

2019 IL App (1st) 162111-U  
No. 1-16-2111  
Order filed September 11, 2019

Third Division

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 12128
	)	
EPHRIAM MARKS,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge, presiding.

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PRESIDING JUSTICE ELLIS delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defendant's convictions for aggravated driving under the influence of alcohol and driving with a revoked license affirmed. Trial court did not improperly take judicial notice of certain facts. State laid sufficient foundation for admissibility of breath test results.
- ¶ 2 Following a bench trial, defendant Ephriam Marks was convicted of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(1) (West 2014)) and felony driving

with a revoked license (625 ILCS 5/6-303(a), (d-5) (West 2014)). The trial court sentenced defendant to concurrent terms of 54 months' imprisonment.

¶ 3 On appeal, defendant claims the trial court erred when it took "judicial notice" of whether the radio in a 1979 Mazda could play while the keys are not in the ignition, relying on the capabilities of the court's own 1992 Mazda, which did not have a similar feature. Defendant also says the trial court erred when it admitted the Breathalyzer test results, as the State failed to lay a proper foundation regarding the machine's accuracy and functionality. We disagree on both points and affirm.

¶ 4 Defendant was charged with 10 counts each of aggravated DUI and felony driving with a revoked license. At trial, Chicago police officer Bruce Dyker testified that about 2:24 a.m. on May 22, 2014, he and his partner, Officer Rhonda Presley, were on routine patrol driving southbound on North Cicero Avenue. Dyker observed a 1979 Mazda parked along the curb on the southbound side of the street with a man inside who appeared to be either asleep at the wheel or passed out. After driving past the vehicle, Dyker turned his vehicle around, returned to the location, and pulled up behind the parked Mazda. He activated his rear emergency lights, and he and Presley left their vehicle. Dyker approached the driver's side of the Mazda, Presley the passenger's side. Dyker observed a man sitting in the driver's seat with his eyes closed and his head back against the headrest at a slight angle. In court, Dyker identified that man as defendant.

¶ 5 Defendant did not appear to be aware that Dyker was standing outside his vehicle. Dyker performed a well-being check to insure defendant was not deceased or experiencing a medical emergency. Dyker found that the door was unlocked and opened it. Defendant did not move or acknowledge that the door had been opened. Defendant was holding a set of keys in his right

hand, which rested on his lap. There were no keys in the ignition. Dyker secured the vehicle keys. He then attempted to wake defendant by lightly shaking his shoulder. Defendant awoke. Dyker identified himself as a police officer and asked defendant if he was okay. Defendant did not reply immediately and appeared to be waking up and collecting his bearings.

¶ 6 Defendant's eyes were red and bloodshot. Dyker again identified himself as a police officer and asked defendant if he was okay. Defendant replied that he was okay but tired. Defendant's speech was slurred, and Dyker smelled a clear and obvious alcohol odor on his breath. Dyker asked defendant for his driver's license and proof of insurance. Defendant did not have either document. Dyker asked defendant if he had been drinking that evening. Defendant replied that he had been drinking much earlier. Dyker told defendant that he wanted to insure that he was okay, and that he was able to drive if Dyker left him there. Dyker asked defendant to step out of his vehicle. As defendant stood up, he leaned against the vehicle. Defendant swayed slightly as he stepped away from his vehicle, and staggered as he walked to the adjacent sidewalk.

¶ 7 Dyker administered three field sobriety tests to defendant—the horizontal gaze nystagmus (HGN) test, the one-legged stand test, and the walk-and-turn test. During the HGN test, Dyker observed six indicators that defendant had consumed alcohol. Only four indicators are needed to find alcohol consumption. During the one-legged stand test, defendant swayed and raised his arms to help him balance. He made five unsuccessful attempts at the test, putting his foot down after one or two seconds each time. Two indicators are needed to find impairment with this test; Dyker observed three. During the walk-and-turn test, defendant used his arms for balance while walking. He veered to the left rather than walking a straight line, did not take the

correct number of steps, and had several inches of distance between each step rather than walking heel to toe. Two indicators are needed to find impairment for this test; Dyker observed six. Based on Dyker's observations of defendant, defendant's admission that he had been drinking, and the fact that defendant was found in immediate physical control of the vehicle, Dyker arrested defendant and transported him to the 16th District police station.

