2017 IL App (2d) 140903-U
No. 2-14-0903
Order filed September 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAIME GARCIA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 12-DT-810 Honorable Alexander McGimpsey III, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

¶ 1 *Held*: The trial court did not abuse its discretion when it sustained the State's objection to Officer Roe's opinion testimony or when it admitted accuracy checks of the State's breathalyzer machine into evidence. In addition, the evidence was sufficient to support the verdict. Therefore, we affirmed.

¶ 2 Defendant, Jaime Garcia, was convicted of driving with an alcohol concentration in his blood or breath of .08 or more (625 ILCS 5/11-501(a)(1) (West 2012)). On appeal, he challenges the trial court's exclusion of Officer Charter Roe's opinion testimony that, at the time defendant was operating his vehicle, his blood alcohol concentration was rising. He also challenges the court's admission as public records of computer-generated copies of accuracy checks performed on the State's breathalyzer machine. Finally, he challenges the sufficiency of

the evidence. For the reasons set forth herein, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Pre-Trial

¶ 5 On March 11, 2012, defendant was arrested and charged with the following four counts: count 1, driving with an alcohol concentration in the his blood or breath[1] greater than .08 (625 ILCS 5/11-501(a)(1) (West 2012)); count 2, driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2012)); count 3, endangering the health of a child (720 ILCS 5/12-21.6 (West 2012))[2]; and count 4, failure to signal (625 ILCS 5/11-804(a) (West 2012)).

¶ 6 On February 24, 2014, the State filed a notice of intent to introduce automatic accuracy certifications ("accuracy checks") for the breathalyzer machine used to test defendant as business records pursuant to Illinois Rule of Evidence 902(11) (eff. Jan 1, 2011). It also filed two motions *in limine*: one to admit the accuracy checks of EC/IR II serial No. 08417 as business records; and a second to admit the same as public records. Defendant objected to the State's motions.

¶ 7 Following a hearing, the court denied the State's first motion for admission of the accuracy checks as a business record. The court explained that the State's Rule 902(11) certification was "lacking" and that the rule was "very specific" in that it required that the certification contain a written declaration under oath subject to penalty of perjury. Here, the certification failed to make such a declaration.

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[1] Throughout this disposition, we will refer to the alcohol concentration in a person's blood or breath as either "alcohol concentration" or "BAC."

[2] Currently 720 ILCS 5/12C-5 (West 2016), as amended by Pub. Act 97-1109 § 1-5 (eff. Jan. 1, 2013).

¶ 8 The court granted the State's second motion to admit the accuracy checks as a public record. The court was persuaded by the State's case law that the accuracy checks met the public record exception to hearsay.

¶ 9 B. Trial

¶ 10 The case proceeded to a bench trial on April 28, 2014. The State sought to admit People's Exhibit 1, which included a computer-generated copy of the same accuracy checks the court addressed in the State's motion *in limine*. The copy was generated on September 24, 2012, and it contained data from two tests of the EC/IR II Serial Number 008417 machine, performed on March 7, 2012, and April 1, 2012. Exhibit 1 also included a certification dated December 3, 2013, signed by the keeper of records, Nancy Easum, of the Alcohol and Substance Testing Section of the Illinois State Police Academy. The certification bore the seal of the Illinois State Police and provided that the accuracy checks were made at or near the time of the occurrence of the matters set forth; were kept in the course of regularly conducted activity; and were made by the regularly conducted activity as a regular practice.

¶ 11 Defense counsel objected and incorporated his arguments made at the motion *in limine*. Defense counsel added that the accuracy checks were generated on September 24, 2012, which was not contemporaneous with the tests performed in March and April 2012; the documents lacked trustworthiness and required a witness to testify to their veracity; and the documents were "gerrymandered" in anticipation of use in litigation. With respect to trustworthiness, defense counsel argued that the accuracy checks in People's Exhibit 1 showed only one test, but the logbook (People's Exhibit 4) showed "three different things going on on March 7th with the same inspector." Therefore, he argued that the accuracy checks were "cherry picked" to select only one of three tests.

¶ 12 The court first rejected defense counsel's contemporaneous creation argument, explaining that it was not always a requirement that a public document, especially in light of computer generated print-outs, be created contemporaneously with the event. In light of the circumstances of the case, the court found that the print-out date on the report did not invalidate the record under the public record's exception.

¶ 13 The court then turned to the argument that the documents were untrustworthy. The court explained that, to attack the trustworthiness of these exhibits, the source of the information had to demonstrate a lack of trustworthiness. It rejected the argument that simply because some information may be missing, the source of the information presented was necessarily untrustworthy. Ultimately, incompleteness went to the weight of the evidence, not the admissibility. The court's conclusion was "buttressed by the case law," and it found People's Exhibit 1 admissible under Rule 803 (Ill. R. Evid. 803 (eff. April 26, 2012)) as a public record.

¶ 14 Defense counsel thereafter tendered a new argument that the public record exception under Rule 803 excluded matters observed by police officers and other law enforcement personnel. He argued that here, the certification was performed by law enforcement personnel and therefore the Rule 803 public records exception did not apply. The State responded that the phrase in Rule 803, excluding matters observed by law enforcement, did not apply to the accuracy checks. The court again rejected defense counsel's argument, explaining that the case law was still applicable and that the exception under Rule 803—an exception recognized prior to the codification of Rule 803—more specifically excluded matters observed by police officers at crimes or events that led to crime. The court agreed that police reports would not be admissible as public records, before or after the adoption of Rule 803, but it found the accuracy checks

differed from police reports. Accordingly, the court admitted People's Exhibit 1 as a public record.

¶ 15 The State first called Charters Roe, a police officer for the Village of Carol Stream. He testified as follows. He was assigned to patrol between 1:00 and 2:00 a.m. on March 11. He observed defendant driving a vehicle around 1:59 a.m. Defendant was stopped at a red light, driving westbound on North Avenue. Defendant looked at Roe, and when the light changed to green, defendant did not accelerate for a few seconds—he was still looking at Roe. After defendant proceeded through the intersection, Roe followed him. Defendant's vehicle "began to drift." Defendant was driving in the center lane, but Roe observed him cross the lane lines to his left and his right without using a turn signal.

¶ 16 Roe initiated a traffic stop, and defendant pulled over to a gas station on his right. He noticed that defendant's eyes were "red and watery," and he "could smell a strong odor of an alcohol-based beverage coming from inside the car." Defendant's wife and three children were also in the vehicle.

¶ 17 Roe requested that defendant participate in field sobriety tests. He was qualified to administer the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-leg-stand test, and he had administered these tests over 100 times. While administering the HGN test, Roe again observed that defendant's eyes were red and watery and his breath smelled of alcohol. Defendant's speech was also slurred. Next, Roe administered the walk-and-turn test, instructing defendant to take nine "heel to toe steps down the line," then turn and do another nine steps back, while keeping his arms at his sides and looking at his feet. Defendant failed the test; he could not keep his balance while listening to instructions, he took the wrong number of steps,

and he turned incorrectly. After he failed this test, Roe asked him to perform the one-leg-stand test. Defendant refused the test and instead requested a breath test.

