UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0443

September Term, 2014

JAMES MITCHELL

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Woodward, J.

Filed: September 3, 2015

Appellant, David Mitchell, was convicted by a jury in the Circuit Court for Harford County of driving while impaired and failure to control vehicle speed as necessary to avoid a collision. Appellant presents four questions for our review, which we rephrase for clarity:[1]

> I. Did the trial court abuse its discretion in determining that a police officer was qualified as an expert in the field of horizontal gaze nystagmus and allowing the officer to testify regarding a horizontal gaze nystagmus test that he conducted upon appellant?
>
> II. Did the trial court err in denying appellant's motion to suppress his statements to police?
>
> III. Did the trial court abuse its discretion in giving the jury an instruction on flight?

[1]Appellant's questions presented *verbatim* are:

> 1. Did the trial court err in allowing Officer Evans to provide expert testimony on the horizontal gaze and nystagmus test when he failed to demonstrate that he was duly qualified to administer the test and that proper procedures had been followed?
>
> 2. Did the motions court err in denying Mr. Mitchell's Motion to Suppress his statements to police when Mr. Mitchell was detained and questioned without being advised of his *Miranda* rights?
>
> 3. Did the trial court err in denying defense counsel's request to strike the jury instruction on flight when Mr. Mitchell made no attempt to flee from police and was cooperative throughout the encounter?
>
> 4. Did the trial court err in denying defense counsel's Motion for Judgment of Acquittal on the charge for [sic] failure to control vehicle speed when the State produced no evidence from which the jury could infer that speeding contributed to the accident?

IV. Was the evidence sufficient to sustain the conviction for failure to control vehicle speed as necessary to avoid a collision?

Finding no error or abuse of discretion, we affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

At trial, the State called Susan Johnson, a cab driver for a company known as ABC Taxi. Johnson testified that, on February 9, 2013, she was going down Route 22 towards Post Road when she saw headlights on the left side of the road and tire tracks going through the grass median. Johnson then drove down Post Road and saw a car in a ditch and a gentleman standing in front of the car. Johnson "got out of her car and asked the man if he was okay." The man replied: "Yes." When Johnson asked if there was anybody else in the car, the man replied: "No." While Johnson was calling the police, the man walked up the hill, leaned against the back of Johnson's cab, and asked if he could use Johnson's phone. When Johnson replied that she was actually on the phone with the police, the man started to walk down the road. Johnson got back in her car and followed the man. When Johnson saw the police, she pulled over on the side of the road and spoke to an officer that pulled up next to her.

The State next called Aberdeen Police Officer James Easton, who testified that on February 9, 2013, he responded to a call in reference to a vehicle in the ditch at the intersection of Route 22 and Post Road. After speaking with Johnson and Aberdeen Police Officer James Evans, Officer Easton went down the road and made contact with appellant.

While engaging appellant in normal conversation, the officer "smell[ed] a mild odor of an alcoholic beverage." On cross-examination, Officer Easton stated that appellant walked in what appeared to be a normal manner. The officer also agreed that it had sort of lightly snowed that evening, and that the snow made the road slippery.

Finally, the State called Officer Evans, who testified that on February 9, 2013, he responded to a motor vehicle accident in the area of Route 22 and Post Road. After speaking with Johnson, the officer went back and met with appellant and Officer Easton. Officer Evans asked appellant: "Are you okay? What happened?" Appellant "said that he wasn't sure what happened and he was fine," but when he spoke to Officer Evans, the officer "could smell the odor of alcoholic beverage coming off his breath." Officer Evans asked appellant whether he fell asleep, and appellant replied that he did not remember and just lost control. When the officer asked appellant if he had anything to drink, appellant replied that he had one shot. When Officer Evans asked appellant if he was driving, appellant replied: "[Y]es."

Based on Officer Evans's observations and the fact that the vehicle was involved in a collision, the officer initiated an investigation for driving under the influence of alcohol. Officer Evans first initiated a horizontal gaze nystagmus test. The officer explained:

> Nystagmus is the involuntary jerking of your eye. Again, it can be caused by medical problems or medications, and what it is, the best way to describe it is your eye will pulsate, usually side to side, but occasionally it can go up and down.

> What we as police officers look for is for that eyeball to jerk as it's moving fluently. I have had to describe this before. The best way to describe it is if you take a smooth glass table and a glass marble and you roll it across the glass table, it should go nice and smooth. Nystagmus would be if you throw some sand on the table and do the same thing, the marble ball will obviously not roll as smooth.
>
> So the first test we look for is what's called the lack of smooth pursuit, which is you take a stimulant, which is, in my case, I use a ballpoint pen, and you have the person follow the pen with just their eyes, not moving their head. So their head stays straight, and their eyes have to track the pen or the stimulant. A normal person without any medical problems, it will be very smooth. Like I said, like a marble on glass. But someone who is either intoxicated or has a medical problem, it will jerk. So the first thing I looked for was the lack of smooth pursuit.

During the test, Officer Evans observed a "lack of smooth pursuit," and "[a]s [appellant] tracked the pen past his viewpoint, his eyes were jerking as he was tracking it." Officer Evans then tested appellant for "the onset of nystagmus prior to 45 degrees," during which the officer moved the pen "side to side, but . . . actually slow[ed] the [pen] down." Appellant's eyes again did not track evenly. Finally, Officer Evans tested appellant for "distinct nystagmus at maximum deviation," during which the officer held the pen "as far out as [he could] possibly get it with [appellant's] eye seeing it in [his] peripheral." Appellant's eyes again did not track evenly.

