2019 IL App (4th) 170092-U

NO. 4-17-0092

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 22, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
WILLIAM VALTIERRA,	)	No. 15CF1137
Defendant-Appellant.	)	
	)	Honorable
	)	John Casey Costigan,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) defendant failed to show his contentions of error were reviewable under the plain-error doctrine and (2) the evidence was sufficient to sustain his conviction for aggravated driving under the influence of alcohol.

¶ 2 Following a bench trial, the trial court found defendant, William Valtierra, guilty of aggravated driving under the influence of alcohol. Defendant appeals, arguing (1) the trial court committed plain error when it considered (a) an anonymous complaint about a reckless driver as proof he was impaired and (b) a portion of an off-camera audio recording as proof he refused to give a breath sample; and (2) the evidence, when excluding the anonymous complaint and the off-camera audio recording, was insufficient to prove him guilty beyond a reasonable doubt. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Indictment

¶ 5 In September 2015, the State charged defendant by indictment with aggravated driving under the influence of alcohol (DUI), a Class 2 felony (625 ILCS 5/11-501(d)(1)(A), (d)(2)(B) (West 2014)). The State alleged defendant, on or about April 25, 2015, drove or was in actual physical control of a motor vehicle while under the influence of alcohol and had previously been convicted of DUI offenses in 1984 and 2011.

¶ 6 B. Bench Trial

¶ 7 Over a two-day period in June and July 2016, the trial court held a bench trial. The following is gleaned from the evidence presented.

¶ 8 1. *State's Case in Chief*

¶ 9 a. Trooper Joshua Vanausdoll

¶ 10 Joshua Vanausdoll testified he had been a trooper with the Illinois State Police for a little more than 2.5 years. Trooper Vanausdoll testified he had prior training and experience with "DUI alcohol detection." He completed six months of training at the Illinois State Police academy, where he learned National Highway Traffic Safety Administration (NHTSA) standards and field sobriety testing, and he had made several DUI arrests.

¶ 11 On April 25, 2015, Trooper Vanausdoll served as a field training officer to Trooper Jason Pignon. That evening, Trooper Vanausdoll observed Trooper Pignon conduct a traffic stop and perform field sobriety tests on defendant. Trooper Vanausdoll testified Trooper Pignon conducted the field sobriety tests in accordance with NHTSA standards. Following those tests, Trooper Vanausdoll observed Trooper Pignon place defendant under arrest.

¶ 12 Trooper Vanausdoll described defendant's speech as "slow and lethargic, lazy." Trooper Vanausdoll observed defendant's behavior change "drastically" after he was arrested, describing defendant's behavior as "all over the place" and "up and down." Trooper Vanausdoll testified defendant was "belligerent" to Trooper Pignon and made "erratic claims" suggesting the troopers were hitting him and that they broke his arm. Trooper Vanausdoll testified they handled defendant politely and cautiously, noting they accommodated defendant after he complained about his arm by moving his handcuffs from behind his back to the front of his body. Trooper Vanausdoll indicated he did not believe defendant needed to be seen by "rescue" that evening and maintained he did not strike defendant nor did he observe any trooper do so. Trooper Vanausdoll concluded, based on his training and experience, defendant was under the influence of alcohol and was unable to operate a motor vehicle.

¶ 13 b. Trooper Jason Pignon

¶ 14 Jason Pignon testified he had been a trooper with the Illinois State Police since September 14, 2014. Trooper Pignon testified he completed DUI training through NHTSA, learning "DUI detection and screening for DUI, field sobriety, standardized field sobriety testing, and the process that goes along with that."

¶ 15 After discussing his experience and training, the following inquiry occurred:

"[STATE]: Were you working on the night of April 25th of 2015?

[TROOPER PIGNON]: Yes, ma'am.

[STATE]: And what were you doing that evening?

[TROOPER PIGNON]: Regular patrol.

[STATE]: Do you recall a call that came in around 9:25 in the evening?

[TROOPER PIGNON]: Yes ma'am.

[STATE]: And what was the nature of that call?

[TROOPER PIGNON]: It was like a warning message to troopers in the area. It was a reckless driver that was southbound on [Interstate 55].

[STATE]: And what did you do in response to that call?

[TROOPER PIGNON]: Made our way to [Interstate 55] to investigate—try to locate that vehicle.

[STATE]: And when you got to [Interstate 55], were you able to immediately locate that vehicle?

[TROOPER PIGNON]: No. We waited at mile post 166, and the vehicle was supposedly coming southbound. And as soon as we made communications with radio, they told us that their caller had seen us, and the vehicle was about to pass our location."

¶ 16 The State then questioned Trooper Pignon about an audio and video recording:

"[STATE]: Is your—the squad car that you were driving on that evening, is it equipped with audio and video recording?

[TROOPER PIGNON]: Yes, ma'am.

[STATE]: And was that audio and video recording working properly on that evening?

[TROOPER PIGNON]: Yes, ma'am.

[STATE]: I'm going to show you what has been marked as People's Exhibit No. 1. Have you had an opportunity to view at least portions of this exhibit today?

[TROOPER PIGNON]: Yes, ma'am.

[STATE]: Does People's Exhibit [No.] 1 fairly and accurately depict the video that would have been recorded from the squad car on April 25th of that evening?

[TROOPER PIGNON]: Yes, ma'am.

[STATE]: And will this video show the time that you first were able to make visual contact with the vehicle that the defendant was driving?