¶ 18 Roe placed defendant under arrest shortly after 3 a.m. and transported him back to the police station.[3] They arrived at the station around 3:20 a.m., and defendant was placed on a 20 minute observation period beginning at 3:23 a.m. Roe stayed with defendant the entire 20 minutes. Defendant continued to slur his speech, and Roe continued to observe that his eyes were red and watery and his breath smelled of alcohol. Defendant did not leave the room, and he did not vomit, smoke, or eat.

¶ 19 At the conclusion of defendant's 20 minute observation period, Roe took defendant to the room with the breathalyzer machine. Roe identified People's Exhibit 2 as his State of Illinois breath operator's certification and license. His certification was issued on April 6, 2011, and it did not expire until April 6, 2014. As of March 11, 2012, he had administered 5 to 20 breath tests. The breathalyzer he used for defendant was an EC/IR II, serial no. 008417. That model was approved by the Illinois State Police rules and regulations as an instrument to collect breathalyzer samples.

¶ 20 Defendant agreed to blow into the breathalyzer machine. Before the defendant used the machine, the machine performed a "self check," which was "basically a self a [*sic*] calibration to make sure everything is working correctly." The check indicated no problems with the machine—if there had been a problem, an error message would have displayed. Roe retrieved a

[3] Roe explained the gap in time between pulling defendant over and his arrest was due to the beginning of daylight saving time.

sterile mouth piece and asked defendant to blow into the machine. Defendant blew continuously into the machine, and Roe did not observe any error malfunction messages.

¶ 21 Defense counsel objected to foundation when the State asked Roe for the result of the test. Defense counsel argued that the State had not proven that the breathalyzer machine was tested and found accurate within applicable rules and regulations. In particular, he argued that the machine was not found accurate pursuant to administrative rule 1286.220(b) (20 Ill. Adm. Code 1286.220(b) (2011)), because the accuracy check in People's Exhibit 1 did not establish whether the reference sample check in the accuracy certification was within 10 percent of the reference sample's value. The court overruled the objection, finding that defense counsel's argument went more toward weight of the evidence, not admissibility. The court explained that the accuracy certifications submitted by the State showed that the machine checks were a success before and after defendant's test, and "given the figures associated with each test and the descriptions and the fact that there is a test status of success on each of them," the accuracy certifications met foundational standards for admissibility.

¶ 22 Roe continued that defendant's result from the breathalyzer machine was a .12. He identified People's Exhibit 3, a copy of defendant's breath ticket print-out (the "breath ticket"). The breath ticket indicated that the breath test took place at 3:48 a.m. He also identified People's Exhibit 4, which was a page from the logbook for the EC/IR II breathalyzer machine that he used to test defendant. Defense counsel objected that the logbook was irrelevant and cumulative, and the court overruled the objection. Roe identified the logbook entry he made for defendant from March 11, 2012, that showed his breath test result of .12. He also identified three lines in the logbook related to the March 7 breathalyzer accuracy checks. Defense counsel objected to

foundation, because Roe was not present when these entries were made, and the court overruled the objection. The logbook was admitted as a business record.

¶ 23 Roe opined that defendant was under the influence of alcohol that night. He had observed a person under the influence of alcohol "over 1,000" times, and he formed his opinion based on the condition of defendant's eyes, the smell coming off his breath, his driving, and his performance on the field sobriety tests. Roe also identified People's Exhibit 5, a video recording of defendant taking the breath test.

¶ 24 On cross-examination, Roe testified that when he stopped defendant on March 11, he gave him a portable preliminary breath test. The result of defendant's preliminary breath test was .107, which was lower than the .12 result at the station.

¶ 25 Defense counsel asked for Roe's opinion of whether defendant's alcohol concentration was rising, based on the two breath tests. The State objected as to foundation of Roe as an expert, and the court sustained the objection. The court explained that to describe whether defendant's alcohol concentration was rising or falling required an expert opinion, and there was insufficient foundation for Roe's expertise in the area of toxicology.

¶ 26 The court gave defense counsel "the last word," and counsel responded that circumstantial evidence was sufficient to prove driving under the influence, and that the State was not required to produce an expert in toxicology to establish that defendant, who registered a .12 BAC at the time he used the breathalyzer machine, had at least a .08 BAC at the time he was driving. Therefore, he should not need a toxicologist to suggest a different conclusion based on the circumstantial evidence. The court countered that defense counsel was trying to do more—he was asking the witness for his opinion based on the circumstantial evidence. The court continued that this was "beyond the ken of this witness ***. I haven't heard any testimony that

he's an expert in that field of rising, falling, fluctuating, altering." Counsel was free to propound another test result, but the court was sustaining the objection to Roe's opinion on defendant's BAC rising.

¶ 27 Defense counsel then sought to lay the foundation for Roe as an expert to offer his opinion that defendant's BAC was rising. Counsel asked Roe about his training and experience with DUI arrests, and he confirmed that he was licensed and trained to be a breath operator. His training encompassed operating breath test instruments, the physiology and pharmacology of alcohol in the human body, and theories of breath testing. Roe agreed that the body does not absorb alcohol immediately and that a person's alcohol concentration depends on how much and how fast a person consumes alcohol. Alcohol absorption was a process. He agreed that the more alcohol someone drinks, the higher their alcohol concentration rises; and the shorter the timeframe someone drinks the alcohol, the quicker their alcohol concentration rises. He could not say whether the absorption rate of alcohol was affected by how much food was in a person's stomach. He agreed that, in general, you could learn whether someone's alcohol concentration was increasing or decreasing based on two breath tests over a period of time.

¶ 28 The State made the same objection that Roe was not an expert in toxicology or qualified to speak about alcohol absorption rates. The court sustained the objection, explaining that Roe was not "an expert in this area of extrapolation or toxicology." Furthermore, there was "very little information presented, in any event, so for those reason [*sic*] I'll sustain the objection."

¶ 29 Roe did not know what defendant's BAC was when he was last operating his vehicle. During the traffic stop, defendant told him he was swerving because he was having an argument with his wife. He also told him he had had two beers at the Brunswick Zone in Glendale Heights.

¶ 30 The State next called Catherine Garcia, defendant's wife, and she testified as follows. She was in the passenger seat of defendant's car when he was pulled over on the morning of March 11, 2012. Her three sons were also in the car at the time, and they had all gone to a bowling alley that night. After her testimony, the State rested. Defendant moved for a directed verdict, and the court denied the motion.

