2018 IL App (1st) 160726-U

No. 1-16-0726

Order filed December 28, 2018

Fifth Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 38214459 |
| | ) | |
| DYLAN BROCKLAND, | ) | Honorable |
| | ) | Terrence J. McGuire, |
| Defendant-Appellant. | ) | Judge, Presiding. |
| | ) | |
| | ) | |

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

**ORDER**

¶ 1 *Held*: Trial court's *sua sponte* declaration of mistrial was warranted by manifest necessity and did not violate defendant's double jeopardy rights; evidence was sufficient to prove defendant guilty of misdemeanor driving under the influence (DUI).

¶ 2 Following a bench trial, defendant Dylan Brockland was convicted of misdemeanor driving under the influence of alcohol (DUI) and sentenced to 18 months' court supervision,

community service and assessed a $500 fine. On appeal, defendant contends that his conviction should be vacated because the trial court's *sua sponte* declaration of mistrial violated his double jeopardy rights and there was insufficient evidence to prove that he was the driver. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 A. Defendant's First Trial

¶ 5 The first bench trial commenced on April 17, 2015, before trial judge Aleksandra Gillespie. The following facts were adduced at trial.

¶ 6 Robert Sampey, a lieutenant EMT with the Chicago Fire Department, testified that on August 1, 2014, at approximately 2:00 a.m., his engine, Engine 69, responded to an accident on the westbound Kennedy Expressway (I-90) near Lawrence Avenue. After arriving at the scene, they determined that it was a one-vehicle accident, and the vehicle had two occupants, who were already outside of the vehicle. The vehicle was upside down and the two people were treated at the scene, one of whom he identified in court as defendant. Sampey testified that he personally treated defendant, while other firefighters tended to the other occupant who had hand injuries. Defendant was standing between the upside down vehicle and the fire truck on the expressway when Sampey first saw him. In checking defendant for injuries, Sampey asked him questions to ascertain his orientation and defendant's answers indicated that he was somewhat confused. Sampey also asked defendant if he had any injuries or pain and noticed an injury on defendant's left shoulder. The injury was a dark red, "large linear abrasion" going from the top of his left shoulder down to his chest that Sampey stated was consistent with a seat belt injury, as he had

seen in his more than 24 years' experience and consistent with someone who was on the left side of the vehicle. Defendant had no injuries to his right shoulder.

¶ 7 Richard Goodson, a Chicago firefighter with Engine 69, testified that he saw the overturned vehicle, some "Good Samaritans" and a young man who was bleeding from his right hand at the scene. The young man had lost skin and flesh along his fingers and part of his right hand, and Goodson bandaged him up. Goodson did not observe any injuries to the left side of the man's body and the ambulance arrived shortly thereafter. The young man was not present in court.

¶ 8 Robert Demovic, a paramedic with the Chicago Fire Department, testified that when he arrived at the scene, Engine 69 and the state police were already there. He saw a vehicle with severe damage to it; it looked like it had been going at a high rate of speed and it was upside down. Demovic also identified defendant in court as one of the two occupants of the vehicle. Demovic spoke with defendant to perform an initial assessment to determine if he was injured and get details about the accident. Demovic put defendant into an ambulance and began treatment. Defendant was vague with his answers, and Demovic was not able to establish whether he was the driver. Demovic received his information about the accident from the police officers, the firefighters of Engine 69 and his own visual inspection of the vehicle. Defendant was taken to Lutheran General Hospital after the paramedics initiated trauma care. Demovic noticed an odor of alcohol on defendant while in the ambulance but did not recall if the other occupant of the vehicle smelled like alcohol. Upon questioning by the court, Demovic stated that the overturned vehicle was located between the shoulder and left lane.

¶ 9 Illinois State Police Trooper Sieczka was also called to the scene of the rollover accident. He identified defendant in court as one of the vehicle's occupants and indicated that he spoke with defendant at the scene, trying to determine who was driving. Sieczka smelled alcohol on defendant and the other occupant,[1] his eyes were glassy and bloodshot, as were the other occupant's. No one at the scene was able to identify the driver, and defendant and the other occupant both denied being the driver. Defendant told Sieczka about his injury, which corresponded to the driver's side seat belt. Defendant also told Sieczka that he drank four beers but could not remember how the accident happened or where he was coming from. Sieczka observed an injury to the other occupant's right forearm.

