

¶ 2 Following a jury trial, defendant Edilberto Sandoval was convicted of driving under the influence of alcohol (DUI) pursuant to section 11-501(a)(2) of the Illinois Vehicle Code (the Vehicle Code) (625 ILCS 5/11-501(a)(2) (West 2010)), and failing to give information and render aid pursuant to section 11-403 of the Vehicle Code (625 ILCS 5/11-403) (2010)). Defendant was found not guilty of driving under the influence with an alcohol concentration of 0.08 or more pursuant to section 11-501(a)(1) of the Vehicle Code (625 ILCS 5/11-501(A)(1) and leaving the scene of an accident. For the DUI conviction, the court sentenced defendant to 24 months of conditional discharge with a variety of conditions. For the failure to render aid conviction, defendant was sentenced to 320 hours of community service. On appeal, defendant contends that the State failed to lay the proper foundation for a police officer's testimony regarding the horizontal gaze nystagmus (HGN) field sobriety test, and thus the trial court erred in allowing the State to introduce such testimony. We affirm.

¶ 3 At trial, Jason Kaestner testified that on July 5, 2010, around 9:30 pm, he was riding his bicycle in the eastbound lane of Diversey Avenue. The weather conditions were clear, and "the streetlights had just come on. There was still some light from the setting sun." He observed "a car [*sic*] that was trying to turn across traffic being rather erratic." He described the car as a "late model Chevy S10." He stated that "the driver was hitting the brakes at a very rapid motion making the truck jerk back and forth." As Kaestner coasted past the truck, it accelerated into the parking lot driveway. The truck's bumper hit Kaestner's knee and knocked him off the bicycle. Kaestner could see the driver through the windshield prior to the impact as well as after the collision. After he was on the ground, the driver "sort of pulled onto the apron of the parking lot and got out of the driver's side and came and stood over [him]." Kaestner identified defendant as the driver of the truck. He stated that from his experience as a college student and through

training to become a bartender, he believed defendant to be under the influence of alcohol. Specifically, "he was not steady on his feet as he approached me. *** He also has sort of his cheeks were a little bit sallow and swollen then as they were sunken, and his eyes were slightly bloodshot as well." Kaestner also noted defendant's "slurred speech." Defendant then stood over Kaestner and said something to him indicating that the accident was defendant's fault. Defendant did not give his name, phone number, proof of insurance, driver's license, or any other identifying information to Kaestner. He walked back to his truck and drove to a parking spot in the parking lot by the exit on the opposite side of the lot. By the time the police arrived, defendant had driven away. Kaestner gave the police defendant's physical description and a description of defendant's truck.

¶ 4 Officer S. Sammartino testified that around 9:50 p.m, he was in the vicinity of Fullerton and Central on routine patrol when he responded to a flash message for assistance in the area of the 2700 block of Linder. When he arrived he saw Sergeant Jerome with defendant and an "older model, gray pickup truck." Defendant stated that he had been in an accident and that he just wanted to go home. At this time, Sammartino noticed that "defendant had a moderate odor of alcoholic beverage on his breath. He had glassy, bloodshot eyes, and he slurred when he spoke." Based on his experience as an officer, he suspected that defendant was under the influence of alcohol. Officer Sammartino placed defendant into custody and took him to the station because he knew there had been an accident involving personal injury.

¶ 5 Officer Karl Mattson also responded to a call for assistance, and upon his arrival he observed defendant handcuffed in the back of a squad car. He detected "a moderate odor of alcohol around [defendant]" as well as "bloodshot, glassy eyes." Defendant said he had been in an accident and said he had two beers at a friend's house. Defendant was transported to the police

station where Officer Mattson also went to begin processing for the DUI investigation. Officer Mattson offered to administer field sobriety tests in Spanish, because defendant seemed more comfortable speaking in Spanish and Officer Mattson was a fluent speaker.

¶ 6 Officer Mattson received at least 36 hours of training to perform the HGN test and passed both written and practical exams on the subject. He explained that when a person has been drinking alcohol, an effect is "an involuntary motion of the eye," and that when the subject is asked to follow a specific path with his or her eyes, their eyes stagger as they follow a pen or stylus. If their eyes stagger it "typically means they've been drinking and they're under the influence of alcohol." Mattson then testified over defense counsel's objection for lack of foundation, that when he performed the test on defendant, he first confirmed that defendant did not wear contacts or glasses. He then held a pen about 12 to 14 inches from defendant's face and moved it slowly to the left and back, then to the right and back. It took about five seconds to get to the outer extreme of defendant's vision, although National Highway Traffic Safety Administration (NHTSA) teaches that each pass should take two seconds. He was looking for smooth pursuit, with both eyes focused on the tip of the pen and tracking smoothly without any stoppage, but defendant's eyes were not following smoothly; he observed the stagger in both eyes. He was also looking for staggering at the maximum point of the field of vision, which he also observed.

