2017 IL App (1st) 152291-U

No. 1-15-2291

Third Division

May 3, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
	)	Nos. 8343954
v.	)	8343955
	)	8343956
	)	
TYRA STOREY,	)	Honorable
	)	John D. Turner, Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for driving under the influence of alcohol affirmed over her contentions that the trial court improperly limited her cross-examination of the State's only witness, the court improperly defined the meaning of "reasonable doubt" and there was insufficient evidence of her guilt.

¶ 2 Following a bench trial, defendant Tyra Storey was convicted of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2014)), speeding (625 ILCS 5/11-

601(b) (West 2014)) and failing to signal (625 ILCS 5/11-708 (West 2014)). On appeal, defendant contends that: (1) the trial court improperly limited her cross-examination of the State's only witness; (2) the court improperly defined the meaning of "reasonable doubt;" and (3) the State failed to present sufficient evidence of her guilt for DUI, especially in light of the court's allegedly incorrect statements concerning one of the field-sobriety tests she performed. We affirm.

¶ 3 At trial, Illinois State Police trooper Ehlers testified that, at 2:30 a.m. on September 8, 2014, he was driving northbound on Interstate 294 when he observed in his rear view mirror defendant's vehicle "rapidly approaching" his unmarked vehicle. Ehlers used his radar detector and determined that her vehicle was traveling at 79 miles per hour in an area with a posted speed limit of 55 miles per hour. As defendant approached Ehlers, she changed lanes without using her turn signal. She passed his vehicle, exited the highway using an off ramp without signaling and proceeded to a toll plaza. Ehlers followed her vehicle. Defendant drove to the toll plaza's center lane where a stop sign was located. Her vehicle "slowed down," but "did not make a full accurate stop." Once her vehicle exited the toll plaza, Ehlers activated his emergency lights. Defendant immediately pulled over to the shoulder of the road, which Ehlers described as "beginning to incline."

¶ 4 Ehlers approached the driver's side of defendant's vehicle, and she promptly provided him her driver's license. Ehlers asked defendant from where she was coming, and she responded "a friend's bar." After advising defendant why he had pulled her over, Ehlers noticed that "her eyes were bloodshot and glassy in color" and there was an "overwhelming odor of an alcoholic beverage on her breath." He asked defendant how much alcohol she had consumed that night,

and she responded "[o]ne drink." Ehlers subsequently requested that defendant exit her vehicle so he could perform field-sobriety tests on her. Defendant got out of her vehicle without any difficulty.

¶ 5 Ehlers testified that he had received initial training in field-sobriety tests in 2009 and further trainings over the years, including a recent two-week program for teaching advanced roadside drug enforcement. At each of these trainings, he passed an examination on conducting various field-sobriety tests, including the horizontal gaze nystagmus (HGN), the vertical gaze nystagmus (VGN), the walk and turn and the one-leg stand.

¶ 6 Ehlers first performed the HGN test on defendant. During the test, defendant exhibited six "clues of impairment," which indicated that she had consumed alcohol. Ehlers next performed the VGN test and observed vertical gaze nystagmus which indicated "[a] high dose of alcohol or narcotic" in defendant, though he acknowledged it could also indicate the presence of central vestibular disorders. The next test was the walk-and-turn test, but defendant stated that she would be unable to perform the test due to having had surgery on her left ankle. Defendant took off her shoe to show Ehlers the scars on her ankle.

¶ 7 The final test was the one-leg-stand test. Ehlers informed defendant that, because of her left ankle issue, she may want to perform the test using her right foot. Defendant told him that she would have bad balance on both legs due to the surgery. Although reluctant at first, she eventually submitted to the test, which she performed three times. On her first attempt, she was able to lift her left foot off of the ground for six seconds. On her second attempt, she lifted her foot for two seconds, but "nearly fell over" when she brought her foot down to the ground. On her third attempt, she lifted her foot for two seconds. Ehlers stopped the test at that point for "her

safety." During the test, defendant "sway[ed] from left to right" and exhibited three "clues of impairment." After completing the field-sobriety tests, Ehlers arrested defendant based on his opinion that she was under the influence of alcohol. During his encounter with defendant, she did not have any difficulty walking and her speech was "fairly" clear. He subsequently transported her to the Lansing Police Department.

¶ 8 At the police station, Ehlers gave defendant a copy of the "Warning to Motorists" and read the document aloud to her. During processing, he described defendant as being "rude and uncooperative." Ehlers waited 20 minutes and then asked her if she would submit to a Breathalyzer test. Defendant refused.

