2018 IL App (1st) 152636-U

SIXTH DIVISION
Order filed: March 9, 2018

No. 1-15-2636

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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
	)	
v.	)	Nos. YW557-864
	)	YW371-474
	)	
WILLARD MORRIS,	)	Honorable
	)	Thomas J. Carroll,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for driving under the influence of alcohol is affirmed where he forfeited his challenge regarding chain of custody. His conviction for "failure to yield to emergency vehicle" under section 11-907(a)(1) of the Illinois Vehicle Code, however, is reversed where the evidence was insufficient to establish that the vehicle was making use of both audio and visual signals.

¶ 2 Following a bench trial, the defendant, Willard Morris, was convicted of "failure to yield to emergency vehicle" (625 ILCS 5/11-907(a)(1) (West 2012)) and driving under the influence

of alcohol (625 ILCS 5/11-501(a)(1) (West 2012)). He was sentenced to 18 months of conditional discharge.

¶ 3 On appeal, the defendant contends that the State failed to prove him guilty of driving under the influence (DUI) because it failed to establish a sufficient chain of custody over the blood sample that showed his blood serum ethanol concentration. The defendant also contends that the State failed to prove him guilty of failure to yield to an emergency vehicle because it did not establish that, at the time of the accident, the "authorized emergency vehicle" made use of "audio and visual signals." For the reasons below, we affirm the defendant's conviction for driving under the influence of alcohol and reverse his conviction for failure to yield to an emergency vehicle.

¶ 4 At trial, Country Club Hills community service officer Bart White testified that he worked with the Country Club Hills police department on "traffic control," "lockouts," and "anything noncriminal." At about 7 p.m., on December 2, 2012, he was dispatched to "relieve an officer" doing traffic control at an accident scene at around "176th and Cicero." There were two northbound lanes of traffic on Cicero and two southbound lanes. White parked his vehicle perpendicularly to block the two northbound lanes. He put on his traffic vest, retrieved his traffic light, and "turned on [his] emergency lights" from "our Ford Escape utility" vehicle, which was equipped with overhead lights. He then stood in front of the passenger side of his vehicle and directed traffic to 177th Street.

¶ 5 At about 8:05 p.m., White saw three motorcycles approaching; two of them decreased speed, but the third one "kept coming." When the motorcycle was about half of a block away and approaching the intersection, White became concerned so he started to wave his light "pretty fast to get his attention." Nonetheless, the motorcycle did not slow down. Feeling that his life was in

danger, White ran and dove to the ground. He heard "screeching noises," looked back, and saw sparks coming from the motorcycle. The rider was face down on 177th and Cicero, on the other side of his emergency vehicle. On cross-examination, White testified that he had not put any flares or cones near his vehicle.

¶ 6 Country Club Hills police officer Giergielewicz testified that, at about 7 p.m. on December 2, 2012, he went to the area of 17600 Cicero Avenue to investigate an accident scene. Initially, the northbound and southbound lanes on Cicero were blocked off at 177th Street by a "squad car," which was later replaced by a "CSO vehicle," as the "community service officers took over traffic control." At about 8 p.m., he heard a "large crashing sound" and saw that the "community service vehicle," which officers referred to as "squads," had been involved in an accident on 177th Street. A motorcycle had struck the "CSO vehicle" on the passenger side and the defendant, who was face down on the ground, was on the other side of the vehicle. Paramedics took the defendant to Christ Advocate Hospital, where Giergielewicz read him the "Illinois Crash Warning to Motorist" in the emergency room. Giergielewicz testified that there was no police-ordered blood draw on the defendant.[1]

¶ 7 Jennifer McGlennon, an emergency room nurse at Advocate Christ Hospital, testified that she had been a nurse for six years, including five years at Advocate. At about 8:40 p.m., on December 2, 2012, she was on the team that cared for the defendant in the emergency room and it was her duty to administer the IV and draw the blood for the labs. McGlennon drew the defendant's blood at 8:48 p.m. To draw his blood, she cleaned the injection site with Betadine,

[1] At the hearing on the defendant's motion to quash arrest and suppress evidence, Giergielewicz testified that he issued three civil citations to the defendant for: failure to reduce speed to avoid an accident, failure to yield to an emergency vehicle, and no proof of insurance. He did not charge the defendant with a DUI until June 2013, after he reviewed the defendant's medical records and became aware that the defendant's blood alcohol concentration was above .08.

started the IV after the Betadine dried, and drew four tubes, or vials, of blood from the IV, which was her normal procedure. She labeled the vials and checked the defendant's armband against the stickers on the vials to make sure "it's correct." She placed a time, date, and her initials on the vials and sent them to the lab located within the hospital, which the hospital used on a regular basis.

