



physical control of a vehicle while under the influence of alcohol and at that time he did not possess a driver's license. The State also charged him with one count of driving while license revoked (625 ILCS 5/6-303(a) (West 2006)), alleging he drove or was in actual physical control of a vehicle at a time when his driver's licence was revoked. Defendant pleaded not guilty.

¶ 6 In March 2010, defendant's jury trial commenced. Chris Culp, a captain with the Decatur fire department, testified he responded to a call of a nonresponsive motorist at an intersection on December 2, 2007. Culp approached the vehicle and saw an individual slumped over the wheel. When Culp was able to get the man's attention, the man released his foot off the brake and the vehicle rolled forward. Culp told the man to stop the vehicle and give him the keys, which the man did. The man denied having any medical problems but stated he had "several drinks." Culp then turned the matter over to the police.

¶ 7 Decatur police detective James Callaway testified he was working as a patrol officer on December 2, 2007. After arriving at the intersection and speaking with Captain Culp, Callaway spoke with the vehicle driver, identified as defendant. Callaway testified he could smell an odor of alcoholic beverage coming from defendant, his speech was mumbled, and his eyes were red and bloodshot. Callaway had defendant step out of the vehicle. Defendant stated he had "about five beers." Callaway then had defendant perform several field-sobriety tests.

¶ 8 Callaway first employed the HGN test, which checks for "involuntary jerking of the eyes." There are three parts to the HGN test: (1) checking for nystagmus at "maximum deviation," (2) the onset of nystagmus prior to 45 degrees, and (3) "smooth pursuit" in both eyes." Each part of the HGN test is graded for each eye for a total of six points. After observing defendant's pupils were equal size and his eyes tracked equally, Callaway performed the test.

Callaway stated defendant "had nystagmus in both eyes" at maximum deviation and did not have a smooth pursuit in either eye. Callaway did not observe an onset of nystagmus prior to 45 degrees. He stated defendant exhibited four points during the HGN test, which is considered a failing score.

¶ 9 After reading the instructions, Callaway then had defendant perform the walk-and-turn test. Defendant took the first nine steps correctly but missed the heel-to-toe twice on the way back, stepped off the line, and raised his arms. Callaway stated defendant's failing score of three indicated he was under the influence of alcohol.

¶ 10 As the final field-sobriety test, Callaway had defendant perform the one-legged stand. Defendant put his foot down while performing the test, lost his balance, and raised his arms. Unable to complete the test, defendant's failure indicated he was under the influence of alcohol. Callaway then arrested defendant for DUI. At the police station and after Callaway read the warning to motorist, defendant refused to submit to a breath test.

¶ 11 On cross-examination, Callaway testified the wind was "medium to strong" at the time of the stop in a north-south direction. Although Callaway demonstrated the walk-and-turn test to defendant facing a north-south direction, defendant performed the test in an east-west direction. Callaway was also concerned with defendant's cowboy boots, fearing they might impair his ability to perform the test.

¶ 12 After the State presented evidence that defendant's Missouri driver's license had been revoked at the time of the incident, defendant testified on his own behalf. On December 2, 2007, defendant was working for a painting contractor at the Caterpillar plant in Decatur. His job was to spray an industrial solvent on the interior walls and duct work. He worked from 7

p.m. to 7 a.m. He had not used a respirator while on the job, and he was "feeling pretty rough" after his shift, like he had been "hit hard in the head." He left the plant and went back to his motel room. He "opened a beer and got in the shower." He then dressed and drank more beer. Defendant fell asleep and woke up at approximately 2 p.m. He stated he felt "a lot worse" and had a headache. He decided to get something to eat and drove his Jeep to a restaurant. After his meal, defendant was driving back to the motel when he stopped at an intersection. He then fell asleep at the wheel.

¶ 13 Following closing arguments, the jury found defendant guilty on both counts. Thereafter, defendant filed a posttrial motion. In May 2010, the trial court denied the posttrial motion. Thereafter, the court sentenced him to two years in prison on the aggravated-DUI charge. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Defendant argues the State failed to lay the proper foundation for Officer Callaway's testimony regarding the HGN field-sobriety test. We agree.