[TROOPER PIGNON]: Yes, ma'am."

Following this line of questioning, the State moved to admit People's Exhibit No. 1. Over no objection, the trial court admitted the exhibit, a DVD containing an audio and video recording approximately 2 hours and 45 minutes in length. At various points during Trooper Pignon's direct examination, the State published portions of the audio and video recording.

¶ 17 Trooper Pignon testified he observed the reported vehicle, later determined to be defendant's vehicle, driving in the center lane of three lanes of traffic and then followed the vehicle. Trooper Pignon indicated the vehicle "appeared to be swerving inside the lane, [and] at one point straddling the center lane marker for a short period of time." Trooper Pignon toggled his emergency lights to stop the vehicle. He then observed defendant's vehicle make an improper

lane change and use the left turn signal even though it was merging to the right shoulder. Trooper Pignon testified, based on his experience with the NHTSA guidelines for DUI detection, he found the improper lane usage, straddling of the centerline, and drifting in the lane to be indicators of possible impairment.

¶ 18 The State played the beginning of the audio and video recording, which showed the view from the dashboard of the squad car looking forward through the windshield. The recording showed a vehicle, later determined to be defendant's vehicle, drift in the center lane and then cross over to the left lane. After emergency lights were activated, defendant's vehicle returned to the center lane, turned on its right turn signal, crossed over to the right lane, turned on its right turn signal, crossed over to an exit lane, crossed back over to the right lane, turned on a left turn signal, and then stopped on the side of the highway. The squad car was then parked directly behind defendant's vehicle.

¶ 19 Trooper Pignon testified he approached the passenger side of defendant's vehicle. Upon doing so, he "detected an odor of alcoholic beverage." He asked for defendant's driver's license and proof of insurance. Defendant handed Trooper Pignon several pieces of paper. Trooper Pignon observed defendant was "leaned forward" and "unbuckled." He described defendant's speech as "[i]ndistinct," "[s]tuttered," and "slurred." Trooper Pignon described defendant's eyes as "glassy." Trooper Pignon asked defendant if he had consumed any alcoholic beverages, and defendant indicated he had a couple earlier that day. Trooper Pignon later testified defendant specifically stated he had a margarita earlier that day. Trooper Pignon testified, based on his experience with the NHTSA guidelines for DUI detection, he found the slurred speech, the odor of an alcoholic beverage, and the fumbling when dealing with locating

an insurance card to be indicators of possible impairment.

¶ 20 After the initial contact, Trooper Pignon returned to the squad car, ran a computer check, and then repositioned the squad car to conduct standardized field sobriety testing in accordance with NHTSA standards. Trooper Pignon then returned to defendant's vehicle and asked defendant to participate in the standardized field sobriety testing. Defendant agreed to do so. Trooper Pignon testified defendant exited his vehicle at a slow place. Trooper Pignon also noticed defendant's clothing from the lower part of his back to approximately his knees was saturated with a wet substance.

¶ 21 Trooper Pignon first administered the Horizontal Gaze Nystagmus (HGN) test. He observed defendant had equal pupil size, no resting nystagmus, and equal tracking. During the administration of the test, Trooper Pignon observed both of defendant's eyes lacked smooth pursuit—two clues of impairment. Both eyes also showed sustained nystagmus at maximum deviation—two more clues of impairment. Neither eye showed nystagmus onset prior to 45 degrees. Trooper Pignon testified a finding of four of six possible clues indicated possible impairment. Trooper Pignon also noted he observed defendant sway back and forth during the test and had difficulty following instructions. Trooper Pignon acknowledged defendant told him he had dry eyes.

¶ 22 After the HGN test, Trooper Pignon administered the walk-and-turn test. Trooper Pignon noted defendant had difficulty understanding the directions for the test, which had to be repeated several times. During the administration of the test, Trooper Pignon observed five clues of impairment—defendant lost his balance, missed heel to toe, stepped off the line, made an improper turn, and stopped walking before the test ended. Trooper Pignon testified a finding of

two or more clues indicated possible impairment.

¶ 23 Last, Trooper Pignon administered the one-leg stand test. During the administration of the test, Trooper Pignon observed two clues—defendant put his foot down and used his arms for balance. Trooper Pignon also noted defendant counted at a rapid pace and then stopped counting.

¶ 24 The State resumed playing the audio and video recording, which showed the view from the dashboard of the squad car looking forward through the windshield. The recording showed two troopers initially approaching defendant's vehicle. (We note the two troopers were not explicitly identified in court. However, based on the testimony presented those troopers can reasonably be identified as Troopers Pignon and Vanausdoll.) The recording contained audio of the conversation between Trooper Pignon and defendant. After being asked how much he had to drink that night, defendant could be heard saying he had "a couple earlier in the day." The troopers eventually returned to the squad car. The recording contained audio of the conversation between Trooper Pignon and Trooper Vanausdoll. Trooper Pignon could be heard stating defendant's "eyes were glassy, smells like alcohol, said he's been drinking." Trooper Pignon could also be heard saying he was "freezing," and then the video later showed him returning to defendant's vehicle wearing a coat. The recording showed defendant exiting his vehicle and taking the field sobriety tests in front of the squad car. During the field sobriety tests, defendant could be heard complaining of the cold and windy weather and indicating he had knee surgery, a disability, and could not stand.

¶ 25 After conducting the field sobriety testing, Trooper Pignon concluded, based on his training and experience, defendant was under the influence of alcohol to the point where he

could not safely operate a motor vehicle. Trooper Pignon placed defendant under arrest.

