[Cite as *State v. Standifer*, 2012-Ohio-3132.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-07-071
	:	O P I N I O N
- vs -		7/9/2012
	:	
MELISSA S. STANDIFER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10CR26632

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Paul M. Laufman, 4310 Hunt Road, Cincinnati, Ohio 45242, for defendant-appellant

POWELL, P.J.

{¶ 1} Appellant, Melissa S. Standifer, appeals her conviction in the Warren County Court of Common Pleas for assault and obstructing official business. For the reasons stated below, we affirm the decision of the trial court.

{¶ 2} During the early morning hours of May 8, 2010, Officer Lacon was dispatched twice to the home of appellant. He first visited appellant's home to investigate reports of a fight in the front yard, however upon arrival he found no evidence of a fight. Officer Lacon

then became concerned that appellant's home had been invaded because the main front door of the home was open and the contents of a purse were emptied in the entryway. Based on these observations, Officer Lacon entered and searched the residence. He found appellant asleep on the couch, very intoxicated but otherwise calm. Officer Lacon then left the home.

{¶ 3} A few hours later, Officer Lacon was dispatched again to appellant's residence after the police had received reports that appellant had harmed herself. When Officer Lacon arrived at appellant's home, he met with appellant's mother, Ms. Hipsher, on the front lawn. Ms. Hipsher stated that she had been told that there was blood everywhere in appellant's house. Additionally, Ms. Hipsher stated that she overheard a conversation between appellant and appellant's sister in which appellant stated that she "would do it right this time" if she was arrested. After relaying this information to Officer Lacon, Ms. Hipsher knocked on the door to the residence and appellant allowed Officer Lacon and Ms. Hipsher to enter.

{¶ 4} Once inside the residence, Officer Lacon noticed that appellant's demeanor had changed from his earlier visit. She was now crying, emotional, and very argumentative. At this time, an additional police officer, Officer Keene, arrived at the residence to assist Officer Lacon. Officer Keene testified that appellant appeared to be intoxicated and possibly under the influence of drugs. It was apparent that appellant was very angry with Ms. Hipsher, so Officer Keene took Ms. Hipsher outside the home. Appellant did not calm down once Ms. Hipsher left the residence and repeatedly mentioned a sexual assault she endured and asked if the officers were going to rape her. Based on her conduct, Officer Lacon decided to take appellant to the hospital so that she could be evaluated.

{¶ 5} Officers Lacon and Keene placed appellant in protective custody after she refused to go to the hospital willingly. Appellant's hands were too small for the handcuffs, so Officer Lacon held onto her arms. He then attempted to move her outside the home so that

she could be transported to a hospital. As Officer Lacon was taking appellant outside her home, she screamed, "stutter stepped," jerked, and pulled away. Once appellant and Officer Lacon reached the sidewalk, she momentarily stopped jerking and pulling away. As the ambulance approached appellant's home, she lifted up her right foot, pushed it back and made contact with Officer Lacon near his groin area. Officer Lacon was startled and jumped away from appellant. Then appellant and Officer Lacon fell to the ground. Officer Lacon did not suffer any injury from the contact but appellant was injured from the fall.

{¶ 6} The Warren County Grand Jury returned an indictment against appellant charging her with one count of assault on a peace officer, a fourth-degree felony, and one count of obstructing official business while creating a risk of physical harm to any person, a felony in the fifth degree. Prior to trial, appellant filed a motion to suppress all evidence in the case. She argued that her custody was unlawful and all evidence stemming from the custody should be suppressed because the officers did not have probable cause to seize and transport her to the hospital for emergency hospitalization. Her motion was denied.

{¶ 7} A jury trial was held on March 17, 2011, in which appellant argued that her conduct did not result in assault or obstructing official business. The jury found appellant guilty of assault on a peace officer, a fourth-degree felony. The jury also found appellant guilty of obstructing official business but did not make the additional finding that appellant's conduct caused a risk of harm to any person. Therefore her obstructing official business conviction was reduced to a first-degree misdemeanor. The trial court sentenced appellant to three years of community control.