Officer Evans next conducted a "walk and turn" test, which measures whether a person is "swaying[,] off balance, or . . . using their arms for balance." The officer instructed appellant "to stand with his left foot down with his right foot directly in front of

it so his [heel was] touching his toe." Officer Evans observed that appellant had a hard time maintaining that position, and "was swaying and off balance as [the officer] was explaining the test to him." Officer Evans then instructed appellant to "take nine [heel] to toe steps," then "walk back the exact same way." During the test, appellant "swayed when he walked," "used his arms for balance," and "never touched heel to toe." Also, appellant did not complete the nine steps back and stopped the test.

Finally, Officer Evans conducted a "one leg stand" test. The officer instructed appellant to "lift [his] foot off the ground[,] keep [his] hands down by [his] side," and "count[] seconds." During the test, Officer Evans observed that appellant was "[s]waying, off balance, [and] using his arms for support." While a normal person should be able to hold that position for 30 seconds, the officer explained, appellant counted to nine very quickly and then stopped the test.

Following the test, Officer Evans concluded that appellant was intoxicated. The officer placed appellant under arrest and transported him back to the police station. At the station, Officer Evans asked appellant if he wanted to take the breath test to determine the level of alcohol in his system. The officer explained to appellant that, if he refused to submit to the test, his driver's license would be confiscated, he would be issued an Order of Suspension, and he could face an additional criminal penalty if he was convicted of a drunk driving offense and the jury found beyond a reasonable doubt that he knowingly refused to take the test. Appellant refused to take the test.

During cross-examination of Officer Evans, the following colloquy occurred:

[DEFENSE COUNSEL]: First things first. At all times on that evening . . . , my client was polite with you; was he not?

[OFFICER EVANS]: Yes.

[DEFENSE COUNSEL]: And he was not obstreperous? By that I mean he was not aggressive in any way, shape or form?

[OFFICER EVANS]: Not at all.

* * *

[DEFENSE COUNSEL]: And it was a rollover collision?

[OFFICER EVANS]: Yes.

[DEFENSE COUNSEL]: No question about that?

[OFFICER EVANS]: The car definitely flipped, yes.

* * *

[DEFENSE COUNSEL]: Forty-five degrees is an important angulation?

[OFFICER EVANS]: It is, yes.

[DEFENSE COUNSEL]: If it's 50 degrees or 35 degrees, that's important; is it not?

[OFFICER EVANS]: Yes.

[DEFENSE COUNSEL]: Because that changes the whole test? You learned that?

[OFFICER EVANS]:	Yes.
[DEFENSE COUNSEL]:	And you learned that part of the process in order to establish the clues that you establish deal with the 45-degree angulation?
[OFFICER EVANS]:	That's correct.
[DEFENSE COUNSEL]:	And in this case, this particular case, you did not use [a] template?
[OFFICER EVANS]:	I've never used a template, no.
[DEFENSE COUNSEL]:	Never do?
[OFFICER EVANS]:	No.
[DEFENSE COUNSEL]:	So when you say 45 degrees, like your opinion regarding strong odor of alcohol, it's subjective?
[OFFICER EVANS]:	Correct.

DISCUSSION

I.

During the prosecutor's direct examination of Officer Evans, the following colloquy occurred:

[PROSECUTOR]:	Okay. In your police academy training before you hit the road, were you also trained in standardized field sobriety tests?

[OFFICER EVANS]:	Yes.
[PROSECUTOR]:	Were you trained in driving while intoxicated investigations?
[OFFICER EVANS]:	Yes.
[PROSECUTOR]:	How long – we will talk about each one. How did your training go for investigating drinking driving cases? How long did that training take?
[OFFICER EVANS]:	In the police academy, it's roughly a week long; however, in that time, I have had extensive recertifications and different types of training.
[PROSECUTOR]:	When you say one week, how many hours is that?
[OFFICER EVANS]:	Eight hours a day.
[PROSECUTOR]:	Is that five days or a whole seven?
[OFFICER EVANS]:	Five.
[PROSECUTOR]:	So 40 hours of training at the police academy, and that's on specifically DUI investigations?
[OFFICER EVANS]:	Yes.
[PROSECUTOR]:	Did the field sobriety tests come with the DUI training, or are they separate things?

[OFFICER EVANS]: Most police officers in the State of Maryland, at least back then –

* * *

– were trained in very basic indicators and tests to look for. There is a separate training that's a little more in depth that is actually a nationally certified standard field sobriety test, which is through NHTSA, which is the National Highway Transportation Safety Administration. They administer and instruct that course.

[PROSECUTOR]: And that is separate and apart from your week's training at the academy?

[OFFICER EVANS]: That's correct.

[PROSECUTOR]: Does it occur during the active time frame or is it after?

[OFFICER EVANS]: In my case, it was after.

* * *

[PROSECUTOR]: Let's fast forward to the national certification. When did you take that the first time you took that test?

[OFFICER EVANS]: That was probably in 2002.

* * *

[PROSECUTOR]: How long was this course in 2002?

[OFFICER EVANS]: I don't recall, but I am assuming it was a 40-hour class. Most training of that nature usually is.

[PROSECUTOR]: During this training, what type of things do they cover with you?

[OFFICER EVANS]: A lot of refresher on what you have already learned, but you go a little bit more in depth with different types of testing. Most importantly is the horizontal gaze and nystagmus testing, which is something I did not have prior to that. The ability to use that tool – that test I should say.

* * *

[PROSECUTOR]: Now, during this training, I assume there's a classroom component?

[OFFICER EVANS]: Yes.

[PROSECUTOR]: And also a live exercise component?

[OFFICER EVANS]: Yes.

[PROSECUTOR]: So with the live exercise, do you have actual intoxicated people you perform the test on?

[OFFICER EVANS]: That's correct.

[PROSECUTOR]: How often do you do that during the course?

