**Online Reference: FLWSUPP 2709YGAR**

**Criminal law -- Driving under influence -- Evidence -- Expert -- Field sobriety exercises -- Trial court erred in allowing state to present officer's testimony about defendant's performance of field sobriety exercises as expert scientific testimony, permitting state to question officer at length about his credentials over defense objections and to testify that defendant did not perform field sobriety exercises "to standard" -- Error was not harmless where there was no breath or blood test result, and officer's testimony was principal feature of trial**

YENIER DIAZ GARCIA, Appellant, v. STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 17-305 AC. L.T. Case Nos. AOZ141P, AZAXNKP. October 22, 2019. On Appeal from the County Court for Miami-Dade County, Betty Capote, Judge. Counsel: Shannon Hemmendinger, for Appellant (John Eddy Morrison on brief). Justus Hogge, for Appellee.

(Before BLUMSTEIN, HERSCH, and HIRSCH, JJ.)

(HIRSCH, J.)

I. **Introduction**

In 1886 Karl Benz invented the automobile. *See, e.g.*, https://www.loc.gov/rr/scitech/mysteries/auto.html. In 1897 George Smith, a London taxi driver, became the first person ever arrested for drunk driving after crashing his cab into the side of a building. Smith pleaded guilty and was fined 25 shillings. *See* https://www.history.com/this-day-in-history/first-drunk-driving-arrest.

Apparently there have been drunk drivers almost as long as there have been drivers, and there has been drunk driving almost as long as there has been driving.

In preference to the expression, "drunk driving," the law of Florida employs the term "driving under the influence." The various Florida crimes grouped under that rubric can be found in Ch. 316 of the Florida Statutes. All, or virtually all, include at least two elements: (1) that the defendant was driving or in actual physical control of a vehicle; and (2) that at the time he was under the influence, typically but not necessarily of alcoholic beverages. Proof of the first element is, in the overwhelming majority of cases, a simple matter: one or more police officers will testify to having seen the defendant at the wheel. Proof of the second element can be trickier. Adults are expected to know, and high-school driver's-ed students are taught, that drinking often produces familiar symptoms: bloodshot eyes, slurred speech, a less-than-steady gait, an odor of alcohol on the breath.[1] But the presence of these symptoms is not a guarantee of alcohol intoxication; the absence of these symptoms is not a guarantee of sobriety; and in any event, the law of Florida does not prohibit *all* drinking and driving -- it prohibits driving under the influence of drink.[2] How, then, is the police officer to determine with sufficient reliability to meet the legal standard of probable cause whether the driver with whom he is dealing is in fact under the influence of alcohol?

Another thing that adults have long been expected to know, and that high-school driver's-ed students are taught, is that the influence of alcohol is manifested by a decrease in physical agility, balance, hand-eye coordination, and the like. "[I]ntoxication leads to diminished balance, [and] coordination . . . [according to] common experience and knowledge." *Commonwealth v. Brown,* 989 N.E. 2d 915, 920, 83 Mass. App. Ct. 772, 779 n. 1 (Mass. App. 2013) (quoting *Commonwealth v. Sands,* 675 N.E. 2d 370, 373, 424 Mass. 184, 188 (Mass. 1997)). With that in mind, police officers have traditionally employed a variety of physical drills (sometimes referred to as "field sobriety exercises," or by other like-kind terms) affording a potential arrestee a chance to demonstrate a level of agility, balance, and hand-eye coordination consistent with sobriety rather than with intoxication. For example, a driver suspected of being under the influence may be asked to stand on one foot; or to extend his arms to the side and then touch his nose with the tip, first of the right, and then of the left, index finger; or to walk, heel to toe, in a straight line for a certain number of steps. The performance of these drills may, or may not, afford a police officer a better assessment of the sobriety of the person performing them. Combined with the

other information in the officer's possession -- whether the driver smelled of alcohol, whether the car had been driven erratically all over the road, whether half-consumed beverages were found within the car, whether the driver slurred his speech, and so on -- the results of these drills may be sufficient to provide the officer with probable cause and thus justify a warrantless arrest. *See* Fla. Stat. § 901.15(5) (2018) ("A law enforcement officer may arrest a person without a warrant when . . . [a] violation of chapter 316 has been committed in the presence of the officer").

