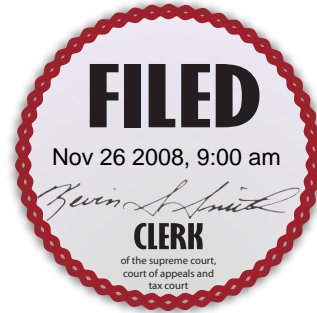


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**IN THE
COURT OF APPEALS OF INDIANA**

ALBERTA J. OTTO,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 03A01-0801-CR-15

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Roderick D. McGillivray, Judge
Cause No. 03D02-0703-FD-377

November 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Alberta J. Otto appeals her conviction of Class D felony operating a motor vehicle while intoxicated.¹ We affirm.

FACTS AND PROCEDURAL HISTORY

At 2:25 a.m. on March 10, 2007, Officer Ben Quesenbery saw Otto pull out of a parking lot shared by several businesses, including Ziggy's Bar. To Officer Quesenbery's knowledge, Ziggy's was the only business in that shopping center that would have been open at that hour of the morning. Otto made such a wide turn onto U.S. 31 that her car was partially in the northbound lane and partially in the center turn lane. Otto proceeded slowly to the intersection of U.S. 31 and Central Avenue, where she again made a wide turn, scraping her tires on the curb. According to Officer Quesenbery, it is not difficult to make that turn because Central Avenue is "a wide road. It's one of our largest intersections in town." (Tr. at 40.)

Otto pulled into a Kroger parking lot, and Officer Quesenbery initiated a traffic stop. When Otto rolled down her window, Officer Quesenbery smelled "a very strong odor of an alcoholic beverage." (*Id.* at 42.) Otto's eyes were "bloodshot and glassy," and her "speech was slow." (*Id.*) Otto had difficulty pulling her license out of her wallet. When Officer Quesenbery asked her about the smell of alcohol, Otto told him she had consumed about six drinks and it had been thirty minutes since her last drink. Officer Ron May, who came to assist Officer Quesenbery, also smelled alcohol on Otto and testified she was "very argumentative." (*Id.* at 107.)

¹ Ind. Code § 9-30-5-3.

Officer Quesenbery administered the horizontal gaze nystagmus test, and he testified that Otto failed that test. He did not administer other tests such as the one leg stand test or the walk and turn test because Otto is elderly and uses a cane or walker. Officer Quesenbery offered Otto a breath test. Otto initially begged to go home, but eventually consented to the test. However, she did not produce enough air to generate a result. Officer Quesenbery then offered a blood test, but Otto refused.

After a jury trial, Otto was found guilty of operating a motor vehicle while intoxicated as a Class C misdemeanor. Otto then admitted she had a prior conviction of operating while intoxicated, and judgment was entered as a Class D felony.

DISCUSSION AND DECISION

Otto raises two issues: (1) whether the trial court erred by admitting Officer Quesenbery's testimony concerning the horizontal gaze nystagmus test; and (2) whether the evidence was sufficient to support her conviction.

1. Admissibility of Test

The decision to admit evidence is within the trial court's sound discretion, and we will reverse only if that discretion was abused. *O'Banion v. State*, 789 N.E.2d 516, 518 (Ind. Ct. App. 2003). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances or the trial court misinterprets the law. *Id.*

We have described the horizontal gaze nystagmus test as follows:

Nystagmus is an involuntary jerking of the eyeball. . . . The jerking may be aggravated by central nervous system depressants such as alcohol or barbiturates. [citation omitted]. Horizontal gaze nystagmus is the inability

of the eyes to maintain visual fixation as they are turned to the side. In the HGN test the driver is asked to cover one eye and focus the other on an object (usually a pen) held by the officer at the driver's eye level. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeball to detect involuntary jerking. The test is repeated with the other eye. By observing (1) the inability of each eye to track movement smoothly, (2) pronounced nystagmus at maximum deviation and (3) onset of the nystagmus at an angle less than 45 degrees in relation to the center point, the officer can estimate whether the driver's blood alcohol content (BAC) exceeds the legal limit

Cooper v. State, 761 N.E.2d 900, 902-03 (Ind. Ct. App. 2002) (quoting *State v. Superior Court in and for Cochise Co.*, 718 P.2d 171, 173 (Ariz. 1986)).

