FIRST DIVISION
September 11, 2017

No. 1-16-2514

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 11060
	)	
NESTOR DE LEON,	)	Honorable
	)	Neera Walsh,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MIKVA delivered the judgment of the court.
Justices Connors and Simon concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient for the trial court to conclude that defendant was the same person named in driving abstracts that were presented as proof of his prior DUI convictions. The State's alleged failure to lay an adequate foundation for a police officer's testimony about the horizontal gaze nystagmus (HGN) test did not amount to plain error.

¶ 2 Following a bench trial, defendant Nestor De Leon was convicted of aggravated driving under the influence (aggravated DUI) and sentenced to three years in prison. On appeal, Mr. De Leon contends the State failed to present sufficient evidence to establish his guilt because the names on the two driving abstracts introduced into evidence at his trial differ from his name as

stated in the charging document. Mr. De Leon also asserts the State did not lay a proper foundation for the admission into evidence of the results of a horizontal gaze nystagmus (HGN) test administered by a police officer at the site of his arrest. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Mr. De Leon was charged with four counts of aggravated DUI. Count 1 alleged that Mr. De Leon committed the offense of DUI and had three prior DUI violations (625 ILCS 5/11-501(a)(2), (d)(1)(A) (West 2012)), and Count 2 alleged that Mr. De Leon committed the offense of DUI and had two prior DUI violations (625 ILCS 5/11-501(a)(2), (d)(1)(A) (West 2012)). Counts 1 and 2 are Class 2 felonies. 625 ILCS 5/11-501(d)(2)(B), (C) (West 2012). Counts 3 and 4 alleged that Mr. De Leon committed the offense of DUI when his driving privileges were revoked (Count 3) or suspended (Count 4) (625 ILCS 5/11-501(a)(2), (d)(1)(G) (West 2012)). Counts 3 and 4 are Class 4 felonies. 625 ILCS 5/11-501(d)(2)(A) (West 2012).

¶ 5 At trial, Chicago police officer Brandon Joyce testified that at 9:55 p.m. on June 6, 2014, he and his partner saw a black Pontiac crash into a parked van on Western Avenue. Both officers walked to the Pontiac to see if the driver was hurt, and Mr. De Leon got out of the car as they approached. The Pontiac was damaged on the front passenger side.

¶ 6 Officer Joyce testified that he "observed there was some open alcohol in the front of the car on the center console. There were Modelo beer cans and I could smell alcohol on his breath." The cans were "in the front of the vehicle on the floorboard" and those cans were "not full." An open case of Modelo beer was in the back seat. Officer Joyce spoke to Mr. De Leon in English, and Mr. De Leon appeared to understand what was being said.

¶ 7 Chicago police officer Balcar testified she that responded to a call to assist at the scene and when she arrived, Mr. De Leon was seated on the curb. At least one air bag in the Pontiac

had deployed. After speaking with the other officers, Officer Balcar asked Mr. De Leon in English for his driver's license and proof of insurance. Mr. De Leon produced a temporary driver's license and responded to her in English.

¶ 8 Officer Balcar described Mr. De Leon as follows:

> "He had very bloodshot eyes, strong odor of alcoholic beverage emitting from his breath, slurred, mumbled speech. When he stood up, he was swaying in a circular motion. His pants were undone, all wet. And he staggered when he walked."

¶ 9 When asked if he had been drinking, Mr. De Leon told Officer Balcar in English that he had consumed three beers. Officer Balcar administered three field sobriety tests, starting with the HGN test. Regarding the HGN test, the officer testified as follows:

> "Q: Can you just briefly describe for us what the HGN test is?
>
> A. The horizontal gaze nystagmus test is when the individual would be standing there and they are instructed to keep their head straight. And I had a pen at the time. So what they would do is, they would look at the tip of the pen with their eyes. And then without moving their head, they would follow the pen as I went to my left and to my right as I was looking for smooth pursuit, horizontal -- you know, this nystagmus at maximum deviation, 45 degrees.
>
> Q. What does that mean, this nystagmus at maximum deviation?
>
> A. It's involuntary jerking of the eyes.
>
> Q. And when you performed that test or administered the test to the defendant, how did he perform on it?
>
> A. He had maximum deviation.
>
> Q. And what did that indicate to you?

