

No. 1-12-1334

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 09 CR 14131
)	
NIKKI KLASSERT,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justice Delort and Justice Cunningham concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Aggravated DUI convictions affirmed over defendant's contention that she received ineffective assistance of trial counsel for failing to file a motion *in limine* to exclude the testimony on the HGN test or object to it at trial.
- ¶ 2 Following a jury trial, defendant Nikki Klassert was found guilty of three counts of aggravated driving under the influence (DUI), and sentenced to two years' probation, 120 days' imprisonment, and 480 hours of community service. On appeal, defendant contends that she was denied effective assistance of trial counsel based on counsel's failure to either file a motion *in*

limine to exclude the officers' testimony about her performance on the Horizontal Gaze Nystagmus (HGN) test, or to object to it at trial and in a post-trial motion because the State did not establish an adequate foundation for the admission of that test.

¶ 3 At trial, Beverly Myers testified that at 10:50 p.m. on June 18, 2009, she was walking to her car, and waited to cross the intersection of North Boulevard and Oak Park Avenue in Oak Park, because the light was yellow and the hand signal was flashing. When the light turned green, she began to cross the street, and was immediately struck by a car. As a result, she received multiple bruises to her body and sustained multiple fractures in her arm requiring two operations and more than a year of physical therapy.

¶ 4 Marcelino Guzman testified that at 10:50 p.m. on June 18, 2009, he was driving with his wife, Bertha Guzman. He entered the intersection of North Boulevard and Oak Park Avenue when the light was green, and his car was immediately struck on the driver's side by another car. He and his wife were injured and transported to the hospital. Marcelino suffered a broken forearm, and numerous bruises. Bertha Guzman testified that she sustained a broken clavicle, eight broken ribs, a chipped tooth, and a laceration to her forehead. Her treating physician testified that Bertha's spleen was also lacerated.

¶ 5 Steve Scheuring testified that on the evening in question, he was travelling northbound on Oak Park Avenue with his wife Julie. He explained that there are elevated tracks running east and west nearby, and that the street south of the tracks is South Boulevard, and the street north of it is North Boulevard. As he approached the intersection of Oak Park Avenue and South Boulevard, there were two cars in front of him, one of which was the Guzmans'. After he drove through that intersection and was partly under the elevated tracks approaching the intersection of

North Boulevard and Oak Park Avenue, he observed the car driven by the Guzmans enter the intersection and be immediately struck by a SUV travelling eastbound on North Boulevard. He did not hear the squeal of tires, but just a loud "bang," and the Guzmans' car was pushed out of his line of sight. Scheuring parked his car and then saw a woman, Beverly Myers, sitting on the sidewalk crying.

¶ 6 Scheuring then saw defendant walking back and forth around the SUV, and heard her asking nearby pedestrians why her car would not turn off. Scheuring did not notice anything unusual about her speech, and testified that defendant did not slur her words, or appear impaired.

¶ 7 Oak Park police officer Ian Miller testified that he went to the Chicago police academy from August 2008 through December 2008, where he learned how to detect impaired drivers. Part of his curriculum included classes on the National Highway Traffic Safety Association (NHTSA) manual. While at the academy, he received training in administering standard field sobriety tests, as well as the HGN test. Prior to this incident, he had been involved in six DUI investigations.

¶ 8 Officer Miller testified that at 10:50 p.m. on June 18, 2009, he responded to the accident in question. On the scene, he observed a large amount of front-end damage on the SUV driven by defendant, and heavy side and front-end damage on the Guzmans' car. Myers was sitting on the sidewalk near the SUV, and he requested an ambulance for her. Officer Miller then went up to the Guzmans, who were seated in their car, and observed that their heads were bleeding, and that Bertha was unconscious. Officer Miller also noticed that a streetlight had been hit and was lying in the front window of an Irish souvenir shop on the northeast corner of the intersection. While Officer Miller was assessing the scene, Oak Park forensic police officer Paul Fellows

arrived.