{¶ 8} Appellant now appeals her conviction, raising six assignments of error.

{¶ 9} Assignment of Error No. 1:

{¶ 10} THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.

{¶ 11} In her first assignment of error, appellant argues that the trial court erred in denying her motion to suppress all evidence obtained as a result of her "illegal" seizure. Specifically, appellant contends that Officer Lacon did not have probable cause for the seizure.

{¶ 12} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Davenport*, 12th Dist. No. CA2008-01-011, 2009-Ohio-557, ¶ 6; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. When considering a motion to suppress, the trial court, as the trier of fact, is in the best position to weigh the evidence in order to resolve factual questions and evaluate witness credibility. *State v. Eyer*, 12th Dist. No. CA2007-06-071, 2008-Ohio-1193, ¶ 8. In turn, the appellate court must accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Lange*, 12th Dist. No. CA2007-09-232, 2008-Ohio-3595, ¶ 4. After accepting the trial court's factual findings as true, the appellate court must then determine, as a matter of law, and without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. *State v. Forbes*, 12th Dist. No. CA2007-01-001, 2007-Ohio-6412, ¶ 29.

{¶ 13} The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Therefore, a seizure of a person must be "reasonable" according to the Fourth Amendment. *State v. Hacker*, 12th Dist. No. CA2000-11-235, 2002-Ohio-2312, ¶ 10. If a seizure is not "reasonable," then the defendant's constitutional rights have been violated and the evidence that is gathered in violation of her rights generally will not be admitted in trial. *State v. King*, 12th Dist. No. CA2008-03-085, 2008-Ohio-5840, ¶ 10.

{¶ 14} At issue in this case is whether appellant's seizure satisfied the Fourth

Amendment's requirement of "reasonableness." Police officers are authorized to take mentally ill individuals into custody and hospitalize them without their consent pursuant to R.C. 5122.10. The statute provides that an officer may take a person into custody and transport the person to a hospital if that officer has "reason to believe" the person is "mentally ill subject to hospitalization" and represents a substantial risk of physical harm to self or others if allowed to remain at liberty. R.C. 5122.10. A person is "mentally ill subject to hospitalization" if that person "represents a substantial risk of physical harm to [her]self as manifested by evidence of threats of, attempts at, suicide or serious self-inflicted bodily harm." R.C. 5122.01(B).

{¶ 15} There are very few cases in Ohio which discuss the level of cause that a police officer must possess in order to seize a person pursuant to R.C. 5122.10. However, the Ohio Supreme Court has held that the requirement in R.C. 5122.10 that a police officer must submit a written statement evidencing his beliefs that the person is "mentally ill subject to hospitalization" ensures that there is "at least a minimal level of probable cause" to hospitalize the individual. *In re Miller*, 63 Ohio St.3d 99, 102-103 (1992). The Court also noted that "'it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or other can engender adverse social consequences on the individual.'" *Id.* at 102, quoting *Addington v. Texas*, 441 U.S. 418, 425-426, 99 S.Ct. 1804 (1979). Therefore, in recognizing the consequences of involuntary commitment the Ohio Supreme Court has held that probable cause is necessary to hospitalize an individual involuntarily.

{¶ 16} In analyzing the level of cause needed for a police officer to seize an individual pursuant to R.C. 5122.10, we also look to the law regarding a criminal arrest of a defendant. As stated above, the Fourth Amendment requires that all seizures of persons must be reasonable. Except for the well delineated exceptions, in general for a criminal arrest to be

