NUMBER 13-18-00373-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

ROCIO RIVERA GARCIA, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 206th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Hinojosa

Appellant Rocio Rivera Garcia appeals her conviction for driving while intoxicated (DWI), third offense or more, a third-degree felony. *See* TEX. PENAL CODE ANN. §§ 49.04, 49.09(b)(2). A jury found Garcia guilty and assessed a punishment of two years' imprisonment probated for a period of two years, and the trial court sentenced Garcia accordingly. In two issues, Garcia argues that: (1) there is legally insufficient evidence

supporting her conviction; and (2) she received ineffective assistance of counsel. We affirm.

I. BACKGROUND

Kevin Barron, a sergeant with the City of McAllen police department, testified that he conducted a traffic stop around 3:30 a.m. after observing the driver of a vehicle fail to signal a lane change on Nolana Avenue in McAllen, Texas. He approached the vehicle and identified the driver as Garcia. Sergeant Barron smelled a strong odor of alcohol and urine coming from the vehicle. He also noted that Garcia's eyes were red and bloodshot. He asked Garcia whether she had been drinking alcohol, and she responded affirmatively. Upon request, Garcia walked to the rear of the vehicle, and Sergeant Barron observed that her balance was unsteady. When talking to Garcia, Sergeant Barron smelled a strong odor of alcohol emitting from her breath. He then administered standardized field sobriety tests. Garcia showed nystagmus [1] in response to the horizontal gaze nystagmus (HGN) test, an indicator of intoxication. For the walk-and-turn test, Garcia displayed five clues for intoxication—swaying, failure to touch heel to toe, taking the wrong number of steps, stopping while walking, and making an improper turn. Sergeant Barron was unable to administer the one-leg-stand test because Garcia would not cooperate. At this point, Sergeant Barron concluded that Garcia was intoxicated, and he placed her under arrest. Sergeant Barron testified that supervisor vehicles, such as

[1] Nystagmus is an involuntary rapid oscillation of the eyes in a horizontal, vertical, or rotary direction. *Emerson v. State*, 880 S.W.2d 759, 765 (Tex. Crim. App. 1994). Horizontal gaze nystagmus refers to the inability of the eyes to smoothly follow an object moving horizontally across the field of vision, particularly when the object is held at an angle of forty-five degrees or more to the side. *See Webster v. State*, 26 S.W.3d 717, 719 n.1 (Tex. App.—Waco 2000, pet. ref'd). Consumption of alcohol exaggerates nystagmus to the degree it can be observed by the naked eye. *Emerson*, 880 S.W.2d at 766.

his, are not equipped with a dashboard camera and he was not wearing a body camera, so there was no video of his encounter with Garcia.

On cross-examination, Garcia's counsel questioned Sergeant Barron on his administration of the HGN test. Specifically, he questioned Sergeant Barron's technique of holding his pen six to eight inches from Garcia's face when looking for nystagmus. Garcia's counsel suggested through his questioning that the appropriate distance was twelve to fifteen inches. Sergeant Barron acknowledged that this might be the case, but he stated he always administers the test by holding the pen six to eight inches from a suspect's face.

Jose Rios, a McAllen police officer, arrived at the scene to transport Garcia to jail. He noticed Garcia stumble a little as she walked toward his vehicle. Officer Rios requested a blood or breath specimen from Garcia, but she declined. The trial court admitted video footage from Officer Rios's patrol vehicle into evidence, as well as two judgments showing Garcia's prior DWI convictions.

Garcia called several witnesses who had been with her in the hours preceding the traffic stop. Each testified that Garcia may have been tired because she had not slept for over twenty-four hours, but they did not see her consume any alcoholic beverages. Samuel Reyes, Garcia's boyfriend, testified that his cat urinated and vomited in Garcia's vehicle. Garcia's counsel argued that this was the reason that Sergeant Barron smelled urine in the car.

The jury returned a guilty verdict. Garcia now appeals.

II. LEGAL SUFFICIENCY

In her first issue, Garcia argues that the evidence was legally insufficient to establish that she was intoxicated.

A. Standard of Review & Applicable Law

The Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution requires that a criminal conviction be supported by a rational trier of fact's findings that the accused is guilty of every essential element of a crime beyond a reasonable doubt. *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009) (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979)). This due process guarantee is safeguarded when a court reviews the legal sufficiency of the evidence. *Id*. Under this review, we consider all of the evidence in the light most favorable to the verdict and determine whether a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt based on the evidence and reasonable inferences from that evidence. *Jackson*, 443 U.S. at 319; *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014). Because the jury is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony, we resolve any conflicts or inconsistencies in the evidence in favor of the verdict. *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015); *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000) (en banc).

We measure the legal sufficiency of the evidence against the elements of the offense as defined by a hypothetically correct jury charge for the case. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's

burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the offense for which the defendant was tried. *Id*. Garcia challenges only the sufficiency of the evidence demonstrating the element of intoxication. As relevant here, intoxication is defined as "not having the normal use of mental or physical faculties by reason of the introduction of alcohol . . . into the body." TEX. PENAL CODE ANN. § 49.01(2)(A).

