FOURTH DIVISION
May 5, 2016

No. 1-15-0329

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. YW 264 017
	)	
MARTIN NIXON,	)	Honorable
	)	Samuel J. Betar, III,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty of driving under the influence of alcohol beyond a reasonable doubt where officers testified that defendant admitted drinking "a couple beers," smelled of alcohol, failed multiple field sobriety tests, and refused to take a Breathalyzer test. Defendant's ineffectiveness of counsel claim must fail where defendant failed to demonstrate that counsel's actions prejudiced him.

¶ 2 After a bench trial, defendant Martin Nixon was found guilty of driving under the influence of alcohol and speeding. The trial court ultimately sentenced defendant to 12 days in jail and 18 months' probation. On appeal defendant contends that the State failed to prove

beyond a reasonable doubt that he was under the influence of alcohol such that his ability to operate his vehicle was impaired. He also contends trial counsel was ineffective where he: (1) prevented defendant from testifying, (2) failed to object to the foundation for police officers' testimony regarding field sobriety tests, and (3) failed to present video and audio recordings of defendant's traffic stop. We affirm.

¶ 3 At trial, Rolling Meadows police officer John Sircher testified that he had been trained in detecting when a driver is under the influence of alcohol, including through the administration of standardized field sobriety tests. When the State began to question Sircher on his training, defense counsel offered "to stipulate to his qualifications." After the stipulation, Sircher testified that he was conducting speed enforcement near the Arlington Park Racetrack at 9:45 p.m. on May 25, 2014. A vehicle drove past Sircher traveling at 57 miles per hour. The posted limit for the area was 40 miles per hour. Sircher followed the vehicle briefly before activating the emergency lights on his squad car and stopping the vehicle. Defendant was the vehicle's driver and sole occupant. Sircher approached the vehicle and began to speak with defendant.

¶ 4 Defendant's eyes were glassy and bloodshot and his breath smelled of alcohol. His speech "was a little slower than *** expected." Sircher asked if defendant had been drinking, defendant stated that he had not. When Sircher indicated that defendant's breath smelled like alcohol and his eyes were bloodshot, defendant stated that he had "a couple beers" and had been at a nearby racetrack all day. Sircher then asked for defendant's license and proof of insurance. He gave Sircher his license, which was expired, and his vehicle registration card. Sircher testified that defendant was "under the impression" he was giving his insurance card, and he had to indicate to

defendant that his registration was not an insurance card. Sircher returned to his squad car and radioed for backup during sobriety testing.

¶ 5 Shortly thereafter, Rolling Meadows police officer Stone arrived. Sircher asked defendant to exit his vehicle and walk behind it. Defendant was cooperative. As he walked, "he appeared to be unsure with his balance." Sircher observed as Stone conducted several sobriety tests with defendant. The first test was the horizontal gaze nystagmus (HGN) test, which Sircher testified was performed consistently with his training. After instructing defendant on the test, Stone moved his finger in front of defendant's eyes and both officers observed. Sircher testified that defendant's eyes were unable to follow Stone's finger smoothly, he had onset of nystagmus, or eye shaking, prior to his eyes breaking a 45 degree plane, and he had severe nystagmus at the maximum deviation. At trial, Sircher explained that when nystagmus begins before an individual's eye reaches a 45 degree angle outward or if there is heavy nystagmus at the maximum angle, it is a clue that the individual is "under the influence at a certain degree." Sircher opined that defendant did not pass the test.

¶ 6 On cross-examination, Sircher testified that he did not observe defendant weave or cross any lane markings while driving, and that there was nothing unusual in the way defendant stopped his vehicle. Although defendant did not need help getting out of his vehicle, he did appear "clumsy." Defendant did not stagger when he initially got out of the car, but Sircher testified that he did stagger later during the tests. While asking Sircher about the position of defendant's car, defense counsel referred to a video-recording of the events taken by the dashboard camera in Sircher's squad car, asking "Well, if we were to view the video, wouldn't it

be true that he was in the left lane?" He similarly referred to the video later when asking where Sircher was standing during the HGN test. The video was not entered into evidence.

