[Cite as *State v. King*, 2010-Ohio-3254.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0040**
- vs -	:	
DAWN M. KING,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 2008 TRC 14255R.

Judgment: Affirmed in part, reversed in part, and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Emily S. Durway, 159 South Main Street, #417, Akron, OH 44308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal follows from the judgment of the Portage County Municipal Court, Ravenna Division, convicting Dawn M. King, appellant herein, of operating a vehicle under the influence ("OVI"). Appellant challenges the underlying judgment of conviction as well as the trial court's entry of judgment denying her motion to suppress evidence. For the reasons discussed below, we affirm the judgment denying appellant's motion to suppress, but reverse the judgment of conviction and remand the matter for further proceedings.

{¶2} On October 11, 2008, at 1:20 a.m., Sergeant Antonio Matos of the Ohio State Highway Patrol was situated at a median strip perpendicular to traffic on Interstate 76. Appellant was traveling eastbound at a high rate of speed as she passed the officer. The officer pulled onto the road and followed appellant for approximately one mile. As he followed her, he noticed that appellant's license plate light was not functioning. He then activated his overhead lights and initiated a traffic stop.

{¶3} The sergeant testified he approached the vehicle and "as soon as the window went down I noticed a moderate odor of alcoholic beverage coming from the vehicle." Appellant "stumbled" and "fumbled" in an attempt to retrieve her driver's license, registration, and proof of insurance. The trooper also testified that appellant's eyes were red and glassy, her eyelids were "droopy," and her speech was a bit slurred. Sergeant Matos, believing appellant may be under the influence, escorted appellant to his cruiser.

{¶4} Inside the cruiser, the sergeant asked appellant if she had been drinking that evening. Appellant responded that she had consumed one beer. She also indicated that she was on an anti-seizure medication as well as other pain medications due to a surgical procedure she had on her neck. Sergeant Matos subsequently advised appellant he was going to perform a horizontal gaze nystagmus ("HGN") test on her. She agreed but advised the officer that she may have nystagmus due to the anti-seizure drug she was taking. During the test, Sergeant Matos noted that appellant had difficulty keeping her eyes open. After administering the test, the trooper testified he observed four of six clues; pursuant to the National Highway Traffic Safety Administration's ("NHTSA") manual, appellant failed the test.

{¶5} The trooper then asked appellant to take a portable breath test (PBT); appellant, however, refused this test indicating she was experiencing heart palpitations. The officer asked appellant if she desired an ambulance, but appellant declined.

{¶6} Next, the trooper asked appellant to exit the cruiser in order to perform two field coordination tests, the walk-and-turn and the one leg stand test. Appellant immediately advised the trooper she had a weak left leg and left arm. Due to this weakness, she claimed that she would be unable to perform the test satisfactorily. Notwithstanding her medical condition, appellant agreed to attempt each coordination test. After having the tests explained, appellant performed each test and, according to Sergeant Matos, she failed both.

{¶7} Appellant was placed under arrest. Due to his observations and appellant's representations regarding her medication, Sergeant Matos concluded a urine sample, rather than a breath test, would provide a better analysis of the concentration of chemicals in appellant's system. To this end, he drove appellant to the county jail so a female officer could administer the test. Upon arrival, Sergeant Matos provided appellant with a B.M.V. 2255 consent form. Although the sergeant explained the consequences of refusing the test, appellant nevertheless refused to provide a urine sample. Moreover, appellant indicated she was unable to sign the form due to extreme weakness.

{¶8} Appellant was ultimately issued a citation for speeding, in violation of R.C. 4511.21(D), and OVI, in violation of R.C. 4511.19(A)(1)(a). The ticket was filed with the Portage County Municipal Court on October 14, 2008 and, on the following day, a complaint was issued charging appellant with the cited violations. Appellant pleaded

not guilty and moved the trial court to suppress evidence of the traffic stop. During the hearing, appellant challenged (1) Sergeant Matos' basis for stopping her; (2) whether he had adequate suspicion to conduct field sobriety tests ("FST"); (3) whether he substantially complied with the NHTSA guidelines in conducting the FSTs; and (4) whether he had probable cause to arrest her.

{¶9} After the hearing, the trial court sua sponte suppressed all evidence of the speeding charge because it was unable to take judicial notice of the scientific accuracy of the laser Sergeant Matos used when he measured appellant's speed. On the other hand, the trial court denied appellant's motion to suppress all remaining evidence, ruling (1) the plate light violation was sufficient to warrant the stop; (2) Sergeant Matos had reasonable suspicion to conduct the FSTs; (3) the FSTs were conducted in substantial compliance with NHTSA regulations; and (4) the totality of the circumstances demonstrated the sergeant had probable cause to arrest appellant for OVI.

{¶10} The matter proceeded to a jury trial on June 2 and 3, 2009. After hearing the evidence and arguments of counsel, the jury returned a verdict of guilty. The trial court subsequently sentenced appellant to 180 days in jail and a fine in the amount of $375. The trial court suspended 177 days of the jail sentence on certain conditions and stayed the entire sentence pending appeal.

{¶11} On appeal, appellant now asserts five assignments of error for this court's consideration.[1] Several arguments challenge the trial court's judgment overruling her motion to suppress evidence; others challenge alleged errors occurring during the jury trial. We shall address the arguments relating to the former first.

1. Appellant's appellate brief mis-numbers her assigned errors as 1,3,4,5, and 6. For consistency, this court shall address the errors as appellant has designated them thereby omitting any reference to a second assignment of error.