¶ 26 Trooper Pignon handcuffed defendant behind his back. Trooper Pignon testified defendant had no difficulty placing his arms behind his back to be handcuffed. After being handcuffed, Trooper Pignon testified defendant's demeanor changed, and he became belligerent and uncooperative. Defendant made erratic statements that the officers were going to kill him. Trooper Pignon testified defendant's mood swing supported his conclusion defendant was under the influence of alcohol.

¶ 27 Trooper Pignon assisted defendant with entering into the back seat of the squad car. Trooper Pignon testified defendant requested his foot and leg be pushed into the car, which Trooper Pignon declined to do to avoid any injury. Defendant then accused Trooper Pignon of hitting him and claimed his arm was broken. Trooper Pignon testified he did not use physical force against defendant nor did he observe any trooper do so. Trooper Pignon indicated defendant's behavior later improved after moving his handcuffs from behind his back to the front of his body.

¶ 28 The State resumed playing the audio and video recording, which contained video and audio of defendant being arrested, handcuffed, and searched. Defendant pleaded for Trooper Pignon to "not kill him" and questioned if Trooper Pignon was "torturing" him. Soon after, defendant and Trooper Pignon walked off camera and then Trooper Pignon asked defendant to have "a seat in there." Defendant could be heard asking Trooper Pignon "to push [his leg] in there," and Trooper Pignon could be heard declining defendant's request. When Trooper Pignon indicated he was placing a seatbelt on defendant, defendant cried out and accused Trooper Pignon of hitting him. Trooper Pignon denied hitting defendant.

¶ 29 After the accusations against Trooper Pignon, the audio and video recording changed to a horizontal split screen. The upper screen showed the view from the dashboard looking forward, and the lower screen showed the view from the dashboard looking backward into the squad car. A third trooper, who was later identified as Trooper Eric Fricke, was seen adjusting the camera. Defendant continued to accuse the troopers of "punishing him." Once Troopers Pignon and Vanausdoll returned to the front seat of the squad car, defendant complained the troopers broke his arm when he was shoved into the squad car. The troopers later exited the squad car and removed defendant to place the handcuffs in front of him. After doing so, defendant no longer complained of pain. The troopers returned to the squad car and waited for a tow truck to arrive. The audio and video recording was stopped at approximately 45 minutes. No other portion of the audio and video recording was published during defendant's bench trial.

¶ 30 Trooper Pignon testified he transported defendant to a subpost that was approximately six minutes away. During the transport, defendant fell asleep in the squad car, which Trooper Pignon found to support his conclusion defendant was under the influence of alcohol. Trooper Pignon testified defendant continued to be belligerent and make erratic statements at the subpost. He also testified defendant "had the same odor of alcohol that has been his person" while at the subpost. Trooper Pignon described the odor as a "strong odor of alcohol." Trooper Pignon read defendant a "Warning to Motorist." The State presented a signed preprinted document warning motorists of the implications for refusal to submit to chemical testing, which Trooper Pignon identified as the document he read to defendant. The document was admitted into evidence over no objection. Trooper Pignon noted defendant asserted he was

going to retrieve his own samples from a hospital.

¶ 31 The first 20 minutes of the unpublished portion of the audio and video recording showed the troopers waiting for defendant's vehicle to be towed and the transport to the subpost. The remaining 90 minutes of the unpublished portion of the audio and video recording showed video of the squad car parked and empty. Off-camera audio of conversations could be heard during this time. A discussion occurred about submitting to a breath test.

¶ 32 On cross-examination, Trooper Pignon testified he had made approximately five arrests with at least one prior DUI arrest. Defense counsel questioned Trooper Pignon about the dispatch call, specifically inquiring about the make, color, and license plate number of the reported vehicle. Trooper Pignon testified he spoke only with the dispatcher and not the person who gave the information.

¶ 33 On redirect examination, Trooper Pignon testified he did not believe the wind was so strong that it would impede a person's performance on field sobriety tests.

¶ 34 2. *Defendant's Case in Chief*

¶ 35 Defendant testified he had been on disability since 2006 for a back injury. He indicated his injury required him to undergo fusion back surgery. Defendant testified he also had a knee injury. He indicated his injury required him to undergo knee reconstruction surgery. Finally, defendant indicated he had "dry eye," which required medication.

¶ 36 Defendant testified to the events occurring on April 25, 2015. He acknowledged he consumed alcohol around 2 p.m. but asserted he had no alcohol after that point.

¶ 37 Around 8 p.m., defendant left his home in Joliet to drive to East Peoria. Defendant acknowledged making an improper lane change when he approached Interstate 74. He asserted

he did so because he was trying to start his global positioning system (GPS) on his cell phone.

¶ 38 After being stopped by the police, defendant exited his vehicle without a jacket. He testified he had no difficulty in exiting the vehicle. Defendant indicated his pants might have had a few drops of water on them. Defendant believed it was 20 degrees outside with 40 miles-per-hour winds. During the walk-and-turn test, defendant asserted he did not use his arms for balance, did not fall off the line, walked heel to toe, and walked all nine steps. Defendant further asserted he stopped the one-leg stand test because of his knee injury.

¶ 39 Defendant testified a trooper "shove[d] [him] into the backseat" of the squad car after he was arrested. Defendant indicated he was in a lot of pain and felt like his arm was broken. Defendant repeatedly requested to go to the hospital. He acknowledged he was "belligerent," "argumentative," and "insulting." Defendant testified he was not under the influence of alcohol when he was arrested.

