2019 IL App (5th) 160255-U

NO. 5-16-0255

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 14-TR-200094
	)	
SCOTT PEERY,	)	Honorable
	)	Luther W. Simmons,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE OVERSTREET delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Cause remanded for a new trial where the record supports the defendant's contention that the verdict entered by the circuit court is tainted by an appearance of impropriety.

¶ 2 On September 25, 2013, the defendant, Scott Peery, struck and killed a pedestrian with his pickup truck. In March 2016, following a January 2016 bench trial, he was found guilty of failure to reduce speed to avoid an accident (625 ILCS 5/11-601(a) (West 2012)) and was sentenced to a six-month term of probation with a $1000 fine (730 ILCS 5/5-4.5-75(a), (b) (West 2012)). On appeal, the defendant argues that the trial court's verdict was potentially influenced by an *ex parte* communication and that the court

misinterpreted the law regarding the charged offense. For the reasons that follow, we vacate the trial court's judgment and remand for a new trial.

¶ 3 FACTS

¶ 4 On the morning of September 25, 2013, the defendant was driving his Ford F150 pickup truck north on Bridle Ridge Road in Collinsville. While turning east onto Beltline Road, the front passenger-side bumper of his truck struck Laura Helmkamp, who had seemingly been walking on the right shoulder of the road along the southeast curve of the intersection. The impact flung Helmkamp forward approximately 20 feet, and she was subsequently run over by the truck's front and rear passenger-side tires. Helmkamp died at the scene due to severe cranial trauma, and the defendant was ticketed for failure to reduce speed to avoid an accident.

¶ 5 On June 12, 2014, the defendant entered a plea of no contest to the ticketed charge of failure to reduce speed. On the same date, a judgment of conviction was entered, and the defendant was ordered to pay a $1000 fine.

¶ 6 On June 30, 2014, by agreement of the parties, the defendant's conviction was vacated; the failure-to-reduce-speed charge was amended to a charge of reckless conduct not involving a motor vehicle; and the defendant entered a plea of *nolo contendere* to the amended charge. On the same date, a judgment of conviction was entered, and the defendant was again ordered to pay a $1000 fine.

¶ 7 In June 2015, the defendant filed a motion to vacate his reckless conduct conviction. In July 2015, he filed an amended motion to vacate and a petition for relief from judgment. By agreement of the parties, the defendant's reckless conduct conviction

was subsequently vacated and the original charge of failure to reduce speed was reinstated.

¶ 8 In January 2016, the cause proceeded to a bench trial. At the outset, the parties stipulated as to the testimony of Alissa Daniel, who had been driving in the right-side eastbound lane of Beltline Road when the accident occurred. Per the parties' stipulation, Daniel initially had the red light at the intersection of Bridle Ridge and Beltline, and the defendant initially had the green light. While looking east waiting to cross the intersection, Daniel did not see Helmkamp walking along the shoulder. As the defendant was turning right from Bridle Ridge onto Beltline, Daniel's light turned green, "so she began to go as well." Daniel was several car lengths behind the defendant when she heard a noise. "When she looked[,] she noticed [Helmkamp] lying in the roadway."

¶ 9 Lieutenant Eric Owen of the Collinsville police department testified that he had responded to the fatal accident and had interviewed the defendant and Daniel at the scene. The defendant advised that as he was driving north on Bridle Ridge, he "had the green light to go" at the intersection and had looked both ways and not seen anything. As the defendant turned right onto Beltline, he "heard a noise." When he looked back, he saw Helmkamp lying in the road and immediately called for assistance. Owen identified photographs of the intersection showing that the defendant would have had an unobstructed view of the intersection and the southeast curve.

¶ 10 Sergeant Mark Krug of the Collinsville police department testified as an expert in the field of traffic crash reconstruction. Krug investigated the accident that resulted in Helmkamp's death, and the crash report that he prepared was admitted into evidence. The

report notes, among other things, that "candied mints," which were consistent with mints that Helmkamp had been carrying, were discovered on the windshield wipers and "hood vent area" of the defendant's truck.

