2018 IL App (2d) 160312-U
No. 2-16-0312
Order filed November 28, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 13-DT-633
JAMIE SUE SCRIBNER,	)	Honorable Thomas J. Stanfa,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant showed no plain error or ineffective assistance as to the trial court's exclusion of certain evidence: the evidence was not relevant to the central issue of whether defendant had been driving her car, and defendant submitted other evidence to support her theory that she had been motivated to falsely tell the police that she had been driving.

¶ 2 Following a jury trial, defendant, Jamie Sue Scribner, was found guilty of driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2016)). She appeals, contending that the trial court erred by striking testimony critical to her defense. We affirm.

¶ 3 At trial, Aurora police officer Steve Pacenti testified that, on June 18, 2013, he was dispatched to investigate an accident. Upon arrival, he saw fresh tire tracks that had gone about 10 feet off the road, an uprooted tree partially blocking the road, and a gold Mercury that had stopped perpendicular to the road. From the tire tracks, he concluded that the car had gone over the curb, crossed the parkway and the sidewalk, struck the tree, then started back toward the road.

¶ 4 Although the car had a passenger, no one was in the driver's seat. After awhile, defendant approached Pacenti and said that she had been the driver. She said that she had been going east when the car, which was hers, began acting "weird" and somehow struck a tree. According to defendant, she was returning home from a friend's house, where she had drunk a 16-ounce can of beer.

¶ 5 Pacenti noted that defendant's eyes appeared glassy and bloodshot, her speech was slurred, she had a strong odor of alcohol, and her body swayed. Pacenti had defendant perform field sobriety tests, following which he concluded that she was under the influence of alcohol. He placed her under arrest. According to Pacenti, defendant never told him that anyone else had been driving her car that night. At the police station, defendant refused to submit to a Breathalyzer test.

¶ 6 Defendant testified that on June 17, 2013, she drove her gold Mercury to the home of a friend, Geraldine Genslinger. Frederick Williams and a neighbor, Lupe, were with her. She was tired, having been up the previous night with her two children. She drank a big can of beer, then lay down on the couch and fell asleep. When she woke up, she, Lupe, and Williams decided that it was time to leave. Still tired, defendant asked Lupe if she was "okay to drive." Lupe said that she was, so defendant gave her the car keys.

¶ 7 Defendant sat in the backseat as Lupe drove. She fell asleep but was awakened when the car shook. The car had hit a tree and would not start. Defendant testified that Lupe told her, " 'I'm not valid.' " The court sustained the prosecutor's general objection and struck that portion of the testimony.

¶ 8 According to defendant, Lupe then walked home "because she said that she was not valid." The court sustained the prosecutor's objection. Defendant and Williams tried to push the car into a parking lot but could not, because a wheel was bent.

¶ 9 Defendant denied driving on June 18. She told police that she was the driver because she "didn't think it was going to be like that serious." She assumed that she would just get a ticket. She continued, "I just—we were friends, I didn't—I don't know." When asked by her attorney whether she was trying to protect her friend, she answered, "Well, kind-of [sic] because I mean I wasn't thinking that I was going to jail yet for no DUI or none of that."

¶ 10 Genslinger testified that, as defendant was leaving, she tossed her keys to Lupe and asked her to drive. However, Genslinger did not actually see Lupe drive away.

¶ 11 The jury found defendant guilty. The court sentenced her to 24 months' probation. Defendant filed a posttrial motion, but did not question the court's decision to strike the testimony about Lupe not being "valid." Defendant timely appeals.

¶ 12 Defendant contends that the trial court erred by striking her testimony that Lupe had said that she was " 'not valid.' " Defendant contends that the statement was not hearsay and, furthermore, that it was critical to her defense.