¶ 8 At the station, Dyker read a warning to motorists to defendant, advising him that the Secretary of State could possibly suspend his license if he was under the influence of alcohol. Defendant agreed to take a Breathalyzer test. Dyker observed defendant for 20 minutes before administering the test to him. The purpose of his observation was to insure that defendant was in good health, that he was not ill, and that he did not place any foreign objects into his mouth during that time. Dyker confirmed that during that time, defendant did not eat any food, drink anything, ingest any alcohol, vomit, or smoke.

¶ 9 The test was conducted about 3:14 a.m. The machine Dyker used was an EC/IR II Breathalyzer with serial number 012434. Dyker had attended a four-day training class on how to operate the Breathalyzer machine during which he received the required minimum of 32 hours of training. The training covered the rules on how to operate the machine. Dyker practiced on an actual machine and passed the required written and practical exams provided by the Illinois State Police (ISP). In January 2012, Dyker received a license from the ISP, certifying him as a breath alcohol operator, with an expiration date of January 19, 2015. The State presented Dyker's license in court. Dyker testified that he was licensed to operate the Breathalyzer machine in May 2014, when he administered the test to defendant. Dyker was certified to operate the particular

machine located at the 16th District police station. Dyker had administered “well over a hundred” tests on the EC/IR machine prior to testing defendant.

¶ 10 Dyker testified that the EC/IR machine is tested to insure its accuracy. The accuracy checks are stored and maintained by the ISP. The results of the maintenance tests must be recorded, maintained and stored pursuant to the Illinois Vehicle Code. The State presented a notarized certification of “Copies of Accuracy Checks and Calibration Checks on EC/IR II, Serial Number 012434, Chicago Police Department 16th District, dated May 1 and June 1, 2014.” The certification is signed by the “Keeper of Records” of the Alcohol and Substance Testing Section of the Illinois State Police Academy. Attached to the certification is an “IntoxNet MIS Report” for instrument serial number 012434 that reflects test dates of May 1 and June 1, 2014. Each test date shows four sample values and a standard value. The standard value for the May 1 test is .079, and the standard value for the June 1 test is .080. Both test dates indicate “Test Status Success.”

¶ 11 Dyker identified the documents and explained that they showed that the scheduled certification tests for the machine with serial number 012434 dated May 1, 2014, and June 1, 2014, indicated that the machine was successfully tested on both dates. Dyker testified that the purpose of the tests is “[t]o check for the accuracy of the instrumentation.” He further explained that the successful test results meant that the machine’s internal diagnostic testing that it self-tested on May 1 and June 1 indicated that the “machine was without error.” Dyker confirmed that these tests were done prior to and after defendant’s breath test, which occurred on May 22. Dyker further confirmed that the tests indicated that the Breathalyzer machine was in good working order on both May 1 and June 1.

¶ 12 Prior to administering the test, Dyker directed defendant to sit on a bench beside the machine. Dyker prepared the machine for the test by hitting the enter key, which initiates the machine's warm-up sequence. Dyker then inputted information about himself, the subject (defendant), the ticket number, defendant's driver's license, and the test location. Dyker testified that he knew the Breathalyzer machine was working properly and accurately when he administered the test to defendant because after he entered all of the above information, the machine ran through a diagnostic to insure it was in proper working order. The diagnostic indicated that the machine passed, and that defendant should attempt the test. Dyker confirmed that the operational procedure he followed for each test was approved by the ISP in accordance with the manufacturer's recommended testing procedures. Dyker further confirmed that there was no equipment or any other item near the Breathalyzer machine that could have affected the result of defendant's test or caused any inaccuracy in the test results.