¶ 10 Defendant and the occupant were taken to the hospital by ambulance for further treatment. Sieczka finished the accident report and went to the hospital, where he found defendant in the emergency room. Defendant initially agreed to take a DUI blood test, but when Sieczka returned with the nurse, defendant refused and Sieczka left to work on his report. Sieczka issued citations to defendant after he was transferred to a regular room.

¶ 11 Katherine Ahlberg, the subpoena technician for Lutheran General Hospital, testified that she maintained medical records for the hospital and released them for legal purposes. Ahlberg testified that she held the position for eight years and that the records were kept in the ordinary course of business for the purpose of treatment during a patient's stay. She identified the certification of medical record authenticity that she signed for release of defendant's medical records pursuant to subpoena. Ahlberg also identified defendant's medical records, which were admitted into evidence. On cross-examination, Ahlberg testified that she was not present when

[1] The other occupant was later identified as James Hogenadal.

defendant's draw was taken, she was not sure if it was a blood or urine test, and she did not know who ordered defendant's tests.

¶ 12 The State rested and defendant made a motion for directed finding, which was denied. Defendant indicated to the court that he did not wish to testify and the defense rested.

¶ 13 After closing arguments, the trial court noted that the State tendered a large stack of medical records and that it would be remiss in its duties if they were not reviewed. The trial court stated that it would set a later date to issue its ruling.

¶ 14 On May 7, 2015, defendant's bench trial resumed. Judge Gillespie stated that prior to starting the trial, she was "pretty sure" that she stated on the record that her sister was a trauma surgeon at Lutheran General Hospital and requested that the records be looked at to make sure that her name was not in them.[2] When she reviewed the medical records, she learned that her sister was defendant's treating physician and there were some inculpatory statements as well. The judge was unsure whether the stipulation to the records by defendant included the inculpatory statements and indicated that she would have to declare a mistrial and recuse herself from the case because "there [was] no way [she] can make a decision in this case." The judge stated that they could set it for trial or whatever the parties wanted to do. Assistant State's Attorney (ASA) Lewellen indicated that the case could be set for trial; defense counsel did not initially respond. Defense counsel then asked for a status date of June 19, 2015, to which the State agreed.

[2] Our review of the record indicates that the first time Judge Gillespie appears as a judge in this case was on the first trial date of April 7, 2015, and the record does not reflect any mention of her sister's position at Lutheran General.

¶ 15 At the June 19, 2015, status date, defendant through his counsel renewed his demand for a speedy trial and the parties agreed to a new trial date of August 7, 2015.

¶ 16 B. Defendant's Second Trial

¶ 17 On August 7, 2015, the parties appeared before Judge Terrence McGuire and requested a trial date of September 15, 2015. Defendant again renewed his speedy trial demand.

¶ 18 Defendant's second bench trial commenced on September 15, 2015, where the same witnesses testified: Lieutenant Sampey, Firefighter Goodson, Paramedic Demovic, Trooper Sieczka and Ms. Ahlberg.

¶ 19 The State presented a motion *in limine* to present limited evidence of the blood test conversion results from the hospital, which was granted. During opening statements, ASA Lewellen noted that defendant's blood test at the hospital revealed his blood alcohol content (BAC) was 0.233.[3] The witnesses' testimony was substantially similar to their testimony at the first bench trial, with all emergency personnel making in-court identifications of defendant. On cross-examination, Paramedic Demovic was questioned about his accident report, which stated that both defendant and the other occupant both denied driving the car and defendant was not wearing a seat belt. Ahlberg testified that defendant's medical records indicated that his alcohol serum was "276 NG-DLABN"[4] after an alcohol draw; she was unsure as to whether it was done with a blood or urine test.

¶ 20 The State asked to have defendant's medical records entered into evidence as a business record. Defendant objected, noting that while Ahlberg laid an adequate foundation for their use as a business record, the State did not present any evidence for the admissibility of the chemical

[3] The statutory limit of BAC is 0.08. 625 ILCS 5/11-501(a)(1) (West 2014).

[4] This term was not defined in the record.

blood or urine tests. The trial court admitted the records into evidence over defendant's objection.

¶ 21 The State rested its case, defendant moved for a directed finding which was denied, and then the defense rested.

