2019 IL App (5th) 160441-U

NO. 5-16-0441

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. 16-TR-5535
	)	
WILLIAM R. ROGERS,	)	Honorable
	)	Luther W. Simmons,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justice Barberis concurred in the judgment.
Justice Cates dissented.

ORDER

¶ 1 *Held*: Jury verdict finding defendant guilty of using an electronic communication device while driving affirmed where section 12-610.2 of the Illinois Vehicle Code (625 ILCS 5/12-610.2 (West 2016)) prohibits taking photographs with a cell phone while driving, the evidence was sufficient to support the conviction, and the statute is not unconstitutional.

¶ 2 The defendant, William R. Rogers, appeals his July 18, 2016, conviction, following a jury trial in the circuit court of Madison County, which found him guilty of using an electronic communication device while driving. 625 ILCS 5/12-610.2 (West 2016). For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 On March 11, 2016, a traffic citation was filed in the circuit court against the defendant, alleging that he improperly used an electronic communication device while driving, in violation of section 12-610.2 of the Illinois Vehicle Code (Code) (625 ILCS 5/12-610.2 (West 2016)). A jury trial was conducted on July 18, 2016.

¶ 5 At the trial, John Hoefert testified that he is employed as an officer and patrolman for the Wood River Police Department and has been so employed for two years. Hoefert indicated that on March 9, 2016, he was on duty and patrolling the west district of Wood River. At approximately 2:30 p.m. he was on school patrol and was parked in a vacant lot with another police officer who was in a separate patrol car, one block north of Wood River High School, facing south toward the school and observing traffic on East Edwardsville Road.

¶ 6 Hoefert testified that while monitoring traffic, he noticed that the defendant, who was driving a gold Chevrolet Malibu, was looking at him and the other officer in their squad cars. He emphasized that the defendant was not looking at the road, but his full attention was on the officers, "as he appeared to either be videotaping or photographing us while he was driving." Hoefert explained that the defendant's arm was extended out the passenger side window and he was holding what appeared to be a flip-style cell phone pointed in their direction. Hoefert was concerned because the defendant's behavior "was an obvious hazard to anybody that would have been in that area."

¶ 7 Hoefert agreed that while driving, besides talking, using a cell phone for other activities—including taking photos—would also be a distraction to the driver. Hoefert

testified that he initiated a traffic stop. He described the defendant as "agitated" when he encountered him and "evasive toward[ ] any conversation I tried to have with him." Hoefert noticed a flip-style cell phone sitting in the passenger seat beside the defendant.

¶ 8 On cross-examination, Hoefert indicated that he could not say that the defendant successfully took a photo or video on the date and time in question, nor could he determine if the cell phone was on or off. He further indicated that the defendant did not appear to be talking, surfing the Internet, or playing a game on the phone. On redirect, Hoefert confirmed that he witnessed the defendant holding the cell phone, which was open, that his arm was outstretched, his eyes were not on the road, but on the phone and the officers, and he appeared to be using the phone at that time. At the conclusion of the evidence, the defendant moved for judgment as a matter of law, which the circuit court denied. After deliberations, the jury found the defendant guilty and he was sentenced to pay fines and costs in the amount of $75. This appeal ensued.

¶ 9 ANALYSIS

¶ 10 On appeal, the defendant raises three issues: (1) whether section 12-610.2(b) of the Code prohibits taking photographs with a cell phone while driving; (2) whether there was sufficient evidence to support the jury verdict; and (3) whether the relevant section of the Code is unconstitutional.

¶ 11 I. Whether Section 12-610.2(b) of the Code Prohibits Taking Photos

¶ 12 The first issue is whether section 12-610.2(b) of the Code (625 ILCS 5/12-610.2(b) (West 2016)) criminalizes taking photographs with a cell phone while driving. Whether the defendant's use of his cell phone for purposes of taking a

photograph or attempting to do the same constitutes the use of an electronic communications device under the Code is an issue of statutory interpretation, which we review *de novo*. See *People v. Brindley*, 2017 IL App (5th) 160189, ¶ 27 (citing *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394, ¶ 17). "The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 6 (2009). "The best indicator of the legislature's intent is the language in the statute, which must be accorded its plain and ordinary meaning." *Id*. "Where the language in the statute is clear and unambiguous, this court will apply the statute as written without resort to extrinsic aids of statutory construction." *Id*. at 6-7. Moreover, common sense may be used in statutory interpretation. See *People v. Ward*, 215 Ill. 2d 317, 327 (2005). Applying these principles, we find this issue may be resolved by examining the plain language of the statute and applying a common sense interpretation of that language.

