FIRST DIVISION
April 21, 2014

No. 1-12-1813

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 C6 60658
	)	
RONALD BERRY,	)	Honorable
	)	Brian Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** Evidence sufficient to sustain defendant's conviction for aggravated DUI; trial counsel not ineffective for failing to file motion *in limine* to exclude HGN test results and object to trial testimony regarding HGN test; judgment affirmed.

¶ 2 After a jury trial, defendant Ronald Berry was convicted of aggravated driving under the influence of alcohol (DUI) and felony driving while his license was revoked. The court sentenced him to concurrent, respective terms of 4 years' and 30 months' probation. On appeal,

he contends that the evidence was insufficient to prove him guilty of aggravated DUI beyond a reasonable doubt, and that he was denied effective assistance of trial counsel. On appeal, he does not contest the felony driving while license revoked conviction.

¶ 3 Defendant was charged, in relevant part, with one count of aggravated DUI based on his two prior DUI violations. At trial, Illinois State Police Trooper Robinson testified that at 11 p.m. on June 6, 2011, he was driving southbound on Interstate 294 when he noticed defendant driving 75 miles per hour in the second middle lane. He began to pace defendant's vehicle with his own, matching defendant's speed and staying within two car lengths of him. When he reached a speed of 95 miles per hour in the 45 miles per hour zone, Trooper Robinson observed defendant "jerk[]" the wheel of his vehicle into the first lane without signaling, and he initiated a traffic stop. Defendant quickly took a "sharp cut across all lanes and on to the shoulder," despite the presence of other vehicles. Defendant and Trooper Robinson parked on the shoulder with traffic on the right of them and a grassy median on the left.

¶ 4 At this point, defendant exited his vehicle and Trooper Robinson instructed him to return. Defendant did not comply, and just gave him a "blank stare." Trooper Robinson approached defendant cautiously and noticed a strong odor of alcohol emanating from him. He also observed that defendant's eyes were red and bloodshot, and asked him if he had been drinking. Defendant told him he had six or seven beers, and Trooper Robinson noted that defendant's speech was slurred. He then asked defendant if he would take the standardized field sobriety tests, and defendant agreed to do so.

¶ 5 Trooper Robinson explained the nature of these tests which include the HGN test, the walk and turn test, and the one-legged stand test. He also testified that he received two weeks of training on these tests following the National Highway Traffic and Safety Administration manual

(NHTSA), and has administered them over a hundred times.

¶ 6 Trooper Robinson then testified that he explained the tests to defendant, demonstrated the one-legged stand and walk and turn tests, and had defendant stand in an area that was flat and free of debris with his back to his vehicle and the police vehicle which had oscillating lights. He explained that tracking vehicles, as well as oscillating lights, can cause nystagmus, which is involuntary eye jerking, and that the HGN test detects involuntary jerking of the eye.

¶ 7 Trooper Robinson further testified that defendant told him that he did not have any medical problems with his eyes. In administering the HGN test, Robinson first determined that defendant's pupils were normal and that he did not exhibit any brain injury. He then checked to see if defendant's eyes would follow his finger smoothly, and he placed his finger 12 inches away from defendant's nose and moved it to his left ear and then back to his right ear. Defendant was unable to track it. He again placed his finger 12 inches away from defendant's nose and moved it to his left ear at a constant speed, back to his nose and then to his right ear at a constant speed, and noticed that defendant's eyes were jerking. After conducting the smooth pursuit test, Robinson performed the distinct and sustained nystagmus at maximum deviation, which involves having defendant follow his finger all the way to the left, then the right and hold it there for four seconds in which defendant's eyes "jerk[ed] extremely." Trooper Robinson then performed the final part of the HGN test, the onset of nystagmus prior to 45 degrees, which involves starting with his finger at defendant's nose and for four seconds he moves his finger to the person's right shoulder and then does the same to the left shoulder. Defendant showed involuntary eye jerking in this test which indicated to the trooper that defendant "might be intoxicated."

¶ 8 Trooper Robinson then had defendant place his left foot on an imaginary line and his

right foot in front of his left foot with his right heel touching his left toe while he explained the walk and turn test. Defendant was unable to hold this position. He then told defendant to take nine heel to toe steps forward with his hands down at his sides, and on the ninth step to pivot on his left foot, take several small steps around, face back toward the trooper, and then take nine steps. During this test, defendant walked on a slant, and stepped off the line. When it was time to turn around, he staggered five steps to the right and then got back on the imaginary line with his hands raised six inches from his waist, which showed his inability to keep his balance.

