

No. 1-12-1178

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 18386
)	
ROBERT JOHNSON,)	Honorable
)	Mary Colleen Roberts,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

O R D E R

¶ 1 **Held:** Defendant's conviction for aggravated driving under the influence of alcohol is affirmed where the evidence was sufficient to prove him guilty beyond a reasonable doubt, and trial counsel did not render ineffective assistance when he failed to object to the police officer's testimony regarding the horizontal gaze nystagmus test. Defendant's fines and fee assessment is reduced as agreed by the parties.

¶ 2 Following a jury trial, defendant Robert Johnson was convicted of aggravated driving under the influence of alcohol for driving while impaired without a valid driver's license. The trial court sentenced defendant to two years' probation and 36 days in the Cook County Department of Corrections, time considered served. The court also assessed defendant fines and fees in the amount of \$1,560.

¶ 3 On appeal, defendant contends the State failed to prove him guilty beyond a reasonable doubt because the police officer's observations were insufficient to support the jury's verdict. Defendant also contends his trial counsel rendered ineffective assistance because counsel failed to move *in limine* to exclude the police officer's testimony about defendant's performance on the horizontal gaze nystagmus (HGN) test where the officer did not properly administer that test. Defendant further contends counsel should have objected to the officer's testimony about the HGN test because the State did not establish an adequate foundation for its admission. Finally, the parties agree that defendant's assessment for fines and fees must be reduced where two charges were improperly assessed and defendant is due monetary credit for the time he spent in presentencing custody. We affirm and modify the assessment.

¶ 4 At trial, Chicago police officer Sergio Glowacki testified that about 1:30 a.m. on August 29, 2011, he was driving a police car with his partner, Officer Ortiz, when he saw defendant driving a car with no taillights. Defendant then made a right turn and failed to signal. Officer Glowacki stopped defendant for the minor traffic violations. As defendant pulled over his car, he drove into the curb with his right front wheel hitting the curb. Officer Glowacki approached defendant's driver's window, introduced himself, and asked for defendant's driver's license and proof of insurance. Defendant had glassy, bloodshot eyes and said "I'm okay, Officer, I've got a driver's license, it's okay, I know you are busy I'm okay." Defendant's speech was slurred and

mumbled, and Officer Glowacki smelled alcohol on defendant's breath. Officer Glowacki, who had been a police officer for three years, had smelled alcohol on a person more than 100 times. Officer Glowacki asked defendant for his driver's license and proof of insurance a second time. Defendant said he left his driver's license at home. Defendant then retrieved a bundle of papers from his glove compartment and handed it to the officer. Officer Glowacki asked defendant "[w]hat's this?" and defendant replied "I'm sorry, I thought you needed to see my papers." Defendant was laughing and mumbling, and some of his speech was incoherent. The officer again asked defendant for his proof of insurance, and defendant apologized and handed the officer a food receipt. Defendant continued laughing, mumbling and speaking incoherently.

¶ 5 Officer Glowacki asked defendant to step out of his vehicle. Defendant opened his car door, leaned forward, and nearly fell out of his car. Officer Glowacki immediately grabbed defendant and helped him from the car. Officer Glowacki escorted defendant to the police car, and helped him get inside. Defendant continued laughing and mumbling incoherently. At this point, based on defendant's glassy, bloodshot eyes, the strong odor of alcohol on his breath, his slurred, mumbled, incoherent speech, and his inability to locate his driver's license and proof of insurance, Officer Glowacki opined that defendant was intoxicated and driving under the influence of alcohol. Officer Glowacki also found a cold, unopened can of beer on the passenger's seat in defendant's car. For safety reasons, Officer Glowacki did not administer any field sobriety tests on the street, and instead, drove defendant to the police station. Once there, Officer Glowacki again observed that defendant's eyes were glassy and bloodshot, there was a strong odor of alcohol on his breath, and defendant's speech was slurred and mumbled.

¶ 6 Officer Glowacki testified that he received training at the police academy for detecting motorists who are impaired due to alcohol. That training included at least 30 hours of classroom

and practical training on the administration of field sobriety tests. Officer Glowacki was certified to administer the HGN test, and had previously testified in other cases regarding his administration of field sobriety tests. Defendant agreed to submit to three field sobriety tests.

