2024 IL App (4th) 221052-U

NO. 4-22-1052

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 8, 2024
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Boone County
VIDEL SEYMOR,	)	No. 22CF9
Defendant-Appellant.	)	
	)	Honorable
	)	C. Robert Tobin III,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Cavanagh and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Any error by the trial court in failing to allow defense counsel to argue defendant had enough time to drink three vodka shots and then to become intoxicated after he stopped driving was harmless error under both the general and constitutional harmless error standards.

¶ 2 In July 2022, a jury found defendant, Videl Seymor, guilty of aggravated driving with a blood alcohol concentration (BAC) of 0.08 or more (625 ILCS 5/11-501(a)(1), (d)(1)(A), (d)(2)(D) (West 2022)) (charged as a Class 1 felony because defendant had four prior convictions of driving under the influence or similar offences), aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (d)(1)(A), (d)(2)(D) (West 2022)) (charged as a Class 1 felony for the same reason), and driving with a suspended license (625 ILCS 5/6-303(a) (West 2022)). The trial court sentenced him to nine years' imprisonment.

¶ 3 In this appeal, defendant challenges the trial court's ruling striking the portion of defense counsel's closing argument in which he argued, consistent with defendant's testimony, defendant had sufficient time before police arrived at the house where he was staying to drink three vodka shots and become intoxicated. The State objected to this argument as unsupported by the evidence, and the court seemingly agreed. Defendant now contends this ruling violated his due process right to present a complete defense. We hold any error was harmless under either potentially applicable standard—the "evidentiary" harmless error standard or the constitutional harmless error standard—and we affirm.

¶ 4 I. BACKGROUND

¶ 5 Defendant had a jury trial on the three charges described above. Dawn Shondel, defendant's ex-wife, was the State's first witness. She lived with her three children at a house in Belvidere, Illinois. On January 15, 2022, defendant was also staying in the house. However, she allowed him to stay there on the condition he did not consume alcohol. Thus, when she returned from a shopping trip at about 4 p.m. and noticed he had been consuming alcohol, she told him to leave.

¶ 6 Shortly after 1 a.m. on January 16, 2022, there was a "commotion" in the front yard. Shondel went outside and discovered defendant was revving the engine of his car, which was stuck in the snow near her driveway. She went back into her house and, "a couple minutes later," called the police. On cross-examination, Shondel said she thought she waited 10 minutes before calling the police. She estimated it took seven to eight minutes for the police to arrive. On redirect examination, she stated she had watched defendant through her front window after she returned to the house and she never saw him drink. In her opinion, defendant was "under the influence" when she interacted with him.

¶ 7 David Ellingson of the Belvidere Police Department testified he was dispatched to Shondel's house at "a little after 1:00 in the morning" on January 16, 2022. Upon arriving, he saw defendant "standing on the front porch" and "having a conversation with somebody inside the residence." When Ellingson approached defendant, he noticed defendant's breath smelled strongly "of alcoholic beverage." Defendant told Ellingson he lived at the house and was trying to go to bed but had not been let in. Defendant said he drove to the house from Rockford, Illinois, and had "just returned." He said he had parked his car "in the front lawn," but Ellingson could see it was stuck. Defendant explicitly denied having had anything to drink since arriving but admitted he drank two beers while at a friend's house in Rockford.

¶ 8 Ellingson asked defendant to perform a standard field sobriety test. Defendant initially refused on the basis no traffic stop was involved, but he later took a test administered by Officer Michelle Bogdonas. Ellingson ultimately arrested defendant. When Ellingson inspected defendant's car before a tow truck took it, he noticed it was still warm inside, "as if it had been recently driven." He did not recall finding any alcoholic beverage containers in the car or near the house.

¶ 9 Bogdonas was dispatched to Shondel's address at approximately 1:12 a.m. on January 16, 2022. She arrived while Ellingson was speaking to defendant. She described defendant as "talking very loudly, very animated, a little wobbly on his feet." He asked the same questions repeatedly, and he slurred his words. His eyes were "bloodshot and glassy." Bogdonas ran "defendant's information through dispatch" and learned his driver's license was suspended. Defendant told her he drank beer and vodka in Rockford, but he later claimed he had only vodka.