[OFFICER EVANS]: It was – the first – probably the first two days of the class were very clinical classroom type setting. By the third day, they actually have volunteers. Most of the time it's other police officers, dispatchers, who come in and drink, and it's called a workshop. They basically are monitored. It's kept track of how much alcohol they are drinking, and we as students go and test them at different stages throughout their course of impairment, I guess you would say.

[PROSECUTOR]: When you do these tests, do you have a certified instructor observing it?

[OFFICER EVANS]: Yes.

[PROSECUTOR]: And you do it through different phases of impairment?

[OFFICER EVANS]: Yes.

[PROSECUTOR]: Are you given your results?

[OFFICER EVANS]: Yes.

[PROSECUTOR]: And when you have instructors observing you, is there a point where you have to be proficient enough before they will let you pass to the next phase?

[OFFICER EVANS]: Yes, that's correct.

* * *

[PROSECUTOR]: Since we are here today, I will ask you: Did you complete this course?

[OFFICER EVANS]: Yes, I did.

[PROSECUTOR]: Were you certified after this course?

[OFFICER EVANS]: Yes, I was.

[PROSECUTOR]: Did you have to sit down for any kind of exam afterwards, or anything like that?

[OFFICER EVANS]: There was a written test, but I believe that covers the Maryland Police Training Commission aspects of the training. We have to have a certain amount of training hours every year, and I believe it was their test. I'm not sure if it was the national test or not.

[PROSECUTOR]: But the workshops are evaluated, and you are tested there?

* * *

[OFFICER EVANS]: Yes.

[PROSECUTOR]:	So you said, you mentioned that you had been recertified several times?
[OFFICER EVANS]:	Yes.
[PROSECUTOR]:	Okay. Since 2002, how many time[s] have you been recertified?
[OFFICER EVANS]:	I don't recall. I know off the top of my head at least two different classes I've had to take that were required of me through my department.
[PROSECUTOR]:	And these are refresher classes. Are they also a week long?
[OFFICER EVANS]:	No. Not usually, no.
[PROSECUTOR]:	From 2002, once you get certified, what do you do next?
[OFFICER EVANS]:	Once the national standard is met, from what I understand, the police officers do not have to – it's not something like a driver's license where you have to get it renewed, it's just something that you have. Again, most police departments, to keep their officers proficient, they go through refresher courses.
[PROSECUTOR]:	And you have done that?
[OFFICER EVANS]:	Yes.

[PROSECUTOR]: Okay. And following being certified, did you employ these tools that you learned as an officer on the road in real life situations?

[OFFICER EVANS]: Yes, I did.

[PROSECUTOR]: How many times, give me a ballpark, 2002 to present, have you utilized these field sobriety tests in your investigations?

* * *

[OFFICER EVANS]: Well over a hundred.

[PROSECUTOR]: Among the times – and you utilized them in DUI investigations?

[OFFICER EVANS]: Yes.

The prosecutor then offered Officer Evans as an expert specifically in the area of the horizontal gaze nystagmus evaluation portion. During voir dire examination, the following colloquy occurred:

[DEFENSE COUNSEL]: Officer, do you have your certification with you?

[OFFICER EVANS]: I do not.

* * *

[DEFENSE COUNSEL]: Now, let me ask you a couple questions as it relates to these interview techniques.

[OFFICER EVANS]: Okay.

[DEFENSE COUNSEL]: First of all, you learned that the National Traffic Highway Safety Administration tells you when you do these tests that the effectiveness of the test is somewhere between 65 percent and 77 percent; isn't that right?

[OFFICER EVANS]: I'm not sure of the percentages.

* * *

[DEFENSE COUNSEL]: And there is nystagmus that is caused as a result of having a disease, a vestibular disease. That can cause nystagmus. You learned that?

[OFFICER EVANS]: I don't recall, but it could, yes.

[DEFENSE COUNSEL]: Right. And you learned, did you not, that one of the causes of nystagmus is something called optokinetic nystagmus. You learned that; did you not?

[OFFICER EVANS]: I'm not sure what that is.

* * *

[DEFENSE COUNSEL]: Okay. You learned that, for example, flashing light in the eye, like a takedown light or a bar light, can cause nystagmus. You learned that, didn't you?

[OFFICER EVANS]: I don't recall.

* * *

[DEFENSE COUNSEL]: I am just asking you about something that is called "acquired nystagmus." You learned that term; did you not?

[OFFICER EVANS]: I may have; I don't recall.

Following voir dire examination, the parties approached the bench, and defense counsel stated: "Based upon this witness's profound failure to remember what I think are very important hallmarks of his education and experience, I don't think he can give this jury an opinion regarding nystagmus and correlate it with the use of alcohol. So I am moving in limine to suppress it." The court found "that Officer Evans is an expert in the area of rendering an opinion regarding the horizontal gaze and nystagmus," and informed the jury that the officer was accepted as an expert in that area. The court did not expressly deny the motion in limine, but allowed Officer Evans to testify regarding the horizontal gaze nystagmus test that he conducted upon appellant.

Appellant contends that the trial court erred in accepting Officer Evans as an expert in the area of the horizontal gaze nystagmus test and denying defense counsel's motion in limine to suppress the testimony regarding the test, because the officer failed to demonstrate that he was duly qualified to administer the test and that proper procedures had been followed. Appellant claims that Officer Evans failed to demonstrate that he was duly

qualified to administer the test because he could not recall many aspects of his training. Appellant further claims that Officer Evans failed to demonstrate that he conducted the test properly on appellant because he did not check appellant's eyes for other possible causes of nystagmus, and did not utilize the required 45-degree angle when testing for the onset of nystagmus prior to 45 degrees.

