

No. 1-12-1811

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.)	Nos. TW 160384
)	TW 160385
)	
ZACHORY HENRY,)	Honorable
)	Lorna E. Propes,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Evidence was sufficient to find defendant guilty of driving under the influence of alcohol. Trial counsel was not ineffective for not challenging foundation for testimony regarding horizontal gaze nystagmus test. Order assessing fines and fees is corrected.
- ¶ 2 Following a bench trial, defendant Zachory Henry was found guilty of driving under the influence of alcohol (DUI) and sentenced to two years' supervision with fines and fees. On appeal, defendant contends that trial counsel was ineffective for not challenging the foundation for

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testimony regarding his horizontal gaze nystagmus (HGN) test. He also contends that the trial evidence was insufficient to find him guilty beyond a reasonable doubt. Lastly, the parties agree that the order assessing fines and fees must be corrected to properly reflect the total thereof.

¶ 3 On Saturday, November 27, 2010, defendant was cited by Chicago police for DUI and obstruction of traffic, both allegedly committed at about 4:05 a.m. on westbound 79th Street near Halsted Street in that municipality.

¶ 4 At the January 2012 trial, police officer Vasquez testified that he was an officer for about five years. On the day in question, he and another officer were on patrol at about 4 a.m. when they stopped for a red traffic light on Halsted for 79th Street. A car facing westbound on 79th did not proceed for about a minute though it had the green light. Officer Vasquez drove and stopped so that his vehicle was alongside the stopped vehicle, and he saw that its driver -- defendant -- had his head tilted to one side and was drooling, so that he concluded defendant was asleep. He knocked on the driver's window and called for defendant's attention for about a minute before defendant awoke and opened the window. His eyes were bloodshot and Officer Vasquez smelled a "slight odor of alcohol" from somewhere in the vehicle.

¶ 5 Defendant exited his vehicle at Officer Vasquez's behest, onto pavement that was flat with no standing water, snow, or significant cracks. Officer Vasquez decided to first administer the HGN test, for which he had received over 40 hours of training at the police academy. He read defendant instructions from the police field guide, and defendant professed to understand the

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instructions. There are six potential clues of impairment ("clues") on the HGN test, and Officer Vasquez saw six when he administered the test to defendant. He also administered the walk-and-turn and one-legged-stand tests; before each test, he read defendant instructions from the police field guide, and defendant professed to understand the instructions. Before the walk-and-turn test, Officer Vasquez asked defendant if he had any injuries; defendant replied that he did not, nor did Officer Vasquez see any obvious injuries. On the walk-and-turn test, defendant did not walk heel-to-toe but instead had at least two inches between his steps, and he went past the nine steps he was told to make. Of the eight clues on the walk-and-turn test, Officer Vasquez saw three. On the one-legged-stand test, defendant put his foot down three times and swayed, and of the five clues on that test Officer Vasquez saw two. (Officer Vasquez had to review his report to refresh his recollection of the failure to walk heel-to-toe, that defendant put his foot down three times, and that there are five clues on the one-legged-stand of which he saw two.) Based on defendant's performance on the field sobriety tests, Officer Vasquez opined that he was under the influence of alcohol and arrested him. While his arrest of defendant was only his second DUI case, he had observed people under the influence of alcohol "several times" in his personal life and at least 10 times as an officer.

¶ 6 At the police station, after he admonished defendant regarding blood alcohol content (BAC) testing of motorists, he asked defendant if he had been drinking or using drugs and what he

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had been doing in the three hours before his arrest. Defendant replied to both questions that he did not know, and repeated Officer Vasquez's questions. Defendant refused to take a breath test.

¶ 7 On cross-examination, Officer Vasquez testified that, pursuant to his training on the HGN test, that test does not show whether one is impaired but only if one has consumed alcohol, and there are alternative causes for failing the test including taking drugs. He was also taught that, before administering the HGN test, an officer must confirm that the subject's pupils are of equal size or the HGN test should not be performed. He could not recall being taught that about three percent of people show nystagmus without having consumed alcohol. Officer Vasquez admitted to having limited recollection of the particulars of the walk-and-turn and one-legged-stand tests and that he would have to review his report to refresh his recollection.

