

2016 IL App (2d) 140700-U
No. 2-14-0700
Order filed September 29, 2016

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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 McHenry County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 13-CF-723
)	
JOSHUA HACHMEISTER,)	Honorable
)	Gorden E. Graham,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* In this DUI action, the trial court committed reversible error in excluding evidence that the arresting officer was biased against defendant, and the error was compounded by the court admitting defendant's prior conviction for impeachment purposes without first balancing its probative value against its prejudicial effect.

¶ 2 Wonder Lake police officer Timothy Harding saw defendant, Joshua Hachmeister, driving at a time when the officer knew that defendant's driving privileges had been revoked. The officer testified that he pulled over defendant and observed indicia of driving under the influence of alcohol, which he allegedly confirmed with three field sobriety tests. A jury found defendant guilty of aggravated driving while under the influence of alcohol (DUI) (see 625 ILCS

5/11-501(a)(2), 11-501(d)(1)(A) (West 2012)), based on his history of DUIs. The trial court imposed a 5½-year prison sentence.

¶ 3 The parties accurately agree that the conviction rests solely on the jury's assessment of the credibility of the witnesses, including defendant. Defendant's theory is that Officer Harding fabricated the charged offense as part of a pattern of harassment. Defendant attempted to introduce evidence that (1) he and the officer had a history of altercations; (2) defendant called the chief of police several times to complain of harassment; and (3) the officer learned of the complaints, threatened retaliation, and arrested defendant for the charged offense the next day. The trial court barred the evidence as irrelevant and hearsay. Conversely, the court allowed the State to use for impeachment purposes defendant's prior felony conviction of unlawful production of cannabis, without evaluating its admissibility under *People v. Montgomery*, 47 Ill. 2d 510 (1971), which the State concedes was error.

¶ 4 We agree with defendant that the trial court violated his right to present a defense by excluding the evidence of the officer's bias, the threat, and the retaliation against defendant. The error was compounded by the court's failure to evaluate defendant's prior conviction under *Montgomery*. The two improper rulings entitle defendant to a new trial.

¶ 5 Defendant alternatively argues that (1) trial counsel rendered ineffective assistance by (i) making an unfulfilled promise to the jury to produce evidence that defendant had no alcohol in his system and (ii) failing to object to the use of the drug conviction for impeachment, and (2) the trial court improperly levied duplicate fines and misapplied credits for time spent in presentence custody. The State concedes that the court erred in calculating the fines and credits. Our holdings regarding the evidentiary questions obviate the need to address defendant's remaining claims of error.

¶ 6

I. BACKGROUND

¶ 7

A. Trial

¶ 8 Defendant was charged with three counts of aggravated DUI (see 625 ILCS 5/11-501(d)(1)(A), (d)(1)(G), (d)(1)(I) (West 2012)), one count of driving with a suspended or revoked license (see 625 ILCS 5/6-303(a) (West 2012)), and one count of operating a motor vehicle while uninsured (see 625 ILCS 5/3-707 (West 2012)). Before trial, defendant pleaded guilty to driving with a suspended or revoked license, and the State proceeded to trial on one count of aggravated DUI. The charge alleged that, on June 9, 2013, defendant drove a motor vehicle while he was under the influence of alcohol and had previously committed at least four violations of the DUI statute. See 625 ILCS 5/11-501(d)(1)(A) (West 2012). The jury heard testimony only from Officer Harding, defendant, and defendant's passenger, Michael Vertucci.

¶ 9

1. The State's Case

¶ 10 Officer Harding testified that, about 6:35 p.m. on June 9, 2013, he was driving southbound on Thompson Road when he saw defendant driving a white GMC truck, which the officer knew was registered to defendant's father. Officer Harding was familiar with defendant and Vertucci. Defendant turned left onto Alden Street, and Officer Harding turned and followed him. Officer Harding did not observe any improper driving, but the officer knew that defendant had a revoked license. Officer Harding activated his emergency lights, and defendant pulled over.

¶ 11 Officer Harding exited his vehicle, approached the truck, and asked defendant why he was driving with a suspended license. Defendant responded that he was on his way to install a door for a friend, but the officer did not see any tools in the truck. Officer Harding testified that he was overwhelmed by the odor of an alcoholic beverage coming from defendant's face and the

vehicle's interior. Defendant's speech was "thick-tongued" and his eyes were bloodshot.