¶ 40 On cross-examination, defendant acknowledged his vehicle "went from left to right," "made an improper lane change," and was "straddling the centerline" prior to being stopped. He also acknowledged he used the left turn signal when he pulled over to the right side of the road but asserted he did so to let other drivers know he would be exiting the driver's door.

¶ 41 Defendant testified the troopers "were trying to shove me into the backseat, which felt like they were hitting me." Defendant asserted he did not tell the trooper to "push" him into the squad car but rather asked the trooper for help. Defendant further described the trooper as "pushing me—helping me in, which felt like he was hitting me." Defendant testified he pleaded with the trooper to not kill him because he was in a lot of pain and "anything could happen nowadays if you watch today's news." Defendant asserted he did not fall asleep during the drive

to the subpost.

¶ 42 Defendant acknowledged he was asked to submit to a breath test at the subpost. He also acknowledged he was read a warning to motorists about the possible penalties if he blew over a .08 or refused to provide a breath sample. After establishing neither defendant's back injury, knee injury, nor his dry eye condition would prevent defendant from submitting to a breath sample, the following inquiry occurred:

> "[STATE]: The only reason to refuse to provide a breath sample would be that you were concerned that it might be over .08, correct?
>
> [DEFENDANT]: No. I was concerned about them lying about it, because the whole night was a consistency of lies from one trooper to the other."

¶ 43 On redirect examination, the following inquiry occurred concerning the breath test:

> "[DEFENSE COUNSEL]: And according to them asking you to take a breath test, did you tell them the reason why you would not take the breath test?
>
> [DEFENDANT]: Yes.
>
> [DEFENSE COUNSEL]: And what was that reason?
>
> [DEFENDANT]: Because I didn't trust them and I would prefer that I be taken to a hospital. And I would submit to a breath test, urine test, and blood test."

¶ 44 3. *State's Rebuttal*

¶ 45 a. Trooper Eric Fricke

¶ 46 Eric Fricke testified he had been a trooper with the Illinois State Police since February 2014. On April 25, 2015, he assisted Trooper Pignon with a DUI arrest. Trooper Fricke arrived on the scene when Trooper Pignon was either finishing the field sobriety testing or shortly after it concluded. Trooper Fricke observed defendant while he was being placed in the backseat of Trooper Pignon's squad car. Trooper Fricke testified Trooper Pignon did not push defendant into the squad car. When defendant made accusations suggesting Trooper Pignon struck him, Trooper Fricke activated the rear-facing camera in Trooper Pignon's squad car. Trooper Fricke testified he did not observe Trooper Pignon push, hit, or strike defendant.

¶ 47 b. Trooper Pignon

¶ 48 Trooper Pignon, recalled as a witness, testified he asked defendant to submit a breath sample, and defendant stated he would get his own blood draw at a hospital. Trooper Pignon testified defendant was not taken to the hospital as he had no visible injuries.

¶ 49 4. *Closing Arguments*

¶ 50 In closing, the State argued it had proven defendant guilty beyond a reasonable doubt of DUI. As evidence of defendant's inability to safely operate a motor vehicle, the State relied on the audio and video recording and Trooper Pignon's testimony. The State asserted this evidence showed defendant's vehicle drift inside the center lane, cross the center lane, and use improper turn signals.

¶ 51 The defense argued the evidence was insufficient to convict. Specifically, the defense argued, among other things, (1) defendant's testimony was more credible than the

troopers' testimony and (2) defendant was antagonistic to the troopers because he believed they were mistreating him and he asked to go to a hospital many times.

¶ 52 C. Written Decision

¶ 53 On September 14, 2016, the trial court entered a detailed written decision. In its decision, the court initially noted it had taken "the matter under advisement to review the video of the stop and the testimony of the witnesses." The court then provided a general summary paragraph. In that paragraph, the court noted, in part, (1) "[t]roopers reviewed a call stating there was an impaired driver heading [s]outhbound on Interstate 55" and (2) "[a]fter being placed under arrest[,] [d]efendant refused to provide a breath sample."

¶ 54 The trial court dedicated separate paragraphs to reviewing Trooper Vanausdoll's testimony, Trooper Pignon's testimony, defendant's testimony, and the audio and video recording. When reviewing Trooper Pignon's testimony, the court noted, in part, (1) "[Trooper Pignon] stated that he received a call that there had been several complaints of a vehicle swerving on the road" and (2) "[a]t the subpost [d]efendant was read the warning to motorist and subsequently refused a breath test." When reviewing defendant's testimony, the court noted, in part, "[defendant] said *** the reason he refused a breath test was that he wanted to be taken to the hospital for testing as opposed to the police testing him." Finally, in reviewing the audio and video recording, the court noted, in part, "[d]efendant was transported to a police substation where he was eventually charged with [DUI]."