The State counters that appellant's claim that proper procedures were not followed is not preserved, and the trial court properly exercised its discretion in admitting the evidence. Alternatively, the State contends that any error in admitting the evidence was harmless beyond a reasonable doubt in light of the other evidence of intoxication.

We first conclude that appellant's contention that the court erred because Officer Evans failed to demonstrate that proper procedures had been followed is not preserved for our review. The Court of Appeals has stated that, "where specific grounds are delineated for an objection, the one objecting will be held to those grounds and will ordinarily be deemed to have waived grounds not specified." *Jackson v. State*, 288 Md. 191, 196 (1980). Also, we have stated that, "to preserve an objection, a party must either 'object each time a question concerning the [matter is] posed or . . . request a continuing objection to the entire line of questioning,'" and this "requirement . . . applies even when the party contesting the evidence has made his or her objection known in a motion in limine[.]" *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (citation omitted), *cert. denied*, 424 Md. 293 (2012). Here, defense counsel did not delineate the specific ground that Officer Evans failed to

demonstrate that he conducted the test properly, did not object to each of the prosecutor's questions regarding the test, and did not request a continuing objection to the entire line of questioning regarding the test. Hence, we deem appellant to have waived that ground.

With respect to appellant's contention that the trial court erred because Officer Evans failed to demonstrate that he was duly qualified to administer the test, we "review a decision to admit expert testimony for abuse of discretion[.]" *Morton v. State*, 200 Md. App. 529, 545 (2011). Rule 5-702 states:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine [ ] whether the witness is qualified as an expert by knowledge, skill, experience, training, or education[.]

We have stated that "'[t]o qualify as an expert, 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 [its] search for the truth.'" *Morton*, 200 Md. App. at 545 (citation omitted).

Here, Officer Evans testified that, at the police academy, he received 40 hours of training in standardized field sobriety tests and driving while intoxicated investigations. He subsequently completed a 40-hour course, administered and instructed by the National Highway Transportation Safety Administration, on a nationally certified standard field sobriety test. The course included classroom training on horizontal gaze nystagmus testing

and a live exercise, observed by a certified instructor, in which such testing was performed on intoxicated individuals. Following a written test, Officer Evans completed the course and was certified. The officer subsequently took at least two refresher courses in order to keep proficient. Finally, Officer Evans testified that, at the time of trial, he had utilized the field sobriety tests in his investigations well over a hundred times. We conclude that this testimony was sufficient to show that Officer Evans possessed such skill, knowledge, and experience in the field of horizontal gaze nystagmus test that his opinions or inferences would probably aid the jury in their search for the truth, and hence, the court did not abuse its discretion in determining that Officer Evans qualified as an expert and allowing him to testify regarding the horizontal gaze nystagmus test that he conducted upon appellant.

Appellant contends that *Schultz v. State*, 106 Md. App. 145 (1995) is instructive. We disagree. "Officer Timothy Rossiter stopped [Schultz] on March 1, 1994, about 11:30 p.m." *Id.* at 147. "Upon approaching [Schultz's] vehicle and speaking with [Schultz,] Officer Rossiter detected, among other things, the smell of alcohol and proceeded to administer several field sobriety tests," including "the horizontal gaze nystagmus (HGN) test." *Id.* at 147-48. The officer ultimately charged Schultz with "driving under the influence, speeding, and driving with alcohol in his blood in violation of a court-ordered alcohol restriction on his driver's license." *Id.* at 147.

At trial, "Officer Rossiter was the only witness that testified for the State." *Id.* at 148. "Officer Rossiter testified that he had been a Hagerstown police officer for just under five years and that he was a duly qualified and certified *radar* operator using properly calibrated and certified *radar* equipment." *Id.* at 174. He additionally testified to the following:

[OFFICER ROSSITER]:	I asked him to exit the vehicle to perform some field sobriety tests....
[PROSECUTOR]:	Have you receive[d] training in how to conduct field sobriety tests?
[OFFICER ROSSITER]:	Yes.
[PROSECUTOR]:	Where ... ?
[OFFICER ROSSITER]:	Western Maryland Police Academy.
[PROSECUTOR]:	Five years ago?
[OFFICER ROSSITER]:	Yes, sir.
[PROSECUTOR]:	[H]ave you had occasion to use field sobriety tests on other occasions?
[OFFICER ROSSITER]:	Yes, sir.

* * *

[OFFICER ROSSITER]:	Close to 100 [times].
[PROSECUTOR]:	[W]hat is the purpose ... in giving somebody field sobriety tests?

[OFFICER ROSSITER]: To check the subject's coordination and see if they can do two things at once....

* * *

[OFFICER ROSSITER]: See if the person is able to pay attention....

[PROSECUTOR]: [W]hat [referring to the case *sub judice*] was the first test that you gave ...?

[OFFICER ROSSITER]: [T]he horizontal gaze nystagmus.

* * *

It tests the eyes, 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.

[PROSECUTOR]: Would you demonstrate how that test is performed?

[DEFENSE COUNSEL]: Your Honor, I'm going to object. That test has never been proven to be reliable in the State of Maryland.

THE COURT: Overruled. The weight to be given to the test will be for the jury.

* * *

[OFFICER ROSSITER]:	The point of it is, with the alcohol, it's a depressant and relaxes the muscles....
[DEFENSE COUNSEL]:	Objection, unless he's *qualified* to say that. [Emphasis added.]
THE COURT:	I'll overrule the objection. You may proceed.

Officer Rossiter then described the tests. Later, he was asked:

[PROSECUTOR]:	And was he able to pass the test?
[OFFICER ROSSITER]:	No, he did not.
[DEFENSE COUNSEL]:	Objection as to passing or failing.
THE COURT:	Overruled.

