

No. 1-10-1615

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. YM 754520
	)	
JAMES MANNING,	)	Honorable
	)	Thomas J. O' Hara,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE SALONE delivered the judgment of the court.  
Presiding Justice Steele and Justice Neville concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where the evidence was sufficient to prove defendant guilty beyond a reasonable doubt, and the State never introduced evidence regarding the HGN field sobriety test, the trial court's judgment was affirmed.
- ¶ 2 Following a jury trial, defendant James Manning was found guilty of driving under the influence of alcohol (DUI) and sentenced to 18 months' conditional discharge. On appeal, defendant contests the sufficiency of the evidence, alleging that the State failed to prove he was under the influence of alcohol. He also contends that his right to a fair trial was impeded when

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the State failed to lay a proper foundation for the horizontal gaze nystagmus (HGN) field sobriety test. We affirm.

¶ 3 At trial, Jonathan Wendt testified that at about 6:30 p.m. on October 26, 2008, he was the passenger in a car driven by Patrick Malone. While they were at the intersection of Pulaski Road and 107th Street in Oak Lawn, Illinois, Wendt saw a black Mustang go through a red light and pull in front of their car. Wendt and Malone continued driving south on Pulaski with the Mustang in front of them. Wendt observed the Mustang swerve in its lane and cause a pedestrian to "jump back" as it neared the corner of an intersection. Wendt called 9-1-1 because he thought the driver of the Mustang was intoxicated. Police informed Wendt that they were dispatching a squad car to the scene, but Wendt and Malone continued following the Mustang.

¶ 4 The vehicles drove to 167th Street near Western Avenue where the Mustang turned into a residential area and parked on the side of the road. Wendt and Malone waited for the driver of the Mustang to continue, and, a short time later, he did and Wendt and Malone followed. Their pursuit of defendant spanned over 100 blocks, and they continued conversing with police regarding their whereabouts. Wendt subsequently saw a police car and indicated to the officer that the Mustang in front of them was the vehicle which had been driven erratically. The police car got behind the Mustang and followed it for a short time. When the Mustang made a turn onto Harlem Avenue, it almost hit the median and had to swerve to avoid hitting it. Police then pulled over the Mustang. Wendt and Malone drove away. According to Wendt, Officer Radtke called him to inform him that police had the driver of the Mustang in custody. Wendt further testified that he wanted to follow the Mustang because he knew people who had been killed by drunk drivers and he had applied to become a police officer in over 20 police departments.

¶ 5 Officer Radtke testified that on October 26, 2008, he was dispatched to the area of Ridgeland Avenue and Vollmer Road in Matteson, Illinois, to investigate a report of a possible impaired driver in a black Mustang. Radtke located the Mustang in the left turn lane at the

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intersection of Vollmer Road and Harlem Avenue. Radtke positioned his vehicle behind the Mustang, and when the light turned green, the Mustang began to turn without signaling and headed straight for a median. The driver, who Radtke identified as defendant, made an abrupt right turn to avoid hitting the median. Radtke pulled over defendant, approached the vehicle, and conversed with him. Defendant's eyes were bloodshot, his speech was slow and slurred, he emitted a moderate odor of alcohol, and his movements were slow and deliberate as he looked for his license and insurance. Radtke asked defendant if he had anything to drink, but Radtke did not recall defendant's response.

¶ 6 Radtke asked defendant to exit his car for a standardized field sobriety test. As defendant exited, he used the door as a guide to help him get up and then opened the door with too much force because he "swayed back into the frame above the car." Radtke instructed defendant to walk toward the rear of the car, and defendant complied but staggered as he walked and supported himself by touching the top of the car. When defendant reached the rear of the car he was swaying in place. Before Radtke administered the field sobriety tests, he asked defendant if he had any injuries that would affect his performance, and defendant responded negatively. During the first field sobriety test, Radtke just looked at defendant's eyes. At one point, Radtke had to put his hand on defendant's back to keep him from falling. Radtke started to give defendant the instructions for the "walk and turn" test, but defendant continued to sway and had to reposition his feet. At that time, Radtke stopped the testing. Specifically, Radtke went over to defendant, asked him if he could "keep going," and defendant responded that he was done. Radtke testified that he stopped the testing for safety reasons because Harlem Avenue is a busy street and defendant kept swaying. Defendant was placed under arrest.

¶ 7 At the station, Radtke observed defendant for about 16 minutes. Officer Bernicki offered defendant a breath test and to take him to the hospital for a blood test, but he refused. Radtke charged and processed defendant accordingly, and read him his *Miranda* rights. Defendant told

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Radtke that he was coming from his cousin's residence, was driving home, and had a couple "Manhattans" that evening. Radtke testified that he never had a conversation with Wendt, but did speak with Malone after defendant was arrested.