¶ 13 Section 12-610.2(b) of the Code provides, "A person may not operate a motor vehicle on a roadway while using an electronic communication device." 625 ILCS 5/12-610.2(b) (West 2016). A cell phone falls into the category of "electronic communication devices" under the Code and is not excluded by subsection (d). See *id.* § 12-610.2(d). This is not disputed. The defendant suggests, however, that he was not "using" his cell phone pursuant to the terms of the Code. He contends that the Code only forbids *talking* on the phone, and any other use of the phone is necessarily excluded. We disagree.

¶ 14 Nowhere does the Code indicate that talking is the only forbidden "use." However, as the State points out in its brief, the word "use" is defined by Merriam-

Webster as "the act or practice of employing something.". https://www.merriam-webster.com/dictionary/use. Had the legislature intended to forbid only *talking*, it could have done so by utilizing that particular language in the Code, but did not. There are multiple uses of a cell phone that could potentially distract a driver, and we find the specific manner of the defendant's use of his cell phone—in particular whether he successfully took or even attempted to take a photograph—is irrelevant under the Code. It would be absurd to apply the defendant's suggested interpretation to this section. Doing so would indicate that talking on a cell phone while driving—which can be accomplished with one's eyes on the road—is forbidden, while taking a photograph with a cell phone while driving—with one's eyes off the road—is permissible.

¶ 15 Assuming, *arguendo*, that the meaning of "using" in the Code is ambiguous, upon application of extrinsic aids to interpret the Code, we reach the same conclusion. In an effort to support his argument that talking on a cell phone while driving is the only forbidden use under the Code, the defendant cites legislative history, emphasizing repetitive comments about "talking" on a cell phone while driving. We refuse to limit the scope of the history based on a few utterances of a single word. A more thorough review of the cited legislative history indicates the intent that it was enacted with public safety in mind and in an effort to prevent drivers from being distracted by using their cell phones while driving. In fact, the very transcript submitted by the defendant indicates that the relevant bill would "require a person who chooses to use their cell phone while driving their car to use the phone without having it in their hands." 98th Ill. Gen. Assem., Senate Proceedings, May 23, 2013, at 53 (statements of Senator Mulroe). The application of this

statement alone supports the verdict, as undisputed testimony at trial was that the defendant was holding his cell phone in his hand and pointing it out the car window. Applying the defendant's suggested interpretation would defy the very purpose of the enactment of this section—to protect public safety by preventing distracted driving. For all of these reasons, we find that section 12-610.2(b) of the Code (625 ILCS 5/12-610.2(b) (West 2016)) prohibits taking photographs with a cell phone while driving.

¶ 16 II. Sufficiency of the Evidence

¶ 17 The second issue is whether there was sufficient evidence to support the jury verdict. "Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *People v. Brown*, 2013 IL 114196, ¶ 48. "[A] criminal conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Id*.

¶ 18 We are mindful that under a challenge of the sufficiency of the evidence, " 'a reviewing court must allow all reasonable inferences from the record in favor of the prosecution.' " *People v. Saxon*, 374 Ill. App. 3d 409, 416 (2007) (quoting *People v. Bush*, 214 Ill. 2d 318, 326 (2005)). "This standard of review applies in cases whether the evidence is direct or circumstantial." *Id*. " 'When weighing the evidence, the trier of fact is not required to disregard inferences that flow from the evidence, nor is it required to search out all possible explanations consistent with innocence and raise them to a level of

reasonable doubt.' " *Id.* (quoting *People v. McDonald*, 168 Ill. 2d 420, 447 (1995)). "The reviewing court will not retry the defendant." *Id.*

¶ 19 Applying the standard of review to the evidence presented to the jury in the case at bar, we find ample evidence to support the verdict of the jury. Officer Hoefert testified that he witnessed the defendant driving his vehicle on East Edwardsville Road. He was looking at the officers—not at the road—and had his cell phone extended out the passenger window and pointed toward the officers. Whether he successfully captured a photo is irrelevant. The jury could have reasonably concluded that—as an inference that flows from this evidence—the defendant was indeed using his cell phone while driving. In considering all of the evidence in the light most favorable to the State, we find a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. See *Brown*, 2013 IL 114196, ¶ 48. Moreover, we cannot say the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. Accordingly, we find the evidence sufficient to support the verdict and we affirm the defendant's conviction. See *id.*

¶ 20 III. Constitutionality of the Code

¶ 21 The final issue on appeal is whether the Code violates the defendant's constitutional right to photograph police officers while on duty. "Statutes are presumed constitutional [citation], and we have the duty to construe statutes so as to uphold their constitutionality if there is any reasonable way to do so [citation]." *People v. Jones*, 223 Ill. 2d 569, 595-96 (2006). "The party challenging the validity of a statute has the burden

of clearly establishing a constitutional violation." *Id*. at 596. "Because constitutionality is a pure question of law, our standard of review is *de novo*." *Id*.

