2017 IL App (2d) 160224-U
No. 2-16-0224
Order filed February 14, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTHONY RICE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 14-DT-2233 Honorable Anthony V. Coco, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence was properly admitted and was sufficient to support the defendant's conviction.

¶ 2 Following a bench trial, the circuit court of Du Page County found the defendant, Anthony Rice, guilty of driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2012)). He appeals, challenging his conviction on a variety of grounds. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 23, 2014, the defendant was arrested and charged with DUI and speeding while in a construction zone (625 ILCS 5/11-605.1 (West 2012)). The bench trial in the case commenced on June 18, 2015. Neither party filed any pretrial motions *in limine*. The sole evidence presented at trial consisted of two items: the testimony of the arresting officer, Illinois State Police Trooper Kelly Hosteny, and DVDs containing video recordings from the dashboard camera and the back seat camera of Hosteny's police car.

¶ 5 Hosteny testified that at 3:37 on the morning of August 23, 2014, she was stopped on the shoulder of I-88 westbound when a car passed her at a high rate of speed despite the fact that it was traveling through a construction zone. The posted speed limit in that area was 45 miles per hour. Hosteny began following the car, matching its speed, which was about 90 miles per hour. She followed it for about two miles. She then turned on her flashing lights and pulled the car over. At trial, she identified the defendant as the driver.

¶ 6 When Hosteny spoke with the defendant, she observed that he had glassy, bloodshot eyes and that his speech was slurred. There was a strong odor of alcohol on his breath. The defendant told her that he was coming from a VFW hall, where a friend of his who was a trooper had bought him a "double shot" of Grey Goose Cranberry and Lime. Hosteny told the defendant that she was going to have him step out of the car and perform field sobriety tests to see whether he should be driving.

¶ 7 Hosteny testified that she had been trained in the administration of standard field sobriety tests through a class based on the National Traffic and Highway Safety Administration's standards. She administered three field tests: the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-leg-stand test. The HGN test offered six "clues" as to whether the test subject had consumed alcohol, and the defendant showed all of them, including a lack of

smooth pursuit, distinct and sustained nystagmus, and an onset of nystagmus prior to 45 degrees. Before administering the next tests, Hosteny asked the defendant if he had any injuries that would impair his ability to complete the tests. The defendant said no.

¶ 8 Hosteny then administered the walk-and-turn test. The defendant was not able to complete the test as instructed, demonstrating a loss of balance and an inability to walk heel-to-toe on several of the steps. He also took 13 steps in one direction and 17 in the other, despite being instructed to take 9 steps in each direction. Hosteny testified that there were eight possible clues indicating impairment in the walk-and-turn test, and the defendant showed six of them.

¶ 9 Hosteny lastly administered the one-leg-stand test. The defendant was unable to keep his balance for the full amount of time (30 seconds) and put his foot down. Hosteny testified that he also swayed and used his arms to keep his balance, showing three indications of impairment.

¶ 10 During all of the tests, the defendant was talkative. Hosteny testified that, during the testing, the defendant became agitated, threw his arms up, and said, "Just arrest me." Hosteny stated that he then "started making remarks about Ferguson." When asked what those remarks were, the defense objected on the grounds of irrelevance, but the trial court overruled the objection. Hosteny then stated that the defendant had said, " 'This is why police officers are getting shot in Ferguson, because of people like you.' " The defense objected again and moved to strike on the basis of irrelevance and that the comments were inflammatory. The trial court overruled the objection, saying that the trial was a bench trial, not a jury trial, and it would not be easily inflamed. In addition, even if the remarks were "not the most powerful evidence," it believed that the defendant's comments were relevant. Hosteny then testified that the defendant's demeanor was "very agitated and very vulgar." The defense objected to this vague language and the trial court commented that it "would be curious" to know what exactly the

defendant had said. Hosteny stated that the defendant said, " 'You white folks, fuck you all,' and then made multiple comments about Ferguson and the police officers getting shot out there," and "that the assisting trooper was trying to plant stuff in his car."

¶ 11 After administering the field sobriety tests, Hosteny arrested the defendant and transported him to the squad room at Plaza 61 for processing. After a 20-minute observation period, the defendant was offered the opportunity to take a breath test. He declined. Hosteny then read the defendant *Miranda* warnings, and the defendant indicated that he understood them. During further conversation at Plaza 61 Hosteny asked the defendant if there was anything wrong with him and the defendant replied that he was sick of her.