¶ 55 After reviewing the evidence presented and the applicable law, the trial court provided the following analysis:

> "The [c]ourt in reviewing the evidence notes that the

> Illinois State Police received calls from other motorists concerning [d]efendant's driving. The video of [d]efendant's vehicle shows it veering within its own lane and traveling outside of its lane on at least one occasion. Defendant states he was working with his GPS at the time. When the trooper attempted to pull [d]efendant over he used the wrong blinker to curb the vehicle. He started to proceed on an exit and then came back on the roadway. The [c]ourt finds the trooper's testimony credi[]ble that when he approached [d]efendant's vehicle he noticed the odor of alcohol and that [d]efendant's eyes were glassy. The trooper asked [d]efendant for his insurance card and several papers were handed to the trooper. The [c]ourt believed that [d]efendant exhibited slurred speech at times during the stop. The [c]ourt finds the trooper's testimony credi[]ble as to the clues he observed on field sobriety testing. The [c]ourt further finds that the video exhibits these clues during field sobriety testing as well. Defendant exhibited numerous mood swings throughout the course of the stop. These are all indicators of alcohol impairment. Defendant refused to submit to chemical testing which the [c]ourt can, and is, considering as [d]efendant's consciousness of guilt."

The court concluded, "[w]hile there is no single factor which is determinative[,] the [c]ourt finds that the totality of the circumstances proves the State's case beyond a reasonable doubt."

¶ 56 D. Motion to Reconsider

¶ 57 On October 7, 2016, defendant filed a motion to reconsider, arguing, in part, (1) his performance on the field sobriety tests was affected by his disabilities and (2) the trial court failed to consider his request to go to a hospital.

¶ 58 E. Hearing on Motion to Reconsider and Sentencing

¶ 59 In December 2016, the trial court held a hearing on defendant's motion to reconsider. After hearing argument, the court denied defendant's motion. In its oral pronouncement of its decision, the court gave a detailed review of the evidence presented. In part, the court noted:

> "[T]he evidence did show that there were calls from other motorists indicating an impaired motorist on the roadway. When the police did get behind [defendant's] vehicle, the [c]ourt believes that the video does show driving that was not—not regular driving. There was movement in the lanes. There was crossing of one lane. When the officer did go ahead and put on his emergency lights, [defendant] began to pull over. There was use of blinkers that were not consistent in terms of we put on the right blinker and then began to take an exit and then come back on the roadway and the wrong blinker is put back on."

¶ 60 After denying defendant's motion to reconsider, the trial court proceeded to sentencing. The court had before it information concerning defendant's convictions for DUI offenses in 1984 and 2011. The court sentenced defendant, as recommended by both parties, to

30 months' probation with certain terms and conditions, 20 days' incarceration, and 480 hours' community services. The court also imposed certain fines. The period of incarceration was stayed.

¶ 61 This appeal followed.

¶ 62 II. ANALYSIS

¶ 63 On appeal, defendant argues (1) the trial court committed plain error when it considered (a) the anonymous complaint about a reckless driver as proof he was impaired, and (b) a portion of the off-camera audio recording as proof he refused to give a breath sample; and (2) the evidence, when excluding the anonymous complaint and the off-camera audio recording, was insufficient to prove him guilty beyond a reasonable doubt. The State disagrees.

¶ 64 A. Plain-Error Review

¶ 65 Defendant asserts the trial court committed plain error when it considered (1) the anonymous complaint about a reckless driver as proof he was impaired and (2) a portion of the off-camera audio recording as proof he refused to give a breath sample.

¶ 66 1. *Forfeiture and the Plain-Error Doctrine*

¶ 67 Defendant concedes he forfeited his contentions of error by failing to raise them before the trial court. He asserts, however, his forfeiture may be excused under the plain-error doctrine.

¶ 68 "To preserve an issue for review, a defendant must object at trial and raise the alleged error in a written posttrial motion." *People v. Reese*, 2017 IL 120011, ¶ 60, 102 N.E.3d 126. "A defendant's failure to do either means that the alleged error is forfeited for purposes of

an appeal." *People v. Lewis*, 2019 IL App (4th) 150637-B, ¶ 84, ___N.E.3d___. When discussing the rationale for the forfeiture rule, our supreme court has stated:

> " 'Failure to raise issues in the trial court denies that court the opportunity to grant a new trial, if warranted. This casts a needless burden of preparing and processing appeals upon appellate counsel for the defense, the prosecution, and upon the court of review. Without a post[]trial motion limiting the consideration to errors considered significant, the appeal is open-ended. Appellate counsel may comb the record for every semblance of error and raise issues on appeal whether or not trial counsel considered them of any importance.' " *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988) (quoting *People v. Caballero*, 102 Ill. 2d 23, 31–32, 464 N.E.2d 223, 227 (1984)).

See also *People v. Hughes*, 2015 IL 117242, ¶ 38, 69 N.E.3d 791 (again highlighting the lack of judicial economy in raising forfeited issues).

¶ 69 The plain-error doctrine provides a "limited and narrow exception" to the general rule of forfeiture. *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009). Under the plain-error doctrine, a reviewing court may disregard a defendant's forfeiture and considered an unpreserved claim of error where:

> " '(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 and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)).

Under both prongs of the plain-error doctrine, the defendant bears the burden of persuasion. *People v. Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015.

¶ 70 2. *Anonymous Complaint*

¶ 71 Defendant argues the trial court committed plain error when it considered the anonymous complaint about a reckless driver as proof he was impaired. Specifically, defendant asserts Trooper Pignon's reference to receiving a radio warning about "a reckless driver" was hearsay, and the erroneous admission of this testimony amounts to second-prong plain error because the court considered the testimony as proof he was impaired.

