2016 IL App (2d) 140785-U
No. 2-14-0785
Order filed September 27, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT S. SHACKLEE, Defendant-Appellant.	)	Appeal from the Circuit Court of Boone County. Nos. 10-CM-965 10-CM-966 10-TR-13396 11-CF-6 Honorable C. Robert Tobin III, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved defendant guilty beyond a reasonable doubt of aggravated DUI, specifically that he was under the influence of alcohol: defendant sideswiped a parked car, showed indicia of impairment during two field sobriety tests, emitted the odor of alcohol, had bloodshot and glassy eyes, and admitted drinking.

¶ 2 Defendant, Robert S. Shacklee, was arrested for, among other things, aggravated driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(2)(B) (West 2010)). Following a bench trial, defendant was found guilty of aggravated DUI and other offenses, and

he was sentenced to six months' imprisonment and two years of probation. On appeal, defendant claims that he was not proved guilty beyond a reasonable doubt of aggravated DUI. We affirm.

¶ 3 Evidence presented at trial revealed that an accident occurred in a subdivision where defendant, Michelle Rojas, and Jeffrey and Michelle Peters lived. Although no streetlights illuminated the roads running through the subdivision, each home had a coach light at the edge of the street that illuminated the driveway of each house.

¶ 4 On November 8, 2010, a little before 7:30 p.m., Rojas's sister parked Rojas's car outside Rojas's home. Rojas testified that the car was parked mostly on the sidewalk to the side of the street, with a small portion of the car parked on the street. Pictures admitted at trial, which Rojas stated accurately reflected where her car was parked, revealed that the car was parked entirely on the sidewalk, within inches of the street. Rojas testified that her car was the only car in her area parked on the street, and she indicated that the street in front of her home was very narrow, which was why her sister parked the car off of the road. Although Rojas and other witnesses indicated that the road was narrow, Jeffrey, who admitted that residents are not supposed to park on the street and that parking on the street makes driving on the road difficult, testified that he did not believe that the road was all that narrow, as he had seen fire trucks, semi trucks, and furniture delivery vehicles travel through that area without any difficulty. Michelle essentially agreed, noting that the street was a two-lane roadway.

¶ 5 Minutes after Rojas's sister parked the car, Jeffrey and Michelle, who lived across the street from Rojas, were smoking cigarettes outside of their home when they heard a crunching sound. Jeffrey looked up and saw a vehicle, which was registered to defendant, driving along the side of Rojas's car. Michelle ran over to the vehicle and yelled out the license plate number to Jeffrey. As she was doing this, defendant slowed down, he turned off his car's headlights, and

then he sped up and drove away. The police were called, and according to Jeffrey, they arrived an hour later. Michelle testified that the police arrived within 30 minutes.

¶ 6 At around 7:47 p.m., Officer Julie Kirk received a dispatch to respond to the scene. When she arrived, she saw that Rojas's car, which she stated was parked with a portion of it on the roadway, had sustained damage to the entire driver's side. The driver's side mirror, which Jeffrey stated was "hanging off the door, sitting there" after defendant hit it, was never located. After observing the damage, Kirk spoke to Rojas, and then she went to defendant's home.

¶ 7 A few minutes after arriving at defendant's house, Kirk, who was standing outside the home's screen door, made contact with defendant, who was inside the house, approximately 8 to 10 feet away. Defendant, who admitted hitting Rojas's car, testified that he was driving to his mailbox when the accident happened. Defendant told Kirk that he got out of his car, looked at the damage, and, after realizing that he did not have his insurance card, decided to go home to retrieve that document and use the bathroom. During this conversation, Kirk did not smell alcohol coming from defendant or notice anything unusual about defendant's eyes or speech.

¶ 8 When Kirk told defendant that he needed to return to the scene of the accident as soon as he could, defendant left the house, and Kirk followed him in her squad car. In the two to five minutes it took defendant to walk to the scene, Kirk did not notice anything about the way defendant walked. More specifically, Kirk testified that defendant did not stumble or fall while he was walking.

