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2016 IL App (3d) 160128-U

Order filed December 8, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Iroquois County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0128
	)	Circuit No. 09-CF-91
RODNEY D. HAMRICK,	)	Honorable
Defendant-Appellant.	)	Gordon L. Lustfeldt, Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Presiding Justice O'Brien and Justice McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Defendant's arguments that the State presented irrelevant and prejudicial evidence, he was deprived of a fair trial by the admission of testimony regarding the horizontal gaze nystagmus test, and the court improperly questioned jurors during *voir dire* were not plain error or the result of ineffective assistance of counsel.

¶ 2 Defendant, Rodney D. Hamrick, appeals from the denial of his motion for a new trial.

Defendant argues that he is entitled to a new trial because: (1) the State presented irrelevant and prejudicial evidence; (2) the admission of the horizontal gaze nystagmus (HGN) test deprived

defendant of a fair trial; and (3) the court improperly questioned jurors during *voir dire*. We affirm.

¶ 3

### FACTS

¶ 4

In case No. 09-CF-91, defendant was charged by indictment with aggravated driving while under the influence of alcohol (aggravated DUI) (625 ILCS 5/11-501(d)(2)(E) (West 2008)) and driving while license revoked (625 ILCS 5/6-303(d-3) (West 2008)).

¶ 5

During *voir dire*, the court asked the potential jurors if he or she belonged to a group or organization involved in the prevention of alcohol abuse, and if he or she personally received treatment for alcohol abuse or knew anyone that had received this treatment. The selected jurors indicated that their knowledge of alcohol abuse prevention and alcoholism would not influence their ability to objectively consider the evidence.

¶ 6

In its opening, the State contended that defendant disobeyed a construction flagger, drove through an area that was undergoing road construction, and struck a moisture density gauge, which contained a “nuclear capsule.” A construction worker saw the “nuclear device” wedged under defendant’s vehicle before defendant left the scene.

¶ 7

Defense counsel agreed that the State’s characterization of the facts was “basically” right. However, defense counsel contended that there was no credible evidence that defendant was under the influence of alcohol at the time of the incident.

¶ 8

The State called its first witness, Bennett Smith, who testified that on June 5, 2009, he was controlling traffic near a construction zone on Route 49 in Iroquois County. At approximately 1:30 p.m., a white Impala drove past his displayed stop sign and into the lane that was closed for construction. The Impala sped toward a group of workers who were conducting a “nuke test.” The Impala appeared to “spin out” and then drove in reverse at a high rate of speed

toward Smith's position. Illinois Department of Transportation technician Andrew Parsons followed the Impala as it left the construction zone.

¶ 9 Brett Redeker testified that he was conducting a quality control inspection when he heard a vehicle approach and a "metal on metal bang explosion." Prior to the noise, Redeker had left his moisture density gauge, a box with a rod that contained a radiation source, in the closed lane. Redeker saw that an Impala had run over the moisture density gauge and the rod from the gauge was stuck in its grill. Parsons directed the driver of the Impala not to move, but the driver ignored Parsons' command.

¶ 10 After the accident, the fire department sealed off the area due to possible radiation exposure from the damaged moisture density gauge. Redeker contacted Arthur Horner, the radiation safety officer for Iroquois Paving. Horner was responsible for ensuring that the moisture density gauge was transported and stored according to the rules promulgated by the Illinois Department of Nuclear Safety (IDNS). Horner contacted the manufacturer of the moisture density gauge and the IDNS. An IDNS employee located the radioactive cesium that was previously contained in the moisture density gauge near the edge of the road and sealed it in a lead box. No loss of radioactivity was detected.