¶ 31 The defense also called Catherine Garcia, and she testified in the defense's case-in-chief as follows. She was with defendant at Stardust Bowling in Addison that night, and he did not go to a bowling alley in Glendale Heights. They went to the bowling alley around 10 or 11 p.m. on March 10 and left near closing time, around 1 a.m. She disagreed with the police report stating that defendant was pulled over at 1:59 a.m., because she recollected that they were pulled over 20 to 25 minutes after leaving the bowling alley. She spoke with defendant in the car after leaving the bowling alley, and his speech was not slurred or impaired. If defendant had been intoxicated she "would have never allowed [him] to get behind the wheel knowing that [her] children were there in the vehicle." Her opinion was that defendant was not under the influence of alcohol at the time.

¶ 32 On cross-examination, Catherine testified that the bowling alley served alcohol and that she was not with defendant the whole time they were there. She did not observe defendant consume alcohol. On their way home, defendant became confrontational—they "were having a verbal argument." He was upset that she wanted to go home. When asked if defendant was weaving in his lane that night, she responded that it was "very windy." She also claimed that the car had an issue with alignment, affecting its ability to drive straight. She denied that she told an officer on the scene of defendant's arrest that defendant drank too much at the bowling alley. After her testimony, the defense rested.

¶ 33 The State called Officer Jeremy Kalinowicz in rebuttal, and he testified as follows. He was employed as a police officer for the Village of Carol Stream and was at the scene of defendant's traffic stop on March 11, 2012, in response to Officer Roe's call for backup. While Roe performed field tests, he stayed with the vehicle and spoke with Catherine. She told him that they were at the bowling alley in Glendale Heights and that defendant drank too much and was confrontational.

¶ 34 On April 30, 2014, the court found defendant guilty of count 1, driving with a blood-alcohol concentration of .08 or more (625 ILCS 5/11-501(a)(1) (West 2012)). It found defendant not guilty of the remaining three counts. In reaching its verdict, the court cited the breathalyzer test result of .12 at the police station, which it noted was 50 percent greater than the .08 limit. The .12 result was also close in time, within an hour of the traffic stop. It continued that the breath tests, while not fool proof, were generally valid under the law. Further, the .12 result was bolstered by the preliminary breath test, which was conducted even closer in time to the traffic stop. The preliminary breath test also showed a result greater than .08. There was no evidence to suggest that defendant's BAC was less than .08 while he was driving, and defendant's attempts to introduce expert opinion testimony regarding a rising alcohol concentration were properly excluded due to a lack of foundation. "[T]he bottom line is there are two tests that have been presented into evidence *** that are exceeding of [*sic*] the .08 legal limit ***. And I find that those—the evidence presented regarding those tests and the other evidence in the case *** corroborate that breath alcohol content result."

¶ 35 C. Posttrial

¶ 36 Defendant filed a posttrial motion for judgment notwithstanding the verdict and/or a new trial. In his motion, defendant argued that the court erred by: considering the breathalyzer test

result because the State did not establish that the machine was accurate under applicable rules and regulations; admitting computer records and logbooks of accuracy checks of the breathalyzer machine prior to defendant's breath test; denying defendant his right to confront the evidence and witnesses concerning knowledge of the accuracy of the breathalyzer machine; interpreting the accuracy result of "success" in the absence of sufficient evidence; and excluding Roe's testimony regarding the change in defendant's BAC over time.

¶ 37 The court heard defendant's motion on July 7, 2014, and the State objected that the motion was untimely. The court expressed skepticism that the motion was timely, as the motion was not filed within 30 days of the verdict. Defense counsel argued that he had 30 days from sentencing.

¶ 38 Ultimately, the court addressed the motion. First, it addressed disallowing Roe's opinion testimony, explaining that "in this Court's mind that officer is not qualified ***. Maybe he could have been, but he was not qualified as an expert in the field of toxicology." Next, the accuracy check records were admissible. The court explained that the accuracy checks came from a computer system, which created the record at the time of the certification tests. The computer records were also monitored by a person with authority and knowledge of the tests.

¶ 39 As to the contents of the accuracy checks and the meaning of "success," the court found that the figures in the documents were "self evident and obvious." Moreover, "[t]he word success isn't the only thing the Court relied upon." The court also relied upon the actual figures that showed the accuracy certification results were within 10 percent of the reference sample. The court believed that these documents met all the foundational requirements under Rules 902 and 803. The documents were clear concerning when the accuracy checks took place and when they were retrieved. The documents clearly fell under the public records exception: they had an

Illinois State Police seal; they were labeled "certification"; and they were sworn to. Finally, the court did not believe that any of these documents were testimonial in nature and therefore was not persuaded that defendant's right to confront witnesses was violated. Accordingly, the court denied defendant's motion.

¶ 40 On August 29, 2014, the court sentenced defendant to two years' probation.

¶ 41 Defendant timely appealed.

¶ 42 II. ANALYSIS

¶ 43 Defendant makes three primary contentions on appeal: (1) the court erred when it barred Roe's opinion testimony regarding defendant's rising BAC level; (2) the court erred in admitting the accuracy testing of the breathalyzer machine as a public record and a business record; and (3) in light of these errors, the evidence was insufficient to prove beyond a reasonable doubt that defendant was driving with a BAC of .08 or greater. We address each argument in turn.

¶ 44 A. Roe's Opinion Testimony

¶ 45 Defendant first argues that the court erred in refusing to allow Roe to opine on defendant's BAC, because he was not qualified as an expert in toxicology. Defendant contends that he was seeking to establish reasonable doubt in that his BAC was below .08 while driving, and the court erred in barring Roe's opinion that the defendant's BAC was rising at the time he tested defendant's BAC. In particular, defendant argues that the court erred when it found that Roe's training and certifications were insufficient, despite Roe testifying to defendant's two breath tests—the preliminary test resulting in a .107 and the subsequent test a .12. Defendant continues that the State only had to prove defendant had a .08 or higher BAC while driving with circumstantial evidence, and the court effectively held the defense to a higher standard by not allowing Roe's opinion testimony. Defendant contends that it was hypocritical to permit Roe to

testify to the results of defendant's breath tests but at the same time exclude his opinion that defendant's BAC was lower while driving because he was not an expert in toxicology. He argues that he has a constitutional right to present evidence, even if technically inadmissible under the rules of evidence. See *Chambers v. Mississippi*, 410 U.S. 284, 289-99 (1973); *People v. Tenney*, 205 Ill. 2d 411, 433 (2002). Defendant argues that the result was the denial of a fair trial.

¶ 46 Defendant cites *People v. Floyd*, 2014 IL App (2d) 120507, ¶ 26, where this court explained that the State could show that a defendant was in the "elimination phase" by conducting additional breath or blood tests. In articulating its position, *Floyd* relied on a Texas appellate court decision that provided:

> " 'If the State had more than one test, each test a reasonable length of time apart, and the first test [was] conducted within a reasonable time from the time of the offense, an expert could potentially create a reliable estimate of the defendant's BAC with limited knowledge of personal characteristics and behaviors.' " *Id.* (quoting *Mata v. State*, 46 S.W.3d 902, 916 (Tex. Crim. App. 2001)).

