[Cite as *State v. Clark*, 2010-Ohio-4567.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-039
	:	O P I N I O N
- vs -		9/27/2010
	:	
MARK A. CLARK,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY MUNICIPAL COURT
Case No. TRC0807859

Jessica Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Julie D. Steddom, 134 North Front Street, Ripley, Ohio 45167, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, Mark A. Clark, appeals a decision of the Brown County Municipal Court overruling his motion to suppress evidence obtained from field sobriety tests taken in connection with a traffic stop. For the reasons outlined below, we affirm the judgment of the trial court.

{¶2} In the late evening hours of December 3, 2008, Officer Jeff Wolf of the

village of Aberdeen Police Department was on patrol in the area of U.S. Route 52 and Millston Road in Brown County. Officer Wolf pulled into the parking lot of the Lively Lady Bar and turned his cruiser around to exit the lot. Prior to exiting, Wolf observed appellant's vehicle enter the lot. Officer Wolf noticed that the rear license plate on the vehicle was not illuminated and was obstructed by a hitch. Wolf followed appellant's vehicle out of the parking lot onto U.S. 52 and initiated a traffic stop.

{¶3} Officer Wolf exited his cruiser and made contact with appellant. Wolf informed him of the rear license plate violation. Wolf testified that almost immediately, he noticed a moderate odor of an alcoholic beverage on or about appellant, and that his eyes were glassy and bloodshot. Wolf further testified that appellant's speech was slurred and that he was stumbling over his words.

{¶4} Pursuant to Officer Wolf's request, appellant agreed to submit to several standardized field sobriety tests. Wolf administered the Horizontal Gaze Nystagmus (HGN), the One-Leg Stand (OLS), and the Walk and Turn (W&T) tests. After administering these tests, Officer Wolf placed appellant under arrest and transported him to the police department. Appellant declined to submit to a breathalyzer test.

{¶5} Appellant was subsequently charged with one count of driving a vehicle while under the influence of alcohol (hereinafter "OVI impaired") in violation of R.C. 4511.19(A)(1)(a), a first-degree misdemeanor, and one count of failure to illuminate a rear license plate in violation of R.C. 4513.05(A), a minor misdemeanor. On February 2, 2009, appellant moved, in part, to suppress the evidence obtained from the field sobriety tests. Following a hearing on the matter, the trial court overruled appellant's motion. Thereafter, appellant pled no contest to the OVI impaired charge,

and the license plate charge was dismissed. The trial court found appellant guilty and sentenced him accordingly.

{¶6} Appellant appeals the trial court's decision overruling his motion to suppress, raising a single assignment of error:

{¶7} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT DENIED HIS MOTION TO SUPPRESS THE EVIDENCE."

{¶8} In his sole assignment of error, appellant contends that the trial court erred in failing to suppress the evidence obtained from the field sobriety tests because they were not administered in substantial compliance with National Highway Traffic Safety Administration (NHTSA) standards.

{¶9} Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. When considering a motion to suppress, the trial court assumes the role as the trier of fact, and is therefore in the best position to resolve factual questions and evaluate witness credibility. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. Consequently, a reviewing court must accept the trial court's factual findings if they are supported by competent, credible evidence. Id. However, with respect to the trial court's legal conclusions, an appellate court applies a de novo standard of review to determine whether the trial court applied the appropriate legal standard. *State v. Bryson* (2001), 142 Ohio App.3d 397, 402.

{¶10} Crim.R. 47 provides that a motion in a criminal proceeding shall "state with particularity the grounds upon which it is made and shall set forth the relief or order sought." In accordance with this rule, a defendant seeking to secure a hearing on a motion to suppress field sobriety test results must "state the motion's legal and

factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *State v. Shindler*, 70 Ohio St.3d 54, 1994-Ohio-452, syllabus. Once the defendant satisfies this initial burden, the burden then shifts to the state to show the requisite level of compliance with the applicable testing standards. *State v. Plunkett*, Warren CA2007-01-012, 2008-Ohio-1014, ¶11.