When the officer began to describe the six-point scoring system for the test, [Schultz's] counsel again objected: "Objection.... He's reached a conclusion and hasn't given any of the underlying basis for reaching that conclusion." The court overruled the objection. As the discussion of "points" continued, [Schultz] again, unsuccessfully, objected as to a lack of foundation. Later, Rossiter's direct examination continued:

[PROSECUTOR]:	And who assigns the points?
[OFFICER ROSSITER]:	[T]he Alcohol Influence Board.
[PROSECUTOR]:	Somebody out there assigns how you're supposed to score the test?
[OFFICER ROSSITER]:	Right.

[DEFENSE COUNSEL]:	Objection. It's leading.
THE COURT:	Overruled.
[PROSECUTOR]:	Do you receive instruction on how to score this test?
[OFFICER ROSSITER]:	I was instructed in the Western Maryland Police Academy how to do it. I'm not a certified instructor to do it.
[PROSECUTOR]:	But have you been taught how to perform the test?
[OFFICER ROSSITER]:	Yes.

Id. at 174-76 (emphasis in original) (footnote omitted). The jury subsequently convicted Schultz of the offenses. *Id.* at 147.

On appeal, Schultz contended that "the court err[ed] in admitting the officer's testimony about [Schultz's] performance of the horizontal gaze nystagmus test[.]" *Id.* at 147. Reversing Schultz's convictions for driving under the influence and driving with alcohol in his blood in violation of a court-ordered alcohol restriction on his driver's license, *id.* at 181, we stated:

> In the case *sub judice*, the record is, at best, minimal in regard to the level of Officer Rossiter's training.
>
> * * *
>
> We have no way of knowing from the record the extent of the officer's actual HGN training, whether it was proper, whether it was supervised by certified instructors, or even whether Officer Rossiter

> was certified to administer the test. We hold, therefore, that a sufficient foundation as to the officer's qualifications to administer the test was not submitted below. His testimony should not have been allowed over the objection of [Schultz]. In allowing this testimony, the trial court erred.

Id. at 179-80.

Here, unlike Officer Rossiter, Officer Evans gave extensive testimony regarding the extent and propriety of his actual horizontal gaze nystagmus test training, including that the training was conducted by certified instructors and that, following the training, the officer was certified to administer the test. This testimony was sufficient to support Officer Evans's qualifications to administer the test, and hence, *Schultz* is inapplicable.

II.

Prior to trial, defense counsel moved to suppress the alleged statements appellant made to Officer Evans, on the ground that the officer's failure to read appellant his *Miranda*[2] warnings prior to asking questions about a one car collision was a violation of appellant's Fifth Amendment rights. At a subsequent hearing on the motion, the State called Officer Evans, and the following colloquy occurred:

> [PROSECUTOR]: Now during your shift on the 9th, did there come a time when you had to respond to Route 22 [a]nd Post Road?

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[OFFICER EVANS]: That's right. It was about ten minutes to three in the morning.

* * *

[PROSECUTOR]: Okay, and what did you observe when you responded to this location?

[OFFICER EVANS]: That's kind of a desolate area.

* * *

I got [Johnson's] information real quick, went down, and I spoke to [appellant].

* * *

[PROSECUTOR]: Okay. Okay, so you made contact with the individual. What did you observe about this individual when you first made contact with him?

[OFFICER EVANS]: Again, he – we weren't 100 percent sure at the time if he was involved with this accident or not. Basically, I mean, the cab driver did point him out, so I went back and I said to him, I said, "Sir, what happened?"

* * *

So anyway, I made contact with him. I asked him what happened, and he said to me, "I'm not sure."

	Indicating he didn't know if he fell asleep or what happened.
[PROSECUTOR]:	Did you notice anything about his person when you first made contact with him?
[OFFICER EVANS]:	Yeah, I noticed he had a strong odor of alcoholic beverage coming off his breath when he spoke to me.
[PROSECUTOR]:	And from the moment you spoke to him to noticing the strong odor, how much time had passed?
[OFFICER EVANS]:	Maybe, again, less than a minute.
[PROSECUTOR]:	So you asked him what happened, he said he did not know?
[OFFICER EVANS]:	That's right.
[PROSECUTOR]:	Okay, what else did you ask him?
[OFFICER EVANS]:	At that point I asked him for his identification. I asked him if the vehicle was his. He said no. I asked him if he was driving. He said yes.
[PROSECUTOR]:	And you said you obtained his identification?
[OFFICER EVANS]:	Yes.
[PROSECUTOR]:	What kind of identification?

[OFFICER EVANS]: He had a Maryland driver's license.

[PROSECUTOR]: Okay, and what did you do with that Maryland driver's license?

[OFFICER EVANS]: I did a routine check to see if his license was valid[,] if he had any open warrants.

[PROSECUTOR]: Okay, and after that, what did you do?

[OFFICER EVANS]: You know, again, based on the vehicle and where it was and the alcohol on his breath, I did field sobriety tests on him.

[PROSECUTOR]: Let me back up. You used the description *desolate* to describe the stretch of road. Is that what you were referring to?

[OFFICER EVANS]: Yes.

[PROSECUTOR]: So was there anyone else around when you arrived at that location other than who you already –

[OFFICER EVANS]: Just Ms. Johnson was the only person around, and she was in a vehicle.

* * *

[PROSECUTOR]: Okay, did you ask this individual that you made contact with about the details of the accident?

[OFFICER EVANS]: A few times. Again, because it didn't look like much of a car accident, so to speak; just looked like he went off the roadway.

[PROSECUTOR]: Okay.

[OFFICER EVANS]: So I asked him a couple times, "Are you okay?" You know, did you – I assumed that he fell asleep. But again, I was asking him to see if he knew what had happened, and he didn't recall.