{¶12} **ISSUES RELATED TO SUPPRESSION HEARING**

{¶13} Appellant's first assignment of error provides:

{¶14} "The trial court erred by denying appellant's motion to suppress because the sergeant did not have reasonable articulable suspicion to extend the stop by performing the field sobriety test[s] and did not substantially comply with the NHTSA guidelines and therefore lacked probable cause to arrest the appellant."

{¶15} Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154, 2003-Ohio-5372. During a hearing on a motion to suppress evidence, the trial judge acts as the trier of fact and, as such, is in the best position to resolve factual questions and assess the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations de novo. *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶19

{¶16} Under this assignment of error, appellant first argues the trooper lacked reasonable suspicion to detain appellant to conduct field sobriety tests. We disagree.

{¶17} When a police officer observes a traffic violation, as the trooper did in this case, he is justified in initiating a limited stop for the purpose of issuing a citation. *State v. Brickman* (June 8, 2001), 11th Dist. No. 2000-P-0058, 2001 Ohio App. LEXIS 2575, *5. A request that a driver perform field sobriety tests, however, constitutes a greater invasion of liberty than the initial stop, and "must be separately justified by specific,

articulable facts showing a reasonable basis for the request." *State v. Evans* (1998), 127 Ohio App.3d 56, 62, citing *State v. Yemma* (Aug. 9, 1996), 11th Dist. No. 95-P-0156, 1996 Ohio App. LEXIS 3361. In other words, an officer who has initiated a valid traffic stop must also have reasonable suspicion that a motorist is impaired to commence field sobriety tests. See, e.g., *State v. Dierkes*, 11th Dist. No. 2008-P-0085, 2009-Ohio-2530, at ¶21.

{¶18} The reasonable suspicion necessary for such a detention involves a consideration of "the totality of the circumstances." See *Terry v. Ohio* (1968), 392 U.S. 1, 22; see, also, *United States v. Cortez* (1981), 449 U.S. 411, 417. "Under this analysis, 'both the content of information possessed by the police and its degree of reliability' are relevant to the court's determination." Id., citing *Alabama v. White* (1990), 496 U.S. 325, 330. "'Since a *Terry* stop is an investigatory tool, it does not require certainty or probability that criminal activity is occurring, just a reasonable suspicion.'" *State v.* Morgan, 11th Dist. No. 2008-P-0098, 2009-Ohio-2795, at ¶16, quoting State *v. Wortham*, 145 Ohio App.3d 126, 129, 2001-Ohio-1506. (Citations omitted).

{¶19} In *Evans*, supra, this court set forth a non-exhaustive list of factors a judge may consider in determining whether an officer had reasonable suspicion of impairment justifying the administration of field sobriety tests. The factors are as follows:

{¶20} "(1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition of the suspect's

eyes (bloodshot, glassy, glazed, etc.); (6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.); (7) the odor of alcohol coming from the interior of the car, or more significantly, on the suspect's person or breath; (8) the intensity of that odor, as described by the officer ('very strong,' 'strong,' 'moderate,' 'slight,' etc.); (9) the suspect's demeanor (belligerent, uncooperative, etc.); (10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and (11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given. All these factors, together with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in determining whether the officer acted reasonably." Id. at 63, fn.2.

{¶21} Here, appellant was stopped at 1:20 a.m. on a Saturday morning. As the trooper approached appellant's car from the passenger side, appellant initially rolled down her rear passenger window. Once she rolled down the front passenger window, Sergeant Matos testified he noticed a moderate odor of alcoholic beverage coming from her vehicle. He also testified appellant's eyes were red and glassy, her eyelids were "droopy," and her speech was noticeably slurred. While looking for her license, registration, and proof of insurance, the officer noted that she "stumbled" and "fumbled" through her purse. Out of the eleven factors set forth in *Evans*, six were relevant to the circumstances of this case. When these factors are considered together, we hold that the officer's decision to conduct FSTs was premised upon a reasonable suspicion that

appellant was operating her vehicle under the influence of alcohol. Accordingly, appellant's argument is overruled.[2]

{¶22} Appellant next argues Sergeant Matos failed to conduct the FSTs in substantial compliance with NHTSA standards. She first challenges the trooper's administration of the HGN test.

{¶23} During direct examination, Sergeant Matos testified the HGN test has three components: (1) a test to determine a lack of smooth pursuit; (2) a test to determine the onset of nystagmus at maximum deviation; and (3) the onset of nystagmus at a 45 degree angle. The sergeant testified that the tests are done twice to verify the result of the initial test. After administering the test, a subject could exhibit as many as six clues (three for each eye).

{¶24} Prior to conducting the tests, Sergeant Matos testified he looked to see if appellant's pupils were dilated or constricted and if they were equal in size. He then checked to make sure appellant's eyes were able to track the stimulus equally. After he was satisfied with these preliminary physical tests, he testified he confirmed appellant understood what she had to do to perform each component of the test. The officer testified appellant was able to complete each aspect of the test without hesitation or problem. After conducting the entire test, however, the officer testified appellant exhibited clues for both eyes on each of the first two components. Although appellant showed no onset of nystagmus at 45 degrees, she exhibited four clues. The sergeant

2. Before the trooper commenced the battery of FSTs, appellant admitted to consuming one beer and while on various medications. Including this important fact would only further buttress the trooper's decision to administer the tests. However, the record demonstrates that the officer clearly decided to conduct the test before gaining this information because appellant had already been removed from her vehicle to the sergeant's cruiser when she made the admission. We therefore believe the evidence of appellant's alcohol consumption and medication intake, while proper for a probable cause analysis, cannot be used for the reasonable suspicion calculus.

testified “per NHTSA *** 77 percent of the time when four clues are present that person will test over the legal limit [of .08 percent blood alcohol content].” During his testimony, Sergeant Matos explicitly indicated that he administered each component of the HGN test in substantial compliance with the NHTSA manual.