{¶11} The typical standards applicable to field sobriety tests are those from the NHTSA manual. *State v. Jimenez*, Warren App. No. CA2006-01-005, 2007-Ohio-1658, ¶12. In order to satisfy its burden of proof, the state is not required to show strict compliance with NHTSA standards, but instead, clear and convincing evidence of substantial compliance with NHTSA standards is sufficient. R.C. 4511.19(D)(4)(b); *State v. Schmitt,* 101 Ohio St.3d 79, 2004-Ohio-37, ¶9.

{¶12} The extent of the state's burden of proof in establishing compliance with the standards is dictated by the level of specificity with which the defendant challenges the legality of the field sobriety tests. *State v. Henry*, Preble App. No. CA2008-05-008, 2009-Ohio-10, ¶12, quoting *State v. Nicholson*, Warren App. No. CA2003-10-106, 2004-Ohio-6666, ¶10. Where a defendant's motion to suppress merely raises issues in general terms and is not sufficiently specific, the state's burden to show compliance is slight and it need only "present general testimony that there was compliance." Id. However, as this court has consistently noted, even if the defendant's motion lacks the required particularity he may still provide some factual basis, either during cross-examination at the suppression hearing or by conducting formal discovery, to support his claim that the applicable standards were not followed in an effort to raise the "slight burden" placed on the state. *Plunkett* at ¶25-26, citing *State v. Embry*, Warren App. No. CA2003-11-110, 2004-Ohio-6324, ¶12; *State v.*

Fink, Warren App. Nos. CA2008-10-118, CA2008-10-119, 2009-Ohio-3538, ¶25.

{¶13} In this case, appellant filed a very general, boilerplate motion to suppress and a supporting memorandum that failed to allege any facts in support of his contention that the NHTSA standards were not followed. In his one-page motion, he alleged only that "[t]he tests were taken in violation of [appellant's] constitutional rights in violation of due process of law * * *. [sic]" His accompanying memorandum in support similarly failed to set forth specific factual grounds for his claim. Although on its face, the motion provided the state and the court with notice of a general challenge to the admissibility of the field sobriety tests, the vague language was insufficient to raise the state's slight burden of proof. See *Henry* at ¶14-18.

{¶14} Although his motion lacked the required particularity, upon review of the transcript of the suppression hearing, we note that appellant obtained factual support for his claims during his cross-examination of Officer Wolf. The record contains 16 pages of cross-examination testimony, during which appellant's trial counsel asked specific questions relating to the administration of each of the field sobriety tests at issue. The facts elicited on cross-examination were sufficiently particular to raise the otherwise slight burden of proof on the part of the state in establishing that the tests were administered in substantial compliance with NHTSA standards.

{¶15} Before addressing the merits of appellant's arguments on appeal, we observe that the trial court's entry overruling appellant's motion to suppress did not contain any factual findings with regard to the administration of the field sobriety tests. Crim.R. 12(F) requires a trial court to "state its essential findings on the record" when issues of fact are involved in determining a motion. In its entry overruling appellant's motion, the court found only that the "physical tests were completed in

substantial compliance with the NHTSA manual."[1]

{¶16} Nevertheless, the trial court's failure to provide its factual findings is not fatal to our review of the court's decision. The transcript of the suppression hearing and the arguments presented by the parties provide a sufficient basis to review the merits of appellant's assignment of error. Id. See, also, *State v. Hamilton*, Lucas App. No. L-07-1254, 2008-Ohio-8, ¶17.

Officer Wolf's Field Notes

{¶17} With regard to the merits of his arguments, as an initial matter, appellant contends that Officer Wolf's failure to take field notes during his performance of the sobriety tests rendered the results of those tests inadmissible. In his brief, he raises this issue in the context of the administration of the W&T test, but appears to also contend that it applies to the admissibility of the results of both the HGN and OLS tests. Appellant argues that note taking during the performance of the tests was "necessary for accurate scoring," and that by failing to take notes while the tests were being performed, Officer Wolf failed to substantially comply with NHTSA standards. We disagree.

