Circuit Court for Montgomery County
Case No. 131292

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2076

September Term, 2017

KAYIN CEMAL LOVE

v.

STATE OF MARYLAND

Fader, C.J.
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: October 14, 2020

Kayin Cemal Love ("Appellant") was charged with driving a vehicle while under the influence of alcohol.[1] During Appellant's trial, after extensive discussion with the court, Officer William Weill testified as an expert witness, about Appellant failing the standard field sobriety tests, specifically the walk and turn and one-leg stand tests. He testified that the results of the tests indicated that Appellant was too intoxicated to operate a vehicle. On September 13, 2017, a jury found Appellant guilty of driving while impaired by alcohol. On November 29, 2017, the Court sentenced Appellant to 60 days in jail, which was suspended. Appellant was also placed on probation for three years. Subsequently, Appellant filed this timely appeal. In doing so, Appellant brings one question for our review:

I. Did the circuit court err in allowing Officer Weill to testify as an expert as to Appellant's results on the standard field sobriety tests?

We answer in the negative and hold that the circuit court did not err in admitting Officer Weill's expert opinion testimony as to the walk and turn and the one leg stand field sobriety test. We hold that the court did not qualify the officer regarding the Horizontal Gaze Nystagmus ("HGN") test. There was sufficient evidence produced by the other administered tests to affirm and we therefore affirm the judgment of the Circuit Court for Montgomery.

[1] Prior to trial, the State nolle prossed a charge of possession of a controlled dangerous substance with the intent to distribute. At trial, the jury found Appellant not guilty as to the charge of driving a vehicle while under the influence of alcohol.

FACTUAL AND PROCEDURAL BACKGROUND

On December 13, 2016, at approximately 10:00 p.m., Officer Robert Farmer of the Montgomery County Police Department observed a vehicle that was "stopp[ed] in the middle of a crosswalk almost in the intersection." Officer Farmer initiated a traffic stop of the vehicle, which was operated by Appellant. Officer Farmer observed Appellant "as having a flushed face and extremely watery bloodshot eyes." Appellant informed Officer Farmer that she had consumed one drink and one beer, approximately one and a half hours earlier. Officer Farmer then asked Appellant on a sobriety scale of one to ten, with one being just "a little tipsy" and ten being "very drunk," what she would say she was, Appellant responded that she was a "five."

Officer William Weill responded to the scene that night to assist Officer Farmer. Officer Weill observed an odor of alcohol coming from Appellant's vehicle and determined that standard field sobriety tests were appropriate to assess Appellant's sobriety. Officer Weill administered the standard field sobriety tests, which he identified as consisting of the HGN test, the walk and turn test, and the one-leg stand test. Based on Appellant's performance on the standard field sobriety tests, Officer Weill determined that Appellant was intoxicated and arrested her.

At Appellant's trial, after a lengthy colloquy, the circuit court admitted Officer Weill as an expert witness for the purposes of testifying about the results of Appellant's standard field sobriety tests. Before he was qualified as an expert Officer Weill testified that his "specialized training in alcohol-related offenses" consisted of:

[OFFICER WEILL]: Yes, sir I have 40 hours of training in the Academy on DUI.

[PROSECUTOR]: And what did those 40 hours entail?

[OFFICER WEILL]: How to conduct a standard field sobriety test and SFSTs is what we refer to them as the acronym. The horizontal gaze nystagmus, the walk and turn test, and the one leg stand. [sic]

[PROSECUTOR]: And those three tests make up the standard field sobriety test? [sic]

[OFFICER WEILL]: Yes, sir. And we also have volunteers come in and actually do the drinking portion of it to get the different levels of intoxication and we run them through the standard field sobriety test. Definitely.

[PROSECUTOR]: So, you were able to observe individuals come in consume alcohol, see what their characteristics are like, and then perform these tests on them?

[OFFICER WEILL]: Yes, sir.

* * *

In answering whether he did the test as a Silver Spring police officer:

[OFFICER WEILL]: Yes. I did do those tests. And I also conducted many roadside standardized field sobriety tests.

After the court overruled an objection to this question, the examination continued.

[PROSECUTOR]: Officer how many arrests have you made and how many stops of you made for DUI enforcement? [sic]

[OFFICER WEILL]: Personally I have done hundreds of DUI arrests while being a midnight officer in Silver Spring.