reasonable, a police officer must possess a warrant. *Maryland v. Pringle*, 540 U.S. 366, 369, 124 S.Ct. 795 (2003). However, an exception to this general warrant requirement exists when police officers possess probable cause to arrest and exigent circumstances exist. *Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S.Ct. 2091 (1984). The exigent circumstances exception to the warrant requirement provides that the need to protect life or avoid serious injury justifies what would otherwise be an illegal search or seizure. *State v. Applegate*, 12th Dist. No. CA92-06-099, 1993 WL 19059, *2 (Feb. 1, 1993), *rev'd on other grounds*, 68 Ohio St.3d 348, 1994-Ohio-356. For example, the Ohio Supreme Court has recently held that threats of suicide falls under the "community caretaking/emergency aid" exception to the Fourth Amendment warrant requirement and allow police officers to stop a vehicle when the driver has made threats of suicide. *State v. Dunn*, 131 Ohio St.3d 325, 2012-Ohio-1008, ¶ 22. Thus, in order to comply with the Fourth Amendment, police officers must at least possess probable cause to arrest in cases of exigent circumstances.

{¶ 17} We find that based on the Ohio Supreme Court's language in *Miller* and the constitutional requirements regarding criminal arrests and exigent circumstances, police officers must possess probable cause that a person "represents a substantial risk of physical harm to [her]self as manifested by evidence of threats of, attempts at, suicide or serious self-inflicted bodily harm" to seize that person pursuant to R.C. 5122.10. Probable cause exists when the officer has sufficient information, derived from his own knowledge or a trustworthy source, which would lead a prudent person to believe the person did certain acts. *State v. Cearley*, 12th Dist. No. CA2003-08-213, 2004-Ohio-4837, ¶ 8. When determining whether probable cause exists, a court reviews the totality of facts and circumstances. *State v. Gargaris*, 12th Dist. No. CA2007-06-142, 2008-Ohio-5418, ¶ 13.

{¶ 18} The trial court applied the correct legal standard and there is competent credible evidence that the officers had probable cause to believe that appellant

"represent[ed] a substantial risk of physical harm to [her]self as manifested by evidence of threats of, attempts at, suicide or serious self-inflicted bodily harm." There was testimony at the suppression hearing that appellant had stated to her sister that there was "blood everywhere" in her house and that she would "do it right this time" if the police were called. Further, when Officer Lacon entered appellant's house she was screaming, crying, very argumentative, and excited. Appellant appeared very intoxicated and possibly under the influence of drugs. She also repeatedly mentioned a sexual assault against her and asked the officers if they were going to assault her. We find, based on the totality of facts and circumstances, that Officers Lacon and Keene had probable cause to place appellant into custody and transport her to the hospital.

{¶ 19} Thus, the trial court did not err in overruling appellant's motion to suppress. Appellant's first assignment of error is overruled.

{¶ 20} Assignment of Error No. 2:

{¶ 21} APPELLANT'S CONVICTIONS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶ 22} In appellant's second assignment of error, she challenges the sufficiency of the evidence presented to the trial court to support her obstructing official business and assault convictions.

{¶ 23} When reviewing a challenge to the sufficiency of the evidence to support a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298 ¶ 33. In such a review, "'[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Haney*, 12th Dist. No. CA2005-07-068, 2006-Ohio-3899, ¶ 14, quoting *State*

v. Tenace, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37. Further, a reviewing court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979). A reviewing court must not substitute its evaluation of the witness' credibility for that of the jury. *See State v. Benge*, 75 Ohio St.3d 136, 143, 1996-Ohio-227.

{¶ 24} Appellant first challenges the sufficiency of evidence regarding her assault conviction. R.C. 2903.13(A) provides, in pertinent part: "[n]o person shall knowingly cause or attempt to cause physical harm to another." Physical harm is defined as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3). Generally, assault is a misdemeanor of the first degree. R.C. 2903.13(C). However, where the victim of the offense is a peace officer engaged in the performance of his official duties, the crime is elevated to a fourth-degree felony. R.C. 2903.13(C)(3).

