

2018 IL App (1st) 171550-U

No. 1-17-1550

September 28, 2018

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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.)	No. YE-215-622
)	
PIOTR CACKOWSKI,)	Honorable
)	Stanley L. Hill,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The evidence was sufficient to prove defendant guilty of driving under the influence of alcohol beyond a reasonable doubt over his contentions that the arresting officer was not credible and there was no evidence that corroborated the subjective opinions of the police officers that he was under the influence of alcohol.

¶ 2 Following a bench trial, defendant Piotr Cackowski was found guilty of driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2016)) and sentenced to 24 months conditional discharge, significant risk treatment, a victim impact panel, 240 hours of community

service, and driving restrictions. On appeal, defendant contends that the State did not prove him guilty beyond a reasonable doubt of driving under the influence because there was no evidence that corroborated the police officers' subjective opinions that defendant was under the influence of alcohol. For the reasons below, we affirm.

¶ 3 At trial, Elmwood Park police officer Steven Messina, who had been a patrol officer for four years and was trained in DUI investigations, testified that, on March 20, 2016, at about 1:20 a.m., while on patrol duty, he saw a pick-up truck driving southbound on a one-way northbound street. There were signs indicating that the street was only a northbound street and it was “unusual for a vehicle, at that time, to be driving the wrong way down a one-way.” When the vehicle turned, Messina started following it. The vehicle “started to pick up” and accelerate and the wheels on the driver’s side “crossed over the median,” which was marked by two solid lines. Messina turned on his emergency lights. The vehicle turned southbound on a northbound street and pulled to the side.

¶ 4 Messina approached the vehicle and asked the driver, identified in court as defendant, for his license and proof of insurance. It took defendant about 30 seconds to get the documents out and he “was fumbling” when doing so. Defendant was the only person inside the vehicle and Messina he “had a strong odor of alcoholic beverage emitting from his breath, slurred speech, [and] blood[shot, watery eyes.” Messina asked defendant to step out of his vehicle to perform field sobriety tests. Defendant stepped out and went to the back of his truck, and, when defendant was standing there, Messina observed that he had “slurred speech,” “was wobbling” and “[t]he smell of alcohol was still coming from his breath.” Messina asked defendant if he would like to

perform field sobriety tests and defendant responded, “ ‘no, I don’t want to do any tests.’ ” Messina placed defendant under arrest.

¶ 5 At the police station, Messina read defendant the “warning to motorists,” which defendant signed. Defendant did not submit to chemical testing. In Messina’s professional life, he had observed a “few hundred” individuals under the influence of alcohol and, in his personal life, he had observed about five hundred individuals under the influence of alcohol. Messina believed defendant was under the influence of alcohol based on his experience and the “driving erratically, going down two, one-way streets, smell of alcohol on his breath, from the person, slurred speech, [and] bloodshot, watery eyes.” The State entered into evidence and published a video taken from a camera in Messina’s squad car.

¶ 6 The video shows Messina approach the driver’s side of defendant’s truck, ask for his license and registration, and wait outside the truck for about one and a half minutes, during which time another officer approaches the passenger’s side. Messina then speaks with defendant, goes back to his squad car, and waits there for a little over one minute. Messina then approaches defendant’s truck again and, although there is no audio at this point, appears to be talking to defendant. Defendant then exits his truck and, after doing something with what appears to be his wallet, Messina and defendant start walking towards the back of defendant’s truck. As they are walking, an officer in the squad car moves the camera at an angle such that Messina and defendant cannot be seen in the video for about one second. The video then shows Messina and defendant stop and talk at the back of defendant’s truck, after which defendant is placed in handcuffs.

¶ 7 On cross-examination, Messina testified that, in Elmwood Park, there are a few streets, “that when they transfer over from Chicago that go in different directions.” He testified that “[y]ou see a few” vehicles driving down the wrong way on a one-way street but he “would still say it’s unusual.” As soon as Messina turned on his emergency lights, defendant turned his car and immediately and safely pulled over. There was nothing wrong with the amount of time it took defendant to respond to Messina’s emergency lights, which is “one of the keys” he would measure when determining whether a person was under the influence. There was no damage to defendant’s vehicle and Messina did not receive any calls reporting that defendant had been driving irregularly.