[PROSECUTOR]: Okay, he did not recall. Did you ask him if he had anything to drink?

[OFFICER EVANS]: Yes.

[PROSECUTOR]: What did he say?

[OFFICER EVANS]: Told me he had one shot.

On cross-examination, the following colloquy occurred:

[DEFENSE COUNSEL: I]t is true, is it not, that Officer Easton had lit up the man?

[OFFICER EVANS]: Yes.

[DEFENSE COUNSEL]: Okay. His takedown light was on the man?

[OFFICER EVANS]: His lights were on I'm sure. What lights he used, I don't know.

* * *

[DEFENSE COUNSEL]: At that point, in order for you to make a valid DWI arrest, since nobody saw who was driving the car, the person that you approached would have had to say to you: I was driving the car; isn't that right?

[OFFICER EVANS]: That's right.

[DEFENSE COUNSEL]: And you wanted to find out who was driving the car to make this investigation complete?

[OFFICER EVANS]: Correct.

[DEFENSE COUNSEL]: Isn't that right?

[OFFICER EVANS]: That's right.

[DEFENSE COUNSEL]: Okay. So that it would be a fair statement to say that when you approached this man, because of your suspicion about the car being in the woods and him being 75 yards down the road, that you were not going to just let him continue walking home, right?

[OFFICER EVANS]: That's right.

[DEFENSE COUNSEL]: So he was, essentially when you approached him, detained; wasn't that right? Because you then said to him: Let me see your license; isn't that right?

[OFFICER EVANS]: That's right.

[DEFENSE COUNSEL]: And he – that's when you noticed what you say is a strong odor of alcohol about him?

[OFFICER EVANS]: That's right.

[DEFENSE COUNSEL]: Okay. And at that point you then asked him the question: Who was driving the car; isn't that right?

[OFFICER EVANS]: That's right.

[DEFENSE COUNSEL]: And according to your report, you say he said, "I was driving the car." Isn't that right?

[OFFICER EVANS]: That's correct.

* * *

[DEFENSE COUNSEL]: Right, but at that point, this guy was detained as far as you're concerned?

[OFFICER EVANS]: Yes.

[DEFENSE COUNSEL]: Okay. You never said to the guy: You have a right to remain silent?

[OFFICER EVANS]: No.

[DEFENSE COUNSEL]: You never said to the guy: If you choose to remain silent, you know, I can't infer anything from your silence? You never said that to him?

[OFFICER EVANS]: No.

[DEFENSE COUNSEL]: You never said to him: Look, if you want to remain silent, you know, or if you want somebody, you want a lawyer to advise you as to what you should do, we'll get a lawyer for you?

[OFFICER EVANS]: No.

[DEFENSE COUNSEL]: And you never said this to him: Anything that you say can be used in a court of law, such as this, against you?

[OFFICER EVANS]: Never said that either, no.

Denying the motion to suppress, the court stated:

> There was an investigative detention here. I find that the questions that were asked of this defendant some distance from the car, there was – I find there was no requirement that he be [M]irandized before he asked him, "Hey, were you driving the car?" given the information that he already had from the cab driver and the scene itself. And specifically, I don't think *Miranda* was required before he asked him, "Hey, buddy, were you driving the car?" So I will deny the motion.

Appellant contends that the trial court erred in denying the motion, because he was in *Miranda* custody when he was approached by Officer Evans and asked to produce his identification. Appellant claims that he was subsequently interrogated within the meaning of *Miranda*, because he was subjected to express questioning that Officer Evans should have known was reasonably likely to elicit an incriminating response. The State counters that the court properly found that appellant was not in custody.

Berkemer v. McCarty, 468 U.S. 420 (1984) is instructive. We quote from the Supreme Court's opinion:

> On the evening of March 31, 1980, Trooper Williams of the Ohio State Highway Patrol observed [McCarty's] car weaving in and out of a lane on Interstate Highway 270. After following the car for two miles, Williams forced [McCarty] to stop and asked him to get out of the vehicle. When [McCarty] complied, Williams noticed that he was having difficulty standing. At that point, Williams concluded that [McCarty] would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated. However, [McCarty] was not told that he would be taken into custody. Williams then asked [McCarty] to perform a field sobriety test, commonly known as a "balancing test." [McCarty] could not do so without falling.
>
> While still at the scene of the traffic stop, Williams asked [McCarty] whether he had been using intoxicants. [McCarty] replied that he had consumed two beers and had smoked several joints of marijuana a short time before. [McCarty's] speech was slurred, and Williams had difficulty understanding him. Williams thereupon formally placed [McCarty] under arrest and transported him in the patrol car to the Franklin County Jail.
>
> * * *
>
> At no point in this sequence of events did Williams or anyone else tell [McCarty] that he had a right to remain silent, to consult with an attorney, and to have an attorney appointed for him if he could not afford one.
>
> [McCarty] was charged with operating a motor vehicle while under the influence of alcohol and/or drugs[.]
>
> * * *
>
> [McCarty] moved to exclude the various incriminating statements he had made to Trooper Williams on the ground that introduction into evidence of those statements would violate the Fifth

> Amendment insofar as he had not been informed of his constitutional rights prior to his interrogation. When the trial court denied the motion, [McCarty] pleaded "no contest" and was found guilty.
>
> * * *
>
> On appeal to the Franklin County Court of Appeals, [McCarty] renewed his constitutional claim. Relying on a prior decision by the Ohio Supreme Court, which held that the rule announced in *Miranda* is not applicable to misdemeanors, the Court of Appeals rejected [McCarty's] argument and affirmed his conviction. The Ohio Supreme Court dismissed [McCarty's] appeal on the ground that it failed to present a substantial constitutional question.
>
> [McCarty] then filed an action for a writ of habeas corpus in the District Court for the Southern District of Ohio. The District Court dismissed the petition, holding that *Miranda* warnings do not have to be given prior to in custody interrogation of a suspect arrested for a traffic offense.
>
> A divided panel of the Court of Appeals for the Sixth Circuit reversed, holding that *Miranda* warnings must be given to *all* individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense.