{¶ 25} The Ohio Revised Code defines the culpability element "knowingly" as "when a defendant is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). To act knowingly, a defendant merely has to be aware that the result may occur, and it is not necessary to demonstrate that the defendant intended to cause physical injuries. *State v. Nutekpor*, 6th Dist. No. WD-05-062, 2006-Ohio-4641, ¶ 15, citing *State v. Edwards*, 83 Ohio App.3d 357, 361 (10th Dist.1992). In addition, the Ohio Supreme Court has concluded that if a defendant's mental state is difficult to establish with direct proof, it may be "inferred from the surrounding circumstances." *State v. Logan*, 60 Ohio St.2d 126, 131 (1979).

{¶ 26} At trial, Officer Lacon testified that appellant was screaming, jerking, and pulling away while he escorted her to a sidewalk outside her home. He explained that once they reached the sidewalk, appellant "raised up her right foot and reared back and kicked me."

Officer Lacon stated that appellant kicked him in his right upper leg, near his groin and that the kick hurt but did not cause any bruising. Additionally, a paramedic who arrived in an ambulance moments before the incident occurred testified that he also saw appellant "lean forward, [her] knees [came] forward, and then [her] foot [came] straight back in an obvious attempt to kick the officer." Moreover, a video from one of the officer's cruiser cams that was played at trial clearly showed appellant kicking Officer Lacon. We find this evidence was sufficient to demonstrate that appellant knowingly caused physical harm to Officer Lacon while he was in performance of his official duties.

{¶ 27} Appellant argues that the evidence was insufficient to establish that she "knowingly" kicked Officer Lacon because she was merely "flailing" in an attempt to evade her detention. The state was not required to prove that appellant specifically intended to kick Officer Lacon but instead it had to establish that appellant was aware that "flailing" and kicking her foot backwards would probably cause Officer Lacon harm. We find that after viewing the evidence in a light most favorable to the prosecution, the jury could infer from appellant's conduct and the surrounding circumstances that she "knowingly" kicked Officer Lacon.

{¶ 28} In appellant's second issue, she argues that the obstructing official business conviction was not supported by sufficient evidence. R.C. 2921.31(A) provides, "[n]o person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties." The proper focus in a prosecution for obstructing official business is on the defendant's conduct, verbal or physical, and its effect on the public official's ability to perform his lawful duties. *State v. Bailey*, 12th Dist. No. CA2007-04-013, 2008-Ohio-3075, ¶ 28, citing *State v. Neptune*, 4th Dist. No. 99CA25 (Apr. 21, 2000). In order to be convicted for

obstructing official business, there must be evidence that a defendant actually interfered with the performance of an official duty and made it more difficult. *State v. Whitt*, 12th Dist. No. CA89-06-091, 1990 WL 82592, *2 (June 18, 1990). However, the state is not required to prove that the defendant successfully prevented an officer from performing their official duties. *Id.*

{¶ 29} A person acts purposely when "it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A). "The purpose with which a person does an act is determined from the manner in which it is done, the means used, and all the other facts and circumstances in evidence." *Bailey* at ¶ 28.

{¶ 30} Upon a thorough review of the record, we find that there was sufficient evidence that appellant purposefully hampered Officer Lacon's custody of her and made the performance of his duties more difficult. The evidence showed that Officer Lacon was performing his lawful duties when he decided to take appellant into custody because of her threats of suicide and erratic behavior. Thereafter, appellant hampered Officer Lacon by screaming, jerking, pulling away, and "stutter stepping." Although appellant was not successful in obstructing Officers Lacon and Keene from transporting her to the hospital, she did interfere and made their performance more difficult. Lastly, sufficient evidence was presented from the surrounding facts and circumstances that appellant acted purposefully in obstructing Officer Lacon from taking custody of her. Therefore, after viewing the evidence in the light most favorable to the prosecution, the jury did not err in convicting appellant of obstructing official business.

{¶ 31} Appellant's second assignment of error is overruled.

{¶ 32} Assignment of Error No. 3:

{¶ 33} THE TRIAL COURT ERRED IN SENDING INDAMISSIBLE EVIDENCE INTO THE JURY ROOM.