All well and good; no one suggests that police officers not be permitted to rely, as part of the calculus of probable cause, on the results of physical drills performed by a driver and observed by the officers. A problem arises, however, in determining the extent to which officers can characterize the results of those drills to a trial jury; and the extent to which that jury can rely on those characterizations in determining whether a driver's intoxication has been proved beyond a reasonable doubt. That problem forms the basis of the present appeal.

The physical drills that drivers are commonly asked to perform are not in any sense scientific tests. They are not intended to be. "They are merely observational tools that law enforcement officers commonly use to assist them in discerning various indicia of intoxication, the perception of which is necessarily subjective." *City of West Bend v. Wilkens,* 693 N.W. 2d 324, 325 (Wis. Ct. App. 2005).

> [F]ield sobriety tests are essentially personal observations of the police officer which determine a suspect's balance and ability to speak with recollection. There is nothing "new" or perhaps even "scientific" about the exercises that an officer requests a suspect to perform. . . . It requires no particular scientific skill or training for a police officer, or any other competent person, to ascertain whether someone performing simple tasks is to a degree affected by alcohol.

*Crampton v. State,* 525 A. 2d 1087, 1093-94 (Md. Ct. Spec. App. 1987).

The officer asking the driver to perform these drills does not have any basis for comparison of the results. He does not, for example, know how the driver would have performed the same drills first thing that morning, or just after his breakfast coffee. He does not know if the driver has a medical history or condition that might influence the driver's performance. He does not know if the driver is exhausted from driving all day, or is nervous because of his immigration status, or is a terrified newcomer to our shores from a country in which police routinely and without consequence shoot whomever they please and leave the dead body by the side of the road. A driver's performance on these drills is at best circumstantial evidence of his sobriety or lack thereof. "Circumstantial evidence is proof of certain facts and circumstances" -- here, the driver's performance of drills testing his balance, coordination, and the like -- "from which the trier of fact may infer that the ultimate facts in dispute" -- here, that the driver was under the influence of alcohol -- "existed or did not exist." *Davis v. State,* 90 So. 2d 629, 631 (Fla. 1956). And "[c]ircumstantial evidence is, after all, by its very nature always amenable to more than one interpretation." *Harrell v. State*, 21 Fla. L. Weekly Supp. 748a, * (Fla. 11th Jud. Cir. 2014).

Because of these concerns, courts in virtually all American jurisdictions have attempted to cabin the testimony that officers can offer at trial about a driver's performance on "field sobriety exercises." The consensus of judicial opinion is that "the officer may not use value-added descriptive language to characterize the subject's performance of the [exercises], such as saying that the subject 'failed the test' or 'exhibited' a certain number of 'standardized clues' during the test." *United States v. Horn,* 185 F.Supp. 2d 530, 533 (D. Md. 2002); *see also id.* at 560 (collecting cases).

The use of such "value-added descriptive language" is error. The repeated and emphatic use of such "value-added descriptive language," if objected to, is reversible error.

II. **Facts**

Yenier Diaz Garcia was tried to a jury in county court and convicted of driving under the influence, a first-degree misdemeanor. Fla. Stat. § 316.193 (2018). The principal witness against Mr. Diaz Garcia -- the only witness whose testimony was of consequence -- was Officer Dale Vargas of the Miami-Dade Police Department. Tr. 746.

No sooner had Officer Vargas given his name and employment than the prosecutor began to elicit from Vargas the details of what can only be described as expert credentials. The jurors learned that Officer Vargas has been assigned to the "DUI task force" for six years, has had "advanced training[,] advance[d] roadsides," attended a "drinking lab," went to a "pre-DRE course called ARIDE" and then became "a drug recognition expert." Tr. 747.

And that was just the first page of the transcript of his testimony.

