

[Cite as *State v. Fink*, 2009-Ohio-3538.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2008-10-118 CA2008-10-119
- vs -	:	<u>OPINION</u> 7/20/2009
CHRISTOPHER D. FINK,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MASON MUNICIPAL COURT
Case Nos. 08-TRC-01557 and 08-CRB-00296

Robert W. Peeler, Mason Municipal Prosecutor, Juliette Gaffney Dame, 423 Reading Road, Mason, OH 45040, for plaintiff-appellee

Darin S. Barber, 12 East Warren Street, Lebanon, OH 45036, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, Christopher D. Fink, appeals from the decision of the Mason Municipal Court denying his motion to suppress evidence of field sobriety test results, as well as his conviction for driving under the influence of alcohol and underage consumption. We affirm in part and reverse in part.

{¶2} In the early morning hours of March 11, 2008, appellant was driving home

from a friend's house on a Warren County road when he was involved in a single car accident. Ryan Saylor and Jeffery Everhart, both deputies with the Warren County Sheriff's Department, were dispatched to the scene.

{¶13} Upon his arrival, Deputy Everhart found appellant standing beside the crashed vehicle. Appellant admitted that he had been driving.¹ Thereafter, while speaking with appellant, Deputy Everhart noticed a "very strong odor of alcoholic beverage coming from his person," and that his speech was "lethargic" and "kind of slow." Deputy Saylor, who had since arrived at the scene, also noticed an odor of alcoholic beverage emanating from appellant, as well as from the overturned vehicle. After first denying that he had anything to drink, appellant later admitted to consuming alcohol that evening. At that point, Deputy Saylor administered the horizontal gaze nystagmus (HGN) test, a standardized field sobriety test, to appellant.

{¶14} After appellant completed the HGN test, Deputy Everhart asked him to perform the walk-and-turn and one-leg stand tests, two other standardized field sobriety tests, to which he agreed. At the conclusion of the field sobriety tests, and after Deputy Everhart ran appellant's Social Security number through the police computer, appellant was arrested and transported to the Deerfield Township Post, a part of Warren County Sheriff's Department. Appellant later refused to submit to a breathalyzer test.

{¶15} Appellant was subsequently charged with driving under the influence of alcohol (OVI) in violation of R.C. 4511.19(A)(1)(a), a first-degree misdemeanor, underage consumption in violation of R.C. 4301.69(E)(1), also a first-degree

1. Appellant originally claimed that he had been driving southbound. However, after being informed that it was impossible for him to be traveling south due to the position of the vehicle, as well as the tracks leading

misdemeanor, and failure to control in violation of 4511.202, a minor misdemeanor. Appellant filed a motion to suppress challenging the admissibility of the three field sobriety test results, which the trial court denied. Following a bench trial, appellant was found guilty on all three charges.

{¶16} Appellant now appeals the trial court's decision overruling his motion to suppress, as well as its decision denying his Crim.R. 29 motion for acquittal, raising three assignments of error. For ease of discussion, appellant's assignments of error will be addressed out of order.

{¶17} Assignment of Error No. 2:

{¶18} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT OVERRULED HIS OBJECTIONS TO DEPUTY EVERHART'S TESTIMONY AS TO THE ALLEGED BIRTH DATE OF DEFENDANT-APPELLANT."

{¶19} In his second assignment of error, appellant argues that the trial court erred by permitting Deputy Everhart to testify regarding his date of birth at trial. Specifically, appellant claims the testimony regarding his birth date, which Deputy Everhart apparently obtained from the Law Enforcement Automated Data System ("LEADS"), was inadmissible hearsay, and therefore, since this testimony was the only evidence regarding his age, his conviction for underage consumption should be reversed.² We agree.

up to the scene, and the damage that the accident had caused, appellant admitted that he was, in fact, driving northbound towards his home.