¶ 9 Officer Miller testified that he learned that defendant was the driver of the SUV, and asked her for her insurance card and driver's license. He then asked her to stand off to the side while he dealt with the Guzmans who needed to be extracted from their vehicle. Defendant, however, kept interrupting him and asking him what was going to happen to her car, and he kept telling her it would be towed and to stand off to the side. After she interrupted him for the third time about her car, he thought it was a bit unusual that she was only concerned about her car and got a little bit closer to her at which point he smelled a strong odor of alcohol emanating from her. He also noticed that her eyes were glassy and bloodshot. When he asked her if she had anything to drink, she admitted to having one drink.

¶ 10 After the victims were transported by ambulance to the hospital, Officer Miller had defendant enter the Irish shop with him away from the lights of the responding vehicles so that there would be no distractions during his examination of her. While they were in the Irish shop, the owner, his wife, and his employees, including Bryan Sierminski, who was defendant's boyfriend, were present. Sierminski caused a disturbance and was arrested for obstructing the investigation.

¶ 11 Officer Miller testified that with the lighting in the shop he could tell that defendant's eyes were glassy and bloodshot, and defendant told him that she had a few beers at a bar. Officer Miller further testified that Officer Fellows was present when he asked defendant if she would perform the standard field sobriety and HGN tests, and she agreed to do so. This was the first time Officer Miller administered these tests, and he had defendant face Oak Park Avenue where there were several squad cars, thereby creating the potential for flickering lights to come through

the broken window. However, while the tests were performed, there were no flickering lights in the store which was well lit.

¶ 12 Officer Miller first read defendant the instructions for the HGN test from his instruction booklet. Officer Miller explained that he uses a pen to track the eyes for smooth pursuit, and if the person is intoxicated, the eyes will bounce and not smoothly track the pen. He tested defendant's eyes for smooth pursuit, holding his pen eight inches from her face, slightly above her eyes, and moved it from center, to the left and back to the right for 8 to 10 seconds in each direction, and noticed that her eyes were bouncing. When he tested both eyes at maximum deviation, pausing for two to three seconds, he noticed that her eyes were bouncing, and when he tested at 45 degrees, he observed defendant's eyes bouncing prior to 45 degrees. In his opinion, she failed the HGN test. Officer Miller testified that he also noticed that defendant was slurring her speech, and asked her if she had anything to drink. She told him she had come from a bar in Forest Park and had a "few beers" there.

¶ 13 He then administered the walk-and-turn test after reading defendant the instructions from his instruction booklet. While he was informing defendant of the instructions, she twice started the test before he told her to begin. She also walked 13 steps instead of 9, as instructed, raised her arms for balance, paused to gain balance, and then started to begin the test again. In Officer Miller's opinion, defendant failed this test.

¶ 14 Officer Miller then read defendant the instructions for the one-legged stand test. During this test, defendant used a table for balance, so Officer Fellows stopped the test, read the instructions to defendant again, and had her repeat the test during which defendant raised her arms for balance, and hopped to keep her balance. Defendant was taken into custody and

transported to the police station where she said this was "B.S." and that she should not be there. Officer Miller asked defendant if she would submit to a breathalyzer test and blood or urine tests, and she refused.

¶ 15 Officer Miller testified that as a police officer, he has come into contact with intoxicated people 80 times, and thousands of times in his personal experience. In his opinion, defendant was impaired and intoxicated. Officer Miller further testified that defendant was not booked until June 20, 2009, on which date her photograph was taken and her eyes were no longer glassy and bloodshot.

¶ 16 Oak Park police officer Paul Fellows testified that he was assigned to the accident as an evidence technician. While he was examining the SUV, defendant came up to him and asked if she could remove her purse from her car. Officer Fellows retrieved the purse and gave it to defendant. Officer Fellows noticed that defendant was fidgety, and was walking back and forth. After he retrieved her purse, and was within a couple feet of her, he noticed a smell of alcohol coming from her breath, that she had bloodshot, glassy eyes, and that her speech was slurred.

