

No. 1-13-0497

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

<p>THE PEOPLE OF THE STATE OF ILLINOIS,</p> <p style="padding-left: 100px;">Plaintiff-Appellee,</p> <p>v.</p> <p>SUSAN WALSH,</p> <p style="padding-left: 100px;">Defendant-Appellant.</p>	<p>)</p>	<p>Appeal from the</p> <p>Circuit Court of</p> <p>Cook County</p> <p>No. TT-552-096</p> <p>Honorable Deborah J. Gubin</p> <p>and Sandra Ramos, Judges</p> <p>Presiding.</p>
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JUSTICE REYES delivered the judgment of the court.
Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment entered on driving under the influence of alcohol and transporting alcoholic liquor in a motor vehicle convictions affirmed over claim that evidence was insufficient.

¶ 2 Following a bench trial, defendant Susan Walsh was found guilty of failing to yield the right of way to an emergency vehicle, driving under the influence of alcohol (DUI), and illegal transportation of alcoholic liquor in a motor vehicle. She was then sentenced to 18 months' supervision and assigned certain fines, fees and costs. On appeal, defendant contends that the

evidence was insufficient to prove her guilty of DUI and illegal transportation of alcoholic liquor beyond a reasonable doubt.

¶ 3

BACKGROUND

¶ 4 Defendant's convictions arose from an accident that occurred at approximately 11 p.m. on September 3, 2010, at the intersection of Chicago Avenue and Larrabee Street in Chicago, Illinois. Robert Greer, a Chicago Fire Department paramedic, testified he was driving an ambulance westbound on Chicago Avenue in response to a call at that intersection. The red emergency lights on his vehicle were flashing on all sides and the sirens were activated. He explained that Chicago Avenue has two lanes of westbound traffic and two lanes of eastbound traffic at that location. As he approached the intersection, he crossed over the center line into the "third lane," or the opposite lane of traffic moving eastbound, and was struck by a vehicle on the rear passenger side of the ambulance. He stopped his vehicle, and could see through the rear view mirror that a vehicle was wedged under the passenger side rear wheel well of the ambulance. The driver backed up, and Greer and his partner pulled over, notified their supervisor of the accident, and made a report. Greer observed some damage on the side trimming and metal on the wheel well of the ambulance, and identified defendant as the driver of the automobile that struck his vehicle.

¶ 5 Chicago police officer Lucas Wise testified that he was a police officer for seven and a half years, and had completed training in DUI detection and investigation. When he arrived at work on September 3, 2010, his partner alerted him to an accident at the intersection of Chicago Avenue and Larrabee Street. The traffic crash report generated by his partner reflected that the accident occurred at 11:10 p.m., and upon his arrival at the scene about midnight, she directed him to a black BMW parked on Chicago Avenue, west of Larrabee, in the loading zone of a

restaurant.

¶ 6 Officer Wise noticed that the front left fender of the vehicle was damaged, there was only one individual inside, and the engine was running. Officer Wise identified that individual as defendant, who was sitting in the driver's seat. She told him she was coming from a birthday party in Lincoln Park where she had consumed two beers. Officer Wise testified that from an "arms reach" distance away from defendant, he observed that her eyes were bloodshot, her face was flushed and red, her speech was slurred and mumbled, there was a strong odor of alcohol on her breath, and she did not have any obvious injuries. Officer Wise then ordered her out of the vehicle and directed her to the sidewalk, about 20 feet from the parked vehicle. He noticed that she staggered while she was walking, and was "uneasy on her feet," and when he asked defendant if she was sick or injured, she replied that she was not.

¶ 7 Officer Wise then conducted a series of standardized field sobriety tests, beginning with the "horizontal gaze nystagmus test," in which he observed defendant's eyes display distinct nystagmus at maximum deviation, and onset of nystagmus prior to 45 degrees. He determined that defendant showed six out of six clues of alcohol consumption for that test. Officer Wise then conducted the "walk-and-turn test," and asked defendant to place her right foot in front of her left foot, heel to toe, while keeping her arms to her sides as he explained the test to her. He testified that defendant could not keep her balance while he explained the test to her, and instead "she separated her feet and just stood there with her arms to her side and watched [him] as [he] demonstrated [the test] and she did not touch heel to toe[.]" He also observed that defendant stepped off the line more than three times during the test, took 11 steps instead of nine during the first pass, did not count the steps aloud as instructed, and pivoted incorrectly while turning on the return pass. Of the eight clues of alcohol consumption on this test, where two clues are sufficient

to indicate impairment, defendant demonstrated six. Officer Wise later testified that the sidewalk was slightly inclined, but not enough to affect the outcome of the tests. He then conducted the “one legged stand test,” in which defendant showed signs of impairment because she put her foot down on three separate occasions by the time she got to 10 seconds, and was never able to make it to 30 seconds without putting her foot down. Of the four clues of alcohol consumption in this test, where two clues are sufficient to indicate impairment, defendant demonstrated three.