¶ 8 Messina testified that defendant understood Messina when Messina asked him for his license and insurance card. Defendant could not find his license and, when he did find it, “he had trouble getting it out.” The license was stuck in the plastic in his wallet. Defendant did not fall or stumble when he got out of his pick-up truck, which required him to use a high step. When defendant walked to the back of his vehicle, he did not stumble, trip, or fall and, when he was standing there, he did not hold on to the vehicle or Messina for support.

¶ 9 Messina did not ask defendant why his eyes were bloodshot. In response to Messina’s question about whether defendant had any alcoholic drinks that night, defendant told him “he did not drink any alcohol.” Messina did not notice anything unusual, disorderly, or soiled on defendant’s clothing and testified his clothing was orderly and neat and Messina understood defendant’s speech. Messina did not notice defendant hiccupping, belching, vomiting, crying, or fighting. Messina noticed defendant “lip-smacking,” which people do when their lips are dry “[o]r when they’re intoxicated” but intoxication is not the only reason someone does it.

¶ 10 Elmwood Park police officer Jason Marchi testified that he had been a police officer for 10 years, took classes on DUI investigations at the police training academy, and was a certified breath operator. On March 20, 2016, at about 1:20 a.m., he assisted Messina with a traffic stop. When he arrived, there was a large pick-up truck facing southbound on a northbound one-way street and Messina was in his squad car. There were no passengers inside the vehicle. Marchi observed two open containers of alcohol in the center cup console. Marchi identified photographs of the interior of defendant's vehicle and testified that they showed two 16-ounce open cans of Heineken beer in the center console and two unopened cans of Heineken beer in a six pack ring in the rear seat. Marchi performed an inventory search of the vehicle and recovered four cans of Heineken beer.

¶ 11 Marchi testified that, when defendant was in the lock-up area, he had "blood[]shot watery eyes, strong odor of an alcoholic-base beverage coming from his breath," was not "very cooperative," and was "refusing instructions." After defendant was read "his warning to motorists," Marchi requested that he perform a breath test. Defendant told Marchi he was "not going to do it." Defendant's refusal was documented on the alcohol influence report and Marchi identified a copy of a printed receipt from the "ECIR 2 machine" showing defendant refused the breath test at 2:17 a.m.

¶ 12 Marchi worked the midnight shift for 8 of his 10 years as a police officer and saw "people just about every other day under the influence." Marchi believed that defendant was under the influence of alcohol based on "his blood[]shot watery eyes, strong odor of alcohol-based beverage on his breath," "attitude," "demeanor," and "slurred speech." Marchi testified

that the “open alcohol in the vehicle was pretty indicative of someone who had been consuming alcohol.”

¶ 13 On cross-examination, Marchi testified that he did not ask defendant if anyone else was in the vehicle, who had been drinking the beer found in the vehicle, or whether defendant had been drinking it. Marchi did not recall seeing defendant stumble or fall at any time and did not see him lose his balance.

¶ 14 The trial court found defendant guilty of driving under the influence of alcohol and three traffic violations, including “improper lane use violated median” and two violations for “driving the wrong way on a one-way.”¹ The court noted that, “even though [defendant] denies that he was drinking, you got two credible officers to testify they smelled alcohol” on him. The court summarized the officers’ testimonies and stated that, “you know, the testimony of one witness who is clear and convincing is sufficient to convict. *** even if it’s subjective, if it’s clear and convincing, that’s sufficient to convict.” The trial court ultimately sentenced defendant to 24 months conditional discharge, significant risk counseling, 240 hours of community service, which included participation in Alcoholics Anonymous or other peer support program, and restrictions on driving.²

¶ 15 Defendant contends on appeal that the State did not prove him guilty beyond a reasonable doubt of driving under the influence of alcohol. He asserts that the trial court relied on the police officers’ testimony but Messina, the arresting officer, was not credible. Defendant argues that,

¹ Defendant is not contesting the traffic violations on appeal.

