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2013 IL App (3d) 120530-U

Order filed July 5, 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 21st Judicial Circuit,
Plaintiff-Appellee,)	Kankakee County, Illinois,
)	
v.)	Appeal No. 3-12-0530
)	Circuit No. 11-CF-72
)	
ANTHONY M. SMITH,)	Honorable
)	Ronald J. Gerts,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Wright and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err when it sustained defendant's objection to the State's question regarding suppressed evidence, and when it denied defendant's motion for a mistrial; (2) the evidence was sufficient for the trier of fact to find defendant guilty of aggravated driving while under the influence of alcohol; and (3) the trial court's failure to ask the potential jurors if they understood the four principles enumerated in Illinois Supreme Court Rule 431(b) was not reversible error.

¶ 2 After a jury trial, defendant, Anthony M. Smith, was convicted of aggravated driving under the influence of alcohol (625 ILCS 5/11-501(d)(1)(A) (West 2010)) and sentenced to 180

days in jail. On appeal, defendant argues that: (1) the State attempted to argue suppressed evidence to the jury; (2) the evidence was insufficient to prove him guilty beyond a reasonable doubt; and (3) the trial court failed to ask the jurors if they understood the four principles set forth in Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). We affirm.

¶ 3

FACTS

¶ 4 On February 4, 2011, defendant was charged by indictment with aggravated driving while under the influence of alcohol. Defendant filed a motion to suppress, arguing that he was interrogated without the benefit of *Miranda* warnings. At the hearing, defendant testified that he was sleeping in a vehicle parked on the shoulder of the southbound lane of I-57. Around 2 a.m., defendant was awoken by an Illinois State Police trooper. Subsequently, defendant was placed under arrest and transported to the Kankakee County jail. While in transit, the trooper asked defendant where his vehicle keys were located. At the time, defendant had not received *Miranda* warnings. As a result, the trial court suppressed "any conversation which [defendant] had brought up, and that was the location of the keys."

¶ 5 On December 12, 2011, the case proceeded to a jury trial. Prior to jury selection, the court asked the jurors if they accepted that: (1) defendant was presumed innocent of the charges against him; (2) the State must prove his guilt beyond a reasonable doubt before defendant could be convicted of an offense; (3) defendant was not required to offer any evidence on his behalf; and (4) defendant's decision not to testify could not be held against him.

¶ 6 Following jury selection and opening arguments, the State called Illinois State Police trooper Nick Shoemaker to testify. Shoemaker stated that on April 24, 2010, he received a motorist assist dispatch for a car parked alongside I-57. At approximately 2:56 a.m., Shoemaker

approached a white vehicle parked on the side of the interstate. Shoemaker saw defendant seated in the driver's seat. Defendant explained that he had gotten into an argument with his fiancée while speaking with her on his cellular telephone and decided to pull over. Defendant admitted that he had three drinks at approximately 9 p.m. Shoemaker directed defendant to exit the vehicle and conducted field sobriety tests. Defendant failed the tests. Shoemaker opined that defendant was under the influence of alcohol and was not fit to drive. Shoemaker arrested defendant and transported him to the Kankakee County jail.

¶ 7 During Shoemaker's direct examination, the State introduced an audio and video recording of the traffic stop. The recording shows that defendant's right rear turn signal was activated and his tail lights were on as Shoemaker pulled up. As Shoemaker approached the vehicle, defendant's turn signal turned off. Before defendant exited the vehicle, the rear tail lights turned off.

¶ 8 On cross-examination, Shoemaker stated that defendant told him that he found his fiancée having sex with another man. To avoid a confrontation, defendant "took off." Thereafter, defendant received a call from his fiancée and pulled over. Shoemaker recalled that he discovered a key to defendant's vehicle at the scene of the stop. While transporting defendant to the jail, Shoemaker received a call from dispatch regarding the key to defendant's vehicle. Shoemaker also stated that he did not see defendant driving and did not receive a report from a citizen who saw defendant driving.

