



to trial. Defendant also contends that trial counsel provided ineffective assistance because he did not obtain the police video recording. She finally contends that she was not proven guilty beyond a reasonable doubt of DUI or driving without a license where the evidence failed to show that she was driving or in actual physical control of the vehicle. We reverse the judgment of the circuit court of Cook County.

¶ 3 Defendant was charged with one count of driving without a license (625 ILCS 5/6-101 (West 2012)) and one count of DUI (625 ILCS 5/11-501(a)(2) (West 2012)). The charges stemmed from a January 17, 2013, incident where a tow truck driver allegedly observed defendant in the driver's seat of a vehicle that was broken down in the left lane of Lake Shore Drive, and the tow truck driver and a police officer believed that defendant was under the influence of alcohol.

¶ 4 At trial, David Stenson (Stenson) testified that he drove a tow truck for the City of Chicago. Stenson received a call that a vehicle was broken down in the left lane on Lake Shore Drive at approximately 10:52 p.m. on January 17, 2013. He proceeded to approximately 1101 North Lake Shore Drive and saw two people inside the vehicle in question in the left lane. He also observed plastic food containers outside the vehicle, on the passenger's side, in the third traffic lane of Lake Shore Drive. Stenson saw the male passenger, later identified as Robert Campbell (Campbell), fall out of the vehicle into the third lane of traffic. Stenson picked him up, put him on the vehicle, and saw defendant sitting in the driver's seat. He told her to get out of the vehicle so that it could be moved off Lake Shore Drive. Defendant initially refused to exit the vehicle. She was slurring and "very incoherent." Stenson testified that he "begged" her to leave the car, because "traffic was flying" and the area was dangerous. He called the police. When the

police didn't come, he escorted defendant and Campbell to his tow truck. Defendant was falling and staggering. Both defendant and Campbell fell into the third lane of traffic and cars were "slamming on their brakes." Once inside the tow truck, defendant became belligerent and started swearing and yelling at Stenson, who could smell alcohol on her breath. Stenson testified that he intended to take defendant, Campbell, and the car to a gas station so the tire could be repaired, but, given defendant's behavior, he instead got off Lake Shore Drive at the next exit, which was North Avenue beach. He told them to get out of the tow truck, which they did. The police arrived shortly thereafter. Stenson saw defendant stagger toward one of the officers and make a statement to him. When Campbell walked to the front of the squad car, defendant hit Campbell in the face and knocked him down. Police then arrested defendant. Stenson testified that based on his experience, he believed defendant was under the influence of alcohol.

¶ 5 On cross-examination, Stenson denied telling the police that defendant and Campbell jumped out of the vehicle upon his arrival. He also denied telling the police that defendant and Campbell were standing in a lane of traffic creating a hazard to themselves and that was why he asked them to get into the tow truck.

¶ 6 Officer Robert Tores (Officer Tores) testified that he drove to the area near the North Avenue beach exit of Lake Shore Drive where police, the tow truck, and the subject vehicle were located. He saw defendant and attempted to interview her. She exhibited signs of impairment. Her speech was slurred, she had glossy red eyes, she was stumbling and needed assistance to stand, was yelling and uncooperative, and her breath smelled like alcohol. Defendant refused Officer Tores' request to perform field sobriety tests and she was transported to the police station.

At the station, defendant refused to take a breathalyzer test. Based on his experience, Officer Tores believed defendant was under the influence of alcohol.

¶ 7 On cross-examination, Officer Tores testified that he spoke to Stenson at the North Avenue beach exit of Lake Shore Drive. Stenson told him that, when he arrived at the car on Lake Shore Drive, defendant jumped out of the driver's side of the vehicle and Campbell jumped out of the passenger side. Stenson told them to get inside his tow truck as they were creating a hazard standing in the traffic lane. Officer Tores did not recall seeing defendant hit Campbell, nor did he recall who owned the vehicle. Officer Tores remembered that Campbell had the keys of the vehicle on his person, but did not recall if they were in his pocket.

¶ 8 Following Officer Tores' testimony, the State introduced into evidence the Secretary of State driver's abstract with defendant's date of birth and name indicating that she did not have a valid driver's license on the day in question. The State rested.