¶ 13 Defendant concedes that she failed to raise the issue in her posttrial motion, thus forfeiting it. However, she asks us to consider the issue as plain error or, alternatively, ineffective assistance of counsel. The plain-error doctrine allows a reviewing court to consider

unpreserved error when (1) a clear or obvious error occurred 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, or (2) a clear or obvious error occurred that is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 14 To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *People v. Cherry*, 2016 IL 118728, ¶ 24 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable and that there is a " 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (quoting *Strickland*, 466 U.S. at 694).

¶ 15 Defendant's entire argument on the plain-error issue is that "evidence on the true identity of the driver of the car was closely balanced and the error was so prejudicial that [defendant] was denied a fair trial." Defendant points out in a footnote that the jury sent out a note asking whether Lupe had been subpoenaed to testify. Defendant asserts that this shows that the jury accorded "significance to the defendant's claim that Lupe was the driver." Similarly, defendant's entire argument on the ineffective-assistance issue is that counsel's failure to preserve the issue for review "may be deemed ineffective assistance of counsel deserving of relief." Thus, defendant has failed to develop a cogent argument on either issue.

¶ 16 In any event, the exclusion of the evidence was not plain error, and the failure to preserve the issue was not ineffective assistance. Initially, defendant devotes much of her brief to arguing that the evidence was not hearsay because it went to defendant's state of mind. We note that the

State never objected on hearsay grounds in the trial court. On appeal, without conceding the hearsay issue, the State principally argues that it was irrelevant in any event. We thus focus on that question without deciding whether the evidence was hearsay.

¶ 17 An accused has " 'the right to present a defense.' " *People v. Manion*, 67 Ill. 2d 564, 576 (1977) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)). However, a trial court has broad discretion to exclude irrelevant evidence. *People v. Bohn*, 362 Ill. App. 3d 485, 490 (2005). We will not reverse a trial court's ruling on evidentiary questions absent an abuse of discretion. *Id.*

¶ 18 The State argues that the evidence was irrelevant to the principal contested issue: whether defendant was driving the car. We agree. The primary issue was whether defendant or Lupe was the driver. Evidence that Lupe told defendant that her license was not valid was irrelevant to that issue. If anything, it made it more likely that defendant was the driver, as someone who knew that her license was suspended would be unlikely to voluntarily get behind the wheel.

¶ 19 The evidence was relevant, if at all, to the collateral issue of why defendant told Pacenti that she was the driver. In that respect, defendant did testify that she was "kind of" protecting her friend by claiming to be the driver. Evidence of the precise reason that her friend needed protecting was thus largely cumulative. See *People v. Frazier*, 129 Ill. App. 3d 704, 710 (1984) (trial court has discretion to exclude cumulative testimony). Given the marginal relevance of the evidence, its exclusion was not plain error or the product of ineffective assistance.

¶ 20 In the cases defendant cites, the excluded evidence went to the heart of the defense. For example, in *People v. Whiters*, 146 Ill. 2d 437, 444 (1992), proffered testimony about the defendant's conversation with the victim during a bus ride after his previous arrest for battering another girlfriend was critical to the defendant's claim of self-defense.

¶ 21 In *People v. Miller*, 327 Ill. App. 3d 594 (2002), the prosecution theory was that the defendant murdered his wife because she was planning to leave him. The reviewing court held that the trial court erred by excluding evidence that the defendant had previously sought to divorce his wife, as it was critical to discrediting the State's evidence of motive. *Id.* at 598.

¶ 22 In *People v. Quick*, 236 Ill. App. 3d 446 (1992), the defendant was convicted of attempting to hire a hitman to kill her husband. The court held that it was error to exclude evidence of conversations between the defendant and the hitman, as they were critical to the defendant's defense that she felt compelled to go through with the plan because the hitman threatened her. *Id.* at 453.

¶ 23 In each case, then, the excluded evidence was directly relevant to a key element of the defense case. Here, by contrast, the evidence related only to a collateral point, which defendant was able to establish by other evidence.

¶ 24 The judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 25 Affirmed.