Defendant contends that he was simply attempting to establish reasonable doubt that his BAC was above .08 while he was driving. He did not need to establish the actual BAC level, and Roe's opinion testimony was admissible under Rule 702 (Ill. R. Evid. (eff. Jan. 1, 2011)).

¶ 47 The State responds as follows. First, this court has previously addressed the requirements for a retrograde extrapolation in *Floyd*, which adopted the reasoning in *State v. Eighth Judicial District Court* (*Armstrong*), 267 P.3d 777 (Nev. 2011). *Floyd*, 2014 IL App (2d) 120507, ¶ 20. The factors necessary for a retrograde extrapolation of BAC included a subject's:

> "(1) gender; (2) weight; (3) age; (4) height; (5) mental state; (6) the type and amount of food in the stomach; (7) the type and amount of alcohol consumed; (8) the time the last alcohol drink was consumed; (9) the subject's drinking pattern at the relevant time; (10) the elapsed time between the first drink and the last drink consumed; (11) the elapsed time between the last drink and the blood draws; (12) the number of samples taken; (13) the elapsed time between the offense and the blood draws; (14) the average alcohol absorption rate; and (15) the average elimination rate." *Id.* ¶ 17 (citing *Armstrong*, 267 P.3d at 783).

In *Floyd*, the witness was accepted as an expert in forensic toxicology, but the trial court erred in admitting his opinion because he did not have enough factors to properly perform a reliable retrograde extrapolation of the defendant's breath alcohol concentration. *Id.* ¶¶ 9, 27. Importantly, the expert did not know what the defendant had eaten, how long she had been drinking, or what type of alcohol she had consumed, and he had only one breath test result to consider. *Id.* ¶¶ 11, 27.

¶ 48 The State continues that unlike the toxicologist in *Floyd*, Roe was not qualified to give an expert opinion in toxicology or retrograde extrapolation. The State argues that Roe did not testify to having formal training or degrees in toxicology, nor did he testify to the specifics of a retrograde extrapolation of BAC. He did not testify to essential information about defendant, including his height, weight, or mental state, or to his consumption of food or alcohol. Further, Roe's opinion would have been based on only the two breath tests, and defense counsel advanced no principle or methodology that Roe would rely on. Accordingly, the State argues that the trial court's decision to exclude his opinion testimony was not an abuse of discretion.

¶ 49 In addition, the State argues that defendant was not denied a fair trial. The State cites case law supporting that it may present breathalyzer testing as evidence to prove blood-alcohol concentration. *People v. Borst*, 162 Ill. App. 3d 830, 836 (1987). It argues that the time between the stop and the testing goes to the weight of the test results, and the tests must be viewed in the light of the circumstances surrounding the arrest. *Id.* Here, the State argues that defendant had the opportunity to challenge the tests results during cross-examination. Moreover, defendant was not denied the opportunity to present relevant evidence related to his BAC. In fact, the State stresses that the court allowed him to introduce the result of the preliminary breath test taken within 13 minutes of the traffic stop. Defendant was free to argue that the preliminary breath test (.107) was lower than the result he blew at the police station (.12), and the court specifically invited this argument. Nevertheless, the State contends that the preliminary breath test was itself additional evidence that defendant's BAC was greater than .08 at the time he was driving his vehicle. The only evidence defendant was not allowed to admit was Roe's opinion testimony that called for an expert opinion in the field of toxicology—specifically, a retrograde extrapolation of defendant's BAC at the time of driving.

¶ 50 We agree with the State and hold that the trial court did not abuse its discretion in sustaining the objection to Roe's opinion testimony that defendant's BAC was rising. Trial courts have broad discretion to admit evidence, and we will not reverse absent an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). A party seeking to call an expert witness must lay a foundation sufficient to establish that the basis for the opinion is reliable. *Turner v. Williams*, 326 Ill. App. 3d 541, 552-53 (2001); see *People v. Enis*, 139 Ill. 2d 264, 290 (1991) ("A trial judge is given broad discretion when determining the admissibly of an expert witness."). "Expert opinion testimony is admissible if the expert is qualified by knowledge, skill,

experience, training, or education in a field with 'at least a modicum of reliability,' and the testimony would assist the jury in understanding the evidence." *Yanello v. Park Family Dental*, 2017 IL App (3d) 140926, ¶ 44; see Ill. R. Evid. 702 (eff. Jan. 1, 2011). On the other hand, if a witness is not testifying as an expert, the witness may offer an opinion only if that opinion is: (1) based on the witness's personal observations; (2) helpful to the trier of fact; and (3) "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." *Atchely v. University of Chicago Medical Center*, 2016 IL App (1st) 152481, ¶ 39 (quoting Ill. R. Evid. 701 (eff. Jan. 1, 2011)).

¶ 51 Here, defense counsel attempted to elicit opinion testimony from Roe. In order to permit such an opinion in this case, the trial court needed to make one of two determinations: Either Roe had to be qualified as an expert; or his opinion needed to be based on his personal observations, helpful to the trier of fact, and outside the scope of expert testimony under Rule 702.

¶ 52 First, the court did not abuse its discretion when it determined that Roe was not an expert in toxicology or retrograde extrapolation. Defense counsel on cross-examination attempted to lay a foundation for Roe's expertise, but failed to offer any relevant skill, knowledge, or education in toxicology or the retrograde extrapolation of BAC. At first, the only foundation offered was the two breath tests. After the court sustained the State's objection to Roe's opinion, defense counsel elicited Roe's training and experience with DUI arrests and his general knowledge of alcohol's affect on the human body. However, this testimony did not go toward Roe's knowledge, training, or experience *in toxicology or retrograde extrapolation*. Rather, his testimony went toward knowledge and experience in police work and operation of a breathalyzer. In fact, when asked about a factor that may affect alcohol absorption rate—whether the absorption was affected by the amount of food in a person's stomach—Roe

responded "I don't know about that." Defense counsel followed up by asking: "Well, on an empty stomach, if you drink, it will be absorbed faster than on a full stomach?" To which he responded "I'm not sure." Based on this testimony, we cannot say the court abused its discretion in sustaining the State's objection based on a lack of expert foundation.