¶ 10 Bogdonas administered a standard field sobriety test to defendant. When he repeatedly put his hands in his pockets, she checked their contents and found his car keys.

Bogdonas also performed a horizontal gaze nystagmus test. Defendant was unable to follow Bogdonas's instruction to keep his head still while following her finger with his eyes. Further, when he attempted the walking portion of the field sobriety test, among other failures, he could not walk heel-to-toe. In Bogdonas's opinion, defendant was under the influence of alcohol and unfit to drive a vehicle. She placed defendant under arrest and, after defendant proved physically incapable of completing a breath test, transported him to an in-town hospital to have his blood drawn.

¶ 11 Bogdonas authenticated body and car camera video recordings relating to her encounter with defendant. The court admitted the evidence and the State showed it to the jury. As the exhibit appears in the record, we lack anything to show what portions of the recordings the State played for the jury. Nothing in the portion of the body camera recording depicting Bogdonas's arrival, defendant's responses to Bogdonas and Ellingson, or the field sobriety testing conflicted with Ellingson's or Bogdonas's testimony.

¶ 12 The parties stipulated a registered nurse drew defendant's blood at approximately 3:20 a.m. on January 16, 2022, a qualified forensic scientist tested the sample, and its BAC was 0.17 grams per deciliter. The State rested after these stipulations.

¶ 13 Defendant testified Shondel allowed him to live with her and their children on the condition he did not drink in her house. As of January 15, 2022, he had been living with her for about three months. At approximately 4 p.m., he was home with his 15-year-old and 9-year-old children while Shondel was at the store with their other child. He drank a beer, and Shondel learned about it. She told him he had to leave the house. He spent about two hours calling around to find "rides." He reached a friend in Rockford, Lori Danrow, who was running errands and would be

home “shortly” but would allow him to come and stay the night. He tried to time his departure so he would not arrive at her home before she did.

¶ 14 When defendant drove his car to Danrow’s apartment, she told him he would have to leave her apartment early in the morning. He told her this arrangement was “not going to work for [him].” He left, driving to the house of another friend, Linda Moon, who would lend him some gas money. He stayed for about 10 minutes and borrowed $5. When asked whether he “dr[a]nk anything from when [he] went to [Danrow’s] house to when [he] stopped over at [his] friend [Moon’s] house,” he responded he had stayed been with Moon “just briefly.”

¶ 15 After leaving Moon’s apartment, defendant drove to a gas station in Belvidere, where he purchased “like three UV Vodka Blues,” which “cost like a dollar ten,” and “told the cashier to put the remaining in gas.” He had “like about two sixty, maybe two seventy left.” He used the change to buy gas and drove back to Shondel’s house.

¶ 16 Shondel did not want defendant’s car in her driveway, so defendant testified he initially pulled into the driveway and then put the car into reverse so he could park on the street. His car started fishtailing in place. He tried to go forward, but he was stuck. In his efforts to free the car, he revved the engine. Shondel came out of the house and complained about the engine noise and his earlier drinking. He apologized, and she went back into the house. Defendant made one more unsuccessful attempt to free his car. Defendant turned the car off, exited it, and locked it. Defendant testified he then decided to drink the vodka he bought. He went to the side of the house near the garbage containers and “downed [the vodka shots] real quick.” He pushed the bottles down into the garbage so Shondel would not discover he had been drinking. He then walked up to the front door and knocked on it. Defendant’s son answered. He thought this occurred on

January 15, 2022, between 11:30 p.m. and midnight, and that the officers arrived 25 to 30 minutes later. Defendant believed both officers arrived at once.