¶ 11 Krug opined that Helmkamp had been walking near the midpoint of the southeast curve of the intersection when she was struck from behind by the defendant's front passenger-side bumper. The impact threw her forward approximately 20 feet before she was run over. Krug testified that Helmkamp had been walking a few feet from the curb and that most of her weight would have been to the left side of her body when the initial impact occurred. Krug testified that Helmkamp's clothing would not have made her difficult to see and that there were no obstructions that would have prevented the defendant from seeing her. Additionally, the weather conditions were clear, dry, and sunny, and the position of the sun would not have been a factor. Krug acknowledged that he could not state with certainty whether Helmkamp had been crouching or running before she was struck, but she "did not jump in front of the vehicle." Krug noted that there were no sidewalks in the area.

¶ 12 Krug testified that the defendant's claim that he had had the green light at the intersection was inconsistent with Daniel's statement that her light had changed to green as the defendant was turning onto Beltline. Krug explained that the yellow light between the defendant's green and red light would have lasted approximately two seconds and that a slight delay during which all of the intersection's lights would have been signaling red would have immediately followed. Krug acknowledged that he had not interviewed the defendant or Daniel.

¶ 13 Krug estimated that the defendant's truck had traveled through the southeast curve of the intersection at a speed between 17 and 21 miles per hour. The defendant's estimated speed had therefore not exceeded the permissible limits of Beltline or Bridle Ridge. Krug testified that there were no indications that the defendant had been driving in a reckless manner. Krug opined that the defendant was nevertheless "at fault" because he had been statutorily obligated to not strike pedestrians and to reduce the speed of his truck to avoid colliding with one. Krug acknowledged that pedestrians walking on public roadways have statutory duties as well.

¶ 14 The defendant testified that he had approached the intersection of Beltline and Bridle Ridge after dropping his eldest son off at a nearby elementary school. The defendant noted that Beltline is a "particularly busy" road. The defendant stated that he had the green light at the intersection and that he did not recall seeing his light turn yellow. The defendant testified that he had looked left and right before turning onto Beltline and that he had not seen Helmkamp until after he had hit her. The defendant explained that as he was pulling through the intersection, he had looked to his left to check for approaching cars and had "heard a noise as [he] was turning [his] head from left to right." He then saw mints on his windshield, and "it felt like [he] hit the curb." When the defendant looked in his rearview mirror, he saw Helmkamp lying in the road, and he immediately stopped. The defendant testified that there was nothing he could have done to have avoided the accident; he "just never saw her."

¶ 15 As an exhibit, the defendant tendered a copy of section 11-1007 of the vehicle code (625 ILCS 5/11-1007 (West 2012)), which prescribes the duties of pedestrians walking on highways. In pertinent part, that section states:

> "where neither a sidewalk nor a shoulder is available, any pedestrian walking along and upon a highway shall walk as near as practicable to an outside edge of a roadway, and, if on a two-way roadway, shall walk only on the left side of the roadway." *Id*. § 11-1007(c).

¶ 16 During closing arguments, the State emphasized that the defendant had acknowledged that he had not been looking in the direction that his truck had been moving when Helmkamp was hit. The State argued that by failing to see Helmkamp when he should have and by failing to reduce his speed to avoid colliding with her, the defendant was guilty as charged. See *In re Vitale*, 71 Ill. 2d 229, 238 (1978) (holding that section 11-601(a) "imposes the duty upon all motorists to exercise ordinary care, to reduce speed, and to avoid colliding with 'any person' " and that to establish a violation of the statute, the State must prove that the defendant "drove carelessly and failed to reduce speed to avoid colliding with a person"), *vacated & remanded on other grounds*, 447 U.S. 410 (1980); *Grass v. Hill*, 94 Ill. App. 3d 709, 714-15 (1981) ("It is well established that a motorist will be deemed to have observed that which he would necessarily have seen if he had looked, and testimony that he looked but did not see will not absolve him of the charge of negligence occasioned by his failure to look.").