The jurors heard that Vargas "became a DUI instructor," one who "teach[es] in the [police] academy." He participated in "studies" at the drinking lab, where he also trains other officers. Tr. 748.

And that was just the second page of the transcript of his testimony.

The jurors learned that in becoming a "drug recognition expert" Officer Vargas had learned about "depressants, inhalants, stimulants, different types of drugs and what it does to a person's body." They were expressly told, in case they were unable to so conclude by themselves, that "it's a lot of training." And then they learned that Vargas was a DUI instructor, which involved yet "more hours of training," including training in the highly technical field of "advanced stuff" and of course "another drinking lab." Tr. 749.

And that was just the third page of the transcript of his testimony.

The jurors heard that Officer Vargas has had seemingly unending continuing education in his years as a police officer. This was done, among other reasons, "to keep up with our certification," and also because "[w]e have to stay certified" and besides that, because "we have to stay certified every amount of years." The jurors heard that Officer Vargas has undertaken eight or nine hundred DUI investigations in the course of his career. Tr. 750-51.

And that was just the fourth and fifth pages of the transcript of his testimony.

Five pages of credentials. Many a psychiatrist or medical examiner has been qualified to offer expert testimony in a fraction of the time and space. Given this lavish assertion of expertise (all of which was objected to repeatedly by counsel for Mr. Diaz Garcia), we are obliged to consider on appeal whether Officer Vargas was entitled to offer expert opinion testimony, Fla. Stat. § 90.702 (2018), and if so, as to what; or lay opinion testimony, Fla. Stat. § 90.701 (2018), and if so as to what; or no opinion testimony at all.

Certainly the officer's testimony was couched in the language of expert opinion. As to each of the four drills -- the four "roadside sobriety exercises" -- Vargas testified that Diaz Garcia "did not perform to standard." Tr. 769 (the first exercise); 770 (the second exercise); 771 (the third and fourth exercises). *See also* Tr. 797 ("Stuff that he did wrong, that he did not perform to standard"). Defense counsel's objections to this testimony were overruled.

III. **Analysis**

Wigmore dates the beginnings of "the principle of testimonial knowledge ...*i.e.*, [the principle] that the witness must speak as a knower, not merely a guesser" to the close of the 18th century. 3 Wigmore § 1917. With respect to lay witnesses -- witnesses who were called upon to testify to what they saw, heard, and did -- this was enforced within the limits of common sense and practicality. "[W]hen an ordinary or lay witness took the stand, equipped with a personal acquaintance with the affair and therefore competent in his sources of knowledge, the circumstance that incidentally he drew inferences from his observed data and expressed conclusions upon them did not present itself as in any way improper." 3 Wigmore § 1917. This is still the law.

> The general rule, of course, is that a lay witness may testify only to facts and not to opinions or conclusions. But lay witnesses are frequently permitted to use so-called "short hand" descriptions, in reality opinions, in presenting to the court their impressions of the general physical condition of a person. . . . This seems to us to be a common sense view . . . .It leaves the witness free to speak his

> ordinary language, unbewildered by admonitions from the judge to testify to facts, when all the while the witness is sure in his own mind that he is testifying to facts.

*State v. Garver,* 225 P. 2d 771, 782 (Or. 1950) (internal citations omitted). Distance, time, size, weight, form, identity, the speed of a car, that a person seemed drunk, are all common examples of things as to which a lay witness may, in appropriate circumstances, express his opinion. 1 Ehrhardt, *Florida Evidence* (2019) § 701.1 at 818-19; *Chesser v. State,* 30 So. 3d 625, 627 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D589b]. "[L]ay witnesses have been permitted . . . to give opinion testimony of [alcohol] impairment based on their observations." *State v. Meador*, 674 So. 2d 826, 831 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1152a] (Pariente, J.) (citing *Cannon v. State*, 107 So. 360, 362 (Fla. 1926); *City of Orlando v. Newell*, 232 So. 2d 413 (Fla. 4th DCA 1970)).