¶ 13 After Dyker entered the above information into the machine, he asked defendant to stand. Dyker demonstrated for defendant how to blow into the mouthpiece. When the machine indicated that it was ready for the test sample, Dyker applied a brand new mouthpiece to the nozzle, and asked defendant to blow into the machine. Defendant complied and provided a sample that was sufficient for a result. The machine indicated that defendant's breath alcohol content was 0.111. Dyker confirmed that defendant's test result was above the legal limit in Illinois, which is 0.08. The machine printed out a breath ticket. The State presented the breath ticket in court. Dyker identified the ticket as the one produced from defendant's breath test. Dyker testified that the ticket was from the Intoxilyzer EC/IR II Breathalyzer machine with serial

number 012434. Dyker pointed out that the ticket included his name, defendant's name, defendant's driver's license number, and the citation number for the traffic violations.

¶ 14 Following the breath test, Dyker advised defendant of his *Miranda* rights. Defendant then answered a series of questions during which he told Dyker:

“that he was out, that he was headed home, that he was tired so he pulled over, that at his home he had consumed seven beers. He was unsure of what time that was at, and that he thought he was going northbound on Cicero Avenue and that he still thought he was under the influence of alcohol.”

Thereafter, Dyker ran a name check on defendant which indicated that his driver's license was in revoked status.

¶ 15 On cross-examination, Dyker acknowledged that defendant had been legally parked. Dyker did not observe defendant driving. When Dyker approached defendant's vehicle, he knocked on the window once or twice, but defendant did not respond. Dyker did not know how long defendant had been sleeping. Dyker removed the keys from defendant's hand. After defendant was arrested, Presley drove defendant's vehicle to the 16th District police station for proper towing. Dyker asked defendant for his driver's license and insurance information because defendant was in physical control of a motor vehicle. Defendant told Dyker that he was diabetic, had not taken his insulin for two days, and had not seen a doctor in awhile. Defendant could not recall the last time he ate. Dyker acknowledged that defendant was cooperative throughout the evening.

¶ 16 The State entered into evidence Dyker's Breathalyzer license, defendant's breath ticket, and the certification of the accuracy of the Breathalyzer machine. The State also presented a

certified document from the Secretary of State indicating that revocation of defendant's driver's license was in effect on May 22, 2014.

¶ 17 Defendant testified that early in the evening of May 22, he was watching the Hawks game with some friends at a place that "was like a golf course." His friend Vicki arrived in a vintage Mazda RX 7. Vicki took her vehicle to a mechanic on North Cicero Avenue for repairs. The mechanic finished the work. Defendant was supposed to meet Vicki at her car on Cicero. He was supposed to wait for her to come to pick up her vehicle. Defendant took a CTA bus to Cicero Avenue. The mechanic left the keys for the Mazda inside the glove box. When Vicki left the golf course, she went home. While defendant sat inside the vehicle waiting for Vicki, he fell asleep. Defendant awoke as soon as the officer knocked on the window. Defendant told the officer that he was waiting for his friend. The officer said "I smell alcohol immediately on you," and asked defendant if he was drunk and driving. Defendant replied that he was not. He again said that he was waiting for his friend. He also told the officer that he had been watching the Hawks game much earlier.

¶ 18 Defendant testified that he did not drive the vehicle at any time that evening. He arrived at the vehicle about 8:30 p.m. and fell asleep by 9 p.m. The officer knocked on the window about 2 a.m. When defendant awoke, he felt good. He cooperated with the police. He performed the walk-and-turn test perfectly. He thought everything was fine until he took the breath test. He blew into the machine more than five times before any results registered.

¶ 19 On cross-examination, defendant testified that he drank three or four beers while watching the Hawks game with his friends at the golf lounge. He did not recall telling the officer that he drank seven beers. He left the golf course because Vicki asked him to check on the



mechanic to make sure the repairs were done. She was supposed to meet him at the mechanic's to pick up the vehicle. When defendant arrived at the mechanic's, Jimmy unlocked the vehicle for defendant and threw the keys inside the glove box. Defendant waited for Vicki because he did not want anyone to steal her vehicle. He thought she would arrive by 10 p.m., but she did not. Defendant was sitting in the passenger seat, not the driver's seat. He was listening to the radio while he waited for Vicki to arrive. He fell asleep waiting for her.

