

No. 1-15-0538

**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).

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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.	)	Nos.  BA 073980
	)	BA 073981
	)	
JOSE ROMO,	)	Honorable
	)	Richard Denis Schwind,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Justices Pierce and Mason concurred in the judgment.

**O R D E R**

- ¶ 1     *Held:* Trial counsel not ineffective for not challenging testimony regarding horizontal gaze nystagmus test where there was sufficient additional evidence that defendant had driven under the influence of alcohol.
- ¶ 2     Following a 2014 bench trial, Jose Romo, the defendant, was convicted of driving under the influence of alcohol (DUI) and improper lane usage and sentenced to two years of probation with community service and fines and fees. On appeal, defendant contends that trial counsel was

ineffective for not challenging testimony regarding defendant's horizontal gaze nystagmus (HGN) test and that the trial evidence was insufficient to convict defendant of DUI.

¶ 3 Defendant was cited for DUI and improper lane usage, both allegedly committed at about 4 a.m. on September 29, 2013.

¶ 4 At trial, police officer Andrew Bubis testified that he had been an officer for about 10 years.<sup>1</sup> He was patrolling at about 4 a.m. on September 29, 2013, when he saw a black sports utility vehicle (SUV) about four car-lengths ahead of him in the inside lane (of a highway with two lanes in each direction) cross the yellow line "for approximately two feet" and two seconds before returning to the lane. There were no cars between the SUV and Officer Bubis, and the scene was lit by streetlights and the headlights of Officer Bubis's car. After making a proper lane change to the outside lane, the SUV crossed the white curbside or "fog" line for about eight seconds. Officer Bubis signaled for the SUV to stop and pull over; it did, and he walked up to the SUV and had a discussion with the defendant, the driver.

¶ 5 Officer Bubis testified that: (i) defendant's eyes were glassy and red; (ii) he had a strong odor of an alcoholic beverage on his breath; and (iii) he dropped some of his documents to the floorboards as he was producing them. Officer Bubis asked defendant if he had been drinking; he replied that he had "two beers." Officer Bubis told defendant to exit the SUV, and he did so without difficulty.

¶ 6 Officer Bubis had defendant stand between the SUV and the police car to perform the HGN test. He told defendant to keep his head still and watch the movement of Officer Bubis's pen. When

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<sup>1</sup> The parties stipulated to Officer Bubis's training in investigating and detecting whether persons are under the influence of alcohol.

he moved the pen and defendant watched it, Officer Bubis saw a "lack of smooth pursuit," "onset of nystagmus<sup>2</sup> prior to 45 degrees," and "distinct and sustained nystagmus" in both eyes, from which he concluded that defendant had "potentially consumed alcohol." No objection was made during any of this testimony.

¶ 7 Officer Bubis decided to conduct further testing. When he asked defendant if he was injured, he responded that he had injured "the ACL of his right knee." In response to Officer Bubis's questions, he also stated that he walks sometimes in his job as a power washer. Officer Bubis had defendant perform the walk-and-turn test, explaining to him that he would put his right foot in front of his left foot heel-to-toe with his hands at his sides and, when told to begin, walk nine heel-to-toe steps in one direction before turning and doing the same in the other direction. Defendant indicated that he understood the instructions but then began to walk before being told to start, raised his right arm during both sets of steps, and did not walk heel-to-toe for his last eight steps.

¶ 8 Officer Bubis also had defendant perform the one-leg-stand test, explaining to him that he would keep his hands at his sides while standing on one foot – whichever he felt more comfortable with – and counting aloud. He told defendant that the test would take 30 seconds and, if he put his foot down, he should raise it again and resume counting. He also demonstrated the test for defendant. When defendant took the test, he swayed, hopped, and raised his arms; Officer Bubis could not recall if he counted aloud.

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<sup>2</sup> Black's Law Dictionary defines nystagmus as a rapid, involuntary jerking or twitching at the eyes, sometimes caused by ingesting drugs or alcohol. Black's Law Dictionary 1100 (8th ed. 1999).

¶ 9 Officer Bubis also had defendant perform the finger dexterity test, though it is not a standard field-sobriety test. He explained to defendant that he would touch his thumb to each of his fingers in turn, counting as he did so, then do the same again in reverse order, and he would do this cycle three times. Defendant did so.

¶ 10 Based on his two lane violations, odor of alcohol, glassy and red eyes, and admission to drinking alcohol, and his failure of the HGN, walk-and-turn, and one-leg-stand tests, Officer Bubis formed the opinion that defendant was under the influence of alcohol. Defendant told Officer Bubis that he was "coming from a bar." He arrested defendant for DUI and took him to the police station. After reading him a warning and observing him for about 20 minutes, Officer Bubis asked him if he would take a breath test. He replied "probably." When Officer Bubis repeated the question twice, he twice replied "probably." Defendant did not take a breath test.

¶ 11 On cross-examination, Officer Bubis testified that defendant committed no other violations beyond the lane usage violations; his headlights were lit, and he was not speeding. When signaled to stop, he stopped in "an appropriate spot" after duly signaling, and he handed over the appropriate documents when asked. The sobriety tests were administered on the roadway, and defendant did not sway or wobble as he walked from the SUV. Though Officer Bubis did not use a painted or marked line for the walk-and-turn test, defendant walked a straight line during that test. Officer Bubis testified that a torn right ACL would affect the defendant's ability to perform the tests. During the one-leg-stand test, defendant stood on his right leg and did not put down his left foot. Defendant performed the finger dexterity test all three cycles without error. Defendant was not abusive or "cocky" in his interactions with Officer Bubis. He did not require assistance exiting the police car. At the police station, defendant asked to contact his attorney.