{¶ 34} In appellant's third assignment of error, she argues that the trial court erred when it allowed a video to be sent into the jury room when the video contained footage that was not presented at trial.

{¶ 35} At trial, portions of two videos from Officer Lacon and Officer Keene's cruiser cams were shown to the jury. These videos recorded much of the incidents that occurred at appellant's home the night she was seized and hospitalized. However, only portions of the video were played. During jury deliberations, the court allowed the full videos, including the portions that were not played, to be sent into the jury room. The court instructed the jury only to view the specific chapters of the video shown at trial and also polled of the jurors after deliberation to determine whether any other portion of the video not played during trial was viewed. All of the jurors reported that they had only seen the parts of the video that were shown during trial.

{¶ 36} We disagree with appellant that the presence of the unredacted video in the jury room requires reversal of the trial court's judgment. We first note that when an error or defect made by the trial court does not affect a defendant's substantial rights, the error is harmless and we will not reverse the court's judgment. Crim. R. 52(A).

{¶ 37} There are a few cases in Ohio that address whether reversible error occurs when inadmissible evidence is found in the jury room. The threshold question in all of these cases is whether the jury saw the evidence. *See State v. Allen*, 8th Dist. Nos. 43687 and 43688, 1983 WL 5914, *4 (April 7, 1983); *State v. Westwood*, 4th Dist. No. 01CA50, 2002-Ohio-2445. In a case involving several pieces of evidence that were accidentally submitted to the jury, but the jury did not view the evidence, a court reasoned that reversible error had not occurred. *Allen* at *4. On the other hand, when evidence that was obtained in violation

of a defendant's constitutional rights was accidentally viewed by jurors, an appellate court reasoned that a new trial must be granted. *State v. Juniper*, 130 Ohio App.3d 219, 222-227 (5th Dist.1998). In *Juniper*, the court also reasoned that a new trial must be granted because the evidence that was viewed was highly prejudicial to defendant and was obtained in violation of his constitutional rights. *Id.* at 225-226. *See Westwood* at ¶ 24-37 (noting that in cases where the jury does see the evidence, then the court must decide whether the evidence was prejudicial and whether the court gave a limiting instruction and the impact of this instruction). Therefore, regardless of whether it is error to send inadmissible evidence into a jury room, the error is harmless if the jury does not view the evidence.

{¶ 38} Moreover, a jury is presumed to follow the limiting instructions of the trial court. *State v. Garner*, 74 Ohio St.3d 49, 59, 1995-Ohio-168. In this case, the jury was instructed not to view the portions of video that were not played at trial and also polled as to whether they viewed those portions. The jury indicated that it had followed the court's instructions and not viewed the inadmissible evidence. Therefore, we find that even if the trial court erred in sending the unredacted video into the jury room, the error was harmless as it did not affect appellant's substantial rights.

{¶ 39} Appellant's third assignment of error is overruled.

{¶ 40} Assignment of Error No. 4:

{¶ 41} THE TRIAL COURT COMMITTED PLAIN ERROR BY ENTERING JUDGMENT ON INCONSISTENT VERDICTS.

{¶ 42} Appellant argues in her fourth assignment of error that the trial court erred when it entered judgment on the assault and the obstructing official business verdicts as these verdicts were inconsistent. She contends that the verdicts were inconsistent because the jury relied on the same conduct for both offenses yet it only found that her conduct caused "physical harm" under the assault charge.

{¶ 43} At the outset, we note that appellant did not object to the judgment and she has therefore waived all but plain error on appeal. Pursuant to Crim.R. 52(B), plain errors affecting substantial rights may be noticed although they were not brought to the attention of the court. Plain error exists when there was an obvious deviation from a legal rule that affected the defendant's "substantial rights." *State v. Blanda*, 12th Dist. No. CA2010-03-050, 2011-Ohio-411, ¶ 20, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. The Ohio Supreme Court has interpreted "substantial rights" as meaning that the error must have affected the outcome of the proceedings. *Barnes* at 27. As this court has stated previously, "[n]otice of plain error must be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *State v. Clements*, 12th Dist. No. CA2009-11-277, 2010-Ohio-4801, ¶ 7, citing *State v. Long*, 53 Ohio St.2d 91, 95 (1978).