¶ 12 The defendant was then transported to the Du Page County Jail. According to Hosteny, during the ride, the defendant told Hosteny that she had beautiful eyes, asked her if she had a boyfriend or was married, and asked for her telephone number so that she could take him out after the arrest. Hosteny testified that, in her experience dealing with individuals under the influence of alcohol, it was her opinion that the defendant was under the influence of alcohol when she arrested him.

¶ 13 Hosteny laid the foundation for the video recordings from her police car, and they were admitted without objection, the defense stipulating that they were a true and accurate representation of what had occurred. The State then played various excerpts from the recordings. The defense did not seek to play any other portions of the recordings.

¶ 14 The first DVD contained recordings of Hosteny pulling over the defendant's car, the field sobriety tests, the defendant's arrest, and the defendant's statements in the back seat of the police car while he was being transported to Plaza 61. The State played the first five minutes of the recording. This portion was from the dashboard camera, and it recorded Hosteny's pursuit of the

defendant's car and her stop of it. The video reveals that the shoulder of the road where the two cars stopped was sloped slightly. It was paved and there did not appear to be any debris on it, although one portion displayed a lengthy crack. When she approached the defendant's car, Hosteny told him that she was stopping him for speeding. The defendant admitted, "Well, you got me," and then immediately mentioned that he had just come from hanging out with another state trooper. Hosteny asked him where he had been and how much he had had to drink. His answers mirrored Hosteny's testimony, and also corroborated her description of his speech as somewhat slurred.

¶ 15 The State then fast-forwarded through some portion and played some portion (the transcript does not indicate how much) of the next 10 minutes of the recording, which documented the field sobriety tests. The video of this 10-minute period showed that, before administering the walk-and-turn test, Hosteny repeated the instructions in full twice, and demonstrated the test as well. The test was administered on the paved shoulder of the roadway, in between the defendant's car and the police car. The defendant protested that the ground was not level. Twice during the test, the defendant became frustrated, raised his arms in a surrendering motion, and said, "Just arrest me."

¶ 16 The State then played another three-minute portion showing the defendant's arrest. The defendant was generally cooperative with Hosteny throughout this portion. After the defendant was placed into the back of the police car, the recording switched from the dashboard camera to the back seat camera. The audio was muffled and hard to hear as to the defendant's statements from that point on (the main audio pickup appeared to be on Hosteny's person).

¶ 17 The State then fast-forwarded through a little more than two minutes of the recording (during which Hosteny spoke to another trooper who was retrieving the defendant's phone and

keys from his car, while the defendant slumped dejectedly and shook his head in the back seat) before playing another three-and-a-half-minute excerpt. This excerpt showed the defendant talking to Hosteny as she typed on her laptop in the front seat. He expressed concern that the police would put something into his car and said that he didn't trust the police. The defendant repeatedly asked what speed Hosteny clocked him going and Hosteny repeatedly refused to tell him, saying that he would get all the information when he went to court (although she told him generally that he was going double the posted limit). He asked what he was being charged with, and Hosteny told him DUI. The defendant appeared distressed to be watching his car getting towed, shaking his head and asking where it would be taken, and demanded that Hosteny get going so that he could "get this thing over with." At one point, the defendant shook his head and said, "This ain't going to be another Ferguson thing." Hosteny responded, "We're not even bringing that up now," because "it has no bearing."

¶ 18 The State again fast-forwarded through two-and-a-half minutes of the recording. The next excerpt, which was about five minutes long, showed the defendant expressing concern and anger about how his car was being handled during the towing process, and making almost inaudible comments regarding Ferguson ("I see why they (inaudible) Ferguson (inaudible) police"). The defendant then began arguing with Hosteny, saying that he was not "damn drunk." Hosteny stated that she was not going to argue with him. The defendant told Hosteny that he urgently needed to go to the bathroom. Hosteny told him that he could go when she got to the "station" (Plaza 61). The excerpt showed the defendant reaching to unbuckle his seat belt and appearing to hold his crotch. The total duration of this DVD recording was about 35 minutes.

¶ 19 The State then played excerpts from a second DVD, which contained recordings made during the defendant's transport from Plaza 61 to the Du Page County Jail. The first excerpt

from this recording was three minutes long. The defendant appeared relaxed and in a more pleasant mood, telling Hosteny that he would let her do her job (putting the seat belt on him at the start of the transport) and maybe someday they would "get together and do something else." He asked for her name. Hosteny's responses were mild and at times she laughed at his comments. The State then fast-forwarded through about 10 minutes of the recording. The next excerpt was about four minutes long, and showed the defendant still asking about Hosteny's name (she gave him her last name), asking if she had a boyfriend, and telling her that she had "delightful eyes."