¶ 8 During cross-examination, the following testimony regarding the "HGN" test was elicited from Radtke by defense counsel:

"Q. You asked Mr. Manning if he would perform some field sobriety tests, right?

A. Yes.

Q. And you testified, I believe, that before you started the tests, you terminated them?

A. No, I couldn't-

Q. You didn't terminate them?

A. No. I did the HGN test and then I attempted the walk and turn test.

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Q. In other words, you're giving these field sobriety tests to see if that person is going to fail them or pass them or refuse them, right?

A. Yes.

Q. And in this case the tests were not administered?

A. Half of them were but-

Q. Pardon me?

A. The HGN test was, the walk and turn I was going through the instructions when I stopped.

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Q. Did you put in this sworn report that you signed RO conducted FSTS, that means field, standard sobriety tests?

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A. Yes.

Q. Which defendant failed?

A. Yes, the HGN test.

Q. Did you put that in your report?

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A. Yes, I wrote that.

Q. You wrote on your, in this report, that you not only conducted the tests but that he failed them, right?

A. Yes. The HGN-

¶ 9 Ralph Padilla, called as a witness for the defense, testified that he was a retired police officer and defendant's neighbor. Padilla received a phone call at about 10 p.m. from defendant on the evening in question. Defendant told Padilla that he was arrested and at the police station in Matteson. Padilla did not notice anything wrong with defendant's speech and went to the police station to pick him up. When Padilla saw defendant at the station, he did not notice anything unusual about him and, after they had a brief conversation, defendant got into Padilla's car. Defendant had no difficulty maneuvering, getting in the car, or walking, but did appear nervous due to his recent arrest.

¶ 10 Defendant, who was 72 years old, testified that he left his home at 8 a.m. on the day in question to go to a restaurant in Oak Lawn and meet his cousin. After breakfast, defendant went to see his chiropractor for about two hours because he had arthritis in his shoulder and knees, and then went to his cousin's residence at about 1:30 p.m. where defendant had an alcoholic beverage. Defendant and his cousin then went to a restaurant at about 5:30 p.m. Defendant drove his new Mustang to the restaurant, and the car was jerking a lot because it was a standard shift, which defendant had not driven in 40 years. At the restaurant, defendant had a "Manhattan" and ate dinner. Defendant then dropped off his cousin and drove back to his

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residence. During his ride home, defendant stated that he did not pull off to the side of the road, was not impaired by the two alcoholic beverages he consumed, had no trouble driving, except for shifting gears, and nothing out of the ordinary happened until he was pulled over by police.

¶ 11 After defendant was pulled over, the officer approached his car, they had a conversation, and defendant gave him his license and insurance information. The officer asked defendant if he had been drinking, and defendant responded that he had two drinks. The officer asked defendant to get out of his car, and, because defendant had trouble with his knees, he used the car to support himself while exiting. After checking his eyes, the officer told defendant that he did not look ready for a test. Although defendant stated that he would take the test, the officer repeated that he was not ready and arrested him. Defendant had no trouble getting himself into the backseat of the squad car, and, when he got to the police station, he had no trouble exiting the car. Following closing arguments, the jury found defendant guilty of driving under the influence.

¶ 12 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of driving under the influence of alcohol. He specifically maintains that the testimony of the State's witnesses were exaggerated, deficient, and inconsistent. Defendant further asserts that his driving, behavior, and demeanor were not indicative of being under the influence of alcohol, and his testimony was credible and unimpeached.

¶ 13 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This standard recognizes the responsibility of the trier of fact to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A reviewing court will not set aside a criminal conviction unless the evidence is so

unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 14 Section 11-501(a)(2) of the Illinois Vehicle Code states that a person shall not drive any vehicle within this State while under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2008). A defendant is considered under the influence of alcohol when his mental state or physical faculties are so impaired as to reduce his ability to think and act with ordinary care. *People v. Gordon*, 378 Ill. App. 3d 626, 631 (2007). A conviction for driving under the influence may be based on circumstantial evidence (*People v. Diaz*, 377 Ill. App. 3d 339, 345 (2007)), and "the credible testimony of the arresting officer by itself is sufficient to sustain a conviction of driving under the influence" (*People v. Hostetter*, 384 Ill. App. 3d 700, 712 (2008)). Moreover, a defendant's refusal to submit to chemical testing is relevant in his DUI prosecution. *People v. Jones*, 214 Ill. 2d 187, 201-02 (2005).