¶ 9 Once at the scene, Kirk, who was standing about one or two feet away from defendant, noticed that defendant's eyes were bloodshot, bright, and glassy and that a "pretty strong" smell of alcohol was coming from defendant's breath. Kirk asked defendant if he had had anything to drink that night, and defendant told her that he had consumed 4 12-ounce bottles of Bud Light at

home between 5 and 6:30 p.m. During that same conversation, defendant told Kirk that his son had called him to pick him up, that he left the house at 5:57 p.m. to go get his son, that the accident happened at that time, and that he did not have anything to drink after the accident occurred. Kirk indicated that defendant did not slur his words, he appropriately responded to her questions, and he did not act improperly.

¶ 10 Soon thereafter, Sergeant Anthony Martin arrived to observe Kirk administer field sobriety tests (FSTs). While Martin was standing next to defendant before the tests began, he noticed the smell of alcohol coming from defendant. However, Martin did not notice anything unusual about defendant's eyes or speech.

¶ 11 Kirk administered three FSTs: the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg-stand test. Because defendant admitted drinking, the court considered only the results of the walk-and-turn and the one-leg-stand tests.

¶ 12 Before asking defendant to complete the walk-and-turn and one-leg-stand tests, Kirk asked defendant if he had any physical condition that would prevent him from completing the tests. Defendant told Kirk that he had had surgery on his left anterior cruciate ligament (ACL) a year ago, "but that did not prohibit him from walking a straight line or balancing on one foot." The video of the tests that was admitted at trial confirms this. The testimony also revealed that the road at the scene of the accident where defendant performed the FSTs was slightly sloped. On the video, which shows that the road was relatively flat, Kirk asked defendant if he agreed that the road was "pretty much level." Defendant responded that, although the road was "not necessarily" level, he nevertheless "pretty much agreed" with Kirk. Given the slight slope, defendant was asked if he wanted to step to the center of the road to complete the tests. Defendant chose not to do so.

¶ 13 With regard to the walk-and-turn test, Martin stated that officers are trained to look for eight clues of impairment. Those are, for example, getting out of position while the test is explained, starting the test too early, stepping off the line, taking too many steps, and using one's arms for balance. The observance of any two of the eight clues indicates intoxication. When defendant performed the walk-and-turn test with Kirk illuminating the area with her flashlight and the headlights on her squad car, Martin observed defendant stagger and use his arms for balance. Kirk stated that she saw defendant get out of position while she explained the test to him,[1] step off of the imaginary line defendant was supposed to use as a guide, use his arms for balance, make an improper turn, and take an improper amount of steps. The video admitted at trial, which does not show all of the test, [2] reveals that defendant did not hold the position he was supposed to when the test was explained to him, crossed his right leg over his left on the first step, used his arms for balance, and wobbled and slightly crossed his left leg over his right, causing him to step off to the right, when walking back to the starting point of the test. According to both officers, because defendant exhibited at least two clues, defendant showed indicia of impairment.

¶ 14 Concerning the one-leg-stand test, Martin testified that officers look for four signs of impairment. Those are hopping, raising one's arms, putting one's foot down, and swaying. Although Martin could not recall what signs he observed when defendant completed the test,

[1] Before the test began, defendant was instructed to stand with his left foot on an imaginary line, to place his right foot directly in front of his left, and to stand with his arms down at his sides.

[2] The hood of Kirk's squad car blocked defendant's feet for a portion of the test, and Kirk was off screen when she demonstrated the turn for defendant.

Kirk, who again illuminated the area with her flashlight and the headlights on her squad car, stated that defendant used his arms for balance and swayed. The video confirms this, but defendant swayed minimally and raised his arms for balance only slightly. Because defendant exhibited these two signs, Kirk determined that defendant showed indicia of intoxication. Based on what Kirk and Martin observed, and in light of their training and experience and acknowledging the fact that defendant said he had had ACL surgery, both officers formed the opinion that defendant was impaired.