¶ 17 In response, referencing Daniel's testimony that she had not seen Helmkamp either, the defendant argued that the accident was unavoidable and that he should

therefore be acquitted. See *Chevrie v. Gruesen*, 208 Ill. App. 3d 881, 885 (1991) (recognizing that "an 'unavoidable collision' is without proximate cause, and a defendant's acts or omissions in breach of a duty are not material"). The defendant also noted that the Illinois Rules of the Road (625 ILCS 5/11-100 *et seq*. (West 2012)) were enacted "to ensure the maximum safety for all persons involved, whether [they] be drivers of vehicles [or] pedestrians."

¶ 18 In March 2016, the trial court filed a written order finding the defendant guilty of failure to reduce speed to avoid an accident and entered a judgment of conviction on the charge. Notably, when summarizing the facts of the case, the trial court referenced testimony that had not been presented at the January 2016 bench trial. Most notably, the court indicated that the defendant had testified that as he was turning onto Beltline, "he began to turn his head back to the right when he heard two (2) 'thumps.' "

¶ 19 With respect to the defendant's conduct, the court stated that as a motorist, the defendant had been statutorily obligated to use due care and decrease his speed to avoid hitting Helmkamp with his truck. Rejecting the defendant's assertion that he had not been driving carelessly, the court found that he had failed to exercise due care by "not looking in the direction that his truck was turning." The court further found that the defendant had failed to reduce his speed to avoid colliding with Helmkamp.

¶ 20 The trial court acknowledged the defendant's argument that Helmkamp's decision to walk on the right side of the road in violation of section 11-1007 made her "contributory to the accident." The court concluded, however, that Helmkamp's statutory

violation "did not contribute to the [d]efendant's own statutory violation" and that the defendant's failure to act with due care was the proximate cause of Helmkamp's death.

¶ 21 In April 2016, the defendant filed a motion for a new trial. The motion raised multiple claims of error and observed that the trial court's judgment order contained several "factual inaccuracies, including the date of the incident." The motion also noted that the defendant's allegations were being made without the benefit of a written trial transcript. In a motion in opposition to the defendant's request for a new trial, the State maintained that many of the defendant's claims pertained to factual disputes that the court had resolved in the State's favor.

¶ 22 In May 2016, the trial court entered an order denying the defendant's motion for a new trial. The court indicated that its verdict finding the defendant guilty was primarily based on Krug's testimony and crash report and that the date of the accident as listed in the report controlled "over any inadvertent dates in the order." The court subsequently sentenced the defendant to a six-month term of probation and ordered him to pay a $1000 fine. In June 2016, the defendant filed a timely notice of appeal.

¶ 23 DISCUSSION

¶ 24 The defendant's first argument on appeal is that he should be granted a new trial before a new judge because the trial court's verdict was potentially influenced by an *ex parte* communication. In support of this claim, the defendant has supplemented the record with copies of victim impact statements written by Helmkamp's sisters nearly two years prior to the date of the bench trial. The statements were apparently submitted to the Madison County state's attorney's victim advocate for the trial court's consideration (see

725 ILCS 120/6(a-1) (West 2012)) and are in the form of letters written to the trial court. The letters are highly critical of the defendant's driving and include emotionally charged expressions of grief over the loss of Helmkamp's life. As the defendant observes on appeal, the letters were undoubtedly intended to influence the trial court's decision in this case. In fact, one of the letters specifically states, "Please consider my sister when you hear this case."

¶ 25 One of the letters is particularly critical of the defendant's failure to see Helmkamp and explains that the letter's author had independently evaluated the visibility conditions at the intersection of Bridle Ridge and Beltline. Notably, the same letter contains the following statements:

> "If you were at [the intersection of Bridle Ridge and Beltline], you would understand what I mean. A driver simply cannot miss seeing a pedestrian if he sees the light, and if he is going the speed limit and following the rules of the road, he could certainly bring himself to a stop to avoid hitting a pedestrian. But to say that he never saw [Helmkamp] begs belief. He claims that he only heard two thumps. He heard more thumps than that[,] and he saw more than that."