¶ 22 The trial court found that the State's evidence was uncontroverted and there was no evidence to rebut it. The court also found the State's witnesses were credible and they testified with "great specificity," noting that each of the witnesses who were present at the scene testified that there were only two injured parties who had any connection to the accident. There was only one damaged vehicle at the scene, there was no testimony of another vehicle or individual involved in the accident. The court further noted that the State was allowed to add circumstantial evidence to prove that defendant was driving, including the injuries he and the other occupant sustained in the accident and found that the only conclusion one could draw was that defendant was in fact driving as there was no evidence to the contrary. Regarding evidence of any level of impairment, the trial court noted that defendant admitted to the officer that he consumed four beers, the officer and paramedic both smelled alcohol on defendant's breath, and the officer saw that defendant had glassy and bloodshot eyes. Additionally, the court found that defendant was unable to recall what happened when questioned by the fire lieutenant and the officer, defendant refused to take a DUI test, and the hospital records revealed that defendant had a BAC of .233. After reviewing all of the evidence, the trial court found that the State proved defendant guilty of DUI beyond a reasonable doubt.

¶ 23 Defendant's motion for new trial was denied after argument from both sides and he was sentenced to 18 months' supervision, community service and a $500 fine. This timely appeal followed.

¶ 24 ANALYSIS

¶ 25 A. Double Jeopardy

¶ 26 Defendant contends that his conviction should be vacated because it was obtained in violation of his constitutional double jeopardy rights. In support, he asserts that the initial trial judge in this case, Judge Gillespie, *sua sponte* declared a mistrial after a continuance to review medical records from the case because her sister was the treating physician at the hospital and the records contained "inculpatory statements." Defendant contends that the trial judge: knew before trial of the potential conflict involving her sister; failed to explain how her sister's role in treating defendant somehow impacted her decision to be fair; failed to disclose the inculpatory statements she found in the medical records; did not consider whether the medical records were necessary for an adequate presentation of the State's case; did not consider whether any conflict of interest could have been waived; and failed to give either party an opportunity to be heard regarding a mistrial. He argues that, because there was no manifest necessity to declare a mistrial during the first trial, his second trial violated the constitutional prohibition against double jeopardy and his conviction should be vacated.

¶ 27 Defendant acknowledges, and the State contends, that this claim was not properly preserved for review. Defendant, however, maintains that it is reviewable under plain error because the evidence was closely balanced.

¶ 28 To preserve an issue for appeal, a defendant must object at trial and raise the issue in his post-trial motion. *People v. Wilson*, 2017 IL App (1st) 143183, ¶ 22. The failure to do so results in forfeiture. *Wilson*, 2017 IL App (1st) 143183, ¶ 22.

¶ 29 The plain error doctrine allows a reviewing court to address defects affecting substantial rights if the evidence is closely balanced or if fundamental fairness so requires rather than finding the claims waived. *People v. Woods*, 214 Ill. 2d 455, 471 (2005). A defendant raising a plain error argument bears the burden of persuasion. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 30 To establish plain error, a defendant must first show that a clear or obvious error occurred (*Thompson*, 238 Ill. 2d at 613), and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error (*People v. Naylor*, 229 Ill. 2d 584, 593 (2008)) or that the error was sufficiently grave that it deprived defendant of a fair trial (*People v. Herron*, 215 Ill. 2d 167, 187 (2005)).

¶ 31 The first step in a plain error review is to determine whether the trial court committed error, and the burden is on defendant to establish that an error occurred. *Thompson*, 238 Ill. 2d at 613. Accordingly, we begin by considering whether the trial court improperly *sua sponte* declared a mistrial.

¶ 32 The double jeopardy clause of both the Illinois and United States Constitutions provide the same protection. *People v. Cabrera*, 402 Ill. App. 3d 440, 446 (2010), (citing *People v. Bellmyer*, 199 Ill. 2d 529, 536-36 (2002). Additionally, section 3-4(a)(3) of the Criminal Code of 1961 (Code) codifies the constitutional double jeopardy proscription. 720 ILCS 5/3-4(a)(3) (West 2014). The prohibition against double jeopardy is designed to prevent the State from

engaging in more than one attempt to convict an individual, thereby subjecting him to embarrassment, expense, continuing anxiety and insecurity, and increasing the possibility that he may be found guilty even if innocent. *Cabrera*, 402 Ill. App. 3d at 446, (citing *People v. Henry*, 204 Ill. 2d 267, 282-83 (2003)). It also furthers the constitutional policy in favor of finality for a defendant (*Cabrera*, 402 Ill. App. 3d at 447) and protects a defendant's interest in avoiding multiple prosecutions where his initial trial is aborted before a final determination of guilt or innocence can be made (*United States v. Scott*, 437 U.S. 82, 92 (1978)).