¶ 7 Officer Stone testified that he responded to Sircher's call and administered five field sobriety tests on defendant. Three of the tests were standardized field sobriety tests: the HGN test, one-legged-stand test, and walk-and-turn test. Stone initially instructed defendant on the HGN test and his instructions were consistent with his training. During the test, defendant's eyes did not smoothly track, developed a nystagmus prior to his eyes breaking the 45 degree plane, and had a severe nystagmus at the maximum deviation. Stone concluded that defendant had failed the test.

¶ 8 Stone next instructed defendant on the performance of the one-legged-stand test and demonstrated it for him. During the test, defendant was "hopping," raised his arms for balance, and put his foot down more than three times. He also swayed while balancing. Based on these observations, Stone concluded that defendant failed the test. He proceeded to instruct defendant on the walk-and-turn test, and demonstrated that defendant was to walk heel to toe for several steps, pivot, and walk back in the same fashion. Defendant could not keep his balance while listening to instructions, did not touch his heel to toe on every step, and did not make the turn correctly. Stone could not remember at trial on which steps defendant failed to touch heel to toe. Based on his observations, Stone concluded that defendant failed the test. Subsequently, the officers administered two non-standardized sobriety tests. He first asked defendant to touch his nose several times with each hand. Defendant missed his nose once and Stone concluded that he had passed the test. One of the officers then asked defendant to recite the alphabet from the letter

"d" to the letter "q." Defendant passed that test as well. Following testing, the officers arrested defendant. At the police station, defendant declined to submit to a Breathalyzer test.

¶ 9 On cross-examination, Stone stated that defendant was able to walk under his own power, but he seemed "unsteady" and "staggered slightly." Defendant was not confused by any of the officer's questions and his speech was "fair." When defense counsel asked how defendant was unable to keep his balance during instructions for the walk-and-turn test, Stone answered that he had instructed defendant to stand with one foot in front of the other, touching heel to toe, and defendant was "unable to maintain that posture" and moved to stand with his feet apart. He also indicated that during the test he did not instruct defendant to walk an imaginary line. Defendant did not lose his balance while walking. In regards to the walk-and-turn test, Stone was unable to recall how many inches had separated defendant's feet when he failed to touch heel to toe. He stated that it might be indicated on the dashboard video.

¶ 10 After the State rested, defendant moved for a directed finding which the trial court denied.

¶ 11 Defendant recalled Sircher, who testified that defendant was able to touch his fingers to his nose and had passed the alphabet test. He indicated that defendant's speech was fair and his clothes were orderly.

¶ 12 The trial court noted that it found both officers to be credible. It found defendant guilty of speeding and driving under the influence of alcohol.

¶ 13 On October 3, 2014, defendant filed a motion to reconsider the finding, which the trial court denied. Defendant subsequently retained new counsel for sentencing and appeal. On December 10, 2014, new defense counsel filed a motion for new trial. On December 12, 2014,

the trial court sentenced defendant to 30 days in jail. Defendant filed a motion to reconsider sentence which was denied on December 15, 2014. The trial court subsequently reduced defendant's sentence to 12 days in jail on December 23, 2014. On January 12, 2015, defense counsel withdrew defendant's motion for new trial "without prejudice" and filed a timely notice of appeal the next day.

¶ 14 We note that defendant's second post-trial motion, his motion for a new trial, was never considered by the trial court due to its withdrawal. However, the motion remains a part of the record on appeal. It alleged, *inter alia*, that trial counsel was ineffective for failing to introduce the video recorded by Sircher's dashboard camera and an audio disc of police radio traffic on the night of the incident. The video and audio discs were attached to the motion and are included in the record on appeal. Defendant also alleged that trial counsel was ineffective because he had ignored defendant's stated desire to testify. Defendant attached his own affidavit to the motion, indicating that he had informed counsel that he wanted to testify after trial counsel rested his case. The affidavit asserted that trial counsel responded, "You have to trust me – that is what you paid me for." Although the trial court never made factual or credibility determinations regarding these attached materials, the State has raised no objection to our considering them as part of the record on appeal.

¶ 15 Defendant first contends that the State failed to prove him guilty beyond a reasonable doubt. He argues that the State failed to present sufficient evidence to prove that his capacity to operate an automobile was impaired because he was "merely speeding" and was not slurring his speech. He also asserts that he "should be considered to have passed the walk-and-turn test" because Stone's testimony was not sufficiently detailed. He further argues that the other

standardized tests should not be considered because Stone did not follow the proper procedures in administering the tests.