2. The state argues that appellant's date of birth was stipulated to at the suppression hearing. While we are aware that a stipulation of fact, such as appellant's date of birth, renders proof of that specific fact unnecessary, a stipulation is only binding and deemed adjudicated for purposes of determining the remaining issues of the case once it is entered into by the parties and accepted by the court. *State v. Parks*, Cuyahoga App. No. 90368, 2008-Ohio-4245, ¶11; *State v. Abercrombie*, Clermont App. No. CA2001-06-057, 2002-Ohio-2414, ¶28. Although there was some discussion regarding the stipulation of

{¶110} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Roten*, 149 Ohio App.3d 182, 2002-Ohio-4488, ¶5. An appellate court will not disturb a trial court's ruling as to the exclusion of evidence absent an abuse of discretion "and the defendant has been materially prejudiced thereby." *Roten* at ¶6; *State v. McCroskey*, Stark App. No. 2007CA00089, 2008-Ohio-2534, ¶36. A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶111} As defined by Evid.R. 801(C), hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Generally, hearsay testimony is inadmissible unless the testimony falls within one of the recognized exceptions to the hearsay rule. *State v. Bryant*, Warren App. No. CA2007-02-024, 2008-Ohio-3078, ¶37; Evid.R. 802.

{¶112} Appellant was charged with underage consumption in violation of R.C. 4301.69(E)(1), which prohibits, among other things, an "underage person" from possessing or consuming beer or intoxicating liquor. *State v. Britton*, Lucas App. Nos. L-06-1265, L-06-1266, 2007-Ohio-2147, ¶13. An "underage person," as defined by R.C. 4301.69(H)(5), is a person under the age of 21 years.

{¶113} After being asked if he was able to determine appellant's age, Deputy Everhart, over appellant's objection, testified as follows:

{¶114} "Yes, we got his Social Security number, ran it through the LEADS and I believe he was nineteen at the time * * *."

facts at the suppression hearing, which included appellant's date of birth, the record is devoid of any evidence that the parties actually agreed to enter into the stipulation, and furthermore, there is no evidence that the stipulation was ever accepted by the court.

{¶15} Deputy Everhart then testified, after looking at an unidentified document, and again over appellant's objection:

{¶16} "His date of birth, I copied it down, 5/28/89, which would have been 18 years old at the time."

{¶17} Deputy Everhart also testified that he never asked appellant his age, and that appellant did not provide him with his driver's license. The state provided no further evidence relating to appellant's age or date of birth.

{¶18} After a careful review of the record, it is apparent that Deputy Everhart testified regarding appellant's date of birth based solely on undocumented computer generated information that he received through LEADS, and that this information went uncorroborated due to the state's failure to provide the trial court with a copy of appellant's driver's license, or with a printout of the LEADS report.³ See *State v. Fair* (Mar. 6, 1998), Wood App. No. WD-97-054, 1998 WL 114218 at *2. As a result, because there was no evidence indicating appellant told Deputy Everhart his age, nor was there any evidence that Deputy Everhart had personal knowledge of appellant's age and date of birth beyond that which he received from the police computer, the trial court erred by admitting Deputy Everhart's testimony regarding appellant's date of birth as it was inadmissible hearsay. *Id.*; see *State v. Wolderufael*, Franklin App. No. 02AP-1148, 2003-Ohio-3817; *Cleveland v. Mohamoud*, Cuyahoga App. No. 84333, 2004-Ohio-6104; see, also, *State v. Eberts* (Sept. 26, 2000), Franklin App. No. 99AP-1327, 2000 WL

3. This court has previously ruled that a LEADS report printout, once properly authenticated, may be offered in a criminal case. See *State v. Papusha*, Preble App. No. CA2006-11-025, 2007-Ohio-3966. However, allowing a police officer to testify regarding information contained within a LEADS report without offering it as evidence, which is essentially what occurred here, would effectively circumvent the authentication requirements of Evid.R. 901. *Id.* at ¶14-15; see *State v. Peterson* (Nov. 29, 1996), Trumbull

1376447.

{¶19} Further, because Deputy Everhart's testimony was the only evidence referencing appellant's age or date of birth, appellant was clearly prejudiced by its admission at trial. *Fair*, 1998 WL 114218 at *2; *State v. Sims*, Butler App. No. CA2007-11-300, 2009-Ohio-550, ¶16. Therefore, because the state failed to prove appellant was underage, an essential element of an underage consumption charge, we hereby sustain appellant's second assignment of error and order his conviction for underage consumption be reversed.