¶ 17 Officers Miller and Fellows took defendant into the Irish shop where there would be fewer interruptions in the investigation. After defendant performed the field sobriety tests, she was asked if she consumed any alcohol. She responded that she was at Duffy's Bar for about an hour, and during that time consumed four beers. Officer Fellows noted that defendant's weight on her identification card was 110 pounds. Officer Fellows testified that he has investigated about 300 DUIs, and has seen someone intoxicated hundreds of times. In his opinion, defendant was impaired based on the fact that she had glassy, bloodshot eyes, slurred speech, smelled of alcohol, failed the field sobriety tests, refused the breathalyzer and blood tests, and was

cooperative at first, but then became "pretty uncooperative" as the DUI investigation continued.

¶ 18 Anne August testified that she owned the Irish shop with her husband and that defendant's boyfriend used to work for her. She further testified that she talked to defendant after the accident, and did not notice any odor coming from her or glassy, bloodshot eyes. August watched defendant perform the tests for the officer, and did not notice her swaying, raising her arms or hopping or jumping during the tests. She also did not see her hold onto a table for support during the tests.

¶ 19 Defendant testified that at 9:15 p.m. on June 18, 2009, she went to Duffy's Bar in Forest Park where she had two beers over the course of an hour. She then left the bar, and as she approached the intersection of North Boulevard and Oak Park Avenue in her car, the light was yellow, and she sped up, hitting another car resulting in her airbags deploying. She tried to turn her car off, but could not do so; then walked around and towards the Irish shop where she saw Myers, and asked her if she was okay. When Officer Miller walked up to her, she was "confused," and asked him if she could get her purse. Officer Miller retrieved her purse for her, and she gave him her driver's license and insurance card. Defendant told Officer Miller that her car would not turn off, that she smelled gas, and that she was concerned, but not about her car being towed. Officer Miller told her to wait on North Boulevard and she complied. She denied repeatedly going up to him and asking questions, and stated that while she was outside the officers did not ask her if she had been drinking.

¶ 20 Defendant further testified that the officers asked her to go inside the Irish shop where it was quieter. While there, she asked the owner of the store to call her boyfriend, and he did. Officer Miller then asked her if she had anything to drink, and she told him she had two beers.

He then had her perform the field sobriety tests. She claimed that he never demonstrated the tests for her, but read the instructions from a book.

¶ 21 During the HGN test, the officer had her face the street where she could see all of the "chaos," lights, ambulances and police cars. She, however, was not paying attention to what was taking place outside. During the walk-and-turn test she had no problem balancing, and did not move her arms back and forth. She also had no problem balancing during the one-legged stand test, performed that test only once, and denied placing her hand on a table to lean on. While she was in the Irish shop, her boyfriend arrived, and police pushed him and told him not to speak to her. They arrested him because he tried to talk to her, and she was then arrested.

¶ 22 At the close of evidence, the jury found defendant guilty of three counts of aggravated DUI. Defendant subsequently presented an oral motion for a new trial, and at the proceeding on it, she argued, in relevant part, that the field sobriety tests should have been "throw[n] out" because the officer did not follow the procedures. Defendant maintained that the officer was impeached based on his failure to follow the procedures, and whether or not he checked her eyes in the HGN test for the correct number of seconds. The court denied the motion.

¶ 23 On appeal, defendant contends that she was denied effective assistance of trial counsel based on counsel's failure to either file a motion *in limine* to exclude the officers' testimony about her performance on the HGN test, or to object to it at trial and in a post-trial motion because the State did not establish an adequate foundation for the admission of the HGN test. She maintains that the HGN test was not performed in compliance with the procedures set forth by the NHTSA manual where Officer Miller did not 1) have her face in a direction that was not distracting during the test; 2) testify that he started the HGN test with her left eye; 3) hold the stimulus 12-

15 inches from her face instead of 8 inches; 4) hold the position at the maximum deviation for a minimum of four seconds to test for jerking, instead of only two to three seconds; and 5) properly position the stimulus to check for the onset of nystagmus prior to 45 degrees, and indicate the speed at which he performed this part of the test or how many inches he held the pen from defendant's nose.