Id. at 423-25 (footnote omitted) (citations and quotation marks omitted).

The Supreme Court "granted certiorari to resolve confusion in the federal and state courts regarding the applicability of [its] ruling in *Miranda* to interrogations involving minor offenses and to questioning of motorists detained pursuant to traffic stops." *Id.* at 426 (footnote omitted). McCarty contended that "the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered custodial interrogation," because "*Miranda* by its terms applies whenever 'a person has been taken into custody or otherwise

deprived of his freedom of action in any significant way[.]'" *Id.* at 435 (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). Reversing the Court of Appeals for the Sixth Circuit, the Supreme Court stated:

> We must decide whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.
>
> **Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced to speak where he would not otherwise do so freely. First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes.** A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way. In this respect, questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek.
>
> **Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police.** To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces. **Perhaps most importantly, the typical traffic stop is public, at least to some degree**. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the

motorist's fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. **In short, the atmosphere surrounding an ordinary traffic stop is substantially less police dominated than that surrounding the kinds of interrogation at issue in *Miranda* itself, and in the subsequent cases in which we have applied *Miranda.***

In both of these respects, the usual traffic stop is more analogous to a so-called "*Terry* stop," see *Terry v. Ohio*, 392 U.S. 1 (1968), than to a formal arrest. Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke suspicion. [T]he stop and inquiry must be reasonably related in scope to the justification for their initiation. Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. **The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not in custody for the purposes of *Miranda*.**

* * *

Turning to the case before us, we find nothing in the record that indicates that [McCarty] should have been given *Miranda* warnings at any point prior to the time Trooper Williams placed him under arrest. For the reasons indicated above, **we reject the contention that the initial stop of [McCarty's] car, by itself, rendered him in custody. And [McCarty] has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those**

> **associated with a formal arrest.** Only a short period of time elapsed between the stop and the arrest. At no point during that interval was [McCarty] informed that his detention would not be temporary. Although Trooper Williams apparently decided as soon as [McCarty] stepped out of his car that [he] would be taken into custody and charged with a traffic offense, Williams never communicated his intention to [McCarty]. A policeman's unarticulated plan has no bearing on the question whether a suspect was in custody at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. Nor do other aspects of the interaction of Williams and [McCarty] support the contention that [McCarty] was exposed to custodial interrogation at the scene of the stop. From aught that appears in the stipulation of facts, a single police officer asked [McCarty] a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.
>
> **We conclude, in short, that [McCarty] was not taken into custody for the purposes of *Miranda* until Williams arrested him. Consequently, the statements [McCarty] made prior to that point were admissible against him.**

Id. at 436-42 (emphasis added) (footnote omitted) (citations and internal quotations marks omitted).

We reach a similar conclusion here. As in *Berkemer*, only a short period of time elapsed between the stop and the arrest. At no point during that interval was appellant informed that his detention would not be temporary. Finally, Officer Evans asked appellant only a modest number of questions and requested that he perform simple tests at a location visible to passing motorists. This treatment cannot fairly be characterized as the functional

equivalent of formal arrest, and hence, the statements that appellant made prior to arrest were admissible against him.

Appellant contends that he was in custody for purposes of *Miranda* for the following reasons:

> First, a reasonable person who is spotlighted using a high intensity police flashlight, and then approached by police officers in a desolate area at 2:50 in the morning and asked to produce identification, would not consider himself free to terminate the police encounter and leave. . . .
>
> Furthermore, Officer Evans admitted that, after seeing the car in the ditch and smelling alcohol on [appellant's] breath, he would not have allowed [appellant] to continue walking on his way once he approached him. This indicates that [appellant's] freedom of action [was] restricted to a degree associated with a formal arrest. . . .
>
> The circumstances surrounding Officer Evans's questioning of [appellant] also indicate that he was in custody for purposes of *Miranda*. First, it is clear that [appellant] was being questioned as a suspect, and not as a potential witness to the accident, when Officer Evans asked him if he had been drinking. Second, Officer Evans asked [appellant] for his identification and performed a warrants check on him . . . . Finally, . . . [appellant] was arrested and taken to the police station following the encounter . . . .

We disagree. Although the officers' stop of appellant occurred at 2:50 a.m. in a desolate area, and the officers may have used a high intensity police flashlight to spotlight appellant, the officers were allowed to detain appellant briefly in order to investigate the circumstances that provoked their suspicion. Moreover, the area in which appellant was stopped, like the area in which McCarty was stopped, was exposed to public view. Although Officer Evans

may not have allowed appellant to continue walking on his way, his unarticulated plan has no bearing on the question whether appellant was "in custody" at a particular time. Whether appellant was being questioned as a suspect and not as a potential witness is irrelevant, because like McCarty, appellant was not obliged to respond to Officer Evans's questions. Although the officer obtained appellant's identification and performed a warrants check, appellant, like McCarty, should have expected that he would be obliged to wait while the officer performed the check. Finally, the culmination of the stop in appellant's arrest does not render the statements that he made prior to arrest the product of custodial interrogation. Hence, the court did not err in denying appellant's motion to suppress the statements.[3]

III.

Following the close of the evidence, the court informed the parties that it intended to give the jury the following instruction:

> A person's flight immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight. If you decide there is evidence of flight, you then must decide whether this flight shows a consciousness of guilt.[4]

[3]Because we conclude that appellant was not taken into custody for the purposes of *Miranda* until he was arrested, we need not address whether he was subsequently "interrogated within the meaning of *Miranda*."