Officer Weill also described the HGN test as "involv[ing] involuntary jerking of the eye" and as being "an indication of the presence of alcohol in the system." The State then proceeded to question Officer Weill as an expert witness and then an objection was raised about his expert testimony:

> [PROSECUTOR]: And what test did you begin with?
>
> [OFFICER WEILL]: It's standard. [E]very time it's the same way. I started with the horizontal gaze nystagmus test.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> [THE COURT]: Basis?
>
> [DEFENSE COUNSEL]: This requires expert testimony and I don't believe the witness has been –
>
> THE COURT: I'm sorry?
>
> [DEFENSE COUNSEL]: This requires expert testimony. The witness is not –
>
> [THE COURT]: Come to the bench.
>
> (Bench conference follows:)

The prosecutor explained that the witness was disclosed during discovery as an expert. And the defense noted that he had not been qualified as an expert. The court then noted that the defense counsel was correct and that he had not been qualified. The defense asked to voir dire him which the court stated would occur later.

> [THE COURT]: Well, we'll see. You will have the opportunity at the appropriate time.

[PROSECUTOR]: All I asked him was to describe the tests. I didn't ask him about the results of the tests were. I just asked him –

[THE COURT]: Well, why don't you –

[PROSECUTOR]: -- just to describe what it is.

[THE COURT]: Are you going to be asking him at some point what the results are?

[PROSECUTOR]: No, I'm not.

[THE COURT]: Then why are you asking?

[PROSECUTOR]: **Because the test was mentioned and I think it will look poorly on the State if we don't at least explain what it is to the jury because otherwise they think we're hiding the ball.** (Emphasis added.)

[THE COURT]: How was it mentioned?

[PROSECUTOR]: It was mentioned by Ms. David when she discussed in her opening.

[THE COURT]: So, all you –

[PROSECUTOR]: All I want –

[THE COURT]: This is a question. All you want to do is say what the test is? But if he's not going to say that the lady—

[PROSECUTOR]: (Unintelligible.)
Min-

[THE COURT]: Let me finish. He's not going to say that the lady took it and passed it and failed it?

[PROSECUTOR]: No.

[THE COURT]: All right. Then that's not expert. If he is just describing what it is without offering any opinions he can do that but make sure - make sure he doesn't jump in and offer an opinion.

[PROSECUTOR]: Yes, Your Honor.

[THE COURT]: Why are you double teaming me?

[PROSECUTOR 2]: I'm sorry. I just wanted to clarify one thing.

[THE COURT]: What's not clear?

[PROSECUTOR 2]: It's been proffered to the jury (unintelligible).

[THE COURT]: I can't hear you.

[PROSECUTOR 2]: I just want a proffer to the jury that the (unintelligible) tells us is that there is the presence of alcohol in her system.

[THE COURT]: Wait a minute. Wait a minute. Hold on. Hold on. I thought -- you guys need to huddle and get your notes straight. **Your colleague said he is not offering any opinions. Great. He is just going to tell us that bluebirds are blue.** Fine. But you said something different. So, you got to decide and the[sic] I'll rule. It's your case. What you want to do? Expert opinion or not? [Emphasis added]

[PROSECUTOR 2]: Your Honor, (unintelligible) the jury what the test showed is --

[THE COURT]: No. You can't. No. You're wrong. Do not.

[PROSECUTOR 2]: Okay.

[THE COURT]: We're doing this. He cannot give me or them the result of the test – that requires an expert opinion without first being qualified. So, if you want to qualify him – if he was disclosed and you want to qualify him, that's different. But it's either in or out. Let me put it this way. It's either it may be in or its out. You tell me. It's your case. Why are you doing this on the fly? I mean do you guys need a meeting? Okay. Well, then let's go. We're in front of a jury. It's in the afternoon.
(Bench conference concluded.)

The prosecutor then proceeded to ask him about the various field sobriety tests. And then asked the following question:

[PROSECUTOR]: And what do these tests indicate to you?

[THE COURT]: Hold on. No. You picked your path. This is where you stop unless.

[PROSECUTOR]: So, as a result of the walk and turn test and the one leg stand test, did you form an opinion?

[DEFENSE COUNSEL]: Objection, Your Honor.

[THE COURT]: Sustained.

Clearly the Court at this point in the testimony believes expertise is needed for these two tests. Also, clearly the prosecutor is not asking for an opinion about the HGN.

[OFFICER WEILL]: Yes. So –

[DEFENSE COUNSEL]: Objection.

[THE COURT]: Officer, when I sustain an objection, please give me a minute. Just hold your answer there, sir.

[OFFICER WEILL]: Yes, Your Honor.

[BY PROSECUTOR]: How much training to you have in performing standard field sobriety tests?

[THE COURT]: Sir-

(Bench conference follows:)

[THE COURT]: You have to wait for the other side B, what is it about you are either putting him on as an expert or you are not? If you are not, all this business about these tests and what they mean is going to go out.