¶ 16 Due process requires the State to prove each element of a criminal offense beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004), citing *In re Winship*, 397 U.S. 358, 364 (1970). When reviewing the sufficiency of evidence, a reviewing court must decide "whether, after viewing 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." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); See also *Cunningham*, 212 Ill. 2d at 278. A reviewing court will not overturn a guilty verdict unless the evidence is "so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005). A reviewing court must resolve all reasonable inferences in favor of the prosecution. *Cunningham*, 212 Ill. 2d at 280. This court may not retry a defendant on appeal. *People v. Milka*, 211 Ill. 2d 150, 178 (2004).

¶ 17 A reviewing court must give due consideration to the fact that a trial court is able to see and hear the witnesses. *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001). A fact finder's determination of a witness's credibility "is entitled to great deference but is not conclusive." *Cunningham*, 212 Ill. 2d at 279. Where a conviction depends on eyewitness testimony, the reviewing court may find testimony insufficient "only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Id.*

¶ 18 In order to to prove a defendant guilty of driving under the influence of alcohol, the State must prove: (1) the defendant was in actual physical control of a vehicle, and (2) he was under the influence of alcohol. *People v. Diaz*, 377 Ill. App. 3d 339, 344 (2007); see also 625 ILCS

5/11-501(a)(2) (West 2012). An individual is under the influence of alcohol where that person's mental or physical faculties are so impaired as to diminish his or her ability to act and think with ordinary care. *People v. Gordon*, 378 Ill. App. 3d 626, 631 (2007). This determination is a question for the fact-finder to resolve based upon its assessment of witness credibility and the evidence presented at trial. *People v. Morris*, 2014 IL App (1st) 130512, ¶ 20.

¶ 19 The State is not required to present scientific evidence such as a Breathalyzer or blood test in order to prove impairment. *Diaz*, 377 Ill. App. 3d at 344-45. The credible testimony of a police officer is sufficient. *People v. Janik*, 127 Ill.2d 390, 402 (1989). The fact-finder may consider a police officer's observations, such as a "defendant's breath smelled of alcohol" and that his eyes were "glassy and bloodshot" in determining whether a defendant was sufficiently impaired. *Morris*, 2014 IL App (1st) 130512, ¶ 20. It may also consider other relevant evidence like a defendant's speech, failed sobriety tests, (*People v. Robinson*, 368 Ill. App. 3d 963, 983 (2006)), or his or her refusal to submit to a Breathalyzer test (*People v. Johnson*, 218 Ill. 2d 125, 140 (2005)).

¶ 20 Taking the evidence in the light most favorable to the State, a rational fact finder could have found defendant guilty of driving under the influence beyond a reasonable doubt. It is undisputed that defendant was in physical control of his vehicle. Furthermore, ample evidence supports a finding that due to his consumption of alcohol, his physical and mental faculties were impaired so as to diminish his ability to operate the vehicle with ordinary care. Defendant admitted that he had consumed multiple beers. Sircher smelled alcohol on defendant's breath and noticed that defendant's eyes were glossy and bloodshot. Moreover, defendant's initial false assertion that he had not been drinking and his refusal to take a Breathalyzer test both provide

circumstantial evidence of his consciousness of guilt. Furthermore, both officers testified that defendant failed the HGN test, which was consistent with him having consumed alcohol. Defendant's mistaken belief that his registration was his proof of insurance also lends support to an inference that his mental faculties were impaired. The officers testified that defendant seemed uneasy or clumsy while walking, and both testified that defendant staggered at some point during their encounter. Defendant's performance on the one-legged-stand test and the walk-and-turn test also support a finding that defendant was impaired. Stone testified that defendant displayed several clues of impairment in each test and concluded that defendant had failed both. Taking the evidence in the light most favorable to the State, a rational fact-finder could have found beyond a reasonable doubt that defendant was impaired due to his consumption of alcohol.