¶ 12 On his police report, Officer Harding described his observations of defendant a bit differently. The report described defendant's breath as moderate and it had no boxes checked to indicate unusual speech. On redirect, Officer Harding explained that the narrative portion of his report mentioned thick-tongued and slurred speech. Under the section labeled "balance," Officer Harding checked "unsure," and left unchecked boxes next to "falling," "wobbly," and "swaying."

¶ 13 Officer Harding testified that he performed three field sobriety tests: the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-legged stand test. The officer gave detailed testimony about his administration of the tests and defendant's performance. He concluded that defendant failed all three tests and arrested him for "suspicion" of DUI and driving with a revoked license.

¶ 14 While transporting defendant to the police station, Officer Harding opened the windows to dissipate the intense odor of alcohol. At the station, defendant refused a Breathalyzer test. Defendant told Officer Harding that he was suffering from a back injury, and an ambulance transported defendant to a hospital emergency room. According to the officer, defendant's blood was not drawn, and he could not use an officer DUI kit because defendant had refused the breath test. Officer Harding opined that defendant was under the influence of alcohol and was unfit to drive, based on his performance in the field sobriety tests.

¶ 15 On cross-examination, defense counsel questioned Officer Harding about three prior interactions with defendant. First, the officer conceded that, the night before the traffic stop, he had issued defendant a citation for disorderly conduct, but he did not recall whether he had pushed defendant against his squad car at the time. Second, defense counsel asked whether,

about a week before the traffic stop, the officer had detained defendant for fishing illegally at Wonder Lake Beach after the park had closed for the evening. The officer testified that he recalled the incident but did not elaborate.

¶ 16 Third, defense counsel asked whether the officer was aware that defendant had called the police chief to complain about the officer's conduct. The State objected to the line of questioning as irrelevant. The trial court sustained the objection. Defense counsel followed up by asking whether the officer had stopped by defendant's home the night before the incident to tell him to stop making the phone calls. The court sustained the State's objection to that question as well.

¶ 17 Following Officer Harding's testimony, the State requested a hearing on whether defendant's felony conviction of unlawful production of cannabis was admissible for impeachment purposes against defendant if he decided to testify. Defense counsel objected to the hearing as premature, but the court ruled that the issue was properly raised because the State had produced a certified copy of conviction. The court summarily ruled that "[i]f defendant chooses to take the stand, under the law, I would allow the evidence of that conviction as it would be properly before the court." Later, on direct examination of defendant, defense counsel introduced the conviction preemptively, eliciting testimony that defendant currently was on probation for that offense.

¶ 18 2. Defendant's Case

¶ 19 Vertucci testified to the circumstances of the traffic stop and stated that he was with defendant all day and that neither he nor defendant consumed alcohol that day. Defendant was driving properly at the time of the stop. Defense counsel questioned Vertucci about his observations of prior encounters between Officer Harding and defendant. Vertucci responded

that he knew the officer from previous encounters, but the State objected to the questions as irrelevant, and the court sustained the objections.

¶ 20 Defense counsel made an offer of proof to show that defendant called the police department several times to report Officer Harding's harassment. Phone records show that, on the day before the traffic stop, defendant called 411 at 1:06 p.m. Defendant then called 911 at 1:08 p.m., 6:06 p.m., and 7:06 p.m. Each call was one to five minutes. Counsel argued that the phone calls were relevant and admissible to show that defendant had contacted the police to complain about Officer Harding's harassment, the officer became aware of the calls, the officer threatened defendant, and the officer's testimony was in retaliation for defendant's complaints.

¶ 21 Defendant testified that he did not consume any alcohol on the date of the traffic stop. He admitted to driving without valid driving privileges but denied violating any other traffic laws. Defendant stated that he had several prior altercations with Officer Harding before the date of the arrest, but the court excluded all details as irrelevant or hearsay. Without giving any details, defendant mentioned altercations with the officer while burning wood in his back yard or fishing. The court barred defendant from testifying about contacting the Wonder Lake police chief and denied counsel a sidebar to discuss the matter.

¶ 22 Defendant testified that, after he performed the field sobriety tests, he was transported to the police station. Defendant declined a Breathalyzer test but told Officer Harding that he would submit to a blood test if it was administered by a neutral party at the hospital. Defendant testified that his blood was drawn at the hospital, but no results of a blood test were introduced.

¶ 23 **3. Judgment**

¶ 24 The jury found defendant guilty of aggravated DUI. Defense counsel moved for a new trial on the grounds that he was prejudiced by the introduction of his prior drug conviction and

the exclusion of his prior contacts with Officer Harding. The court denied the motion and sentenced defendant to 5½ years' imprisonment. This timely appeal followed.