B. Analysis

We first address Garcia's contention that Sergeant Barron's testimony concerning the HGN test should not be considered as evidence supporting the jury's intoxication finding because it is unreliable. Garcia does not contend that the HGN test in general is unreliable,[2] but she maintains that Sergeant Barron deviated from the recommended technique when administering the test. However, Garcia did not object at trial to Sergeant Barron's testimony on this basis, and she does not raise an evidentiary issue on appeal. *See* TEX. R. APP. P. 33.1(a)(1). Therefore, the admissibility of Sergeant Barron's testimony is not before us.

In addition, slight variations in the administration of the HGN test do not render the evidence inadmissible or unreliable but may affect the weight to be given the testimony. *See Williams v. State*, 525 S.W.3d 316, 324 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd); *Hartman v. State*, 198 S.W.3d 829, 840 (Tex. App.—Corpus Christi–Edinburg 2006, pet. struck); *Compton v. State*, 120 S.W.3d 375, 378 (Tex. App.—Texarkana 2003,

[2] The Texas Court of Criminal Appeals has taken judicial notice that the scientific theory underpinning the HGN test is sound and that the HGN test, when properly administered, is a reliable indicator of intoxication. *Emerson*, 880 S.W.2d at 768; *see Plouff v. State*, 192 S.W.3d 213, 218–19 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

pet. ref'd). Garcia's counsel was able to cross-examine Sergeant Barron concerning the proper technique for administering the HGN test. As the trier of fact, it is within the jury's sole province to determine the weight to be given this testimony. *See Ramsey*, 473 S.W.3d at 808. For the foregoing reasons, we will consider Sergeant Barron's testimony concerning the HGN test in our legal sufficiency analysis.[3] *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (explaining that a legal sufficiency review of the evidence admitted at trial includes both properly and improperly admitted evidence).

Viewing the evidence admitted at trial in the light most favorable to the verdict, we note that the jury could have considered the following evidence[4] in determining that Garcia was intoxicated: (1) bloodshot eyes; (2) unsteady balance; (3) odor of alcohol from the vehicle (4) odor of alcohol on the person; (5) admission to recent alcohol consumption; (6) failed field sobriety tests; (7) refusal to provide a breath specimen; (8) the smell of urine; and (9) Sergeant Barron's opinion testimony that Garcia was intoxicated.

A defendant's poor performance on the standardized field sobriety tests is evidence that supports a jury's finding of intoxication. *Zill v. State*, 355 S.W.3d 778, 786 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see Finley v. State*, 809 S.W.2d 909, 913 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) ("Texas courts consistently uphold DWI

[3] Garcia presents similar arguments about the reliability of the remaining standardized field sobriety tests, which we reject for the reasons previously mentioned. In addition, we note that an officer's testimony about a suspect's coordination, balance, and any mental agility problems exhibited during the one-leg-stand and walk-and-turn tests are observations grounded in common knowledge. *Plouff*, 192 S.W.3d at 223; *see Emerson*, 880 S.W.2d at 763. Therefore, an officer's testimony concerning those tests is considered lay witness opinion testimony. *Plouff*, 192 S.W.3d at 223; *see Emerson*, 880 S.W.2d at 763.

[4] We decline Garcia's invitation to consider evidence presented at the motion for new trial hearing in our legal sufficiency analysis. *See Idowu v. State*, 73 S.W.3d 918, 922 n.12 (Tex. Crim. App. 2002) ("Sufficiency of the evidence . . . must be based upon evidence submitted at the time of trial, not later.").

convictions based upon the opinion testimony of police officers who observed the defendant's unsatisfactory performance in field sobriety tests."). Further, a witness does not have to be an expert to testify that a person he observes is intoxicated by alcohol; therefore, lay opinion testimony by a police officer in this regard is probative evidence of intoxication. *Henderson v. State*, 29 S.W.3d 616, 622 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd); *see Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979).

In addition, Texas courts have classified bloodshot eyes, unsteady balance, and the odor of alcohol on a person as objective indicators of intoxication. *See Cotton v. State*, 686 S.W.2d 140, 142 n.3 (Tex. Crim. App. 1985) (noting slurred speech, bloodshot eyes, odor of alcohol on the person, unsteady balance, a staggered gait, and the odor of alcohol on the breath as evidence of intoxication). Finally, the jury was entitled to consider Garcia's refusal to provide a blood or breath specimen as evidence of intoxication. *See* TEX. TRANSP. CODE ANN. § 724.061 (providing that evidence of a person's refusal to submit to an officer's request for a blood or breath specimen is admissible in a trial); *Griffith v. State*, 55 S.W.3d 598, 601 (Tex. Crim. App. 2001) (explaining that sometimes the reason a defendant refuses a request by police for a biological specimen is relevant to the defendant's consciousness of guilt); *Hartman*, 198 S.W.3d at 834.