¶ 9 On cross-examination, Ehlers acknowledged that alcohol itself does not have an odor, but rather it is the "congener" that has the odor. He further acknowledged that, based on the odor, he could not tell what type of alcohol or exactly how much alcohol she had consumed that night. Ehlers, however, stated that, based on the strength of the odor, he could tell whether a person had recently consumed alcohol and relatively how much alcohol they consumed. Although he could not tell the exact amount, he observed that "if someone has one drink," the odor "might not be as strong," but if someone has "several drinks," the odor "could be stronger."

¶ 10 Ehlers stated that his training was based on the National Highway Traffic Safety Administration's (NHTSA) DUI Detection and Standardized Field Sobriety Testing Manual. He acknowledged the manual was based on research and studies, and gave police officers objective ways to detect alcohol. He agreed that the manual did not state that an officer can differentiate the amount of alcohol an individual has consumed based upon the strength of the odor of alcohol emanating from that person's breath. He asserted that, based on his experience of doing "DUI

enforcement on a regular basis," he could tell that "a slight odor is different than a strong odor or an overwhelming odor."

¶ 11 At the conclusion of the State's case, it submitted video from Ehlers' dashboard camera into evidence. The video was substantially similar to Ehlers' testimony about the events in question.

¶ 12 The trial court found defendant guilty of DUI, speeding and failing to signal. Concerning the DUI, the court noted that several tests were used by Trooper Ehlers, including the HGN and VGN. It recalled that defendant informed Ehlers that she could not perform the walk-and-turn test due to her injured ankle yet noted that she did not exhibit any issues with that ankle while exiting the vehicle or standing near the vehicle. The court highlighted defendant's one-leg-stand test and observed that, during the test, she did not count properly, "sway[ed]" and "fell over." The court also recounted that, after being read the "Warning to Motorists," defendant refused to perform a Breathalyzer test.

¶ 13 Defendant unsuccessfully moved for a new trial. The trial court subsequently sentenced her to concurrent terms of 12 months' supervision. This timely appeal followed.

¶ 14 Defendant first contends that the trial court improperly restricted her cross-examination of Trooper Ehlers during two instances. The first instance occurred after Ehlers testified that he could determine, based on the strength of the odor of alcohol on someone's breath, whether that person had recently consumed alcohol and relatively how much alcohol they had consumed. Defendant highlights the following colloquy:

> "[Defense Counsel]: [Trooper], your training through NHTSA is that you cannot tell how much alcohol a person drank, correct?

[Assistant State's Attorney]: Objection, asked and answered.

THE COURT: Sustained.

[Defense Counsel]: Judge, he did not answer whether or not that was his training. He is giving me his personal opinion in response to the question.

THE COURT: I don't know, Counsel. Ask him— I think you have asked the question twice, and he has given a response.

[Defense Counsel]: But he hasn't said whether that's his training.

THE COURT: You can ask again about his training.

[Defense Counsel]: Your training is that you can't tell?

THE COURT: Counsel, ask him what his training is. You're giving—.

[Defense Counsel]: That is—.

THE COURT: You're not asking questions. You're giving statements again.

[Defense Counsel]: It's cross, Judge."

The second instance occurred when the court sustained the State's objection to defense counsel's question to Ehlers about "[h]ow many arrests" he had made in 2014. Defendant argues the court's limitation was improper because the experience of a police officer and the number of times he has arrested individuals for DUI are important factors in determining whether the officer's testimony supports a conviction for DUI.

¶ 15 A defendant has the constitutional right to confront the witnesses against her. *People v. Arze*, 2016 IL App (1st) 131959, ¶ 113. This right includes cross-examination of witnesses. *Id.* However, the right to cross-examine witnesses is not absolute. *People v. Rendak*, 2011 IL App

(1st) 082093, ¶ 23. The trial court may "impose reasonable limits on cross-examination based on concerns of harassment, prejudice, confusion of issues, witness safety, or repetitive interrogation" (*People v. Holmes*, 2016 IL App (1st) 132357, ¶ 98), as well as the need to limit questions of minimal relevance. *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 56 (citing *People v. Britt*, 265 Ill. App. 3d 129, 146 (1994)). The limits placed on cross-examination rest within the sound discretion of the court, and it will abuse its discretion only if the limitation results "in manifest prejudice to the defendant." *People v. Hall*, 195 Ill. 2d 1, 23 (2000).