{¶ 44} The Ohio Supreme Court has determined that inconsistent verdicts on different counts in a multi-count indictment do not justify overturning a guilty verdict. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, ¶ 138. "'The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count.'" *State v. Brown*, 12th Dist. No. CA2006-10-247, 2007-Ohio-7070, ¶ 41, quoting *Gapen* at ¶ 138. In addition, it is not for an appellate court to speculate as to why the jury decided as it did, as "'[c]ourts have always resisted inquiring into a jury's thought processes.'" *Id.*, quoting *United States v. Powell*, 469 U.S. 57, 67, 105 S.Ct. 471 (1984).

{¶ 45} In this case, the state argued that appellant's conduct resulted in assault and obstructing official business. The obstructing official business charge was indicted as a fifth-degree felony and required that the jury make a finding that appellant's conduct "create[d] a risk of physical harm to any person." R.C. 2921.31. If the jury failed to find that appellant

"created a risk of physical harm to any person" then the obstructing official business conviction would be reduced to a first-degree misdemeanor. Similarly, the assault charge required that the jury find that appellant "cause[d] or attempt[ed] to cause physical harm to another." R.C. 2903.13. The jury found appellant guilty of assault and also guilty of obstructing official business, but failed to find that in obstructing official business appellant "created a risk of harm." Therefore, appellant was convicted of obstructing official business, a first-degree misdemeanor.

{¶ 46} Appellant contends that her verdicts were inconsistent because the state relied on her kick of Officer Lacon to prove both charges and yet the jury found that her conduct created a risk of physical harm for only one charge. First, we disagree that the state relied on appellant's kick of Officer Lacon to prove both offenses. Appellant's conduct of jerking, pulling away, screaming, and kicking Officer Lacon was discussed extensively in both opening statements and through the direct testimony of Officer Lacon and Officer Keene. Moreover, in closing arguments the state discussed all of the evidence regarding appellant's conduct and the elements for both assault and obstructing official business. Appellant argues that the statement in closing argument, "obstructing official business, this is essentially another way of looking at the conduct that was engaged in" [sic] shows that the state relied on her kick of Officer Lacon for both offenses. However, it is clear from the entire context of closing argument that the state was not arguing that only the kick constituted obstructing official business. Thus, the jury's verdict was not inconsistent as the state relied on multiple instances of appellant's conduct to prove the charges.

{¶ 47} Secondly, even if we were to find that the verdicts were inconsistent, inconsistent verdicts in a multiple count indictment do not amount to plain error that requires reversal. In this case, appellant was indicted on multiple counts, one count of assault and one count of obstructing official business. Therefore, even if the verdicts were based on the

same evidence and inconsistent, the trial court would not have committed plain error in entering judgment on the verdicts as they were part of a multiple count indictment.

{¶ 48} The trial court did not err in entering judgment on the jury verdicts for obstructing official business and assault counts. Appellant's fourth assignment of error is overruled.

{¶ 49} Assignment of Error No. 5:

{¶ 50} THE TRIAL COURT ERRED IN INSTRUCTING THE JURY WITH REGARDS TO OBSTRUCTING OFFICIAL BUSINESS.

{¶ 51} In appellant's fifth assignment of error, she raises two issues regarding the obstructing official business jury instructions. First, she challenges the appellate standard of review regarding jury instructions. Secondly, appellant argues that the trial court erred when it excluded her proposed jury instructions.