¶ 9 When Trooper Robinson asked defendant if he had any problems with his legs, defendant said he had no medical problems, and did not tell him that he had two herniated discs and a sciatic nerve problem in his leg. Trooper Robinson noted that the results of the one-legged stand test can be compromised if someone is overweight, but that defendant was not so overweight that he could not perform the test. He also noted that defendant was wearing flat shoes. Defendant lifted one leg off the ground, but then started hopping on the other leg, and raising his arms. He also swayed, and put his foot down multiple times, prompting him to stop the test for defendant's safety.

¶ 10 He also ran defendant's name and birth date into his computer, and learned that defendant's license was revoked. The parties later stipulated that defendant's Illinois driving privileges were revoked on June 6, and 7, 2011.

¶ 11 Trooper Robinson further testified that defendant told him that he was over the legal limit, which was .08, that he was on Vicodin, last ate at 8 p.m., and had seven beers and a shot of alcohol. Defendant refused to take the breathalyzer test, and used profanity. Based on defendant's failure on the field sobriety tests, and the way he was talking and driving, Trooper Robinson concluded that he was under the influence of alcohol.

¶ 12 Defendant testified that on June 6, 2011, he worked as a car salesman and was on his feet for eight hours. He worked until 9 p.m. that day, then went to a restaurant bar where he ate a hamburger and french fries, and drank three beers over the course of an hour and a half. When he left the restaurant, he was not stumbling, swaying or falling, and did not need to call anyone to drive him home. He drove onto the 95th Street ramp of Interstate 294 and headed southbound toward his home in Lynwood, Illinois. There was light traffic, and he was driving 65 miles per hour.

¶ 13 Defendant further testified that after he signaled to move into another lane, a police officer came "flying up" to him, put his lights on, and then "faded all the way over until [he] could stop." He then exited his vehicle because the power window to his car was broken, and Trooper Robinson told him to remain standing at the back of his car. He then agreed to do the field sobriety tests because he was not intoxicated, and informed the trooper that he had a bad back with two herniated disks and a sciatic nerve problem in his left leg. He also told him that he had a prescription for Vicodin but was not taking it, and further testified that he was 5'10" tall and weighed 280 pounds.

¶ 14 Defendant testified that there was debris in the area where he was standing, and "[e]ighteen wheelers [were] blowing by." Although he had his back to the police car, the oscillating lights were on and he could see them on the sides. Defendant further stated that he was wearing dress shoes with two inch heels. During the walk and turn test, he did not use his arms for balance, and the one-legged stand test was difficult for him due to his back pain, wearing dress shoes, and the traffic going by. Defendant testified that he had to stop the test, and told Trooper Robinson that his back was "killing" him and his feet were hurting. He denied telling the trooper that he was over the legal limit, or that he had seven beers and one shot, and

explained that he refused to take the breathalyzer test because he "wasn't taking no more of his tests."

¶ 15 At the close of evidence, the jury found defendant guilty of driving while his license was revoked, and aggravated DUI of alcohol. On appeal, defendant contends that the State failed to prove him guilty of aggravated DUI beyond a reasonable doubt because Trooper Robinson's observations of him were insufficient to prove that his driving was impaired, and merely showed that he consumed alcohol. Defendant also contends that the field sobriety tests were not performed in a reliable manner and thus cannot be relied upon to support the conclusion that he was intoxicated. He also contends that due to his medical condition, it is understandable that he would not perform the tests "in full."

¶ 16 When a defendant challenges the sufficiency of the evidence to sustain his conviction, our duty is to determine whether all of the evidence, direct and circumstantial, when viewed in the light most favorable to the prosecution, would cause a rational trier of fact to conclude that the essential elements of the offense have been proved beyond a reasonable doubt. *People v. Wiley*, 165 Ill. 2d 259, 297 (1995). A criminal conviction will be reversed only if the evidence is so unsatisfactory or improbable that it leaves a reasonable doubt of defendant's guilt. *Wiley*, 165 Ill. 2d at 297. We do not find this to be such a case.