¶ 26 On appeal, the defendant correctly observes that this letter's " 'thumps' terminology" is found nowhere in the record other than in the letter and the trial court's March 2016 judgment order. Moreover, the court's order erroneously indicates that the defendant testified that he "heard two (2) 'thumps.' " The defendant argues that although "it is not clear if the trial judge read the letter from the deceased's sister," the court's

inexplicable use of the word "thumps" gives rise to an appearance of impropriety that warrants a new trial before a new judge. We agree.

¶ 27 Pursuant to the Code of Judicial Conduct, a judge "should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Ill. S. Ct. R. 62(A) (eff. Oct. 15, 1993). A judge must avoid all appearance of impropriety (*id*. at Committee Commentary) and "should be unswayed by partisan interests, public clamor, or fear of criticism" (Ill. S. Ct. R. 63(A)(1) (eff. Jan. 1, 2016)). A judge is prohibited from considering *ex parte* communications or other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding (*id*. at 63(A)(5)) and "must consider only the evidence presented" (*id*. at Committee Commentary). When determining whether an appearance of impropriety exists with respect to a judgment entered by the trial court, a reviewing court must ask whether an objective observer could reasonably believe that the judgment was improperly influenced by matters that should not have been considered. See *In re Marriage of Wheatley*, 297 Ill. App. 3d 854, 857 (1998).

¶ 28 Here, attributing the word "thumps" as a direct quotation, the trial court indicated that the defendant testified that he "heard two (2) 'thumps' " as he was turning. The defendant did not so testify, however. He testified that he "heard a noise." We cannot dismiss as mere coincidence that the phrase "two thumps" appears nowhere in the record other than in the trial court's judgment order and the aforementioned victim impact statement. The record therefore supports the defendant's suggestion that the court's judgment may have been improperly influenced by the statement. At the very least, the

court considered something other than the evidence presented at trial. Either way, the circumstances give rise to an appearance of impropriety.

¶ 29 On appeal, while acknowledging that the trial court's use of the word "thumps" may have stemmed from the court's exposure to the victim impact statements, the State argues that we should nevertheless affirm the defendant's conviction. The State suggests that because what the defendant heard as he turned onto Beltline had no bearing on his guilt or innocence, he could not have been prejudiced by the court's use of the word "thumps."

¶ 30 The State's argument ignores that "[t]he judiciary is bound to maintain a favorable public impression that all defendants receive impartial trials and that justice is administered fairly" and that "the appearance of bias or prejudice can be as damaging to public confidence as would be the actual presence of bias or prejudice." *People v. Bradshaw*, 171 Ill. App. 3d 971, 976 (1988). Whether the defendant was in fact prejudiced by the trial court's exposure to the victim impact statements is therefore irrelevant; it is the appearance that the statements might have influenced the court's judgment that warrants a new trial before a different judge. See *Wheatley*, 297 Ill. App. 3d at 858.

¶ 31 We also note that the cases the State cites in support of its general assertion that a verdict should not be set aside where no prejudice results from an *ex parte* communication are inapposite. The *ex parte* communications in those cases involved jury notes sent to the trial court during deliberations, and the issue on appeal was whether prejudice resulted from the manner in which the court responded to the notes. See *People*

v. Childs, 159 Ill. 2d 217, 226-35 (1994); *People v. Cotton*, 393 Ill. App. 3d 237, 261-64 (2009). Here, the issue is whether the verdict entered by the trial court is tainted by an appearance of impropriety. We conclude that it is and accordingly vacate the defendant's conviction and remand for a new trial before a different judge.

¶ 32 Although we are not making a determination that is binding on retrial, we also conclude that the evidence adduced at trial was sufficient to prove the defendant's guilt beyond a reasonable doubt. See *People v. Mueller*, 2015 IL App (5th) 130013, ¶ 42. There is therefore no double jeopardy impediment to a new trial. *People v. Tenney*, 205 Ill. 2d 411, 442 (2002). Given that the cause is being remanded for further proceedings before a different judge, we need not address the defendant's claim that the trial court misapplied the law regarding the offense of failure to reduce speed to avoid an accident. See *People v. Latona*, 184 Ill. 2d 260, 280-81 (1998).

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we hereby vacate the defendant's conviction and sentence and remand for a new trial.

¶ 35 Judgment vacated; cause remanded.