¶ 8 McGlennon testified that the lab results were memorialized in the medical records, it was the hospital's regular practice to make such records, and it was done in the regular course of the hospital's business to keep those records. She identified People's Exhibit No. 1 as the defendant's patient chart and testified that it was a portion of the defendant's medical records from his stay at the hospital beginning on December 2, 2012. She stated that she reviewed the medical records and that her initials were in certain parts of the chart. McGlennon further testified that the medical records truly and accurately depicted the procedures that were performed on the defendant during his stay. The records also conveyed that, on December 2, 2012, the defendant's blood serum was .222 milliliters per liter. The State entered the medical records contained in People's Exhibit No. 1 into evidence, with no objection from defense counsel.

¶ 9 On cross-examination, McGlennon testified that she draws blood about 50 times a day. She explained that, when trauma patients come into the emergency room, their names might not be known yet so they are usually identified with a "Doe" name. When McGlennon initially puts an armband on a patient, she usually does not have the real name, date of birth, social security number, or any identifying information. When the defendant first came into the hospital, she did not identify him by his real name.

¶ 10 McGlennon testified that the defendant's blood draw was "ordered by the doctors." To send the blood to the lab, she put the vials in a bag and "tube[d] it to the lab." She testified that she did not know who tested the blood or what procedures they used to test it. The lab identifies patients by "M.R." numbers on the labels of the vials. When a patient arrives at the hospital, an "M.R." number is assigned to him and stays with him until discharge. The M.R. number is put on the "Doe" wristband and on perforated stickers. McGlennon used such stickers to label the vials of the defendant's blood.

¶ 11 McGlennon did not know if the defendant received any medication before she drew his blood. She testified that she did not store the records at the hospital; rather, they are stored in the computer. She was familiar with how the computer works and how it stored patient charts.

¶ 12 On re-direct, McGlennon testified that a patient's M.R. number is never reused on other patients, it is specific to the patient the entire stay at the hospital, and it is the only number specific to the patient. The defendant was identified by his real name at 9:26 p.m., which is when his name was put on his armband. The same M.R. number stayed with the defendant the whole time.

¶ 13 The court found the defendant not guilty of "failure to reduce speed to avoid an accident" but guilty of driving under the influence of alcohol and failure to yield to an emergency vehicle. The court denied the defendant's motion for a new trial and sentenced him to 18 months of conditional discharge, "significant risk of treatment," a victim impact panel, 100 hours of community service, and fines and fees on the DUI conviction. It did not sentence him on the failure-to-yield-to-an-emergency-vehicle conviction. The defendant now appeals.

¶ 14 The defendant first contends that the State failed to establish a sufficient chain of custody for his blood sample that was subject to testing and which showed his blood serum ethanol

concentration. He argues that, while section 11-501.4 of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501.4(a) (West 2012)) relieves the State of the hearsay bar to allow admission of blood test results in DUI cases, it does not eliminate the chain of custody requirement. The defendant acknowledges that, in *People v. Lach*, 302 Ill. App. 3d 587 (1998), and *People v. Henderson*, 336 Ill. App. 3d 915 (2003), the appellate court held that the State need not establish a chain of custody to admit blood results under section 11-501.4; however, he asserts that these cases were incorrectly decided and misconstrued the statute.

¶ 15 "The purpose of establishing a chain of custody is to connect the object to the defendant and the crime and to negate the possibility of tampering or substitution and the rule is therefore applicable to evidence that is easily subject to tampering or substitution." *People v. Hutchison*, 2013 IL App (1st) 102332, ¶ 28. A challenge to the chain of custody is "considered an attack on the admissibility of the evidence" and not to the sufficiency of the evidence, and is, therefore, "subject to the ordinary rules of forfeiture." *People v. Alsup*, 241 Ill. 2d 266, 275 (2011).