¶ 17 To sustain defendant's conviction for aggravated DUI, the State was required to prove, in relevant part, that defendant was driving under the influence of alcohol. 625 ILCS 5/11-501(a)(2). A defendant is under such influence when his mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care. *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 24. To prove that defendant was under the influence, the State must show that defendant was less able, either mentally and/or physically, to exercise clear judgment

and with steady hands and nerves operate a vehicle with safety to himself and the public. *People v. Gordon*, 378 Ill. App. 3d 626, 632 (2007).

¶ 18 The record here shows that Trooper Robinson observed defendant driving 75 miles per hour in a 45 miles-per-hour construction zone, and that as he paced defendant, their vehicles reached 95 miles per hour. At that point, Trooper Robinson observed defendant "jerk[]" his car into another lane without signaling, activated his lights and curbed him. Defendant failed to comply with his initial order to return to his car, and just blankly stared at him. At that point, Trooper Robinson observed that defendant smelled of alcohol, his speech was slurred, and his eyes were red and bloodshot. In addition, defendant admitted that he had seven beers, a shot of alcohol, and a Vicodin, and expressed that he was over the legal limit for driving.

¶ 19 The record further shows that defendant failed the field sobriety tests which were performed on flat ground while defendant was wearing flat shoes, and refused to take a breathalyzer test. See *People v. Edwards*, 241 Ill. App. 3d 839, 843 (1993) (refusal to take potentially incriminating test can indicate consciousness of guilt). The totality of this evidence was sufficient to allow the trier of fact to find defendant guilty of aggravated DUI beyond a reasonable doubt. *People v. Hires*, 396 Ill. App. 3d 315, 318 (2009); *People v. Matthews*, 304 Ill. App. 3d 514, 517-18 (1999).

¶ 20 Defendant, nonetheless, claims that his version of events was more plausible, and, therefore, the field sobriety tests "cannot be considered to have established intoxication." He further contends that the results of the field sobriety tests were unreliable and cannot be used to conclusively determine whether he was incapable of driving safely.

¶ 21 Defendant testified at trial that he was only driving 65 miles per hour, and had two beers, and told the trooper that he had two herniated disks and a sciatic nerve problem in his left leg.

He claimed that these factors, along with the fact that traffic was whizzing by, and that he was overweight and had been standing all day, wearing dress shoes with two-inch heels, and standing on an uneven surface, prevented him from performing the one-legged stand test, and the walk-and-turn test. The contrasting testimony provided by defendant raised a credibility issue which fell within the purview of the trier of fact to determine. *People v. Campbell,* 146 Ill 2d. 363, 375 (1992); *People v. Hodge,* 250 Ill. App. 3d 736, 744-45 (1993). In making that determination, the trier of fact was not required to believe defendant's self-serving testimony (*People v. Moreira*, 378 Ill. App. 3d 120, 130 (2007); *People v. Comage*, 303 Ill. App. 3d 269, 275 (1999)), over that of Trooper Robinson, and by its decision, the jury obviously found the trooper credible regarding the elements of the charged offense (*People v. Cerda*, 2014 IL App (1st) 120484, ¶ 163). We find no reason to disturb that determination where the jury could reasonably infer the tests were reliable and the testing conditions did not affect defendant's ability to perform the tests (*People v. Ortiz*, 196 Ill. 2d 236, 259 (2001); *People v. Misch*, 213 Ill. App. 3d 939, 942 (1991), citing *People v. Sides*, 199 Ill. App. 3d 203, 206-07 (1990)).

¶ 22 Notwithstanding, defendant contends that his case is similar to *People v. Winfield*, 15 Ill. App. 3d 688, 690 (1973) and *People v. Sullivan*, 132 Ill. App. 2d 674 (1971), where this court found the evidence insufficient to sustain defendants' DUI convictions. In *Winfield*, 15 Ill. App. 3d at 689, and *Sullivan*, 132 Ill. App. 2d at 676, defendants were arrested for DUI of alcohol based on the troopers' observations of alcohol on their breath, and their staggering or swaying conditions. Additionally in *Winfield*, the trooper noted that defendant had bloodshot eyes, and fair speech. Here, in addition to the smell of alcohol on defendant's breath, bloodshot eyes, and slurred speech, defendant failed the field sobriety tests, was observed speeding well over the limit, and changing lanes without signaling. He also admitted to drinking heavily for two hours

prior to being stopped and being over the legal limit. In contrast to *Winfield* and *Sullivan*, the evidence in this case clearly showed that defendant was unable to operate a vehicle safely where his mental or physical faculties were so impaired as to reduce his ability to think and act with ordinary care. *Halerewicz*, 2013 IL App (4th) 120388, ¶ 24. In addition, unlike *Sullivan*, 132 Ill. App. 2d at 678, defendant's testimony that he told the trooper he had medical conditions was contradicted by the trooper's testimony to the contrary, and the jury obviously rejected defendant's account.