A. That he consumed alcohol.

Q. Would you say that the defendant did not pass that test then?

A. Although it's not a pass or fail, it does indicate that the individual did drink quite some alcohol that evening."

¶ 10 Following the HGN test, Officer Balcar administered two additional tests to Mr. De Leon. In the one-legged stand test, Mr. De Leon was directed to stand with his arms at his sides and lift a foot off the ground six inches, maintaining that position for 30 seconds. According to Officer Balcar, Mr. De Leon swayed and placed his foot on the ground several times and "flailed his arms," almost falling backwards when she stopped the test. She described Mr. De Leon's performance on that test as "very poor."

¶ 11 In the walk-and-turn test, Mr. De Leon was told to stand with his left foot on a line and his right foot in front of his left foot. Mr. De Leon was instructed to take nine steps forward heel-to-toe, turn and perform the same task in returning to the starting point. Mr. De Leon did not keep his right foot in front of his left foot, did not touch the heel and toe of his feet to each other "on numerous occasions" and stepped off the line. Mr. De Leon also "flailed his arms" and "did incorrect numbers." Based on those tests and her observation of Mr. De Leon, Officer Balcar believed Mr. De Leon was under the influence of alcohol.

¶ 12 Officer Balcar testified that she saw three empty beer cans on the floor of the front passenger side of the car, and the rear seat contained a "24-pack of Modelo with 14 full cans remaining." Officer Balcar testified that after Mr. De Leon was arrested he refused to take a breath test or provide a blood or urine sample.

¶ 13 Chicago police officer Ramon Salcedo testified that he questioned Mr. De Leon at about 11:20 p.m. at the police station after giving him *Miranda* warnings in Spanish. Mr. De Leon said

he was drinking from 3 p.m. to 6:20 p.m. that day.

¶ 14 Different parts of the record spell Mr. De Leon's name "Nestor" and "Nester." For example, his name is spelled "Nester" in the notice of appeal and trial transcript, whereas it is spelled "Nestor" in the briefs and charging document. We have spelled Mr. De Leon's first name as it is spelled in the charging document and briefs.

¶ 15 The State introduced into evidence certified copies of two driving abstracts in the names of "Nester De Leon" and "Ernesto De Leon." Those abstracts both list "2-26-78" as the date of birth, but they list different addresses, different dates that the suspension of the driver's license went into effect, and different dates for conviction of prior DUI offenses. The abstract for Nester De Leon lists a driver's licenses number of D450-6207-8057-0. The abstract for Ernesto De Leon lists a driver's license number of D450-2007-8057-0. Neither abstract indicates the height, weight, or eye color of the driver. Defense counsel stated that there was "no objection" to the admission of these driving abstracts.

¶ 16 Mr. De Leon testified with the aid of a Spanish interpreter. The court reporter took down his full name as "Nester Daniel De Leon Rocos," but Mr. De Leon was not asked to spell his name for the record.

¶ 17 Mr. De Leon testified that he had a temporary driver's license. On the day of his arrest, Mr. De Leon worked as a mechanic in Broadview and finished work at 3 p.m., but "stayed behind to finish a job that was not part of the company." Mr. De Leon said the car that he drove that day belonged to his brother and that he did not purchase the Modelo beers. Mr. De Leon had one beer at 3:30 or 4 p.m.

¶ 18 Mr. De Leon testified that the accident occurred when he lost control of the car trying to avoid a pothole in the street. When he tried to get out of the car, he could not breathe due to dust

from the airbags that had deployed. He "felt dizzy" and was experiencing chest pain. His eyes were red because he "kept rubbing them."

¶ 19 When the two officers approached the car and asked Mr. De Leon in English if he was drunk, he told them he was not. Officer Balcar explained the field sobriety tests to him in English. Mr. De Leon swayed during the tests because he was dizzy and not feeling well. He told Officer Salcedo he was unable to take a breath test due to chest pain. Mr. De Leon testified that he had provided a urine sample.

¶ 20 Mr. De Leon testified that he had lived in the United States for 17 years but did not speak English other than "basic addresses, telephone numbers, names." He only understood "the basics" of what the officers said to him and tried to respond in English, but was in pain.

¶ 21 In its rebuttal case, the State introduced into evidence Mr. De Leon's 2008 conviction for aggravated DUI in case No. 08 CR 21071-01 to impeach Mr. De Leon's credibility as a witness. Mr. De Leon stipulated to this conviction.