Garcia argues that the evidence that she did not drink in the twenty-four hours leading up to the traffic stop "created no other reasonable inference that supports the jury verdict[.]" However, there was conflicting evidence in this regard, including Garcia's admission to Sergeant Barron that she consumed alcoholic beverages and the indicators of alcohol intoxication previously noted. Our standard of review requires that we resolve

this conflicting evidence in favor of the jury's verdict. *See Ramsey*, 473 S.W.3d at 808.

Considering the evidence in the light most favorable to the verdict, we conclude that a rational fact finder could have found beyond a reasonable doubt that Garcia did not have the normal use of her mental or physical faculties by reason of the introduction of alcohol into the body. *See Jackson*, 443 U.S. at 319; *Whatley*, 445 S.W.3d at 166. Therefore, the evidence supporting the jury's verdict is legally sufficient. We overrule Garcia's first issue.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

In her second issue, Garcia argues that she received ineffective assistance of counsel.

A. Standard of Review & Applicable Law

The right to counsel afforded by the United States and Texas Constitutions requires more than the presence of a lawyer; "it necessarily requires the right to effective assistance." *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011); *see* U.S. CONST. amend. VI; TEX. CONST. art. 1, § 10. To prevail on an ineffective assistance claim, appellant must show (1) counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Lopez*, 343 S.W.3d at 142. "Unless [an] appellant can prove both prongs, an appellate court must not find counsel's representation to be ineffective." *Lopez*, 343 S.W.3d at 142. To satisfy the first prong, an appellant must prove by a preponderance of the evidence that his counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. *Id.* To prove

prejudice, an appellant must show that there is a reasonable probability, or a probability sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different. *Id.*

"In order for an appellate court to find that counsel was ineffective, counsel's deficiency must be affirmatively demonstrated in the trial record; the court must not engage in retrospective speculation." *Id*.; *see Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) ("Any allegation of ineffectiveness must be firmly rooted in the record[.]"). Although an appellant may claim ineffective assistance of counsel for the first time on direct appeal, the record in such a case often will be insufficient to overcome the presumption that counsel's conduct was reasonable and professional. *Cannon v. State*, 252 S.W.3d 342, 349 (Tex. Crim. App. 2008); *Washington v. State*, 417 S.W.3d 713, 724 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). Where, as here, there is no proper evidentiary record developed at a hearing on a motion for new trial, it is extremely difficult to show trial counsel's performance was deficient. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Under this procedural posture, we will not find deficient performance unless counsel's conduct is so outrageous that no competent attorney would have engaged in it. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Washington*, 417 S.W.3d at 724.

B. Analysis

Garcia alleges that her trial counsel was ineffective in failing to object to Sergeant Barron's testimony concerning the HGN test. She further argues that Sergeant Barron's testimony was inadmissible because he administered the test improperly.

To prevail on her ineffective assistance of counsel claim based on a failure to object to evidence, an appellant must demonstrate that the trial court would have committed harmful error in overruling the objection. *See Alexander v. State*, 282 S.W.3d 701, 709 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). As we note above, slight variations in the administration of the HGN test do not render the evidence inadmissible or unreliable but may affect the weight to be given the testimony. *See Williams*, 525 S.W.3d at 324; *Hartman*, 198 S.W.3d at 840; *Compton*, 120 S.W.3d at 378. On the record before us, Garcia has not established that the trial court would have committed error in overruling an objection to the HGN testimony had one been raised.

Furthermore, there was no factual development of Garcia's ineffective assistance of counsel claim in the trial court. Although Garcia filed a new trial motion, that motion did not raise ineffective assistance as a ground. Assuming for the sake of argument that the challenged testimony was inadmissible, the record is silent as to why counsel did not object. "It is not sufficient that appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence." *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). When direct evidence is unavailable, we will assume counsel had a strategy "if any reasonably sound strategic motivation can be imagined." *Lopez*, 343 S.W.3d at 143. Deciding not to object to inadmissible evidence can, in some instances, be a plausible trial strategy. *See McKinny v. State*, 76 S.W.3d 463, 473–74 (Tex. App.—Houston [1st Dist.] 2002, no pet.). It would not have been unreasonable for Garcia's counsel to have determined that the purported failure to correctly administer the HGN test was a matter most effectively pursued by way

of cross-examination, rather than through an objection. In that regard, we note that trial counsel engaged in a vigorous cross-examination of Sergeant Barron, to the point that Sergeant Barron conceded that his preferred technique for the test might vary from the accepted practice. While this strategy did not prevent the jury from hearing evidence regarding the HGN test, it did serve to challenge the credibility of the State's lead witness, a theme that Garcia's counsel emphasized in closing arguments. We are unable to conclude that trial counsel's decision not to object to the HGN testimony constituted conduct so outrageous that no competent attorney would have engaged in it.

On this silent record, Garcia has failed to establish that her counsel's representation fell below an objective standard of reasonableness. Having failed to establish the first *Strickland* prong, Garcia cannot show that she received ineffective assistance of counsel, and we overrule Garcia's second issue.

IV. CONCLUSION

We affirm the trial court's judgment.

LETICIA HINOJOSA
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
9th day of April, 2020.