¶ 16 To preserve a claim for review, a defendant must generally object to the issue at trial and raise it in a posttrial motion. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). Here, the defendant did not object to the admission of the blood test results in the medical records at trial or raise the issue of chain of custody in a posttrial motion and, thus, "deprived the State of any reasonable opportunity to correct the alleged errors in the chain of custody evidence it presented at trial." *People v. Wilson*, 2017 IL App (1st) 143183, ¶ 22. Because the defendant did not preserve his challenge to the admission of the blood test results in the medical records or raise the issue of chain of custody in the trial court, he forfeited it.

¶ 17 The defendant concedes that he did not properly preserve his challenge in the trial court, but argues that we may nonetheless review the issue under the plain-error doctrine. "The plain-

error doctrine allows a reviewing court to address defects affecting substantial rights if the evidence is closely balanced or if fundamental fairness requires." *People v. Echavarria*, 362 Ill. App. 3d 599, 607 (2005). The first step in the plain-error analysis is to determine whether error occurred because, if there is no error, there can be no plain error. *Wilson*, 2017 IL App (1st) 143183, ¶ 25.

¶ 18 The defendant's medical records containing his blood test results were admitted under section 11-501.4 of the Code, which provides that the results of blood tests are admissible as a business record exception to the hearsay rule if the following criteria are met:

> "(1) the tests were ordered in the regular course of providing emergency medical treatment and not at the request of a law enforcement officer; (2) the tests were performed by the laboratory routinely used by the hospital; and (3) the results of the tests are admissible regardless of the time the records were prepared." *People v. Henderson*, 336 Ill. App. 3d 915, 919-20 (2003); 625 ILCS 5/11-501.4(a) (West 2014).

This court has held that compliance with section 11-501.4 establishes the admissibility of blood test results "and additional chain of custody evidence is not required." *Lach*, 302 Ill. App. 3d at 594. "The purpose of section 11-501.4 is to insure the reliability and integrity of test results conducted on a person charged with driving under the influence." *Id.* Therefore, when the State complies with section 11-501.4, it "demonstrates that reasonably protective measures have been taken to ensure that the blood taken from [the] defendant and tested in the hospital lab was not changed or substituted." *Id*. We will not disturb a trial court's ruling on admission of evidence absent an abuse of dissection. *Id*. at 593.

¶ 19 We conclude that the State complied with section 11-501.4 in this case. McGlennon testified that the defendant's blood draw was "ordered by the doctors." She specifically explained her usual procedure for drawing blood from patients and sending it to the hospital lab, which was the same procedure that she used on the defendant. Giergielewicz testified that there were no blood draws ordered by the police. Thus, the defendant's blood test was conducted in the regular course of providing emergency medical treatment and was not requested by a law enforcement officer, meeting the first criteria for admission under section 11-501.4.

¶ 20 After McGlennon drew the defendant's blood, she checked the stickers she placed on the vials with the defendant's armband to make sure they were correct. She placed the time, date, and her initials on the vials and sent them to the lab located on the first floor of the hospital, which the hospital used on a regular basis. Thus, the blood tests were performed at the hospital's own laboratory in accordance with the hospital's routine, meeting the second criteria for admissibility.

¶ 21 McGlennon testified that the test results were memorialized in the medical records. Under the third criteria in section 5/11-501.4, "the results of the tests are admissible regardless of the time the records were prepared." 625 ILCS 5/11-501.4(a) (West 2014). Accordingly, the State complied with the requirements set forth in section 11-501.4. See *Lach*, 302 Ill. App. 3d at 594 (the State complied with section 11-501.4 where the staff nurse testified that the physicians ordered the blood draw, the test was performed in the regular course of emergency medical treatment, the blood was sent to the hospital lab which normally did the hospital's blood tests, and a report was immediately prepared by lab personnel). Because the State complied with the statute, it did not need to establish a chain of custody. *Id.* ("compliance with section 11-501.4 is

sufficient in and of itself to establish the admissibility of blood tests, and additional chain of custody is not required").

¶ 22 The defendant acknowledges that, "[b]ecause McGlennon testified that the blood draw was 'ordered by the doctors,' and that she sent the specimen to the hospital's own lab, the State's evidence would seem to satisfy" the requirements of section 11-501.4. He nonetheless contends that, contrary to *Lach*, 302 Ill. App. 3d 587, and *Henderson*, 336 Ill. App. 3d 915, compliance with section 11-501.4 only satisfies the hearsay bar on the lab results, not the chain of custody requirements for the underlying blood sample. He argues that *Lach* and *Henderson*, which followed *Lach*, were wrongly decided and should not be followed.