¶ 16 Initially, we note defendant did not object at trial or in his posttrial motion that the State failed to present an adequate foundation for the testimony on the HGN test. Instead, trial counsel's objection centered on the lack of scientific support for the HGN test. The failure to make an objection on the lack of an adequate foundation results in forfeiture of the issue on appeal. See *People v. Johnson*, 238 Ill. 2d 478, 484, 939 N.E.2d 475, 479 (2010) (a defendant's failure to object to an error at trial and to raise the error in a posttrial motion forfeits review of the error on appeal). In his reply brief, defendant asks this court to review the foundation issue as a matter of plain error.

¶ 17 The plain-error doctrine allows a court to disregard a defendant's forfeiture and address the merits of the alleged error in two situations. *People v. Owens*, 394 Ill. App. 3d 147, 152, 914 N.E.2d 1280, 1285 (2009).

" '(1) [A] clear and obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)).

Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). As the first step in the analysis, we must determine whether any error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010).

¶ 18 Our supreme court has twice addressed the propriety of testimony regarding the results of HGN testing in DUI cases. In *People v. McKown*, 226 Ill. 2d 245, 254, 875 N.E.2d 1029, 1034 (2007) (*McKown I*), the court considered whether it was error to admit HGN test results as scientific evidence without holding a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), "to determine whether the HGN test had been generally accepted as a reliable indicator of alcohol impairment by the relevant scientific community." Under the

standard set forth in *Frye*, " 'scientific 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, 875 N.E.2d at 1034 (quoting *In re Commitment of Simons*, 213 Ill. 2d 523, 529-30, 821 N.E.2d 1184, 1188-89 (2004) (quoting *Frye*, 293 F. at 1014).

¶ 19 The supreme court determined HGN testing is scientific and subject to the *Frye* requirements. *McKown I*, 226 Ill. 2d at 256-57, 875 N.E.2d at 1035-36. A *Frye* hearing was thus required "to determine if the HGN test has been generally accepted as a reliable indicator of alcohol impairment." *McKown I*, 226 Ill. 2d at 275, 875 N.E.2d at 1046. The court remanded the cause to the trial court. *McKown I*, 226 Ill. 2d at 276, 875 N.E.2d at 1047.

¶ 20 The supreme court retained jurisdiction over the case and addressed the HGN testing again after the trial court conducted the requisite hearing and concluded HGN testing satisfied *Frye*. *People v. McKown*, 236 Ill. 2d 278, 293, 924 N.E.2d 941, 950 (2010) (*McKown II*). The supreme court held "HGN testing is generally accepted in the relevant scientific fields and that evidence of HGN test results is admissible for the purpose of proving that a defendant may have consumed alcohol and may, as a result, be impaired." *McKown II*, 236 Ill. 2d at 303, 924 N.E.2d at 955.

¶ 21 To be admissible, the test must be performed according to the protocol established by the National Highway Traffic Safety Administration (NHTSA) by a properly trained officer. *McKown II*, 236 Ill. 2d at 306, 924 N.E.2d at 957. To establish a proper foundation, the evidence must show the witness has been "properly trained and that he performed the test in accordance with proper procedures." *McKown II*, 236 Ill. 2d at 306, 924 N.E.2d at 957.

¶ 22 The NHTSA DWI Detection and Standardized Field Sobriety Testing Student Manual (NHTSA Manual) defines "nystagmus" as an "involuntary jerking of the eyes." NHTSA Manual, ch. VII, at 2 (2004). HGN refers to "an involuntary jerking occurring as the eyes gaze toward the side." *Id.* "Involuntary jerking of the eyes becomes readily noticeable when a person is impaired." *Id.*

¶ 23 The NHTSA Manual states that prior to the administration of the HGN test, the officer must check the suspect's eyes "for equal pupil size, resting nystagmus, and equal tracking." NHTSA Manual, ch. VIII, at 5. This is done to determine whether the suspect has a medical disorder or injury that might cause the nystagmus. *Id.* The officer is then required to give the suspect the following instructions: (1) "I am going to check your eyes;" (2) "Keep your head still and follow this stimulus with your eyes only;" and (3) "Keep following the stimulus with your eyes until I tell you to stop." *Id.* at 6.

