2016 IL App (2d) 140793-U
No. 2-14-0793
Order filed August 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 12-DT-858
NICKALOS RIZZATO,	)	Honorable Robert J. Morrow,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to convict the defendant beyond a reasonable doubt of the offense of driving under the influence of alcohol.

¶ 2 On June 4, 2014, following a bench trial, the defendant, Nickalos Rizzato, was found guilty of driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2012)) and was sentenced to 18 months' conditional discharge. On appeal, the defendant argues that he was not proven guilty beyond a reasonable doubt. We affirm.

¶ 3 BACKGROUND

¶ 4 On July 1, 2012, the defendant was charged by complaint with driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2012)). On March 12, 2014, a bench trial

commenced. Jamie Humbert testified that she was driving west on Kaneville Road in Geneva on July 1, 2012. She saw a green minivan speed through a stop sign at a high rate of speed on Burgess Road where it intersects with Kaneville Road. Humbert turned left onto Burgess but could no longer see the minivan. Humbert saw the minivan again when she turned south on Western Avenue. She saw the minivan veer up onto the side of the median, hit a tree and a yield sign, run into a chain link fence, and then drive back onto Western Avenue, where it came to a stop. She stopped and exited her vehicle to find out what was going on and to see if she could help. When she approached the van, she saw a brown-haired male. He was disoriented and was stumbling, screaming, and pounding his fists. The police arrived shortly thereafter. When asked to identify a vehicle that was in a photo marked as People's Exhibit 2-B, Humbert said that this was "the green minivan that he was driving." Humbert also acknowledged that the photo marked as People's Exhibit 2-A accurately depicted the area of Western Avenue where the defendant, the brown-haired male, had driven off the road.

¶ 5 Robert Gill testified that he worked at an industrial facility on Western Avenue called Burgess Norton. On July 1, 2012, when he was leaving work at about 3 p.m., he was stopped at the intersection of Western and South Street. A green minivan drove past him going east on South Street. The green minivan made a U-turn on South, going onto the curb on both sides of the street. The minivan drove back and turned left onto Western, just about clipping the front of Gill's vehicle. Gill made his turn onto South and lost sight of the minivan. Gill then heard a crash and turned around, heading back toward Western. On Western, he saw the minivan against the curb just before the entrance to Burgess Norton. Gill stopped his vehicle, exited, and ran to the minivan. No one was inside the van. When he walked in front of the van, he saw a woman, who had also stopped, and a "middle-aged young man." Gill approached the man to see if he

was hurt. He did not see any injuries but he smelled alcohol on the man's breath and the man was slurring his speech.

¶ 6 Penny Boedigheimer testified that she was a Geneva police officer. She was on duty on July 1, 2012. Her shift started at 3 p.m. She was familiar with the defendant's home address because of domestic disturbances and previous dealings with the defendant. She identified the defendant in court. She testified that the defendant lived with his mother. While on the beat on July 1, she heard a dispatch to the defendant's home address due to a domestic disturbance. She was not the officer that responded to that call. At about 4 p.m., she was dispatched to Western Avenue in front of the Burgess Norton facility. When she arrived, she saw a green minivan parked haphazardly on the road and the defendant sitting on the ground at the driveway entrance to Burgess Norton. There was a crowd of people around him.

¶ 7 Boedigheimer asked the defendant what happened. He said that his wife punched him in the face. The defendant's speech was slurred and she smelled alcohol on his breath. She asked him if he had consumed any alcohol. The defendant said he drank anything and everything that day. Specifically, he stated that he drank vodka and beer at his mother's house. The defendant also stated that he was probably "a .150 or .20." The defendant reached his hand out so she grabbed it to help him up. She had to hold him with both hands to keep him up so she sat him back down again. The defendant said his arm hurt and that he had bumped his head on the car earlier in the day. She called the paramedics to assess the defendant. The paramedics transferred the defendant to the hospital.

¶ 8 Boedigheimer followed the defendant to the hospital in her squad car. While he was in an exam room, she asked him again what had happened that day. The defendant responded, "I'm f***ed; I know I shouldn't do that." The defendant denied that he had been driving a vehicle but admitted that he had two or three drinks. The defendant also told her that he could not really

remember what had happened. She believed he had been driving while under the influence of alcohol and she wrote him a ticket at the hospital. The defendant refused to submit to a blood and urine test. Boedigheimer opined that the defendant was under the influence of alcohol and not able to safely drive. Her opinion was based on the fact that the defendant was seen driving erratically, smelled of alcohol, had slurred speech, and was unable to stand at the accident scene. Additionally, she was aware, based on previous experience with the defendant, that he was a self-admitted alcoholic.

¶ 9 The State did not present any evidence as to who owned the green minivan. After the State rested, the defendant presented no further evidence. On June 4, 2014, following closing arguments, the trial court found the defendant guilty of driving under the influence. The trial court acknowledged that the witnesses did not testify that they actually saw the defendant exit the green minivan. However, the trial court found, based on the erratic driving, the defendant's condition, the defendant's close proximity to the vehicle, and the defendant's admissions, that the defendant was driving the green minivan at the time of the accident. As to the admissions, the trial court noted that the defendant stated he was a "0.15 or a 0.20" and "I f***ked up." The trial court found that the evidence of the erratic driving, the odor of alcohol, the slurred, incoherent, and rambling speech, and the defendant's admission that he had been drinking was sufficient to show that the defendant was under the influence of alcohol. Following the denial of his motion for a new trial, the trial court sentenced the defendant to 18 months' conditional discharge. Thereafter, the defendant filed a timely notice of appeal.