{¶20} Assignment of Error No. 1:

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

{¶22} In his first assignment of error, appellant argues the trial court erred in its decision denying his motion to suppress evidence of field sobriety tests because the state "failed to show the necessary requisite level of compliance with accepted testing standards."

{¶23} Appellate review of a 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 of the trier of fact, and therefore, is in the best position to resolve factual questions and evaluate witness credibility. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. In turn, the reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence, and then determine as a matter of law, without deferring

App. No. 96-T-5456, 1996 WL 761231 (trial court improperly admitted LEADS report at trial where police

to the trial court's conclusions, whether the trial court applied the appropriate legal standard. *State v. Bryson* (2001), 142 Ohio App.3d 397, 402.

{¶24} Pursuant to Crim.R. 47, the defendant, in filing a motion to suppress in a criminal proceeding, must "state with particularity the grounds upon which it is made and shall set forth the relief or order sought." *State v. Henry*, Preble App. No. CA2008-05-008, 2009-Ohio-10, ¶11. This requires the defendant, in order to be entitled to a hearing on his motion to suppress, to "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. Eyer*, Warren App. No. CA2007-06-071, 2008-Ohio-1193, ¶9, quoting *State v. Shindler*, 70 Ohio St.3d 54, 1994-Ohio-452, syllabus. Once the defendant satisfies this initial burden, thereby providing notice of the issues to be determined at the suppression hearing, the burden then shifts to the state to show the requisite level of compliance with the applicable testing standards. *State v. Way*, Butler App. No. CA2008-04-098, 2009-Ohio-96, ¶17; *State v. Plunkett*, Warren App. No. CA2007-01-012, 2008-Ohio-1014, ¶11, citing *City of Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 220.

{¶25} The extent of the state's burden of proof establishing compliance with the applicable standards "only extends to the level with which the defendant takes issue with the legality of the test." *State v. Wyatt*, Clermont App. No. CA2008-01-013, 2008-Ohio-5667, ¶10; *State v. Crothers*, Clinton App. No. CA2003-08-020, 2004-Ohio-2299, ¶10. As a result, where the 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." *Henry*, 2009-Ohio-

officer failed to properly authenticate the document).

10 at ¶12. However, as this court has noted previously, if the defendant's motion to suppress lacks the required particularity, he may still provide some factual basis, either during cross-examination 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. *Id.*; *Plunkett* at ¶25-26; *State v. Embry*, Warren App. No. CA2003-11-110, 2004-Ohio-6324, ¶27-28.

{¶26} The typical standards applicable to field sobriety tests, and that were used in this case, 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 the NHTSA standards, but instead need only establish substantial compliance by clear and convincing evidence. R.C. 4511.19(D)(4)(b); see, also, *State v. Wood*, Clermont App. No. CA2007-12-115, 2008-Ohio-5422, ¶9; *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, ¶9. A determination of whether the facts satisfy the substantial compliance standard is made on a case-by-case basis. *State v. Marcinko*, Washington App. No. 06CA51, 2007-Ohio-1166, ¶16. Therefore, if a field sobriety test is administered in substantial compliance with the applicable NHTSA standards, the results of that test are admissible; however, the weight to be given that evidence at trial is left to the trier of fact. *Columbus v. Weber*, Franklin App. No. 06AP-845, 2007-Ohio-5446, ¶18; R.C. 4511.19(D)(4)(b)(iii).

{¶27} As noted in *Plunkett*, this court has repeatedly been faced with OVI cases where the defendant files a boilerplate motion to suppress that merely contains a laundry list of virtually every fathomable defect that could occur in the collection of evidence. *Plunkett* at ¶14. This case is of no exception.

{¶28} Appellant's motion lists the evidence he seeks to have suppressed, including field sobriety tests and observations of the police officer, and is followed by a number of vague grounds upon which the motion is based,⁴ including the general claim that "the tests were not administered in substantial compliance with the testing standards in effect at the time the tests were administered." These stated grounds, although sufficient to place the state and the court on notice that he challenged the administration of the field sobriety tests in general, fail to provide anything more than the same vague language that we have considered insufficient to raise the state's slight burden previously. See, e.g., *Plunkett* at ¶15-19, 25; *Wood* at ¶13; *Wyatt* at ¶12; *Henry* at ¶14-19.