By contrast, when a witness seeks to offer his opinion, not in his capacity as an observer but in his capacity as an expert, "two principles have to be applied. We first ask . . ., Is it a matter as to which the witness as such needs a special experience above the ordinary, and if so, has he this? When this question has been settled . . .we ask . . ., Does the jury need any inference from this witness, either because of his skill or because his observed data cannot be adequately reproduced by him?" 3 Wigmore § 1925.

With respect to "field sobriety exercises," American courts speak with one voice. "The testimony of a police officer about the results of ordinary field sobriety tests. . . is lay witness testimony, not expert witness testimony." *Commonwealth v. Brown*, 989 N.E. 2d 915, 920, 83 Mass. App. Ct. at 776 n. 1. "Because the evidence procured by administration of [field sobriety exercises] is within the common experience of the ordinary citizen, the majority of courts that have addressed the issue generally consider [those exercises] to be nonscientific evidence." *State v. Ferrer*, 23 P. 3d 744, 760-61 (Haw. Ct. App. 2001) (collecting cases). *See also Meador*, 674 So. 2d at 831 (citing *Commonwealth v. Ragan*, 652 A. 2d 925, *appeal denied*, 664 A. 2d 540 (Pa. 1995); *People v. Sides*, 556 N.E. 2d 778, 779-80 (Ill. 1990)).

*Meador* is perhaps the most frequently cited Florida case in this area. In *Meador* the court held:

> A defendant's ability to perform these simple psychomotor tasks is within a juror's common experiences and understanding. There are objective components of the field sobriety exercises, which are commonly understood and easily determined, such as whether a foot is on a line or not. Jurors do not require any special expertise to interpret performance of these tasks. Thus, evidence of the police officer's observations of the results of defendant's performing the walk-and-turn test, the one-legged stand, the balance test and the finger-to-nose test should be treated no differently than testimony of lay witnesses (officers, in this case) concerning their observations about the driver's conduct and appearance.

*Meador,* 674 So. 2d at 831.

But Officer Vargas did not testify as a lay witness. His testimony was festooned with the ornaments of science and scientific expertise. An "officer may not bolster [his] lay opinion testimony by reference to any scientific, technical, or specialized information . . . but must confine his or her testimony to helpful firsthand observations of the defendant." *Horn*, 185 F.Supp. 2d at 533-34. *See also Meador*, 674 So. 2d at 833 ("References to the [field sobriety] exercises by using terms such as 'test,' 'pass,' 'fail,' or 'points,' . . . creates a potential for enhancing the significance of the observations in relationship to the ultimate determination of impairment, as such terms give these layperson observations an aura of scientific validity"). Such bolstering is just what the prosecution and Officer Vargas placed before the jury. The jury was treated to five pages of testimony about Vargas's scientific expertise. Having thus been led to the ineluctable conclusion that the witness from whom they were hearing was an expert, and an expert of the highest order, the jury was then told by this august authority that Mr. Diaz Garcia did not "perform to standard." The clear implication was that the significance of the drills Mr. Diaz Garcia was made to perform was not readily apparent to the jurors, but could be interpreted only by Officer Vargas; and that Vargas's interpretation was that Diaz Garcia had flunked as surely as if he had multiplied three times two and come up with 32. The law emphatically disallows such an implication. The defense emphatically objected to such an implication. But such an implication was permitted to be conveyed to the jury.

Fla. Stat. § 90.702 (2018), captioned, "Testimony by experts," provides that if "scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert . . . may testify about it in the form of an opinion." But such testimony is admissible if and only if it is "based upon sufficient facts or data," Fla. Stat. § 90.702(1) (2018); and "is the product of reliable principles and methods," Fla. Stat. § 702(2) (2018). The testimony of Officer Vargas was presented to the jury as expert testimony, *viz.,* as "scientific, technical, . . . specialized knowledge." In truth it was nothing of the kind, as *Meador*, *supra*, and the case authority from around the country cited *supra* makes clear. The testimony of Officer Vargas was presented to the jury as being "based upon sufficient facts or data." In truth it was based upon nothing of the kind, as *Meador*, *supra*, and the case authority from around the country cited *supra* makes clear. The testimony of Officer Vargas was presented to the jury as "the product of reliable principles and methods." In truth it was nothing of the kind, as *Meador*, *supra,* and the case authority from around the country cited *supra* makes clear. The testimony of Officer Vargas, as it was received at the trial below, was clear error. *See Ferrer*, 23 P. 3d at 762 ("the [trial] court should not have allowed [the police o]fficer...to testify that Defendant had 'failed' the F[ield] S[obriety] T[ests]").