¶ 21 Defendant argues that the State did not prove impairment because Sircher did not observe him make any traffic infractions beyond speeding. He asserts that speeding, in and of itself, is not enough to conclusively show impairment. However, travelling at 17 miles per hour over the speed limit indicates a lack of sound judgment, and while alone it might not support a finding of impairment, the State presented ample other evidence that supported an inference that defendant was under the influence of alcohol. Furthermore, the fact that an officer did not witness a defendant drive in a suspect fashion does not preclude a finding that he or she was under the influence of alcohol where there is other evidence of impairment. See, *e.g.*, *People v. Diaz*, 377 Ill. App. 3d 339, 341-345 (2007) (finding evidence sufficient to support driving under the influence of alcohol conviction where officer did not observe the defendant violate any traffic laws other than failing to wear a seatbelt and did not observe him perform any unusual driving).

¶ 22 Defendant argues that both officers' testimony lacked sufficient detail and asserts that each officer's account was "full of holes." He notes that the officers were unable to recall certain details, for example, Stone's inability to recall exactly how many times defendant placed his foot down during the one-legged-stand test. He also asserts that he should be considered to have passed the walk-and-turn test because Stone did not identify on which specific steps defendant failed to touch his heel to his toe and Stone did not elaborate on how defendant failed to turn correctly during the test. However, the fact-finder is in the best position to judge the credibility of the witnesses (*Ortiz*, 196 Ill. 2d at 267), and the trial court explicitly found the officers' testimony to be credible. None of the details listed by defendant are so significant as to render the court's determination unreasonable. Therefore we defer to its credibility determinations. See *Cunningham*, 212 Ill. 2d at 279.

¶ 23 Defendant also argues that while Stone indicated on direct examination that defendant had lost his balance, he contradicted that statement on cross-examination. This assertion mischaracterizes the record. When defense counsel asked how defendant was unable to keep his balance during instructions for the walk-and-turn test, Stone answered that he had instructed defendant to stand a certain way, and defendant was "unable to maintain that posture" and moved to stand with his feet apart. We detect no inconsistency between Stone's two comments, and certainly nothing that "compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Id.*

¶ 24 Defendant argues that the results of the HGN test were "compromised," and therefore unreliable, because neither officer's testimony specifically laid out each step Stone took in performing the test. While defendant phrases his argument in terms of the sufficiency of the

evidence presented, he is in fact challenging the foundation for the HGN test. We note that defendant did not object to the test at trial, nor did he include the issue in his post-trial motion. Consequently, such an issue would typically be considered forfeited on appellate review. See *People v. Korzenewski*, 2012 IL App (4th) 101026, ¶ 14. A defendant cannot circumvent the forfeiture of a foundational claim by recasting it as a challenge to the sufficiency of the evidence. See *People v. Hill*, 345 Ill. App. 3d 620, 631 (2003). However, even if defendant had properly preserved his foundational claim, it must fail. A proper foundation for the admission of HGN testing must show that a witness has been trained in the procedures of the testing and that the witness conducted the specific test in accordance with that training. See *People v. McKown*, 236 Ill. 2d 278, 306 (2010). Stone testified that he was trained in the administration of field sobriety tests. He also testified that he instructed defendant in accordance with that training and experience before administering the HGN test to defendant. Moreover, Sircher also testified that he was trained in the administration of field sobriety test and defendant stipulated that the officer was qualified in that field. Sircher indicated that he watched Stone administer the HGN test and that the test was administered consistently with his training. Thus, the trial court's consideration of the HGN was not unreasonable. Furthermore, even if we were to disregard the HGN test, the State presented sufficient evidence of impairment. See *People v. Graves*, 2012 IL App (4th) 110536, ¶ 33 (finding any error in the admission of HGN test results was harmless where the competent evidence showed defendant failed two additional field sobriety tests). We have already noted the ample evidence of defendant's impairment including his failure of the two, other standardized field sobriety tests, the smell of alcohol on his breath, and his refusal to take a Breathalyzer test. Any error regarding the admission of the HGN test was therefore harmless.