¶ 24 Under the two-prong test for examining a claim of ineffective assistance of counsel, defendant must establish that her attorney's performance fell below an objective standard of reasonableness, and that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, defendant must satisfy both prongs of the *Strickland* test, and if this court concludes that defendant did not suffer prejudice, we need not decide whether counsel's performance was deficient. *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 25 Based on the record before us, we find that defendant cannot establish the prejudice prong of the *Strickland* test. Defendant's claim that counsel was ineffective for failing to file a motion *in limine* to exclude the HGN evidence is based on conjecture, surmise, and hindsight. Defendant's claim appears to arise from the testimony presented by Officer Miller at trial. Prior to that, there is no indication in the record of any flaws or irregularities with the administration of the test to warrant a pretrial motion to exclude it. Rather, there is a single notation in the police report that defendant "failed FST." As such, any pretrial motion would have been based on surmise and conjecture which would not warrant relief (*People v. Cooper*, 2013 IL App (1st) 113030, ¶58), and, as proposed here, relies on the benefit of hindsight which is equally unavailing to support her claim of ineffective assistance of counsel (*People v. Young*, 341 Ill.

App. 3d 379, 383 (2003)).

¶ 26 Defendant further contends that counsel was ineffective for failing to object at trial and in a written post-trial motion to the officer's testimony regarding the HGN test based on lack of foundation. In support, defendant relies on *People v. McKown*, 236 Ill. 2d 278, 293, 307-10 (2010), contending that admission of an improperly administered HGN test is inherently prejudicial. We find that reliance misplaced, as *McKown* did not so hold, and is factually distinguishable from the instant case.

¶ 27 In *McKown*, the supreme court held that evidence of HGN field-sobriety testing, when performed according to the NHTSA protocol by a properly trained officer, is admissible for the purpose of showing whether defendant has likely consumed alcohol and may be impaired. *McKown*, 236 Ill. 2d at 306. The supreme court further held that a testifying officer may use the results of the test as part of the basis for his opinion that defendant was under the influence and impaired. *McKown*, 236 Ill. 2d at 306. The supreme court thus concluded that the admission of HGN testimony, in the absence of a proper foundation for the test performed, was reversible error, where it was reasonable to conclude that the trial court relied heavily on the improperly admitted HGN test results since defendant's blood-alcohol level was not verified by any chemical test and no other field sobriety tests were given. *McKown*, 236 Ill. 2d at 310-12.

¶ 28 Here, the record shows that Officers Miller and Fellows, as well as defendant, testified that Officer Miller performed the HGN and field sobriety tests according to his instructional booklet. At trial, however, Officer Miller testified to certain time frames, and specifics in the administering of the HGN test which were inconsistent with those set forth in the regulations. However, unlike *McKown*, we cannot say that counsel's failure to address these deficiencies was

prejudicial to defendant give the evidence of impairment. Both officers testified to their observations of defendant's condition, including, bloodshot, glossy eyes and alcohol odor on her breath. *People v. Diaz*, 377 Ill. App. 3d 339, 344-45 (2007). In addition, the 110-pound defendant admitted to police that she had four beers in less than an hour shortly before the accident (*People v. Borys*, 2013 Ill App (1st) 111629, ¶41), and she then refused to take the breathalyzer, urine or blood tests, which indicated a consciousness of guilt (*People v. Edwards*, 241 Ill. App. 3d 839, 843 (1993)). Moreover, and unlike *McKown*, defendant failed the other individual field sobriety tests where she took the wrong number of steps for the walk-and-turn test and raised her arms for balance, and then was unable to perform the one-legged stand test without holding onto a table. When she performed it a second time, she raised her arms and hopped.

¶ 29 Although Scheuring testified that defendant did not appear impaired, he was not trained in detecting impairment due to alcohol, and was not in close contact with defendant after the incident as were the officers, and August was not necessarily a disinterested witness where defendant's boyfriend previously worked for her. In light of the more than sufficient evidence of defendant's guilt, we find that she cannot establish prejudice resulting from counsel's failure to object to the foundation of the HGN testimony at trial and in a written post-trial motion (*Harris*, 206 Ill. 2d at 304; *People v. Weathersby*, 383 Ill. App. 3d 226, 233 (2008)), and her claim of ineffective assistance of counsel fails (*Harris*, 206 Ill. 2d at 304).

¶ 30 We, therefore, affirm the judgment of the circuit court of Cook County.

¶ 31 Affirmed.