{¶29} In addition, appellant's accompanying "Memorandum in Support" is nearly entirely comprised of boilerplate language that does nothing more than relay legal concepts, only some of which were applicable, and provides only one paragraph evidencing the specific facts of the case. *Plunkett* at ¶16-17; *Wyatt* at ¶12-14. That paragraph reads as follows:

{¶30} "Warren County Sheriff's deputies encountered [appellant] on March 11, 2008 after he had an accident in his vehicle. The encounter occurred on Rich Road at about 4:00 a.m. He was arrested for operating a motor vehicle under the influence in violation of R.C. 4511.19 and underage drinking. He was transported to the Deerfield Township Building where he allegedly refused to take a breath test."

{¶31} This statement, which contains even less information than other factual statements that we have found insufficient to raise the state's burden previously, does

4. Of the 19 grounds listed, 13 dealt with the admissibility of breathalyzer testing evidence, a test which

not provide any factual basis with sufficient particularity to properly place the prosecutor and the court on notice of the issues to be decided at the suppression hearing. See, e.g., *Plunkett*, 2008-Ohio-1014 at ¶¶16-18; *Wyatt*, 2008-Ohio-5667 at ¶¶12-14. Therefore, we find appellant's motion to suppress, which is nearly identical to those found insufficient to raise the state's slight burden of proof in *Plunkett* and *Wyatt*, is also insufficient to raise the state's slight burden of proof showing substantial compliance with the NHTSA standards.

{¶32} Further, although the necessary factual basis can be obtained during cross-examination at the motion hearing, appellant failed to do so in this case. *Plunkett* at ¶26; *Wyatt* at ¶15. After reviewing the record, appellant failed to ask specific questions during his cross-examination to support his claim that the NHTSA standards were not followed. Instead, appellant's cross-examination, which spans a total of four pages, merely consists of generalized questions regarding the road conditions observed and listed on the incident report, the arresting officer's observations during the administration of the field sobriety tests, and whether he was familiar with the NHTSA manual. As a result, we find appellant's questioning also failed to provide any factual basis with sufficient particularity to raise the state's slight burden of proof.⁵

{¶33} Accordingly, because appellant's motion to suppress contains only general claims and vague assertions, and because appellant's cross-examination did not allege any factual basis with sufficient particularity, we find the state needed only to address

was never performed.

5. Appellant also claims that his written memorandum submitted *after* the suppression hearing "[raised] the specific issues as to why the [field sobriety tests] were not in substantial compliance with NHTSA standards." However, a memorandum filed *after* the motion hearing does little to place the state and the court on notice of the issues appellant intends to address *during* the suppression hearing.

appellant's claims generally in order to meet its slight burden of proof establishing the contested field sobriety tests were conducted in substantial compliance with NHTSA standards. *Crothers*, 2004-Ohio-2299 at ¶14.

Walk-and-Turn Test

{¶34} With respect to the walk-and-turn test, appellant first argues that the trial court erred by denying his motion to suppress because "the [road] conditions at that time were deplorable and unacceptable," and therefore, not administered in substantial compliance with NHTSA standards.

{¶35} The NHTSA manual lists specific instructions officers are taught to provide the suspect prior to the walk-and-turn test, and recommends certain test conditions in which the test should be performed. *Wood*, 2008-Ohio-5422 at ¶20. Specifically, the NHTSA manual calls for the walk-and-turn test to be conducted on a "reasonably dry, hard, level, non-slippery surface." However, "the conditions will seldom be perfect," and simply because the environmental conditions were less than ideal does not, by itself, render the test result invalid. *State v. Benson*, Portage App. No. 2001-P-0086, 2002-Ohio-6942, ¶10; *Marcinko*, 2007-Ohio-1166 at ¶17. In addition, as the NHTSA manual explicitly states, "[r]ecent field validation studies have indicated that varying environmental conditions have not affected a suspect's ability to perform [the walk-and-turn] test." *State v. Mapes*, Fulton App. No. F-04-031, 2005-Ohio-3359, ¶49.