¶ 7 The first test defendant performed was the HGN test. Officer Glowacki explained that HGN is an involuntary jerking of the eye caused by consumption of alcohol or narcotics. The HGN test looks for three indications of impairment – the lack of smooth pursuit, onset prior to maximum deviation, and onset prior to 45 degrees. During the test, the officer must keep the person's head forward without moving and focus on the eyes. Officer Glowacki further explained, in general, that he administers the test by holding an object in front of the person and asking them to follow it. He performs this task to determine if the individual is injured, which could medically disqualify the person from the test. The first test Officer Glowacki performs is lack of smooth pursuit, where the eyes slowly bounce as they move back and forth. For the maximum deviation test, the officer holds an object about 10 to 12 inches from the side of the person's head and observes whether jerking occurs as the eye proceeds to the right.

¶ 8 Officer Glowacki testified that he first performed the test on defendant to ascertain if he had a medical impairment that would affect the test. Defendant had equal pupil size and did not lack equal tracking, and thus, did not exhibit a medical impairment. Officer Glowacki held a pen in front of defendant's eyes to administer the HGN test. During the test, Officer Glowacki observed involuntary jerking in defendant's eyes. In each eye, defendant demonstrated a lack of smooth pursuit, nystagmus at maximum deviation, and onset prior to 45 degrees. During the lack of smooth pursuit test, defendant's eyes repeatedly jerked as they moved from left to right. During the maximum deviation test, defendant's eyes moved back and forth. During the onset prior to 45 degrees test, defendant had involuntary jerkiness in his eyes. During the test,

defendant laughed, failed to follow instructions, repeatedly moved his head to follow the pen, and continued mumbling incoherently. Defendant appeared to not understand the instructions. Based on the HGN tests, Officer Glowacki believed defendant had consumed alcohol.

¶ 9 Officer Glowacki next administered the walk-and-turn test which evaluates if a person can perform multiple tasks at one time, as is necessary when driving. The test required defendant to walk heel to toe for nine steps while counting out loud, then turn taking several small steps while keeping his front foot in place, and again walk nine steps, returning to his point of origin. Officer Glowacki described and demonstrated the test for defendant, during which time defendant swayed from side to side. Defendant said he understood the test. Defendant started before being told and took 11 steps instead of 9. As defendant began to turn, he leaned forward and belched. After turning, he walked nine steps, but walked normally, not heel to toe. Defendant lost his balance while performing the test and almost fell. At the conclusion of the walk-and-turn test, Officer Glowacki again opined that defendant was intoxicated.

¶ 10 Officer Glowacki next administered the one-legged-stand test. For this test, the person chooses which leg he wants to lift, lifts that leg six inches off the ground, keeping his hands at his side and looking at his foot, and counts one-thousand-one, one-thousand-two until being told to stop. Officer Glowacki described the test to defendant, and defendant said he understood. A couple of seconds into the test, defendant grabbed his pant leg, used his arm to hold his pant leg up, and swung his other arm back and forth. Defendant miscounted, stating "1, 2, 3, 4, 5," then "2, 3, 5, 6, 9." He did not count one-thousand-one, one-thousand-two, as instructed. Officer Glowacki testified that from the time of his first encounter with defendant on the street, through the administration of the three tests, he opined that defendant was intoxicated and under the influence of alcohol. His opinion was based on defendant's glassy, bloodshot eyes, his slurred

and mumbled speech, the strong odor of alcohol on his breath, and his failure of all three field sobriety tests.

¶ 11 Officer Glowacki offered defendant the option of submitting to a blood or urine test to test for alcohol, but defendant declined. Defendant did, however, agree to a breath test. On cross-examination, Officer Glowacki acknowledged that a non-alcoholic beer could smell like alcohol. He also acknowledged that factors other than alcohol, including caffeine and nicotine, could cause HGN. However, on redirect examination, the officer explained that with other stimulants such as caffeine, the amounts are so trace that unless the particular person is so affected by the chemical, nystagmus would not be evident.

¶ 12 Chicago police officer Serrano testified that he administered a breath test to defendant using a Breathalyzer machine. Before the test, Officer Serrano observed defendant for 20 minutes to insure defendant did not place a foreign object in his mouth or vomit, which would have compromised the integrity of the test. During this period, defendant laughed and mumbled incoherently with slurred speech. Officer Serrano did not know if defendant was talking to him or to himself. Officer Serrano also smelled a strong odor of alcohol on defendant's breath. Officer Serrano instructed defendant to take a deep breath and emit a long, strong, steady blow without pausing or stopping. Defendant attempted the test three times, but each attempt was unsuccessful due to lack of adequate breath. The first two times, defendant blew into the machine very lightly, and during the third attempt, he was laughing. The machine limits the test to three minutes, at which time it automatically prints the test results. In this case, the printout from the machine stated "insufficient breath." Officer Serrano testified that in his experience as a police officer, he has observed people under the influence of alcohol hundreds of times, and he believed defendant was under the influence.