¶ 22 Constitutional challenges may be analyzed as either facial or as-applied challenges. See *People v. Thompson*, 2015 IL 118151, ¶ 36. "Although facial and as-applied constitutional challenges are both intended to address constitutional infirmities, they are not interchangeable." *Id*. "An as-applied challenge requires a showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party." *Id*. "In contrast, a facial challenge requires a showing that the statute is unconstitutional under any set of facts ***." *Id*. Here, the defendant claims that the Code is unconstitutional under the first and fourteenth amendments of the United States Constitution (U.S. Const. amends. I, XIV), regarding his right to photograph police officers while they are on duty. Accordingly, we find this to be an as-applied constitutional challenge.

¶ 23 The defendant concedes correctly that the Code is content-neutral, because the Code may affect speech but without discrimination as to the messenger or its content. *People v. Clark*, 2014 IL 115776, ¶ 19. "A content-neutral regulation will be sustained under the first amendment if it advances important governmental interests unrelated to the expression of free speech and does not burden substantially more speech than necessary to further those interests." *Id*.

¶ 24 Here, the defendant argues that the Code is unconstitutional because "the record reveals no important governmental interest that the legislature sought to protect by banning photography." As observed in our analysis of the sufficiency of the evidence,

upon enacting the Code, the legislature did not seek to ban photography, but to protect public roadways by forbidding the use of, *inter alia*, cell phones while driving. The protection of people on Illinois roadways from the dangers caused by distracted drivers is an important governmental interest. Moreover, the Code only limits activities associated with speech (*i.e.*, the use of a cell phone) to a time when a person is driving, thereby not burdening speech substantially more than necessary to further the interest. Accordingly, the Code is constitutional. See *Clark*, 2014 IL 115776, ¶ 19.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm the defendant's July 18, 2016, conviction and sentence.

¶ 27 Affirmed.

¶ 28 JUSTICE CATES, dissenting:

¶ 29 After reviewing the record in this case, I must respectfully dissent. In my view, the State failed to present sufficient evidence to prove beyond a reasonable doubt that the defendant was guilty of using an electronic communication device while operating a motor vehicle on a roadway. Further, I would find that the statute as applied in defendant's case is unconstitutionally vague.

¶ 30 On March 9, 2016, defendant was issued a citation alleging improper use of an electronic communication device under section 12-610.2 of the Illinois Vehicle Code (Code) (625 ILCS 5/12-610.2 (West 2016)). On July 18, 2016, the case was called for

jury trial. The State presented only one witness at trial, Officer John Hoefert. Officer Hoefert testified that he and another officer were on school patrol, parked in a vacant lot near East Alton-Wood River High School. While waiting for school to end, Officer Hoefert noticed a gold Chevrolet Malibu. The operator of the vehicle, later identified as the defendant, appeared to be fumbling with some object in his car. The officer explained that he noticed the driver's actions because he "diverted all of his attention away from driving towards us as he appeared to either be videotaping or photographing us while he was driving." Upon further questioning, Officer Hoefert stated that the driver "had his arm extended out the passenger side window pointed over in our direction." The officer testified that it "appeared" the defendant had a "flip-style cell phone in his hand." When asked whether the defendant's attention was on the roadway, Officer Hoefert replied that "all of his [defendant's] attention was off of the road," which was an "obvious hazard to anybody who would have been in that area."

¶ 31 Because he was concerned that defendant was "attempting to photograph or videotape" the officers, Officer Hoefert initiated a traffic stop. When he approached defendant's Chevy Malibu, Officer Hoefert saw an "old-style flip phone" lying on the front passenger seat of the defendant's vehicle. Officer Hoefert could not identify the particular make or model of the phone. Nevertheless, Officer Hoefert testified regarding the size of the screen on a flip-style phone such as the one he saw, based on his experience in life. Specifically, Officer Hoefert stated that screens on the flip phone, such as defendant's phone, are much smaller than the screens on phones today.

¶ 32 During cross-examination, Officer Hoefert testified that he could not state, beyond a reasonable doubt, that defendant had been taking any video images with the phone. Officer Hoefert acknowledged that defendant did not appear to be talking on the phone or searching the internet. Officer Hoefert further stated that he did not know whether the cell phone was turned on or off, or whether it was functional. Officer Hoefert could only testify that, at the time in question, defendant appeared to have a flip-style phone in his hand, which was outstretched toward the two officers.