¶ 20 On cross-examination, Hosteny agreed that she had not observed the defendant's car swerving when she was following it, and it pulled over without incident. When she asked for the defendant's license and insurance, he was able to locate them and present them without fumbling. When the defendant got out of the car, she did not see him use the car door for support. She did not see anything unusual about his gait as he walked to the back of his car. Further, he did not sway during the HGN test. With the exception of turning his head once to look at passing traffic, he was able to follow her fingertip with his eyes only. Pressed to admit that the video recordings did not show the defendant directing profanity toward Hosteny or other officers, Hosteny stated that the defendant had made his comment, "You white folks, fuck you all," at Plaza 61. Hosteny also testified that her speedometer had last been calibrated one month before the arrest, and she had relied upon another trooper's report of the calibration. After Hosteny's cross-examination, the State rested.

¶ 21 The defense moved for a directed finding. The trial court granted the motion as to the speeding count, finding that the evidence did not show that Hosteny personally calibrated "the radar device" before and after her shift, and instead it had last been calibrated 30 days earlier.

However, the trial court denied the motion as to the DUI count. The defense then rested, with the trial court inquiring of the defendant regarding his decision not to testify.

¶ 22 The parties presented their closing arguments. During its closing, the defense admitted that the video showed the defendant "hitting on" Hosteny but argued that his conduct was not necessarily a sign of impairment as perhaps it was his normal demeanor. Further, aside from the speeding, the defendant had operated his vehicle proficiently, and he had pulled over, produced his license and registration, and gotten out of the car without signs of impairment. Moreover, the defendant's statements that Hosteny should "just arrest me" reflected a fatalistic view of his position, suggesting that he had no motivation to try to avoid arrest by being careful about the field sobriety tests. The defense summarized the incident as reflecting excellent and professional work by Hosteny, but argued that the State had failed to show that the defendant was impaired. In response, the State argued that the video had supported Hosteny's testimony that the defendant failed his field sobriety tests. Further, the "best sign of impairment" was the defendant's demeanor and comments, which changed from "difficult" with comments about Ferguson and his distrust of police, to flirtatious, asking Hosteny for a date and commenting on her eyes. The State argued that these comments showed that the defendant was under the influence of alcohol. The State noted that Hosteny was also forced to repeat her instructions for the field sobriety tests, indicating that the defendant was having a hard time comprehending and remembering the instructions. Lastly, the defendant had refused to take a breath test, which demonstrated a consciousness of guilt.

¶ 23 The trial court found the defendant guilty of DUI. It began by noting that the State was required to prove beyond a reasonable doubt that the defendant was driving and was under the influence of alcohol—that is, that "his mental or physical faculties [were] so impaired as to

reduce his ability to think and act with ordinary care." Some of the evidence, the court stated, had favored the defendant. For instance, the defendant apparently was able to operate his car in a construction zone while speeding, which took a "certain amount of manual dexterity"—even though the trial court had granted judgment for the defendant on this count, it could take account of the evidence presented on that issue. Further, "he pulled over properly, he got out of the car okay, [and] he gave his driver's license to the trooper okay," which were "all things that cut in the defendant's favor." However, the trial court found credible Hosteny's testimony about the odor of alcohol, the defendant's glassy, bloodshot eyes, and his slurred speech, the last of which the court had observed for itself on the video. Further, the trial court expressed the opinion that the defendant "did terrible on the field sobriety tests," both mentally and physically. Mentally, the defendant "seemed to exhibit actually an inability to follow directions," forcing Hosteny to repeat the instructions several times, and even then the defendant did not seem to be able to follow those directions. Moreover, he performed poorly physically on the walk-and-turn and one-leg-stand tests, stepping off of the heel-toe line and putting his foot down well before the end of the latter test. His refusal to take a breathalyzer test indicated a consciousness of guilt. Finally, the defendant's sustained talking showed mood swings:

> "I mean I don't think he's guilty because he mentioned Ferguson or whatever, but it certainly was quite a contrast as the evening wore on. And, again, I understand that some people are perhaps less shy than others, but, you know, it's certainly not—you don't normally see somebody in handcuffs in the back of a squad car propositioning the arresting officer for a date, and even if he kept his mouth shut and he didn't say any of those things, I still think that the State would have proven their case, but I certainly think to a certain extent that those things are relevant and add to all the things I've said."