¶ 7 Officer Mattson did not perform a third portion of the test after he noted four clues of impairment. He explained that there are six possible clues to observe in the subject, but once the subject displays four clues, it indicates that they are under the influence of alcohol and should not be operating a vehicle or it justifies continuing with further field sobriety tests. Mattson also

administered the "walk-and-turn test" and the "stand-on-one-leg test," and on each of those tests defendant exhibited enough clues to indicate he had consumed alcohol and was impaired.

¶ 8 Officer Patrick Learnahan, who was trained to administer Breathalyzer tests, offered defendant a Breathalyzer test at approximately 11 p.m., and defendant's blood alcohol concentration (BAC) registered 0.079. The Breathalyzer that was used passed accuracy checks on July 1, 2010 and August 1, 2010, as well as a self-diagnostic test just before defendant used it.

¶ 9 Dr. Larsen, director of graduate studies for Forensic Sciences at the University of Illinois Chicago, testified that he could use a subject's BAC to estimate a BAC at an earlier point in time using a technique called retrograde extrapolation. He determined that, at the time of the incident, defendant's BAC was between 0.090 and 0.101.

¶ 10 Following closing arguments, the jury deliberated and found defendant guilty of driving under the influence and failure of duty to give information or render aid. The jury found him not guilty of driving with an alcohol concentration of 0.08 or more and leaving the scene of an accident. The court sentenced defendant to 24 months of conditional discharge with various conditions for the DUI conviction. For the failure to render aid conviction, defendant was sentenced to 320 hours of community service.

¶ 11 On appeal, defendant contends that the State failed to lay the proper foundation for a police officer's testimony regarding the horizontal gaze nystagmus (HGN) field sobriety test, and therefore the trial court erred in allowing the State to introduce such testimony. The State responds that there is evidence that Officer Mattson administered the test in substantial compliance with NHTSA standards, and even if he did not comply with the standards the error was harmless.

¶ 12 Generally, the admissibility of evidence is within the discretion of the trial court so its decision will not be set aside absent an abuse of discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12. A court abuses its discretion only where its decision was arbitrary, fanciful, or unreasonable so that no reasonable person would agree with it. *People v. Rivera*, 2013 IL 112467, ¶ 37. Consumption of alcohol is a necessary precondition to impairment due to alcohol, so that any evidence of alcohol consumption is relevant to the issue of impairment. *People v. McKown*, 236 Ill. 2d 278, 302 (2010) (*McKown II*). To lay a proper foundation for the admission of HGN results, the State needs to demonstrate that the officer who administered the test was trained in the procedure and that the test was properly administered. *People v. Basler*, 193 Ill. 2d 545, 552 (2000).

¶ 13 However, admission of HGN testimony in the absence of a proper foundation is harmless error where other evidence establishes the defendant's guilt beyond a reasonable doubt so that retrial without the HGN evidence would produce no different result. *McKown II*, 236 Ill. 2d at 311. Error will be deemed harmless and a new trial unnecessary when the competent evidence in the record establishes the defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result. *Id.*

¶ 14 In *McKown II*, our supreme court set forth the procedure an officer must follow to administer an HGN test as follows:

“In brief, the officer first questions the subject to determine whether he or she has any medical condition or is taking any medication that might affect the results of the test. If not, the officer performs a preliminary test to determine whether the pupils of the subject’s eyes are of equal size and whether the eyes ‘track’ equally as an object is moved, at eye level, from side to side. If so, the HGN test itself is performed. The officer looks for three ‘clues,’ assessing each eye separately. The three clues are lack of smooth pursuit, distinct nystagmus at maximum deviation, and the onset of nystagmus at an

angle less than 45 degrees. One point is assigned for each clue that is present in either eye. Thus, the maximum score is six, which would indicate all three clues present in both eyes. A score of four or more is considered 'failing' and indicative of alcohol impairment." *McKown II*, 236 Ill. 2d at 284-85.