¶ 53 Because the court did not accept Roe as an expert, his opinion would only be admissible if it were based on his personal observations, helpful to the trier of fact, and outside the scope of Rule 702. Here, the opinion that defendant's BAC was rising fell within the scope of expert testimony under Rule 702. Our case law is consistent that the retrograde extrapolation of a past BAC is a complicated, scientific matter that requires expert testimony. *People v. Barnham*, 337 Ill. App. 3d 1121, 1133-34 (2003) (witness qualified to testify to blood samples for presence of alcohol was not also qualified to testify regarding rate of elimination of alcohol); see *People v. Ikerman*, 2012 IL App (5th) 110299, ¶¶ 37-41 (discussing an expert's sufficient qualifications to perform a retrograde extrapolation of BAC); see also *People v. Rice*, 40 Ill. App. 3d 667, 671 (1976) (explaining that the rates of absorption and oxidation of alcohol, into and out of the bloodstream, have generally been the subject of expert testimony). While we acknowledge that Roe was not attempting to pinpoint defendant's BAC while driving, we believe a substantially similar scientific basis is necessary to conclude that his BAC was rising. When defense counsel sought to have Roe opine that defendant's BAC was rising, he effectively would have been opining that defendant was in the alcohol absorption phase at that time. Knowledge of the absorption and elimination of alcohol in blood is generally considered scientific knowledge within the scope of Rule 702 (see *Schneider v. Kirk*, 83 Ill. App. 2d 170, 180 (1967) ("It cannot seriously be urged that the rate of oxidation and dissipation of alcohol from the blood is not subject to expert testimony.")), and lay opinion testimony on the matter was inappropriate (see

Ill. R. Evid. 701 (eff. Jan. 1, 2011)). Therefore, the trial court did not abuse its discretion in requiring defense counsel to first lay a foundation for Roe's scientific knowledge, experience, or training.

¶ 54 Finally, defendant was not denied a fair trial. Case law is well-settled that the State may use breath tests as circumstantial evidence to prove that a defendant was driving with a BAC of .08 or greater, and the timing of the tests goes to their weight, viewed in light of the circumstances surrounding the arrest. *Village of Bull Valley v. Winterpacht*, 2012 IL App (2d) 101192, ¶ 13; *People v. Zator* 209 Ill. App. 3d 322, 332 (1991) ("Illinois law is well-settled that any delay between the time of the incident and the breathalyzer test goes to the weight given the results, viewed in light of the totality of the circumstances."); *People v. Kappas*, 120 Ill. App. 3d 123, 129 (1983). On the other hand, the admission of expert testimony—which is what defendant challenges—is a separate matter that lies within the discretion of the trial court. See *People v. Lerma*, 2016 IL 118496, ¶ 23 (detailing the considerations that the trial court makes in admitting expert testimony). As the State correctly argues, defendant was free to introduce his own circumstantial evidence and make arguments based on the circumstantial evidence. In fact, defendant introduced the preliminary breath test result of .107 and argued that this result, which was closer in time to the traffic stop than the police station breathalyzer test, was a lower BAC. The court specifically considered this test result and found that it weighed in favor of its finding that defendant's BAC was .08 or greater at the time he was driving his vehicle. Moreover, the court also heard Roe's opinion that defendant was under the influence of alcohol that night, based on his observation of defendant's red and watery eyes, the smell of his breath, and his field sobriety tests.

¶ 55 Accordingly, we hold that the trial court did not abuse its discretion and that defendant was not denied a fair trial.[4]

¶ 56 B. Admission of the Accuracy Checks

¶ 57 1. Public Record

¶ 58 Defendant argues as follows that the court erred in admitting a copy of the accuracy checks (People's Exhibit 1) of the breathalyzer machine as a public record. The copy of the accuracy checks document is entitled "IntoxNet MIS Report" and is accompanied by a certification by Nancy Easum of the Illinois State Police. Defendant asserts that IntoxNet is a trademark of Intoximeters, Inc., a private company, and he provides a link to their website. Defendant argues that because IntoxNet is an application created by a private company, the accuracy checks report cannot be a public record created by a public official as required by Rule 902, nor was it created by a public office or employee as contemplated by Rule 803(8).

¶ 59 Further, defendant argues that the public record exception to hearsay does not apply to police records, citing to the portion of Rule 803(8) that states "police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel." Ill. R. Evid. 803(8) (eff. April 26, 2012). Turning to Easum's certification of the accuracy checks, defendant contends that the certification did not comport

[4] Defendant also argued that he had a right to present the opinion evidence regardless of proper foundation, citing *Chambers*, 410 U.S. at 289-99, and *Tenney*, 205 Ill. 2d at 433. We reject this contention, noting that *Chambers* and *Tenney* addressed the application of hearsay rules. Those cases did not address the foundation necessary for opinion testimony.

with rule 902(2) because the "IntoxNet" seal is not a seal of a public agency, and therefore the affidavit required a second signature for Exhibit 1 to be admissible.

¶ 60 The State responds as follows. First, defendant references "facts" that are not found in the record. The record does not support that IntoxNet was a computer-generated record created by a private corporation, and defendant's link to IntoxNet's website is a fact outside the record that should be disregarded. Further, defendant did not object to the IntoxNet seal below and has therefore forfeited a challenge that it is a seal of a public agency on appeal.

¶ 61 The State cites several cases in support of admitting the accuracy checks as public records, including two cases relied upon by the trial court: *People v. Black*, 84 Ill. App. 3d 1050 (1980), and *People v. Hester*, 88 Ill. App. 3d 391 (1980). In *Black*, the court held that a decal on the breathalyzer machine, which indicated the machine was certified for accuracy, was admissible under the public record exception. *Black*, 84 Ill. App. 3d at 1052. In *Hester*, the court relied on *Black* to hold that a page of a log book related to a breathalyzer machine, used to establish that the machine was accurate and working properly, was admissible as a public record. *Hester*, 88 Ill. App. 3d at 393-94. The police were required to keep the log book detailing results of machine maintenance tests. *Id.* at 395. The court disagreed that the log book page was any less a public document than a decal or certificate. *Id.* Rather, " while the log book entries [were] not in the form of a seal, decal, or certificate, they [were] nevertheless made pursuant to official duty and therefore qualify as an official document." *Id.* Further, under *Black*, the testifying officer was not required to have personal knowledge of the events and procedures summarized in the log. *Id.*

¶ 62 The State also disagrees that the accuracy checks constituted a police matter under Rule 803(8). The accuracy checks were not created for the prosecution of defendant. Rather, they

were an administrative function of the police department. See 20 Ill. Adm. Code 1286.70 (2007).

¶ 63 Here, defendant's argument breaks down into two parts: (1) the accuracy checks were not self-authenticating under Rule 902, and (2) the accuracy checks were inadmissible hearsay because they did not meet the hearsay exception under Rule 803(8). We reject both contentions and hold that the trial court did not abuse its discretion when it admitted the State's copy of the accuracy checks as a public record.

¶ 64 We first address the accuracy checks' authenticity. The issue here is whether the State's copy of the accuracy checks for its breathalyzer machine, accompanied by Easum's certification, qualified as self-authenticating certified copies of public records. Therefore, we logically begin under Rule 902(4), which governs certified copies of public records, and not under Rule 902(2), which only applies to domestic public documents without a seal. Rule 902(4) provides that no extrinsic evidence of authenticity is a condition precedent for the admissibility of the following:

> "A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule of complying with any statute or rule prescribed by the Supreme Court." Ill. R. Evid. 902(4) (eff. Jan. 1, 2011).