Officer Quesenbery testified he did not administer the horizontal gaze nystagmus test correctly:

- Q. Officer let[']s talk briefly about the horizontal gaze nystagmus test. You testified that you did do it wrong. Is that accurate?
- A. That's correct.
- Q. What did you do incorrectly?
- A. I did not move my finger slow[ly] enough in front of her and I also did not hold my finger out at maximum deviation long enough.
- Q. When you're holding your finger out at maximum deviation, how long are you supposed to hold it out there?
- A. Four seconds.
- Q. Why didn't you hold it out there four seconds?
- A. Because I had already detected the nystagmus that I was looking for.
- Q. So actually . . . what you did wrong reduced the time that you had available to observe the clue that you were looking for?
- * * * * *
- A. That is correct.
- Q. But you still saw it?
- A. I did see it still.
- Q. Saw all six clues when you administered the test?^[2]
- A. All six clues were present.

² These six clues are the three observations described in *Cooper*, one set for each eye. Officer Quesenbery testified that a person fails the horizontal gaze nystagmus test if the person exhibits four or more clues.

(Tr. at 96-97) (footnote added).

A proper foundation for the admission of a horizontal gaze nystagmus test consists of a description of the officer's education and experience in administering the test and a demonstration the procedure was properly administered. *O'Banion*, 789 N.E.2d at 518. Otto argues a proper foundation was not laid for the admission of the test because Officer Quesenbery testified he did not administer it correctly. We disagree.

In *O'Banion*, the defendant challenged the admissibility of a horizontal gaze nystagmus test because the officer did not have him cover one eye at a time. We concluded covering one eye was not mandatory for a valid horizontal gaze nystagmus test because there was no indication that nystagmus was affected by whether the other eye was covered. *Id.* at 519. We stated "the thrust of *Cooper* is to provide that the proper [horizontal gaze nystagmus] procedure is for the tester to move an object in a certain fashion in front of the driver and 'watch[] the driver's eyeball to detect involuntary jerking.'" *Id.* That was done, and the results were admissible. *Id.*

Officer Quesenbery testified he should have moved his finger slower and held it at maximum deviation longer. However, Otto directs us to no evidence that this caused her nystagmus. Officer Quesenbery testified the procedure he used was incorrect because it gave him less time to observe the clues, but he observed all six clues. Officer May testified that using an improper procedure could lead to incorrect results, but he did not contradict Officer Quesenbery's testimony that the danger in moving the finger too quickly is that the officer might *miss* some of the clues. As did the officer in *O'Banion*, Officer Quesenbery watched each eye for involuntary jerking, and there was no evidence

the procedure he used affected the nystagmus. Therefore, the trial court did not abuse its discretion by admitting the testimony. *See id.*

2. Sufficiency of the Evidence

In reviewing sufficiency of evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *Pickens v. State*, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001). We consider the evidence favorable to the verdict and the reasonable inferences drawn therefrom. *Id.* We will affirm if a reasonable jury could find the defendant guilty beyond a reasonable doubt. *Id.*

Proof of intoxication can be established through evidence of: (1) the consumption of significant amounts of alcohol; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of alcohol on the breath; (5) unsteady balance; (6) failure of field sobriety tests; and (7) slurred speech. *Id.* at 335.

Officer Quesenbery testified Otto admitted she had six drinks and the last one had been half an hour before the traffic stop. He observed impaired reflexes in her driving and her fumbling for her license. Otto's eyes were glassy and bloodshot. Officers Quesenbery and May both smelled alcohol on Otto. Officer Quesenbery testified Otto was speaking slowly. Even if we discounted the validity of the field sobriety test, Otto displayed five of the seven characteristics recognized by *Pickens* as evidence of intoxication.

Otto argues Officer Quesenbery's testimony was mostly uncorroborated; however, corroboration was not required. See *Baltimore v. State*, 878 N.E.2d 253, 258 (Ind. Ct. App. 2007) ("A conviction may be sustained on the uncorroborated testimony of a single

witness or victim.”), *trans. denied* 891 N.E.2d 38 (Ind. 2008). There was sufficient evidence of intoxication to support her conviction. *See Pickens*, 751 N.E.2d at 335 (affirming conviction of operating a vehicle while intoxicated where Pickens displayed five signs of intoxication).

Affirmed.

ROBB, J., and NAJAM, J., concur.