¶ 11 Parsons testified that he saw the Impala drive at a high rate of speed over the freshly paved asphalt until it hit the moisture density gauge. The Impala dragged the moisture density gauge for approximately 270 feet. Parsons tried to get the Impala to stop, but the driver ignored his command. Parsons followed the Impala in his truck until it stopped in a farmer's lane. At that point, Parsons told the driver to return to the construction site. The driver stared at Parsons for a bit and then shook his head yes. The driver's eyes were glazed and red and he did not speak. As Parsons followed the Impala back to the construction zone, he noticed that the Impala

was swerving from “ditch to ditch.” Near the construction zone, the Impala sped through an intersection. Parsons pursued the Impala until he reached 75 miles per hour, at which point he ended the chase and returned to the construction zone. There, Parsons spoke with Illinois State Trooper Michael Cummings. Cummings told Parsons that a vehicle matching the description of the one involved in the accident in the construction zone was on fire a few miles from the construction zone. At the scene of the fire, Parsons identified the driver of the burning vehicle as the individual who was involved in the accident in the construction zone.

¶ 12 Cummings was dispatched to the Route 49 construction zone on a report of a hit and run accident. Parsons gave Cummings a description of the vehicle, and Cummings received a report that a similar vehicle was on fire near the construction zone. At the vehicle fire, defendant gave Cummings a state issued identification card. Defendant’s eyes were bloodshot and glassy, his speech was mumbled and slurred, and his responses were very slow. Cummings directed defendant to get into his patrol car, and defendant staggered as he walked toward the car. While defendant was in the patrol car, Cummings smelled an odor of an alcoholic beverage emanating from defendant. Defendant said that he had some beers on the morning of the accident.

¶ 13 After Cummings spoke with defendant in the patrol car, he directed defendant to exit the car and submit to several field sobriety tests. Cummings first conducted the HGN test by placing his pen in front of defendant’s eyes. Cummings instructed defendant to follow the movement of the pen with his eyes. Cummings explained that involuntary eye movements indicated consumption of alcohol. While performing the HGN, defendant’s body swayed, his head moved, and he had difficulty keeping his eyes open wide enough. Defendant completed the HGN, but Cummings observed eye movement that was indicative of alcohol consumption. Defendant next agreed to submit to the walk-and-turn test. Before performing the test, defendant said that he had

knee surgery. As defendant started the test, he staggered, lost his balance, and attempted to sit on the hood of the patrol car. Defendant was unable to follow Cummings' instructions, as he began the test before being instructed to do so. At that point, defendant refused to complete the test. Defendant also refused the one-leg stand test commenting that he was unable to maintain his balance. After the refusals, defendant continued to lose his balance as he spoke to Cummings, and Cummings escorted defendant by the arm to his patrol car. Based on his training and experience, Cummings opined that defendant was under the influence of alcohol and placed him under arrest.

¶ 14 On the way to the Iroquois County jail, Cummings told defendant that he appreciated his cooperation, and that he thought defendant was a "nice guy." Defendant responded "I'm just a drunk." At the jail, defendant refused to submit to a breathalyzer test and denied drinking alcohol. Cummings issued defendant three citations: "leaving the scene of a property damage accident, driving under the influence of alcohol and driving while license revoked."

¶ 15 During Cummings' testimony, the State introduced defendant's driving abstract into evidence. The abstract indicated that on June 5, 2009, defendant's driver's license was revoked. The State also introduced a video recording of the field sobriety tests, which was largely consistent with Cummings testimony.

¶ 16 After Cummings' testimony, defense counsel filed a motion to strike the HGN test testimony. The court granted defendant's motion, and when the proceedings resumed, the court instructed the jury:

"[I]adies and gentlemen, we talked about this in our indoctrination and there are sometimes occasions where the court must direct you to disregard certain testimony or certain evidence and this is one of those times. So what I'm telling

you is there was testimony from [Cummings] about the [HGN] test where they move the pen in front of your face. I'm ordering you to disregard that part of his testimony about the horizontal gaze eyeball thing and that is my order and I don't want you to concern yourselves with why I made that ruling. And in making that ruling I'm not trying to indicate any opinion as to what you ought to do, but it's an evidentiary ruling. It was my job to make and I made it."

