

NOTICE

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FILED

November 17, 2015
Carla Bender
4th District Appellate
Court, IL

2015 IL App (4th) 140121-U

NO. 4-14-0121

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Vermilion County
BECKIE J. CARDOZA,)	No. 12DT169
Defendant-Appellee.)	
)	Honorable
)	Derek J. Girton,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding (1) any error in admitting testimony regarding the horizontal gaze nystagmus test was harmless, and (2) the evidence adduced at defendant's trial was sufficient to sustain the jury's verdict beyond a reasonable doubt.

¶ 2 Following a November 2013 jury trial, defendant, Beckie J. Cardoza, was found guilty of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a) (West 2010)). In January 2013, the trial court sentenced defendant to 24 months' intensive DUI probation. Defendant appeals, arguing the (1) trial court erred in allowing testimony regarding the horizontal gaze nystagmus (HGN) test, and (2) State failed to prove her guilty beyond a reasonable doubt. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 1, 2012, the State charged defendant by uniform traffic citation with DUI (625 ILCS 5/11-501(a) (West 2010)). In November 2013, the trial court held a jury trial. The following is a summary of the evidence adduced at trial.

¶ 5 A. State's Case in Chief

¶ 6 1. *Officer Steve Doggett*

¶ 7 The State called Steve Doggett, a police officer with the Westville police department. Officer Doggett testified that on September 1, 2012, he was assigned to a DUI detail near Julee's Shooting Star Tavern. The DUI detail was composed of Deputy James Wright, Officer Tom Kirby, Officer Sean O'Kane, and Officer Doggett. Around 2:30 a.m., Officer Doggett heard a loud noise and then observed that a vehicle had struck a guy wire in a nearby alley. Officer Doggett identified defendant as the driver of the vehicle.

¶ 8 On cross-examination, Officer Doggett testified one of the four police vehicles present at the scene was equipped with a camera.

¶ 9 2. *Officer Tom Kirby*

¶ 10 Officer Kirby, a police officer with the Westville police department testified that on September 1, 2012, at approximately 2:38 a.m., he observed a vehicle reverse into a guy wire, making a loud noise. Officer Kirby, standing within two to three feet of defendant, noticed a strong odor of an alcoholic beverage emanating from defendant's breath and that she was unsteady on her feet. On cross-examination, Officer Kirby acknowledged he could not tell how much alcohol someone had consumed based on the smell of their breath.

¶ 11 Officer Kirby observed Deputy Wright conduct field sobriety tests under an awning on a nearby building. As to the conditions outside, Officer Kirby testified "it wasn't

pouring[,] but just kinda spitting [rain]," and it was dark.

¶ 12 The State introduced photographs of the guy wire defendant's vehicle struck, which were later admitted into evidence. Officer Kirby testified the guy wire had a "highly visible yellow" casing. Officer Kirby testified, based on his experience as a police officer, in his opinion, defendant was under the influence of alcohol.

¶ 13 *3. Deputy James Wright*

¶ 14 Deputy Wright, a deputy sheriff for Vermilion County, testified that on September 1, 2012, he was working part-time with the Westville police department. At approximately 2:38 a.m., while patrolling near Julee's Shooting Star Tavern, he observed a green Chrysler Sebring back into a guy wire in Julee's parking lot. After the vehicle struck the guy wire, it started to move forward. Deputy Wright made eye contact with the driver, later identified as defendant, and she looked at him with a surprised look. Deputy Wright stopped the vehicle and then approached defendant inside her vehicle. Upon conversing with defendant, Deputy Wright noticed a strong odor of an alcoholic beverage emanating from her mouth, her speech was slurred, and her eyes were glassy and bloodshot. Defendant indicated she drank two 12-ounce beers.

¶ 15 Deputy Wright conducted field sobriety tests. As there was a "slight drizzle," these tests were conducted approximately 25 yards away, under an awning on a sidewalk. While walking to the sidewalk, Deputy Wright observed defendant stumbling. Prior to starting the tests, Deputy Wright asked defendant whether she had any medical conditions that would prevent her from performing the tests to which defendant responded she did not.

¶ 16 Deputy Wright first had defendant perform the one-legged-stand test. According

to Deputy Wright, to perform this test, the officer asks the individual, on his command, to lift either their left or right leg approximately six inches off the ground, pointing their toe downward, and count aloud in the manner of "one thousand one", "one thousand two", and so on for approximately 30 seconds, while keeping his or her hands down to his or her sides, and without looking at his or her feet. Deputy Wright testified defendant, against his instruction, began performing the test during Wright's demonstration. He testified defendant also lifted her arms from her sides to steady herself. During her count of 1,001 to 1,013, she placed her foot on the ground to regain her balance at counts 1,001; 1,003; 1,004; 1,005; and 1,009. During counts 1,014 through 1,024, she did not include "one thousand" before each number. These results constituted a failure of the test and indicated defendant may be under the influence of alcohol.