[PROSECUTOR]: My understanding of our conversation the last time was to talk about –

[THE COURT]: What conversation?

[PROSECUTOR]: The last time –

[THE COURT]: I'm talking about Maryland rule 5-702.

[PROSECUTOR]: Just two minutes ago.

[THE COURT]: Well, let's try it the old-fashioned way. Is he an expert or not?

[PROSECUTOR]: Yes. But the horizontal gaze nystagmus I don't offer him as an expert on that.

[THE COURT]: Sir, if it's a test that falls under Maryland 5-702 to be requires expert as opposed to lay opinion. Do it by the rule. If you don't you're going to be hearing sustained 52 times and you will lose the case, I guarantee you if you go on this way, because this jury will think you have no idea what you're doing.

[PROSECUTOR]: So, the standard field sobriety tests is an expert opinion outside of -

[THE COURT]: I don't give advice to the State's Attorney's Office. I just rule.

[PROSECUTOR]: Thank you.

(Bench conference concluded.)

[THE COURT]: Objection sustained.

[PROSECUTOR]: Officer Weill, you indicated that you went through 40 hours of training as it pertained to alcohol-related offenses: is that correct?

[OFFICER WEILL]: Yes, sir. In the Academy.

[PROSECUTOR]: And as part of that training, were you trained in the standard field sobriety tests?

[OFFICER WEILL]: I was.

[PROSECUTOR]: And how many of those hours were dedicated to is standard field sobriety testing?

[OFFICER WEILL]: All 40 of them.
[PROSECUTOR]: In addition to the training that you received, how many traffic stops have you conducted where you have performed standard field sobriety tests on individuals you stopped?

[OFFICER WEILL]: Hundreds.

[PROSECUTOR]: Did you receive any additional training in the standard field sobriety tests performance or instruction?

[OFFICER WEILL]: Just the ones that the Academy and conducting them on the roadside.

[PROSECUTOR]: Your Honor, I now move this witness to have this witness admitted as an expert.

[THE COURT]: Any objection?

[DEFENSE COUNSEL]: Yes, Your Honor.

[THE COURT]: Basis?

[DEFENSE COUNSEL]: I don't believe that the proper foundation has been laid.

[THE COURT]: Overruled. The witness is qualified by reason of his experience, training, and education at the police academy to give expert opinion testimony in this limited area under Maryland rule 5-702. Go ahead, sir.

[PROSECUTOR]: So, as a result of the defendant's performance on the standard field sobriety tests, did you form an opinion about her sobriety?

[OFFICER WEILL] Yes sir.

[DEFENSE COUNSEL]: Objection, Your Honor.

[THE COURT]: Basis?

[DEFENSE COUNSEL]: There is no foundation for the basis of this opinion.

> [THE COURT]: Overruled. I'll admit it conditionally under 5-104 subject to once we know what the opinion is understanding the basis of the opinion. He can do it this way as opposed to the other way. Go ahead, folks.

On September 13, 2017, the jury found Appellant guilty of driving while impaired by alcohol. On November 29, 2017, the Honorable Ronald B. Rubin sentenced Appellant to 60 days in jail, which was suspended. Appellant was also placed on probation for three years. Subsequently, Appellant filed this timely appeal.

STANDARD OF REVIEW

Maryland Rule 4-323(a) provides that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." A party must object each time a question eliciting such testimony is asked, otherwise, the objection is not preserved. *See Ridgeway v. State*, 140 Md. App. 49, 66 (2001), *aff'd*, 369 Md. 165 (2002); *see also Wimbish v. State*, 201 Md. App. 239, 261 (2011) (objection was not preserved where, following the denial of a motion *in limine*, defendant failed to object to testimony and failed to request a continuing objection), *cert. denied*, 424 Md. 293 (2012).

If this Court determines that an objection was in fact preserved, we will review the trial court's decision under an abuse of discretion standard. *See Randall v. State*, 223 Md. App. 519, 577 (2015), *cert. denied*, 457 Md. 414 (2018). A trial court abuses its discretion when its ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Levitas v. Christian*, 454 Md. 233, 243 (2017) (quoting *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 241 (2011)) (emphasis removed).

The trial court's decision "may be reversed on appeal if it is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion." *Rochkind v. Stevenson*, 454 Md. 277, 285 (2017) (quoting *Sippio v. State*, 350 Md. 633, 648 (1998)) (citation and internal quotation marks omitted).