¶ 24 The defendant filed a motion to reconsider the finding of guilty or for a new trial, arguing that: (1) Hosteny did not give the defendant any *Miranda* warnings when she placed him under arrest, and that this prejudiced the defendant because his statements were in fact "used against him" at trial; (2) the field sobriety tests were conducted on uneven ground, and were further influenced by the fact that the defendant needed to urinate; and (3) as the speeding charge was dismissed, there was no reasonable articulable suspicion for the initial stop and all of the subsequent evidence was "fruit of the poisonous tree." The defendant, who had retained new counsel, also argued that his former attorney was ineffective in that he had not filed a motion to suppress the evidence despite the lack of *Miranda* warnings.

¶ 25 After hearing argument on the motion to reconsider, the trial court denied it. The trial court stated that it recalled the case because of the defendant's "amorous advances" toward Hosteny, and while it did not hold those against the defendant, the court believed it was appropriate to consider the evidence of the defendant's mood swings. Even if it ignored that evidence, however, the State had presented ample evidence that the defendant was under the influence of alcohol when he drove. As to the last argument raised by the defendant, it had not dismissed the speeding charge; rather, it found the State had not proved its case beyond a reasonable doubt. Because of the difference between this high burden of proof and the reasonable articulable suspicion standard, there was no basis for the defendant's argument. The trial court did not specifically address the defendant's arguments relating to *Miranda* warnings or the condition of the ground where the field sobriety tests were performed. The defendant was later sentenced to 5 days in jail and 18 months of probation. He then filed this timely appeal.

¶ 26 II. ANALYSIS

¶ 27 In his opening brief on appeal, the defendant raises four arguments: (1) the trial court should not have admitted the evidence regarding the results of the HGN test because no hearing was held on the scientific acceptance of HGN test results pursuant to *Frye v. United States*, 293 F. 1013, 1014 (1923), in this case; (2) the trial court should not have considered any evidence of the defendant's statements to Hosteny because he did not receive *Miranda* warnings when he was first arrested; (3) the trial court erroneously failed to take into account the unevenness of the ground and its effect on the defendant's ability to perform the walk-and-turn and one-leg-stand tests; and (4) if the evidence referred to in the other three arguments had been properly excluded or had been assigned the proper weight, there was insufficient evidence to support his conviction. We examine each argument in turn.

¶ 28 The State argues that the defendant's first argument is forfeited, and we agree. The defendant's trial counsel never objected to Hosteny's testimony regarding the results of the HGN test she administered to the defendant, and did not raise the issue in the posttrial motion. In order to preserve an argument that no proper foundation was laid for the admission of evidence (because its admissibility under the *Frye* standard was in doubt), a defendant must object at trial and also raise the issue in a posttrial motion in order to give the trial court the opportunity to address the alleged error. *People v. Korzenewski*, 2012 IL App (4th) 101056, ¶ 14; see also *People v. Smith*, 2016 IL 119659, ¶ 38 (generally speaking, "[t]o preserve an alleged error for review, a defendant must raise a timely objection at trial and raise the error in a written posttrial motion").

¶ 29 The defendant's only response to the State's forfeiture argument was to raise a new argument in his reply brief—namely, that the failure to object at trial or include the alleged error in the posttrial motion constituted ineffective assistance of counsel. However, as the defendant

did not argue ineffective assistance of counsel in his opening brief, that argument is also forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb 6, 2013) (an appellant's opening brief must contain argument, supported by citations to the record and legal authority, and "[p]oints not argued are waived and shall not be raised in the reply brief"). The State has filed a motion to strike those portions of the reply brief that discuss this new argument, and we hereby grant that motion. Accordingly, we find forfeited the argument that the HGN test results should not have been admitted in the absence of a *Frye* hearing, and we strike the defendant's belated arguments regarding ineffective assistance of counsel.

¶ 30 Further, even if the defendant had not forfeited his argument regarding the HGN test results, that evidence was at most cumulative of other properly-admitted evidence: the defendant's own statements that he had consumed alcohol. As Hosteny testified, the HGN test indicates whether an accused has consumed alcohol (see *People v. McKown*, 236 Ill. 2d 278, 306 (2010)), not whether that consumption has resulted in impairment. Here, the defendant admitted that he had consumed alcohol. Thus, even if there had been any error in the trial court's admission of the HGN test results (and we do not say that there was any such error), that error was harmless.