¶ 20 Pursuant to the court's questioning, defendant confirmed that the vehicle was a 1979 Mazda. He also confirmed that he was listening to the radio while the keys were inside the glove box. Defendant testified that the key did not need to be in the ignition to have the radio on.

¶ 21 In rebuttal, the State presented certified copies of defendant's prior convictions for theft and residential burglary.

¶ 22 In rendering its findings, the trial court stated "I don't believe the defendant's testimony in any way, shape, or form." The court remarked that Vicki could have picked up her vehicle herself. The court then stated:

"I didn't own my Mazda until about 1992 except maybe they had a technology in place in 1979 that would have allowed the playing of the radio without the keys in the ignition.

My 1992 Mazda you couldn't do that but you know technology is a fluid thing. I also believe the defendant's testimony has been impeached by his prior felony convictions.

If the whole purpose was to make sure the vehicle is safe, why are the keys in the glove box and the car is open. I don't believe that he left the car—I'd lock the—I believe the police officer.”

¶ 23 The trial court found that the State proved defendant guilty beyond a reasonable doubt of aggravated DUI and driving with a revoked license. The court sentenced defendant to concurrent terms of 54 months' imprisonment on count I for aggravated DUI and count V for driving with a revoked license. The court stated that all of the other counts merged into counts I and V.

¶ 24 On appeal, defendant first claims the trial court erred when it took “judicial notice” of whether the radio in a 1979 Mazda could play when the keys are not in the ignition, relying on the capabilities of the court's own 1992 Mazda, which did not have that feature. Defendant claims that the trial court rejected his testimony based on its personal knowledge of the technological capabilities of its own 1992 Mazda, and thus, improperly relied on facts not in evidence to assess the credibility of his testimony. Defendant argues that the court thereby violated his right to due process.

¶ 25 Defendant acknowledges that he forfeited this issue for appeal, as he did not object to the trial court's comment at trial and did not raise the issue in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). He argues, however, that his claim is reviewable as plain error. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Alternatively, defendant says his claim should not be considered forfeited because the basis of his objection was the trial court's conduct. See *People v. Sprinkle*, 27 Ill. 2d 398, 401 (1963). Finally, defendant claims his trial counsel rendered ineffective assistance when he failed to object to the trial court's allegedly improper consideration of facts not in evidence.

¶ 26 We start with plain error. The plain-error doctrine is a limited and narrow exception to the forfeiture rule that exists to protect defendant's rights and the reputation and integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). Defendant must demonstrate that a clear or obvious error occurred, and either: (1) that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him, or (2) that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *People v. Sebby*, 2017 IL 119445, ¶ 48. The burden of persuasion is on defendant, and if not met, the procedural default will be honored. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 27 But the first step is determining whether error occurred at all, because without error, there can obviously be no plain error. *Sebby*, 2017 IL 119445, ¶ 49. So we must first determine whether the trial court took "judicial notice" of the radio capabilities of a 1979 Mazda based on its personal knowledge of the capabilities of its own 1992 Mazda, and thereby relied on facts not in evidence to assess the credibility of defendant's testimony.

¶ 28 It is presumed that, when the trial court sits as the trier of fact, it considers only competent, admissible evidence in making its findings and disregards inadmissible evidence. *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). This presumption may be rebutted when the record shows the contrary. *Id.* at 603-04. The court may take judicial notice of a fact that is not subject to reasonable dispute, in that it is either generally known within the court's territorial jurisdiction or capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questioned. Ill. R. Evid. 201 (eff. Jan. 1, 2011). Otherwise, the trial court's deliberations are limited to the record, and any determination based on the private knowledge of the court, untested by cross-examination, constitutes a denial of due process. *People v. Jenk*,

2016 IL App (1st) 143177, ¶ 53. Whether defendant was denied due process is a question of law we review *de novo*. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75.