DISCUSSION

A. Parties' Contentions

Appellant contends that the trial court erred in accepting Officer Weill as an expert based on the limited testimony offered as to his qualifications in the administration of standard field sobriety tests. Specifically, Appellant contends that the State failed to elicit evidence establishing the extent of Officer Weill's training, whether he was certified to administer the field sobriety tests, and whether he had done so correctly. We disagree.

Appellant asserts that her objection to Officer Weill's qualifications was preserved when she objected at the time the State offered Officer Weill as an expert. Appellant argues that the State failed to lay the necessary foundation to establish that Officer Weill was a qualified expert witness. We disagree.

Appellant further contends that the trial court's error in qualifying Officer Weill as an expert was highly prejudicial, resulting in reversible error. We disagree.

The State responds that Officer Weill's testimony about the standard field sobriety tests and Appellant's performance on them presents no basis for reversal. We agree. The State also contends that Appellant's claim is not preserved because Appellant failed to object to the scope and substance of Officer Weill's testimony following her objection to

the foundation for his testimony. Regarding the officer's testimony regarding the walk and turn and one leg stand tests, we disagree.

Alternatively, the State argues that Appellant affirmatively waived any objection to Officer Weill's testimony when, on cross-examination, she elicited evidence on the subject of the field sobriety tests, specifically the HGN test. With this contention we disagree. The State further contends that even if Appellant's claim is preserved, the trial court did not abuse its discretion in qualifying Officer Weill as an expert. The State argues that the Court of Appeals has held that expert testimony is not required for the walk and turn test and the one-leg stand test. Specifically, the State contends that expert testimony is only required for the HGN test because it requires training and experience all of which Officer Weill possessed. The State maintains that it "expressly stated that it did not intend to offer Officer Weill as an expert on the HGN test." However, the circuit court required the State to qualify "the officer as an expert." Finally, the State maintains that any error in the admission of Officer Weill's opinion testimony was harmless beyond a reasonable doubt in light of the other evidence of Appellant's intoxication.

B. Analysis

1. Maryland Rule 4-323

i. Objections to Evidence

Preliminarily, we must determine whether Appellant's claim is preserved for review. This Court ordinarily will not consider an issue on appeal "unless it plainly appears by the record to have been raised in or decided by the trial court." Maryland Rule 8-131(a). *See also Ray v. State*, 435 Md. 1, 20 (2013). Maryland Rule 4-323 provides, in relevant part:

> **(a) Objections to Evidence.** An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs.

In addition, Maryland Rule 5-103(a) states:

> **(a) Effect of Erroneous Ruling.** Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and
>
> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was requested by the court or required by rule; or
>
> (2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered. The court may direct the making of an offer in question and answer form.

See Hall v. State, 225 Md. App. 72, 84 (2015). "[W]here an appellant states specific grounds when objecting to evidence at trial, the appellant has forfeited all other grounds

for objection on appeal." *Perry v. State*, 229 Md. App. 687, 709 (2016) (citation omitted), *cert. dismissed*, 453 Md. 25 (2017).

According to the State, Appellant's objection to Officer Weill's qualification as an expert was insufficient to preserve her challenge to Officer Weill's testimony regarding his administration of the standard field sobriety tests. The State asserts that, in order to preserve that claim, Appellant was required to object to that testimony, when offered, or to request a continuing objection, which she failed to do.

Appellant cites *Hall*, *supra*, 225 Md. App. at 87, in support of her contention that her objection to the qualification of Officer Weill as an expert was sufficient to preserve her challenge to the substance of his testimony. In *Hall*, the State argued that defense counsel's objections were insufficient to preserve his challenge to a police officer's qualifications to testify as an expert in the field of cell phone data reading and cell phone mapping. *Hall*, 225 Md. at 83.

In determining whether defense counsel's objections were sufficient to preserve that issue, we explained that "in order for us to review whether the trial court abused its discretion by admitting Trooper Dwyer as an expert witness, defense counsel must have objected at least once on the grounds that Trooper Dwyer was insufficiently qualified as an expert." *Id.* at 87.

Here, Appellant objected to Officer Weill's testimony regarding his administration of the standard field sobriety tests, arguing that the State had failed to lay a sufficient foundation to qualify Officer Weill as an expert with respect to the standard field sobriety tests. She did not object that the officer was insufficiently qualified as an expert. Instead

the objection was that a proper foundation had not been laid. Clearly, up to the point of the objection there was an attempt to show that the officer was an expert with respect to the standard field sobriety tests other than the HGN test. Therefore, the only preserved objection was to the foundation for the officer's testimony, not his qualifications.