{¶ 52} It is well established that in this district, jury instructions are matters left to the sound discretion of the trial court. *State v. Tucker*, 12th Dist. No. CA2010-10-263, 2012-Ohio-139, ¶ 23. The Ohio Supreme Court has stated that "[i]t is within the sound discretion of a trial court to refuse to admit proposed jury instructions which are either redundant or immaterial to the case." *Bostic v. Connor*, 37 Ohio St.3d 144 (1988), paragraph two of the syllabus. Moreover, a reviewing court will not reverse a trial court's decision as to whether there was sufficient evidence presented in a case to warrant a jury instruction absent an abuse of discretion. *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989).

{¶ 53} An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 130. Further, an appellate court may not reverse a conviction in a criminal case due to jury instructions unless "it is clear that the jury instructions constituted prejudicial error." *State v. Campbell*, 12th Dist. No. CA2009-08-208, 2010-Ohio-

1940, ¶ 13.

{¶ 54} Any party may propose jury instructions. Crim.R. 30. In a criminal case, if the proposed instruction for the jury is correct, pertinent and timely presented, the trial court must include it, at least in substance, in the general charge. *State v. Guster*, 66 Ohio St.2d 266, 269 (1981), citing *Cincinnati v. Epperson*, 20 Ohio St.2d 59 (1969), paragraph one of the syllabus. However, the trial court is not required to give a proposed jury instruction verbatim. The court may use its own language to communicate the same legal principles. *State v. Sneed*, 63 Ohio St.3d 3, 9 (1992).

{¶ 55} First, we decline the invitation to change our standard of review of jury instructions to a de novo standard. As stated above, it is well established that in this district, jury instructions are within the sound discretion of the trial court. Moreover, the Ohio Supreme Court has held that if a jury instruction is immaterial or redundant, it was within the discretion of the trial court to exclude it. As we will discuss below, appellant's requested jury instructions were immaterial and therefore it is within the trial court's discretion to exclude them.

{¶ 56} Secondly, the trial court did not err in excluding appellant's proposed jury instructions regarding the "lawful duty" of a police officer for the obstructing official business charge. At trial, the court instructed the jury that in order to find appellant guilty of obstructing official business, they would have to find that appellant "without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity did an act that hampered or impeded the public official in the performance of his *lawful duties*." The court went on to describe a lawful duty of a police officer as "any act or acts required by law."

{¶ 57} Appellant requested the jury instruction include a description of the lawful duty of a police officer by referencing R.C. 5122.10, the emergency hospitalization statute.

Specifically, the proposed instruction stated that an officer has a lawful duty to take a person into custody if the "officer has reason to believe that the person is mentally ill subject to hospitalization by court order, and represents a substantial risk of physical harm to herself or others if allowed to remain at liberty pending examination."

{¶ 58} We find that the trial court did not abuse its discretion in denying appellant's proposed jury instructions. The trial court's jury instructions were legally correct as they closely tracked the language of R.C. 2921.31. Although appellant's proposed jury instruction was technically accurate, it was not relevant to the issues in front of the jury. As explained in the first assignment of error, the trial court had already determined that the seizure of appellant was lawful. Therefore, a jury instruction that further explained the lawfulness of the police officer's actions was not relevant as this was already conclusively determined for the duration of the case.

{¶ 59} The trial court did not err in instructing the jury on obstructing official business. Thus, appellant's fifth assignment of error is overruled.

{¶ 60} Assignment of Error No. 6:

{¶ 61} THE TRIAL COURT COMMITTED PLAIN ERROR IN ENTERING MULTIPLE CONVICTIONS FOR ALLIED OFFENSES OF SIMILAR IMPORT.

{¶ 62} In appellant's last assignment of error, she argues that the trial court erred in sentencing her on both the assault and the obstructing official business offenses as the offenses were committed by the same conduct and thus allied offenses of similar import. Appellant also contends that the offenses should be merged due to the doctrine of judicial estoppel.

{¶ 63} To begin, we note that appellant failed to raise this issue at her sentencing hearing and thus has waived all but plain error. *Blanda*, 12th Dist. No. CA2010-03-050, 2011-Ohio-411 at ¶ 20. However, the Ohio Supreme Court has held that the failure to merge

allied offenses of similar import is plain error. *State v. Synder*, 12th Dist. No. CA2011-02-018, 2011-Ohio-6346, ¶ 8, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31.