¶ 9 On redirect-examination, the State asked "[w]hen you spoke to the defendant, when you first got there about 2:56 in the morning, where were the car keys?" Defense counsel objected, and the two prosecuting attorneys said "[h]e's opened the door, Judge." The court sustained

defense counsel's objection, but permitted Shoemaker to testify to his observations at the scene. Thereafter, the State asked "[a]nd what did he say in the next conversation that you had with him [on the way to the jail]?" Defense counsel objected, and the trial court sustained the objection. The court also denied defense counsel's request for a mistrial. Shoemaker did not recall seeing the keys when he walked up to the vehicle. Shoemaker recalled that he documented in his police report that defendant told him that he had too much to drink, and he decided to pull over and "sleep it off." Shoemaker noticed the strong odor of alcohol on defendant's breath. Shoemaker opined that it was not possible for the vehicle's turn signal to be on without a key in the ignition.

¶ 10 Outside of the presence of the jury, the State introduced defendant's driving record. The court found that defendant had two prior violations for driving while under the influence of alcohol. The State rested, and the case proceeded to closing arguments.

¶ 11 The trial court instructed the jury, in part, to "disregard questions and exhibits which were withdrawn or to which objections were sustained." The jury found defendant guilty of aggravated driving while under the influence of alcohol. The trial court entered a conviction and sentenced defendant to 180 days in jail. Defendant appeals.

¶ 12 ANALYSIS

¶ 13 I. Suppressed Evidence

¶ 14 Defendant argues that a constitutional error occurred when the State attempted to argue suppressed evidence to the jury. Specifically, defendant contends that the prosecuting attorney's reactions of "jump[ing] to their feet, yelling he opened the door" tipped off the jury that evidence was being withheld from its consideration.

¶ 15 Under the *Miranda* exclusionary rule, any statement made by a suspect without the

presence of an attorney is inadmissible in the State's case-in-chief unless the State demonstrates that the defendant received *Miranda* warnings and made a knowing and intelligent waiver of his privilege against self-incrimination. *People v. Winsett*, 153 Ill. 2d 335 (1992). In the present case, Shoemaker asked defendant where his car keys were located while he was transporting defendant to the Kankakee County jail. This evidence was suppressed because defendant was not represented by counsel and had not received *Miranda* warnings. At trial, following cross-examination, the State asked Shoemaker about the location of defendant's keys at the beginning of the stop. The State also asked Shoemaker what defendant said on the way to the jail. The court sustained defense counsel's objections with regard to Shoemakers' conversation with defendant, but allowed Shoemaker to testify to his observations at the scene.

¶ 16 The jury was not exposed to prejudicial evidence, as the prosecutor did not mention the suppression motion and Shoemaker was not allowed to testify as to what defendant said with regard to his keys. Allowing Shoemaker to testify to his observations or sensory perceptions was appropriate. To be admissible, the testimony of a lay witness must be confined to statements of fact of which the witness has personal knowledge. *People v. Donegan*, 2012 IL App (1st) 102325 (2012), ¶ 41; see also *People v. McCarter*, 385 Ill. App. 3d 919, 934, 897 N.E.2d 265, 325 Ill. Dec. 17 (2008). Based on the rule espoused in *Donegan* and *McCarter*, Shoemaker could testify as to what he observed (location of keys) at the crime scene.

¶ 17 The record does not support defendant's contention that the prosecutors' behavior was prejudicial. The record indicates that the two prosecuting attorneys said in response to defendant's objection "[h]e's opened the door," but there is no indication that they leapt to their feet and shouted this response. Furthermore, if any harm was actually caused by the manner in

which the prosecutors objected it was mitigated by the trial court's jury instruction to disregard questions to which objections were sustained. See *People v. Taylor*, 166 Ill. 2d 414 (1995) (jury is presumed to follow the instructions that the court gives it). Therefore, the trial court did not err when it sustained defense counsel's objection, but refused to grant a mistrial.

¶ 18

II. Sufficiency of the Evidence

¶ 19 Defendant argues that the State failed to prove beyond a reasonable doubt his guilt of aggravated driving under the influence of alcohol. Specifically, defendant contends that the State did not prove that defendant drove or was in control of the vehicle.

¶ 20 When presented with a challenge to the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187 (2006). Instead, we must determine, after viewing the evidence in the light most favorable to the prosecution, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1 (2011). The trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor must it search out all possible explanations consistent with innocence. *People v. Campbell*, 146 Ill. 2d 363 (1992). As a court of review, we shall not substitute our judgment for that of the trier of fact unless the inference accepted by the trier of fact was inherently impossible or unreasonable. *People v. Marcotte*, 337 Ill. App. 3d 798 (2003).