¶ 17 Defendant admitted he was "under the influence" when the officers arrived. He said he misunderstood their questions regarding whether he had been drinking earlier. When he said he had drunk beer, he was talking about the beer he had in Shondel's house, which caused her to tell him to leave. Because he left Danrow's apartment as soon as she told him he would have to leave early the next day, he did not stay there long enough to drink anything. Ellingson's questioning never gave defendant the opportunity to mention he had drunk the vodka shots after he got out of his car.

¶ 18 On cross-examination, defendant admitted "the video" showed Ellingson asking him whether he had anything to drink after he returned home, but he said he misunderstood the question. He said, when he left for Rockford, he had approximately $1.20 with him. He said the "shooters" were $1.00 each and $1.05 with tax, which he conceded left him with less than $3 to buy gas. He thought buying just a little gas would be fine because he expected Shondel to give him money so he could go back to his family in Wisconsin to live. He denied he drank alcohol with Danrow because she did not drink.

¶ 19 In its closing argument, the State first argued the evidence showed defendant was already intoxicated when he returned to Shondel's house. The video indicated defendant missed the driveway and drove his car into the front yard of Shondel's house. Additionally, he appeared highly intoxicated when he spoke to the officers. Next, the State argued defendant was guilty of aggravated driving with a blood alcohol level of more than 0.08 because his BAC was 0.17. It also argued the evidence showed defendant did not drink after reaching the house. The State noted

defendant told the officers he did not drink once he was back at the house and Shondel said she watched defendant after he arrived and did not see him drink.

¶ 20 Defense counsel argued defendant admitted to driving with a suspended license but not the DUI charges. Counsel contended defendant was more afraid of how Shondel would respond to his drinking at the house than of arrest and acted accordingly. Counsel started to argue defendant could have become intoxicated in the time before the police arrived by drinking outside Shondel's house. However, he was stopped by the State's objection:

> "[DEFENSE COUNSEL]: Now, there was plenty of time from the call to when the police got there for [defendant] to slam three vodka shots, UA blue he called them, and to have that intoxicating effect by the time the police got there. [Defendant]—
>
> [THE STATE]: Objection, Your Honor. Facts not in evidence.
>
> THE COURT: I'll sustain that objection. We'll strike that argument. There's no evidence as to how long it would take for that to happen."

¶ 21 After a brief sidebar, defense counsel resumed his argument by asking the jury not to blame defendant for not getting enough gas. Counsel argued defendant's cooperation with the police showed he believed he had nothing to hide. He further argued:

> "Now, [defendant's] versions of the events are very clear on that day where he came from, who he saw, what time everything happened from his one friend in Rockford to waiting for her to come home from work, to getting gas, to going to the gas station, to how much he paid for everything, and then finally back to [Shondel's house]."

Counsel argued defendant's memory became unclear only after the police arrived.

¶ 22 In its rebuttal, the State argued defendant had every opportunity to tell the officers he had been drinking after he arrived at Shondel's house.

¶ 23 The jury found defendant guilty of all three counts.

¶ 24 Defendant filed a "Motion for New Trial," in which he argued, *inter alia*, "the Court erred when it sustained objections made by the prosecutor during Defendant's closing argument." Defense counsel did not elaborate on this claim when he argued the motion. The trial court denied the motion. It sentenced defendant to nine years' imprisonment on the aggravated DUI count based on BAC. The court denied his motion for reconsideration of his sentence.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, defendant argues the trial court's ruling barring defense counsel from arguing defendant "was drunk 20 to 30 minutes after downing three vodka shots in quick succession was a reasonable inference from the trial evidence, and the jury could draw that conclusion based on their common knowledge and life experiences." He contends matters concerning alcohol intoxication do not require scientific evidence. Moreover, because the "defense turned entirely on [the] precluded argument, the court's error prevented him from presenting a complete defense." This, he argues, was a violation of his right to due process, and thus we should require the State to demonstrate the error was harmless beyond a reasonable doubt. He contends the error could not be harmless because it prevented him from arguing the vodka shots were the source of his intoxication. Further, he insists the State's case was circumstantial and relied on contested facts, such that the evidence was not overwhelming.