¶ 22 The trial court found Mr. De Leon guilty of all four counts of aggravated DUI. The court stated that the officers testified credibly about their interactions with Mr. De Leon and that Mr. De Leon's version of events was not credible. The court noted Officer Balcar administered three tests that Mr. De Leon was not able to perform. Regarding the HGN test, the trial court noted Mr. De Leon "did not pass that one" and "had maximum deviation," which indicated that Mr. De Leon had consumed alcohol.

¶ 23 After trial, Mr. De Leon obtained new counsel who filed a motion for a new trial, asserting for the first time that the State failed to prove that Mr. De Leon had the two prior DUI violations necessary to convict him of aggravated DUI. Counsel argued that the two driving abstracts admitted into evidence bore different names, addresses, and driver's license numbers

from each other, and that they had not been shown to be related to Mr. De Leon. In addition, defense counsel asserted that the trial court erred in admitting evidence of the HGN test "without a proper foundation." Defense counsel contended that both of those omissions constituted plain error and reflected the ineffectiveness of trial counsel.

¶ 24 The trial court denied Mr. De Leon's motion for a new trial, stating that the prosecution had met its burden of proof. Proceeding to sentencing, the court reviewed Mr. De Leon's previous aggravated DUI convictions:

> "It does not appear that anybody is disputing the fact that under Case No. 08 CR 21071-01, [Mr. De Leon] had an aggravated DUI from January 9 of 2009 where he received probation and the probation was terminated satisfactorily. Then he also had another one, a traffic matter, that was in August 12 of 2009 that was—these are in reverse chronological order, 18 months conditional discharge and that too, was terminated satisfactorily. There was another one that was an aggravated DUI, a traffic one, that was in August 12 of 2002 where he received 18 months of supervision and that supervision was terminated satisfactorily."

¶ 25 The trial court sentenced Mr. De Leon to three years in prison on Count 2, which charged him with committing the offense of DUI having had two prior DUI violations. The court merged the remaining counts into Count 2.

¶ 26 JURISDICTION

¶ 27 Mr. De Leon was sentenced on August 22, 2016, and timely filed a notice of appeal on August 23, 2016. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case (Ill. S. Ct. Rs. 603,

606 (eff. Feb. 6, 2013)).

¶ 28 ANALYSIS

¶ 29 A. Sufficiency of the Evidence

¶ 30 On appeal, Mr. De Leon first contends that the State failed to prove the prior DUI convictions necessary to find him guilty of aggravated DUI. Mr. De Leon was convicted on Count 2, which required proof that he had two previous DUI convictions. 625 ILCS 5/11-501(a)(2), (d)(1)(A) (West 2012). He asserts that the driving abstracts admitted into evidence bore two names that both differed from his name as stated in the charging instrument.

¶ 31 When considering a challenge to a criminal conviction based on the sufficiency of the evidence, a reviewing court must determine whether, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the required elements of the crime beyond a reasonable doubt. *People v. Bradford*, 2016 IL 118674, ¶ 12. On appeal from a criminal conviction, we will not reverse the trial court's judgment unless the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Id*.

¶ 32 As proof of Mr. De Leon's prior DUI violations, the State presented certified copies of two driving abstracts—one for "Nester De Leon" and one for "Ernesto De Leon." Those two abstracts both list "2-26-78" as the subject's date of birth. The arrest report lists Mr. De Leon's date of birth as February 26, 1979. The two abstracts list different addresses, different dates that suspension of the driver's license went into effect, and different dates for conviction of prior DUI offenses. The abstract for Nester De Leon lists a driver's licenses number of D450-6207-8057-0. The abstract for Ernesto De Leon lists a driver's license number of D450-2007-8057-0. Neither abstract contains the height, weight, or eye color of the driver.

¶ 33 A certified copy of the abstract of a motorist's driver's license is *prima facie* evidence of the facts stated therein. 625 ILCS 5/2-123(g)(6) (West 2012). Our statute provides:

> "[I]f the name appearing in such abstract is the same as that of a person named in an information or warrant, such abstract shall be *prima facie* evidence that the person named in such information or warrant is the same person as the person named in such abstract and shall be admissible for any prosecution under this code and be admitted as proof of any prior conviction or proof of records, notices, or orders recorded on individual driving records maintained by the Secretary of State." *Id.*

¶ 34 Once an abstract is presented by the State, a defendant may present evidence to rebut it; however, when that is not done, the contents of the abstract are deemed to be accurate. *People v. Meadows*, 371 Ill. App. 3d 259, 263 (2007). Here, although Mr. De Leon now challenges whether the abstracts presented at trial reflected his driving record, defense counsel presented no evidence to the trial court to suggest that these abstracts were not about him and made no objection to their admission at trial.

