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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Boone County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07—CF—14
)	
APRIL D. DLUGI,)	Honorable
)	John H. Young,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Bowman and Schostok concurred in the judgment.

ORDER

Held: (1) The State proved defendant guilty beyond a reasonable doubt of aggravated DUI; defendant exhibited the standard indicia, admitted drinking, struggled on field-sobriety tests, and refused a Breathalyzer; although defendant had innocent explanations for these, the trial court was entitled to reject them; (2) although the State failed to lay a sufficient foundation for the admission of HGN test results, it did not introduce such results (which the officer could not obtain); instead, the State properly introduced testimony about the HGN test only to show that defendant failed to follow the officer's instructions; thus, there was no erroneous admission of results.

Following a bench trial in the circuit court of Boone County, defendant, April D. Dlugi, was found guilty of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11—501(d)(1)(G) (West Supp. 2007)) and was sentenced to a 24-month term of conditional

discharge. On appeal, defendant argues that the State failed to prove her guilt beyond a reasonable doubt. She alternatively argues that the trial court erred in allowing the arresting officer to testify about how she behaved when he was administering the horizontal gaze nystagmus (HGN) test. We affirm.

At trial, Kevin Smyth, a Boone County sheriff's deputy, testified that at about 2 a.m. on December 3, 2006, while proceeding east on Business Route 20, he observed the vehicle in front of his cross over the center line of traffic on a straight section of the roadway. Smyth then observed the vehicle cross the center line and veer almost completely into the median at a curve in the road. Smyth conducted a traffic stop. He identified defendant as the vehicle's driver. There were no passengers. When Smyth approached the vehicle, defendant rolled the window down about two inches. Smyth detected the odor of alcohol coming from defendant's direction and observed that her eyes were slightly bloodshot. Defendant provided Smyth with an identification card, but was unable to produce a driver's license or proof of insurance. Smyth asked defendant if she had been drinking. At first she replied simply that she worked at a bar. She then admitted to Smyth that she had "two shots" while working. Smyth returned to his squad car and learned that defendant's driver's license had been suspended. He then returned to defendant's vehicle and asked her to exit the vehicle. Defendant did so and started to lock the vehicle. She explained to Smyth that she believed that she was being arrested because her license was "jacked up."

When Smyth began to testify that he administered the HGN test to defendant, her attorney objected. The prosecutor indicated that she was not seeking admission of the results of the test; she sought to admit evidence of the test only as it pertained to defendant's ability to follow instructions. The trial court ruled that Smyth could testify about his observations "about [defendant's] eyes or

confusion or something like that.” Smyth testified that he asked defendant to look at his finger and follow it with her eyes as he moved it. He instructed her not to move her head. Although she indicated that she understood, she moved her head, did not follow his finger with her eyes, and talked throughout the test. Smyth “was unable to get any results from the test.”

Smyth administered two other field sobriety tests: the one-leg-stand test and the walk-and-turn test. For the one-leg-stand test, Smyth instructed defendant to keep her hands at her sides, raise one foot more than six inches off the ground, look at her toes, and count by thousands (*i.e.* “One-one-thousand, two-one-thousand ...”) to 30, or until Smyth told her to stop. Defendant protested that the test was unfair because she was wearing heels. Smyth offered defendant the option of removing her shoes, but she initially declined. Smyth noted that it was cold outside. On her first attempt at performing the test, defendant failed to keep her arms at her sides and was able to keep her foot off the ground for only about two seconds. The results of defendant’s second attempt were similar. She then performed the test with her shoes off. She raised her arms and put her foot on the ground at the count of 17.

Defendant wore her shoes while performing the walk-and-turn test. Smyth instructed defendant to place her right foot in front of her left. She did the opposite, but Smyth corrected her and got her in the proper position. Smyth then instructed defendant to take nine heel-to-toe steps in a straight line, turn, and take nine heel-to-toe steps back. He also told her to keep her hands at her sides and count her steps out loud. According to Smyth, while performing the test, defendant raised her arms to maintain balance and she failed to touch her heels to her toes. Smyth testified that in his personal and professional experience he had observed people under the influence of alcohol. He described several common signs of alcohol impairment. Smyth further testified that he formed the

opinion that defendant was under the influence of alcohol. He explained that this opinion was based on “[defendant’s] driving, the odor of alcohol, her eyes being bloodshot, her admission of drinking alcohol, *** her inability to follow directions and *** the balance that [Smyth] could see during the field sobriety.” Smyth placed defendant under arrest and subsequently requested that she submit to a Breathalyzer test. She refused.

Smyth’s squad car was equipped with a video camera that recorded his encounter with defendant. The recording of the encounter was played during defendant’s trial and was admitted into evidence.

Defendant testified that prior to her arrest she had been “[w]orking all day” and had just finished a shift at a nightclub where she worked as a bartender. During her shift, she drank two shots. She testified that she was exhausted, had an ear infection, and was coming down with a sinus infection. Before Smyth pulled defendant over, her vehicle crossed the center line on Business Route 20 while she was replying to a text message on her cellular telephone. Defendant estimated that when she was stopped the temperature was in the 20’s. She was wearing four-inch heels without socks or nylons. Knowing that the ground was cold, defendant initially declined to perform the one-leg-stand test barefoot. When she did attempt the test barefoot, her feet were freezing. Defendant was also shivering from the cold. She testified that nervousness may have contributed to the shivering. Defendant testified that she had no trouble with the walk-and-turn test, although she indicated that if she had been wearing flat shoes she might have been better able to touch her heels to her toes.