The State also argues, in the alternative, that Appellant affirmatively waived any objections to Officer Weill's qualifications as an expert when, during cross-examination, defense counsel elicited testimony on the subject of the field sobriety tests, including HGN. Ordinarily "[a] party waives his objection to testimony by subsequently offering testimony on the same matter." *Halloran v. Montgomery Cty. Dep't of Pub. Works*, 185 Md. App. 171, 199 (2009) (emphasis deleted) (quoting *Peisner v. State*, 236 Md. 137, 144 (1964)). There is, however, an exception to this rule:

> When testimony has been admitted and an exception noted, counsel may deem it necessary to cross-examine the witness on the subject, and if it is simply a cross-examination he ought not to be deprived of his exception, provided the record shows he does not intend thereby to waive it, and that ought to be inferred when it is strictly cross-examination.

Id. (citing *United Rys. & Elec. Co. v. Corbin*, 109 Md. 442, 455 (1909)) (emphasis removed). A party does not "waive the issue on appeal by attempting to counter the impact of erroneously admitted evidence, either by cross-examining witnesses about it, or by presenting extrinsic evidence designed to weaken its impact." Joseph F. Murphy, Jr., Maryland Evidence Handbook § 106[B] at 32 (4th ed. 2010, 2017 Supp.). In *Mayor & City Council of Baltimore v. Smulyan*, 41 Md. App. 202 (1979), we explained:

> When a party makes a clear objection to specific evidence and that objection is plainly overruled, he is not required to play the ostrich and simply ignore the evidence, or its potential effect upon his case, for fear of losing his ground

> for appeal. He may cross-examine … the witness about the evidence, and make other reasonable efforts to show that the evidence, admitted over his objection, should nevertheless be discounted or disregarded by the trier of fact.

Smulyan, 41 Md. App. at 219 (internal citations omitted).

On cross-examination, defense counsel asked Officer Weill whether he was aware of the "38 other possible reasons to have horizontal gaze nystagmus that are not alcohol-related." Officer Weill responded that natural resting nystagmus, astigmatism and head trauma are examples of non-alcohol-related conditions that could cause someone to have HGN. Defense counsel asked Officer Weill whether it was his practice to ask whether a driver suffers from astigmatism prior to administering the HGN test, and Officer Weill responded that it was not. Officer Weill further acknowledged that he had misspoken on direct examination when he stated that Appellant showed "five out of six clues" on the walk and turn test. In fact, Appellant exhibited five out of eight total clues. We conclude that defense counsel's cross-examination of Officer Weill was aimed at diminishing the impact of his testimony and demonstrating that his assessment of Appellant's performance on the HGN test and the walk and turn tests were flawed. Accordingly, if Appellant had properly preserved an objection to the HGN testimony up to that point – which he did not, as we will explain – then Appellant did not affirmatively waive her objection to Officer Weill's qualifications by cross-examining him.

2. Expert Witness Testimony

"[I]n order to determine whether a proposed witness is qualified to testify as an expert, the trial court must examine whether a proposed witness has sufficient knowledge, skill, experience, training, or education pertinent to the subject of the testimony." *Deese v. State*, 367 Md. 293, 303 (2001) (quoting *Sippio v. State*, 350 Md. 633, 649 (1998)). We have recognized that, to qualify as an expert under Md. Rule 5-702, "one need only possess such skill, knowledge, or experience in that field or calling as to make it appear that [the] opinion or inference will probably aid the trier [of fact] in his search for the truth." *Donati v. State*, 215 Md. App. 686, 742 (citation omitted), *cert. denied*, 438 Md. 143 (2014).

Under Maryland law, evidence relating to the administration of the HGN test requires expert testimony, pursuant to *State v. Blackwell*, 408 Md. 677, 695 (2009) ("[T]he very foundation for the admission of HGN test evidence is premised on specialized knowledge and training," which requires "expert testimony within the purview of Md. Rule 5-702"); *accord Schultz v. State*, 106 Md. App. 145, 151 (1995) ("the results of HGN evidence are admissible in evidence in the courts of this State, provided the administrator of the test is duly qualified and the testing procedure is conducted properly"). In *Blackwell*, a state trooper stopped Blackwell because of a non-functioning tail light, and attempted to administer the three standard field sobriety tests: the HGN test, the walk and turn test, and the one-leg stand test. *Blackwell*, 408 Md. at 681. The trooper stopped the walk and turn test after noticing that Blackwell had an injured leg, and due to that injury, he did not have

Blackwell complete the one-leg stand test. *Id.* at 685. The State did not qualify the trooper as an expert before he testified regarding the results of the HGN test. *Id.* at 685-86.