¶ 23 The defendant does not cite to any authority holding that, contrary to *Lach* and *Henderson*, when a blood test is conducted in the ordinary course of providing emergency medical treatment and the blood sample is in the hospital's custody at all times, the State must establish a chain of custody under section 11-501.4 for that blood sample. See *Henderson*, 336 Ill. App. 3d at 922 ("it would be logically absurd for us to require the State to prove chain of custody under section 11-501.4 for a blood sample that was continuously in a hospital's custody and never in the State's custody"). Further, we note that, when a blood test is ordered at the request of a law enforcement officer and the blood sample is immediately taken into the officer's custody, the State must establish a chain of custody under section 11-501.2 of the Code (625 ILCS 11-501.2) (West 2012)). *Henderson*, 336 Ill. App. 3d at 921. The legislature did not impose the same requirement for blood samples ordered in the regular course of providing emergency medical treatment, such as those at issue here. Therefore, we are unpersuaded by the defendant's argument and follow *Lach* and *Henderson* in concluding that, because the State

complied with section 11-501.4, chain of custody evidence regarding the blood samples was not required.

¶ 24 The trial court did not abuse its discretion by admitting the blood test results into evidence without the State establishing a chain of custody for the blood samples. See *Henderson*, 336 Ill. App. 3d at 922 (finding that the State complied with section 11-501.4 and concluding that the trial court "did not abuse its discretion by admitting the lab report into evidence without the State establishing a chain of custody for [the] defendant's sample"). Accordingly, there was no error here and we will not invoke the plain-error doctrine to excuse the defendant's forfeiture of this issue.

¶ 25 The defendant next contends that his conviction of "failure to yield to emergency vehicle" under section 11-907(a)(1) of the Code should be reversed because the State failed to prove that the "authorized emergency vehicle" was displaying "audible and visual signals."

¶ 26 When we review the sufficiency of the evidence, the 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). As a reviewing court, "we must draw all reasonable inferences from the record in favor of the prosecution." *People v. Jones*, 2017 IL App (1st) 143718, ¶ 12. "The determination of the weight to be given the witnesses' testimony, their credibility, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 16. The State must prove "every essential element of the crime beyond a reasonable doubt." *People v. Lozano*, 2017 IL App (1st) 142723, ¶ 30. We "will not set aside a criminal conviction on grounds of insufficient evidence unless the proof is so improbable or

unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *People v. Maggette*, 195 Ill. 2d 336, 353 (2001).

¶ 27 The traffic citation charged the defendant with "failure to yield to emergency vehicle" as the offense, citing section 11-907(a)(1) of the Code (625 ILCS 5/11-907(a)(1) (West 2012)). Section 11-907(a)(1), in relevant part, states:

> "(a) Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of this Code or a police vehicle properly and lawfully making use of an audible or visual signal,
>
> > (1) the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway clear of any intersection and shall, if necessary to permit the safe passage of the emergency vehicle, stop and remain in such position until the authorized emergency vehicle has passed***[.]" 625 ILCS 5/11-907(a)(1) (West 2012).

Thus, to convict the defendant of violating this section, the State had to prove that he failed to yield to an immediately approaching "authorized emergency vehicle" making using of "audible *and* visual signals" or an immediately approaching "police vehicle" making use of "audible *or* visual signal." (Emphasis added.) *Id.* Other than alleging "failure to yield to emergency vehicle" and citing section 11-907(a)(1), the traffic citation does not set forth how the defendant committed the charged violation.

¶ 28 The defendant contends that the State failed to establish that his failure to yield was a violation of section 11-907(a)(1) as charged. He argues that the evidence shows that White's

vehicle was an "authorized emergency vehicle" and therefore the State had to prove that his vehicle made use of both audio and visual signals. The defendant asserts that, although White's testimony shows that the "overhead Mars lights on the top of his vehicle were on[,]" it does not establish that his vehicle had audio signals that were activated. The defendant therefore argues that, as there was no evidence of the statutorily required audio signals, the State failed to establish that he was guilty of failure to yield under section 11-907(a)(1).[2]

¶ 29 The State does not challenge the defendant's assertion that it failed to prove him guilty of violating section 11-907(a)(1); instead, it argues that the evidence established that the defendant violated a different subsection of the statute: section 11-907(c)(1) (625 ILCS 5/11-907(c)(1) (West 2012)).[3] Although the traffic citation cites section 11-907(a)(1), not section 11-907(c)(1), as the offense, the State asserts that, because the defendant did not object to the charging instrument, his argument here should be "construed as asserting the existence of a fatal variance between the charging instrument and the evidence presented." The State contends that there was no variance here and "any perceived variance between the indictment and the evidence at trial sustaining [the] defendant's conviction were immaterial because [the] defendant was not misled in making his defense."