¶ 31 As for the defendant's argument that the trial court should not have considered his statements because he was not given *Miranda* warnings when he was first arrested, we find it meritless. *Miranda* warnings are intended to safeguard an individual's right under the fifth amendment of the United States constitution not to be compelled to testify against himself. U.S. Const., amend. V; see also *Miranda*, 384 U.S. at 444 ("the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against

self-incrimination"). However, the requirement of *Miranda* warnings does not apply to all statements made by an accused. Rather, that requirement applies only when an accused is subjected to custodial interrogation. *Id*. at 478 (*Miranda* warnings must be given "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning"). Custodial interrogation means "*questioning initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Emphasis added.) *Id*. at 444. *Miranda* warnings are not required prior to general investigatory questioning at the scene (*id*. at 477), nor does *Miranda* require the exclusion of spontaneous statements made by the defendant that are not made in response to questioning (*id*. at 478 ("Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding")).

¶ 32 Here, the only statements made by the defendant that were considered by the trial court were those made during the initial stop, prior to his arrest, and those made during the two occasions on which he was being transported by Hosteny. The defendant's initial statements at the scene between the time that he was stopped by Hosteny and his arrest were not subject to exclusion under *Miranda*. *Id*. at 477; see also *People v. Schuld*, 175 Ill. App. 3d 272, 283 (1988) ("*Miranda* warnings are not required prior to general on-the-scene questioning by police who are investigating the scene"). As for the statements he made after being placed under arrest, such as his statements to Hosteny while he was being transported to and from Plaza 61, the defendant concedes that they were spontaneous and that he was "not necessarily interrogated after being placed under arrest." The record supports this concession: there is no evidence at all of any custodial interrogation—that is, "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to

elicit an incriminating response from the suspect" (*Rhode Island v. Innis*, 446 U.S. 291, 301 (1980))—by Hosteny during these transports. Accordingly, the defendant's right against self-incrimination was not triggered, and *Miranda* did not require the exclusion of any of the statements considered by the trial court in determining whether the defendant was guilty of DUI.

¶ 33 The defendant next argues that the trial court did not adequately take into account the possible unevenness of the ground in assessing the defendant's performance on the field sobriety tests, specifically the walk-and-turn and one-leg-stand tests. It is unclear whether the video excerpts played at trial included the defendant's protests, at the start of both tests, that he was not on level ground. However, the defendant's trial counsel did not object to the excerpts that the State played or seek to play other excerpts. Although the issue of uneven ground was raised in the defendant's posttrial motion, it was not raised at trial through objections nor mentioned in the defendant's closing arguments. Thus, this issue is forfeited. *Smith*, 2016 IL 119659, ¶ 38 (to preserve an issue for review, a defendant must have raised it both at trial and in a posttrial motion).

¶ 34 Even if the issue had been properly preserved, however, any unevenness in the ground would be relevant only as to the defendant's physical performance on the field sobriety tests. However, as the trial court noted, the video revealed that the defendant also had significant mental difficulties with the test, failing to comprehend the instructions despite repeated explanations and Hosteny's own demonstrations of those instructions. "A defendant is under the influence when, as a result of consuming alcohol ***, 'his mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care.' " *People v. Gordon*, 378 Ill. App. 3d 626, 631 (2007) (quoting Illinois Pattern Jury Instructions, Criminal, No. 23.29 (4th ed. 2000)). Here, even if there was uneven ground that affected the defendant's physical

faculties, the video of the field sobriety tests supported the trial court's finding that the defendant's mental faculties were impaired. Thus, there was evidence that the defendant had been driving while under the influence of alcohol.

¶ 35 The defendant's final argument on appeal is that, if all of the evidence regarding the field sobriety test results and his statements were inadmissible as he argued, there was insufficient evidence to support his conviction. As we have ruled, however, the defendant has failed to show any error in the trial court's consideration of this evidence. Moreover, even if the evidence relating to the defendant's physical performance on the walk-and-turn and one-leg-stand tests is set aside, ample evidence remains that supports his conviction. In evaluating the sufficiency of the evidence, the relevant question is " '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. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The weight to be given to the witnesses' testimony, the determination of their credibility, and the reasonable inferences to be drawn from the evidence are all matters within the jurisdiction of the trier of fact. *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *Collins*, 106 Ill. 2d at 261-62. Likewise, the resolution of any conflicts or inconsistencies in the evidence is also within the province of the fact finder. *Collins*, 106 Ill. 2d at 261-62. We will set aside a criminal conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Smith*, 185 Ill. 2d at 542. That standard is not met here, and we therefore affirm the judgment of the circuit court of Du Page County.

¶ 36 Affirmed.