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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11-CF-553
	)	
LARRY D. HODGES,	)	Honorable
	)	George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices Hutchinson and Zenoff concurred in the judgment.

**ORDER**

*Held:* Defendant could not show reversible plain error in the trial court's admission of certain testimony (which contention had been forfeited despite defendant's packaging it under the rubric of sufficiency of the evidence): some of the testimony could not have affected the outcome, and defendant himself elicited the rest.

¶ 1 Following a bench trial in the circuit court of Du Page County, defendant, Larry D. Hodges, was found guilty of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d) (West 2010)) and was sentenced to a four-year prison term. Defendant argues on appeal that the properly admitted evidence at trial was insufficient to satisfy the State's burden of proving his guilt

beyond a reasonable doubt. Specifically, defendant argues that his conviction rests, in part, on testimony that the arresting officer subjected him to the horizontal gaze nystagmus (HGN) test. According to defendant, however, the record lacks a proper foundation pursuant to *People v. McKown*, 236 Ill. 2d 278 (2010), for the testimony. Defendant insists that his conviction cannot be sustained on the basis of the other evidence presented by the State. As explained below, however, defendant has forfeited review of the question of whether testimony concerning the HGN test was admissible. We therefore affirm defendant's conviction.

¶2 At trial, Darien police officer Anton Hruby testified that on December 12, 2010, at about 1:30 a.m., he was on patrol in the area of North Frontage Road and Cass Avenue. Hruby was there in response to a report of a "wrong way driver" operating a white Pontiac. Hruby observed a white Pontiac in the parking area of a gas station. The Pontiac left the gas station and turned onto southbound Lemont Road. Hruby followed it. He observed the Pontiac continuously swerving between lanes. Hruby saw nothing in the roadway that would account for the swerving. As the Pontiac approached 97th Street, Hruby activated his squad car's emergency lights and pulled the Pontiac over. Defendant was driving. Hruby approached the vehicle and spoke with defendant. He noticed that defendant's eyes were red, glassy, and bloodshot; a strong odor of an alcoholic beverage was coming from defendant's mouth; and defendant's speech was slurred.

¶3 Hruby asked defendant if he knew what time it was. Defendant indicated that he believed that it was about 9:40 p.m. According to Hruby, defendant then looked at his watch and appeared surprised to learn that it was 1:30 a.m. Hruby asked defendant for his driver's license. It took defendant about two minutes to retrieve it. The license had been revoked. Defendant was unable to find proof of insurance, but Hruby found it underneath the driver's visor. Hruby testified on direct

examination that he conducted an HGN test while waiting for a backup unit to arrive. Hruby did not elaborate on the testing and did not divulge the result. Hruby further testified that he asked defendant if he had had anything to drink. Defendant indicated that he had had one beer. Hruby had asked defendant the same question earlier and defendant had denied having anything to drink. Defendant was also confused about his location; he appeared to believe that he was near Division Street in Chicago.

¶ 4 When a backup officer arrived, Hruby asked defendant to step out of the vehicle so that he could place him under arrest for driving with a revoked license. Defendant stumbled slightly as he emerged. Hruby transported defendant to the police station. While Hruby was removing defendant's handcuffs, defendant stated that he needed to use the restroom. Hruby asked defendant to wait 30 seconds so he could get the second handcuff off, but defendant began to urinate. Defendant became uncooperative at that point. He refused to perform field sobriety tests and to submit to a Breathalyzer test. He also made belligerent remarks to Hruby.

¶ 5 Hruby testified that he had encountered individuals under the influence of alcohol on over 100 occasions. During his encounter with defendant, Hruby formed the opinion that defendant was under the influence of alcohol. This opinion was based on "[Hruby's] [p]rior training, experience and the fact that [defendant] had a strong odor of alcoholic-based beverage, red, glassy, bloodshot eyes, [defendant's] admission to drinking."

¶ 6 On cross-examination, Hruby testified that when he first observed defendant's vehicle at the gas station it was parked properly. Defendant pulled over immediately when Hruby activated his squad car's emergency lights. When defendant exited his vehicle, he did not use any part of the vehicle for support. When placed under arrest, defendant had no apparent difficulty walking to

Hruby's squad car. Nor was there anything unusual about defendant's gait once he arrived at the police station. Of particular significance here, is the following exchange that occurred during cross-examination:

“Q. You made the decision at some point to administer the HGN test, the horizontal nystagmus—

A. Yes. Horizontal gaze nystagmus.

Q. Yes, okay.

A. Yes.

Q. And you administered that test while he was seated in the car; correct?

A. Sure.

Q. And through your training, isn't it not proper protocol to administer the HGN test while a subject is seated in the car?