¶ 28 In response, the State argues, first, defense counsel could not properly make the argument because it lacked a scientific basis. The State contends defendant's argument required

scientific evidence about the speed at which alcohol is absorbed into the bloodstream. It next contends the ruling did not prevent defendant from presenting his defense because defendant presented his defense through his own testimony. Finally, it contends any error was harmless because the evidence of defendant's guilt was overwhelming.

¶ 29 A. This Appeal May Be Resolved on Nonconstitutional Grounds

¶ 30 Our supreme court has a long-standing rule a reviewing court should not decide a constitutional question if the appeal can be decided on nonconstitutional grounds. See, *e.g.*, *Strauss v. City of Chicago*, 2022 IL 127149, ¶ 51, 215 N.E.3d 87; *In re E.H.*, 224 Ill. 2d 172, 178, 863 N.E.2d 231, 234 (2006) ("We have repeatedly stated cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort."). Defendant's principal claim, though constitutional, ignores the facts of this case.

¶ 31 Defendant seeks to pigeonhole his case into that "narrow set of cases" *E.H.* said could "theoretically exist *** in which admission of the same evidence is harmless if considered as an evidentiary error, but not harmless if evaluated pursuant to the constitutional error standard." *E.H.*, 224 Ill. 2d at 181. Unless an error is structural, a showing of error does not result in automatic reversal. *People v. Pingelton*, 2022 IL 127680, ¶ 44, 215 N.E.3d 764. Generally, an error in a criminal case is reversible error only if it is not harmless error. See *Pingelton*, 2022 IL 127680, ¶ 44 (noting the existence of a strong presumption that even constitutional errors are subject to harmless error analysis). "To establish that any error was harmless, the State must prove beyond a reasonable doubt that the result would have been the same absent the error." *People v. Salamon*, 2022 IL 125722, ¶ 121, 202 N.E.3d 283. Defendant concedes his claim is subject to harmless error analysis. We can resolve this appeal on nonconstitutional grounds by limiting our analysis to determining whether any error in the ruling was harmless beyond a reasonable doubt.

¶ 32 B. There Was No Error, and Even If There Was, It Was Harmless Beyond a Reasonable Doubt

¶ 33 Counsel was precluded from arguing sufficient time elapsed after defendant consumed the three vodka shots to show signs of impairment when the officers arrived. As the State points out, defendant was attempting, in a roundabout way, to present principles of retrograde extrapolation to explain his intoxication and 0.17 BAC were the result of the three vodka shots consumed after he arrived at his ex-wife's house. Although framed as "plenty of time *** to have that intoxicating effect," the argument was intended to address both counts related to defendant's alcohol consumption, as demonstrated by counsel's closing argument. He began and ended by saying defendant acknowledged only that he drove with a suspended license. His argument, therefore, was necessarily directed at both DUI-related counts. As such, this was an effort to explain not only defendant's intoxication as observed by the officers, but also the stipulated evidence of defendant's BAC of 0.17 obtained from the blood draw taken over two hours later. Counsel's effort to raise such an inference in the absence of any scientific evidence to support it was improper, and the State's objection was properly sustained. The amount of time it takes someone to become intoxicated to the point where, over two hours later, he registers a 0.17 BAC, is a matter of scientific evidence. *People v. Beck*, 2017 IL App (4th) 160654, ¶ 109, 90 N.E.3d 1083.

¶ 34 However, even if we found the trial court's decision to sustain the objection to be error, it was harmless beyond a reasonable doubt. First, the jury must not have believed defendant's testimony that his only measurable alcohol consumption occurred after he returned to Shondel's house. The jury heard everything counsel sought to argue from defendant's testimony to explain

defendant's intoxication by the time police arrived. Defendant testified he purchased the three vodka "shooters" on his way back to Shondel's house, and after becoming stuck,

> "I knew I couldn't drink in her house so the three UV Vodka Blues that I had previous that I bought from the Mobil gas station before I got to her house I went on the side of her house where the garbage is and all that so I downed them real quick on the side of the house."