¶ 29 The remark in question was made by the trial court in reference to defendant's testimony that, while he waited for Vicki inside the 1979 Mazda and before he fell asleep, he'd been listening to the radio while the keys were inside the glove compartment. The court said that "[m]y 1992 Mazda you couldn't do that but you know technology is a fluid thing." Defendant argues that this comment shows that "[t]he judge dismissed Marks's account, noting that Marks could not have been listening to the radio while the keys were not in the ignition."

¶ 30 But we should put that comment in its overall context. The court stated that "I don't believe the defendant's testimony in any way, shape, or form," noting among other things that Vicki could have picked up the vehicle herself. The court then stated:

"I didn't own my Mazda until about 1992 except maybe they had a technology in place in 1979 that would have allowed the playing of the radio without the keys in the ignition.

My 1992 Mazda you couldn't do that but you know technology is a fluid thing. I also believe the defendant's testimony has been impeached by his prior felony convictions.

If the whole purpose was to make sure the vehicle is safe, why are the keys in the glove box and the car is open. I don't believe that he left the car—I'd lock the—I believe the police officer."

¶ 31 While we do not condone any reference to evidence outside the record, we find no error here. The trial court did not reject defendant's testimony based on its own knowledge of a later

model of Mazda. Instead, it immediately corrected itself and acknowledged the fluidity of technology, and the possibility that a feature that was lacking in the court's 1992 Mazda was present in the 1979 model. The court was speaking extemporaneously and, whatever it may have believed or known about a Mazda model 16 years older than the one in which defendant was found, the court immediately clarified that it would not place any weight on that knowledge.

¶ 32 The court's rejection of defendant's version of events, instead, was based in large part on what the court perceived as the implausibility of defendant leaving the keys in the glove box while inside the car; the fact that defendant, rather than Vicki, would have been picking up the car in the first instance; and defendant's previous felony conviction. The court also found the police officer more credible, and the officer's testimony was that the car keys were not in the glove compartment but in defendant's hand, resting on his lap.

¶ 33 In short, the record does not establish that the court relied on facts outside the record or that its brief reference to such facts played any role whatsoever in its reasoning. We find no error here and thus no plain error. See *Sebby*, 2017 IL 119445, ¶ 48.

¶ 34 Because we find no error, we likewise reject defendant's alternative argument to consider his claim under the *Sprinkle* doctrine, which provides a basis for relaxing the forfeiture rule where an error arises from judicial misconduct. *Sprinkle*, 27 Ill. 2d at 400-01. There was no error by the trial court, and thus, no judicial misconduct.

¶ 35 And for that reason as well, we find no ineffective assistance of counsel. To support such a claim, defendant must show both that counsel's representation was deficient, and that as a result of that deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Veatch*,

2017 IL 120649, ¶¶ 29-30. Because the trial court did not improperly rely on facts outside the record, counsel's failure to object was not deficient performance, and an objection would not have made any difference in the trial's outcome, in any event. We thus reject the ineffectiveness argument.

¶ 36 Defendant next contends that the trial court erred when it admitted the Breathalyzer test results, because the State failed to lay a proper foundation regarding the machine's accuracy and functionality. Defendant acknowledges that the State entered a timely electronic certification for the Breathalyzer machine but argues that Dyker's testimony explaining that certification was insufficient, as he did not address two of the four required foundational elements. Defendant claims there was insufficient proof that an accuracy check was conducted prior to defendant's test that was within the accuracy tolerance specified in the regulations, and that defendant's test was conducted not more than 62 days after the last accuracy check.

¶ 37 Defendant concedes that he did not preserve this issue for appeal because he did not object to the State's evidence based on foundation during trial and did not raise the issue in his posttrial motion. See *Enoch*, 122 Ill. 2d at 186. He argues, however, that his claim is reviewable under both prongs of the plain-error doctrine. Alternatively, defendant argues that his trial counsel rendered ineffective assistance when he failed to object to the inadequate foundation.