{¶18} At the outset, we note that Officer Wolf testified at the suppression hearing that he received instruction in alcohol detection and prevention in the context of his training at the police academy, and was taught how to conduct each of the three NHTSA field sobriety tests. Wolf testified that he was certified to administer the field sobriety tests pursuant to NHTSA standards in 2005.[2]

1. Crim.R. 12(F) is not self-executing, and a defendant must request that the trial court state its findings of fact on the record. *State v. Bennett*, Cuyahoga App. No. 86962, 2006-Ohio-4274, ¶16. In this case, appellant failed to file a motion with the trial court specifically requesting findings of fact.
2. The trial court took judicial notice of the NHTSA manual at the suppression hearing.

{¶19} On cross-examination, Officer Wolf stated that he prepared field notes from memory subsequent to appellant's arrest, but did not take any notes while the testing was taking place. However, as the state points out, the NHTSA manual's instructions on note taking are provided to assist the officer in testifying at trial. Although the manual recommends that an officer take notes as the subject is performing each of the tests, it is not a required element of the testing. Accordingly, the failure to take notes at the time the tests are performed does not render the results of those tests inadmissible. See *Brookpark v. Key*, Cuyahoga App. No. 89612, 2008-Ohio-1811 (finding substantial compliance with NHTSA guidelines where there was evidence in the record that the officer did not take field notes during the testing, but wrote the notes from memory when he returned to the police station).

{¶20} We now turn our attention to the specific issues raised by appellant with regard to the administration of each of the field sobriety tests.

The HGN Test

{¶21} Appellant argues that the trial court erred in failing to suppress evidence relating to the results of the HGN test. Specifically, appellant contends that Officer Wolf failed to substantially comply with the NHTSA standards in administering the test because (1) he failed to position the stimulus 12 to 15 inches from appellant's eyes; (2) he improperly checked for smooth pursuit of the stimulus three times on each eye and did not move the stimulus at the proper rate of speed; (3) while checking for distinct nystagmus at maximum deviation, he failed to hold the stimulus for four seconds; and (4) in checking for the onset of nystagmus prior to 45 degrees, he failed to move the stimulus at a speed of four seconds, and improperly held the stimulus for several seconds at the point of onset.

{¶22} In conducting the HGN test, the NHTSA manual provides that "a police officer should instruct the suspect that [he is] going to check the suspect's eyes, that the suspect should keep [his] head still and follow the stimulus with [his] eyes, and that the suspect should do so until told to stop. After these initial instructions are provided, the officer is instructed to position the stimulus approximately 12 to 15 inches from the suspect's nose and slightly above eye level. The officer is then told to check the suspect's pupils to determine if they are of equal size, the suspect's ability to track the stimulus, and whether the suspect's tracking is smooth. The officer is then to check the suspect for nystagmus at maximum deviation and for onset of nystagmus prior to 45 degrees." *Henry*, 2009-Ohio-10 at ¶19, quoting *State v. Wood*, Clermont App. No. CA2007-12-115, 2008-Ohio-5422, ¶16. The manual instructs the officer to repeat each of the three portions of the HGN test.

{¶23} In addition, the NHTSA guidelines list certain approximate and minimum time requirements for the various portions of the test. For instance, when checking for smooth pursuit, the time to complete the tracking of one eye should take approximately four seconds. When checking for distinct nystagmus at maximum deviation, the examiner must hold the stimulus at maximum deviation for a minimum of four seconds. When checking for the onset of nystagmus prior to 45 degrees, the officer should move the stimulus from the suspect's eye to his shoulder at an approximate speed of four seconds. See *Embry*, 2004-Ohio-6324 at ¶38.

{¶24} Wolf testified on direct examination that he gave appellant the instructions for the test, and during its administration, he obtained four out of six possible clues of intoxication. Wolf also observed that two clues for vertical nystagmus were present.

{¶25} On cross-examination, appellant's counsel raised specific issues about the administration of the test. With regard to the initial positioning of the stimulus, Wolf testified as follows: "I instruct the subject of the test to focus on the edge of my stimulus, which is normally a pen, and hold it about 18 - - 12 to 18 inches from their eyes, and ask them to follow that pen with their eyes and not move their head." Upon further questioning, Wolf testified that he holds the stimulus 18 inches away from the individual.