The NHTSA manual also requires the officer to "[r]epeat the procedure." NHTSA DWI Detection and Standardized Field Sobriety Testing Manual, Student ed., at VIII-7 (November 25, 2014, 3:09 p.m.), <http://oag.dc.gov/publication/2006-nhtsa-sfst-manual>.

¶ 15 In this case, we find that Officer Mattson's testimony failed to show that he followed the NHTSA manual regarding proper testing procedures. Although the officer did ask defendant whether he wore glasses or contacts, he did not testify to following other pre-test procedures required by the NHTSA manual. Officer Mattson did not testify that he checked for equal pupil size or for resting nystagmus, repeated the procedure of checking for smooth pursuit, and held the stylus for a minimum of four seconds while looking for distinct and sustained nystagmus at maximum deviation.

¶ 16 We reject the State's argument that substantial compliance with NHTSA procedures is sufficient to allow admission of HGN test results. The State's argument reflects a misunderstanding of the essential holding of *McKown II*. The *McKown II* court held that an HGN test administered within the guidelines of the NHTSA manual is generally accepted within the scientific community as indicative of alcohol consumption. See *McKown II*, 236 Ill. 2d at 306 ("A properly trained police officer who performed the HGN field test in accordance with proper procedures may give expert testimony regarding the results of the test.") An HGN test performed in "substantial compliance" with the procedures may well have some probative value, but its acceptance within the relevant scientific community has not been established. If the State desires to introduce such evidence, it must first establish that the tests, actually performed, are generally

accepted as scientific evidence of impairment in the relevant fields of medicine, ophthalmology, optometry or neurophysiology. In other words, the trial court must conduct a *Frye* hearing. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The essential question is scientific acceptance. If the proper procedures have been followed by a properly trained officer, the trial court may rely on *McKown II* and take judicial notice of scientific acceptance. If some other procedures have been followed, the HGN evidence may still be admissible, but the trial court cannot rely on *McKown II* as a basis for admissibility.

¶ 17 Therefore, we find that the State failed to lay the proper foundation for Officer Mattson's testimony regarding the HGN test because the officer did not comply with the testing protocols established by the NHTSA. *People v. Basler*, 193 Ill.2d 545, 552 (2000). Because there was no proper foundation, we find that the trial court abused its discretion in admitting the HGN test results.

¶ 18 The State contends that even if Mattson failed to follow the NHTSA manual and the evidence was improperly admitted, the error was harmless. Defendant was first seen driving erratically in his truck by the bicyclist, Kaestner, around 9:30 p.m. After defendant hit Kaestner on his knee with his truck, he exited his truck and Kaestner observed that defendant was "not steady on his feet," had swollen cheeks, slightly bloodshot eyes, and slurred his speech as he spoke to him. He concluded that defendant appeared to be intoxicated. Defendant then left the scene of the accident. Minutes later, defendant was stopped by police. Officer Sammartino noticed that "defendant had a moderate odor of alcoholic beverage on his breath. He had glassy, bloodshot eyes, and he slurred when he spoke." The combination of their testimony was sufficient to show that defendant was intoxicated. See *People v. Morris*, 2014 IL App (1st) 130512, ¶ 20 (holding that testimony that a defendant's breath smelled of alcohol and his or her

eyes were glassy and bloodshot is relevant and admissible evidence in a DUI prosecution.) Following his arrival, Officer Mattson observed defendant and stated that he detected "a moderate odor of alcohol around [defendant]" as well as "bloodshot, glassy eyes." Defendant also admitted to having two beers at a friend's house. Aside from the HGN test, defendant was also given two other standardized field sobriety tests (the walk-and-turn test and the stand-on-one-leg test), and Officer Mattson determined that defendant exhibited enough clues to indicate he had consumed alcohol and was impaired. We find that Officer Mattson's failure to comply with the HGN testing protocols resulted in harmless error because the remaining competent evidence was more than sufficient to find defendant guilty of the charged offense. See *People v. Graves*, 2012 IL App (4th) 110536, ¶ 33.

¶ 19 Because this court has held that "[s]cientific proof of intoxication is unnecessary to sustain a conviction for driving under the influence of alcohol where there is credible testimony from the arresting officer," (see *People v. Gordon*, 378 Ill. App. 3d 626, 632 (2007)) we find that competent evidence in the record establishes defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result. See *McKown II*, 236 Ill. 2d at 311. Moreover, although we do not need any scientific evidence to affirm defendant's conviction, we note that defendant's breath registered a 0.079 BAC at 11 p.m on the night of the accident, which strongly suggests that defendant was impaired during the incident.

¶ 20 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.