¶ 38 The State responds that it laid an adequate foundation for the evidence, as Dyker testified that the machine was tested for accuracy and passed those tests. It further argues that the combined evidence of Dyker's testimony, his license for operating the machine, the machine's test report, and the ticket printed from the machine following defendant's test provided a sufficient foundation for admission of defendant's breath test results. The State also asserts that

there is a rebuttable presumption that the machine was accurate, because Dyker testified that the machine was without error, and the exhibits demonstrated that the accuracy test conducted prior to defendant's test was within the accuracy tolerance.

¶ 39 As a threshold matter, the parties disagree on the appropriate standard of review. Defendant asserts that the issue of whether the State met a foundational element is a question of law subject to *de novo* review. See *People v. Cady*, 311 Ill. App. 3d 348, 350 (2000). The State counters that defendant's challenge to the foundation raises an evidentiary issue, and the trial court's evidentiary rulings are reviewed for an abuse of discretion. See *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). This same disagreement was raised in *People v. Smith*, 2015 IL App (1st) 122306, ¶¶ 37-39, where the defendant also claimed that the State failed to lay an adequate foundation for admission of the Breathalyzer test results. In *Smith*, we determined that we did not need to resolve the issue of the proper standard of review, because our holding would be the same under either standard. *Id.* ¶ 39. We reach that same determination here.

¶ 40 To admit a Breathalyzer test result, the State must show that: (1) the breath test was performed according to the uniform standard adopted by the relevant state agency (now the Department of State Police); (2) the operator who administered the test was certified by the Department of State Police; (3) the machine used was a model approved by the Department of State Police, was tested regularly for accuracy, and was working properly; (4) the motorist was observed for the required 20 minutes prior to the test and, during this period, did not smoke, regurgitate, or drink; and (5) the result appearing on the printout sheet can be identified as the test given to the motorist. *People v. Orth*, 124 Ill. 2d 326, 340 (1988).

¶ 41 Defendant challenges only a portion of the third factor here—whether the Breathalyzer machine was tested for accuracy and was working properly on the date of defendant’s test. To meet this requirement, the State must show that the breath test was performed in accordance with section 11-501.2(a) of the Illinois Vehicle Code (625 ILCS 5/11-501.2(a) (West 2014)) and the rules promulgated by the Department of State Police. *Smith*, 2015 IL App (1st) 122306, ¶ 31. “In pertinent part, section 11-501.2(a) authorizes admission of the chemical analysis of a person’s breath in the prosecution of the offense of driving with an alcohol concentration of 0.08 or more” as long as the breath test was performed “ ‘according to standards promulgated by the Department of State Police.’ ” *Id.* ¶ 32 (quoting 625 ILCS 5/11-501.2(a)(1) (West 2010)).

¶ 42 Pursuant to section 1286.200 of the rules of the Department of State Police, there is a rebuttable presumption that the Breathalyzer machine was accurate:

“if the following four conditions are met: (1) the Breathalyzer machine was approved pursuant to section 1286.210 of the regulations (20 Ill. Adm. Code 1286.210 (2011) (not pertinent here)); (2) an accuracy check was conducted prior to defendant’s test that was within the ‘accuracy tolerance’ described in section 1286.230 of the regulations; (3) no accuracy check was performed after defendant’s test or an accuracy check was performed after defendant’s test and it was within the accuracy tolerance; and (4) defendant’s test was conducted not more than 62 days after the last accuracy check.” *Id.* ¶ 33 (citing 20 Ill. Adm. Code 1286.200 (2009)).

The rules also require that either a breath analysis technician or an “automated system” perform accuracy checks “at least once every 62 days” and that the results are recorded in the machine’s



logbook or internal memory, or if performed remotely, in the central repository. *People v. Crump*, 2018 IL App (3d) 160124, ¶ 25 (citing 20 Ill. Adm. Code 1286.230 (2011)).