{¶25} In light of this testimony, appellant challenges Sergeant Matos’ methodology in conducting the test. Appellant essentially argues the sergeant failed to substantially comply with the NHTSA standards on HGN testing because (1) he failed to explicitly articulate the instructions set forth in the manual; (2) he failed to meet the minimum time requirement for administering the examination; (3) he failed to perform each test twice; and (4) during the “onset at 45 degree” component, he failed to ensure appellant’s shoulders were square.

{¶26} With respect to appellant’s first challenge, a law enforcement officer is not required to provide the accused with the NHTSA instructions verbatim. See *State v. Wood*, 12th Dist. No. CA2007-12-115, 2008-Ohio-5422, ¶20, ¶29; *State v. Secoy*, 5th Dist. No. CT2008-0065, 2009-Ohio-5100, at ¶17. “Instead, the instructions provided may deviate from the quoted language found in the NHTSA manual so long as they are sufficient to apprise the accused of the manner in which [she] is to perform the test.” *State v. Way*, 12th Dist. No. CA2008-04-098, 2009-Ohio-96, at ¶24; see, also, *State v. Davis*, 2d Dist. No. 2008 CA 65, 2009-Ohio-3759, at ¶17. To demand more “amounts to strict compliance with the NHTSA standards, which is not necessary; rather, clear and convincing evidence of substantial compliance with the NHTSA standards is sufficient.” *State v. Henry*, 12th Dist. No. CA2008-05-008, 2009-Ohio-10, at ¶27. Here, Sergeant Matos’ testimony demonstrates that he sufficiently instructed appellant on how to

perform each component of the HGN test and nothing in the record indicates appellant failed to understand the administration procedure.

{¶27} Next, appellant argues a proper HGN test must take a total minimum time of between 48 and 50 seconds. However, appellant argues a stipulation was entered indicating the time the officer took was "significantly less than forty four seconds." We cannot agree.

{¶28} Initially, there is nothing in the record indicating the parties stipulated to the amount of time Sergeant Matos took to administrate the HGN. During a discussion with the judge, defense counsel argued the trooper took approximately 32 seconds; while the prosecutor did not specifically debate defense counsel on his calculations, nothing indicates a stipulation was entered on this issue.

{¶29} This point aside, a review of the videotape of the arrest is inconclusive as to the timeframe the trooper took on the HGN. The trooper administered the test in his cruiser; however, the dash-mounted camera was pointed at appellant's vehicle. Defense counsel inquired why the "swivel-mounted" camera was not moved so as to create a video record of the administration procedure. In response, the trooper stated there was insufficient room to adequately adjust the camera and, in any event, the trooper asserted the video recordation of HGN tests is only a "suggested" practice. Defense counsel did not pursue the issue further.

{¶30} With this in mind, the conversation between the trooper and appellant is audible and, as a result, we know the trooper began instructing appellant on the HGN test at approximately 1:24.55 a.m. At 1:28.12 a.m., the video indicates the trooper and appellant exit the vehicle. During this three minute 17 second timeframe, instructions

are given by the trooper and some "small talk" can be heard. It is not possible, however, to tell with any certainty the amount of time the trooper spent on each aspect of the test. Because the record does not refute Sergeant Matos' testimony on the procedure he used or his interpretation of the test results, appellant's argument is without merit.

{¶31} Appellant next alleges the trooper failed to administer each component of the test twice. Again, we have no way of verifying this claim. However, the trooper's testimony indicated he did, in fact, perform each of the three enumerated components of the HGN test twice. Without some additional evidence to the contrary, we cannot accept appellant's claim.

{¶32} Lastly, appellant argues the trooper failed to ensure her shoulders were square and therefore could not properly measure a 45 degree angle for the third component of the test. Similar to her two previous arguments, the video fails to show the position of appellant's shoulders during the HGN test. Moreover, Sergeant Matos did not testify appellant's shoulders were somehow out of alignment during the exam. Finally, and perhaps most importantly, the trooper testified appellant did not exhibit an onset of nystagmus at 45 degrees. Hence, any procedural error on this portion of the test would have been harmless.

{¶33} Given the foregoing analysis, we therefore hold the HGN was conducted in substantial compliance with the NHTSA manual.

{¶34} Next, appellant challenges the trooper's administration of the walk and turn test. Specifically, appellant argues the trooper (1) failed to advise her of many of the instructions; (2) failed to designate a real or imaginary line; and (3) instructed her to

"pivot" when she turned, but testified her "pivot" was a "clue" which led to her failing the test.

{¶35} At the suppression hearing, the trooper testified he provided appellant with verbal instructions and a physical demonstration of the test in substantial compliance with the NHTSA manual. He further stated that when appellant was asked whether she understood the instructions, she responded in the affirmative. A review of the arrest video confirms the trooper's testimony. As discussed above, even though Sergeant Matos may have failed to follow the manual "word-for-word," his failure to strictly comply does not render the test results inadmissible. *Wood*, supra; *Secoy*, supra. It is clear the officer substantially complied with the instruction procedure set forth in the NHTSA manual and, as a result, any omission is insufficient to render the results inadmissible.

{¶36} Moreover, although Sergeant Matos did not specifically designate an "imaginary line," he told appellant to "walk in a straight line as best you can." Nothing in the manual requires an officer to set forth an actual or imaginary line when conducting the walk and turn test. Accordingly, such an omission has no effect on the admissibility of the results.