{¶36} In an effort to conduct the walk-and-turn test, Deputy Everhart testified that he "took [appellant] to where the crash of the vehicle was." However, after realizing that the crash scene was "actually on a pretty good grade," Deputy Everhart testified that he escorted appellant to the back of his cruiser "where the grade [was] not absolutely level

but * * * a lot more level than what it was in front of [his] vehicle." There was also testimony indicating the road was wet, and in some places, icy. However, there was no testimony that appellant ever complained of the road conditions, nor was there any evidence indicating the road conditions affected Deputy Everhart's demonstration of the test, or appellant's subsequent performance thereof.

{¶37} The trial court, in its decision denying appellant's motion to suppress the walk-and-turn test result, found Deputy Everhart "took [appellant] to a level grade" prior to conducting the test, and that "[t]here [was] no reason to believe that the [road] conditions were out of compliance with NHTSA standards." After reviewing the record, and because performing a field sobriety test under less than ideal conditions does not automatically negate the test result, we find no error in the trial court's decision finding the walk-and-turn test was administered in substantial compliance with NHTSA standards based on the road conditions. See *Jimenez*, 2007-Ohio-1658 at ¶19; see, also, *State v. Almonte*, Portage App. No. 2005-P-0093, 2006-Ohio-6688, ¶22; *State v. Barnett*, Portage App. No. 2006-P-0117, 2007-Ohio-4954, ¶44 (slight grade in road does not prevent it from being level for purposes of walk-and-turn test).

{¶38} In addition, appellant claims that the trial court erred by denying his motion to suppress the walk-and-turn test result because there was "no evidence that a straight line was used." However, Deputy Everhart was never questioned, either during direct or cross-examination, regarding his use of a straight line during the administration of the test. As stated in *Plunkett*, a motion to suppress "is not designed to be a game of hide and seek to see if the state fails to give testimony on every issue raised in the broad motion," only to then rely upon the implicit omissions to support assertions of

noncompliance on appeal. Id. at ¶23, 27. Therefore, since the record is devoid of any evidence indicating Deputy Everhart failed to conduct the test in substantial compliance with the NHTSA standards, the trial court did not err in denying appellant's motion to suppress the result of the walk-and-turn test. Id. at ¶9.

One-Leg Stand Test

{¶39} With respect to the one-leg stand test, appellant initially argues that the trial court erred by denying his motion to suppress the result of this test because it was not administered under proper lighting conditions. However, although the test was administered to appellant behind Deputy Everhart's cruiser during the early morning hours, there is no evidence in the record that the test cannot be performed in dimly lit conditions,⁶ nor was there any evidence that the lighting conditions interfered in any way, material or otherwise, with appellant's performance. Therefore, we find no error in the trial court's decision finding the one-leg stand test administered in substantial compliance with the NHTSA standards based on the alleged insufficient lighting conditions.⁷

{¶40} In addition, appellant argues that the trial court erred by denying his motion to suppress because Deputy Everhart "did not testify to any of the clues that [were] part of the test." However, while it may be true that Deputy Everhart made no reference to the four specific "clues" listed in the NHTSA manual, such a failure is not indicative as to

6. The NHTSA manual, contrary to appellant's claim, does not recommend any lighting conditions necessary for the administration of the one-leg stand test. Instead, the manual simply states that the test should be conducted on a "reasonably dry, hard, level, and non-slippery surface."

7. Appellant also argues that the one-leg stand test was not administered in substantial compliance with the NHTSA standards due to the less than ideal road conditions. We have already addressed this argument in our discussion of the administration of the walk-and-turn test.

whether the test was *administered* in substantial compliance with the NHTSA standards.