Here, the accuracy checks are clearly a copy of a public record. The police department is required to maintain accuracy check records by the Illinois Administrative Code (Administrative Code) (Ill. Adm. 1286.70 (2007)). In particular, the police department was required to maintain accuracy check records of any approved evidentiary instrument, including the breathalyzer, in a

logbook and/or the instrument's memory. 20 Ill. Adm. Code. 1286.70 (2007). Any records removed from the instrument's internal memory should be downloaded if possible and practicable to a central repository, and the central depository "will maintain instrument records for not less than five years from the date downloaded." 20 Ill. Adm. Code. 1286.70(d), (e), (f) (2007). Therefore, the accuracy checks were official records in that they were "data compilations in any form" that the police department was required by law to record. See Ill. R. Evid. 902(4) (eff. Jan. 1, 2011).

¶ 65 In addition, Rule 902(4) requires that the accuracy checks be certified as correct. Here, the State attached a notarized certification bearing the Illinois State Police seal, signed by Nancy Easum, the keeper of records for the Illinois State Police Alcohol and Substance Testing Section. The certification stated that the copy of the accuracy checks was true and accurate. While the trial court did not believe the certification complied with the more stringent requirements of Rule 902(11)[5] for business records, we believe it satisfied the requirements of Rule 902(4). In particular, the certification stated that the accuracy checks were true and accurate, and it complied with Rule 902(1) because the certification was signed by the custodian and bore the seal of the Illinois State Police. See Rule 902(1) (eff. Jan 1, 2011) ("A document bearing a seal purporting to be that of *** any State *** or of a political subdivision, department, officer, or

[5] In the State's motion *in limine*, the State argued that this certification met the requirements of 902(11) in order to admit the accuracy checks as a business record. The trial court denied the motion, noting that 902(11) required a written declaration under oath and subject to penalty of perjury, which the certification lacked. Rule 902(4) has no such requirement.

agency thereof, and a signature purporting to be an attestation or execution."). Accordingly, the accuracy checks were self-authenticating under Rule 902(4).

¶ 66 Before turning to the hearsay issue, we note that defendant's reference to "IntoxNet" seal was a red herring. The seal that mattered was the Illinois State Police seal on the certification. Furthermore, the mere presence of a private trademark on a report does not, without more, make an otherwise public record a private record.

¶ 67 The second issue is whether the accuracy checks satisfied the public records exception to hearsay under Rule 803(8). Rule 803(8) excludes the following from the hearsay rule:

> "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel, unless the sources of information or other circumstances indicate a lack of trustworthiness." Ill. R. Evid. 803(8) (eff. April 26, 2012).

We have already established that the accuracy checks were records created and maintained by the police department. Therefore, we reject defendant's argument that the accuracy checks were not created by a public office or employee. Likewise, we have already established that the Administrative Code required that the police record accuracy checks for the breathalyzer machine. See 20 Ill. Adm. Code 1286.70 (2007).

¶ 68 The remaining hurdle for the admissibility of the accuracy checks is found under part (B) of Rule 803(8), which excludes from the hearsay exception "matters observed by police officers and other law enforcement personnel." We first note that the codification of Rule 803(8) was

part of a structural change in Illinois to create separate hearsay exceptions for business records (Rule 803(6)) and public records (Rule 803(8)), both applicable in civil and criminal cases. See Ill. R. Evid., Committee Commentary. Prior to the adoption of the Illinois Rules of Evidence, the hearsay exception for business and public records in criminal cases was governed by section 115-5 of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/115-5 (West 2016)). *Id.* The Illinois Rules of Evidence were designed to retain the exclusion of section 115-5 but remove the difference between civil and criminal business and public records. *Id.* In particular, any writing or record made by anyone "during an offense or during any investigation relating to pending or anticipated litigation of any kind" was inadmissible under section 115-5(c)(2) (725 ILCS 5/115-5(c)(2) (West 2016)). The important test under section 115-5(c)(2) was whether a document was created in anticipation of litigation. See *People v. Smith*, 141 Ill. 2d 40, 73 (1990) (prison incident reports were inadmissible because they were created with subsequent discipline or possible litigation in mind); *In re V.T. III*, 306 Ill. App. 3d 817, 821 (1999) (report was admissible because it was not prepared in anticipation of future discipline or litigation of respondent); *People v. Virgin*, 302 Ill. App. 3d 438, 450-51 (1998) (receipt not created in anticipation of litigation was admissible); see also *People v. Davis*, 322 Ill. App. 3d 762, 766 (2001) (documents prepared in anticipation of litigation are inadmissible under section 115-5, but documents retrieved in anticipation of litigation are not disqualified).

¶ 69 This understanding of section 115-5 of the Criminal Code is consistent with federal law interpreting Federal Rule of Evidence (FRE) 803(8), which is similar in substance and structure to Rule 803(8).[6] We may look to federal and out-of-state decisions for guidance in our

[6] FRE 803(8) provides that the following is excluded from the hearsay rule:

interpretation of the Illinois Rules of Evidence. *Cf. People v. Thompson*, 2016 IL 118667, ¶ 40 (explaining that the court could look to federal law, as well as state decisions interpreting similar rules for guidance, because Rule 701 was modeled after Federal Rule of Evidence 701).

¶ 70 On one end of the spectrum, the U.S. Second Circuit strictly interpreted FRE 803(8) in *U.S. v. Oates*, 560 F.2d 45, 66-67 (2d Cir. 1977), which held that the admission of a chemist's report on a substance obtained from defendant's companion was inadmissible hearsay. The *Oates* court believed it "manifest that it was the clear intention of Congress to make evaluative and law enforcement reports absolutely inadmissible against defendants in criminal cases." *Id.* at 73. Defendant cites this case to argue that the accuracy checks were inadmissible.

¶ 71 On the other hand, the commonly applied interpretation of FRE 803(8) is to exclude only those police records created with litigative purpose, and to admit records created in nonadversrial situations for nonlitigative purposes. See *U.S. v. Enterline*, 894 F.2d 287, 290-91 (8th Cir. 1990) (FBI computer report was admissible as a public record under FRE 803(8)); *U.S. v. Hardin*, 710 F.2d 1231, 1237 (7th Cir. 1983) (Drug Enforcement Agency graph of statistical report of illicit

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"A record or statement of a public office if: (A) it sets out: (i) the office's activities; (ii) a matter observed while under a legal duty to report, *but not including, in a criminal case, a matter observed by law-enforcement personnel*; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." (Emphasis added.) Fed. R. Evid. 803(8) (eff. Apr. 27, 2017).

cocaine sales was admissible; it had nonlitigative purposes of identifying national trends and was created to meet its obligation to pursue its mission accurately and reliably); see also *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321-22 (2009) (explaining that records kept in the regular course of business for use at trial would be inadmissible under FRE 803(6) for the same reason police reports would be inadmissible as public records under FRE 803(8)). We note that *Oates* has been limited within and without its circuit. See *U.S. v. Quezada*, 754 F.2d 1190, 1193-94 (5th Cir. 1985) (declining to follow *Oates*, which "inflexibly applied" Rule 803(8)); *U.S. Yakobov*, 712 F.2d 20, 26 (2d Cir. 1983) (explaining that it regarded the breadth of the *Oates* language as dictum that it declined to follow in addressing FRE 803(10)); see also *U.S. v. Grady*, 544 F.2d 598, 604 (2d. Cir. 1976) (deciding, a year before *Oates*, that admission of police records was permitted under FRE 803(8) when the records related to routine police functions and not observations related to the defendants' commission of crimes).