{¶26} Wolf initially testified that he performs the smooth pursuit portion of the test "two to three" times, but upon further questioning, clarified his testimony, stating that he performed the test three times on appellant. Wolf also testified that it took him approximately three or four seconds to move the stimulus out across appellant's field of vision in checking for smooth pursuit.

{¶27} In testing for nystagmus at maximum deviation, Officer Wolf testified that he moves the stimulus out "until their eyes are facing that direction to what you believe is maximum deviation, watching for the bouncing of the eyes." Wolf further testified that he moves the stimulus at a rate of speed of "three seconds out and three seconds back." He stated that he holds the stimulus at maximum deviation for four to five seconds.

{¶28} Finally, in testing for the onset of nystagmus prior to 45 degrees, Officer Wolf explained that he moves the pen out at what he believes is a 45 degree angle and watches for the involuntary jerking of the eyes. Wolf also testified that he moves the stimulus at a rate of approximately two seconds and holds the stimulus for three to four seconds once he reaches the point of onset.

{¶29} Upon review of the record, we conclude that Officer Wolf substantially

complied with the NHTSA standards in administering the HGN test. With regard to the positioning of the stimulus, although Officer Wolf admitted on cross-examination that holding the stimulus 18 inches from the suspect was not in strict compliance with the NHTSA manual's recommendation of 12 to 15 inches, this court has held that the HGN test is not rendered inadmissible when a stimulus is held as close as 8 inches (a deviation of four inches) from a suspect's face. See *Henry*, 2009-Ohio-10 at ¶23. In this case, we find that a deviation of three inches from the recommendation of the manual constitutes substantial compliance.

{¶30} In checking for smooth pursuit, Wolf testified to performing the test three times. The NHTSA manual provides that the procedure is to be "repeated." However, appellant has not argued, and we fail to find, that he was prejudiced by the fact that Officer Wolf performed the smooth pursuit portion of the test three times.

{¶31} Appellant also points out that Wolf testified on cross-examination that he "could not recall" some of the approximate and minimum times outlined in the NHTSA manual. However, the record indicates that in checking for nystagmus at maximum deviation, Wolf properly held the stimulus for four seconds. Although appellant further contends that in checking for the onset of nystagmus prior to 45 degrees, Wolf improperly held the stimulus for three to four seconds, the manual provides that once the officer observes that the eye is jerking, they are to "stop and verify that the jerking continues." In light of this instruction, we do not find that appellant was prejudiced by the fact that Wolf held the stimulus for several seconds.

{¶32} Officer Wolf also admitted on cross-examination that he did not strictly comply with the NHTSA timing recommendations in testing for smooth pursuit. In addition, in checking for the onset of nystagmus prior to 45 degrees, Wolf testified to

moving the stimulus at a speed of two seconds, rather than four seconds as recommended in the NHTSA manual. In checking for the onset of nystagmus prior to 45 degrees, the manual cautions the officer not to move the stimulus too fast so as not to go past the point of onset or miss it altogether.

{¶33} However, this court has determined that substantial compliance with NHTSA regulations was shown where, in testing for the onset of nystagmus prior to 45 degrees, an officer took two seconds to move the stimulus out, rather than the four seconds outlined in the manual. *State v. Lange*, Butler App. No. CA2007-09-232, 2008-Ohio-3595, ¶10-11, citing *Cleveland Heights v. Schwabauer*, Cuyahoga App. No. 84249, 2005-Ohio-24, ¶24-25. In *Lange*, we noted that no prejudice was shown to the defendant because "presumably moving the stimulus in strict compliance with the manual would have rendered the same, if not worse results." Id. at ¶11, citing *Schwabauer* at ¶25. In this case, we likewise conclude that appellant was not prejudiced by the fact that Officer Wolf moved the stimulus at a differing rate of speed than that set forth in the NHTSA manual in checking for smooth pursuit of the stimulus and the onset of nystagmus prior to 45 degrees.

{¶34} Based on the foregoing, we find that the state met its burden of demonstrating by clear and convincing evidence that the HGN test was administered by Officer Wolf in substantial compliance with the NHTSA standards.