² The report of proceedings on appeal does not contain the transcripts for the hearings on defendant’s motion for a new trial, sentencing, or motion to reconsider sentencing. On appeal, the parties do not raise issues with respect to defendant’s motion for a new trial nor do they dispute the sentence. Thus, the absence of the transcripts of these hearings does not affect our disposition.

other than the police officers' testimony, there was no other evidence that he was under the influence of alcohol and the officers' subjective opinions were not corroborated by evidence. Defendant also claims that the trial court misapplied the burden of proof when it found him guilty because it applied a "clear and convincing" standard, which is a lower burden of proof than the beyond a reasonable doubt standard.

¶ 16 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." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We must draw all reasonable inferences in favor of the State. *People v. Phillips*, 2015 IL App (1st) 131147, ¶ 16. The trier of fact, the trial court here, has the responsibility "to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences from it." *People v. Morris*, 2014 IL App (1st) 130512, ¶ 16. We will not substitute our "judgment for that of the trier of fact on issues involving the weight of evidence or the credibility of witnesses." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). We will not "reweigh the evidence" (*Phillips*, 2015 IL App (1st) 131147, ¶ 26) and "will not set aside a conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt" (*People v. Diaz*, 377 Ill. App. 3d 339, 344 (2007)).

¶ 17 To prove defendant guilty of driving under the influence (DUI) of alcohol, as charged here, the State had to prove that defendant (1) was in actual physical control of the vehicle and (2) was under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2016); see *People v. Gordon*, 378 Ill. App. 3d 626, 631 (2007). Defendant only challenges the second element, *i.e.* whether he was under the influence of alcohol.

¶ 18 “Circumstantial evidence alone may suffice to prove a defendant guilty of DUI.” *Morris*, 2014 IL App (1st) 130512, ¶ 20. Further, “[t]he testimony of a single, credible police officer may alone sustain a conviction for driving under the influence of alcohol.” *Phillips*, 2015 IL App (1st) 131147, ¶ 18. When the arresting officer provides credible testimony, “[s]cientific proof of intoxication is unnecessary to sustain a conviction for driving under the influence.” *Gordon*, 378 Ill. App. 3d at 632. “Intoxication is a question for the trier of fact to resolve on the basis of having assessed the credibility of the witnesses and the sufficiency of the evidence.” *Morris*, 2014 IL App (1st) 130512, ¶ 20.

¶ 19 We first note that we disagree with defendant’s assertion that the trial court misapplied the burden of proof. Defendant takes issue with the trial court’s statement that “you know, the testimony of one witness who is clear and convincing is sufficient to convict. But, when you got - - even if it’s subjective, if it’s clear and convincing, that’s sufficient to convict.” The trial court found that both officers were credible and, from our review of the court’s ruling, it was not describing the State’s burden of proof with respect to the evidence when it used this language but was rather explaining its credibility findings with respect to the officers’ testimonies, *i.e.* their testimony was clear and convincing. See *People v. Weston*, 271 Ill. App. 3d 604, 616 (1995) (“The circuit court’s use of the term of art “clear and convincing” was used solely to assess the credibility of [the witness].”). Further, we note that the trial court is presumed to know the law and apply it properly. *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 70 (“The trial court is presumed to know the law, including the allocation of the burden of proof, and to apply it properly, absent a strong affirmative showing to the contrary in the record.”). There is no indication in the record that the trial court applied the incorrect burden of proof. Thus, because

the court was describing its credibility findings and because there is no indication in the record that it applied the incorrect burden of proof, we are unpersuaded by defendant's argument.

¶ 20 Viewing the evidence as a whole and in the light most favorable to the State, we conclude that the circumstantial evidence was sufficient to prove defendant guilty of driving under the influence of alcohol.