¶ 9 In defendant's case-in-chief, Campbell testified that he and defendant, his girlfriend, ate dinner and drank wine at a restaurant in Greektown on January 17, 2013. He had a "glass of wine." Following dinner, Campbell drove his vehicle on Lake Shore Drive just before 11 p.m. Defendant was with him in the vehicle, but she was never in the driver's seat. He hit a pothole that damaged his left front tire and broke the wheel. He drove a short distance and then pulled the car over to the left and called a tow truck. When it arrived, Campbell and defendant were outside of the vehicle, and Campbell started walking toward the tow truck. The tow truck driver never asked Campbell or defendant to enter the truck in order to be taken to a different location, nor did Campbell ever get into the truck to be taken to North Avenue beach. Instead, a police

officer drove Campbell home, and defendant was taken away in a squad car. Defendant never hit Campbell on the date in question and was never in the driver's seat of the vehicle.

¶ 10 Defendant testified that, on January 17, 2013, she was a passenger in Campbell's car, which he was driving home following their dinner at a restaurant in Greektown. Defendant admitted that she had a "few glasses of wine" that evening and was drunk. While on Lake Shore Drive, Campbell hit a pothole causing a flat tire. Campbell pulled over to the left side of Lake Shore Drive and he and defendant exited the vehicle. When checking the tire, Campbell fell down onto the ground. Campbell called a tow truck. When it arrived, Campbell and defendant walked toward it. Campbell never fell out of the passenger's seat of the vehicle when the tow truck arrived. Subsequently, the police arrived, handcuffed defendant, and took her away from the scene in a police car. She never rode in the tow truck, nor was she transported to North Avenue beach. Defendant denied hitting Campbell at the scene.

¶ 11 Following closing argument, the trial court found defendant guilty of DUI and driving without a license. In doing so, the court acknowledged that the case turned on the issue of credibility, which it resolved "well in favor of the State's witnesses." It stated that it believed Stenson's testimony, adding that he had no reason to lie.

¶ 12 Defendant, through newly appointed counsel, filed a motion for a new trial, arguing that she was not proven guilty beyond a reasonable doubt and that she was provided ineffective assistance of trial counsel in that counsel failed to properly investigate the charges and the defense, prepare for trial, and call essential witnesses to prove that she did not drive on the night in question and had not driven in years. Counsel subsequently filed a posttrial motion for discovery, requesting that the State produce all video and audio related to the arrest as referenced

in the alcohol/drug influence report. After receiving the video recording, defendant filed an amended motion for new trial, adding that the State failed to produce the subject video recording in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Defendant attached to her amended motion affidavits from several people, including herself, attesting that she did not drive.

¶ 13 At the hearing on the motion for new trial, defense counsel presented several witnesses. Gus Kriaras (Kriaras) testified that he was a manager at Athena Restaurant and that defendant and Campbell were regular customers. Kriaras interacted with them every time they were at the restaurant, and he never saw defendant drive a vehicle leaving the restaurant. However, he had seen Campbell driving a vehicle. On the evening in question, Kriaras saw defendant and Campbell enter the restaurant. They left two to three hours later, and it was Campbell who drove away from the restaurant when the two left.

¶ 14 Dorian Motton (Motton) testified that he was employed with Standard Parking at a condominium building located at 5455 North Sheridan Road. Motton knew both defendant and Campbell, and testified that Campbell owned a silver Toyota Solara that Motton had only seen Campbell drive the car, never defendant.

¶ 15 There was also evidence that defendant on occasion employed a driver instead of driving herself. Campbell testified that he lived at 5455 North Sheridan Road and drove a Toyota Solara. Defendant had never driven his vehicle, was not driving it on the evening in question, and he did not give her his car keys. After his car became immobilized on Lake Shore Drive, defendant put the leftovers from the restaurant outside of the vehicle. Defendant was never in the driver's seat of the vehicle. Campbell claimed in his testimony that he never told the police that he was the one driving because the police indicated that no one was being arrested and since he had a prior

DUI, he did not volunteer that information. He claimed he was not intoxicated that night but defendant was.

¶ 16 Lamont Cooper (Cooper), defendant's brother, testified that Campbell called him during the early morning hours of January 18, 2013, and told him that defendant was improperly arrested as she was not the driver of the vehicle. Cooper testified that during the call, Campbell explained that he had several prior DUIs, and that he wanted defendant to "take the case for him."