¶ 17 Deputy Wright next had defendant perform the walk-and-turn test. According to Deputy Wright, to perform this test, the officer asks the individual, on his command, to take a series of nine heel-to-toe steps in a forward direction on an imaginary straight line. At the end of the ninth step, the individual is to pivot on their planted foot and then proceed back toward the start position, taking another series of nine heel-to-toe steps. Deputy Wright testified defendant, against his instruction, began performing the test during his demonstration. Deputy Wright stopped defendant and allowed her to start when he finished the demonstration. During her second attempt, defendant lifted her arms to steady herself and her first three steps were not heel-to-toe. She then stopped the test and stated she was done taking the test. These results constituted a failure on the test and indicated defendant may be under the influence of alcohol.

¶ 18 Deputy Wright performed a third test, the HGN test. According to Deputy Wright, the purpose of the test is to determine if an individual's eyes jerk while they move from

side to side. If the eyes jerk, it is an indication the individual may be under the influence of alcohol. Deputy Wright testified in 2005 he was trained on this test while at the Police Training Institute, an academy where recruits obtain a certification for law enforcement. After this training, Deputy Wright attended a mobile training unit through Illinois Law Enforcement Alarm System, where he received approximately eight hours of training. Since his training, Deputy Wright testified he had performed over 100 HGN tests. Over defendant's lack of foundation objection, Deputy Wright testified when performing the test on defendant, he had defendant stand in a relaxed position and, with a pen held out approximately six inches from defendant's face, he directed defendant to follow his pen while he moved it from side to side by only moving her eyes. Deputy Wright observed a lack of smooth pursuit, or jerking, in defendant's eyes—an indication defendant may be under the influence of alcohol.

¶ 19 After making his observations and performing the field sobriety tests, Deputy Wright placed defendant under arrest and transported her to the public safety building. Deputy Wright testified he did not give defendant a Breathalyzer test at the public safety building because the incident occurred on private property and a reading of blood-alcohol content is only of interest if a defendant committed a crime on a roadway. Deputy Wright testified defendant did not ask him to perform a Breathalyzer or blood test at the public safety building. If she had, Deputy Wright testified, he would have done so. Based on his experience as a police officer, Deputy Wright concluded defendant was under the influence of alcohol.

¶ 20 On cross-examination, Deputy Wright acknowledged his police report from the incident indicated it was raining outside. He also acknowledged that smelling an odor emanating from someone's breath is not conclusive as to how much alcohol was consumed. He testified he

did not ask when defendant consumed the two 12-ounce beers. He acknowledged heel-to-toe was not the usual way people walk around. As to the HGN test, Deputy Wright acknowledged other things could cause a jerking of the eyes. Finally, Deputy Wright acknowledged the field sobriety tests were not recorded.

¶ 21 On this evidence, the State rested. Defendant moved for a directed verdict, which the trial court denied.

¶ 22 B. Defendant's Case in Chief

¶ 23 Defendant testified on her own behalf. Defendant testified that around 10 p.m. she drank two 12-ounce Bud Light beers while at her residence. At that time, she was also taking anxiety medicine. Defendant testified the anxiety medicine caused her to have slurred speech, unsteadiness, clumsiness, and glassy looking eyes. Defendant testified that generally, she is a very clumsy person.

¶ 24 Around 2:15 a.m., defendant left her residence to go to Julee's Shooting Star Tavern. Her vehicle was missing a mirror on the passenger side. As to the weather conditions, defendant testified it was raining and dark. After admittedly striking the guy wire, defendant testified she exited her vehicle and walked to a police officer. At that time she was "shaky" and nervous because of the accident. Defendant testified when she is nervous she slurs her words. Defendant testified she was also nervous during the field sobriety tests because everyone in Julee's was watching. Defendant testified after completing the field sobriety tests, she completed two Breathalyzer tests, but the officers did not disclose the results. After being transported to the public safety building, defendant testified she asked for a blood test, which was never given.

¶ 25 On cross-examination, defendant indicated she had taken the same medicine the

morning of trial as she did the night of the incident.

¶ 26 On this evidence, defendant rested.

¶ 27 C. State's Rebuttal

¶ 28 On rebuttal, the State recalled Deputy Wright. Deputy Wright testified he did not give defendant two preliminary breath tests on the night of the incident. Deputy Wright further testified defendant did not ask him to administer a Breathalyzer or blood test while at the public safety building.

¶ 29 D. Jury's Verdict, Posttrial Motion, and Sentencing

¶ 30 On November 19, 2013, the jury returned a verdict of guilty. On December 30, 2013, defendant filed a motion for a new trial, alleging, in relevant part, the (1) trial court erred in allowing testimony regarding the HGN test without a proper foundation, and (2) State failed to prove her guilty beyond a reasonable doubt.

¶ 31 In January 2014, the trial court held a hearing on defendant's motion and then proceeded with sentencing. The court denied defendant's motion and sentenced her to 24 months' intensive DUI probation.