¶ 13 The parties stipulated that the Breathalyzer machine was in proper working order. The State then submitted a certified copy of defendant's driving abstract from the Illinois Secretary of State which indicated that a suspension of defendant's driving privileges was in effect on the date of his arrest, and that defendant had never been issued an Illinois driver's license.

¶ 14 Defendant testified that he had just woken up and was driving his uncle's car around the block when he was stopped by police. He denied hitting the curb. A police officer approached his window, asked for his driver's license, and defendant said he left it at home. Defendant retrieved his insurance papers from the glove compartment and handed them to the officer. He denied handing the officer a food receipt. Defendant acknowledged that there was an unopened can of beer in the car, but claimed it was on the floor in the back seat. Defendant testified that he drank one beer about 3 p.m. and had nothing to drink after that. Per the officer's instructions, defendant got out of his car and got into the back of the police car. He denied that he almost fell out of his car and that he needed assistance walking to the police car.

¶ 15 At the police station, Officer Glowacki asked defendant if he had more than one beer, and defendant replied "I drank a lot of things, man, I need to go now." Defendant testified that he drank pop and water and needed to use the washroom. Defendant denied telling the officer "I just had a few drinks." Officer Glowacki then told defendant to remove his shoelaces.

Thereafter, defendant attempted the walk-and-turn test, but his shoes repeatedly came off his feet. In addition, defendant's pants slipped from his waist because they were too big and he was not wearing a belt. Defendant acknowledged losing his balance during the tests, but claimed it was because his pants were falling down and Officer Glowacki took his shoelaces. Defendant also claimed Officer Glowacki instructed him to keep his eyes closed during the test. Defendant took a breath test three times as instructed and passed. Defendant testified that after the breath

test, he repeatedly asked the officers to take him to the hospital for a blood test, but they refused. The court noted for the jury that defendant was missing his two front teeth on both the top and bottom of his mouth. Defendant testified that his eyes are always red, and the court noted for the record that his eyes appeared red. Defendant acknowledged that he laughed when he spoke with the officers, but explained that he laughs all the time. Defendant also acknowledged that his driving privileges had been suspended and that he was not supposed to be driving.

¶ 16 In rebuttal, Officer Glowacki testified that defendant almost fell out of his car, and the officer had to grab defendant's arm to keep him from falling to the ground. The officer further testified that it did not appear defendant was able to walk to the police car unassisted. Officer Glowacki testified that defendant told him "I just had a few drinks." Defendant's shoelaces were not removed before he took the field sobriety tests. At no time during those tests did he see defendant pull up or hold up his pants. After the breath test, defendant was placed in a holding cell and immediately fell asleep. He never asked to be taken to the hospital. Officer Glowacki clarified that a person's shoelaces are not removed during an investigation, but are removed later when the charges are finalized. Defendant's shoelaces were removed when he was on his way to lock-up, after the field sobriety tests had been completed.

¶ 17 Following deliberations, the jury found defendant guilty of aggravated driving under the influence of alcohol. The trial court subsequently sentenced defendant to two years' probation with substance abuse treatment, and 36 days in the Cook County Department of Corrections, time considered served. The court also assessed defendant \$1,560 in fines and fees.

¶ 18 On appeal, defendant contends the State failed to prove him guilty beyond a reasonable doubt because Officer Glowacki's observations were insufficient to support the jury's verdict. Defendant argues that there was no evidence that he was driving erratically or that he was under

the influence to the extent that his driving was impaired. Defendant argues that his eyes are always bloodshot, as noted by the court at trial, and he has difficulty speaking due to his missing front teeth.