¶ 17 The defense called Kim Atkins as its first witness. On the morning of the incident, Atkins and defendant went to garage sales in Paxton and ate lunch at the Tin Pan restaurant. Atkins did not see defendant consume an alcoholic beverage during their time together.

¶ 18 Defendant testified that he spent the night before the incident working at his mother's house. Around 7:30 a.m., defendant went with Atkins to the Paxton garage sales. Defendant and Atkins ate lunch at a restaurant, and afterwards, defendant drove back to his mother's house.

¶ 19 On the way to his mother's house, defendant approached a construction zone, but did not see a flagger. Defendant proceeded down the road, which had cones on the center line, and saw two men standing near their trucks. Defendant thought that one of the men might be the flagger, and as he neared their position, he saw something in the road and applied his brakes. Defendant's car slid 50 feet. Defendant backed up and he heard a man yelling. Defendant left the construction site in fear and drove to a nearby lane. While sitting in the lane, the man from the construction site approached and instructed defendant to return to the scene of the accident. Defendant drove back to the construction site where he saw the flagger for the first time. While he was stopped, defendant thought to himself "all I saw was ten years in prison \$14,000," and he fled the scene. At the time, defendant did not have a valid driver's license. While driving, defendant's car caught fire, which defendant attributed to the earlier accident.

¶ 20 When Cummings arrived at the vehicle fire, defendant told Cummings that his driver's license was revoked. Cummings asked defendant to submit to field sobriety testing. Defendant explained to Cummings that he had a headache, medical issues with both of his legs, and his ability to walk deteriorated with the amount of time he spent on his feet. Defendant told Cummings three times that he had not been drinking. Defendant said that he last consumed an alcoholic beverage two or three days before the incident. Defendant told Cummings that he physically could not complete the field sobriety tests because his knees were in poor physical condition and he had flat feet. Undeterred, Cummings insisted that defendant complete the sobriety tests. Defendant leaned on the hood of the patrol car while Cummings explained the walk-and-turn test. During their interaction, Cummings seemed to want defendant to talk and he baited defendant by telling him that he was a nice guy. Defendant did not respond to the compliment. At the Iroquois County jail, defendant refused to submit to a breathalyzer test.

¶ 21 The jury found defendant guilty of the charged offenses. The court sentenced defendant to 15 years' imprisonment for aggravated DUI, and concurrent prison terms of 3 years for driving while license is revoked and 364 days for leaving the scene of an accident. The written judgment contains only the sentences imposed in case No. 09-CF-91. The February 18, 2016, docket entry notes that the court imposed the sentence for leaving the scene of a property damage accident in case No. 09-TR-2878 at the same time as those in case No. 09-CF-91. Defendant filed a notice of appeal from case No. 09-CF-91. In the notice, he references all three convictions.

¶ 22 ANALYSIS

¶ 23 Defendant raises three claims of error: (1) he was denied his right to a fair trial due to the State's presentation of evidence regarding the nuclear implications of the damage to the moisture

density gauge; (2) he was deprived of a fair trial by the admission of testimony regarding the HGN test; and (3) the court improperly questioned jurors during *voir dire* about alcoholism and alcohol abuse. Defendant acknowledges that he has forfeited review of each of these arguments but he argues that they are reversible plain error or the result of ineffective assistance of counsel. Even if we presume that each of defendant's contentions is error, we find that defendant cannot establish the requisite prejudice to warrant reversal under either the first prong of plain error or ineffective assistance of counsel. We also conclude that the alleged errors do not warrant reversal under the second prong of the plain error.

¶ 24 We note that defendant challenges his three convictions, but only his aggravated DUI conviction is subject to review. Defendant cannot establish prejudice regarding his driving while license is revoked conviction because he did not contest this issue at trial. *People v. White*, 2011 IL 109689, ¶ 133 (first prong plain error review and ineffective assistance of counsel require a showing of prejudice, *i.e.*, the verdict resulted from the error and not the evidence or, but for the error, there was a reasonable probability of a different result). Further, defendant cannot challenge his conviction for leaving the scene of a property damage accident because defendant has not provided us with a record for this conviction. As it is defendant's duty to provide a complete record on appeal, we construe this omission against him. See *People v. Gilbert*, 2013 IL App (1st) 103055, ¶ 17 (appellant has a duty to present a complete record on appeal and any doubts arising from an incomplete record will resolved against appellant).