¶ 21 To sustain a conviction of aggravated driving under the influence of alcohol, the State must prove that defendant was in actual physical control of a vehicle while he was under the influence of alcohol, and that he had two prior convictions for driving under the influence. 625 ILCS 5/11-501(a)(2), (d)(1)(A) (West 2010). A defendant need not be driving to have actual

physical control of the vehicle. *City of Naperville v. Watson*, 175 Ill. 2d 399 (1997). Actual physical control is determined on a case-by-case basis in consideration of whether the motorist: (1) is positioned in the driver's seat of the vehicle; (2) has possession of the ignition key; and (3) has the physical capability of starting the engine and moving the vehicle. *Id.*

¶ 22 In the present case, the evidence supports the jury's guilty verdict. Shoemaker testified that the car was found on the side of the highway. Defendant was seated in the driver's seat, and no one else was in the car. The video recording of the stop showed defendant's right turn signal flash and later switch off after Shoemaker approached. Shoemaker opined that a turn signal would not flash unless the key was in the vehicle's ignition. Additionally, defendant's tail lights turned off before he exited the vehicle. Shoemaker stated that defendant admitted that he had been driving and pulled over. Shoemaker's testimony and the video recording established that defendant was intoxicated. Although no evidence was presented as to the location of the vehicle key, the evidence was sufficient for the trier of fact to reasonably infer that defendant had actual control of the vehicle and was guilty of the offense.

¶ 23 III. Illinois Supreme Court Rule 431(b)

¶ 24 Defendant argues that the trial court committed plain error when it failed to ask each prospective juror whether he or she understood the principles set forth in Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). The State argues that defendant waived review of this issue.

¶ 25 During *voir dire*, defendant did not object to the trial court's questioning; therefore, any error is subject to plain error analysis. *People v. Herron*, 215 Ill. 2d 167 (2005). The plain error doctrine permits unpreserved errors to be considered on appeal if either: "(1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant;

or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Wilmington*, 2013 IL 112938, ¶ 31. The first step in plain error analysis is to determine whether the trial court erred. *Id.*

¶ 26 We review *de novo* the question of whether the trial court violated Rule 431(b). *Wilmington*, 2013 IL 112938.

¶ 27 At the time of defendant's trial, Rule 431(b) stated:

"The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

The supreme court has reiterated that the trial court must ask potential jurors as a group or individually whether they "understand and accept" these principles. *People v. Thompson*, 238 Ill. 2d 598, 607 (2010).

¶ 28 In the instant case, the trial court erred when it failed to ask the potential jurors whether they understood the enumerated principles. However, this error does not necessitate reversal. First, the evidence was not so closely balanced that the error threatened the fairness of defendant's trial. As discussed in the second issue, the jury received evidence that defendant had

control of the vehicle and had failed field sobriety tests. This evidence was corroborated, in part, by the video recording of the stop. Thus, the evidence was not so closely balanced that the trial court's error affected the outcome of the case.

¶ 29 Secondly, the error did not affect the fairness and integrity of defendant's trial. The second plain error prong only requires automatic reversal where an error is deemed structural, *i.e.*, it is "a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.'" *Thompson*, 238 Ill. 2d at 614 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)). Finding that defendant was tried by a biased jury would satisfy the second prong of plain error analysis. *Thompson*, 238 Ill. 2d 598. However, defendant has not presented any evidence that the jury was biased. The prospective jurors were asked about each of the Rule 431(b) principles and whether they accepted them. Although they were not asked if they understood the principles, this omission had little effect. See *Wilmington*, 2013 IL 112938 (trial court's failure to ask jurors whether they understood and accepted the principle that they could not hold defendant's decision not to testify against him, and its failure to ask whether they understood the remaining three Rule 431(b) principles, did not result in a biased jury); *Thompson*, 238 Ill. 2d 598 (trial court's failure to ask jurors whether they understood and accepted the principle that defendant was not required to present evidence on his behalf and if they accepted the presumption of innocence was not reversible under the second prong of plain error analysis). Accordingly, the second prong of plain error analysis does not excuse defendant's waiver.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 32 Affirmed.