> Normally, scientific evidence involves highly technical or specialized information beyond the ken of the average person's general knowledge. Courts admit expert testimony in order to help the finder of fact understand and apply this information. Ordinary individuals are readily familiar with the manifestations of alcohol consumption, both physical and mental. They do not need to hear expert testimony about how to discern drunkenness . . . any more than they require an explanation of the theory of gravity in a suit where a plaintiff claims to have been injured by a fallen object.

*City of West Bend v. Wilkens,* 693 N.W. 2d at 329.

Because this matter must be remanded to the county court for retrial, we consider whether Officer Vargas's testimony, if presented differently, might have been admissible under Fla. Stat. § 90.701 (2018), captioned, "Opinion testimony of lay witnesses." Pursuant to that statutory provision, a lay witness may testify "in the form of inference and opinion" if "the witness cannot readily...communicate what he...has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact." As noted *supra* at 8, lay witnesses are routinely permitted to testify that someone else did or did not seem drunk at a given time, if it can be established that the testifying witness sufficiently perceived the other person's physical attributes -- his gait, stance, speech, scent, *etc.* -- at the relevant time. Traditionally, a police officer, neither more nor less than any other onlooker, has been permitted to testify that someone with whom he came in close contact was or wasn't drunk.

But a lay witness's conclusions

> are inadmissible when the jury can be put into a position of equal vantage for drawing them -- in other words, when by the mere words and gestures of the witness the data he has observed can be so reproduced that the jurors have those data as fully and exactly as the witness had them at the time he formed his opinions.

3 Wigmore § 1924. Wigmore coined the phrase "autoptic proference" to refer to those things that the jury could view for itself and determine for itself. 1 Wigmore § 24; 2 Wigmore § 1150. If, for example, a crime victim testifies that his assailant had certain tattoos on his arms, the jury can determine by autoptic proference -- by the judge ordering the defendant to roll up his sleeves -- whether this defendant is that assailant.

Drunk-driving investigations, like so much of police work, have been profoundly altered by the advent of body cameras. Police officers nowadays routinely wear such cameras, and Officer Vargas at all times material to this case wore such a camera. The jury below saw the audiovisual recording made by the camera. We have reviewed that audiovisual recording on appeal. In effect, then, the jury saw and heard all that Officer Vargas saw and heard.[3] We have seen and heard all that Officer Vargas saw and heard. Thus the jury was, in Wigmore's words, "put into a position of equal vantage [with the witness] for drawing [conclusions]" because "the jurors have th[e relevant] data as fully and exactly as the witness had them at the time he formed his" conclusions. According to Wigmore, there is no need or reason for a witness in these circumstances to express any opinion at all. The jury,

having perceived all that the witness perceived, will draw its own conclusions.[4] At one point the experienced trial judge below actually made the same observation. "Okay. But, here is my point, if we can just watch it [*i.e.,* the audiovisual recording], it -- if he did it right then [*i.e.,* if Mr. Diaz Garcia performed the field sobriety exercises correctly], it's not an issue; you see what I'm saying?" Tr. 120.