The Court of Appeals held:

> the trial [court] erred, as a matter of law, in admitting into evidence [the trooper's] testimony, over objection, about Blackwell's performance on the HGN test without first making a preliminary legal determination that [the trooper] was qualified to testify as an expert witness. *Id.* at 697.

Blackwell was an extension of this Court's earlier holding in *Schultz, supra*, that HGN testing results are admissible in evidence so long as the officer is qualified to administer the test and the test is conducted properly. *Schultz*, 106 Md. App. at 151. In *Schultz*, Officer Rossiter stopped Schultz's vehicle, detected an odor of alcohol, and proceeded to administer several field sobriety tests, including HGN. *Id.* at 147-48. At trial, Officer Rossiter testified that he had received training in administering field sobriety tests five years prior at the police academy and that he had administered field sobriety tests approximately 100 times. *Id.* at 174. With respect to the HGN test, the officer explained that it "tests the muscles in the eyes as to how lax or smooth that the eyes can follow an object as it's passed in front of them," and stated that "with the alcohol, it's a depressant and relaxes the muscles...," at which point, defense counsel objected as to his qualifications, and the court overruled the objection. *Id.* at 175.

Officer Rossiter was then asked whether Schultz had passed the HGN test, and the officer responded that Schultz did not pass. *Id.* Defense counsel objected to the officer's testimony as to "passing or failing," and the court overruled the objection. *Id.* Defense counsel objected again when the officer then began describing the scoring system for the

test, arguing that the officer had "reached a conclusion and hasn't given any of the underlying basis for reaching that conclusion." *Id*. at 175-76. Officer Rossiter further testified that he had received instruction at the Western Maryland Police Academy on how to perform the test and score the test. *Id.* at 176.

Schultz argued on appeal that the trial court had erred in admitting Officer Rossiter's testimony about Schultz's performance on the HGN test. While counsel rely on these cases to support their arguments in this case, we do not think that they are applicable under the circumstances presented in this case.

We interpret the acceptance of Officer Weill as an expert as non-specific and therefore he was qualified as an expert in the walk and turn and the one leg stand tests. We however do not think that the court intended to qualify the officer as an expert regarding the HGN test. The prosecutor at first did not offer Officer Weill as an expert at all, but sought only his lay opinion regarding Ms. Love's state "as a result of the walk and turn test and the one leg stand test." After the trial court sustained the defense's objection to that testimony, the prosecutor sought to qualify Officer Weill as an expert. In an ensuing bench conference, the prosecutor stated that Officer Weill was an expert, "[b]ut the horizontal gaze nystagmus[,] I don't offer him as an expert on that." After the bench conference, the prosecutor asked Officer Weill general questions about his training in and performance of "standard field sobriety tests," and then asked that the officer be "admitted as an expert." Over the defense's objection that a proper foundation had not been laid, the court qualified Officer Weill "by reason of his experience, training, and education at the police academy to give expert testimony in this limited area under Maryland rule 5-702."

In context, we do not think the trial court intended to accept Officer Weill as an expert witness regarding the HGN test. The prosecutor expressly stated that the officer was not being offered as an expert regarding that test, and the questions the prosecutor asked to qualify Officer Weill did not mention the HGN test at all, referring instead in general terms to "standard field sobriety testing." It is in that context that the prosecutor tendered Officer Weill "as an expert" and the trial court made its nonspecific acceptance of him as an expert "in this limited area." Given that, and given the "presumption that trial judges know the law and apply it properly," *State v. Chaney*, 375 Md. 168, 181 (2003), we do not think we should infer that the trial court qualified Officer Weill as an expert on a subject as to which the prosecutor had expressly stated he was not being tendered.[2] Of course, the jury was not privy to the prosecutor's qualification during the bench conference, but Ms. Love did not object to that or to the lack of specificity in the trial court's qualification of Officer Weill at trial, and she does not raise that as an issue on appeal.

Second, because we do not think the circuit court qualified Officer Weill as an expert on the HGN test, we conclude that Ms. Love was required to object to the introduction of testimony concerning the HGN test when it was offered, and she failed to do so. An expert, of course, may only properly opine on subjects as to which the expert has been properly qualified. *See Buxton v. Buxton*, 363 Md. 634, 650 (2001) (citing Md. Rule 5-702(2)) (in assessing whether expert testimony is admissible, "the court must

[2] If the trial court had qualified Officer Weill as an expert witness regarding the HGN test, that would have been an abuse of discretion. *See Roy v. Dackman*, 445 Md. 23, 39 (2015) (citing *Bryant v. State*, 393 Md. 196, 203 (2006)) ("A circuit court's decision to exclude a witness will be reversed only if there is a clear abuse of discretion.").