There is a distinction between the officer's *administration* of a field sobriety test, the officer's subsequent *interpretation* of the test result, and the officer's *observations* during the suspect's performance of the test.⁸

{¶41} Regardless, contrary to appellant's claim, and although he made no reference to the specific "clues" listed in the NHTSA manual, Deputy Everhart never offered any testimony regarding the *result* of the one-leg stand test. Instead, Deputy Everhart testified as to his *observations* of appellant during the administration of the test, which included testimony that appellant failed to "raise his foot the six inches," he did not "point his toe out," he continuously looked down at his feet, and, while counting to 30, he "missed" the number 22 all together. It is well-established that a law enforcement officer may testify as a lay witness regarding the observations made during a defendant's performance of the standardized field sobriety tests, which is exactly what occurred here. *Schmitt*, 2004-Ohio-37 at syllabus; *State v. Hammons*, Warren App. No. CA2004-01-008, 2005-Ohio-1409, ¶5; *State v. Kirby*, Butler App. No. CA2002-06-136, 2003-Ohio-2922, ¶17. Therefore, despite Deputy Everhart's failure to testify regarding the "clues" listed in the NHTSA manual, because there was evidence indicating Deputy Everhart properly *administered* the one-leg stand test in substantial compliance with the NHTSA standards, the trial court did not err by denying appellant's motion to suppress the one-leg stand test result, as there was no result to suppress.

8. As noted by R.C. 4511.19(D)(4)(b)(i), if the officer "*administered*" a field sobriety test in substantial compliance with the applicable testing standards, "[t]he officer may testify concerning the *results* of the field sobriety test so *administered*." (Emphasis added.) In addition, as stated in the NHTSA manual under the heading "Test Interpretation," an officer is instructed to look for certain "clues" each time the test is "*administered*." (Emphasis added.)

Horizontal Gaze Nystagmus

{¶42} With respect to the HGN test, appellant argues that the trial court erred by denying his motion to suppress because "there was no evidence of compliance with the NHTSA standards." After reviewing the record, it is clear that the state provided absolutely no evidence regarding the administration of the HGN test to appellant at the suppression hearing. In fact, Deputy Saylor, the officer who administered the HGN test to appellant, did not even testify. Therefore, even though the state's burden was slight, the trial court erred by denying appellant's motion to suppress the result of the HGN test because there was simply no evidence presented at the suppression hearing to establish whether the test was administered to him in substantial compliance with NHTSA standards.

{¶43} In light of the foregoing, we find that the trial court erred in denying appellant's motion to suppress with respect to the HGN test result, and therefore, the result was inadmissible at trial. However, upon further review, we find such error was harmless as the state presented more than enough evidence to support appellant's OVI conviction even without the result of the HGN test. *State v. Williams* (1983), 6 Ohio St.3d 281, 290.

{¶44} Appellant was convicted of OVI in violation of R.C. 4511.19(A)(1)(a), which states:

{¶45} "No person shall operate any vehicle * * * within this state, if, at the time of the operation * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶46} At trial, the state presented evidence indicating appellant had been driving

home from a friend's house when he was involved in a single car accident, and that he had a "very strong odor of alcoholic beverage coming from his person," as well as from inside the crashed vehicle. There was also evidence that he talked "kind of slow" and "lethargic," and that he admitted, although with some reluctance, to consuming "two beers" earlier that evening. In addition, the testimony indicated appellant had difficulty maintaining his balance and that he failed to touch heel-to-toe numerous times during his performance of the walk-and-turn test, and that, during the one-leg stand test, he raised his arms for balance and did not follow the instructions provided.

{¶147} After reviewing the record, and viewing the evidence in a light most favorable to the state, we find that there was ample evidence to convict appellant of OVI beyond a reasonable doubt. See *State v. Norris*, 168 Ohio App.3d 572, 2006-Ohio-4325, ¶13-17. As a result, because we find the evidence sufficient to support appellant's OVI conviction even without the otherwise inadmissible HGN test result, the trial court's error in denying his motion to suppress was harmless. Therefore, appellant's second assignment of error is overruled.

{¶148} Assignment of Error No. 3:

{¶149} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT OVERRULED HIS MOTION FOR JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE-IN-CHIEF AND AT THE CLOSE OF ALL THE EVIDENCE."

{¶150} In his third assignment of error, appellant argues that the trial court erred in denying his Crim.R. 29 motion for acquittal because "[o]ther than the field sobriety tests, there was no evidence that [appellant] operated a vehicle while under the influence of

alcohol," or that he was underage at the time of the accident. This assignment of error is rendered moot given our resolution of appellant's first and second assignments of error.

{¶51} Judgment affirmed in part, reversed in part and remanded for further proceedings.

RINGLAND and HENDRICKSON, JJ., concur.