¶ 15 Defendant was then arrested for aggravated DUI. He was transported to the public safety building, and his car was searched. No open containers of alcohol were found in defendant's car. At the public safety building, defendant was asked if he wanted to take a Breathalyzer test. Defendant declined to do so.

¶ 16 In finding defendant guilty of aggravated DUI, the court outlined all of the testimony and delineated what the court observed on the video of the FSTs. Concerning the video, the court found that, although defendant's ACL problems might have affected his performance on the walk-and-turn test, "[defendant's] performance of the test would have been consistent with impairment." However, the court concluded that "the test itself was not dispositive of being under the influence of alcohol or, on the other hand, being sober." With regard to the one-leg-stand test, the court observed that defendant, who stood on his right leg, "performed well except that his arms were out (as opposed to at his side) most of the time." The court determined that "[t]his would provide some additional evidence of impairment." Although the FSTs "showed some indication of impairment," the court found that "on their own, [they] were not proof beyond a reasonable doubt of the defendant's impairment."

¶ 17 The court also noted that, although "[s]ome frequent signs of impairment were missing such as stumbling, slurring [of speech], and incoherent dialogue," defendant smelled of alcohol; had red, bloodshot, and glassy eyes; and admitted drinking four 12-ounce beers within 1½ hours. Further, the court noted that defendant struck a parked car that was either completely or almost completely parked off the street; he fled the scene of the accident; he remained at home for a significant amount of time, returning to the scene only when Kirk told him to do so; and he refused to take a Breathayzer test. Based on all of this evidence, the court concluded that "[defendant's] mental or physical faculties were so impaired as to reduce his ability to think and act with ordinary care." Following rulings on a posttrial motion, sentencing, and a motion to reconsider the sentence, defendant timely appealed.

¶ 18 At issue in this appeal is whether defendant was proved guilty beyond a reasonable doubt of aggravated DUI. When a defendant challenges the sufficiency of the evidence, the same standard of review applies to both jury and bench trials. Specifically, we must consider 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 a crime beyond a reasonable doubt. *People v. Patterson*, 314 Ill. App. 3d 962, 968-69 (2000). "In a bench trial, it is the job of the trial judge, sitting as the factfinder, to make determinations about witness credibility." *People v. Williams*, 2013 IL App (1st) 111116, ¶ 76. As is the case in jury trials, those credibility determinations are entitled to great deference, and will rarely be disturbed on appeal. *Id.*

¶ 19 In assessing whether a defendant was proved guilty beyond a reasonable doubt, we need not engage in a "point-by-point discussion of every piece of evidence as well as every possible inference that could be drawn therefrom." *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007). "To engage in such an activity would effectively amount to a retrial on appeal, an improper task

expressly inconsistent with past precedent." *Id.* Moreover, we will neither disregard inferences that normally flow from the evidence nor search out all possible explanations consistent with a defendant's innocence and raise them to the level of reasonable doubt. *Id.* Rather, we will reverse a conviction only if the evidence is so improbable or unsatisfactory as to raise a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 20 As relevant here, to sustain a conviction of aggravated DUI, the State needed to prove beyond a reasonable doubt that defendant was in physical control of a motor vehicle, he was under the influence of alcohol at the time, and he had committed DUI on at least two prior occasions. See 625 ILCS 5/11-501(d)(2)(B) (West 2010). Here, defendant argues only that the State failed to prove beyond a reasonable doubt that he was under the influence of alcohol. To prove that a defendant was under the influence, the State must establish that, as a result of consuming alcohol or any other intoxicating compound, the defendant could neither think nor act with ordinary care. *People v. Diaz*, 377 Ill. App. 3d 339, 344 (2007). Whether a defendant was under the influence presents a question of fact for the fact finder to resolve. *People v. Janikas*, 127 Ill. 2d 390, 401 (1989).