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, defendant argues the (1) trial court erred in allowing testimony regarding the HGN test without a proper foundation, and (2) State failed to prove her guilty beyond a reasonable doubt. We address these arguments in turn.

¶ 35 A. HGN Testimony

¶ 36 Defendant argues the trial court erred in allowing testimony regarding the HGN

test without a proper foundation. Specifically, defendant asserts the State failed to lay a proper foundation as Deputy Wright did not comply with the National Highway Traffic Safety Administration guidelines when performing the HGN test. Defendant asserts, "[a]lthough defense counsel failed to properly preserve this error for review [by failing to file a timely posttrial motion], this [c]ourt can relax the [forfeiture] rule and address this error on appeal." See 725 ILCS 5/116-1(b) (West 2012) ("A written motion for a new trial shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict."). In the alternative, defendant asserts this court should find defense counsel was ineffective for failing to file a timely posttrial motion.

¶ 37 Forfeiture aside, even if, *arguendo*, we found the trial court erred in allowing testimony regarding the HGN test, we find such admission harmless. "Error will be deemed harmless and a new trial unnecessary when 'the competent evidence in the record establishes the defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result.'" *People v. McKown*, 236 Ill. 2d 278, 311, 924 N.E.2d 941, 959 (2010) (quoting *People v. Arman*, 131 Ill. 2d 115, 124, 545 N.E.2d 658, 662 (1989)).

¶ 38 To prove that a defendant committed DUI (when no blood alcohol level is specified), the State must present evidence sufficient to establish beyond a reasonable doubt the defendant (1) drove, or was in actual physical control of, a motor vehicle, (2) while under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2010). Here, it was uncontradicted defendant drove a motor vehicle; thus, element one is met. It was also undisputed that at approximately 2:30 a.m., defendant struck a guy wire with her vehicle in a tavern's parking lot

after consuming alcoholic beverages. Officer Kirby and Deputy Wright noticed a strong odor of an alcoholic beverage emanating from defendant's breath and that she was unsteady on her feet. Deputy Wright noticed defendant's speech was slurred and her eyes were glassy and bloodshot. Setting aside the testimony regarding the HGN test, Deputy Wright testified defendant failed two additional field sobriety tests due to her inability to follow directions and maintain proper balance.

¶ 39 Defendant asserts that this evidence is insufficient to prove beyond a reasonable doubt she was under the influence of alcohol as her appearance and performance on the field sobriety tests were attributable to her medical condition. We disagree. This assertion was before the jury. According to Deputy Wright, he asked defendant whether she had any medical conditions that would prevent her from performing the field sobriety tests, to which defendant responded she did not. Further, on cross-examination defendant indicated she had taken the same medicine the morning of trial as she did the night of the accident. Based on the jury's verdict, it is clear it did not believe defendant's testimony that her medicine was the cause of her appearance and performance on the field sobriety tests on the night of the incident. Giving due consideration to the fact that the jury saw and heard the witnesses, and in light of its role to resolve conflicts in evidence, defendant's claim is unpersuasive. See *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999); *People v. Wheeler*, 226 Ill. 2d 92, 115, 871 N.E.2d 728, 740 (2007).

¶ 40 Therefore, setting aside Deputy Wright's testimony regarding the HGN test, we conclude the State introduced sufficient competent evidence for the jury to find defendant guilty of DUI beyond a reasonable doubt defendant, and a new trial without evidence of the HGN

testing would not produce a different result. Accordingly, even if, *arguendo*, the trial court erred in allowing testimony regarding the HGN testing, such error was harmless. See *People v. Graves*, 2012 IL App (4th) 110536, ¶ 33, 965 N.E.2d 546 (finding any error in the admission of HGN test results was harmless where the competent evidence showed defendant failed two additional field sobriety tests); *cf. People v. McKown*, 226 Ill. 2d 245, 276, 875 N.E.2d 1029, 1047 (2007) (holding the erroneous admission of the HGN test results constituted reversible error where no other field sobriety tests were conducted and chemical samples collected were negative).

¶ 41 As such, any claim of ineffective assistance of counsel for failing to file a timely posttrial motion must also fail as defendant is unable to demonstrate prejudice. ("[T]he only manner in which defendant could show prejudice would be if the tardy filing [forfeited] any of his claims on appeal and if any claims which were [forfeited] would otherwise have been found to be meritorious on appeal. If the claims were without merit defendant could not show prejudice even if they were [forfeited], thus he would be entitled to no relief on this claim of ineffective assistance."). *People v. Segoviano*, 189 Ill. 2d 228, 246, 725 N.E.2d 1275, 1284 (2000)

¶ 42 B. Sufficiency of the Evidence

¶ 43 In accordance with our resolution of defendant's first contention of error, defendant's sufficiency-of-the-evidence argument also fails. As stated above, the State introduced sufficient evidence to prove defendant guilty of DUI beyond a reasonable doubt, and we need not repeat that discussion here.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm defendant's conviction and sentence. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 46 Affirmed.