¶ 43 When discussing the third *Orth* factor, this court has previously held that to satisfy the foundational requirement that the Breathalyzer machine was tested for accuracy and met the accuracy tolerance described in the regulations, the State is not required to present evidence at trial showing the actual accuracy test results; instead, the State only needs to establish that “the Breathalyzer machine was inspected and certified as accurate within the time prescribed in the regulations and that the machine does not exhibit any malfunction at the time of defendant’s test.” *Smith*, 2015 IL App (1st) 122306, ¶ 35; see also *People v. Caruso*, 201 Ill. App. 3d 930, 941 (1990); *People v. Kilpatrick*, 216 Ill. App. 3d 875, 881 (1991).

¶ 44 Here, the record reveals that the certification and “IntoxNet MIS Report” presented by the State, coupled with Dyker’s testimony explaining that documentation, provided a sufficient foundation for the admission of defendant’s breath test results. The certification and report indicate that “Accuracy Checks and Calibration Checks” were performed on the Breathalyzer machine with serial number 012434 located at the Chicago Police Department 16th District on May 1 and June 1, 2014. The report shows four sample values and a standard value for each of the two test dates. The standard value for the May 1 test is .079, and the standard value for the June 1 test is .080. Both test dates indicate “Test Status Success.”

¶ 45 Dyker identified the documents and explained that they showed that the scheduled certification tests for the machine with serial number 012434 dated May 1, 2014, and June 1, 2014, indicated that the machine was successfully tested on both dates. Dyker testified that the purpose of the tests is “[t]o check for the accuracy of the instrumentation.” He further explained

that the successful test results meant that the machine's internal diagnostic self-testing on May 1 and June 1 indicated that the "machine was without error." Dyker confirmed that these tests were done prior to and after defendant's breath test, which occurred on May 22. Dyker further confirmed that the tests indicated that the Breathalyzer machine was in good working order on both May 1 and June 1. In addition, Dyker testified that the accuracy checks are stored and maintained by the ISP, and that the results of the maintenance tests must be recorded, maintained and stored pursuant to the Illinois Vehicle Code.

¶ 46 The record thus shows that the State properly established that the ISP conducted accuracy checks on the Breathalyzer machine on May 1 and June 1 which both indicated that the machine was accurate. The evidence also showed that defendant's test on May 22 was conducted 21 days after the last accuracy check, well within the required time period of 62 days. Consequently, there was a rebuttable presumption that the Breathalyzer machine was, in fact, accurate. 20 Ill. Adm. Code 1286.200. Nothing in the record rebuts that presumption.

¶ 47 Defendant relies heavily on our holding in *Smith*, 2015 IL App (1st) 122306, ¶ 44, where we concluded that the State failed to establish a proper foundation for the admission of the Breathalyzer test result. But the evidence in *Smith* was much less substantial than here. In *Smith*, the certification from the ISP merely listed numerical results of the accuracy tests without providing any interpretation of those results. *Id.* ¶ 40. The certification did not state whether the Breathalyzer machine had passed the accuracy tests, performed within the accuracy tolerance, or was, in fact, accurate. *Id.* In addition, the police officer who administered the breath test to Smith did not testify to the results of the accuracy tests. *Id.* ¶ 18. He testified that he did not know how the Breathalyzer machine worked, and did not test it for accuracy. *Id.* ¶ 20. Consequently, based

on the evidence presented in *Smith*, we were unable to discern whether the machine was certified as accurate for the test dates. *Id.* ¶ 43.

¶ 48 Unlike *Smith*, here, the certification and report indicated that the accuracy checks were a success. Moreover, Dyker explained the test results and testified that the accuracy checks for both test dates indicated that the “machine was without error.” In other words, the machine was accurate.

¶ 49 The record in this case shows that that foundation for the admission of defendant’s Breathalyzer test results was sufficient. Without error, there obviously can be no plain error. Nor could we find ineffective assistance for failure to object on foundation grounds, given our conclusion that foundation was sufficiently established.

¶ 50 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 51 Affirmed.