¶ 8 Officer Oates testified that he was on patrol at about 4 a.m. on the day in question when he saw that Officer Vasquez and his partner had stopped defendant at 79th Street, so he and his partner stopped to provide assistance. Later, he was with Officer Vasquez at the police station as they observed defendant for 20 minutes in anticipation of a breath test. During this period, defendant was crying and "defiant" in that he "just wasn't following verbal direction," and after the observation period he refused a breath test.

¶ 9 Following arguments, the court found defendant guilty of DUI and not guilty of obstructing traffic. The court noted that it has "a fairly high standard" for corroboration of the field sobriety tests when there is no BAC evidence, and conversely gives no weight to a

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defendant's refusal of a breath test. The court found adequate corroboration here: by the credible police testimony, defendant was "passed out" and not merely dozing at a red traffic light, then behaved bizarrely at the police station.

¶ 10 Defendant filed a post-trial motion arguing insufficiency of the evidence, in particular that Officer Vasquez was inexperienced, demonstrated insufficient knowledge of the field sobriety tests, and required refreshment of his recollection on many key points. As to his knowledge of the tests, he needed to refresh his recollection not only of defendant's performance but of how many clues there are on the one-legged-stand test.

¶ 11 By agreement of the parties, the court sentenced defendant to two years' supervision with fines and fees. The court denied the post-trial motion without further findings, and this appeal timely followed.

¶ 12 On appeal, defendant contends that counsel was ineffective for not challenging the foundation for testimony regarding the HGN test. He also contends that the evidence was insufficient to find him guilty of DUI beyond a reasonable doubt.

¶ 13 On a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Henderson*, 2013 IL 114040, ¶ 11. Where counsel was allegedly ineffective for not seeking to exclude evidence, the defendant must show that the unraised challenge is

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meritorious and that a reasonable probability exists that the outcome of the trial would have been different had the evidence been excluded. *Id.*, ¶ 15.

¶ 14 When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking 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. *People v. Brown*, 2013 IL 114196, ¶ 48. Because it is the role of the trier of fact to fairly resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences, we will not substitute our judgment for that of the trier of fact on issues involving the weight of evidence or witness credibility. *Id.* The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly, the trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Brown*, ¶ 48.

¶ 15 Here, taking the evidence in the light most favorable to the State as we must, we cannot conclude that no reasonable finder of fact would find defendant guilty of DUI. Regardless of his experience with field sobriety tests, Officer Vasquez testified clearly that defendant's vehicle stood

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for a minute at a green traffic light, that defendant was visibly sleeping behind the wheel to the point where he was drooling and difficult to awake, and that his eyes were bloodshot and there was an odor of alcohol from his vehicle. We do not consider it impeaching that Officer Vasquez's recollection of defendant's performance on tests he performed over a year earlier had to be refreshed. Moreover, as the court found, defendant's post-arrest behavior corroborates his impairment: by the testimony of Officers Vasquez and Oates, he claimed to not recall if he had consumed drugs or alcohol, he repeated questions addressed to him, and he was crying.

¶ 16 As to counsel not challenging the foundation for the HGN test, Officer Vasquez testified that he was trained in the HGN test and followed the instructions in his field guide. Generally, a "properly trained police officer who performed the HGN field test in accordance with proper procedures may give expert testimony regarding the results of the test." *People v. McKown*, 236 Ill. 2d 278, 306 (2010). Moreover, admission of HGN testimony in the absence of a proper foundation is harmless error where other evidence establishes the defendant's guilt beyond a reasonable doubt so that retrial without the HGN evidence would produce no different result. *McKown*, 236 Ill. 2d at 311. Under these circumstances, and with the corroborating evidence as described above, we conclude that a foundational challenge to the HGN evidence was unlikely to have affected the outcome of the trial, and thus find no ineffective assistance.

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¶ 17 Lastly, defendant contends, and the State agrees, that the order assessing fines and fees must be corrected to properly reflect the total fines and fees. The parties are correct: the order states a total of \$1,545 but the actual total of the fees and fines therein is \$1,535.

¶ 18 Accordingly, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the clerk of the circuit court is directed to correct the order assessing fines and fees to reflect a total of \$1,535. The judgment of the circuit court is otherwise affirmed.

¶ 19 Affirmed; order corrected.