¶ 25

II. ANALYSIS

¶ 26

A. Alleged Bias

¶ 27 Defendant argues that he was denied the right to present a defense when the trial court excluded testimony regarding past altercations with Officer Harding. In the presentence investigation report, defendant stated that he would have testified that the officer had a history of harassing and bullying him, including recent incidents at Wonder Lake Beach and in defendant's backyard. Defendant indicated that, on Saturday June 8, 2013, the day before the traffic stop, he called the police dispatcher several times to complain. The dispatcher allegedly told defendant that "he wasn't the only one" to complain and that the Wonder Lake police chief would be at the station and available to speak with defendant on the following Monday. The parties agree that, later that evening, Officer Harding cited defendant for disorderly conduct at his home. Defendant alleges that Officer Harding learned of the complaints, sought out defendant, and said he was "going to get" defendant if he called again to complain. Defendant stated that he never got the chance to speak to the police chief because Officer Harding arrested him the next day. Defendant argues on appeal that the prior contacts and the officer's statement indicate a bias against defendant and a motive to falsely accuse him of DUI.

¶ 28 An individual charged with a criminal offense has the right to present one or more defenses to the offense, and to present his or her " 'version of the facts as well as the prosecution's to the [trier of fact] so it may decide where the truth lies.' " *People v. Manion*, 67 Ill. 2d 564, 576 (1977) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)). Consistent with the right to present a defense, the accused has the right to show, by competent evidence, facts

that tend to negate one or more elements of the charged offense. *Manion*, 67 Ill. 2d at 576. A trial court's evidentiary rulings that restrict the defendant's right to present a defense are reviewed under an abuse of discretion standard. *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 48.

¶ 29 Moreover, a criminal defendant has a constitutional right to confront the witnesses against him. See U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §8; *Crawford v. Washington*, 541 U.S. 36, 54 (2004). The right to confront witnesses includes the right to cross-examine a witness for purposes of showing interest, bias, or motive to testify falsely. *People v. Sims*, 192 Ill. 2d 592, 624-25 (2000). A defendant should be afforded wide latitude in attempting to establish a witness's bias or motive, but the scope of cross-examination remains within the trial court's discretion. *People v. Robinson*, 349 Ill. App. 3d 622, 632-33 (2004).

¶ 30 Here, the trial court excluded most of the challenged evidence as irrelevant. The trial court has discretion to determine whether evidence is relevant and admissible, and therefore, an evidentiary ruling will not be overturned unless it is arbitrary, fanciful, or unreasonable. *People v. Hanson*, 238 Ill. 2d 74, 101 (2010). Evidence is relevant if it has “ ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’ ” *People v. Monroe*, 66 Ill. 2d 317, 322 (1977) (quoting Fed. R. Evid. 401). A court may exercise its discretion and exclude evidence, even if it is relevant, if the danger of unfair prejudice substantially outweighs its probative value. *Hanson*, 238 Ill. 2d at 102.

¶ 31 We agree with defendant that the challenged evidence is relevant and that its probative value greatly outweighs its potentially prejudicial effect. See *People v. Gonzalez*, 120 Ill. App. 3d 1029, 1036 (1983) (citing *Davis v. Alaska*, 415 U.S. 308, 316 (1974)) (evidence of a witness's

biases, prejudices, or ulterior motives is “always relevant”). We further agree with defendant that this case is similar to *People v. Averhart*, 311 Ill. App. 3d 492 (1999), where the accused was arrested by a police officer for possession of a controlled substance. Almost a year before that arrest, however, the defendant was arrested by the same police officer in an unrelated matter where a scuffle ensued, causing injuries to the defendant and the officer. *Averhart*, 311 Ill. App. 3d at 494. The defendant had filed a complaint with the Office of Professional Standards (OPS), alleging physical abuse, verbal abuse, and false arrest. The complaint against the officer was “not sustained,” and the defendant was ultimately found not guilty of the underlying possession charge. *Averhart*, 311 Ill. App. 3d at 494. At the defendant’s second trial, he sought to introduce evidence of the prior OPS complaint to show possible bias or motive that might color the officer’s testimony. The trial court, however, precluded the defendant from cross-examining the officer regarding the specifics of the OPS complaint. *Averhart*, 311 Ill. App. 3d at 494-95.

¶ 32 The Appellate Court, First District, reversed the trial court’s limitation on the officer’s testimony. After observing that the trial’s outcome turned almost entirely on credibility determinations, the reviewing court held that the OPS complaint from a prior arrest was very relevant in showing bias or motive in the officer’s testimony. *Averhart*, 311 Ill. App. 3d at 499. Furthermore, because part of the defendant’s theory at trial was that the officer had planted evidence to make the arrest, the court noted that evidence showing motive to testify falsely could not be called collateral and the defendant had a right to develop his theory. *Averhart*, 311 Ill. App. 3d at 501.