{¶37} Finally, although the sergeant did testify he told appellant to pivot and technically one is not supposed to pivot, the sergeant did not testify her "pivot" was a clue per se. Rather, the record indicates he cited her turn as a "clue" because she failed to execute the turn as he instructed, viz., keeping one foot stationary, while taking small steps around with the opposite foot. While the sergeant's use of the term "pivot" was improper, the arrest video shows he physically demonstrated the proper manner of turning. Appellant indicated she understood, but failed to execute the turn as shown by

Sergeant Matos. At worst, the trooper's error was semantic and was cured when he provided appellant with a visual example of the turn which she stated she understood.

{¶38} Although appellant alleges the trooper failed to substantially comply with the NHTSA manual when he instructed her on the one leg stand test, she does not specifically identify how he erred. Without an argument to support her allegation, we need not address this issue. See App.R. 16(A)(7).

{¶39} A thorough review of appellant's overall argument indicates she is challenging the trial court's judgment denying her motion to suppress because the officer failed to follow the specific letter of the manual. Ohio, however, does not require strict compliance with NHTSA standards. So long as an officer substantially complies with the standards, flaws in the administration process only affect the weight of the evidence, not its admissibility. As this court has previously observed: "A compromise in reliability that may be caused by a lack of strict compliance may be used by the defense to attack the evidentiary value of [FSTs] at trial, but it does not warrant suppression of such evidence." *State v. Penix*, 11th Dist. No. 2007-P-0086, 2008-Ohio-4050, at ¶25. A review of the evidence in the record demonstrates Sergeant Matos administrated the tests in substantial compliance with the standards in the NHTSA manual and therefore the trial court did not err in denying appellant's motion.

{¶40} Finally, appellant argues the evidence submitted in support of her arrest was insufficient to support a finding of probable cause as a matter of law. Probable cause is defined in terms of those facts and circumstances sufficient to warrant a prudent law enforcement officer in believing that a suspect committed or was committing an offense. See *Beck v. Ohio* (1964), 379 U.S. 89, 91. Here, a brief sketch

of our rulings supra, in conjunction with other aspects of the arrest demonstrate the trooper possessed probable cause to arrest appellant.

{¶41} First, upon approaching appellant's car, the trooper smelled a moderate odor of alcohol emanating from appellant's vehicle; moreover, appellant had slurred speech, red and glassy eyes, droopy eyelids, and notably fumbled when asked to retrieve certain papers. Just prior to administering the FSTs, appellant conceded she had consumed one beer and was on several different medications. A review of the testimony, arrest video, and other relevant aspects of the record show the FSTs were administered in substantial compliance with NHTSA standards. And, after conducting the FSTs, Sergeant Matos concluded appellant failed each test. Notwithstanding appellant's representations relating to the effects of her medications and her physical limitations due to her medical condition(s),[3] we hold the circumstances demonstrate that Trooper Matos had probable cause to arrest appellant for OVI.

{¶42} Appellant's first assignment of error is overruled.

{¶43} Next we shall consider appellant's fifth assignment of error, which provides:

{¶44} "The trial court committed reversible error by not allowing appellant an opportunity to cross examine in a meaningful manner and to impeach the witness with his own prior statements during the suppression hearing."

{¶45} Appellant asserts the trial court violated Evid.R. 611(B) by not allowing defense counsel an adequate opportunity to cross-examine Sergeant Matos regarding his compliance with NHTSA standards. She further argues the court violated Evid.R.

3. The record reveals appellant suffered carpel tunnel syndrome, nerve damage in her neck, and chronic pain. On the date of the arrest (due to her medical conditions) she was on Lyrica, an anti-seizure medication, had a Lidoderm patch, a topical anesthetic, and Relafen, an arthritis medication.

613 by denying counsel the opportunity to impeach the sergeant with his prior inconsistent statements. We disagree.

{¶46} Initially, appellant premises her arguments upon the operation of the Ohio Rules of Evidence. It is well-established, however, that the rules of evidence are not applicable to hearings on motions to suppress. *State v. Boczar*, 113 Ohio St.3d 148, 151, 2007-Ohio-1251. In *Boczar*, the Court pointed out:

{¶47} "Evid.R. 101(C)(1) provides that the Rules of Evidence do not apply to '[d]eterminations prerequisite to rulings on the admissibility of evidence when the issue is to be determined by the court under Evid.R. 104.' Further, Evid.R. 104(A) provides that '[p]reliminary questions concerning *** the admissibility of evidence shall be determined by the court ***. In making its determination it is not bound by the rules of evidence except those with respect to privileges.' Therefore, the Rules of Evidence do not apply to suppression hearings." *Boczar*, supra. See, also, *State v. Scrivens*, 11th Dist. No. 2009-T-0072, 2010-Ohio-712, at ¶13.

{¶48} Because appellant's argument is premised upon the operation of the rules of evidence, her argument is overruled. Regardless of this fatal flaw, however, we note the trial court afforded appellant a clear, meaningful opportunity to cross-examine Sergeant Matos. The transcript of the suppression hearing totaled 138 pages, 82 of which were occupied by defense counsel's cross-examination of the sergeant. Throughout the cross-examination, counsel probed the sergeant's method of conducting each FST and, in so doing, measured his approach against the standards set forth in the NHTSA. Although the trial court ordered counsel to "proceed" or "get on with it" on several occasions, the record indicates he was able to establish the sergeant did not

precisely follow the NHTSA guidelines as set forth in the manual. Notwithstanding the court's periodic impatience with counsel's meticulous examination, the record demonstrates he was able to accomplish his goal, viz., call into question the quality of the trooper's compliance with the standards. We find no error in the manner in which the trial court managed the suppression hearing.

{¶49} Appellant's fifth assignment of error is overruled.