The OLS Test

{¶35} Appellant also takes issue with the OLS test, arguing that the results of the test should have been suppressed because Officer Wolf did not administer it in substantial compliance with the NHTSA manual.

{¶36} In administering this test, the NHTSA manual requires the officer to

instruct the subject "that [he] must begin the test with [his] feet together and that [he] must keep [his] arms at [his] side for the entire test. The officer also [must tell] the suspect that he must raise one leg, either leg, six inches from the ground and maintain that position while counting out loud for thirty seconds. * * * NHTSA standards provide that the counting should be done in the following manner: 'one thousand and one, one thousand and two, until told to stop.'" *Henry*, 2009-Ohio-10 at ¶24, quoting *Nicholson*, 2004-Ohio-6666, ¶24.

{¶37} Wolf testified that he told appellant to stand with his feet together and with his arms at his sides. He told appellant not to begin the test until instructed. Wolf further instructed appellant to raise either foot six inches from the ground, and while keeping his hands down at his sides, count from one to 30. Wolf instructed appellant to count in the following manner: "one-one hundred, two-one hundred, three-one hundred." Officer Wolf then demonstrated the test for appellant.

{¶38} According to Wolf, appellant began the test before the instructions were over, and "constantly" lifted his arms more than six inches from his waist in order to keep balance. Wolf testified that appellant did not finish counting to 30. He stopped at 20 and put his foot down during counting. The NHTSA manual states that a suspect's use of their hands for balance and placing their foot down during testing are two out of four possible clues of intoxication.

{¶39} Appellant's challenge on appeal focuses on the fact that Wolf testified on cross-examination that he did not independently time the test.[3] The NHTSA

3. Although appellant's counsel stated during cross-examination that Officer Wolf used an improper counting format, i.e., "one-one hundred" instead of "one thousand and one," we note that a law enforcement officer is not required to provide the accused with the NHTSA instructions verbatim. *State v. Way*, Butler App. No. CA2008-04-098, 2009-Ohio-96, ¶24. Despite the deviation from the

manual provides that the officer "should always time the 30 seconds," and appellant contends that the failure to time the test constitutes a lack of substantial compliance.

{¶40} Appellant correctly notes that the NHTSA manual provides that time is a critical component of the test. The manual stresses that counting is important because a person with a blood alcohol content above 0.10 can maintain balance for up to 25 seconds, but seldom as long as 30 seconds. In this case, both "clues" of intoxication were observed by Officer Wolf during the period that appellant was counting to 20. Because these clues were observed before appellant had counted to 30, we find that he was not prejudiced by Officer Wolf's failure to independently time the OLS test. See, generally, *State v. Beechler*, Clark App. No. 09-CA-54, 2010-Ohio-1900, ¶93.

{¶41} Upon review, we find that there is clear and convincing evidence in the record to establish that the OLS test was administered in substantial compliance with NHTSA standards.

The W&T Test

{¶42} Appellant also argues that the results of the W&T test should have been suppressed because Officer Wolf failed to substantially comply with the NHTSA manual in providing appellant with instructions for the test.

{¶43} The NTSA manual states that an officer is required to first instruct the suspect of the initial positioning, which requires the suspect to stand with his arms down at his side, and to place his left foot on a line (real or imaginary). The suspect's right foot is to be placed on the line ahead of the left foot, with the heel of the right

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language of the manual, the instructions were sufficient to apprise appellant of the manner in which he was to perform the test, and were not prejudicial. Id.

foot against the toe of the left foot. The suspect is then told to remain in that position while further instructions are given. These further instructions include the "method by which the suspect walks while touching his heel to his toe for every step, counting the nine steps out loud while walking down the line, and making a turn with small steps with one foot while keeping the other foot on the line. The officer is also told to demonstrate the instructions to ensure that the suspect fully understands." *Henry*, 2009-Ohio-10 at ¶32.