¶ 24 During the HGN test, the officer is to check for three clues, which include (1) the "lack of smooth pursuit," (2) "distinct and sustained nystagmus at maximum deviation," and (3) "onset of nystagmus prior to 45 degrees." *Id.* at 5. The officer places the stimulus, *i.e.*, an index finger or pen, "approximately 12-15 inches from the suspect's nose and slightly above eye level." *Id.* at 6. To check the eyes for smooth pursuit, the officer must "move the stimulus smoothly, at a speed that requires approximately two seconds to bring the suspect's eye as far to the side as it can go." *Id.* at 7. The officer then is to move the stimulus back to the opposite side. The procedure is then repeated.

¶ 25 After checking both eyes for lack of smooth pursuit, the officer is to check the eyes for distinct and sustained nystagmus at maximum deviation. This is done by moving the

stimulus to the right until the suspect's left eye has gone "as far to the side as possible." The officer holds the eye "for a minimum of four seconds" and observes the eye "for distinct *and sustained* nystagmus." (Emphasis in original.) *Id.* Once completed, the officer moves the stimulus to the opposite side and holds the right eye in position for a minimum of four seconds. The procedure is then repeated.

¶ 26 In checking for the onset of nystagmus prior to 45 degrees, the officer moves the stimulus toward the right "at a speed that would take approximately four seconds for the stimulus to reach the edge of the suspect's shoulder." *Id.* The officer is to watch the eye "for any sign of jerking." If the officer sees any jerking, he is to stop and verify that it continues. The officer does the same to the opposite side. The procedure is then repeated. *Id.*

¶ 27 After the completion of the HGN test, the officer is instructed to have the suspect perform the walk-and-turn test and the one-legged-stand test. NHTSA manual, ch. VII, at 9. The officer then utilizes the results of the three tests and determines whether to arrest the suspect. *Id.*

¶ 28 One of the arguments made in *McKown II* was that the HGN test results should not have been admitted because Martin Klatt, the arresting officer, failed to administer the HGN test in compliance with NHTSA standards. *McKown II*, 236 Ill. 2d at 307, 924 N.E.2d at 957.

"Specifically, [defendant] argues that Klatt did not testify that he checked her eyes for equal tracking before conducting the HGN test. He did not testify that he checked her eyes for equal pupil size. He did not describe the speed at which he moved the stylus or that he held the stylus at the point of maximum deviation for the

requisite four seconds. He did not testify that he repeated the procedure twice, as NHTSA protocol requires. Finally, he confused two of the clues when he combined two steps in the protocol." *McKown II*, 236 Ill. 2d at 307, 924 N.E.2d at 957.

¶ 29 During an offer of proof, Illinois State Police master sergeant Antonio Lebron reviewed Officer Klatt's trial testimony and found he did not perform the test in accord with NHTSA standards. *McKown II*, 236 Ill. 2d at 309, 924 N.E.2d at 958. Specifically, Lebron stated Officer Klatt's testimony showed he performed the test while the defendant was seated and did not indicate Klatt "questioned defendant about any eye problems, equal tracking, equal pupil size, or resting nystagmus." *McKown II*, 236 Ill. 2d at 309, 924 N.E.2d at 958.

¶ 30 The defense in *McKown* also made an offer of proof during the cross-examination of Dr. Carl Citek, a professor of optometry, regarding Officer Klatt's administration of the HGN test. *McKown II*, 236 Ill. 2d at 309, 924 N.E.2d at 958. Citek stated a review of the testimony did not show Klatt "observed equal pupil size and equal tracking before he conducted the HGN test." *McKown II*, 236 Ill. 2d at 309, 924 N.E.2d at 958. Thomas Page, who trained police officers to perform the HGN test, "agreed that Klatt's trial testimony did not correctly describe the clues one observes when administering the HGN test." *McKown II*, 236 Ill. 2d at 309, 924 N.E.2d at 958. Dr. Robert Henson, a police instructor, opined Klatt failed to perform the HGN test in compliance with NHTSA standards. *McKown II*, 236 Ill. 2d at 309, 924 N.E.2d at 958.