¶ 21 Here, much of defendant's argument on appeal concerns the weight to be given the evidence in light of his theory of the case. For example, defendant notes that he was not slurring his words, stumbling, or otherwise acting inappropriately. Defendant observes that he performed relatively well on the FSTs, with his mistakes allegedly attributable to his ACL surgery, the sloped surface of the road, and poor lighting conditions. Finally, defendant claims that the accident occurred in a dimly lit area on a narrow street and that, because the driver's side mirror on Rojas's car was not found, the inference to draw is that Rojas's car was parked more on the street than the sidewalk when the accident happened and was moved before the police arrived or

took pictures. From this, defendant attempts to diminish the weight, in assessing whether he was impaired, attributable to the fact that he struck a parked car.

¶ 22 After examining the record, we agree that defendant presented significant evidence in support of his case. However, be that as it may, the court concluded that, even in light of that evidence, defendant was proved guilty beyond a reasonable doubt of aggravated DUI. The evidence as a whole supports that ruling.

¶ 23 Specifically, the evidence revealed not that defendant bumped into Rojas's car on his way to either get his mail or pick up his son. Rather, defendant, who was not driving very fast, sideswiped the entire driver's side of Rojas's car, leaving visible scratches and marks down the whole side of her vehicle. Regardless of whether Rojas's car was parked partially on the road, the severity of the damage to her car in light of the slow speed at which defendant was traveling certainly supports a conclusion that defendant was driving while impaired. See *People v. Ciborowski*, 2016 IL App (1st) 143352, ¶ 115 (considering, among other things, damage to vehicle in assessing whether the defendant was incapable of driving safely while under the influence of legal drugs). When defendant hit the car, he did not, according to the eyewitnesses, stop, observe the damage, and alert Rojas. Rather, both Jeffrey and Michelle stated that defendant not only sped up and drove away, but turned off his lights so as not to be detected. When Kirk confronted defendant at his home, defendant, who admitted hitting Rojas's car, advised the officer that he had returned to his home, which was just around the corner from where the accident happened, to get his insurance card and go to the bathroom. This did not explain why he did not return to the scene until Kirk told him to. As the trial court found, all of these actions establish defendant's consciousness of guilt, which is relevant in assessing whether defendant was driving while impaired. See *People v. Kizer*, 365 Ill. App. 3d 949, 962 (2006)

(evidence that the defendant asked a witness to tell the police that the passenger killed in the vehicle the defendant was driving was the driver was admissible at the defendant's DUI trial to show consciousness of guilt); *People v. Henderson*, 39 Ill. App. 3d 502, 507 (1976) (a consciousness of guilt may be implied when a defendant leaves the scene of a crime in order to avoid arrest or detection).

¶ 24 Once at the scene of the accident, Kirk, who was now standing close to defendant, detected a "pretty strong" odor of alcohol coming from defendant's breath. Martin indicated that he, too, could smell alcohol on defendant. Defendant told Kirk that, in 90 minutes, he had consumed 48 ounces of beer and that he did not drink any alcohol after the accident happened. Moreover, although Martin did not make similar observations, Kirk testified that she saw that defendant's eyes were bloodshot and glassy. Such evidence certainly supports a conclusion that defendant was intoxicated. See *People v. Weathersby*, 383 Ill. App. 3d 226, 229-30 (2008) (the defendant was proved guilty beyond a reasonable doubt of DUI where, although he committed no traffic violations and was cooperative with the police, he had a bottle of liquor in his car, had glassy eyes, admitted drinking, smelled of alcohol, and had thick-tongued speech); *Diaz*, 377 Ill. App. 3d at 345 (the defendant was proved guilty beyond a reasonable doubt of aggravated DUI where the evidence revealed that he had bloodshot eyes, smelled of alcohol, " 'mumbled' " his speech, failed one FST, had balance problems, and refused to take a Breathalyzer test).