¶ 25 Defendant similarly argues that the results of the walk-and-turn test were "compromised" because Stone did not instruct him to walk an imaginary line during the test. Defendant, however, did not raise an objection at trial or raise the issue in his post-trial motion. The appellate court has previously noted that unlike the HGN test, other field sobriety tests require " '[n]o expert testimony is needed nor is a showing of scientific principles required.' " *People v. Hires*, 396 Ill. App. 3d 315, 319 (2009), quoting *People v. Sides*, 199 Ill. App. 3d 203, 206-07 (1990). This is because a fact-finder need not possess scientific expertise to appropriately infer that a defendant's ability to perform the simple physical tasks which comprise the field-sobriety tests indicates he or she may have been similarly impaired in his ability to think and act with ordinary care while driving. See *id.* Stone testified to the clues he relied upon in concluding that defendant failed: his inability to balance during instructions, his failure to touch his heel to his toes on several steps, and his inability to perform a turn as demonstrated by the officer. The trial court could thus properly weigh how defendant's performance reflected on his physical and mental state.

¶ 26 Taking all the evidence in the light most favorable to the State, a rational fact-finder could determine beyond a reasonable doubt that defendant was under the influence of alcohol while operating his vehicle. Accordingly, we find the State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt of driving under the influence of alcohol.

¶ 27 Defendant next contends that his trial counsel was ineffective for: (1) preventing him from testifying, (2) failing to object to the foundation laid for the field sobriety tests, and (3) failing to present the dashboard video and radio recording.

¶ 28 When claiming ineffective assistance of counsel, a defendant must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that the result of the proceeding would have been different without counsel's deficient representation. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). Under the *Strickland* test, a reasonable probability is a probability sufficient to undermine confidence in the outcome because counsel's performance caused the result of the trial to be unreliable or the proceeding fundamentally unfair. *People v. Enis*, 194 Ill.2d 361, 376 (2000). Defendant must overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and was the product of sound trial strategy. *Strickland*, 466 U.S. at 689. The failure to satisfy either element of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Enis*, 194 Ill. 2d at 377.

¶ 29 Defendant first argues counsel was ineffective for preventing him from testifying, citing his own affidavit which he attached to his motion for a new trial. In the affidavit, he asserts that he informed trial counsel that he wished to testify after counsel had rested his case. A defendant's decision regarding whether to testify belongs solely to the defendant and will not be deemed a matter of trial strategy. See *People v. Ramey*, 152 Ill. 2d 41, 54 (1992). Such a claim is typically best suited for a postconviction petition where a defendant can introduce further evidence which can be weighed at an evidentiary hearing. See *id.* While the record on appeal in the instant case contains an affidavit asserting that defendant spoke with trial counsel regarding his intention to testify, the credibility of this assertion was never weighed by the trial court because defendant withdrew the motion. However, even if we assume, *arguendo*, that defendant's assertions are true his claim must fail.

¶ 30 Typically on direct appeal, a defendant asserting a violation of his or her right to testify "must demonstrate that [he or she] 'contemporaneously asserted his right to testify by informing the trial court that he wished to do so.' " *People v. Davis*, 373 Ill. App. 3d 351, 361 (2007), quoting *People v. Smith*, 176 Ill. 2d 217, 234 (1997). Defendant, however, is asserting a claim that trial counsel was ineffective for not giving him the opportunity to testify and relies upon his affidavit attached to the motion for a new trial. In order to show that counsel's performance was objectively unreasonable, a defendant must demonstrate in the record that he or she made a contemporaneous assertion of his or her wish to testify to trial counsel, and that trial counsel refused that wish. See *People v. Youngblood*, 389 Ill. App. 3d 209, 217-18 (2009). Defendant's affidavit indicates that defendant did not contemporaneously assert his wish to testify, but rather waited until after trial counsel had rested. See *People v. Cleveland*, 2012 IL App (1st) 10631, ¶¶ 66-67 (affirming dismissal of a defendant's postconviction claim of ineffective assistance of trial counsel for preventing the defendant from testifying where he did not tell counsel of his wish until after counsel rested). Moreover, defendant's affidavit does not indicate that counsel prevented him from testifying, or told him that he could not testify; rather, trial counsel's reply that defendant trust him was more comparable to advice not to testify. See *People v. Smith*, 176 Ill. 2d 217, 235 (1997) (recognizing that the decision whether to testify ultimately belongs to the defendant, "but it should be made with the advice of counsel."); *c.f.*, *People v. Whiting*, 365 Ill. App. 3d 402, 405 (2006) (finding counsel ineffective where he told defendant she could not testify). As such, we cannot find that defendant has demonstrated that trial counsel's actions regarding defendant's wish to testify were objectively unreasonable and his claim fails to meet the first prong of the *Strickland* test.