{¶50} **ISSUES RELATED TO JURY TRIAL**

{¶51} We shall next consider appellant's fourth assignment of error, which provides:

{¶52} "The trial court abused its discretion and substantially prejudiced the appellant's ability to mount a defense by not following the law of the case where an acting judge, who presided over the suppression hearing ruled on legal issues during the suppression hearing which were not continued by the jury trial's presiding judge."

{¶53} Under this assignment of error, appellant points out that, during the suppression hearing, the acting judge sustained defense counsel's objection to the introduction of evidence relating to the medications appellant was taking on the night of the arrest. At trial, the sitting judge who presided over the proceedings, however, overruled the same objection. The effect of the ruling allowed the prosecution to regularly refer to the medications before the jury. Appellant contends the court's ruling violated the law of the case doctrine necessitating reversal. We disagree.

{¶54} We first point out that the basis for defense counsel's objection during the suppression hearing was the lack of any test results relating to drugs. He proceeded to argue, therefore, appellant was merely charged with OVI alcohol. The citation charging

appellant with OVI, however, indicated she was charged in the alternative with OVI "under the influence of alcohol/drug of abuse." Moreover, the complaint charged appellant with violating R.C. 4511.19(A)(1)(a), which provides "[n]o person shall operate any vehicle *** [while] *** [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them." Although counsel claimed at the suppression hearing that it was his understanding that appellant had been charged strictly with OVI alcohol, both the citation and accusatory pleading indicated otherwise. In effect, counsel procured a ruling which was inconsistent with the citation and statutory charge.

{¶55} Still, appellant could have sought to suppress the evidence surrounding appellant's medications or, alternatively, filed a motion in limine on this issue. She did not. The judgment overruling appellant's motion to suppress did not include any ultimate ruling on the scope of the evidence the state would present. Although the state procured an evidentiary ruling, no final judgment was entered or journalized indicating the matter had been formally resolved. Because a trial court speaks exclusively through its journal entries, appellant was not entitled to rely upon the ruling during trial. See, e.g., *State v. Brooke*, 113 Ohio St.3d 199, 205, 2007-Ohio-1533.

{¶56} Regardless of these points, nothing in Ohio law indicates the law of the case doctrine applies to bind the trial court as appellant urges. The law of the case doctrine is typically understood as a rule of judicial hierarchy whereby "'the decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.'" *Keytack v. Warren*, 11th Dist. No. 2005-T-0152, 2006-Ohio-5179, at ¶56, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. Although the phrase "law of the case" has also

been used to describe the effect of rulings made in earlier stages of proceedings, the doctrine used in this way has been construed as a rule of mere convenience. See *State v. Kempton* (May 2, 1985), 4th Dist. No. 1099, 1985 Ohio App. LEXIS 7554.

{¶57} In *Kempton*, the defendant was convicted of OVI. On appeal, the defendant argued that he was not bound by the trial court's ruling denying his motion to suppress breathalyzer results at trial. Instead, the appellant asserted the prosecution was again required to prove the foundational requirements for admissibility of the results during the trial. In overruling the appellant's assigned error, the court quoted 1 Criminal Procedure, Lafave and Israel, 808, Sec. 10.6(c), for the following proposition:

{¶58} "'*** while it is usually to be expected that the trial judge will rely upon the prior ruling as the law of the case, he "has the option, but not the obligation, to reconsider" the matter. The law of the case doctrine operates only as a discretionary rule of practice, for to view the pretrial ruling as binding "would be to proscribe correction of its own error by trial court at trial or even on motion for a new trial."'" *Kempton,* supra, at *4.

{¶59} In light of the foregoing, the ruling on appellant's objection during the suppression hearing could be seen as merely interlocutory. The trial judge was at liberty to reconsider the acting judge's decision and change the ruling for purposes of trial. In view of the complaint and the statutory charge, we believe the trial court acted within her discretion in doing so.

{¶60} Appellant's fourth assignment of error is overruled.

{¶61} We shall next consider appellant's sixth assignment of error, which asserts:

{¶62} "The trial court committed reversible error under the Ohio Rules of Evidence 402 when it did not allow appellant[] an opportunity [to] present evidence regarding the appellant's ability to physically move and possible level of pain when complying with the sergeant's order and handcuff position."

{¶63} Under this assignment of error, appellant argues the trial court abused its discretion by not allowing her to present evidence, via her expert, regarding the pain she was experiencing as a result by her medical condition. Appellant argues the testimony would have explained her irritable demeanor while in handcuffs. Appellant contends she was prejudiced by the ruling because the state was allowed to present evidence, during its case-in-chief, of how appellant's behavior changed after she was placed in handcuffs and later, during closing, permitted the prosecutor to use this behavior as a sign that she was under the influence during closing.

{¶64} During the state's case-in-chief, the prosecution recounted, via the testimony of Sergeant Matos, the entire arrest. The trooper testified that, upon placing appellant under arrest, she began to pull away from him and struggle. Although he told her to "stop resisting arrest," she continued to pull away. During this process, the trooper testified appellant told him he was "full of it" and "used some swear words ***." Furthermore, during closing, the prosecutor underscored that appellant's uncooperativeness during her arrest was a result of her intoxication.

{¶65} Alternatively, during her case-in-chief, appellant called Dr. Frankie Roman, appellant's primary physician, to testify regarding her medical conditions. He stated appellant had carpal tunnel syndrome, nerve damage to the neck and left side, and chronic pain. He testified she had surgery to alleviate the pain, but it was only effective

for a short time. He further testified to the different medications appellant had been prescribed and their respective effects. Dr. Roman also testified how appellant's medical condition would have affected her ability to perform the FSTs. Defense counsel ultimately attempted to introduce evidence, through Dr. Roman, that appellant's resistance to handcuffs (subsequent to the administration of the FSTs) was a result of pain from which she was suffering due to her medical condition. The state objected, observing: "Your Honor, there is a pending civil litigation out of this. It's the State's contention that this is going down the road of trying to build a case in a civil matter."

