). A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215 (2010).

¶ 28 Under Illinois Rule of Evidence 701(c) (eff. Jan. 1, 2011), a lay witness's testimony is limited to opinions "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Lopez testified that in her experience as a social worker, she had interacted with intoxicated individuals. She did not express that her opinion about defendant's intoxication was based on "scientific, technical, or other specialized knowledge." Rather, the opinion was based on her personal past experiences observing intoxicated persons. As such, the opinion was admissible under Rule 701. See, e.g., *People v. Richardson*, 2013 IL App (2d) 120119; *People v. Bowman*, 357 Ill. App. 3d 290, 299-300 (2005) ("Lay persons may express their opinion on the question of intoxication, if their opinion is based on their personal observation of and experience with intoxication.")

¶ 29

2. Evidence of Passenger's Intoxication

¶ 30 Defendant argues that it was error for the State to introduce evidence of the passenger's intoxication, because that issue was irrelevant to defendant's charges. This argument was not preserved in the trial court. Typically, we would review such an argument under the plain error

doctrine. See *Piatkowski*, 225 Ill. 2d 551. However, plain error review is forfeited when the defendant has invited the error. *People v. Harding*, 2012 IL App (2d) 101011.

¶ 31 The testimony about the passenger's intoxication resulted from defense counsel's own questioning of Mau. During cross-examination of Mau, defense counsel asked, referring to the passenger, "You would characterize her as intoxicated?" Mau responded, "Her? Absolutely." Under the doctrine of invited error, a defendant may not proceed in one manner at trial and later claim on appeal that the course of action was error. *People v. Harvey*, 211 Ill. 2d 368 (2004). As a result, we will not address defendant's claim of error.

¶ 32 3. Closing Argument

¶ 33 Defendant claims that, during closing argument, the prosecutor committed error when he offered the jury his personal opinion that defendant was intoxicated.

¶ 34 It is improper for a prosecutor to offer his own opinion about defendant's guilt or innocence where that opinion is not based on the evidence. *People v. Caballero*, 126 Ill. 2d 248 (1989). However, a prosecutor is given great latitude in making closing arguments. *People v. Meeks*, 382 Ill. App. 3d 81 (2008).

¶ 35 In the present case, we need not determine whether the prosecutor's statement was error, because the prosecutor did not complete the statement. The prosecutor said to the jury, "You had an opportunity to see how Officer Mau dealt with the defendant. It didn't look to me from watching that video, or should it look to you—" At that point, defense counsel objected, and the prosecutor was precluded from finishing the sentence. The prosecutor did not present the jury with his opinion as to defendant's intoxication. As a result, there was no error.

¶ 36

CONCLUSION

¶ 37 The decision of the circuit court of Will County is affirmed.

¶ 38 Affirmed.