¶ 16 The first instance of an allegedly improper limitation of defendant's cross-examination concerned the subject of Ehlers' training through NHTSA. Specifically, defense counsel attempted to elicit from Ehlers that NHTSA's training manual did not include instruction that the amount of alcohol an individual has consumed can be determined based on the strength of the odor of alcohol emanating from that person's breath. It is true that the trial court limited defense counsel's questioning in the portion defendant highlights on appeal, by sustaining the State's objection and then informing counsel that he was "not asking questions" and instead "giving statements."

¶ 17 However, defense counsel later was able to ask Ehlers, without limitation by the trial court, about his training through NHTSA and whether it included training that the amount of alcohol an individual has consumed can be determined based on the strength of the odor of alcohol emanating from that person's breath. In fact, under this questioning, Ehlers acknowledged that his ability to determine how much alcohol someone had consumed based on the strength of the odor of alcohol emanating from that person's breath was based on his "experience" and was not included in the NHTSA manual. Given that defense counsel was able

to ask the very questions of, and elicit the desired responses from, Ehlers later in cross-examination without being limited, the trial court's earlier limitation of defendant's cross-examination did not result in a manifest prejudice to him. See *Hall*, 195 Ill. 2d at 23.

¶ 18 Defendant further argues that the trial court improperly limited her cross-examination of Ehlers when it prevented defense counsel from asking him "[h]ow many arrests" he had made in 2014, the year she was arrested for DUI. To the extent defendant argues the reason for this question was to elicit Ehlers' experience in arresting individuals for DUI, which this court has previously stated is an important factor in determining whether an officer's testimony supports a conviction for DUI (see *People v. Wheatley*, 4 Ill. App. 3d 1088, 1090 (1972)), we note that Ehlers' experience had already been elicited extensively during the State's direct examination of him. In fact, he testified that, in his career as a trooper, he had observed people under the influence of alcohol "[t]housands" of times. A specific question about the amount of arrests he had made in 2014 was repetitive and thus could be properly precluded by the court. See *Holmes*, 2016 IL App (1st) 132357, ¶ 98. Furthermore, defense counsel broadly asked Ehlers how many arrests he had made in 2014, not limiting the question to arrests for DUI. Clearly, Ehlers' arrests for other offenses had no relevance to his ability to determine whether defendant was under the influence of alcohol, and thus counsel's question could be properly precluded by the court on this basis, as well. See *Campbell*, 2012 IL App (1st) 101249, ¶ 56. Accordingly, the trial court did not abuse its discretion in limiting defendant's cross-examination of Ehlers.

¶ 19 Defendant next contends that she was denied her right to a fair trial when the trial court improperly defined the meaning of "reasonable doubt," a "blunder" exacerbated by its analogy to a piece of art. The alleged impropriety occurred when the court stated:

> "Beyond a reasonable doubt, that's the standard which I must apply here. Beyond a reasonable doubt does not mean perfect, absolute, no errors, and no flaws. Beyond a reasonable doubt means reasonable doubt of a reasonable person. I take it akin to much like if you attend an art showing like in the Louvre. You look at the Mona Lisa close up, you'll see all kinds of imperfections. They don't seem to fit, but when you step back, all the pieces seem to fall into place, and that's pretty much how I would view beyond a reasonable doubt where the minor infractions in their nature don't really take away from the true aspect for a reasonable person to make the determination that that was the finding here."

¶ 20 "The United States Constitution neither requires nor prohibits a definition of reasonable doubt." *People v. Downs*, 2015 IL 117934, ¶ 18. Illinois, however, does not provide a definition of reasonable doubt. *Id.* ¶ 19; see Illinois Pattern Jury Instructions, Criminal, No. 2.05 (4th ed. 2000) (where no definition of reasonable doubt is provided and the instruction contains a Committee Note stating it "recommends that no instruction be given defining the term 'reasonable doubt.' ") Our supreme court has long held that trial courts should not attempt to explain or define the meaning of reasonable doubt to a jury, as " 'reasonable doubt' is self-defining and needs no further definition." *Downs*, 2015 IL 117934, ¶ 19 (citing cases). Providing a definition of reasonable doubt will violate the defendant's due process rights "if there is a reasonable likelihood that the jurors understood the instruction to allow conviction upon proof less than beyond a reasonable doubt." *Id.* ¶ 18.