¶ 33 As evidence had been presented and received, there is no dispute that jeopardy had attached when the mistrial was declared at defendant's first trial. *Serfass v. United States*, 420 U.S. 377, 388 (1975); *People v. Pendleton*, 75 Ill. App. 3d 580, 591 (1979). In a bench trial, jeopardy attaches when the first witness is worn and the court begins to hear evidence. *Cabrera*, 402 Ill. App. 3d at 447. However, concluding that jeopardy attached prior to a mistrial declaration begins rather than ends the inquiry as to whether the double jeopardy clause bars retrial. *Pendleton*, 75 Ill. App. 3d at 591.

¶ 34 When a trial court grants a mistrial *sua sponte*, retrial is only permissible if "manifest necessity" existed for the mistrial. *People v. Roche*, 258 Ill. App. 3d 194, 198-99 (1994); *Pendleton*, 75 Ill. App. 3d at 591. Manifest necessity only exists when " 'the ends of public justice would not be served by a continuation of the proceedings.' " *People v. Poindexter*, 214 Ill. App. 3d 78, 83 (1991) (quoting *United States v. Jorn*, 400 U.S. 470, 485 (1971)).

¶ 35 The trial court must carefully consider all of the circumstances and any reasonable alternatives to declaring a mistrial. *People v. Bagley*, 338 Ill. App. 3d 978, 982 (2003). Whether

to declare a mistrial is a matter within the sound discretion of the trial court and double jeopardy concerns do not arise unless that discretion is abused. *Bagley*, 338 Ill. App. 3d at 982.

¶ 36 Here, the record reveals that, after closing arguments, the trial court took the matter under advisement to review the medical records before issuing its ruling. At the next hearing date, the trial judge noted that she previously stated that her sister worked at the hospital, however, there is no evidence of that statement contained in the record. The trial judge then *sua sponte* declared a mistrial based on what she discovered in the medical records, making specific mention that her sister was defendant's treating physician after the accident and that inculpatory statements were contained in the medical records. Defendant concludes that there was no manifest necessity because the trial court did not articulate its specific reasons for declaring a mistrial.

¶ 37 We disagree with defendant's conclusion. A trial judge's mistrial declaration is not subject to attack "simply because he failed to find 'manifest necessity' in those words or to articulate on the record all the factors which informed the deliberate exercise of his discretion." *Washington*, 434 U.S. at 517.

¶ 38 Defendant misstates the trial judge's stated reasons for *sua sponte* declaring a mistrial. The record indicates that the trial judge stated that she was declaring a mistrial after reviewing defendant's medical records because her sister was his treating physician in the emergency room, the records contained inculpatory statements and it was unclear to what extent defendant's prior stipulation to the medical records extended to those statements. Both parties were given the opportunity to be heard regarding the mistrial, and neither party objected. We conclude that there was a manifest necessity to declare a mistrial in the case at bar and that the trial judge did

not abuse its discretion in declaring a mistrial. Thus, it was not error for the trial judge to *sua sponte* declare a mistrial.

¶ 39 We further note, and the State contends, defendant consented to the mistrial by not objecting to it and participating in the second trial. The defendant's acquiescence in a mistrial will generally remove any bar to reprosecution unless the conduct of the judge or prosecutor was calculated to provoke the defendant to move for mistrial. *Roche*, 258 Ill. App. 3d at 199. Further, a defendant's failure to object to the trial court's *sua sponte* grant of a mistrial generally constitutes acquiescence in the mistrial. *Roche*, 258 Ill. App. 3d at 199.

¶ 40 In response, defendant argues in the alternative that his trial counsel was ineffective for failing to object or preserve the issue for review. To prevail on an ineffective assistance of counsel claim, the defendant must demonstrate that his counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984), *People v. Gabriel*, 398 Ill. App. 3d 332, 346 (2010). As we have already concluded that the trial court properly *sua sponte* declared a mistrial, it follows that trial counsel's conduct could not be considered objectively unreasonable for failing to object to the trial court's proper conduct. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Gabriel*, 398 Ill. App. 3d at 346. We accordingly reject defendant's contention that his trial counsel was ineffective.

¶ 41 We conclude that the decision to *sua sponte* declare a mistrial was not an abuse of the trial judge's discretion and was not done in error. Without error, there is no plain error. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008). We shall honor the procedural default and decline to address

the merits of defendant's contentions as they are forfeited. *People v. Sebby*, 2017 IL 119445, ¶ 48.