¶ 8 Based on Officer Wise's personal and professional experience, and defendant's performance on the field sobriety tests, he opined that defendant was under the influence of alcohol, and took her into custody for DUI at 12:10 a.m. He transported her to the 18th District police station, sat her down in an interview room, handcuffed her to a metal bar, and momentarily left the room. When he returned at 12:27 a.m., he read defendant the “Warnings to Motorist” and asked her if she would submit to a Breathalyzer test. Defendant refused the test, and still demonstrated signs of impairment at that time, including slurred speech, a flushed face and a strong odor of alcohol on her breath. Office Wise then called in a licensed breath analysis operator at 1:20 a.m., who asked defendant a second time if she would submit to a Breathalyzer test, and she refused.

¶ 9 Officer Wise also testified that after defendant was taken into custody, he had the opportunity to look inside her vehicle. In the pocket of the driver's side door, he found an open 7 ounce bottle of Corona beer "with a little bit of liquid and crushed lime in it[,]” which smelled like beer, and in the back seat, he found a cooler with two sealed 7 ounce bottles of Corona beer, one empty 7 ounce bottle, and a Ziploc bag with cut limes. Officer Wise testified that the contents of the bottles discovered in defendant's car were not analyzed. During cross examination, Officer Wise acknowledged that he noted in his police report that the open bottle

was found in the passenger side door pocket, but remembered that he found it in the driver's side door pocket.

¶ 10 Joe Mustari testified for the defense that he had known defendant for 15 years, and that she had picked him up from his house on the night of the accident and drove him to a friend's birthday party. Mustari testified that he had a couple of beers at the party and that defendant, who was in the same room with him, also had a couple of beers. They left the party together, she drove him to his house, and Mustari did not believe that defendant was under the influence of drugs or alcohol at that time. During cross examination, Mustari stated that he and defendant were "good friends" and he would not want to see her get into trouble. He acknowledged that the party was held in a room with a dozen or so other people, and he assumed that defendant consumed the same number of beers as he did, but he did not count them. He did not know there were bottles of Corona in the vehicle, and denied consuming any of them.

¶ 11 Defendant testified that on September 3, 2010, she picked up Mustari in her automobile and they drove to a friend's birthday party. She and Mustari stayed at the party for approximately two hours, where she consumed two beers. Defendant then dropped Mustari off at his place and began driving back home. As she headed westbound on Chicago Avenue, she observed a number of emergency vehicles on her right and construction on her left, just west of Larrabee street. She also observed that the traffic on Chicago Avenue merged into one lane there and "[t]he whole area was a mess because all lanes of traffic were trying to merge at the same time at that intersection[.]" and her attention was focused on the emergency vehicles to the right. Defendant testified that as she drove towards the intersection, an ambulance clipped her driver's side mirror, and she instinctively jerked from that impact and hit the rear end of the ambulance. Defendant heard sirens but thought they came from the ambulance to her right, and testified that

she hit the right side of her forehead on her steering wheel when she collided with the ambulance.

¶ 12 After the accident, defendant pulled her vehicle over to the valet area of the restaurant west of Larrabee Street, and waited for someone to approach her. After some time, a male police officer arrived, asked her to step out of the car, and took her to the sidewalk where he made her perform several tests. Defendant testified that at the time of the accident, she was feeling "kind of woozy, [and she] was upset, [she] was in an accident, there was lot [sic] going on around [her], [she] was tired, [and she] had worked late[.]"