¶ 72 Other states have likewise recognized the workable distinction between police reports made in nonadversarial situations and those made in anticipation of litigation. See *Ealy v. State*, 685 N.E.2d 1047, 1053-55 (Ind. 1997) (examining federal law for guidance and holding an autopsy report admissible as a public record under Indiana Rule of Evidence 803(8)). The West Virginia Supreme Court specifically addressed the admissibility of breathalyzer accuracy checks as a public record. *State v. Dilliner*, 569 S.E.2d 211, 215 (W. Va. 2002). The West Virginia Supreme Court interpreted West Virginia Rule of Evidence (WVRE) 803(8), which, similarly to FRE 803(8) and Rule 803(8), excluded the following:

> " 'Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth … (B) matters observed pursuant to duty imposed by law as to

> which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel[.]' " *Id.* at 215.

The court held that the accuracy inspection report of the breathalyzer machine was admissible under WVRE 803(8). *Id.* at 216. After looking to federal authorities for guidance, the court explained that the accuracy report was made pursuant to a duty imposed by state rules and that the law enforcement limitation under WVRE 803(8)(B) did not apply. *Id.* at 217. Importantly, the court explained that the "accuracy check of a[] [breathalyzer] is an administrative function that is not performed pursuant to the investigation of any particular person." *Id.*

¶ 73 Based on our case law interpreting section 115-5 of the Criminal Code and foreign case law interpreting rules of evidence similar to our own, we hold that the trial court did not err in admitting the accuracy checks under Rule 803(8). The accuracy checks were not a law enforcement report made in anticipation of litigation. Rather, the State conducted the accuracy checks pursuant to the Administrative Code, and the accuracy checks assured the proper operation of the State's breathalyzer machines, independent of any particular test subject and divorced from the anticipation of any particular litigation. The checks were not conducted in an adversarial situation but were performed by State employees as a routine administrative function. The mere retrieval of the accuracy checks for use in litigation did not indicate that they were created in anticipation of litigation.

¶ 74 Because the accuracy checks were excluded from the hearsay rule under Rule 803(8) and were self-authenticating under Rule 902(4), the trial court did not abuse its discretion in admitting the accuracy checks into evidence as a public record.

¶ 75 2. Business Record

¶ 76 Defendant also contends that the State failed to lay a foundation for the accuracy checks as a business record. The State does not respond to this issue, noting that the trial court denied its motion *in limine* to admit the accuracy checks as business record. The State is correct—the court admitted the accuracy checks at trial as a public record, not a business record. Moreover, we have already held that the trial court properly admitted the accuracy checks as a public record. We therefore do not address this argument.

¶ 77 3. Computer-Generated Record

¶ 78 Defendant argues that because the accuracy checks were computer generated, they were subject to additional foundational requirements. He contends that the State failed to lay a foundation of how the computer-generated test result was obtained and how the computer determined whether a result was accurate, citing *People v. Nixon*, 2015 IL App (1st) 130132, ¶ 111.

¶ 79 The State responds that: (1) defendant failed to object to foundation for a computer-generated record before, during, or after trial, and has therefore forfeited the argument on appeal; and (2) any error in admission was harmless, given that the logbook pages were also admitted and the preliminary breath test showed defendant's BAC was .107.

¶ 80 We agree with the State that defendant has forfeited this argument. A defendant must specifically object to foundation at trial and again in a post-trial motion in order to preserve any alleged error for review. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). "This rule is particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level." *Id.* The failure to properly preserve an issue for review results in forfeiture. *People v.*

Korzenewski, 2012 IL App (4th) 101026, ¶ 7. Here, defendant did not make any specific objection to the foundation for computer-generated records before, during, or after trial. This deprived the State of an opportunity to correct any deficiency there may have been in the foundation at the trial level. Therefore, defendant has forfeited this argument.

¶ 81 In defendant's reply brief, he argues that even if the issue is technically forfeited, we should review the issue for plain error. He summarily asserts that the evidence was closely balanced and that the admission of the accuracy checks denied him a fair trial. We decline to review the issue for plain error. Even if there were error—and we offer no opinion whether there was—the State correctly argues that any such error was harmless and not prejudicial. See *People v. Schaefer*, 398 Ill. App. 3d 963, 966 (2010) ("We may consider forfeited error under the plain-error rule when 'the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence.' "). In reaching its verdict, the court also considered the logbook entries; the circumstances around defendant's arrest, including his field sobriety tests; and the preliminary breath test, taken closer in time to defendant's traffic stop, which showed a BAC of .107.[7]

¶ 82 4. Insufficient Evidence of Accuracy

[7] We additionally note that the only authority defendant cites, *Nixon*, 2015 IL App (1st) 130132, ¶ 111, addressed the foundational requirements for a computer-generated record as a *business* record. Here, the court admitted the accuracy checks as a public record. Further, *Nixon* noted a distinction between the foundational requirements for a computer-generated record and a computer-stored record (*id.* ¶¶ 116-17), which is an important distinction that is not addressed in the briefs.

¶ 83 Finally, defendant argues that even if the accuracy checks were admissible, there was insufficient evidence to establish that the breathalyzer machine was accurate and in compliance with the Administrative Code and State Police regulations. Defendant continues that unless the chemical tests were in compliance with the Administrative Code, they were not admissible. *People v. Kilpatrick*, 216 Ill. App. 3d 875, 880 (1991).

¶ 84 Defendant stresses that the court had no guidance upon which to interpret the word "success" on accuracy checks—it only assumed that "success" meant that the breathalyzer passed the accuracy certification test. "Success" could have had many meanings, including that information was successfully stored or that the test was successfully completed. He also contends there was "zero evidence" that the accuracy checks met the requirements outlined by section 1286.220 of the Administrative Code, which required that the result of the accuracy test be within 10 percent of the reference sample's value.

¶ 85 We reject defendant's argument. Defendant's argument breaks down into two parts: (1) there was no evidence that the accuracy check complied with 20 Ill. Adm. Code 1286.220(b) (2011), and (2) the term "success" had no meaning absent further evidence. Neither part has merit. First, the Administrative Code specifies what the accuracy check must include. Specifically, an accuracy check "will include at least the type of instrument, instrument serial number, test date, reference sample value, and the readings of the two accuracy test checks." 20 Ill. Adm. Code 1286.10 (2015). A "reference sample" may be a dry gas mixture, "commonly referred to as a dry gas evidential standard." *Id.*

¶ 86 A review of the accuracy checks document reveals that it includes all the necessary information. See *People v. Torruella*, 2015 IL App 2d 141001, ¶ 30. It contains the type of instrument (EC/IR II), the serial number (008417), test dates (March 7 and April 1, 2012),

reference sample values (both dates had a dry gas sample value of .079), and the readings of the two accuracy checks (.079 on March 7, and .078 on April 1). Furthermore, the test results showed compliance with 20 Ill. Adm. 1286.220(b) (2011), which requires that the results be within 10 percent of the reference sample's value. Here, the reference sample was .079, and therefore the test results had to fall between .0869 and .0711. The results of .079 and .078 fell within the acceptable range.