¶ 10 ANALYSIS

¶ 11 On appeal, the defendant argues that he was not proven guilty beyond a reasonable doubt because there was insufficient evidence to find that he was in actual physical control of a vehicle while intoxicated. In evaluating the sufficiency of the evidence, it is not the province of this

court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question 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.'" (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The weight to be given to the witnesses' testimony, the determination of their credibility, and the reasonable inferences to be drawn from the evidence are all matters within the jurisdiction of the trier of fact. *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *Collins*, 106 Ill. 2d at 261-62. We will set aside a criminal conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Smith*, 185 Ill. 2d at 542.

¶ 12 Section 11-501 of the Illinois Vehicle Code (Code) provides, in relevant part, that a person shall not drive or be in "actual physical control" of any vehicle within this State while "under the influence of alcohol." 625 ILCS 5/11-501(a)(2) (West 2012). In the present case, the defendant does not challenge the trial court's determination that he was "under the influence of alcohol." The defendant argues only that there was insufficient evidence to find that he was in "actual physical control" of the green minivan.

¶ 13 Actual physical control is a question of fact that must be decided on a case-by-case basis. *People v. Cummings*, 176 Ill. App. 3d 293, 295 (1988). The issue of actual physical control is determined by giving consideration to whether the defendant: (1) possessed the ignition key; (2) had the physical capability to operate the vehicle; (3) was sitting in the driver's seat; and (4) was alone with the doors locked. *People v. Slinkard*, 362 Ill. App. 3d 855, 859 (2005). These factors provide a guideline to determine whether the defendant had actual physical control of the vehicle; the list is neither exhaustive, nor is the absence of one individual factor controlling. *Id.* at 859. A criminal conviction may be based on circumstantial evidence, as long as it satisfies

proof beyond a reasonable doubt of the charged offense. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 14 In arguing that there was insufficient evidence to prove he was in actual physical control of a vehicle, the defendant notes that none of the witnesses testified that they recognized the defendant as the person driving the green minivan or that they saw the defendant exit the vehicle. He further notes that Boedigheimer did not see him driving the vehicle and he denied doing so when she asked whether he had been driving the vehicle.

¶ 15 The defendant's contention is without merit. The evidence at trial was sufficient to prove beyond a reasonable doubt that the defendant was in actual physical control of the green minivan. When asked to identify a vehicle that was in a photo marked as People's Exhibit 2-B, Humbert testified that this was "the green minivan that he was driving." Based on the context of her testimony, the "he" referred to was the brown-haired male that Humbert found at the scene of the accident. Humbert also testified that the photo marked as People's Exhibit 2-A accurately depicted the area of Western Avenue where the defendant, the brown-haired male, had driven off the road. A rational trier of fact could have reasonably inferred from this testimony that the defendant was driving and Humbert saw the defendant in actual physical control of the green minivan. Further, while Humbert did not specifically testify that she saw the defendant get out of the green minivan, there was no evidence that anyone else was in the vicinity of the green minivan when Humbert exited her vehicle, approached the green minivan, and saw the defendant stumbling and disoriented. Humbert's testimony alone was a sufficient basis to conclude that the defendant was in actual physical control of the vehicle. *Smith*, 185 Ill. 2d at 541 (the evidence of a single witness is sufficient to convict if the witness is found to be credible).

¶ 16 The defendant also notes that the trial court, in rendering its ruling, misquoted statements he had made at the scene. Specifically, the trial court found that the defendant was in actual

physical control based on the observed erratic driving, the defendant's conduct at the scene, his close proximity to the vehicle and his admissions. As to the admissions, the trial court noted that the defendant stated he was a "0.150 or a 0.20" and "I f***ked up." We acknowledge that the trial court misquoted the defendant. Boedigheimer testified that the defendant stated "I'm f***ed." Nonetheless, even considering the defendant's actual statements, the trial court drew a reasonable inference that the defendant was referring to his blood alcohol content being over the legal limit and that he was "f***ed" because he was driving while under the influence of alcohol. This circumstantial evidence, when considered collectively with Humbert's testimony, allows the conclusion that the defendant was in actual physical control of the green minivan. *Hall*, 194 Ill. 2d at 332 ("the trier of fact is not required to disregard inferences which flow normally from the evidence and to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt").

¶ 17 In arguing that he was not proved to be in actual physical control, the defendant notes that the State and the trial court relied on *People v. Slinkard*, 362 Ill. App. 3d 855 (2005), and argues that this reliance was improper. In *Slinkard*, the defendant, Danny Slinkard, was found to be in actual physical control of a vehicle that was involved in an accident even though he was not found in the driver's seat because Slinkard was the owner of the vehicle, was found near the vehicle in front of his house, and the damage to his vehicle was consistent with the damage to the other vehicle involved in the accident. *Id.* at 858. In the present case, the defendant argues that *Slinkard* is distinguishable because he was not proved to be the owner of the green minivan and was not found in front of his house. Nonetheless, whether a defendant exercised actual physical control over a vehicle must be decided on a case-by-case basis. *Id.* at 859. Accordingly, simply because the facts in *Slinkard* are distinguishable from the present case is not a sufficient basis to conclude that the defendant was not proved guilty beyond a reasonable doubt.

¶ 18 CONCLUSION

¶ 19 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed the State's attorney fee of $50 under section 4-2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2014)) for the cost of this appeal. See *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 20 Affirmed.