Defendant first argues that the State failed to prove beyond a reasonable doubt that she was under the influence of alcohol at the time of the traffic stop leading to her arrest. A reviewing court

will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In reviewing a challenge to the sufficiency of the evidence, “ ‘the relevant question is 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 in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). “The State may prove a defendant guilty of DUI based upon circumstantial evidence.” *People v. Weathersby*, 383 Ill. App. 3d 226, 229 (2008). Moreover, “[t]he trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence, and this court will not substitute its judgment for that of the trier of fact on these matters.” *People v. Slinkard*, 362 Ill. App. 3d 855, 857 (2005).

A person is under the influence of alcohol when, due to the consumption of alcohol, he or she is “less able, either mentally or physically, or both, to exercise clear judgment, and with steady hands and nerves, operate an automobile with safety to himself and to the public.” *People v. Sullivan*, 132 Ill. App. 2d 674, 677 (1971). Even a slight impairment that leads to a slight reduction in the motorist's ability to drive is sufficient to support a conviction. *Mills v. Edgar*, 178 Ill. App. 3d 1054, 1057 (1989).

The evidence presented at trial establishes that defendant exhibited a number of signs of impairment. The arresting officer observed her vehicle cross the center line twice and when he stopped her he noticed the odor of alcohol coming from her direction after she rolled down her window. He also observed that her eyes were slightly bloodshot. Defendant admitted having “two shots.” Defendant appeared to have difficulty both in following the instructions for the field sobriety

tests that the arresting officer administered and in performing the tests. In addition, her refusal to submit to a Breathalyzer test is circumstantial evidence of consciousness of guilt. *Weathersby*, 383 Ill. App. 3d at 230.

It is true that the weather conditions and defendant's footwear were not ideal for performing the one-leg-stand test and the walk-and-turn test. However, it was the trial court's role to decide what weight to give the test results in light of the conditions under which the tests were administered. *Slinkard*, 362 Ill. App. 3d at 857 In any event, in accordance with our decision in *Weathersby*, we hold that the other indicia of impairment were sufficient to sustain defendant's conviction even if the one-leg-stand test and the walk-and-turn test are disregarded. In *Weathersby*, the only field sobriety test administered to the defendant (who was missing a leg) was the HGN test, and we did not consider that test in assessing the sufficiency of the evidence that the defendant committed DUI. We affirmed the defendant's conviction based on evidence that he had glassy eyes, thick-tongued speech, and the smell of alcohol on his breath; that he admitted he had a few drinks; and that a mostly-empty 22-ounce bottle of malt liquor was found in the defendant's vehicle. One indicator of intoxication that was present in *Weathersby*—thick-tongued speech—is absent here. However, the evidence that defendant was observed driving erratically (which was not the case in *Weathersby*) compensates for the absence of that indicator and leads us to conclude that the quantum of proof in the two cases is similar. Moreover, it is noteworthy that, in *Weathersby*, we concluded not only that the evidence was sufficient to sustain the defendant's conviction, but also that the evidence was not so closely balanced as to permit review under the plain error rule (see Ill. S. Ct. Rule 615(a) (eff. Jan. 1, 1967)) of an alleged error in the admission of evidence regarding the HGN test. *Weathersby*, 383 Ill. App. 3d at 232.

Defendant contends that, because she had spent several hours working as a bartender, it would be expected that she would have the odor of alcohol about her whether she had been drinking or not. We disagree. The odor of alcoholic beverages does not normally cling to a person or his or her clothing as a result of ambient exposure, and there is no evidence that defendant spilled any alcohol on herself. In any event, because defendant admitted to the arresting officer that she had consumed alcohol while tending bar, the point is largely academic. Defendant also suggests innocent explanations for the slightly bloodshot appearance of her eyes and the erratic driving that the arresting officer observed. She notes that the traffic stop occurred at around 2 a.m. and that, according to her testimony, she had worked all day, she was exhausted, she was experiencing ear and sinus problems, and she crossed the center line because she was responding to a text message. She also contends that any inappropriate laughter or talkativeness during the traffic stop may represent nothing more than a case of nerves. The thrust of defendant's argument is that the inferences to be drawn from this evidence give rise to a reasonable doubt of her guilt. As noted, however, it was the trial court's function to determine what inferences to draw from the evidence. *Slinkard*, 362 Ill. App. 3d at 857. The trial court was not obliged to draw those inferences most favorable to defendant. Accord *People v. Martin*, 401 Ill. App. 3d 315, 323 (2010) (whether or not it was reasonable to infer that caps on natural gas lines had simply fallen off, it was also reasonable to infer that the caps had been removed intentionally, and trier of fact in reckless conduct prosecution was entitled to draw the latter inference). Based on the evidence presented at trial, a rational trier of fact could conclude that the State proved beyond a reasonable doubt that defendant was under the influence of alcohol.