¶ 19 When defendant argues the evidence is insufficient to sustain his conviction, this court must determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the elements of the offense proved beyond a reasonable doubt. *People v. Martin*, 2011 IL 109102, ¶ 15. "Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State." *People v. Baskerville*, 2012 IL 111056, ¶ 31. This standard applies whether the evidence is direct or circumstantial. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). A criminal conviction will not be reversed based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). As the trier of fact, the jury is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences there from. *Jackson*, 232 Ill. 2d at 281. In weighing the evidence, the jury is not required to disregard the inferences that naturally flow from that evidence, nor must it search for any possible explanation consistent with innocence and raise it to the level of reasonable doubt. *Jackson*, 232 Ill. 2d at 281. This court is prohibited from substituting its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *Jackson*, 232 Ill. 2d at 280-81.

¶ 20 To convict defendant of aggravated driving under the influence of alcohol under the circumstances in this case, the State was required to prove defendant drove a vehicle while under the influence of alcohol, and he did not possess a driver's license at the time he committed the offense. 625 ILCS 5/11-501(a)(2), (d)(1)(H) (West 2010). It is undisputed that defendant was

driving a car and that he did not have a driver's license at that time. The only element at issue is whether the State proved defendant was under the influence of alcohol. Whether defendant was intoxicated was a question of fact for the jury's determination. *People v. Janik*, 127 Ill. 2d 390, 401 (1989). A conviction for driving under the influence of alcohol may be sustained based solely on the credible testimony of the arresting officer. *Janik*, 127 Ill. 2d at 402.

¶ 21 Here, the record reveals that the evidence was sufficient for the jury to find defendant guilty beyond a reasonable doubt. Officer Glowacki testified that defendant had glassy, bloodshot eyes, a strong odor of alcohol on his breath, and his speech was slurred and mumbled. Defendant laughed and mumbled incoherently throughout his arrest, including the time he was in his car, while he was in the police car, and during his field sobriety tests. When asked for his insurance, defendant handed Officer Glowacki a bundle of papers, then handed him a food receipt. As defendant exited his car, he nearly fell to the ground, and Officer Glowacki had to grab him, help him from the car, and help him walk to the police car. Officer Glowacki also found a cold, unopened can of beer on the passenger's seat of defendant's car.

¶ 22 Officer Glowacki testified that defendant told him "I just had a few drinks." Defendant acknowledged telling the officer "I drank a lot of things, man, I need to go now," but claimed he drank pop and water.

¶ 23 Officer Glowacki further testified that defendant failed all three of the field sobriety tests. During the HGN test, defendant exhibited involuntary jerking in his eyes, which can be caused by alcohol. While performing the test, defendant laughed, failed to follow instructions, and mumbled incoherently. During the walk-and-turn test, defendant took too many steps, belched, lost his balance and almost fell, and walked normally instead of heel to toe. During the one-legged-stand test, defendant held his pant leg and miscounted. Officer Glowacki repeatedly

opined that defendant was under the influence of alcohol and intoxicated based upon defendant's glassy bloodshot eyes, the strong odor of alcohol on his breath, his slurred, mumbled, incoherent speech, and his failure of all three field sobriety tests.

¶ 24 Corroborating Officer Glowacki's testimony, Officer Serrano also testified that defendant had a strong odor of alcohol on his breath, and that he laughed and mumbled incoherently with slurred speech. Defendant could not complete the breath test due to lack of adequate breath, and Officer Serrano also opined that defendant was under the influence of alcohol. Although defendant testified that his eyes are always bloodshot, that he has difficulty speaking due to his missing teeth, and that he laughs all the time, it was the jury's responsibility to weigh the evidence, resolve the conflicts therein, and assess the credibility of the witnesses. As the trier of fact, the jury determined that the evidence established that defendant was under the influence of alcohol, and we find no reason to disturb that finding.

¶ 25 Defendant next contends his trial counsel rendered ineffective assistance because counsel failed to move *in limine* to exclude Officer Glowacki's testimony about defendant's performance on the HGN test where, based on the officer's testimony, he did not properly administer that test. Defendant claims Officer Glowacki's testimony did not show that he conducted the required pre-test of defendant's eyes, whether defendant was standing, whether the officer began with the left eye, and whether he held his hand the proper distance from defendant's head. Defendant further argues there was no indication Officer Glowacki utilized the proper speed, held defendant's gaze for the proper length of time, or repeated the test. Defendant also contends counsel should have objected to Officer Glowacki's testimony about the HGN test because the State did not establish an adequate foundation for its admission. Defendant claims he was prejudiced by the HGN

testimony because the State highlighted the HGN test results in its closing argument, and there was no chemical analysis to show defendant was under the influence of alcohol.