¶ 25 Then, before Kirk asked defendant to complete the walk-and-turn and one-leg-stand tests, she asked defendant if he had any physical impairments that would affect his performance. Although defendant told Kirk that he had had surgery on his left ACL a year ago, defendant made very clear that that surgery would not alter his performance. Moreover, while defendant claims on appeal that the road was sloped and affected his ability to complete the FSTs,

defendant told Kirk that he "pretty much agreed" with her that the road was flat. And, even if that were not the case, defendant was given the opportunity to perform the tests on a flatter part of the road, and he refused to do that. Further, although defendant contends that the area where he performed the FSTs was poorly lit, the testimony revealed that there were coach lights at the end of each driveway, and Kirk illuminated the area with her flashlight and the headlights of her squad car. The video confirms the fact that the area was relatively well lit. In our opinion, given the evidence presented, defendant simply cannot complain now that something other than his impairment affected his performance on the walk-and-turn and one-leg-stand tests. See *Diaz*, 377 Ill. App. 3d at 345-46 (even though arresting officer testified that factors such as fatigue could contribute to poor performance on FSTs, reviewing court would not consider such facts, as no evidence was presented at trial indicating that the defendant was tired when the FSTs were administered).

¶ 26 In performing the walk-and-turn and one-leg-stand tests, defendant, as the trial court found, did do fairly well. However, that fact does not mean that defendant did not show indicia of impairment. Indeed, the evidence revealed that, with regard to both tests, defendant exhibited the necessary amount of clues for an officer to conclude that he was impaired. Based on the accident, the results of the FSTs, the odor of alcohol emanating from defendant's breath, the fact that defendant's eyes were bloodshot and glassy, and defendant's admission to drinking alcohol, Kirk concluded that defendant was impaired. Her testimony alone, which the trial court credited, was sufficient to sustain defendant's conviction of aggravated DUI. *Janik*, 127 Ill. 2d at 402.

¶ 27 After completing the tests, defendant was arrested for DUI and transported to the public safety building, where he was asked to take a Breathalyzer test. Defendant refused to take the test. This refusal supports a conclusion that defendant was impaired, as a "driver's refusal to

submit to a [B]reathalyzer test is relevant as circumstantial evidence of his consciousness of guilt" of DUI. *People v. Garriott*, 253 Ill. App. 3d 1048, 1052 (1993); see also *Diaz*, 377 Ill. App. 3d at 345.

¶ 28 Given all of the above, we cannot conclude that defendant was not proved guilty beyond a reasonable doubt. Although none of the above facts, standing alone, would necessarily be sufficient to establish defendant's guilt, we conclude that, in light of all of the evidence, a rational trier of fact could have found defendant guilty beyond a reasonable doubt. *Wheeler*, 226 Ill. 2d at 117.

¶ 29 The cases on which defendant relies are clearly distinguishable. See *People v. Winfield*, 15 Ill. App. 3d 688 (1973); *People v. Sullivan*, 132 Ill. App. 2d 674 (1971). The most noteworthy difference perhaps is that, in reversing the DUI convictions of the defendants in those cases, the reviewing courts noted that the arresting officers were aware of the fact that physical impairments or injuries might have caused the conduct of the defendants that the arresting officers observed before concluding that the defendants were impaired. See *Winfield*, 15 Ill. App. 3d at 690; *Sullivan*, 132 Ill. App. 2d at 678. Here, unlike in those cases and as noted previously, defendant told Kirk that, although he had had ACL surgery a year ago, that would not impede his ability to complete either the walk-and-turn or the one-leg-stand test.

¶ 30 In reaching our conclusion that defendant was proved guilty beyond a reasonable doubt of aggravated DUI, we must comment on the various articles defendant cites in his brief. These articles purport to discredit FSTs and the common clues officers look for in assessing impairment. As the State notes, this is evidence that is not part of the record. See *People v. Bosley*, 197 Ill. App. 3d 215, 223 (1990).

¶ 31 The purpose of appellate review is to evaluate the evidence presented in the trial court. *People v. Heaton*, 266 Ill. App. 3d 469, 477 (1994). Thus, review must be confined to what appears in the record. *Id.* Given that the articles constitute "evidence" not in the record, we have not considered them in determining that defendant was proved guilty beyond a reasonable doubt. *Bosley*, 197 Ill. App. 3d at 223.

¶ 32 For the above-stated reasons, the judgment of the circuit court of Boone County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 33 Affirmed.