¶ 21 In the present case, however, defendant did not have a jury trial. Rather, she had a bench trial. Defendant points to no case law where the prohibition on the trial court from defining

reasonable doubt to a jury similarly applies to the trial court defining the term aloud during its findings of fact. This prohibition applies in jury trials so as not to confuse the jury and risk convicting the defendant on a lesser burden of proof. See *Downs*, 2015 IL 117934, ¶¶ 18, 32. Conversely, in bench trial, we presume the trial court knew the defendant could only be convicted of an offense if the State had proven all the elements of the offense beyond a reasonable doubt, and we presume the court utilized the proper burden of proof. See *People v. Howery*, 178 Ill. 2d 1, 32 (1997). This presumption can only be rebutted if the record "contains strong affirmative evidence to the contrary." *Id.*

¶ 22 In the present case, the trial court's attempt to explain or define reasonable doubt during its findings of fact do nothing to show that it convicted defendant of DUI on a lesser burden of proof. Furthermore, nothing else in the record provides strong affirmative evidence that the court found defendant guilty on a lesser burden of proof. Rather, the record demonstrates the court's express use of the proper standard of proof, "beyond a reasonable doubt," four separate times during its findings of fact. Similarly, its analogy to the Mona Lisa does not provide strong affirmative evidence that it relied on a lesser standard of proof.

¶ 23 Notably, every decision defendant cites in support of her contention that she was denied a fair trial because the trial court defined reasonable doubt involved a jury trial, not a bench trial. See *People v. Keene*, 169 Ill. 2d 1, 5-6 (1995); *People v. Malmenato*, 14 Ill. 2d 52, 54 (1958); *People v. Dabbs*, 370 Ill. 378, 380 (1938); *People v. Vasquez*, 368 Ill. App. 3d 241, 243 (2006); *People v. Jenkins*, 89 Ill. App. 3d 395, 396 (1980); *People v. Robinson*, 21 Ill. App. 3d 343, 345 (1974). Consequently, we cannot find defendant was denied a fair trial due to the trial court, in a bench trial, discussing its definition of reasonable doubt during its findings of fact.

¶ 24 Defendant lastly contends that the evidence of her guilt for DUI was insufficient. In particular, she argues that the evidence revealed that she had no problems with her speech, demeanor, reaction time, walking or with her balance, which, she asserts, "can hardly be deemed classic symptoms of intoxication." Defendant also argues that her guilt was, in part, due to the trial court's mistaken belief that she failed the one-leg-stand test because she counted incorrectly and fell over during the test. Defendant does not challenge the sufficiency of the evidence to prove she committed the driving violations of speeding or failing to signal.

¶ 25 When a defendant challenges a conviction based upon the sufficiency of the evidence presented against her, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all the elements of the offense proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. While we must carefully examine the evidence before us, credibility issues, resolution of conflicting or inconsistent evidence, weighing the evidence and making reasonable inferences from the evidence are all reserved for the trier of fact. *Brown*, 2013 IL 114196, ¶ 48. We will not overturn a conviction unless "the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Id.*

¶ 26 To sustain a conviction for DUI, the State has to prove that the defendant drove a vehicle while "under the influence of alcohol." 625 ILCS 5/11-501(a)(2) (West 2014). To be considered under the influence of alcohol, the defendant must be "under the influence to a degree that renders the driver incapable of driving safely." *People v. Love*, 2013 IL App (3d) 120113, ¶ 34. Intoxication is a question of fact that must be resolved by the trier of fact. *People v. Morris*, 2014

IL App (1st) 130152, ¶ 20. Circumstantial evidence may be used to prove intoxication. *Id.* The testimony of a single, credible police officer may, by itself, sustain a conviction for DUI. *People v. Eagletail*, 2014 IL App (1st) 130252, ¶ 38.

¶ 27 The evidence at trial revealed that, after witnessing defendant commit multiple traffic violations, Trooper Ehlers pulled her vehicle over to the shoulder of the road. After approaching her vehicle, Ehlers observed that defendant had bloodshot and glassy eyes, and her breath had an "overwhelming" odor of alcohol. See *Love*, 2013 IL App (3d) 120113, ¶ 35 (finding "testimony that a defendant's breath smelled of alcohol and that her eyes were glassy and bloodshot is relevant evidence of the influence of alcohol"). After defendant admitted to having consumed one drink before driving, Ehlers proceeded to perform various field-sobriety tests on her, including the HGN, VGN and one-leg stand. During the HGN test, defendant exhibited six "clues of impairment" which indicated that she had consumed alcohol. The VGN test revealed that defendant had a "high dose" of either alcohol or narcotics. During the one-leg-stand test, in which she exhibited three "clues of impairment," defendant could not balance herself for more than six seconds at any one time and she "sway[ed] from left to right." Ehlers even had to stop the test out of concern for her safety. See *People v. Janik*, 127 Ill. 2d 390, 402-03 (1989) (finding sufficient evidence of DUI where a police officer testified as to the defendant's "odor of liquor," "watery eyes," and "poor test performance" on field-sobriety tests); *Eagletail*, 2014 IL App (1st) 130252, ¶ 38 (finding sufficient evidence of DUI where police officers testified that the defendant had a "strong odor of alcohol on [her] breath," admitted to consuming some alcohol before driving and failed all three field-sobriety tests).