{¶66} The court sustained the objection and counsel subsequently proffered that his intention was to have the physician testify that the trooper's actions while handcuffing would have caused a person with appellant's medical condition pain. Hence, any resistance appellant had to the trooper's attempt to handcuff her could be reasonably seen as evidence of the pain she was experiencing at the time of the arrest, not as an indicator of impairment.

{¶67} The admission or exclusion of evidence lies within the broad discretion of a trial court, and a reviewing court should not disturb evidentiary decisions save an abuse of discretion that has created material prejudice. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶43, citing *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290. The term "abuse of discretion" denotes a trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beecher*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, quoting Black's Law Dictionary (8 Ed. Rev. 2004) 11.

{¶68} Generally, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the

matter." Evid.R. 602. This principle, however, is subject to Evid.R. 703, the rule governing bases of opinion testimony by experts. That rule provides:

{¶69} "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Id.

{¶70} Moreover, Evid.R. 703 is supplemented by Evid.R. 705, which provides:

{¶71} "[t]he expert may testify in terms of opinion or inference and give the expert's reasons therefor after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise."

{¶72} It is important to point out, however, that an expert can base an opinion only on facts presented in a hypothetical question if the evidence tending to establish those facts is or has been admitted into evidence. See, e.g., *Sowers v. Middletown Hosp*. (1993), 89 Ohio App.3d 572, 586.

{¶73} While Dr. Roman could not have perceived the specific quality of the pain which appellant experienced while being handcuffed, there was sufficient "facts or data" admitted at trial to support his hypothetical opinion regarding whether the action at issue would cause one suffering from her medical condition pain or discomfort. Specifically, the defense laid a foundation that allowed Dr. Roman to testify regarding his knowledge of the disease processes for which he was treating appellant and the medications he prescribed. Appellant was suffering from nerve damage of the neck and chronic pain, medical problems the effects of which are not within the ken of the average juror.

{¶74} One way of introducing evidence of the effects of her medical problems, namely, the pain from which she was suffering, was through her physician, an expert in

pain control with direct knowledge of appellant's medical problems and the kind of physical movements which might cause one suffering from such problems pain or discomfort. The physical movement at issue was the manner in which Sergeant Matos' placed handcuffs on appellant. Appellant could have directly testified about the nature and intensity of the pain she experienced when the handcuffs were being placed on her wrists; doing so, however, would forfeit her constitutional right not to testify. Appellant was entitled to mount her defense pertaining to her pain and the resulting "mood change" using her expert.

{¶75} Appellant was able to reasonably counter nearly all the state's evidence of her impairment by reference to her medical condition and the pharmacological effects of her medications. Hence, we would be remiss to conclude that the exclusion of this evidence had no effect on the jury's verdict, especially given the heavy emphasis the state placed upon her ostensibly uncooperative post-arrest conduct. Had appellant been given the opportunity to counter the state's argument with her expert's testimony, the jury could have reasonably reached a different verdict. The state's basis for its objection, i.e., the pendency of civil litigation, was irrelevant and therefore we hold the trial court abused its discretion in sustaining the state's objection.

{¶76} Appellant's sixth assignment of error is sustained.

{¶77} Although the foregoing is reversible error, we shall nevertheless address appellant's third assignment of error because the issue it raises is capable of repetition in later proceedings. Appellant's third assignment of error alleges:

{¶78} "The trial court permitted plain error under Criminal Rule 52(B), substantially affected the appellant[']s right[s] and deprived the defendant of a fair trial[]

when the court allowed prosecutorial misconduct during closing arguments where the prosecutor elevated the standard for defendant's conduct to that of an officer of the court and not like all other defendants and intentionally elevated the standard of her conduct with which she must conform and lowering the bar for conviction to less than beyond a reasonable doubt."

{¶79} Under this assignment of error, appellant contends the prosecutor's reference to her status as an attorney during closing argument was improper because it implicitly indicated she should be subject to a higher standard of conduct than that of a defendant without legal training or expertise. In suggesting to the jury that they hold her, as an attorney, to a higher standard, appellant maintains the prosecutor undermined her right to be convicted only upon proof beyond a reasonable doubt.

{¶80} "[A] prosecutor has wide latitude in closing arguments. As long as an improper comment is isolated and does not deprive the defendant of a fair trial, it will not constitute reversible error. *** 'The test for prosecutorial misconduct is whether remarks are improper and, if so, whether they prejudicially affected substantial rights of the accused. ***'" (Internal citation omitted.) *State v. Bleasdale* (Sept. 6, 1996), 11th Dist. No. 95-A-0047, 1996 Ohio App. LEXIS 3876, *7, quoting *State v. Lott* (1990), 51 Ohio St.3d 160, 165. The closing argument must be considered in its totality to determine whether it was prejudicial. *State v. Jenkins,* 11th Dist. No. 2006-T-0058, 2007-Ohio-4227, at ¶54.

{¶81} During closing, the prosecutor fairly observed that the consumption of alcohol commonly inhibits judgment and impairs decision making. He underscored that such effects could be exacerbated by mixing alcohol with prescription drugs. Indeed, he

recalled that during voir dire, "a number of you told us *** yesterday, you don't mix alcohol with prescription drugs." According to the prosecutor, "[t]hat's commonsense." The prosecutor pointed out that, on the night of her arrest, appellant chose to mix pain medications, an anesthetic, and an anti-seizure medication with alcohol and "what's worse *** she chose to drive." In the context of this discussion, the prosecutor made the following statements to the jury:

{¶82} "We heard the trooper on the video indicate that, 'Ma'am' - - when he's explaining the test, 'Ma'am, if you're an attorney, you know I have to go through these instructions with you and I have to ask you these questions.' She didn't deny being an attorney when he said that. An attorney. An officer of the Court.