¶ 30 A defendant's argument that he was "convicted of a charge not made" is considered "an argument as to the existence of a fatal variance between the charging instrument and the evidence presented." *People v. Roe*, 2015 IL App (5th) 130410 ¶ 8. However, the defendant here

[2] The defendant does not address the fact that, since White's vehicle was parked, it was not "immediate[ly] approach[ing]" (625 ILCS 5/11-907(a)(1) (West 2012)) when he allegedly violated the Code.

[3] Subsection (c) describes conduct a motorist must follow when "approaching a stationary authorized emergency vehicle" displaying the statutorily required signals. 625 ILCS 5/11-907(c) (West 2012).

is not arguing that he was convicted of a charge not made. He is also not arguing that the act alleged in the charging document under a specific offense was different than the act proved at trial for that same offense, of which he was also convicted. See *People v. Lattimore*, 2011 IL App (1st) 093238, ¶¶ 1, 5, 66-70 (variance argument applied where the indictment alleged that the defendant committed aggravated battery under 720 ILCS 5/12-4(b)(15) in that he "struck" the victim "about the body," and the defendant was convicted of aggravated battery under the same section where the evidence at trial showed that the defendant "caused" the victim to be "struck" "about the body"). He is simply arguing that the evidence is insufficient to prove the elements of the charged offense of which he was convicted and which is specifically cited in the traffic citation, *i.e.*, section 11-907(a)(1).[4] Nothing in the record demonstrates that the defendant was, in fact, convicted under section 11-907(c)(1) rather than the charged section 11-907(a)(1), and the State does not provide a citation to the record showing otherwise. Thus, the State's variance argument has no application here and we will not review its assertion that the evidence shows that the defendant was guilty of violating section 11-907(c)(1) instead of 11-907(a)(1).

¶ 31 We conclude that the State failed to prove the defendant guilty of violating section 11-907(a)(1). Under section 11-907(a)(1), a motorist must yield to an "authorized emergency vehicle" using "audio and visual signals" or to a "police vehicle" using "audio or visual signal." 625 ILCS 5/11-907(a)(1) (West 2012). The State does not argue that the evidence showed that White's vehicle was considered a "police vehicle" under the Code such that it only had to prove that White's vehicle made use of either audio *or* visual signal. Further, neither party disputes that

[4] The only reference in the record to the section of the Code under which the defendant was convicted is in the traffic citation, which cited "11-907(a)(1)" as the "violate[d] section." Throughout the record, the parties consistently referred to the offense as "failure to yield to an emergency vehicle." The traffic citation uses the same verbiage.

White's community service vehicle was considered an "authorized emergency vehicle" under the Code.[5] Therefore, to prove the defendant guilty of violating section 11-907(a)(1), the State had to prove that White's authorized emergency vehicle made use of "audible *and* visual signals." [6]

¶ 32 The evidence did not establish that White's vehicle made use of both "audio and visual signals." Rather, it shows that White turned on the overhead lights of his vehicle, but not any audio signals. Thus, the State did not prove that the defendant failed to yield to an authorized emergency vehicle making use of both audio and visual signals. Accordingly, the State did not prove the defendant guilty of violating section 11-907(a)(1).

¶ 33 For the reasons explained above, we affirm the defendant's conviction for driving under the influence of alcohol and reverse his conviction for violating section 11-907(a)(1) of the Illinois Vehicle Code.

¶ 34 Affirmed in part; reversed in part.

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[5] Throughout the record, the parties refer to White's vehicle as an "emergency vehicle."

[6] Again, White's vehicle was parked rather than "immediate[ly] approach[ing]," as required by section 11-907(a)(1). 625 ILCS 5/11-907(a)(1) (West 2012). Arguably, therefore, the defendant could not violate section 11-907(a)(1), no matter whether White's vehicle was an authorized emergency vehicle or a police vehicle displaying the statutorily required audio and/or visual signals. The defendant does not make this argument.