¶ 13 Defendant recalled doing the "horizontal gaze nystagmus test," "walk-and-turn-test" and the "one-leg test," and testified that the area where she performed the test was on an incline, and that she was wearing flip flops. She remembered having "done fine" on those tests, after which she was handcuffed and taken to the 18th District station in a squad car. Defendant further testified that she was put in an interview room and handcuffed to the wall at the station, and after an hour or two she was brought out of the interview room to speak with the breath analysis expert who asked her to submit to a Breathalyzer test. She asked him if she could speak to an attorney, he said "ok," and walked away, and she was led back to the interview room. She denied reading the Warnings to Motorists, or having the warnings read to her by Officer Wise, and also denied being asked to submit to a Breathalyzer test by Officer Wise when he first brought her into the interview room.

¶ 14 Defendant also testified that she ingested medication for allergies which affected her eyes, and that she was always flushed because of rosacea. On cross examination, she acknowledged that she did not recall seeing any bruising or cuts on her forehead the next day, did not tell Officer Wise that she felt woozy or that her head hurt during the field sobriety tests,

and did not request medical assistance at the police station.

¶ 15 Defendant further testified that she was unaware of the bottles of Corona inside the vehicle at the time of the incident. She assumed they were there from the prior weekend when she and a friend went sailing on a friend's boat and left the empty bottles in a cooler in the backseat of her automobile so that she could discard them later.

¶ 16 Following closing arguments, the court found defendant guilty of failing to yield the right of way to an emergency vehicle, DUI, and illegal transportation of alcoholic liquor in a motor vehicle. In this appeal from that judgment, defendant challenges the sufficiency of the evidence to prove her guilty beyond a reasonable doubt of DUI, and illegal possession and transportation of alcoholic liquor in a motor vehicle.

¶ 17 ANALYSIS

¶ 18 When presented with a challenge to the sufficiency of the evidence to sustain a conviction, the relevant question for the reviewing court 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. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). It is not the function of the reviewing court to retry defendant, reweigh the evidence, or substitute its judgment for that of the fact finder. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Rather, it is the responsibility of the trier-of-fact to determine the credibility of the witnesses, and the weight to be given their testimony, to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). This court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable, or inconclusive that it creates a reasonable doubt of defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶ 19 To prove defendant guilty of the offense of DUI, the State must show that defendant drove or was in actual physical control of a vehicle while under the influence of alcohol (625 ILCS 5/11-501(a)(2) (2010)). *People v. Diaz*, 377 Ill. App. 3d 339, 344 (2007). The issue of actual physical control is determined on a case-by-case basis, giving consideration to factors such as whether defendant: (1) possessed the key to the ignition; (2) had the physical capability of operating the vehicle; (3) was positioned in the driver's seat; and (4) was alone in the vehicle with the doors locked. *People v. Kiertowicz*, 2013 IL App (1st) 123271, ¶ 21. To prove that defendant was under the influence of alcohol, the State was required to show that 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 [herself] and the public." *People v. Gordon*, 378 Ill. App. 3d 626, 632 (2008).

¶ 20 When viewed in the light most favorable to the State, the evidence showed beyond a reasonable doubt that defendant had actual physical control of her vehicle. *Kiertowicz*, 2013 IL App (1st) 123271 at ¶ 22. Officer Wise testified that he approached defendant's vehicle and observed that she was the only individual in the automobile, and was sitting in the driver's seat with the engine running. Defendant, herself, testified that she was driving her vehicle at the time of the accident, and pulled over to the valet area of a nearby restaurant and parked there as she waited for an officer to approach her. Greer testified that he observed defendant exit the vehicle that had collided with his ambulance when Officer Wise arrived at the scene and asked defendant to step out of her automobile. This evidence thus established the first element of this offense.

¶ 21 As to the second element, we observe that scientific proof of impairment is unnecessary to sustain a DUI conviction where there is credible testimony from the arresting officer. *Gordon*, 378 Ill. App. 3d at 632. In this case, Officer Wise testified that he could smell alcohol on

defendant's breath, her eyes were bloodshot, her face was flushed, her speech was slurred, and she was unsteady on her feet when she exited her vehicle. Even assuming defendant's bloodshot eyes and flushed appearance could be explained by allergies and rosacea, respectively, defendant still failed all three of the field sobriety tests, admitted to drinking two beers prior to driving, and possessed in her vehicle both opened and unopened bottles of beer. Officer Wise accordingly testified that based on his personal and professional experience defendant was in fact under the influence of alcohol, an opinion the fact finder was free to accept. See *People v. Morris*, 2014 IL App (1st) 130512, ¶ 35 ("A court may rely on the observations of a trained police officer in making a judgment about the intoxication level of a defendant."). In addition, the evidence demonstrated that defendant twice refused to submit to a breathalyzer test, which may be considered as circumstantial evidence of defendant's consciousness of guilt. *People v. Johnson*, 218 Ill. 2d 125, 140 (2005). Viewed in the light most favorable to the prosecution, the totality of this evidence is sufficient to support the trial court's finding that defendant was proved guilty of DUI beyond reasonable doubt. *People v. Diaz*, 377 Ill. App. 3d 339, 345 (2007).