¶ 26 Claims of ineffective assistance of counsel are evaluated under the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11. To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that counsel's representation was deficient, and as a result, he suffered prejudice. *Strickland*, 466 U.S. at 687; *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Specifically, defendant must show that counsel's performance was objectively unreasonable, and that there is a reasonable probability the outcome of the proceeding would have been different if not for counsel's error. *Henderson*, 2013 IL 114040, ¶ 11. If defendant cannot prove he suffered prejudice, this court need not determine whether counsel's performance was deficient. *Givens*, 237 Ill. 2d at 331. Moreover, *Strickland* requires defendant to demonstrate actual prejudice, and mere speculation as to prejudice is not sufficient. *People v. Bew*, 228 Ill. 2d 122, 135-36 (2008) (and cases cited therein).

¶ 27 Here, we find that defendant failed to show that he was prejudiced by counsel's failure to challenge the admission of Officer Glowacki's HGN testimony where there was ample evidence that defendant was under the influence of alcohol. We acknowledge that there was not a chemical analysis test or a breath test measuring defendant's alcohol content. However, Officer Glowacki's testimony, detailed above, provided an abundance of evidence from which the jury could conclude that defendant was intoxicated, even without the HGN testimony. Officer Glowacki testified that defendant expressly told him "I just had a few drinks." Officer Glowacki repeatedly testified that he believed defendant was under the influence of alcohol based upon defendant's glassy, bloodshot eyes, the strong odor of alcohol on his breath, his slurred, mumbled

speech, his inability to locate his driver's license and proof of insurance, and his failure of all of the field sobriety tests. Officer Glowacki's testimony was corroborated by Officer Serrano, who also testified that he smelled a strong odor of alcohol on defendant's breath. Based on his observations, Officer Serrano also opined that defendant was under the influence of alcohol. Accordingly, we find that the outcome of the trial would not have been different even if the challenged testimony regarding the HGN test had been suppressed.

¶ 28 In addition, we reject defendant's argument that the State highlighted the results of the HGN test in its closing argument. The State did argue that defendant provided no explanation for his failure of the HGN test, as he attempted to do for the other tests. However, immediately thereafter, the prosecutor argued "[t]he thing is you have to consider all of the evidence together." The State then listed all of Officer Glowacki's observations, and specifically noted that defendant "failed three field sobriety tests. That's why there is not just one. Because maybe there is something going on, there [are] three tests he fails."

¶ 29 We also reject defendant's argument that the record shows that Officer Glowacki failed to properly administer the HGN test. Our review of the record reveals that Officer Glowacki did not testify as to his step by step procedures in administering the test to defendant. Instead, the officer explained how he administers the test, in general, to any person. Furthermore, contrary to defendant's assertion, the record shows that prior to administering the HGN test, Officer Glowacki first performed the preliminary test required to determine if defendant had a medical impairment that would affect the test. Based on this record, we conclude that trial counsel's failure to challenge Officer Glowacki's HGN testimony did not constitute ineffective assistance.

¶ 30 Finally, defendant contends, and the State agrees, that his fines and fees assessment must be reduced from \$1,560 to \$1,240. The parties agree that the \$150 assessment for the Crime Lab

DUI Analysis (730 ILCS 5/5-9-1.9 (West 2010)) must be vacated because there was no laboratory analysis in this case. In addition, the \$5 Court System fee (55 ILCS 5/5-1101(a) (West 2010)) must be vacated because defendant was already charged the \$30 fee under the same statute for a DUI offense. Accordingly, we vacate the \$150 Crime Lab DUI Analysis assessment and the \$5 Court System fee from the Fines, Fees and Costs order.

¶ 31 The parties further agree that defendant is entitled to monetary credit against his fines of \$5 per day for the 33 days he spent in presentencing custody (725 ILCS 5/110-14(a) (West 2010)), for a total credit due of \$165. Pursuant to our authority (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999)), we direct the clerk of the circuit court to amend the Fines, Fees and Costs order to reflect the \$165 credit. Defendant's adjusted total assessment should be \$1,240.

¶ 32 For these reasons, we vacate the \$150 Crime Lab DUI Analysis assessment and the \$5 Court System fee from the Fines, Fees and Costs order and direct the clerk of the circuit court to further amend that order to reflect a credit of \$165 against defendant's assessment. We affirm defendant's conviction and sentence in all other respects.

¶ 33 Affirmed as modified.