¶ 33 At the conclusion of the State's case, defense counsel moved for a directed verdict and argued that the State had not produced any testimony or evidence to show that the defendant had actually taken a photo or video. Without such proof, there was insufficient evidence to show the defendant had improperly used an electronic communication device in violation of the statute. The defendant's motion for a directed verdict was denied, and subsequently, the jury returned a verdict finding the defendant guilty of violating section 12-610.2 of the Code.

¶ 34 Subsequent to the defendant's conviction, his counsel filed a motion for judgment of acquittal notwithstanding the verdict, or in the alternative, for a new trial. The court entered an order denying the motion on August 16, 2016. In its handwritten order, the trial court made the following findings:

1. That the jury heard the testimony herein that the defendant either photographed *or simulated photographing the Wood River Police*.

2. That the defendant did so while operating a motor vehicle upon a public roadway.

3. That his cellphone constituted an electronic communications device under the statute and that it was his cellphone that he utilized in photographing *or simulating photographing the Wood River Police*.

4. *Further, the court finds from a review of the legislative history of this statute that the clear intent of the legislature in enacting this statue [sic] was to prohibit "multi-tasking" while operating motor vehicles, and to thereby enhance public safety. Enhancing public safety was a key motivator for the promulgation of this statute. In the court's opinion, using a cell phone as a camera is just as great a public safety risk as talking on one, and this is all behavior that the legislature sought to proscribe.* (Emphasis added.)

¶ 35 Section 12-610.2(a) of the Code prohibits a person from operating a motor vehicle on a roadway while using an electronic communication device. 625 ILCS 5/12-610.2(a). The statute defines an electronic communication device as an electronic device, including a held-held wireless telephone, hand-held personal digital assistant, or a portable or mobile computer. 625 ILCS 5/12-610.2. The word "using" is not defined in the statute. Use of an electronic communication device is an essential element of the offense and must be established beyond a reasonable doubt. The State's evidence, at best, showed that defendant held a flip phone in his hand while operating a motor vehicle. The State's only witness, Officer Hoefert, could not say whether the flip phone was even turned on at the time he saw it on the front seat of the defendant's vehicle. Officer Hoefert did not testify whether the flip phone was capable of taking photos or video recordings, or even whether it was functional. Considering the evidence in the light most favorable to the State, the facts simply show that the defendant was extending his arm out of the passenger window of his vehicle while holding what appeared to be a flip phone. Based on this record, I must conclude that the evidence was insufficient to establish beyond a reasonable doubt

that defendant was using his cell phone in violation of the statute. Accordingly, I would reverse the judgment of conviction.

¶ 35 Further, the trial court's order of August 16, 2016, raises a question regarding the constitutionality of this statute, as applied to this defendant. Subsequent to defendant's conviction, his counsel filed a motion for judgment of acquittal notwithstanding the verdict, or in the alternative, for a new trial. The trial court entered an order on August 16, 2016, denying the defendant's motion based, in part, on a finding that "simulating" the taking of a photograph was sufficient to sustain a conviction for "use" of an electronic communication device. The court also relied upon the legislative history of the statute as a basis for sustaining the conviction. This interpretation is not only contrary to the plain language of the statute, but also has potential constitutional implications.

¶ 36 The proscription of a criminal statute must be clearly defined and provide a sufficiently definite warning of the prohibited conduct as measured by common understanding and practices. *People v. Jihan*, 127 Ill. 2d 379, 385 (1989). A criminal statute must be definite so that a person of ordinary intelligence will have a reasonable opportunity to know what conduct is prohibited. *Jihan*, 127 Ill. 2d at 385. A criminal statute must also be definite to avoid arbitrary and discriminatory enforcement and application by police officers, judges, and juries. *Jihan*, 127 Ill. 2d at 385.

¶ 37 In this case, the defendant was charged and convicted of using his cell phone while operating a motor vehicle based on Officer Hoefert's observations that the defendant was holding a flip phone with his hand extended out of the passenger side window of his Chevy Malibu. If the defendant can be found guilty of this offense based

upon merely displaying his cell phone or "simulating" the taking of a photograph, then the statute is unconstitutionally vague. Here, the phrase "while using" has been extended to what the defendant appeared to be doing, or what he was "simulating." In support of the conviction, the court has cited legislative history which is not an element of the offense. In my view, any attempt to extend the term "use" of an electronic communication device to encompass merely holding the device in your hand, as opposed to actually operating the device, renders the statute unconstitutionally vague under the circumstances of this case, as a person of ordinary intelligence would have no warning of the prohibited conduct.

¶ 38 For these reasons, I respectfully dissent.