He then explained how he hid the bottles "way down" inside the garbage can. Defendant estimated this occurred "I want to say 11:30, maybe 12:00," and that the police arrived 25 to 30 minutes later. He also acknowledged he was intoxicated by that time and was unable to perform the field sobriety tests.

¶ 35 Even after the State's objection to counsel's argument was sustained, counsel continued to argue that "the State has not proven that [defendant] drove while under the influence as he did not become under the influence until after he got to Ms. Shondel's [house]." Despite the objection, counsel was still able to make the argument of which defendant now contends he was deprived—that he became intoxicated only after arriving at Shondel's house and by the time the police arrived. Between defendant's testimony and the remainder of counsel's argument, everything counsel sought to argue was before the jury.

¶ 36 Second, the evidence defendant drove while intoxicated with a BAC exceeding the legal limit was overwhelming. The jury heard defendant's car became stuck after he drove into the front yard of the residence, missing the driveway. Despite all other witnesses who testified defendant's car was in the yard, defendant believed he was stuck in the driveway. The jurors were able to see and hear defendant's interaction with the police and observe his speech and actions. They heard defendant's explanation for why he didn't tell the officers about his one and only

defense to the DUI charges against him, drinking after arrival, and his response that he did not understand the question, "[H]ave you had anything to drink since you got home?" Defendant's ex-wife testified he was intoxicated when he first appeared stuck in her yard upon his return, which would have been before he said he consumed the three vodka "shooters." The jury also heard defendant's several versions about what and when he drank that day and how his timeline of events differed from the other evidence in the case. The jury was able to compare defendant's version of events with the testimony of his ex-wife and the officers to determine his credibility.

¶ 37 The jury, as the fact finder, was in the best position to weigh defendant's credibility against the State's evidence. It was able to do so through both the video shown at trial, which is available to us, and defendant's testimony from the stand, which is only available through a cold transcript. The jury made credibility assessments and resolved the case utilizing those assessments. In doing so, the jury was privy to information a cold record cannot provide this court. In *People v. Hadden*, 2015 IL App (4th) 140226, ¶ 28, 44 N.E.3d 681, this court discussed the concept of "paralanguage":

> "Spoken language contains more communicative information than the mere words because spoken language contains 'paralanguage'—that is, the 'vocal signs perceptible to the human ear that are not actual words.' [Citation.] Paralanguage includes 'quality of voice (shrill, smooth, shaky, gravely, whiny, giggling), variations in pitch, intonation, stress, emphasis, breathiness, volume, extent (how drawn out or clipped speech is), hesitations or silent pauses, filled pauses or speech fillers (*e.g.*, "um,/uhm," "hmm," "er"), the rate of speech, and extra-speech sounds such as hissing, shushing, whistling, and imitation sounds.' " (quoting Keith A.

Gorgos, *Lost in Transcription: Why the Video Record Is Actually Verbatim*, 57 Buff. L. Rev. 1057, 1107-08 (2009))

See also *People v. Carter*, 2021 IL App (4th) 180581, ¶ 70, 188 N.E.3d 391 (reaffirming the position taken in *Hadden*). As there is no common counterpart for these features of speech, paralanguage is rarely included in the transcript. "Paralanguage is critical to evaluating oral testimony, and we note that paralanguage is even more important when evaluating witnesses who are testifying from the witness stand." *Carter*, 2021 IL App (4th) 180581, ¶ 70.

¶ 38 There is no dispute about the jury instructions given. Based on those instructions, the jurors understood that, to find defendant guilty of the DUI counts, they had to find defendant drove or was in actual physical control of a motor vehicle while intoxicated and had an alcohol concentration of 0.08 or more beyond a reasonable doubt. They did so. To do that, they had to discount defendant's testimony.

¶ 39 We find the trial court did not err in sustaining the objection, and even if it was error, based on this record, it was harmless error beyond a reasonable doubt.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the trial court's judgment.

¶ 42 Affirmed.