{¶44} Officer Wolf testified that in instructing appellant of the initial positioning, he told appellant to "stand with [his] feet together and [his] arms down to the side during instructions," and not to begin the test until instructed. In his additional instructions, Wolf testified that he identified a straight line, and told appellant to take nine heel-to-toe steps down the line. Officer Wolf told appellant to start the test with whichever foot he preferred, and further instructed appellant as follows: "when he reache[d] the end [of the line], the foot that he takes the ninth step on, to pivot on that foot stepping with his opposite foot to rotate into the opposite direction and take nine heel-to-toe steps back to his original location." Wolf testified that he demonstrated the first "two to three" steps as well as the turning portion of the test.

{¶45} The record indicates that Officer Wolf observed three out of eight possible "clues" of intoxication on the W&T test: (1) appellant raised his arms more than six inches from his sides in order to maintain balance; (2) he did not touch heel-to-toe and there was "quite a gap" between his heel and his toe when he stepped;[4] and (3) he turned incorrectly on the turn.

4. Although Officer Wolf testified to observing four clues, his observation that appellant did not touch heel-to-toe and that there was a gap between his heel and his toe constituted only one clue under the NHTSA manual.

{¶46} The only aspect of the test that appellant took issue with on cross-examination was the fact that Wolf did not instruct appellant to place his left foot on the line with his right foot ahead of the left, and that he told appellant that he could start walking with whichever foot he preferred. However, a law enforcement officer is not required to provide the accused with the NHTSA instructions verbatim. See *Way*, 2009-Ohio-96 at ¶24. 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." *Henry,* 2009-Ohio-10 at ¶27. Although Officer Wolf incorrectly told appellant to initially stand with his feet together, and indicated that appellant could begin the test with either foot, Wolf's testimony demonstrates that he sufficiently instructed appellant on how to perform the W&T test, and nothing in the record indicates that appellant failed to understand how to perform the test. *Way* at ¶24, citing *Wood*, 2008-Ohio-5422, ¶29; *Nicholson*, 2004-Ohio-6666, ¶23. As a result, we find that the state met its burden of demonstrating by clear and convincing evidence that the W&T test was administered in substantial compliance with NHTSA standards.

{¶47} Based on the foregoing, we conclude that the trial court did not err in overruling appellant's motion to suppress. Appellant's sole assignment of error is overruled.

{¶48} Judgment affirmed.

POWELL, J., concurs.

HENDRICKSON, J., concurs separately.

HENDRICKSON, J., concurring separately.

{¶49} I agree with the majority opinion that the NHTSA manual's instructions on note taking during the three field sobriety tests is not a specific requirement. It is merely a recommendation. Even if such note taking were a NHTSA requirement, appellant failed to show that he was prejudiced in any way by Officer Wolf's failure to comply with this mandate. Cf. *State v. Way*, Butler App. No. CA2008-04-098, 2009-Ohio-96, ¶20. In view of the fact that Officer Wolf was the sole testifying witness, there was no evidence indicating that the notes recorded by the officer after conducting the field sobriety tests were incorrect. Consequently, I concur with the portion of the majority opinion declining to find that the officer's failure to take notes during the administration of the field sobriety tests rendered the results of those tests inadmissible.

{¶50} I also concur with the majority in its finding that Officer Wolf substantially complied with the NHTSA requirements for the one-leg stand test. Although the officer instructed appellant to count in the manner of "one-one hundred, two-one hundred" rather than "one thousand and one, one thousand and two," his instruction was sufficient to constitute substantial compliance with NHTSA requirements for the test. Appellant also challenges Officer Wolf's failure to independently time the one-leg stand test. NHTSA instructs the officer to have the subject count up to the number 30. According to the NHTSA manual, the original research on which the manual was based showed that a person with a blood alcohol content of 0.10 or higher can maintain his balance for up to 25 seconds, but seldom as long as 30 seconds. In addition, the manual instructs the officer to independently

time the 30-second interval. In the present matter, appellant did not show how he was prejudiced by the officer's failure to time the test. See id. Appellant himself stopped counting at 20 seconds and put his foot down. He cannot now complain about the failure to reach the full 30-second count when appellant shortened the interval himself.