¶ 72 We turn first to whether a clear or obvious error occurred. *People v. Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475. Defendant asserts Trooper Pignon's reference to receiving a radio warning about "a reckless driver" was hearsay as it was an out-of-court statement offered to prove he drove recklessly, and the testimony cannot be excused on the theory it explained a police investigation as it went beyond what was needed to explain Trooper Pignon's decision to look for defendant's vehicle. The State disagrees, contending defendant cannot complain of any error in the admission of this testimony as his counsel further delved into the issue and invited the alleged error during Trooper Pignon's cross-examination and,

regardless, the testimony was proper as it simply explained police investigative procedure and without that testimony Trooper Pignon would have been in the false position of seeming just to have happened upon the scene.

¶ 73 We initially reject the State's argument suggesting defendant cannot complain of any error due to his counsel's cross-examination of Trooper Pignon. Under the doctrine of invited error, "a defendant may not proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Ramirez*, 2013 IL App (4th) 121153, ¶ 78, 996 N.E.2d 1227; see also *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17, 966 N.E.2d 437 ("[P]lain-error review is forfeited when the defendant invites the error."). During Trooper Pignon's cross-examination, defense counsel inquired about the make, color, and license plate number of the reported vehicle. This inquiry related solely to the appearance of defendant's vehicle. At no point did defense counsel actively use the statement characterizing defendant as a reckless driver. *C.f. Ramirez*, 2013 IL App (4th) 121153, ¶ 78 (where the defendant actively used during cross-examination the very testimony the admission of which he contended was plain error on appeal). In the absence of clear invited error, we will continue in our plain-error analysis.

¶ 74 "The hearsay rule generally prohibits the introduction of an out-of-court statement offered to prove the truth of the matter asserted therein." *People v. Williams*, 238 Ill. 2d 125, 143, 939 N.E.2d 268, 278 (2010); see also Ill. Rs. Evid. 801, 802 (eff. Jan. 1, 2011). Courts are often confronted with possible hearsay when a police officer testifies about his or her investigation into a defendant's alleged crime. See, *e.g.*, *People v. Matthews*, 2017 IL App (4th)

150911, 93 N.E.3d 597; *People v. Boling*, 2014 IL App (4th) 120634, 8 N.E.3d 65; *People v. Cameron*, 189 Ill. App. 3d 998, 546 N.E.2d 259 (1989).

¶ 75 Generally, a police officer may testify about an out-of-court statement, which would be hearsay if used to provide the accused did the things attributed to him by the declarant of that statement, as long as the testimony is offered for the purpose of explaining police investigative procedure. *Cameron*, 189 Ill. App. 3d at 1003-04; *People v. Ochoa*, 2017 IL App (1st) 140204, ¶ 41, 73 N.E.3d 50. This general rule, however, is subject to specific limitations:

> "A police officer may testify as to the steps taken in an investigation of a crime "where such testimony is necessary and important to fully explain the State's case to the trier of fact." [Citation.] '[O]ut-of-court statements that explain a course of conduct should be admitted only to the extent necessary to provide that explanation and should not be admitted if they reveal unnecessary and prejudicial information.' [Citation.] Testimony about the steps of an investigation may not include the *substance* of a conversation with a nontestifying witness. [Citations.]" (Emphasis in original.) *Boling*, 2014 IL App (4th) 120634, ¶ 107.

¶ 76 Almost 30 years ago, this court discussed the theory on which out-of-court statements are admitted to explain police investigative procedure and the danger of misuse of such statements:

> " 'In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have

> happened upon the scene; he should be allowed some explanation of his presence and conduct. His testimony that he acted "upon information received," or words to that effect, should be sufficient. Nevertheless, cases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. The need for the evidence is slight, the likelihood of misuse great.' " *Cameron*, 189 Ill. App. 3d at 1004 (quoting Edward W. Cleary, McCormick on Evidence § 249, at 734 (3d ed. 1984)).

Since that time, this court, amongst others, has repeatedly highlighted the danger of misusing out-of-court statements to explain police conduct. See *Matthews*, 2017 IL App (4th) 150911, ¶ 19; *Boling*, 2014 IL App (4th) 120634, ¶ 108; *People v. Shorty*, 408 Ill. App. 3d 504, 511, 946 N.E.2d 474, 481 (2011); *People v. Rice*, 321 Ill. App. 3d 475, 483-84, 747 N.E.2d 1035, 1042 (2001). See also Michael H. Graham, Graham's Handbook of Illinois Evidence § 801.5 (10th ed. 2010) ("This limited admissibility of investigatory background *** is still nevertheless unfortunately overly broad. Investigatory steps taken by a police officer are rarely more than marginally relevant at best, while the risk of jury misuse of the information at great expense to the accused is substantial.").

¶ 77 In this case, the State questioned Trooper Pignon as to "the nature" of the call he received on the night of the incident, and Trooper Pignon responded: "It was like a warning message to troopers in the area. It was a reckless driver that was southbound on [Interstate 55]."

This testimony went beyond what was necessary to fully explain the State's case to the trier of fact. The State could have sufficiently explained its case by eliciting testimony that Trooper Pignon, an officer on patrol on the night of the incident, "acted upon information received" and began to follow the reported vehicle when it passed his location. The testimony actually elicited—the report of a "reckless driver"—was the type of testimony that poses danger of misuse. That misuse came to fruition when the trial court considered the testimony as a factor, albeit amongst several other factors, to find defendant guilty of the charged offense.