In light of the advent of body-worn cameras, and the availability of plenary audiovisual evidence from such a camera in this case, the question whether Officer Vargas should have been permitted to offer lay-opinion testimony (*e.g.,* "He seemed drunk to me") or no opinion testimony at all (*e.g.,* "I told him to do this exercise and here's the video of how he performed") is not as readily answered as once it was. It is a question that wiser judges on higher courts will no doubt be called upon to answer in the not-distant future. Traditionally, police officers, like other lay witnesses, were properly permitted to express the opinion that, based on a driver's performance of the walk-and-turn test, or the finger-to-nose test, the driver seemed drunk. But in the era of body-worn cameras, when the jurors can be shown the driver's performance of the walk-and-turn test, or the finger-to-nose test, and draw their own conclusions from it, is it appropriate for the officer to express any opinion at all? We can offer the trial judge in this case no more guidance than to say that at this moment in our jurisprudential history it is not error to permit an officer to express such an opinion. But Dean Wigmore certainly made clear his position to the contrary, and Florida's appellate courts may well conclude that he has the better of the argument.

That, however, is matter for another day. In the case at bar, Officer Vargas was permitted to offer what was surely received, and intended to be received, as expert-opinion testimony; and this was error. On this appeal the prosecution argues that the error was harmless. We cannot agree.

The Florida Supreme Court has made clear that

> [t]he harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

*State v. DiGuilio,* 481 So. 2d 1129, 1134 (Fla. 1986) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Here, the defense, anticipating the mischaracterization of proof that Officer Vargas's testimony could involve, moved *in limine*, citing *Meador*, that the officer confine himself to lay testimony that sounded like lay testimony. Thus the prosecution was on notice that any attempt to pretend that Officer Vargas could determine, any better than the jury could determine for itself, whether Mr. Diaz Garcia's performance of the "roadside sobriety exercises" was or was not indicative of alcohol intoxication, was unsupportable and inadmissible. Nothing deterred, the prosecution larded the trial record with window-dressing intended to make Officer Vargas look like an expert; and then elicited from the officer testimony conveying clearly the message that Vargas, but not the jury, could determine and had determined that Diaz Garcia had failed tests as objectively assessable as the multiplication tables. The defense objected again and again, to no effect.

There was no breath test or blood test here. The closest thing to objective, non-circumstantial evidence of Mr. Diaz Garcia's impairment was the so-called "horizontal gaze nystagmus" (or "HGN") test -- although of course as to the results of that test, the jury was obliged to rely upon Officer Vargas's testimony.

"Nystagmus" refers to an involuntary twitching movement of the eyes, sometimes colloquially referred to as "dancing eyes." *See* https://en.wikipedia.org/wiki/Nystagmus. There is some support for the notion that inebriation produces or exaggerates the symptoms of nystagmus. *Id*. *See Meador*, 674 So, 2d at 833 *et. seq*. Evidence of HGN has been held admissible in a DUI trial if a sufficient foundation is laid. *See, e.g., Robinson v. State,* 982 So. 2d 1260 (Fla. 1st DCA 2008) [33 Fla. L. Weekly D1430a]; *Castillo v. State*, 955 So. 2d 1252 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D1294a]. *But see Williams v. State*, 701 So. 2d 24, 36 n. 22 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D752a] (quoting *State v. Superior Court In and For Cochise County*, 718 P. 2d 171, 181 (Ariz. 1986)).[5] At the trial below, it appears -- the record is perhaps not as clear as it might be on this point[6] -- that Officer Vargas testified that he administered the HGN test to Mr. Diaz Garcia and that Diaz Garcia "did

not perform to standard." Tr. 768-69. When the video was later played, Tr. 784-86, the jury was able to see Vargas's administration of the HGN test, and Diaz Garcia's attempts to comply; but whether Mr. Diaz Garcia's pupils twitched to a degree or in a manner inconsistent with their normal state is something the jurors could not observe or know. Officer Vargas's body camera was not close enough to Mr. Diaz Garcia's face and any twitching in Diaz Garcia's eyes would have been too slight to be captured on the video feed. Thus, even if HGN testing has a scientific or objective component that the other field sobriety exercises lack, the jurors were in the same position as to the results of the former as they were as to the results of the latter: they were obliged to rely on what Officer Vargas told them.