¶ 15 Here, when viewed in the light most favorable to the prosecution, we find that defendant was proven guilty beyond a reasonable doubt of DUI. The evidence showed that during the night of October 26, 2008, Wendt, who was a passenger in Malone's vehicle, witnessed defendant's erratic driving, believed that defendant was under the influence, called 9-1-1, and followed him for over 100 blocks until police arrived. After Officer Radtke witnessed defendant nearly hit a median, he pulled over defendant. Radtke observed that defendant's eyes were bloodshot, his speech was slurred, he emitted an odor of alcohol, and his movements were slow and deliberate. Defendant staggered his way to the rear of the car where Radtke stated he would perform a standardized field sobriety test on defendant. During the first test, Radtke looked at defendant's eyes and had to put his hand on defendant's back to keep him from falling. Radtke started to give defendant instructions for the "walk and turn" test, but defendant continued to sway in place. Radtke stopped the testing because defendant stated that he was done and Radtke was concerned about continuing to administer the test for safety reasons on a busy street. Radtke placed

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defendant into custody, and, at the station, defendant refused to take a breath or blood test, and admitted to having a couple of drinks that evening.

¶ 16 Nevertheless, defendant contends that the testimony of the State's witnesses was exaggerated, deficient, and inconsistent. He specifically maintains that Wendt's testimony is suspect because his actions were motivated by his desire to become a police officer, his description of defendant's vehicle nearly hitting a pedestrian was exaggerated, his reasoning for following defendant was irrelevant and prejudicial to defendant, as was his testimony regarding his experiences with identifying drunk drivers. Defendant further maintains that Radtke could not recall a number of critical facts, *i.e.*, defendant's response at the scene when asked if he had been drinking. Moreover, defendant asserts that Wendt and Radtke contradicted each other with regard to whether they spoke on the phone. In contrast to the State's witnesses, defendant argues that his testimony was credible and unimpeached. Although defendant appears to want this court to reweigh the evidence, it is the responsibility of the trier of fact to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences therefrom. *Campbell*, 146 Ill. 2d at 375. Moreover, minor inconsistencies in a witness' testimony do not, of themselves, create reasonable doubt. *People v. Myles*, 257 Ill. App. 3d 872, 884 (1994). We thus find no reason to set aside defendant's conviction where the evidence was not so unreasonable or improbable as to raise a reasonable doubt of his guilt.

¶ 17 In reaching this conclusion, we find *People v. Sullivan*, 132 Ill. App. 2d 674 (1971), relied on by defendant, distinguishable from the case at bar. In *Sullivan*, this court reversed the defendant's conviction for operating a motor vehicle while under the influence of liquor where there was a reasonable doubt of the defendant's guilt. This court specifically held that the arresting officer's testimony was almost entirely in answer to leading questions, and he was not asked, nor was there any evidence, of what experience he had in observing individuals under the influence of alcohol. *Sullivan*, 132 Ill. App. 2d at 678. Here, by contrast, Officer Radtke did not

testify in response to leading questions, he did testify to his experience regarding previous arrests he made in drunk driving cases, and the testimony of Wendt, coupled with defendant's refusal to take a chemical test, proved that he was guilty of DUI beyond a reasonable doubt.

¶ 18 Defendant next contends that his right to a fair trial was impeded when the State failed to lay a proper foundation for the HGN field sobriety test. Defendant specifically maintains that the unqualified evidence of the HGN test was particularly damaging in light of the weakness and insufficient nature of the State's evidence against him.

¶ 19 We initially note that defendant forfeited this argument on appeal by failing to object at trial or include the issue in a posttrial motion. See *People v. Robinson*, 223 Ill. 2d 165, 173-74 (2006) (holding that the defendant forfeited his argument that the HGN evidence was not properly admitted by not including it in his posttrial motion).

¶ 20 Moreover, the State never introduced evidence regarding the HGN test. When the State questioned defendant regarding the first field sobriety test, Officer Radtke responded that he:

"Just look[ed] at [defendant's] eye. He was, when he was standing there, like I said, he was swaying. He kept having to reposition his feet. One time where it looked like he was going to begin to fall, I had to put my hand on his back to keep him from falling."

The next question the State asked was in regard to the second test, which was the walk-and-turn test, and the State never asked Officer Radtke about that first test again. To the extent that the HGN test was before the jury, it was introduced by defense counsel when he, during cross-examination, elicited testimony from Radtke regarding the performance of that test. Because the State never sought to introduce any evidence regarding the HGN test, defendant's argument that the State failed to lay a proper foundation is without merit.

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 22 Affirmed.

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