{¶51} As to the HGN, I concur for the most part with the majority's reasoning, but make the following separate findings:

{¶52} First, appellant contends that Officer Wolf failed to hold the stimulus 12 to 15 inches from appellant's eyes. The majority properly cites a holding previously enunciated by this court conveying that a four-inch deviation is still in substantial compliance with NHTSA requirements. *State v. Henry*, Preble App. No. CA2008-05-008, 2009-Ohio-10, ¶23. I concur with the majority on this point because the NHTSA manual instructs the administering officer to "[p]osition the stimulus *approximately* 12 – 15 inches from the suspect's nose * * *." (Emphasis added.) This indicates that there is some leeway in the distance that the stimulus should be held from the suspect's nose.

{¶53} Other NHTSA requirements are more rigid and specific, such as the instructions given for looking for nystagmus at maximum deviation. NHTSA instructs the officer to hold the stimulus at maximum deviation "for a *minimum* of four seconds * * *." (Emphasis added.) Here, NHTSA did not use the word "approximately." Therefore, it is important to hold the stimulus a minimum of four seconds for maximum deviation. By contrast, there is more room for deviation in the distance that the stimulus should be held from the suspect's nose. Because we have previously held that a four-inch deviation is still in substantial compliance with NHTSA

requirements, a three-inch deviation such as that presented in the case at bar can reasonably be ruled substantially compliant. Cf. *Henry* at ¶23.

{¶54} Second, with respect to the onset of nystagmus prior to 45 degrees, appellant contends that Officer Wolf failed to move the stimulus at a speed of four seconds and improperly held the stimulus for several seconds at the point of onset. Although the 2006 NHTSA manual does set forth a rate of speed for moving the stimulus from side to side, there is no such time requirement suggested by NHTSA for holding the stimulus once nystagmus is detected.

{¶55} The majority cites *State v. Lange*, Butler App. No. CA2007-09-232, 2008-Ohio-3595 to support its position that a deviation of two seconds, rather than four, in moving the stimulus out when testing for the onset of nystagmus prior to 45 degrees is substantially compliant with NHTSA requirements. In *Lange*, this court cited the rationale set forth by the Eighth Appellate District in *Cleveland Heights v. Schwabauer*, Cuyahoga App. No. 84249, 2005-Ohio-24 to find substantial compliance with the third part of the HGN testing. The *Lange* court summarized the *Schwabauer* case in the following parenthetical:

{¶56} "([W]here officer, in addition to two other variations in compliance with the HGN test, checked onset of nystagmus prior to 45 degrees by moving the stimulus across the field of vision for two to three seconds instead of four seconds, HGN test was administered in substantial compliance; NHTSA manual cautions that if officer moves stimulus too fast, officer may go past point of onset or miss it altogether, so *presumably* moving the stimulus in strict compliance with manual would have rendered same, if not worse results, and therefore, no prejudice to defendant is shown)." *Lange* at ¶11. (Emphasis added.)

{¶57} In *Schwabauer*, there was no evidence mentioned in the record to support this presumption. Such a presumption is contrary to the NHTSA instructions for the HGN test. Even though NHTSA initially instructs the administering officer to move the stimulus at a speed of approximately four seconds, the manual contains the following warning in a subsequent paragraph: "NOTE: *It is important to use the full four seconds* when checking for onset of nystagmus. *If you move the stimulus too fast, you may go past* the point of onset or miss it altogether." (Emphasis added.)

{¶58} It is important that the officer detect nystagmus prior to 45 degrees in order to properly interpret the results of the HGN test. The 45 degree angle is a critical component of the test. If the officer moves the stimulus too quickly, i.e., less than four seconds out, the test could be compromised because the officer could perceive nystagmus beyond 45 degrees. Again, it is the wording used by NHTSA that determines what portions of the test should be standardized or consistent when administered.

{¶59} I disagree with the majority's reliance on *Schwabauer* due to the unfounded presumption that moving the stimulus four seconds out for this portion of the HGN, as indicated by the manual, would yield more inaccurate results than deviating from this NHTSA requirement. There was no evidentiary basis in the record in the present case or in *Schwabauer* to substantiate this presumption.