¶ 33 In *Averhart*, the defendant’s theory was that an officer had allegedly framed him in retaliation for an altercation during a prior arrest, and the appellate court held that the defendant was denied his right to introduce the circumstances of the prior altercation and any threats of

retaliation by the officer. Likewise, in this case, defendant and Officer Harding allegedly had prior altercations resulting in defendant calling the police department to complain of harassment. The correlation between the alleged harassment and defendant's arrest is even stronger here, where defendant allegedly called in his complaints the day before the arrest, and there is no evidence that those complaints were ever investigated. In *Averhart*, the OPS complaint was made a year before the arrest at issue, and the complaint was "not sustained." *Averhart*, 311 Ill. App. 3d at 494.

¶ 34 Here, on the day that defendant voiced his complaints, the officer allegedly confronted and threatened defendant at his home. The next day, and before defendant could speak with the police chief, the officer spotted defendant driving. The officer properly pulled over defendant, knowing that defendant's driving privileges were revoked. However, Officer Harding conceded at trial that he observed nothing wrong with defendant's driving, and there were some inconsistencies between the officer's testimony and his report. No chemical testing, video recording, or corroborating testimony was introduced to show that defendant had alcohol in his system or was under the influence. Defendant denied consuming alcohol on the date of the traffic stop.

¶ 35 Thus, defendant's conviction was based entirely on the officer's account that defendant smelled of alcohol, had bloodshot eyes, slurred his speech, and failed field sobriety tests. Like in *Averhart*, the trial's outcome turned almost entirely on the jury's credibility determinations, and defendant's complaints to the police dispatcher were very relevant in showing bias or motive in the officer's testimony. See *Averhart*, 311 Ill. App. 3d at 499.

¶ 36 The trial court excluded defendant's testimony regarding Officer Harding's threat that he was "going to get" defendant if he called the police department again to complain. The alleged

threat was the linchpin of defendant's theory that the officer fabricated the DUI charge in retaliation for defendant's complaints. The court excluded the threat as inadmissible hearsay.

¶ 37 “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Ill. R. Evid. 801(c) (eff. Jan.1, 2011). Hearsay is generally not admissible unless it falls within a recognized exception. *People v. Cloutier*, 178 Ill. 2d 141, 154 (1997). Although a trial court's evidentiary rulings generally are reviewed for an abuse of discretion (*People v. Caffey*, 205 Ill. 2d 52, 89 (2001)), a ruling on whether a statement is hearsay may be reviewed *de novo* when the determination does not involve fact finding or weighing the credibility of the witnesses. *People v. Steele*, 2014 IL App (1st) 121452, ¶ 34.

¶ 38 Under Rule 803(3) of the Illinois Rules of Evidence, the hearsay rule does not apply to “a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health).” Ill. R. Evid. 803(3) (eff. Apr. 26, 2012). Defendant sought to introduce the threat to show Officer Harding's intent to arrest him in retaliation for making complaints to the police chief. We agree with defendant that the challenged testimony was offered to show the officer's state of mind and intent. The court erred in excluding the alleged threat as hearsay.

¶ 39 The State contends that “defendant was able to bring forth his theory of the case and cannot seek a remand for new trial because he was unable to introduce everything the way he wished it to be presented.” The State essentially is arguing that no error occurred because the jury heard some testimony on the subject. The State emphasizes some stilted and vague statements that defendant and Vertucci had “previous encounters” with Officer Harding at the beach and in defendant's backyard.

¶ 40 The transcript shows that the court allowed limited testimony that defendant and Vertucci knew Officer Harding and that he knew them. However, the jury only heard of contacts in which defendant was receiving a citation or being arrested, as Officer Harding was acting in his official capacity as a police officer.

¶ 41 The allegations of bias were revealed only when defense witnesses blurted unresponsive answers and talked over the prosecutor's objections. The court sustained nearly every objection to that testimony and barred all testimony regarding defendant's complaints and the officer's alleged threat. Thus, most of the testimony that the jury heard was not the result of any evidentiary ruling by the court, but were isolated statements that slipped out before the State's objections were sustained. Before deliberations, the trial court instructed the jury to disregard all questions and testimony to which an objection was sustained. The State is disingenuous in arguing that defendant was permitted to paint an adequate picture of his relationship with the officer. Disclosing the prior encounters from only the officer's point of view was highly prejudicial.