{¶83} "A person who studies the law should know the law, then turns around when he goes to place her under arrest and behaves as you saw her behave on the video. She knows better. She would know better today. Probably knew better yesterday. But she didn't seem to know better the night in question because she was under the influence of alcohol and drugs.

{¶84} "What's more *** when [the trooper] has the cuffs on her, she tells him he's full of shit.

{¶85} "Now, an attorney I would expect and I hope you would expect and I hope we can agree on this, that an attorney who is part of the legal system would have a little bit more appreciation for how an officer of the law, a law enforcement officer such as Sergeant Matos, plays into the picture of upholding the legal system. And she attacked that.

{¶86} "Would she normally do that? Probably not. This night she did. And the reason for that was it was the alcohol. It was the drugs. Drugs that were in her system that were affecting her judgment and what she was doing.

{¶87} "He places her in the car. You hear her demeanor. Even if we couldn't make out the words on the tape yesterday, it was difficult because of the sound quality system [sic]. If you didn't hear the words, you heard her demeanor and the tone of her voice when he sat her in the car.

{¶88} "Again, would you expect that kind of behavior from an attorney. I would argue no. Again, that's the alcohol and drugs that were in her system speaking."

{¶89} The prosecutor's strategy in closing focused on the way in which the consumption of alcohol and prescription medications, together, impairs one's judgment and affects one's behavior. To illustrate his point, he directed the jury's attention to the change in appellant's demeanor from the beginning of the stop up until the trooper attempted to place handcuffs on her. Viewed in the abstract, this is a legitimate theme for summation. Under the circumstances of this case, however, the argument is illegitimate for several important reasons.

{¶90} First, as discussed above, the prosecutor was responsible for the exclusion of evidence indicating her change in behavior could be explained by the pain she experienced from her medical condition. Had the jury been able to hear Dr. Roman's testimony on this issue, appellant could have countered the prosecutor's argument with a plausible alternative explanation for her ostensible uncooperativeness. We believe it was illegitimate for the prosecutor, on one hand, to object to appellant's medical explanation of her demeanor and, on the other hand, use the same demeanor

as evidence of appellant's impairment. To the extent the prosecutor wished to go down this road in closing, the jury should have been allowed to hear both constructions of the evidence.

{¶91} Moreover, the trial court, in sustaining the state's objection to Dr. Roman's testimony, ruled that because appellant was not charged with resisting arrest, her apparent resistance to the trooper's arrest was "not an issue in this case." Despite this ruling, the prosecutor placed heavy emphasis upon her lack of cooperation (or resistance) during her arrest. Had the judge known the prosecutor intended on using this behavior during closing, she may have ruled differently on the state's objection. Nevertheless, the state used appellant's behavior, which the court had deemed a non-issue to the charge, as a primary theme of its closing argument. Although there was no objection by defense counsel, we still find it troubling that the state ignored a ruling which it had previously invited through one of its own objections.

{¶92} Finally, the foregoing problems were compounded by the prosecutor's suggestion that appellant be held to a higher standard than that of a typical defendant. Earlier in the trial, the prosecutor asked the trooper whether he was aware of appellant's occupation. The trial court sustained defense counsel's objection, ruling appellant's occupation was irrelevant to the charge. The prosecutor ignored the trial court's ruling (for the second time) and utilized appellant's status as an attorney as a means of provoking the jury.

{¶93} By focusing the jury's attention on her status as an attorney (a fact that was specifically excluded as irrelevant in a previous evidentiary ruling and never conceded at trial), the prosecutor implicitly urged the jury to punish appellant for acting

in a manner somehow inconsistent with what one should expect from an officer of the court. Appellant's profession and the unclear social expectations on which the prosecutor invited the jury to judge her are, as the trial court determined, fundamentally irrelevant to the charge of OVI. The prosecutor's closing argument, therefore, can be reasonably seen as an attempt to cajole the jury into convicting appellant on a basis other than the evidence presented.

{¶94} Statements that might "inflame the passions and prejudice of the jury" are improper because they wrongly "'invite the jury to judge the case upon standards or grounds other than those upon which it is obligated to decide the case, namely, the law and the evidence.'" *State v. Cunningham*, 178 Ohio App.3d 558, 568, 2008-Ohio-5164, quoting *State v. Draughn* (1992), 76 Ohio App.3d 664, 671. A prosecutor may not invoke the community's abhorrence to certain actions or nebulous expectations a defendant's conduct failed to meet in an attempt to sway the jury's judgment. See, e.g., *United States v. Solivan* (C.A.6, 1991), 937 F.2d 1146, 1153. "'The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his [or her] own guilt or innocence.'" Id., quoting *United States v. Monaghan* (D.C. Cir., 1984), 741 F.2d 1434, 1441. As the Supreme Court of the United States has observed, a prosecutor is entitled to:

{¶95} "*** 'strike hard blows, but [he or she] is not at liberty to strike foul ones. It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

{¶96} "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney,

will be faithfully observed. Consequently, improper suggestions [or] insinuations *** are apt to carry much weight against the accused when they should properly carry none." *Berger v. United States* (1935), 295 U.S. 78, 88.