¶ 17 Following argument on the motion for a new trial, the court denied the motion. In doing so, the court stated that it heard the testimony at trial and at the hearing on the motion, read the affidavits, and reviewed the video recording. The court again found Stenson's trial testimony "absolutely credible." It found that the witnesses who testified at the hearing "add[ed] nothing," and ownership of the vehicle was irrelevant. In making its ruling, the court stated: "one thing that concerned me was the key. But in the video I see [defendant] drop something and Bob Campbell pick it up. Watched it several times. I don't know if it was the key, but I do know there was a whole time between the time that they were on the road and transported." The court found that the video recording was further evidence of defendant's guilt. It held that defendant was definitely in the driver's seat and in actual physical control of the vehicle. The court then sentenced defendant to a cumulative term of one year of supervision. Defendant filed a motion to reconsider her sentence, which was also denied. Defendant filed a timely notice of appeal. Accordingly, we have jurisdiction.

¶ 18 Defendant contends that she was not proven guilty beyond a reasonable doubt of DUI because there was no reliable evidence presented that she ever drove the vehicle or was in actual physical control of the vehicle on the night she was arrested.

¶ 19 When a defendant challenges the sufficiency of the evidence to sustain a conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime *beyond a reasonable doubt*. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). This standard recognizes the responsibility of the trier of fact to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences therefrom. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable or improbable as to raise a *reasonable doubt* of the defendant's guilt. *People v. Bradford*, 2016 IL 118674, ¶ 12.

¶ 20 However, " [i]f a court determines that the evidence is insufficient to establish the defendant's guilt beyond a reasonable doubt, the defendant's conviction must be reversed." "*People v. Clinton*, 397 Ill. App. 3d 215, 220 (2009) (quoting *People v. Woods*, 214 Ill. 2d 455, 470 (2005)). Where the State has failed to prove its case, remand is not an option. *Woods*, 214 Ill. 2d at 470-71. Instead, a judgment of acquittal is the only appropriate remedy. *Id.*

¶ 21 Under section 11-501(a)(2) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501(a)(2) (West 2012)), "[a] person shall not drive or be in actual physical control of any vehicle" while under the influence of alcohol. Defendant does not contest that she was under the influence of alcohol. Instead, she contends that the State failed to prove that she was driving or in actual physical control of the vehicle at the time of her arrest.



¶ 22 "In Illinois, a vehicle need not be moving or the engine running for the driver to be in actual physical control for purposes of driving under the influence." *People v. Morris*, 2014 IL App (1st) 130512, ¶ 28. The purpose of the statute is to discourage intoxicated people from entering motor vehicles, unless they are passengers. *City of Naperville v. Watson*, 175 Ill. 2d 399, 404 (1997). To that end, the statute only requires "actual physical control" of a vehicle. *Id.* The term is unqualified, suggesting that the defendant's purpose in occupying the vehicle is not "germane to criminal responsibility." *Id.* "An intoxicated individual who gets into his vehicle to sleep poses a threat of immediate operation of his vehicle at any time while still intoxicated." *Id.* Actual physical control is determined on a case-by-case basis, giving consideration to factors such as whether defendant possessed the key to the ignition, was positioned in the driver's seat, was alone in the vehicle and the doors were locked. *People v. Slinkard*, 362 Ill. App. 3d 855, 859 (2005). The factors enunciated here merely provide a guideline to determine if the defendant was in actual physical control of the vehicle, and the list is not exhaustive and the absence of a factor is not controlling. *Id.*

¶ 23 The evidence in the instant case, even when viewed in the light most favorable to the State, failed to establish that defendant was driving or in actual physical control of the vehicle *beyond a reasonable doubt*. There was no evidence presented at trial that defendant drove the subject vehicle. Tow truck driver Stenson never testified that he saw defendant driving when he arrived on the scene, and Officer Tores only saw defendant, Campbell, and Stenson after Stenson had relocated everyone to the North Avenue beach area of Lake Shore Drive. Campbell and defendant both testified that Campbell drove the vehicle, and defendant did not have a driver's license. Moreover, during the hearing on defendant's motion for a new trial, defendant presented

several witnesses who testified that defendant did not drive and had not driven in years. In particular, Gus Kriaras, the manager of the restaurant where defendant and Campbell dined on the evening in question, testified that he saw Campbell and defendant leave the restaurant in a vehicle it was Campbell that drove away from the restaurant. Finally, the video recording did not show defendant driving the vehicle.