¶ 12 On redirect examination, Officer Bubis testified that defendant told him he suffered the ACL injury a year after his first son was born. He mentioned that his son was 11 years old, but he did not specify which son. He also mentioned that he played soccer recently, in every position but goalie and forward.

¶ 13 The parties stipulated to the foundation of the video of defendant's stop and testing by Officer Bubis, and the court viewed the video.

¶ 14 Following closing arguments, the court found defendant guilty of DUI and improper lane usage. The court found Officer Bubis credible and the video helpful. The video clearly showed defendant's improper lane usage. Defendant's apparent confusion when asked questions by Officer Bubis was not attributable to language issues, the court found. Defendant swayed during the HGN test. The court found the HGN test results "moot" because defendant admitted drinking alcohol, which is what the HGN test tends to indicate, so the issue was whether his alcohol consumption impaired him. The court found defendant leaning with a bent knee as he waited, and bending his knee during the one-leg-stand test, to be inconsistent with his professed ACL injury, which occurred years before the day in question. Defendant was unsteady and using his arms for balance, but was not limping or favoring his right leg, during the heel-to-toe-walk and one-leg-stand tests. Defendant performed the dexterity test, but very slowly and deliberately. The court found that defendant's answers when asked to take the breath test indicated not belligerency but an inability to follow instructions. In sum, the court found that defendant was under the influence of alcohol.

¶ 15 In his post-trial motion, defendant argued insufficiency of the evidence, and the court denied the motion following arguments. In relevant part, the court found that defendant "did not have any smooth pursuit" on the HGN test but that test merely shows that defendant consumed

alcohol – which he admitted – but not how much or whether he was impaired thereby. Following a sentencing hearing, the court sentenced defendant to two years of probation with 240 hours of community service and fines and fees. This appeal timely followed.

¶ 16 On appeal, defendant contends that counsel was ineffective for not challenging testimony regarding his HGN test. He also contends that the evidence was insufficient to convict him of DUI.

¶ 17 A defendant claiming ineffective assistance of counsel 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 alleged to be ineffective for failing to file a motion to suppress to exclude evidence, the defendant must show that the unraised challenge is meritorious and that a reasonable probability exists that the outcome of the trial would have been different had the evidence been excluded. *Id.*, ¶ 15.

¶ 18 Consumption of alcohol is a necessary precondition to impairment due to alcohol, so that any evidence of alcohol consumption is relevant to the issue of impairment. *People v. McKown*, 236 Ill. 2d 278, 302 (2010). "A failed HGN test is relevant to impairment in the same manner as the smell of alcohol on the subject's breath or the presence of empty or partially empty liquor containers in his car. Each of these facts is evidence of alcohol consumption and is properly admitted into evidence on the question of impairment." *Id.* at 302-03. Our supreme court has concluded that HGN testing is generally accepted in the relevant scientific fields so that HGN test results are admissible to prove that a defendant may have consumed alcohol and may be impaired as a result of that consumption. *Id.* at 303. A properly-trained officer who performed the HGN test in accordance with the National Highway Transportation Safety Protocol (NHTSP) may give

expert testimony regarding the results of the test. *Id.* at 306. 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. *Id.* at 311; *People v. Morris*, 2014 IL App (1st) 130512, ¶¶ 34-35; *People v. Borys*, 2013 IL App (1st) 111629, ¶¶ 40-42. A trier of fact may rely on the observations of a trained police officer in making a judgment about a defendant's intoxication or impairment, so that scientific proof is unnecessary where an officer provides credible testimony such as the defendant's breath smelling of alcohol and his eyes being bloodshot. *Morris*, ¶¶ 20, 35.

¶ 19 When we consider the claim of insufficiency of the evidence, we must determine whether, taking 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. *In re Q.P.*, 2015 IL 118569, ¶ 24. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence, and the trier of fact is better equipped than this court to do so because it heard the evidence. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We do not retry the defendant – we do not substitute our judgment for that of the trier of fact on the weight of the evidence or credibility of witnesses – and we accept all reasonable inferences from the record in favor of the State. *Q.P.*, ¶ 24. 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. *Jonathon C.B.*, ¶ 60. 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, nor to find a witness was not credible merely because the defendant says so. *Id.* A conviction will be

reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *Q.P.*, ¶ 24.

¶ 20 Here, we need not determine whether counsel acted unreasonably by not objecting to Officer Bubis's HGN testimony. We conclude that there was sufficient other evidence of defendant's guilt of DUI – of his impairment by consumption of alcohol – that defendant was not prejudiced by counsel not seeking to exclude the HGN evidence. First and foremost, the court stated twice that it considered defendant's HGN test results as mere corroboration of his admission to Officer Bubis that he consumed alcohol. Officer Bubis testified to defendant's glassy and red eyes and the strong odor of alcohol from his breath. Defendant failed the field sobriety tests other than finger dexterity, and the court found reason to doubt defendant's explanation of a right knee injury. The court's reasons included observations of and admissions by defendant, not merely the judge's personal experience. Despite being asked several times, defendant did not submit to breath testing, which is circumstantial evidence of his guilt as it shows consciousness of guilt. *Morris*, ¶¶ 20, 35; *Borys*, ¶ 42. While defendant argued that he did so because he wanted counsel present, Officer Bubis testified merely that defendant asked to contact counsel at an unspecified time while at the police station. A reasonable trier of fact could find defendant's driving impaired from the aforementioned evidence.

¶ 21 Accordingly, we find (i) the evidence sufficient to convict defendant of DUI, and (ii) a challenge to the HGN evidence was unlikely to have affected the outcome of the trial because of the other evidence of guilt, and therefore, we find no ineffective assistance by trial counsel.

¶ 22 Accordingly, the judgment of the circuit court is affirmed.

¶ 23 Affirmed.