Officer Vargas's testimony was the principal feature of the trial. True, the jury was permitted to view the videotape of Vargas's body camera. But that video was played only *after* the officer had been permitted to testify in detail and at length to his so-called expertise, and his so-called expert conclusions. In the circumstances, it is simply impossible for us to say "beyond a reasonable doubt that the error" -- the spurious presentation of Officer Vargas as an "expert" and the receipt of his "expert" conclusions -- "did not contribute to the verdict." *DiGuilio*, 481 So. 2d at 1134. We are persuaded of the contrary: that nothing contributed so greatly to the verdict.

The order of judgment and sentence below is reversed, and the matter remanded to the trial court. (BLUMSTEIN and HERSCH, JJ., concur.)

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**[1]**There is venerable support for the proposition that "drink . . . is a great provoker of three things." William Shakespeare, MacBeth, Act II sc. 3. The three demised things that the Bard had in mind were not bloodshot eyes, the odor of alcohol, and slurred speech, but "nose-painting," -- *i.e.,* a flushed face -- "sleep, and urine. Lechery . . . it provokes, and unprovokes; it provokes the desire, but it takes away the performance." *Id.* Apparently the symptoms of alcohol intoxication are something about which reasonable observers may differ.

**[2]**The influence of an intoxicant renders driving unlawful only if the driver is "affected to the extent that the [driver's] normal faculties are impaired." Fla. Stat. § 316.193(1)(a) (2018). "Such normal faculties include, but are not limited to, the ability to see, hear, walk, talk, judge distances, drive an automobile, make judgments, act in emergencies, and, in general normally perform the many mental and physical acts of daily life." Fla. Stat. § 316.1934(1) (2018).

**[3]**With one exception: Officer Vargas performed the so-called "HGN" test on Mr. Diaz Garcia. The video introduced at trial shows the officer's efforts to administer that test, and Mr. Diaz Garcia's efforts to perform it. But Officer Vargas's actual observations of Mr. Diaz Garcia's eyes during the test cannot be derived from the video. *See* discussion *infra* at 16-17.

**[4]**And all things being equal, our system of justice prefers that the jury draw its own conclusions rather than having an expert draw those conclusions for the jury. This has been explained many times, but never more poignantly than by G. K Chesterton in his famous essay, The Twelve Men:

> [T]he more a man looks at a thing, the less he can see it, and the more a man learns a thing the less he knows it. The Fabian argument of the expert, that the man who is trained should be the man who is trusted, would be absolutely unanswerable if it were really true that a man who studied a thing and practiced it every day went on seeing more and more of its significance. But he does not. He goes on seeing less and less of its significance. In the same way, alas! we all go on every day, unless we are continually goading ourselves into gratitude and humility, seeing less and less of the significance of the sky or the stones.
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> Now, it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things; he can even grow accustomed to the sun. And the horrible thing about all legal officials, even the best, about all judges, magistrates,

> barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.
>
> Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. Therefore, the instinct of Christian civilisation has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. Men shall come in who can see the court and the crowd, and coarse faces of the policemen and the professional criminals, the wasted faces of the wastrels, the unreal faces of the gesticulating counsel, and see it all as one sees a new picture or a ballet hitherto unvisited.
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> Our civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity.

**5**The quoted passage from *State v. Superior Court In and For Cochise County* -- which opinion the Third District has referred to as "the seminal case in HGN admissibility," *Faires v. State*, 711 So. 2d 597, 598 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D1073b] (Sorondo, J.) -- provides as follows:

> The arresting officer's "reading" of the HGN test cannot be verified or duplicated by an independent party. . . . The test's recognized margin of error provides problems as to criminal convictions which require proof of guilt beyond a reasonable doubt. The circumstances under which the test is administered at roadside may affect the reliability of the test results. Nystagmus may be caused by conditions other than alcohol intoxication . . . .

**6**Officer Vargas testifies only that he administered "the first exercise." He does not identify that exercise as HGN. But he subsequently describes the second exercise as "[t]he Romberg balance," Tr. 770 -- a grandiose way of saying that Mr. Diaz Garcia was asked to stand on one foot. Vargas describes the third test as "the walk and turn," Tr. 771; and the fourth and last test as "the finger to nose," *id.* Thus by process of elimination it appears that "the first exercise" was the HGN.

* * *