determine . . . the appropriateness of the expert testimony on the particular subject"); *see also Giant Food, Inc. v. Booker*, 152 Md. App. 166, 182-83 (2003)) (internal citations omitted) ("[S]imply because a witness has been tendered and qualified as an expert in a particular occupation or profession, it does not follow that the expert may render an unbridled opinion."); *AccoTapscott v. State*, 106 Md. App. 109, 132 (1995), *aff'd*, 343 Md. 650, 684 A.2d 439 (1996). In her reply brief, Ms. Love argues that her failure to object to Officer Weill's testimony about the HGN test does not present a preservation problem because her exclusive claim on appeal is that the court erred in qualifying Officer Weill as an expert. That is, she contends that if Officer Weill was properly qualified as an expert, to the specific questions asked of him about the HGN test.

As already explained, however, we disagree with the premise that the court qualified Officer Weill as an expert regarding the HGN test. As a result, to preserve an objection to testimony regarding that test, Ms. Love was required to object at the time the testimony was offered, and she failed to do so. Officer Weill's first mention of the HGN test was when he stated that he "started with" that test when describing his interactions with Ms. Love. That mention elicited a defense objection, which led to a lengthy bench conference. During the conference, the court stated that because the witness had not been qualified as an expert at that point, he would be permitted to describe what the test "is without offering any opinions." At the conclusion of the bench conference, the court *sustained* the objection. The next question the prosecutor asked was, "What is the horizontal gaze nystagmus test?" Without any objection, Officer Weill responded: "The horizontal gaze nystagmus test involves involuntary jerking of the eye and is an indication

of the presence of alcohol in the system." In failing to object to this question, or to request a continuing objection to the line of questioning, Ms. Love failed to preserve her objection to it. *See DeLeon v. State*, 407 Md. 16, 31 (2008); *see also Ridgeway v. State*, 140 Md. App. 49, 66 (2001) ("A challenge to the trial court's decision to admit testimony is not preserved unless an objection is made each time that a question eliciting that testimony is posed.").

Officer Weill's second mention of the HGN test was entirely unsolicited. After Officer Weill was qualified as an expert witness, the prosecutor asked a series of questions about Ms. Love's performance of the walk and turn test. At the end of that series of questions, the prosecutor asked whether "that test by itself"—i.e., the walk and turn test—"indicate[s] anything to you?" Without objection, Officer Weill testified: "I believe at that point at the conclusion of all three tests that the subject was intoxicated." Thus, although the prosecutor's question was limited to the walk and turn test, Officer Weill's response brought in both the one leg stand test and the HGN test. However, neither the question nor the response elicited a defense objection. Ms. Love thus failed to preserve an objection to that testimony.[3] Officer Weill's direct examination concluded without any further mention of the HGN test and without any testimony at all about Officer Weill's administration of the HGN test or Ms. Love's performance on that test.

[3] The prosecutor proceeded to ask a targeted series of questions about the one leg stand test, and then asked, "at the culmination of those two tests what was your opinion, if any?" Officer Weill answered: "My opinion was that she should not be operating a vehicle that evening . . . [b]ecause of the level of intoxication I believe that she was under."

The third mention of the HGN test during Officer Weill's testimony came on cross-examination, when the defense asked a series of questions about whether there were "other possible reasons to have horizontal gaze nystagmus that are not alcohol-related." Over the State's objection, Officer Weill answered, and agreed that there were. Ms. Love, of course, did not preserve an objection to any of the testimony that she herself elicited from Officer Weill. And although a defendant does not waive a properly preserved objection by introducing responsive testimony, *see Fullbright v. State*, 168 Md. App. 168, 178 (2006) (explaining that a party does "not waive his objection . . . by re-raising that issue with [a witness] on cross-examination"), here, Ms. Love had not properly preserved an objection to any HGN testimony up to that point.

The fourth mention of the HGN test came on redirect, when the prosecutor asked a series of questions to probe why Officer Weill "mentioned the BAC content" when responding to a question on cross-examination about the HGN test.[4] The defense did not object to any of the prosecutor's questions, and objected to only one answer, in which Officer Weill stated that the HGN test "is the most objective out of all three" field sobriety tests. When asked the basis for the objection, the defense stated: "The witness's knowledge of what is the most objective test. He is required to do all three." The court responded: "Overruled. If that's your objection. You may answer the question, sir." The defense did

[4] In the transcript, the prosecutor is identified as saying that Officer Weill mentioned the BAC content in responding to "the State's question about horizontal gaze nystagmus." In context, and as specified in the immediately following question, it seems clear that he meant in responding to the defense's question.

not offer any other basis for objecting to that answer, nor did counsel make any further objection on redirect.