¶ 21 Officer Messina, whom the trial court found credible, testified that he stopped defendant's vehicle after defendant drove the wrong way on a one-way street and crossed over a median marked by two solid yellow lines. When Messina asked defendant for his driver's license, defendant "fumbled" and took about 30 seconds getting it out and Messina observed that he had "blood[ly]shot" "watery eyes," "slurred speech," and a "strong odor of alcoholic beverage emitting from his breath." When defendant was standing by his truck, Messina further observed that he had "slurred speech," and "[t]he smell of alcohol was still coming from his breath." See *People v. Love*, 2013 IL App (3d) 120113, ¶ 35 ("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"). In Messina's professional career, he had observed a "few hundred" people under the influence of alcohol and, based on his experience, he believed defendant was under the influence of alcohol. Messina's testimony was sufficient to establish that defendant was driving under the influence of alcohol. See *Phillips*, 2015 IL App (1st) 131147, ¶ 18 ("[t]he testimony of a single, credible police officer may alone sustain a conviction for driving under the influence of alcohol").

¶ 22 Further, Officer Marchi corroborated Messina's testimony. Marchi testified that, when defendant was in the lock-up area, he had "blood[ly]shot watery eyes" and a "strong odor of an

alcoholic-base beverage coming from his breath.” In addition, Marchi observed two 16-ounce open cans of beer in the center console of defendant’s vehicle. Marchi, who worked the midnight shift for 8 of his 10 years as a police officer, saw people “just about every other day under the influence” and, based on defendant’s bloodshot “watery eyes,” “attitude,” “demeanor,” “slurred speech,” the “strong odor of alcohol-based beverage on his breath,” and “open alcohol in the vehicle” believed that defendant was under the influence of alcohol. Furthermore, defendant refused to perform field sobriety tests and to take a breathalyzer test, which is relevant circumstantial evidence of defendant’s consciousness of guilt. See *People v. Weathersby*, 383 Ill. App. 3d 226, 230 (2008); see *People v. Roberts*, 115 Ill. App. 3d 384, 387-88 (1983). Considering the evidence in the light most favorable to the State, this evidence was sufficient for any rational trier of fact to find defendant guilty beyond a reasonable doubt of driving under the influence of alcohol.

¶ 23 Defendant claims the trial court’s finding that Messina was credible was “against the manifest weight of the evidence.” He asserts that Messina was not credible because his testimony on direct examination that defendant “was wobbling” was contradicted by his testimony on cross-examination that defendant did not have any problems getting out of his pickup truck and defendant did not stumble, trip, or fall when he walked to the back of his vehicle. Defendant claims that Messina’s testimony was contradicted by the video and Marchi’s testimony, as there is no indication in the video that defendant “wobbled” at any point and Marchi testified that he did not see defendant lose his balance and could not recall seeing defendant use anything for support, stumble, or fall at any point.

¶ 24 The trial court heard Messina and Marchi testify and viewed the video that was published at trial and, after doing so, it found both officers credible. As the trier of fact, the trial court is in a “superior position to observe witnesses, judge their credibility, and determine the weight their testimony should receive” (*People v. Tara*, 367 Ill. App. 3d 479, 483 (2006)) and it has the responsibility to “fairly resolve conflicts in the testimony.” *People v. Spiller*, 2016 IL App (1st) 133389, ¶ 25. From our review of the video, although defendant does not appear to be “wobbling,” that does not mean that Messina, who was next to defendant, did not observe him wobbling. Messina could have seen defendant wobble during the point in the video where defendant and Messina could not be seen for about one second. It was the trial court’s responsibility to observe Messina, judge his credibility, and resolve any conflicts in his testimony. Further, even if we assume that defendant was not wobbling during the stop, we cannot find that Messina’s testimony on the issue of whether defendant was “wobbling” would have been anything more than a minor inconsistency or that his testimony as a whole was so improbable as to raise a reasonable doubt of defendant’s guilt. *Joiner*, 2018 IL App (1st) 150343, ¶ 62 (“[m]inor inconsistencies in the testimony between witnesses or within one witness’ testimony may affect the weight of the evidence but does not automatically create a reasonable doubt of guilt”). Thus, we are unpersuaded by defendant’s argument that the trial court’s credibility finding with respect to Officer Messina was against the manifest weight of the evidence.

¶ 25 For the reasons stated above, we affirm defendant’s conviction.

¶ 26 Affirmed.