¶ 31 The supreme court stated the record showed Officer Klatt's testimony did not meet the standards necessary for the admission of the HGN test and, without a proper foundation, was erroneously admitted. *McKown II*, 236 Ill. 2d at 310-11, 924 N.E.2d at 959. The court

also declined to find the error was harmless, given that the " 'defendant's blood-alcohol content was not verified by any chemical test, and no other field-sobriety tests were given.' " *McKown II*, 236 Ill. 2d at 311, 924 N.E.2d at 959 (quoting *McKown I*, 226 Ill. 2d at 276, 875 N.E.2d at 1047). The court then reversed the defendant's conviction. *McKown II*, 236 Ill. 2d at 311, 924 N.E.2d at 959.

¶ 32 In the case *sub judice*, Officer Callaway testified he had been trained at the Illinois State Police Academy and had been certified by the NHTSA for field-sobriety testing. He stated he had a standardized field test from the Illinois State Police that he read from in administering the HGN test to defendant. He testified to the three clues in the HGN test. Callaway stated he read the instructions to defendant and then he "checked for smooth pursuit or [he] checked for equal tracking and equal pupil size." He checked for maximum deviation and found nystagmus in both eyes. He next checked for the onset of nystagmus prior to 45 degrees but did not observe any. Callaway found defendant's overall HGN score was four, which indicated a failure of the test.

¶ 33 Defendant argues Officer Callaway failed to completely follow the proper NHTSA procedures in administering the HGN test. Defendant claims Callaway failed to testify that he gave the three instructions to him prior to administering the test and the video of the stop only shows he gave the first two instructions. He also claims Callaway did not testify that he checked for resting nystagmus. As to the "lack of smooth pursuit" portion of the test, defendant states Callaway did not testify how far away he held his finger from defendant's nose, how fast he moved his finger, or whether he repeated the procedure. During the maximum deviation portion, defendant states Callaway did not state how long he held his finger at maximum

deviation.

¶ 34 Given the similarities in this case with the alleged deficiencies in *McKown II*, 236 Ill. 2d at 307, 924 N.E.2d at 957, minus the expert testimony in the offers of proof found in that case, we find the State failed to lay a proper foundation for the admission of the HGN test results. While Callaway's testimony indicated he was trained in administering the HGN test and certified by the NHTSA in field-sobriety testing, the gaps in the testimony regarding the proper administration of the test to defendant establish an incomplete foundation to find the results admissible. In the absence of a proper foundation, Callaway's testimony regarding the HGN test he performed and the results was error.

¶ 35 Now that we have found error in this case, we return to the plain-error doctrine. Defendant argues we should review the error as plain error because the evidence was closely balanced. Defendant claims the evidence was weak because of the wind conditions during the field-sobriety tests, the boots he was wearing, and the side effects he was experiencing from his solvent spraying at the Caterpillar plant. We find the evidence was not closely balanced.

¶ 36 Captain Culp testified he observed a man asleep or slumped over the wheel of a vehicle stopped at an intersection. After Culp was able to get defendant's attention, he denied having any medical problems. In response to Culp's inquiry as to whether he had been drinking, defendant admitted he had several drinks.

¶ 37 Detective Callaway testified he could smell an odor of alcoholic beverage coming from defendant, his speech was mumbled, and his eyes were red and bloodshot. Defendant "swayed slightly" as he stood outside the vehicle. Defendant admitted he had consumed five beers between 8 a.m. and 2 p.m. While conducting the walk-and-turn test, Callaway observed

defendant correctly perform the first nine steps and the turn, but he missed heel-to-toe twice, stepped off the line once, and raised his arm on the way back. Callaway stated defendant failed the test and that was indicative of a person under the influence of alcohol. During the one-legged-stand test, defendant put his foot down, lost his balance, and raised his arms. Defendant's inability to complete the test resulted in failure, which again indicated he was under the influence of alcohol. Also, Callaway testified defendant refused to submit to a breath test following his arrest.