¶ 23 We also find defendant's reliance on *People v. Workman*, 312 Ill. App. 3d 305, 312 (2000), misplaced. In *Workman*, the court reversed defendant's conviction for DUI of drugs because the arresting trooper was not knowledgeable of the drug in question, and there was no competent testimony regarding the drug's physiological effects, or how it would affect one's ability to drive safely. *Workman*, 312 Ill. App. 3d at 311-12. There was also conflicting testimony as to whether defendant had taken the drug. *Workman*, 312 Ill. App. 3d at 312. Here, by contrast, defendant admitted to consuming seven beers and a shot, and then failed the field sobriety tests. The testimony in this case clearly established that defendant's consumption of alcohol placed him under the influence of alcohol, and, accordingly, a rational jury could have found him guilty of aggravated DUI of alcohol beyond a reasonable doubt. *People v. Shelton*, 303 Ill. App. 3d 915, 922 (1999).

¶ 24 Defendant further contends that the HGN test was conducted "incorrectly." As explained in his ineffective assistance of counsel claim herein, he maintains that Trooper Robinson did not follow the procedures set forth by the NHTSA manual where he did not test initially for resting nystagmus, and there is no indication that he held his finger above eye level, bringing each eye as far as it can go to the side at appropriate speed, or that he repeated this smooth pursuit part of

the test. Defendant failed to object to the results of the HGN test below, and, therefore, did not preserve this issue for review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Insofar as his contention relates to his challenge of the sufficiency of the evidence, we find that it does not change the outcome since we find that the evidence, as outlined above, was sufficient even without the HGN tests results to allow the trier of fact to conclude that he was proved guilty of aggravated DUI of alcohol beyond a reasonable doubt. *Hires*, 396 Ill. App. 3d at 318; *People v. Weathersby*, 383 Ill. App. 3d 226, 233 (2008).

¶ 25 Although defendant maintains that he had a medical problem which rendered the results of the HGN test inaccurate, Trooper Robinson testified that defendant told him he did not have any medical conditions. Defendant did not dispute this in his testimony, nor offer any evidence to cast doubt on the assessment made of him. Under these circumstances, we find no reasonable doubt of defendant's guilt arising from his claim.

¶ 26 Defendant next contends that trial counsel was ineffective for failing to file a motion *in limine* to exclude the HGN test results, and object to the foundation of the HGN testimony at trial. He maintains that Trooper Robinson's testimony showed that he did not follow the procedures set forth by the NHTSA manual where he did not test initially for resting nystagmus, and there is no indication that he held his finger above eye level, bringing each eye as far as it can go to the side at appropriate speed, or that he repeated this smooth pursuit part of the test. He also contends that because his eyes did not track together, this evidenced the chance of a medical disorder or injury causing the nystagmus.

¶ 27 Under the two-prong test for examining a claim of ineffective assistance of counsel, defendant must establish that his attorney's performance fell below an objective standard of reasonableness, and that but for counsel's deficient performance, the result of the proceeding

would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, defendant must satisfy both prongs of the *Strickland* test, and if this court concludes that defendant did not suffer prejudice, we need not decide whether counsel's performance was deficient. *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 28 Based on the record before us, we find that defendant cannot establish the prejudice prong of the *Strickland* test. Defendant's claim is based on conjecture and surmise, and even without the HGN test, the evidence of defendant's guilt was substantial. Defendant thus cannot establish prejudice resulting from counsel's failure to file a motion *in limine* to exclude the HGN test results, or to object to the foundation of the HGN testimony at trial. *Harris*, 206 Ill. 2d at 304; *Weathersby*, 383 Ill. App. 3d at 233.

¶ 29 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.