{¶97} Here, the prosecutor could have made his argument in accordance with his "impaired judgment" theme without spotlighting appellant's status as an attorney or referencing conduct that was deemed a non-issue for trial. And, he did not need to ask rhetorical questions about whether the jury would (or should) expect such conduct from an attorney. It is well-established that prosecutors are entitled to great latitude in closing argument as to what the evidence has shown and what inferences the factfinder may draw. See, e.g., *State v. Lott* (1990), 51 Ohio St.3d 160, 166. The prosecutor's argument in this case, however, went beyond the evidence and, as a result, transcended the bounds of fair play. Appellant was entitled to have the jury determine her guilt based upon the evidence submitted at trial. The prosecutor's emphasis on appellant's profession and what the public should expect from such professionals violated this right. Although defense counsel did not object to the prosecutor's improper comments, we hold the remarks were plain error pursuant to Crim.R. 52.

{¶98} Appellant's third assignment of error has merit.

{¶99} **CONCLUSION**

{¶100} We find no errors in the trial court's decision overruling appellant's motion to suppress evidence. All arguments related to this aspect of the proceedings are therefore overruled. However, by erroneously denying appellant the opportunity to present evidence of the pain she was experiencing due to her medical condition while she was in handcuffs, the court undermined her ability to defend herself against the

prosecutor's theory that her behavior in handcuffs was evidence of her intoxication. Moreover, the prosecutor's argument that appellant's behavior was unbefitting of an attorney and somehow disrespectful to the legal system, implied that the jury should condemn appellant for acting in a manner inconsistent with the community's expectation of a professional. Making this suggestion invited the jury to judge appellant on bases not supported by and irrelevant to the evidence submitted at trial. Because these errors prejudiced appellant's right to a fair trial, we hold the instant matter is reversed and remanded for a new trial.

{¶101} For the reasons discussed above, appellant's first, fourth and fifth assignments of error are overruled. Appellant's third and sixth assignments of error are sustained. Thus, the judgment denying appellant's motion to suppress is affirmed, while the judgment of conviction is reversed and remanded.

COLLEEN MARY O'TOOLE, J., concurs in judgment only,

DIANE V. GRENDELL, J., concurs in part, dissents in part with a Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in part, dissents in part with a Dissenting Opinion.

{¶102} I agree with the majority's disposition of the first, fourth, and fifth assignments of error. I disagree, however, with the majority's disposition of the third and sixth assignments of error.

{¶103} As to the third assignment of error, the record does not support a finding of plain error. Given that King failed to object to the prosecutor's allegedly improper

comments at trial, pursuant to Crim.R. 52(B), such comments must rise to the level of plain error before this court can reverse appellant's convictions. "Prosecutorial misconduct rises to the level of plain error if it is clear the defendant would not have been convicted in the absence of the improper comments." *State v. Anderson*, 11th Dist. No. 2008-P-0002, 2008-Ohio-6413, at ¶47 (citation omitted).

{¶104} Evidence presented demonstrated that the arresting officer noticed a moderate odor of alcoholic beverage coming from King's vehicle; King's eyes were red and glassy, her speech was noticeably slurred; and the FSTs, which King failed, were administered in substantial compliance with NHTSA standards. Under the circumstances evidenced in the record, it is not reasonable to conclude that the trial court's outcome would have been different if the Prosecutor's comments had not been made. Accordingly, the alleged error does not rise to the level of plain error and the third assignment of error is without merit.

{¶105} The sixth assignment of error is without merit as well. The majority found that the trial court abused its discretion by excluding the challenged testimony, reasoning that "[h]ad appellant been given the opportunity to counter the state's argument with her expert's testimony, the jury could have reasonably reached a different verdict."

{¶106} During the sidebar exchange with the court, King's counsel proffered that he was going to have the witness "testify that based on [King's] condition and having her arm in that position she was in pain." Further, counsel stated that "[t]he sergeant has testified and stated repeatedly that [King] was resisting. And I think that it is appropriate for the doctor to say based on her condition - -." The court responded that

King could testify herself to her pain during the arrest and that King is "not charged with resisting, so that's not an issue in this case anyway."

{¶107} King was charged with OVI. Testimony regarding the pain she felt when handcuffed does not make the underlying conviction for OVI more or less probable. The decision to exclude the testimony was not unreasonable, arbitrary, or unconscionable.

{¶108} Furthermore, the majority maintains that "[o]ne way of introducing evidence of the effects of [King']s] medical problems, namely, the pain from when she was suffering, was through her physician, an expert in pain control with direct knowledge of [King's] medical problems and the kind of physical movements which might cause one suffering from such problems as pain or discomfort." I disagree. Eliciting this testimony from the expert witness contravenes the Ohio Rules of Evidence. Moreover, in contrast to the contention of the majority, the record was lacking in sufficient facts or data to support a hypothetical opinion regarding whether the action at issue would cause King suffering from her medical condition.

{¶109} Evid.R. 705 provides that "[t]he expert may testify in terms of opinion or inference and give the expert's reasons therefor [sic] after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise." As the majority notes, "[t]he physical movement at issue was the manner in which Sergeant Matos placed handcuffs on appellant." Consequently, the expert would only be able to base an opinion on facts presented in a hypothetical question if the evidence tending to establish those facts is or has been admitted into evidence. See *Sowers v. Middletown Hosp*. (1993), 89 Ohio App.3d 572, 586; *Burens v. Indus. Comm.*

of Ohio (1955), 162 Ohio St. 549, at paragraph one of the syllabus ("The hypothesis upon which an expert witness is asked to state an opinion must be based upon facts within the witness' own personal knowledge or upon facts shown by other evidence."). The doctor had no independent knowledge of the details of the manner in which Sergeant Matos placed the handcuffs on King or if King actually experienced pain or discomfort during the exact movements. Thus, the hypothetical question was not based upon facts within the witness' own personal knowledge or upon facts shown by other evidence.

{¶110} For the aforementioned reasons, I would affirm the decision of the trial court in its entirety.