¶ 25 I.

¶ 26 Defendant argues that each of his forfeited allegations of error is reversible under the first prong of plain error. The first prong permits reversal of an otherwise forfeited error where the evidence is closely balanced such that the error might have tipped the scales of justice against



defendant. *People v. Herron*, 215 Ill. 2d 167, 178 (2005). Under the first prong, defendant must show that he suffered prejudice as a result of the error. *White*, 2011 IL 109689, ¶ 133.

¶ 27 The sole issue at trial was whether defendant was under the influence of alcohol to a degree that rendered him incapable of driving safely. *People v. Gordon*, 378 Ill. App. 3d 626, 631 (2007).

¶ 28 The evidence readily established defendant's impairment. Defendant failed to stop at a construction zone stop sign, drove into a closed lane, struck a moisture density gauge, fled the scene when he was approached by a construction worker, drove erratically back to the construction scene, and fled a second time. Evidence that defendant had consumed an alcoholic beverage before the accident included: Parsons' and Cummings' observations that defendant's eyes were glazed and red, or glassy and bloodshot; and Cummings statements that defendant's breath smelled of an alcoholic beverage, he was unstable, and he could not complete field sobriety testing. Defendant's refusal to submit to a breathalyzer test and flight from the scene also evinced a consciousness of guilt. See *People v. Harris*, 225 Ill. 2d 1, 23 (2007) (evidence of flight is admissible as proof of consciousness of guilt); *People v. Garriott*, 253 Ill. App. 3d 1048, 1052 (1993) (refusal to submit to a breathalyzer test is relevant as circumstantial evidence of consciousness of guilt). Finally, defendant told Cummings that he had some beers in the morning before the accident. Thus, even if we were to accept defendant's arguments, he could not establish prejudice, because the evidence was not close.

¶ 29

## II.

¶ 30 Defendant argues that each of the three forfeited issues is reversible if the error results in the denial of defendant's substantial rights regardless of the closeness of the evidence. *Herron*, 215 Ill. 2d at 178. Under the second prong, "[p]rejudice to the defendant is presumed because of

the importance of the right involved \*\*\*.” *Id.* at 187. Our supreme court has equated the second prong with structural error such that reversal is warranted only where the error erodes the integrity of the judicial process and undermines the fairness of defendant’s trial. *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009). Structural error exists in a limited class of cases including: a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. *People v. Thompson*, 238 Ill. 2d 598, 609 (2010) (citing *Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006)).

¶ 31 Here, the admission of the nuclear implications evidence, HGN testimony, which the jury was subsequently instructed to disregard, and *voir dire* questions about alcohol abuse and alcoholism did not erode the integrity of the judicial process and undermine the fairness of defendant’s trial.

¶ 32 III.

¶ 33 Defendant also argues that his trial counsel provided ineffective assistance in failing to preserve the claimed errors. “To establish ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that prejudice resulted from that deficiency.” *People v. Bailey*, 232 Ill. 2d 285, 289 (2009) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). To satisfy the prejudice prong, a defendant must establish that there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. When an ineffective assistance of counsel claim can be disposed of because defendant cannot establish prejudice, we need not determine whether counsel’s performance was deficient. *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 34 As we noted in our first prong plain error analysis, the evidence of defendant's guilt of aggravated DUI was not close. *Supra* ¶ 28; see also *White*, 2011 IL 109689, ¶ 133 (noting first prong of plain error and ineffective assistance of counsel arguments share the requirement that defendant must show he was prejudiced). Defense counsel's objection and preservation of the three issues would not have altered the outcome of the proceedings.

¶ 35 CONCLUSION

¶ 36 The judgment of the circuit court of Iroquois County is affirmed.

¶ 37 Affirmed.