¶ 35 In *People v. Coleman*, 409 Ill. App. 3d 869, 875 (2011), we rejected the defendant's argument that the State could not rely on a certified conviction where the name on the document was "not identical" to the defendant's spelling of his first name. There, the State needed to prove the prior conviction to show that the defendant was an armed habitual criminal. *Id.* at 874-75. We held that, because the defendant did not object to the document or put on any evidence or argument that he did not commit the prior crimes, the variance was not "sufficient to defeat the initial presumption of identity and defendant did not present any evidence to the trial court to rebut the presumption." *Id.* at 876.

¶ 36 We find the facts of this case are comparable to those in *Coleman*. Here, Mr. De Leon was charged under the name "Nest*o*r De Leon" and that spelling is used in the parties' briefs to this court. The name of "Nest*e*r De Leon" is listed on the notice of appeal and in the trial transcripts. It appears that the parties and Mr. De Leon used these two spellings interchangeably. On the driving abstracts, Ernesto De Leon has the same date of birth as Nester De Leon. Ten of the twelve numbers on the driver's licenses listed on the two driving abstracts are identical. The convictions and suspensions listed as well as the addresses are different which, of course, makes sense since they cover different time periods.

¶ 37 Mr. De Leon claims that *Coleman* is different because it was about the common law rule that allows proof of a prior conviction to be shown by a certified record and not about the statute regarding proof through a driving abstract. However, as the court recognized in *Coleman*, the issue before it was the same issue that was before the trial court here—whether the difference in the first name between the driving abstracts meant that "the certified copies for both convictions did not contain sufficient identifying information to prove they were [the] defendant's convictions." *Coleman*, 409 Ill. App. 3d at 875.

¶ 38 Mr. De Leon points us to *People v. Moton*, 277 Ill. App. 3d 1010, 1011 (1996), in which the defendant—William Moton—had been convicted of unlawful use of a weapon by a felon based on a prior conviction from Tennessee that the State proved by introducing a certified copy of a felony conviction for "William B. Morton." This court held that the proof of the defendant's prior conviction was insufficient because the only "evidence" that the defendant, William Moton, was also "William B. Morton" was that the indictment was amended, after the certified copy of the conviction had been obtained, to include William B. Morton as one of defendant's aliases. *Id.* As we recognized in *Moton*, the indictment was not evidence and could not be used to make the

necessary proof that the prior conviction was the defendant's. *Id.* at 1012-13.

¶ 39 However, neither the trial court in *Coleman* nor the trial court here relied on an indictment as evidence. Instead, both trial courts concluded that the slight variance between the name of the defendant on the charging document and the name on the documents that the State put into evidence, with no objection by the defendant, were not "sufficient to defeat the initial presumption of identity." *Coleman*, 409 Ill. App. 3d at 876. It is this factual finding—that the presumption that the prior conviction was of the defendant was not defeated—that the court in *Coleman* and we in this case find is sufficiently supported by the trial record.

¶ 40 The *Coleman* court also looked at the defendant's criminal history report, although it recognized that this report was not a part of the substantive evidence that the State relied on in obtaining the conviction. *Id.* at 876. Here, Ernesto De Leon, Nestor D. De Leon, and Nester De Leon are all listed as aliases for Mr. De Leon in his criminal history report. The criminal history report also indicates that the "Date of Birth Used" for Nester and Ernesto was February 26, 1978, and for Nestor was February 26, 1979. We agree with Mr. De Leon that we may not consider this report in our assessment of whether the evidence of guilt was sufficient. But the criminal history report was before the court at the time that Mr. De Leon first raised any objection to consideration of the driving abstracts, and we simply note that the criminal history report confirms that Mr. De Leon went by Ernesto, Nestor, and Nester.

¶ 41 Even without the criminal history report, after reviewing the evidence before us in the light most favorable to the State, which we are required to do, we find that the trial court could have properly found that Mr. De Leon was the person named in the driving abstracts and could have relied on those to find Mr. De Leon guilty of aggravated DUI.