¶ 31 Defendant also argues that trial counsel was ineffective for failing to challenge the foundation of the three standardized field sobriety tests. As we have previously noted, unlike the HGN test, the walk-and-turn test and the one-legged-stand test do not require a scientific foundation or expert testimony. *Hires*, 396 Ill. App. 3d at 319. Additionally, defendant cites no case law to support his assertion that these tests did not have proper foundation. Stone testified that he was trained to administer field sobriety tests and that he instructed defendant in accordance with his training. He then detailed for the court the specific observations that led him to believe that defendant was under the influence of alcohol, including his difficulties with balance and his failure to repeat the tests as demonstrated. Defendant has failed to show that a foundation objection would be successful, and thus has failed to show that he was prejudiced by trial counsel's decision not to object. In regards to the HGN test, defendant has not affirmatively indicated any errors in the administration of the test. Instead he asserts that the officers failed to sufficiently detail each step performed and argues that because neither officer testified that each specific step was performed, we do not know if it was properly performed. However, in order to show prejudice under the *Strickland* test, defendant must demonstrate that if trial counsel had objected, there was a reasonable probability that the outcome of the trial would have been different. *Diaz*, 377 Ill. App. at 350. Defendant has made no showing that if counsel had objected the State would not have been able to cure any defect by asking the officers to more thoroughly explain the procedures they followed. See *id.* Because defendant has failed to affirmatively demonstrate that the State could not provide foundation for the test, any claim that the HGN test was administered incorrectly is purely speculative. As such, defendant has not demonstrated that trial counsel's decision not to object prejudiced him. Because we find that defendant was not

prejudiced by trial counsel's failure to object to the field sobriety tests, we need not determine the reasonableness of trial counsel's actions. See *People v. Rucker*, 346 Ill. App. 3d 873, 885 (2003).

¶ 32 Finally defendant argues that trial counsel was ineffective for failing to introduce the video-recording of defendant's traffic stop and the corresponding audio-recording of the police radio traffic. He solely argues in his initial brief that this failure prejudiced him because the video and audio showed that the officers had concluded that he was intoxicated before performing any field sobriety tests and thus were predisposed to arresting him. Specifically, he asserts that the recordings show that Sircher reported over the radio that he was "gonna have one in custody" and requested a tow truck for defendant's car prior to actually conducting the sobriety tests. Having reviewed the video and audio recordings, it appears that defendant is mistaken. It is clear from the video that the statements referenced by defendant were made following the sobriety tests and defendant's arrest. As the factual assertions underlying defendant's prejudice argument are incorrect, we find that defendant has failed to establish that trial counsel's decision not to introduce the video into evidence prejudiced him. Accordingly, trial counsel's decision not to introduce the video did not constitute ineffective assistance of counsel.

¶ 33 Defendant argues for the first time in his reply brief that the video-recording's depiction of the sobriety tests would have supported a finding that defendant was not impaired, and thus there is a reasonable probability that the recording's admission would have changed the result of trial. It is well-settled that a party cannot raise a new argument in a reply brief because it deprives the opposing party of an opportunity to address such arguments. See *People v. English*, 2011 IL App (3d) 100764, ¶ 22. As such, we need not consider this argument. *Id.* Furthermore, having reviewed the video-recording, we cannot find that anything contained therein undermines

or impeaches the testimony of Officers Sircher and Stone. Rather, the video corroborates the officers' accounts. Accordingly, defendant cannot show that trial counsel was objectively unreasonable in not introducing the tape, or that its absence prejudiced him.

¶ 34 For the foregoing reasons, we find that the State proved defendant guilty of driving under the influence beyond a reasonable doubt. We also find that defendant has failed to demonstrate that trial counsel's decisions not to call defendant to testify, not to raise an objection to the foundation of the field sobriety tests, and not to introduce the video and audio recordings into evidence were ineffective assistance of counsel. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 35 Affirmed.