¶ 87 Defendant's focus on the word "success" is misplaced. On the accuracy checks, there is a line at the bottom that says "Test Status: Success." More important, however, are the test results themselves, which, as we have explained, fell within the acceptable accuracy range under the Administrative Code. The trial court specifically stated that it was not relying on the word "success" alone. It also considered the figures themselves, which were "self evident and obvious." Because the accuracy checks complied with the Administrative Code, the trial court did not abuse its discretion in admitting them into evidence.

¶ 88 C. Sufficiency of the Evidence

¶ 89 Defendant's final contention is that the evidence was insufficient to prove him guilty beyond a reasonable doubt of driving with a BAC of .08 or more. Defendant elaborates that: Roe had "no idea" what defendant's BAC was when he was driving his vehicle; there was insufficient evidence of defendant's impairment; the two breath tests established that defendant's BAC was rapidly rising after his traffic stop, and therefore his BAC may have been below .08 while he was driving; and the logbook (People's Exhibit 4) contained unexplained entries of "calibrations" that were not included in the accuracy checks. Furthermore, defendant argues that the trial court mistakenly believed that his breathalyzer test occurred only 48 minutes after his traffic stop, whereas it actually took place 108 minutes after. Finally, the trial court was not

qualified to find that defendant's BAC was .08 or greater when, by its own reasoning, only a toxicologist could do so.

¶ 90 The State responds as follows. Defendant confuses the burden of proof for driving under the influence of alcohol with driving with a BAC of .08 or greater—the State was not required to prove that defendant was impaired in order to convict him for driving with a BAC greater than .08. Further, the two breath tests did not show that defendant's BAC was "rapidly rising" or that his BAC was below .08 while he was driving. Rather, the breathalyzer test taken 48 to 49 minutes after his traffic stop yielded a result of .12, and the length of time between the stop and the breath test went to the weight of the evidence. The logbook showed that defendant's breath sample was certified as accurate.

¶ 91 We agree with the State. In a challenge to the sufficiency of the evidence, we ask " '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.) *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In reviewing the evidence, we must not retry the defendant or substitute our judgment for that of the trier of fact. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). Here, we must review whether any rational trier of fact could have found beyond a reasonable doubt that defendant was driving his vehicle while the alcohol concentration in his blood or breath was .08 or more. 625 ILCS 5/11-501(a)(1) (West 2012).

¶ 92 The State is correct that defendant confuses the offense of driving while impaired with driving with a BAC of .08 or more. Driving with a BAC of .08 or more and driving under the influence of alcohol are separate offenses, and the State does not need to show impairment to prove the former offense. *People v. Ziltz*, 98 Ill. 2d 38, 42-43 (1983); see also *Torruella*, 2015 IL

App (2d) 141001, ¶¶ 41-44 (the evidence was sufficient to convict the defendant of driving with a BAC of .08 or greater where he was also acquitted of driving under the influence of alcohol). Accordingly, we reject the portion of defendant's argument that there was insufficient evidence of impairment, as evidence of impairment was not an element of defendant's offense.

¶ 93 Here, the trial court specifically considered both the .12 breathalyzer result and the .107 preliminary breath test result, in light of "the rest of the evidence in the case." The rest of the evidence included Roe's observations of defendant during the traffic stop, including defendant's red and watery eyes, the smell of alcohol on his breath, and his field sobriety tests. The evidence also included accuracy checks for the breathalyzer and a copy of the logbook entry for defendant's breathalyzer test, showing that defendant's BAC was .12. To the extent that the logbook page showing defendant's breath test result also contained "unexplained entries" of the breathalyzer machine's accuracy checks, the trial court correctly concluded that those logbook entries went toward the weight of the accuracy checks, not the admissibility. The court considered the logbook entries (People's Exhibit 4) in light of the accuracy checks (People's Exhibit 1), defendant's breath ticket (People's Exhibit 3), Roe's testimony, and defendant's two breath test results. Moreover, the "unexplained" logbook entries concluded that the breathalyzer was certified accurate.

¶ 94 Contrary to defendant's contention, the breathalyzer test at the police station took place within an hour of defendant's traffic stop. Roe first observed defendant around 1:59 a.m. on March 11, 2012. Defendant was placed under arrest shortly after 3 a.m. on March 11, 2012, and his breath ticket from the breathalyzer machine read 3:48 a.m. Roe testified that the gap in time was due to daylight saving time. We take judicial notice that daylight saving time began at 2 a.m. on March 11, 2012, where Illinois sprung forward to 3 a.m. See *People v. Cain*, 14 Ill. App.

3d 1003, 1006 (1973) (explaining that daylight saving time was a fact that everyone knew to be true). Therefore, the trial court correctly considered that the time between defendant's traffic stop and his breathalyzer test was around 48 minutes.

¶ 95 As we have already discussed, the trial court could rely on breath tests to establish defendant's BAC of .08 or higher while driving, and the length of time between the traffic stop and the tests went to the weight of the tests, considered in light of all the circumstances. See, *e.g.*, *Village of Bull Valley*, 2012 IL App (2d) 101192, ¶ 13; *Zator* 209 Ill. App. 3d at 332 ("Illinois law is well-settled that any delay between the time of the incident and the breathalyzer test goes to the weight given the results, viewed in light of the totality of the circumstances."). Therefore, the trial court did not need to hear expert testimony or, as defendant suggests, be qualified as a toxicologist to reach its verdict. The trial court was best situated to weigh the evidence, and it determined that the two breath tests, each over .10 and each taken within an hour of defendant's traffic stop, tended to show that defendant's BAC was .08 or greater while he was driving. Contrary to defendant's argument that his BAC was "rapidly rising," the trial court explained that it heard no evidence to suggest that defendant's BAC was less than .08 while he was driving. Under these facts, a rational trier of fact could have found defendant guilty beyond a reasonable doubt, and therefore the evidence was sufficient.

¶ 96 III. CONCLUSION

¶ 97 The trial court did not abuse its discretion when it sustained the State's objection to Roe's expert opinion testimony and when it admitted accuracy checks of the breathalyzer into evidence as public records. In addition, the evidence was sufficient to support defendant's conviction for driving with an alcohol concentration in his blood or breath of .08 or more (625 ILCS 5/11-501(a)(1) (2012)). Therefore, we affirm the judgment of the Du Page County circuit court.

¶ 98 As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 99 Affirmed.