¶ 24 The only evidence at trial showing that defendant was in actual physical control of the vehicle was Stenson's testimony that defendant was in the driver's seat when he approached the vehicle on Lake Shore Drive. In its findings, the trial court stated that Stenson had no reason to lie about the fact that defendant was in the driver's seat. However, there was evidence that defendant acted belligerently toward Stenson, and the video recording never showed defendant hit Campbell, as Stenson had testified at trial. In addition, there was evidence that defendant and or Campbell had been outside of the vehicle *before* Stenson arrived.

¶ 25 Nevertheless, even assuming defendant was in the driver's seat of the vehicle when Stenson arrived, that fact alone was insufficient to find that defendant was in actual physical control of the vehicle. The evidence presented at trial and during the hearing on the motion for a new trial, did not show that there were keys in the ignition when Stenson claimed that defendant was in the driver's seat. On the contrary, the evidence showed that defendant did not have the keys to the vehicle and the keys were in Campbell's possession. Further, the video recording which the trial court suggested depicts Campbell retrieving the car keys after they are dropped by defendant, does nothing to support that belief. Our repeated review of the video shows Campbell retrieving something which he or someone else may have dropped. It cannot be discerned from the video whether it was Campbell or someone else who dropped the items, nor what the item is.

Further, it is undisputed that the vehicle belonged to Campbell, other people saw Campbell driving away from the restaurant prior to the occurrence, and Campbell had prior DUIs that, which according to Lamont Cooper's testimony, was why Campbell wanted defendant to the "take the case for him."

¶ 26 Moreover, although the trial court found that the video recording provided additional proof that defendant was guilty, the court failed to explain how the video was further evidence of defendant's guilt. As discussed, the video recording, in addition to the depiction discussed, did not show defendant in the driver's seat or show defendant in possession of the vehicle's keys at any time. Further the police officer testified that Campbell had the car keys. Therefore, only one of the *Slinkard* factors was arguably met here, *i.e.*, that defendant was in the driver's seat when Stenson arrived. *Slinkard*, 362 Ill. App. 3d at 859. However, there was also evidence that both defendant and Campbell had been outside the vehicle before Stenson arrived and may not have been in their original seats. Although the *Slinkard* factors only provide a guideline to determine if the defendant was in actual physical control of the vehicle (*id.*), in evaluating the particular facts of this case, we find that no rational trier of fact could have found *beyond a reasonable doubt* that defendant was in actual physical control of the vehicle based solely on Stenson's statement that he saw defendant in the driver's seat upon his arrival on the scene.

¶ 27 In reaching this conclusion, we find *Morris*, 2014 IL App (1st) 130512, relied on by the State, distinguishable from the case at bar. In *Morris*, the defendant was convicted of aggravated DUI. On appeal, the defendant argued, in part, that he was not in actual physical control of the vehicle. This court rejected defendant's contention, finding that although defendant was asleep in a vehicle with the door open and the vehicle's keys in his hand he could have awakened, closed

the door, and driven away. *Id.* ¶¶ 18-19. Here, however, there was no such evidence that defendant could have simply driven away from the scene. On the contrary, the evidence suggests that she could not have driven away. Even if we assume, *arguendo*, that defendant was in the driver's seat, there was no evidence presented at trial to indicate that she possessed the keys or that the car was operable. Instead, Officer Tores indicated that Campbell possessed the keys and Stenson implied that the care was inoperable necessitating towing. The State's suggestion that defendant could have easily obtained the keys from Campbell in order to drive away does not persuade us that she was in actual physical control of the vehicle and could have thus driven away at will. We thus reverse defendant's DUI conviction.

¶ 28 Additionally, defendant was not proven guilty beyond a reasonable doubt for driving without a license (625 ILCS 5/6-101 (West 2012)), since the State failed to prove that she was driving. Although defendant does not contest that she did not have a license on the night in question, as discussed above, the evidence did not show that defendant was driving or in actual physical control of the vehicle. Therefore, defendant's conviction for driving without a license cannot stand.

¶ 29 In light of our holding, we need not decide whether the State committed a discovery violation for withholding an in-squad video recording, or whether trial counsel was ineffective for not obtaining the video recording prior to trial, as these issues are now moot.

¶ 30 For the foregoing reasons, we reverse the judgment of the circuit court.

¶ 31 Reversed.