¶ 78 Defendant argues the error in the admission of the improper testimony amounts to second-prong plain error because the trial court considered the testimony as proof he was impaired and mistakenly recalled the testimony as more prejudicial than the testimony actually offered. The State disagrees, contending the error was harmless as there was no reasonable probability the trial court would have acquitted defendant absent the testimony and the court considered the crux of defendant's defense and any misstatement of evidence was minor and did not affect the court's ruling.

¶ 79 Again, second-prong plain error occurs where a clear or obvious error " 'is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *Thompson*, 238 Ill. 2d at 613 (quoting *Piatkowski*, 225 Ill. 2d at 565). Our supreme court has equated second-prong plain error with structural error. *People v. Glasper*, 234 Ill. 2d 173, 197-98, 917 N.E.2d 401, 416 (2009). "A structural error is an error which renders a criminal trial fundamentally unfair or unreliable in determining a defendant's guilt or innocence." *People v. Bates*, 2018 IL App (4th) 160255, ¶ 72,

112 N.E.3d 657. "Structural errors occur in very limited circumstances." *Id.* (citing *People v. Averett*, 237 Ill. 2d 1, 13, 927 N.E.2d 1191, 1198 (2010)).

¶ 80 While the trial court mentioned the improper testimony in concluding defendant was under the influence of alcohol and could not safely drive his vehicle, it made clear its conclusion was based on "the totality of the circumstances" presented and "no single factor [was] determinative." Apart from the improper testimony, the trial court received other evidence concerning defendant's driving through Trooper Pignon's testimony and the audio and video recording. In fact, the court explicitly indicated it considered the video evidence showing defendant's vehicle (1) "veering within its own lane and traveling outside of its lane on at least one occasion," (2) "us[ing] the wrong blinker to curb the vehicle," and (3) "start[ing] to proceed on an exit and then came back on the roadway." The improper testimony relied upon by the court was merely cumulative as it related to defendant's ability to safely operate a motor vehicle. After our review of the evidence presented as well as the written decision and oral ruling on defendant's motion to reconsider, we find there is no reasonable probability the trial court would have acquitted defendant absent its reliance on the improper testimony.

¶ 81 Defendant also briefly suggests second-prong plain error occurred because the trial court recalled the improper testimony as more prejudicial than the evidence actually offered. Specifically, defendant argues, "Following the rationale that a defendant does not receive a fair trial when, at a bench trial, the trial judge fails to recall evidence crucial to the defense, the same result should follow here where the trial judge recalls prejudicial evidence that was not offered." We disagree. The trial court made clear it considered the crux of defendant's defense. We find the court's misstatement of the evidence was minor in light of all of the evidence presented.

Further, we find no basis to conclude the result would have been different absent the court's misstatement of the evidence. As such, defendant has failed to show he was deprived of a fair trial.

¶ 82 We find the admission of the improper testimony in this case was not, on its own, so egregious that it threatened the integrity of the judicial process or undermined defendant's right to a fair trial. Defendant has failed to show plain error occurred. We hold defendant to his forfeiture of this issue.

¶ 83 3. *Off-Camera Audio Recording*

¶ 84 Defendant argues the trial court committed plain error when it considered a portion of the off-camera audio recording as proof he refused to give a breath sample. Specifically, defendant asserts the State failed to lay a proper foundation for the 90-minute off-camera audio portion of the audio and video recording, and the error in the admission of this evidence amounts to first-prong plain error because without the refusal to give a breath sample no other evidence directly indicated he was impaired.

¶ 85 We turn first to whether a clear or obvious error occurred. *Eppinger*, 2013 IL 114121, ¶ 19. Defendant asserts the State failed to lay a proper foundation for the 90-minute off-camera audio portion of the audio and video recording. The State disagrees, contending it laid a sufficient foundation for the entirety of the audio and video recording.

¶ 86 "A recording containing both audio and video is admissible if the State presents the foundation necessary to admit both the video and audio." *People v. Johnson*, 2016 IL App (4th) 150004, ¶ 63, 55 N.E.3d 32. A sufficient foundation for a video recording is laid "when a witness with personal knowledge of the filmed object testifies that the film is an accurate

portrayal of what it purports to show." *People v. Vaden*, 336 Ill. App. 3d 893, 899, 784 N.E.2d 410, 415 (2003). A sufficient foundation for an audio recording is laid when "a participant to the conversation or a person who heard the conversation while it was taking place identifies the voices of the people in the conversation and testifies that the tape accurately portrays the conversation." *In re C.H.*, 398 Ill. App. 3d 603, 607, 925 N.E.2d 1260, 1264 (2010).

¶ 87 The State mischaracterizes the record when it asserts Trooper Pignon "stated he viewed the recording and it was an accurate portrayal of what was recorded on the evening of the incident." Trooper Pignon only testified People's Exhibit No. 1, at least the portions of the exhibit he reviewed on the day of trial, fairly and accurately "depict[ed] the video" from his squad car on the evening of the incident and the "video" showed the time he first was able to make "visual contact" with defendant's vehicle. As defendant argues, the State did not establish a sufficient foundation for the off-camera, 90-minute audio portion of the recording.

¶ 88 In reaching this decision, we note our supreme court has emphasized the forfeiture rule is "particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence [as] a defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level." *People v. Woods*, 214 Ill. 2d 455, 470, 828 N.E.2d 247, 257 (2005). Had defendant objected in this case, the State would have had the opportunity to elicit additional foundational testimony. Having reviewed the audio and video recording, it is difficult to imagine the State could not have established a sufficient foundation for the off-camera, 90-minute portion of the recording had defendant made a proper objection.