A. I do this just to get an idea what his eyes look like to find out, all right, has he been drinking or has he not. Typically then after I have the subject exit the vehicle I do—I re-administer the exam to do it officially. So it's just usually while I'm waiting for a backup officer to get there. I take a quick look at their eyes to make sure—not to make sure, just to confirm my suspicion that the subject has been drinking.

Q. Okay. But isn't it through NHTSA standards, the National Highway Traffic Safety Administration standards, isn't it not an accurate reading if the subject is seated?

A. Yes, correct. I mean, yes, this is just for—this is for my—I guess for me to use, not necessarily—this isn't the official HGN test.”

¶ 7 In *McKown*, our supreme court held that “evidence of HGN field-sobriety testing, when performed according to the [National Highway Traffic Safety Administration (NHTSA)] protocol by a properly trained officer, is admissible \*\*\* for the purpose of showing whether the subject has likely consumed alcohol and may be impaired.” *McKown*, 236 Ill. 2d at 306. Defendant argues that Hruby’s testimony shows that he did not perform the HGN test in accordance with the NHTSA protocol and that the testimony regarding the test was therefore inadmissible. According to defendant, “[w]ithout Officer Hruby’s testimony regarding the HGN test, the State was incapable of proving [defendant] guilty beyond a reasonable doubt.”

¶ 8 Defendant did not object to the testimony in question; indeed, he *elicited* most of it while cross-examining Hruby. Nor did defendant raise the issue in his posttrial motion. It is well established that “[w]hen \*\*\* a defendant fails to object to an error at trial and include the error in a posttrial motion, he forfeits ordinary appellate review of that error.” *People v. Johnson*, 238 Ill. 2d 478, 484 (2010). Defendant maintains that, because his posttrial motion challenged the sufficiency of the evidence, he has not forfeited that issue. That is true. In fact, the forfeiture rule does not apply to challenges to the sufficiency of the evidence. See, e.g., *People v. McGee*, 326 Ill. App. 3d 165, 168 (2001). However, defendant’s argument on appeal is not simply that the State presented insufficient evidence of guilt, but rather that his conviction rests on evidence admitted without a proper foundation. The argument therefore subsumes a question of admissibility that was neither raised below nor exempt from the forfeiture principle.<sup>1</sup>

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<sup>1</sup>“Generally, a defendant’s challenge to the foundation for a particular piece of evidence is considered an attack on its admissibility rather than an attack on its sufficiency to uphold a conviction and is thus subject to the ordinary rules of [forfeiture].” *People v. Hamilton*, 361 Ill. App.

¶ 9 In his reply brief, defendant argues that the admission of testimony regarding the HGN test was plain error.<sup>2</sup> The plain-error rule permits a reviewing court to consider a forfeited issue where the evidence in a case is so closely balanced that the outcome might have resulted from the error and not the evidence (*People v. Herron*, 215 Ill. 2d 167, 178 (2005)), or where the error is so serious that the defendant was denied a substantial right, and thus a fair hearing (*id.* at 179). It should be considered axiomatic, however, that if an error would not have resulted in a reversal if it had been properly preserved, it cannot be considered plain error. *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). Furthermore, the plain-error rule does not permit review of “invited errors” (*People v. Harding*, 2012 IL App (2d) 101011, ¶ 17), *i.e.* those that the defendant induced the trial court to commit or to which the defendant consented (*Coella v. JMS Trucking Co. of Illinois, Inc.*, 403 Ill. App. 3d 82, 95 (2010)). Mindful of these principles, we conclude that the plain-error rule does not apply here. During direct examination by the State, Hruby did nothing more than mention that he performed the HGN test while waiting for a backup officer to arrive. Hruby did not testify as to the result of the test or whether it affected his opinion of whether defendant was under the influence of alcohol. We fail to see how merely mentioning that the test had been performed could have had any effect on the outcome of the case. Any error in admitting this testimony was harmless and thus

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3d 836, 843-44 (2005). That generalization is true of defendant’s argument here. Defendant does not argue that the absence of foundational evidence gives rise to a reasonable doubt of his guilt. He argues that the evidence necessary to prove his guilt was inadmissible.

<sup>2</sup>Contrary to the State’s argument, defendant’s failure to raise the plain-error rule in his opening brief does not foreclose review under the plain-error rule. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010).

would not have mandated reversal even if defendant had objected to the testimony and raised the error in his posttrial motion.

¶ 10 The bulk of Hruby's testimony concerning the HGN test was elicited by defense counsel during cross-examination. The questioning was apparently designed to confirm that the HGN test procedure did not yield any evidence of guilt. It is hard to imagine how Hruby's testimony that he performed the test improperly could have contributed to the trial court's finding that defendant was guilty. Be that as it may, any error in the admission of that testimony was invited by the defense through its questioning, and defendant may not now complain that the testimony was plain error.

¶ 11 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 12 Affirmed.