[4]This instruction mirrors Maryland Criminal Pattern Jury Instruction 3:24.

Defense counsel stated: "In this case, Your Honor, using the context of the factual fabric of the case, I don't think there is evidence of flight. I would ask you not to give a flight instruction." The court denied the request and gave the jury the instruction. After the court completed its instructions to the jury, the parties approached the bench, and defense counsel stated: "Your Honor, the objection goes to the instructions that I made in open court that I am going to adopt in toto."

Appellant contends that the trial court erred in giving the jury the instruction because the instruction was not generated by the evidence. The State counters that appellant failed to preserve this claim because he did not object on this ground after the court instructed the jury. Alternatively, the State contends that the court properly gave this instruction.

We first conclude that appellant's contention is preserved for our review. Rule 4-325(e) states: "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." Here, after the court instructed the jury, defense counsel adopted the objection that he made when the court was considering what instructions to give to the jury. That objection specifically referenced the lack of evidence to support a flight instruction. Appellant's issue and grounds are preserved.

Appellant contends that, because he walked at a normal pace, stopped immediately upon making contact with police, and was cooperative throughout the entire encounter with

police, the "evidence would not reasonably support the inference that he was attempting to flee. We disagree.

"'[W]e review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard.'" *Page v. State*, 222 Md. App. 648, 668 (2015) (citation omitted). In *Page*, we addressed the propriety of giving a flight instruction:

> A requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate. This preliminary determination is a question of law for the judge[,] and on appellate review, we must determine whether the requesting party produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired. This threshold is low, in that the requesting party must only produce "some evidence" to support the requested instruction. Upon our review of whether there was "some evidence," we view the facts in the light most favorable to the requesting party, here being the State.
>
> The Court of Appeals has established that a flight instruction is properly warranted when four inferences may reasonably be drawn from the evidence: [1] that the behavior of the defendant suggests flight; [2] that the flight suggests a consciousness of guilt; [3] that the consciousness of guilt is related to the crime charged or a closely related crime; and [4] that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime. . . .
>
> As to the first inference, flight is defined as an "act or instance of fleeing, esp. to evade arrest or prosecution . . . also termed *flight from prosecution; flee from justice*." At its most basic, evidence of flight is defined by two factors: first, that the defendant has moved from one location to another; second, some additional proof to suggest that this movement is not simply normal human locomotion. As to the second inference, the movement also must reasonably justify an inference that it was done with a consciousness of guilt and

> pursuant to an effort to avoid apprehension or prosecution based on that guilt.

Id. at 668-69 (emphasis in original) (citations and internal quotations marks omitted).

Here, when Johnson told appellant that she was on the phone with police, appellant started to walk down the road away from the scene of the accident. Leaving the scene of an accident would make it more difficult for appellant to be identified as the driver, thereby hampering the apprehension and/or prosecution of appellant for any traffic or criminal charge arising out of the accident. Viewing the facts in a light most favorable to the State, we conclude that there was "some evidence" that appellant's leaving the scene of the accident immediately after learning that the police had been called and were probably on the way, could reasonably justify an inference of a consciousness of guilt and an effort to avoid apprehension and prosecution based on that guilt. *See id.,* at 668-69. Accordingly, the trial court did not abuse its discretion in giving the flight instruction.

Even if the trial court abused its discretion in giving the jury the flight instruction, we would conclude that the abuse is harmless. In light of the other evidence presented by the State, which we summarized in resolving appellant's first contention, we can declare a belief, beyond a reasonable doubt, that the evidence pertaining to appellant's flight, and the court's subsequent giving of the instruction on flight, in no way influenced the verdict. *See Dorsey*, *supra*, 276 Md. at 659.

IV.

Following the close of the State's case, defense counsel moved for judgment of acquittal of only the offense of driving while impaired. The court denied the motion.

Following the close of the evidence, defense counsel moved for judgment of acquittal as to all offenses. With respect to the offense of failure to control vehicle speed as necessary to avoid a collision, defense counsel argued that "there is simply an absence of evidence to show that [appellant] either drove the car, operated the car, or moved the car." The court again denied the motion.

Appellant contends that the trial court erred in denying the motion, because the State failed to produce evidence of (1) an existing condition that would require a driver to reduce his speed, the condition being the possibility of colliding with a person, vehicle, or conveyance, and (2) appellant in fact failing to reduce his speed in light of that condition if he had been driving at all. The State counters that appellant failed to preserve this claim because he did not move for judgment of acquittal on this basis. Alternatively, the State contends that the evidence was sufficient.

We first conclude that appellant's contention is not preserved for our review. Rule 4-324(a) states that, when moving for judgment of acquittal, a defendant "shall state with particularity all reasons why the motion should be granted," and we have stated that "[g]rounds that are not raised in support of a motion for judgment of acquittal at trial may not be raised on appeal." *Jones v. State*, 213 Md. App. 208, 215 (2013), *aff'd*, 440 Md. 450

(2014). Here, when defense counsel moved for judgment of acquittal at the close of the State's case, he did not raise any challenge to the offense of failing to control vehicle speed as necessary to avoid a collision. When defense counsel moved for judgment of acquittal of the close of all of the evidence, he did raise the issue of the sufficiency of the evidence for such offense, but on the grounds that appellant was not the driver. Defense counsel did not raise the grounds asserted in the instant appeal, namely, that the State failed to produce evidence of the presence of a person, vehicle or conveyance that would require a driver to reduce his speed, and that appellant in fact failed to reduce his speed in light of that condition. Hence, appellant may not raise those grounds on appeal.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.