¶ 89 Defendant argues the error in the admission of the 90-minute, off-camera audio recording amounts to first-prong plain error because without the refusal to give a breath sample, no other evidence directly indicated he was impaired. The State disagrees, contending defendant's own testimony evidenced the fact he refused to take a breath test and the record is devoid of any indication the trial court in fact relied on the off-camera audio.

¶ 90 "In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *People v. Sebby*, 2017 IL 119445, ¶ 53, 89 N.E.3d 675. Generally, "[a] reviewing court's inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id.* In this case, defendant suggests the evidence is close only with respect to whether he was actually impaired. Specifically, defendant asserts without the evidence from the portion of the off-camera audio recording indicating he refused to give a breath sample, no other evidence directly indicates he was impaired.

¶ 91 Initially, setting aside any refusal discussed during the off-camera portion of the audio and video recording, ample testimony was presented whereby it can be reasonably inferred defendant refused to give a breath sample. It was undisputed defendant was asked to submit to a breath sample and read a warning for failing to do so. Both the State and the defense questioned defendant as to his reason for not taking the breath test. Defendant responded to these questions not by denying he refused to take the breath test but instead by providing his reasoning that he did not trust the troopers and wanted to have the testing done at a hospital. Given the reasoning provided, it can be reasonably inferred defendant in fact refused to give a breath sample.

¶ 92 Defendant otherwise fails to show the evidence was closely balanced. While defendant denied being under the influence of alcohol when he was arrested, Troopers Vanausdoll and Pignon testified they concluded, based on their training and experience, defendant was under the influence of alcohol and was unable to operate a motor vehicle. The troopers' testimony was corroborated by the initial 45 minutes of the audio and video recording, which showed defendant driving, speaking, and taking the field-sobriety tests. This case was more than just a contest of credibility.

¶ 93 Defendant has failed to show plain error in the admission of the 90-minute, off-camera audio recording. We hold defendant to his forfeiture of this issue.

¶ 94 4. *Cumulative Error*

¶ 95 Defendant briefly argues, even if the improper admission of the anonymous complaint or the off-camera audio recording may not constitute plain error alone, the cumulative effect of those errors was plain error. The State does not address defendant's argument.

¶ 96 Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) requires an appellant's brief to include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." As our supreme court has stated, "a reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented." (Internal quotations omitted.) *Bartlow v. Costigan*, 2014 IL 115152, ¶ 52, 13 N.E.3d 1216.

¶ 97 Defendant's initial brief dedicates two sentences to his argument: (1) "[t]his [c]ourt has observed that plain error can result when multiple errors occur in the same proceeding, even though each error when viewed individually may not constitute plain error" and

(2) "[i]n the instant case, even if the individual instance of error, alone, do not amount to plain error, the errors identified in this section, when viewed together, rise to the level of plain error." Following his first sentence, defendant provides a citation to *People v. Young*, 2013 IL App (2d) 120167, ¶ 42, 997 N.E.2d 285, for the proposition that court noted "there is some precedent for finding plain error when multiple errors have occurred in a case," and a citation to *People v. Sykes*, 2012 IL App (4th) 111110, 972 N.E.2d 1272, for the proposition this court found in that case two errors constituted plain error when viewed together.

¶ 98 Defendant's argument is in effect a conclusion. He provides no legal analysis or well-reasoned argument. We find defendant has forfeited his claim by failing to fully brief it before this court. We decline to consider his argument further.

¶ 99 B. Sufficiency of the Evidence

¶ 100 Defendant argues the evidence presented, when excluding the anonymous complaint and the off-camera audio recording, was insufficient to prove him guilty beyond a reasonable doubt. The State disagrees.

¶ 101 When considering a challenge to the sufficiency of the evidence, we must determine " '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 omitted.) *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We will reverse a conviction only where the evidence is so improbable and unsatisfactory it creates a reasonable doubt as to defendant's guilt. *People v. Bradford*, 2016 IL 118674, ¶ 12, 50 N.E.3d 1112.

¶ 102 As charged in this case, a person commits aggravated DUI when he or she drives or is in actual physical control of a vehicle while under the influence of alcohol and having had at least two prior DUI convictions. 625 ILCS 5/11-501(d)(1)(A) (West 2014). To prove a defendant committed the crime of DUI, the State may rely on circumstantial evidence. *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 24, 2 N.E.3d 333. We note defendant does not dispute he had at least two prior DUI convictions.

¶ 103 Excluding the anonymous complaint and the off-camera audio recording, the evidence showed defendant, who admitted to drinking alcohol earlier in the day, was driving his vehicle in an unsafe manner—the vehicle drifted in the center lane, crossed into the left lane, and used improper turn signals. Trooper Pignon detected an odor of alcohol emanating from inside defendant's vehicle and then on defendant's person. Defendant's clothing appeared wet and disheveled. His eyes appeared glassy and his speech slurred. Defendant exhibited mood swings and made erratic claims. He had difficultly following directions, and the results of the HGN and walk-and-turn tests showed possible impairment. Defendant refused to submit to a breath test. Both Trooper Pignon and Trooper Vanausdoll concluded, based on their training and experience, defendant was under the influence of alcohol and was unable to safely operate a motor vehicle. We find this evidence was more than sufficient to prove defendant guilty beyond a reasonable doubt of the charged offense.

¶ 104 III. CONCLUSION

¶ 105 We affirm the trial court's judgment. We award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 106 Affirmed.