¶ 42 B. Proper Foundation for HGN Test

¶ 43 Mr. De Leon next argues that the trial court improperly admitted evidence that he was administered an HGN test that indicated alcohol consumption without a proper foundation for that testimony. Because Mr. De Leon did not object to this testimony, we can consider this argument on appeal only if the admission of this evidence rises to the level of "plain error." *People v. Rinehart*, 2012 IL 111719, ¶¶ 14-15.

¶ 44 Under the "plain error" doctrine, this claim can be addressed only where a clear or obvious error has occurred and either (1) the evidence is so closely balanced that the error alone could have affected the outcome of the case or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Hood*, 2016 IL 118581, ¶ 18. The defendant bears the burden of persuasion to show both that an error has occurred and that the evidence was closely balanced or the error affected the fairness of his trial. *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010).

¶ 45 To lay a proper foundation for the admission of the results of HGN testing, the State must demonstrate that (1) the officer who administered the test was trained in the procedure, and (2) the test was properly administered. *People v. McKown*, 236 Ill. 2d 278, 306 (2010); *People v. Motzko*, 2017 IL App (3d) 160154, ¶ 21. Mr. De Leon contends that Officer Balcar's testimony did not establish that the HGN test was administered under National Highway Traffic Safety Administration standards.

¶ 46 Mr. De Leon argues that the evidence was so closely balanced that the HGN evidence could have affected the outcome in his case because the State offered no other scientific evidence that he had consumed alcohol, such as the result of a breath, blood, or urine test, and the trial

court expressly relied on his performance on that test to conclude he was impaired. Mr. De Leon does not persist in his trial testimony that he took a urine test. Instead, he argues that he was "not administered a breath, blood, or urine test." Mr. De Leon argues that his demeanor and performance on the other tests can be attributed to his having just been in a car accident.

¶ 47 On appeal, the State does not contest Mr. De Leon's argument that it failed to lay a complete foundation for the HGN test, but contends that the evidence in this case was not closely balanced and the remaining evidence was more than sufficient to establish Mr. De Leon's intoxication beyond a reasonable doubt. We agree with the State that, even accepting that there was an inadequate foundation for the evidence regarding the HGN test, Mr. De Leon cannot demonstrate that the admission of this evidence affected the outcome of his case.

¶ 48 Although Mr. De Leon contends that the prosecution needed to provide some "objective" evidence of his impairment, the State is not required to present scientific or chemical evidence of Mr. De Leon's intoxication in the form of a breathalyzer or blood test; the credible testimony of the arresting officer "may be sufficient to prove the offense." *People v. Diaz*, 377 Ill. App. 3d 339, 344-45 (2007) (citing *People v. Janik*, 127 Ill. 2d 390, 402 (1989)). Here, the officers observed Mr. De Leon's car crash into a parked van. Officer Joyce testified that Mr. De Leon had an odor of alcohol on his breath; he also saw open alcohol on the center console and empty cans in the front of the car on the floor. Officer Balcar testified that Mr. De Leon had "very bloodshot eyes" and was slurring and mumbling his words. She also stated that Mr. De Leon was swaying and staggering and his pants were "undone" and "all wet." In addition, after the HGN test, Officer Balcar administered the one-legged stand test and the walk-and-turn test, both of which the officer reported that Mr. De Leon had not completed correctly. Officer Balcar testified that Mr. De Leon refused the urine test. The trial court, as the finder of fact in this bench trial,

could consider all of these observations in determining that Mr. De Leon was impaired. See *Morris*, 2014 IL App (1st) 130512, ¶ 20; *People v. Robinson*, 368 Ill. App. 3d 963, 983 (2006) (a defendant's appearance, speech and conduct are factors in impairment). While Mr. De Leon offered a different explanation, the trial court found the police officers to be credible and Mr. De Leon not to be credible. Thus, even excluding the HGN testimony, the remaining evidence was not so closely balanced that we can conclude that the evidence of the HGN test impacted the outcome of this issue.

¶ 49 In summary, the evidence was sufficient to support the trial court's finding that the driving abstracts reflected Mr. De Leon's prior DUIs and, even if there was an absence of foundation for the HGN test, the evidence was not so closely balanced that admission of this evidence rises to the level of plain error.

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 52 Affirmed.