

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

JAMES LYNCH

Appellant,

APPELLATE DIVISION (CRIMINAL)
CASE NO: 502012AP900009XXXXMB
L.T. NO: 502011CT019094XXXXSB

v.

STATE OF FLORIDA,

Appellee.

Appealed: February 9, 2012

Opinion filed: **AUG - 5 2013**

Appeal from the County Court in and for Palm Beach County,
Judge Marni Bryson

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✓ For Appellee: Stephanie Dutko, Esq.
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PER CURIAM.

In this appeal of his conviction for Driving Under the Influence, Appellant/Defendant James Lynch ("Lynch") raises two issues: 1) whether the trial court committed reversible error by limiting the cross-examination of the arresting police officer, and 2) whether the trial court committed fundamental error by considering Lynch's lack of remorse during sentencing. Although we find that Lynch's arguments do not merit reversal, the issues raised merit discussion, nonetheless.

During Lynch's cross-examination of the arresting officer, the trial court sustained the State's relevancy objections to questions regarding whether field sobriety exercises are normal adult activities. Lynch argued that because the officer testified on direct examination that the

exercises tested Lynch's normal faculties, he should have been allowed to cross-examine the reliability of the field sobriety exercises to show impairment. The trial judge ruled that the actions of others were not relevant to whether Lynch was impaired. The judge also sustained relevancy objections as to whether the officer ever saw people walking heel-to-toe at the grocery store and to questions that sought to compare the field sobriety exercises to driver's license testing procedures.

In defining the scope of cross-examination, the Florida Supreme Court stated:

[W]hen the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts . . . or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief . . .

Coxwell v. State, 361 So. 2d 148, 151 (Fla. 1978) (quoting *Coco v. State*, 62 So. 2d 892, 895 (Fla. 1953)). Here, the direct examination of the officer opened the general subject of field sobriety exercises and left an impression that Lynch's performance of the exercises was an indication of impaired normal faculties. Lynch's proposed cross-examination sought to rebut that impression. It was therefore error to sustain the State's relevancy objections.

Any error that resulted from the exclusion of the testimony, however, was rendered harmless by the strength of the evidence in the record suggesting Lynch's guilt. Furthermore, field sobriety exercises are considered to be within a juror's common experiences and understanding; hence, the exclusion of testimony that seeks to establish that they are not normal activities would be insignificant. See *State v. Meador*, 674 So. 2d 826, 831 (Fla. 4th DCA 1996) (noting that jurors do not require any special expertise to interpret the performance of the field

sobriety exercises).

Lynch additionally argues that the trial court committed fundamental error by improperly considering lack of remorse during sentencing. *Donaldson v. State*, 16 So. 3d 314 (Fla. 4th DCA 2010); *Whitmore v. State*, 27 So. 3d 168, 172 (Fla. 4th DCA 2010) (holding appellate counsel was ineffective for failing to argue that it was fundamental error and denial of due process for the court to consider lack of remorse and denial of responsibility during sentencing). Although “remorse and an admission of guilt may be grounds for mitigation of a sentence,” a trial court is not permitted to otherwise consider the lack of such remorse or a failure to admit guilt. *K.N.M. v. State*, 793 So. 2d 1195, 1198 (Fla. 5th DCA 2001).

The instant case is analogous to *Shelton v. State*, 59 So. 3d 248, 250 (Fla. 4th DCA 2011), which held that no error occurred when the trial court expressly stated that it was basing a life sentence on the defendant’s record and his conduct in the case, despite mentioning the defendant’s lack of remorse. The appellate court found the comments regarding the defendant’s lack of remorse to be the court’s recognition that it lacked grounds to mitigate the sentence. *Id.*

The record in the case at bar does not reflect that the trial court used Lynch’s lack of remorse against him during sentencing. Instead, the trial court focused on the facts of the case and expressly stated that it based the sentence on the egregious nature of Lynch’s crime and concern for public safety. Indeed, the defendant’s lack of remorse was not mentioned by the trial court until *after* the sentencing when Lynch moved to mitigate the sentence. Thus, the trial court’s statements regarding the lack of remorse reflected why the court lacked grounds to mitigate the sentence and do not establish fundamental error.

Accordingly, the lower court’s decision is hereby AFFIRMED.

BURTON, MCSORLEY, RAPP, JJ. concur.