¶ 42 There is no dispute that defendant and Officer Harding had prior altercations. In an offer of proof, defendant produced telephone records to show that he called the police four times a few hours before Officer Harding issued a citation for disorderly conduct at defendant's home. Then, the officer arrested defendant for the charged offense the next day, before defendant could meet with the police chief. This evidence supports defendant's claim that Officer Harding's conduct and testimony was possibly in retaliation for the complaints.

¶ 43 The State argues that any error was harmless because the excluded testimony was cumulative of other evidence. However, the other evidence that the State points to is defendant's limited testimony that he and Officer Harding had prior altercations. The record belies the

State's claim that "the alleged hearsay statement [regarding the threat] would not have added to the evidence." The State does not further develop an argument that the error was harmless beyond a reasonable doubt, and we decline to advocate on the State's behalf. See *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010) ("Both argument and citation to relevant authority are required. An issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of the rule.").

¶ 44

B. Impeachment

¶ 45 The trial court ruled admissible defendant's prior felony conviction of unlawful production of cannabis. The court instructed the jury that evidence of defendant's previous conviction may be considered as it may affect his believability as a witness but may not be considered as evidence of his guilt. Defendant argues that the trial court erred in admitting the conviction without evaluating its admissibility under *Montgomery*. We agree.

¶ 46 In *Montgomery*, our supreme court adopted the then-proposed Federal Rule of Evidence 609 as a guide for trial courts in deciding whether a defendant's prior convictions should be admitted to impeach credibility. *Montgomery*, 47 Ill. 2d at 516-17; see also Ill. S. Ct. R. 609 (eff. Feb. 6, 2013). A witness's prior conviction is admissible to impeach the witness's credibility when "(1) the prior crime 'was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or *** involved dishonesty or false statement regardless of the punishment' (internal quotation marks omitted); (2) less than 10 years have elapsed since the prior conviction or the date the witness was released from confinement, whichever is later; and (3) the judge determines the probative value of the evidence of the prior crime outweighs the danger of unfair prejudice." *People v. Raney*, 2014 IL App (4th) 130551, ¶ 24 (quoting *Montgomery*, 47 Ill. 2d at 516).

¶ 47 The State concedes that the trial court erred by failing to balance the prior conviction's probative value against its prejudicial effect, as mandated by *Montgomery*. The prejudicial effect of the error was compounded by erroneously excluding evidence of Officer Harding's alleged bias. If the issue arises on remand, we direct the trial court to conduct a *Montgomery* hearing to evaluate the prior convictions of defendant and other witnesses, as necessary.

¶ 48 C. Ineffective Assistance and Fines

¶ 49 Defendant also argues that trial counsel rendered ineffective assistance by making an unfulfilled promise to the jury to produce blood test results showing that defendant had no alcohol in his system. Defendant also alleges ineffectiveness for the failure to object to the use of the drug conviction for impeachment. Finally, defendant contends that the trial court levied duplicate fines and misapplied credits for time spent in presentence custody. Our decision to reverse the judgment and remand the cause for a new trial obviates the need to address these issues.

¶ 50 D. Double Jeopardy

¶ 51 Our reversal of defendant's conviction raises the double jeopardy issue. The double jeopardy clause of the United States Constitution prohibits the State from having another opportunity to try a case unless it has in the first trial presented sufficient evidence to prove the defendant guilty beyond a reasonable doubt. *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 84. Thus, before remanding for a new trial, double jeopardy requires the appellate court to rule upon the sufficiency of the evidence. *People v. Taylor*, 76 Ill. 2d 289, 309 (1979); *Johnson*, 2013 IL App (2d) 110535, ¶ 84. We have carefully reviewed the record in the light most favorable to the prosecution and conclude that the evidence sufficiently supports the verdict beyond a reasonable

doubt. Our determination, however, is not binding on retrial and does not indicate this court's opinion as to defendant's guilt or innocence.

¶ 52

III. CONCLUSION

¶ 53 The court erroneously excluded evidence of the arresting officer's alleged bias while admitting a prior felony conviction for impeaching defendant's credibility without examining it under *Montgomery*. One ruling impeached defendant and the other shielded the officer from cross-examination on his alleged bias. These compound errors affected the jury's perception of the witnesses' credibility in a trial that turned entirely on credibility.

¶ 54 For the reasons stated, the judgment of conviction of aggravated DUI is reversed and the remand the cause for a new trial.

¶ 55 Reversed and remanded with directions.