¶ 22 This conclusion is not altered by defendant's claim that Muscari supported her testimony that she only had two beers and was not driving while intoxicated. It is the responsibility of the trier of fact to determine the credibility of the witnesses, the weight to be given their testimony, and to resolve any inconsistencies and conflicts in the evidence. *Campbell*, 146 Ill. 2d at 375 (1992). Here, Muscari acknowledged that he was "good friends" with defendant, and merely assumed that defendant drank two beers as he did, but he did not actually observe how much alcohol she had consumed prior to leaving the party, nor could he testify to defendant's actions after she dropped him off. Based on the trial court's ultimate ruling, it is evident that the trial court did not give much weight to Muscari's testimony, which may have been affected by

Muscari's bias or interest (*People v. Reed*, 80 Ill. App. 3d 771, 781 (1980)), and we will not reweigh the evidence, or substitute our judgment for that of the fact finder (*Sutherland*, 223 Ill. 2d at 242 (2006)).

¶ 23 Defendant also contends that in finding her guilty of DUI, the court incorrectly interpreted the evidence and found that the two vehicles involved in the accident were travelling toward each other, and that "this finding alone makes the court's verdict so unsatisfactory that reversal is warranted." This argument is not supported by the record.

¶ 24 Prior to announcing its decision, the trial court reviewed the evidence presented at trial, including Greer's testimony. The court recalled that "Greer testified that while moving in the westbound lane in the opposite direction, he was struck by a vehicle on the passenger's rear[.]" and noted that "if the cars made a point of impact as described[.], the front end of defendant's car to the rear of the ambulance[.], and that ambulance had all the emergency equipment on[.], then that vehicle should have been seen by the defendant certainly with time to move." In addition, defendant acknowledges that she and Greer both testified that they were traveling westbound on Chicago Avenue when the collision between the front end of her car's driver's side and the rear passenger side of the ambulance took place, and the reports of the damage to each vehicle are consistent with this account. We thus find no confusion or conflict as to this evidence or basis to support defendant's claim that the court misunderstood the evidence presented, and call its ultimate decision into question.

¶ 25 Defendant also contends that the evidence was insufficient to find her guilty of transporting alcoholic liquor in a motor vehicle, because there was no evidence that the open bottle of beer discovered in her vehicle contained alcoholic liquor. We disagree.

¶ 26 Pursuant to section 11-502 of the Illinois Vehicle Code (Code), no driver may transport,

carry, possess or have any alcoholic liquor within the passenger area of any motor vehicle upon a highway in this State except in the original container and with the seal unbroken. 625 ILCS 5/11-502(a) (2008); *People v. Angell*, 184 Ill. App. 3d 712, 714 (1989). Defendant does not contest that she was the driver of her vehicle, or that Officer Wise discovered an open 7 ounce bottle of Corona beer "with a little bit of liquid and crushed lime in it[,] in the automobile, but argues instead that the contents were not analyzed to prove that the liquid was beer, and could have been "juice from the lime which at one time had contact with the beer." Defendant cites no authority for her argument that a scientific analysis is necessary to convict under section 11-502(a) of the Code, and we are unaware of any authority which suggests such a conclusion. Instead, the trial court could properly rely on the arresting officer's testimony to prove this element of the offense. *Angell*, 184 Ill. App. 3d at 717.

¶ 27 Here, Officer Wise identified the liquid in the open beer container as alcoholic because he was familiar with the smell of beer, and the contents of the bottle smelled like "beer, an alcoholic beverage." Defendant herself acknowledged that there were beer bottles in her automobile at the time of the incident, although she testified that she was unaware of their presence, and assumed that they were there from a prior weekend when she and a friend went sailing. We find this evidence and the reasonable inferences therefrom sufficient to allow the trial court to find that the State proved beyond a reasonable doubt that defendant illegally transported alcoholic liquor in an open container within her vehicle. *Angell*, 184 Ill. App. 3d at 717-18.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.