{¶ 64} Ohio prohibits the imposition of multiple punishments for the same criminal conduct pursuant to R.C. 2941.25. *State v. Brown*, 12th Dist. No. CA2009-05-142, 2010-Ohio-324, ¶ 7. The statute provides for the following:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 65} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court established a new two-part test to determine whether offenses are allied offenses of similar import under R.C. 2941.25. *Id.* at ¶ 46–52. Under this new test, courts must first determine "whether it is possible to commit one offense and commit the other with the same conduct." (Emphasis deleted.) *Johnson* at ¶ 48; *State v. McCullough*, 12th Dist. Nos. CA2010-04-006, CA2010-04-008, 2011-Ohio-992, ¶ 14. In making this determination, it is not necessary that the commission of one offense would always result in the commission of the other, but instead, the question is simply whether it is possible for both offenses to be committed with the same conduct. *State v. Craycraft*, 193 Ohio App.3d 594, 2011-Ohio-413, ¶ 11 (12th Dist.), citing *Johnson* at ¶ 48.

{¶ 66} If it is found that the offenses can be committed by the same conduct, courts must then determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Johnson* at ¶ 49, quoting *State v. Brown*,

119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50. If both questions are answered in the affirmative, the offenses are allied offenses of similar import and must be merged. *Id.* at ¶ 50. However, if the commission of one offense will never result in the commission of the other, "or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Id.* at ¶ 51.

{¶ 67} Applying *Johnson*, we first determine whether it is possible for assault and obstructing official business to be committed with the same conduct. As discussed above, a person commits assault when she "knowingly, cause[s] or attempt[s] to cause physical harm to another or another's unborn." R.C. 2903.13(A). The assault charge is elevated to a felony in the fourth degree if the victim of the assault is a peace officer. *Id.* at (C)(3). The offense of obstruction of official business is committed when a person "without privilege to do so, and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties." R.C. 2921.31(A).

{¶ 68} The state concedes, and we agree, that it is possible to commit both offenses with the same conduct. A defendant could hamper or interfere with a public official's performance of official duties by assaulting the public official. However, we find that the offenses arose from separate conduct. The assault conviction was based upon appellant's kick of Officer Lacon. The evidence showed that after appellant was taken outside her home, she momentarily stopped pulling and jerking away from Officer Lacon and kicked him. On the other hand, appellant's conviction for obstructing official business was based on her conduct in jerking, pulling away, "stutter stepping," and screaming while she was in custody. Thus, appellant's conviction should not be merged because the offenses were committed by

separate conduct.

{¶ 69} Appellant also argues that the doctrine of judicial estoppel requires that her convictions be merged. Appellant claims that the state argued during trial that both offenses were committed with the same conduct but now argues on appeal that the offenses were committed by separate conduct. Judicial estoppel precludes a party from taking a legal position inconsistent with a legal position taken in a prior action. *Edwards v. Edwards*, 12th Dist. No. CA2006-04-044, 2007-Ohio-123, ¶ 11. The purpose of judicial estoppel is "to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment." *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶ 25. In order for the doctrine to be applied, a party must show that his opponent "(1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court." *Id.*

{¶ 70} We do not find merit in appellant's judicial estoppel argument because she has failed to prove that the state took a contrary position during trial. As discussed in the fourth assignment of error, viewing the state's presentation of its case as a whole, it is clear that the state did not argue that appellant was guilty of assault and obstructing official business based solely on her kick of Officer Lacon. Therefore, appellant's convictions should not be merged due to the doctrine of judicial estoppel.

{¶ 71} The trial court did not commit plain error by failing to merge appellant's convictions. Appellant's sixth assignment of error is overruled.

{¶ 72} Judgment affirmed.

RINGLAND and PIPER, JJ., concur.