¶ 42 B. Sufficiency of the Evidence

¶ 43 Alternately, defendant also contends that the evidence was insufficient to prove him guilty of misdemeanor DUI because there was no direct evidence to prove that he was the driver. In support, defendant maintains that he gave no inculpatory statements; no eyewitness identified him as the driver; no evidence was presented that he possessed the keys to the car; and no evidence was presented that the car was registered in his name. He contends that his conviction should be vacated.

¶ 44 In reviewing the sufficiency of the evidence, the relevant question is whether, considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. McCormick*, 339 Ill. App. 3d 641, 647 (2003). A reviewing court is not permitted to substitute its judgment for that of the trier of fact. *McCormick*, 339 Ill. App. 3d at 647. Rather, the reviewing court must examine the record, keeping in mind that it was the trier of fact who saw and heard the witnesses. *People v. Weathersby*, 383 Ill. App. 3d 226, 229 (2008). It is the function of the trier of fact to determine the credibility of witnesses and the weight to be given their testimony, to resolve conflicts in the evidence and to draw reasonable inferences from the evidence. *McCormick*, 339 Ill. App. 3d at 647. Testimony may be found insufficient only where it is clear from the evidence in the record that no reasonable person could accept it. *Weathersby*, 383 Ill. App. 3d at 229.

¶ 45 Section 11-501(a)(2) of the Code provides that an individual "shall not drive or be in actual physical control of any vehicle within this State" while such individual is "under the influence of alcohol." 625 ILCS 5/11-501(a)(2) (West 2014). A defendant is guilty of DUI if the State proves that he was under the influence of alcohol to a degree that rendered him incapable of driving safely. *Weathersby*, 383 Ill. App. 3d at 229.

¶ 46 In this case, some of the evidence presented by the State was circumstantial. The State may prove a defendant guilty of DUI based on circumstantial evidence as long as it satisfies proof beyond a reasonable doubt. *People v. Slinkard*, 362 Ill. App. 3d 855, 857 (2005). In a case based on circumstantial evidence, the trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances if all the evidence considered collectively satisfies the trier of fact beyond a reasonable doubt that the defendant is guilty. *Slinkard*, 362 Ill. App. Ed at 857. A conviction for DUI may be sustained based solely on the testimony of the arresting officer, but that testimony must be credible. *People v. Gordon*, 378 Ill. App. 3d 626, 632 (2007).

¶ 47 Here, the following evidence was introduced at trial by the State as evidence of defendant's guilt: three firefighter personnel and a state trooper who were present at the scene testified that there were only two injured parties who had any connection to the accident. There was only one damaged vehicle at the scene and there was no evidence of another vehicle involved in the accident. The State presented evidence of defendant's injury to his left side that was consistent with being on the driver's side of the vehicle, as testified to by emergency personnel. The State also presented evidence of the other occupant's injuries that were consistent with being on the passenger side. Defendant admitted to the officer that he consumed four beers

and the officer and paramedic both smelled alcohol on defendant's breath. The officer also testified that defendant had glassy and bloodshot eyes. The fire lieutenant and state trooper testified that defendant was unable to recall what happened when questioned at the scene. After his arrival at the hospital, defendant refused to take a DUI test and the hospital records revealed that defendant had a BAC of .233. Viewing the evidence in the light most favorable to the State, we find that the State proved defendant guilty of DUI beyond a reasonable doubt.

¶ 48 Defendant nevertheless contends that the State provided no proof that he was the driver. However, in other cases where the defendant denied driving and another person present at the scene could have operated the vehicle, courts nevertheless have concluded that the defendant was in fact the driver. *Slinkard*, 362 Ill. App. 3d at 858. These courts based their conclusions on physical evidence collected at the accident scene and the defendant's proximity to the vehicle. *Slinkard*, 362 Ill. App. 3d at 858.

¶ 49 Here, the State presented circumstantial evidence that defendant was the driver: there were only two occupants of the vehicle; both defendant and the other occupant sustained injuries. Both occupants denied driving the vehicle, however, defendant's injuries were consistent with being the driver while the other occupant's injuries were consistent with being the passenger. We conclude that the circumstantial evidence was sufficient to prove beyond a reasonable doubt that defendant was the driver.

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, we affirm the decision of the trial court.

¶ 52 Affirmed.