The final mention of the HGN test was in the defense's sole question on re-cross, to which Officer Weill agreed that the HGN test "does not give you a blood alcohol content." No objection was made to the question or the answer.

In sum, we conclude that the circuit court did not qualify Officer Weill as an expert specifically on the HGN test and, therefore, Ms. Love was required to object to testimony about the HGN test to preserve those objections for appeal. She did not do so and the trial court did not err or abuse its discretion on any preserved issue.

The Appellant has also raised the issue of whether the court erred in qualifying the officer to testify regarding his observations with respect to the other tests administered, the one leg stand and walk and turn tests. First, his testimony regarding his training and experience, described supra, established his qualifications as to those tests. His many practical hours conducting those field sobriety tests in Silver Spring as an officer and the training involving with individuals who had imbibed alcohol clearly established his qualifications. This testimony would clearly have been helpful to the jury in evaluating the officer's testimony in which he concluded that she "appeared" to be intoxicated. It must be noted that he did not conclude that she had "passed or failed" the tests. In a recent Court of Appeals opinion, *Walter Elenlis Portillo Funes v. State* (No. 65, Sept. term 2019) the court confirmed that a police officer's testimony about a motorist's performance on field sobriety tests is "helpful lay testimony" and as such is admissible under Rule 5-701, which governs lay opinion testimony. Slip op. at 36.

In this case, we can also say that even if there had been error in qualifying Officer Weill as an expert as to the HGN test it did not play a role in the jury's verdict. Defense counsel started their closing argument with "Ladies and gentleman, you heard a lot of evidence and you heard of lot of testimony." He was correct in that there was a variety of evidence that led to the jury's conviction of the Appellant. The HGN test was not the only evidence offered by the State. The two other tests that were administered and for which expert testimony was offered relied on the basic observations of the officer. Officer Weill had conducted many of these before and was certainly qualified as an officer to decide based on his observations whether the subject appeared to be intoxicated. First, after the Appellant went through a stop sign, she brought up alcohol before the officer when she was stopped. Furthermore both officers observed that her eyes were bloodshot and watery, she admitted that she had drunk a beer and one mixed drink, she admitted that on a sobriety scale of one to ten she was a "five", the smell of alcohol was noted to be coming from the vehicle by both officers, the Appellant was video taped failing to perform satisfactorily the walk and turn (including a big false step) and the one-leg stand test, and her normal gate was observed in the courtroom during a demonstration and did not demonstrate any problem with her gait. While the prosecutor mentioned the HGN test he did not describe it in detail in his closing argument, as he did the other field sobriety tests. Furthermore, the Appellant testified that she had to "think" about walking but not that it caused her to limp on the day in question. She said she "always has trouble walking even though" her feet hurt. On the night in question and in the video tape evidence the Appellant was asked were there any infirmities that caused her to be unable to perform the tests. She answered that

she had flat feet and "no arches". She was also asked if she wanted to put on different shoes and she said no. She did not mention any pain. Officer Weill testified that he saw her walking before the tests and she was walking "fine". Also we can also say that even if there had been error in qualifying Officer Weill as an expert as to the walk and turn test and the one leg stand test it did not play a role in the jury's verdict. There was sufficient evidence supporting the officer's conclusion that she was under the influence that was established by the officer's testimony.

Furthermore, on June 30, 2020, the Court of Appeals decided *Walter Elenils Portillo Funes v. State*, No. 65, Sept. Term 2019. In this opinion, the Court of Appeals confirmed, among other things, that a police officer's testimony about a motorist's performance on field sobriety tests is "helpful lay testimony" and, as such, is admissible under Maryland Rule 5-701, which governs lay opinion. *Portillo Funes*, slip op. at 36. Although there was no allegation of improper allowance of expert opinion testimony by the officer in that case, the Court of Appeals also noted its holding in *State v. Blackwell*, 408 Md. 677, 691 (2009), that an officer's testimony about a motorist's "'performance *on the HGN test* constituted expert testimony subject to the strictures of Md. Rule 5-702,'" *Portillo Funes*, slip op. at 36 n.20 (quoting *Blackwell*) (emphasis added).[5] Thus Officer Weill's testimony regarding the other two tests is bolstered as helpful lay testimony.

[5] The State noted that the Court thereby seemed to underscore *Blackwell*'s applicability to the HGN test rather than field sobriety tests generally.

Accordingly, even if there had been an error in this regard assuming no prejudice, the judgment of the Circuit Court for Montgomery County would be affirmed.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.