¶ 28 Furthermore, after defendant had been arrested and brought to the police station, Ehlers read the "Warning to Motorists" to her. After an observation period of 20 minutes, Ehlers asked

defendant if she would submit to a Breathalyzer test. Defendant refused, thus providing evidence of a consciousness of guilt. See *People v. Johnson*, 218 Ill. 2d 125, 140 (2005). Although the trial court never expressly stated Ehlers' testimony was credible, in finding defendant guilty based solely on his testimony, the court necessarily found him to be a credible witness. Given these circumstances, when viewing the evidence in the light most favorable to the State, a rational trier of fact could have found defendant was under the influence of alcohol to support her conviction for DUI. See *Eagletail*, 2014 IL App (1st) 130252, ¶ 38 (the testimony of a single, credible police officer may, by itself, sustain a conviction for DUI).

¶ 29 Although defendant argues that her speech, demeanor, reaction time, ability to walk without difficulty and ability to balance herself all demonstrate that she was not intoxicated on the morning in question, intoxication is a question of fact reserved for the trier of fact. See *Morris*, 2014 IL App (1st) 130152, ¶ 20. We cannot reweigh the evidence and substitute our judgment in for that of the trier of fact on this factual issue. See *People v. Lee*, 2012 IL App (1st) 101851, ¶ 32. Moreover, merely because defendant exhibited some symptoms consistent with sobriety does not mean she was not intoxicated.

¶ 30 Defendant further argues that the trial court found she failed the one-leg-stand test based, in part, on its mistaken belief that she counted incorrectly. During the court's discussion of the one-leg-stand test, it stated:

> "On the one-leg-stand test it is quite interesting not only did she keep her arms up at all times despite the numerous times the trooper told her not to do so, when she continued after putting her foot down, she didn't start at one again. She continued from the number she left off. She started at 1, 2, put her foot down, raised it back

up again the second attempt and kept going on from 6, 7, 8, 9, 10, which is not proper."

¶ 31 Defendant highlights a portion of the NHTSA manual she attached to her motion for new trial, in which she made the same argument to the trial court, indicating the proper way to count during the one-leg-stand test is for the individual to continue counting from where she left off after putting her foot on the ground, not restarting the count altogether.

¶ 32 Even if the trial court misspoke about the proper counting method during the one-leg-stand test, we could not find this misstatement had an "effect on the basis of the trial court's ruling" and "result[ed] in a mistake in the decision-making process." *People v. Schuit*, 2016 IL App (1st) 150312, ¶ 107. Regardless of this statement by the court, defendant did not pass the one-leg-stand test, as she swayed from left to right during the test and could not keep her foot lifted in the air for more than six seconds on any of her three attempts. After these three attempts, Ehlers had to stop the test out of concern for her safety. Moreover, even disregarding the one-leg-stand test in its entirety, defendant exhibited signs of alcohol impairment, according to Ehlers, based on the HGN and VGN test, her bloodshot and glassy eyes, and the odor of alcohol on her breath. There was ample evidence to find defendant was intoxicated beyond the evidence from the one-leg-stand test.

¶ 33 Defendant also argues the trial court made an incorrect factual finding when, while recalling her performance on the one-leg-stand test, it stated that "[s]he fell over." We note that Ehlers testified that, during the one-leg-stand test, defendant "fell to the right and nearly fell over." Ehlers' dashboard camera footage also showed that defendant lost her balance on her second attempt of the one-leg-stand test and fell toward her right, but did not fall to the ground. Our review of the video does not convince us that the trial court's finding was incorrect.

¶ 34 Defendant further asserts the trial court failed to mention that the surface on which she was asked to perform the one-leg-stand was inclined. She argues that this incline combined with her foot ailment "was a perfect storm for failure" on the test. As previously discussed, there was ample evidence to find defendant was intoxicated on the morning in question beyond the evidence from one-leg-stand test. Accordingly, we affirm defendant's conviction for DUI.

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.