¶ 38 Here, the State presented the testimony of two witnesses who observed defendant's appearance and mannerisms after he was found asleep at the wheel at a busy intersection. He admitted he had been drinking beers and failed two field-sobriety tests. His refusal to submit to a breath test after his arrest constituted circumstantial evidence of his consciousness of guilt. *People v. Garstecki*, 382 Ill. App. 3d 802, 813, 890 N.E.2d 557, 565 (2008); see also *People v. Garriott*, 253 Ill. App. 3d 1048, 1052, 625 N.E.2d 780, 784 (1993) (noting the trier of fact can infer the driver refused to submit to a breath test because he knew it would confirm he was under the influence). The witnesses' observations, defendant's refusal to take the breath test, and the field-sobriety tests administered by Callaway, with the exception of the HGN test, constituted evidence sufficient to find defendant guilty beyond a reasonable doubt. Even considering the windy conditions, defendant's footwear, and the alleged side effects of the solvents, which he did not mention to Officer Callaway, the evidence was not so closely balanced that the HGN foundation error alone threatened to tip the scales of justice against defendant. See *People v. Weathersby*, 383 Ill. App. 3d 226, 232, 890 N.E.2d 620, 626 (2008) (finding admission of HGN evidence in the absence of a *Frye* hearing was error, but since the evidence was not closely

balanced, the error did not warrant a new trial). We find no plain error to excuse defendant's forfeiture of this issue.

¶ 39

### III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 41 Affirmed.

¶ 42 JUSTICE COOK, dissenting:

¶ 43 During the trial, on March 16, 2010, Officer James Callaway attempted to testify to the results of an HGN test which he had performed. Defense counsel objected on the basis that there is no scientific basis to support the test. That was a valid objection until the Supreme Court's decision in *McKown II* was issued. *McKown I*, 226 Ill. 2d at 248, 875 N.E.2d at 1031, had held that results of HGN testing are scientific evidence and were inadmissible in the absence of a *Frye* hearing establishing general acceptance in the scientific community. The majority states that defendant has forfeited the issue whether the State provided an adequate foundation for the HGN testimony by failing to cite *McKown II*, which held that HGN testing satisfied *Frye*, but laid down strict training and testing rules. The majority concedes the *McKown II* rules were not met in this case.

¶ 44 It would be unreasonable to apply forfeiture here. Where a party has argued before the court in accordance with then-existing binding precedent, it would be inequitable to hold that the party has forfeited an argument based on new law that has since come into being. *Our Savior Evangelical Lutheran Church v. Saville*, 397 Ill. App. 3d 1003, 1028, 922 N.E.2d 1143, 1163 (2009). Even reviewing courts sometimes have difficulty keeping up with recent cases. *McKown II* was decided February 19, 2010, and released for publication March 26, 2010.

¶ 45 *McKown II* refused to apply forfeiture in this situation. The failure of the State to lay the foundation for HGN evidence is "inextricably intertwined" with the issue whether HGN testing is admissible under *Frye*. *McKown II*, 236 Ill. 2d at 310, 924 N.E.2d at 959. The defendant did bring the matter of HGN testing to the attention of the trial court. It is not clear why the trial court denied defendant's objection. *McKown I* required that the objection be

granted. If the State was able to cite *McKown II* to the court, thereby justifying denial of defendant's objection, the State should then have been required to comply with *McKown II*, which it did not. Our decision allows the State to ignore both *McKown I* and *McKown II*.

¶ 46 In *McKown I*, the supreme court rejected the State's argument that admission of HGN testing was harmless error. "Given the fact[s] that defendant's blood-alcohol content was not verified by any chemical test, and no other field-sobriety tests were given," it was "reasonable to conclude that the trial court relied heavily on the improperly admitted HGN test results." *McKown I*, 226 Ill. 2d at 276, 875 N.E.2d at 1046. There also were no chemical tests in the present case. There were some field-sobriety tests, but there were questions about them: the windy conditions, defendant's footwear, and the side effects of the solvents. We should not assume the jury ignored the HGN evidence, a major portion of the State's case. A serious risk of undue prejudice was created by the improper admission of the HGN evidence. We should reverse and remand for a new trial, excluding the HGN evidence, as the supreme court did in *McKown II*.