{¶60} There is an additional omission in both *Schwabauer* and the present matter that is problematic. Neither case provided any factual background as to whether the administering officer was able to properly establish the required 45-degree angle when moving the stimulus out at a rate of two seconds. Officer Wolf testified that he *believed* he achieved the 45-degree angle, but he failed to explain

the manner in which he followed the NHTSA requirements for attaining this angle. The establishment of a 45-degree angle is significant in this segment of the HGN test because it represents one of the three clues that an officer is instructed to look for, i.e., whether the onset of nystagmus occurred prior to the stimulus reaching a 45-degree angle. The other two clues are: (1) the eye cannot follow a moving object smoothly, and (2) nystagmus is distinct and sustained when the eye is held at maximum deviation for a minimum of four seconds.

{¶61} In the present matter, Officer Wolf testified that he observed four of the six clues on the HGN test, plus an additional two clues on the vertical gaze nystagmus portion of the test. As the record stands before us, we are unable to discern which four of the six possible clues were actually observed on the HGN. However, because appellant's motion to suppress presented a general challenge to the field sobriety tests, the burden on the state to show substantial compliance with NHTSA requirements regarding the HGN remained slight. *Henry*, 2009-Ohio-10 at ¶12. Appellant bore the burden to present evidence that Officer Wolf failed to observe the onset of nystagmus prior to 45 degrees if he wanted the state to address this specific issue. See *State v. Baker*, Warren App. No. CA2009-06-079, 2010-Ohio-1289, ¶31-32. Since appellant failed to present any evidence on this specific issue, he failed to show how he was prejudiced by any alleged omission on the part of Officer Wolf in administering the HGN. Cf. *Way*, 2009-Ohio-96 at ¶20. Thus, I concur with the portion of the majority opinion affirming the lower court's decision declining to suppress the results of the HGN test in this case.

{¶62} Finally, I concur with the majority's finding that the walk-and-turn test was administered in substantial compliance with NHTSA requirements. NHTSA

specifically and unequivocally provides the following instructions for the walk-and-turn test:

{¶63} "*For standardization* in the performance of this test, have the suspect assume the heel-to-toe stance *by giving the following verbal instructions*, accompanied by demonstrations:

{¶64} "'Place your left foot on the line' (real or imaginary). Demonstrate.

{¶65} "'Place your right foot on the line ahead of the left foot, with heel of right foot against toe of left foot.' Demonstrate." (Emphasis added.)

{¶66} As demonstrated by this quote, NHTSA emphasizes that the subject's heel-to-toe stance must conform with the manual's instructions in order for there to be standardization in the performance of this test. The more the officer deviates from the NHTSA requirements in administering the three field sobriety tests, the less valid the standardized tests become. Hence, the law requires substantial compliance with NHTSA regulations rather than loose compliance.

{¶67} Here, the state had a general burden to establish that Officer Wolf substantially complied with NHTSA requirements as set forth in the 2006 manual in administering the walk-and-turn test. The evidence shows that Officer Wolf incorrectly instructed appellant that he could keep his feet together and that he could start with whichever foot he preferred. Had this specific issue been pursued by the defense, it would have been incumbent upon the state to show that Officer Wolf administered the test in substantial compliance with NHTSA requirements despite these defects. However, the record is silent as to (1) how appellant placed his feet during the instructional stage; (2) whether the officer improperly demonstrated the test in conjunction with his inaccurate instructions; and (3) whether appellant

incorrectly placed his feet when he began performing the test. Inaccurate instructions, alone, do not necessitate a finding that the test was not administered in substantial compliance with NHTSA requirements. Because the burden was on appellant to address these specific issues, the omission of evidence on these points is not grounds for suppression. *Baker*, 2010-Ohio-1289 at ¶31-32. Therefore, I concur with the portion of the majority opinion affirming the lower court's decision declining to suppress the results of the walk-and-turn test in this case.

{¶68} In sum, despite the defects in this case, I believe there was sufficient evidence for the state to meet its slight burden to show substantial compliance with NHTSA regulations in the administration of the three field sobriety tests. I therefore concur with the majority opinion in its entirety.