Defendant relies, in part, on *Sullivan*, but we do not find that decision to be persuasive authority for a contrary result. In *Sullivan*, the court reversed a DUI conviction that was based on

testimony that the defendant had the odor of alcohol on his breath, that he was “ ‘[s]ort of’ ” staggering when he got out of his car, and that his clothes were “ ‘a little disarranged.’ ” *Sullivan*, 132 Ill. App. 2d at 676. The *Sullivan* court noted that no evidence was presented concerning what experience, if any, the arresting officer had observing persons under the influence of alcohol. *Id.* at 678. Here, in contrast, the arresting officer testified that he had experience observing people under the influence of alcohol, he described common signs of impairment due to alcohol consumption, and he explained the basis of his opinion that defendant was under the influence of alcohol. The *Sullivan* court also apparently relied on the fact that the defendant offered unimpeached testimony that he suffered from low blood pressure, which accounted for some of the arresting officer’s observations. In this respect, the *Sullivan* court improperly substituted its judgment for that of the trier of fact as to the defendant’s credibility and the weight to be given to his testimony. The trier of fact is not required to believe the defendant’s testimony (*People v. Primbas*, 404 Ill. App. 3d 297, 302 (2010)), even when that testimony is uncontradicted (*People v. Martin*, 271 Ill. App. 3d 346, 352 (1995)).

Another case cited by defendant, *People v. Schultz*, 10 Ill. App. 3d 602 (1973), is readily distinguishable. In that case, there was no credible evidence that the defendant, a nurse arrested for DUI following a motor vehicle accident, had been drinking. A coworker testified that, before the accident, the defendant had given her a ride from work to a bus stop. The coworker had not seen the defendant drinking, but before leaving work the defendant washed her arms and hands with alcohol, which would explain why the arresting officer detected the odor of alcohol. Another witness testified that the defendant’s breath did not smell of alcohol; the only odor of alcohol about her was “medicinal.” *Id.* at 603. We therefore hold that the evidence here was sufficient to prove defendant’s guilt beyond a reasonable doubt.

Relying on our supreme court’s decision in *People v. McKown*, 226 Ill. 2d 245 (2007) (*McKown I*), defendant next argues that the trial court erred in permitting Smyth to testify about the HGN test. In *McKown I*, the court explained that the HGN test “purportedly measures nystagmus, which has been defined as an abnormal and involuntary rapid movement of the eyeballs up and down, or more commonly, side to side.” *Id.* at 248. The court noted that, although many people exhibit some nystagmus as their eyes track to the extreme side, in an intoxicated person nystagmus “occurs after fewer degrees of lateral deviation from center, and the jerking is more pronounced at extreme angles.” *Id.* at 248. A police officer conducting the HGN test looks for six “clues”—three in each eye—as the subject attempts to follow an object with his or her eyes while the officer moves it from side to side: (1) lack of smooth pursuit; (2) distinct nystagmus when the subject is looking as far to the side as possible; and (3) nystagmus occurring with the eye at an angle of less than 45 degrees. *Id.* at 249-50. If four or more clues are observed, the subject is deemed to have failed the test. *Id.* at 249.

The *McKown I* court stated, “Because the results of an HGN test require expert interpretation, we *** hold that the results of HGN testing are scientific evidence.” *Id.* at 257. In order to be admissible, scientific evidence must meet the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). “ ‘[S]cientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is “sufficiently established to have gained general acceptance in the particular field in which it belongs.” ’ ” *McKown I*, 226 Ill. 2d at 254 (quoting *In re Commitment of Simons*, 213 Ill.2d 523, 529-30 (2004) (quoting *Frye*, 293 F. at 1014)). Declining to take judicial notice that the scientific principles underlying the interpretation of HGN test results have gained general acceptance in the relevant scientific field, the *McKown I* court remanded the

case for an evidentiary hearing on the question of general acceptance. *Id.* After that hearing was conducted, our supreme court concluded that evidence of the results of the HGN test meets the *Frye* standard for admissibility. *People v. McKown*, 236 Ill. 2d 278 (2010) (*McKown II*). But in order for the results to be admissible, it must be established that the officer who administered the test is properly trained and that he or she conducted the test in accordance with proper procedures. *Id.* at 306.

In this case, had the State endeavored to introduce evidence of the *results* of HGN testing, an objection would have been well taken; the arresting officer did not testify that he was trained to administer the HGN test or that he followed the proper procedures in doing so. That is of no moment, however, because the State made it abundantly clear that it was not introducing the results of the testing; indeed the arresting officer testified that, because of defendant's failure to follow his instructions, he was unable to obtain results. The State offered the arresting officer's account of his attempt to administer the HGN test not as scientific evidence, but rather to show that defendant's failure to follow the officer's instructions to keep her head still and follow his finger with her eyes was an indication that she was under the influence of alcohol. This evidence is clearly outside the ambit of the holdings in *McKown I* and *McKown II*.

For the foregoing reasons, the judgment of the circuit court of Boone County is affirmed.

Affirmed.