

Delaney, J.

{¶1} Appellant Matthew S. Williams appeals from the July 17, 2014 Journal Entry of the Fairfield County Municipal Court convicting and sentencing him upon one count of O.V.I pursuant to R.C. 4511.19(A)(1)(d). Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose on December 29, 2013 around 2:06 a.m. when Trooper Fuller of the Ohio State Highway Patrol was traveling westbound on U.S. Route 33A east of Ety Road in Lancaster, Fairfield County, Ohio. Fuller observed brake lights on a Honda Accord pulled over on the right shoulder and she pulled over to offer assistance. As she pulled up, she observed a female passenger hanging out of the right front passenger door, vomiting onto the ground.

{¶3} Appellant was the driver and registered owner of the Accord. Fuller approached him to ask if everything was O.K. and appellant responded he stopped just in time. Fuller detected a strong odor of an alcoholic beverage emanating from the car and appellant's eyes were bloodshot and glassy. Fuller asked him if he had anything to drink and he replied one or two beers.

{¶4} Fuller asked appellant to step out of the car to perform standardized field sobriety tests at the rear of her patrol car. On the horizontal gaze nystagmus test, Fuller observed six out of six possible clues: lack of smooth pursuit, distinct nystagmus at maximum deviation, and onset of nystagmus before 45 degrees. When Fuller asked appellant to perform the walk and turn test, he said he had a bad knee but successfully completed the test and demonstrated only one clue. On the final standardized field sobriety test, the one-leg stand, Fuller observed one clue out of a possible four.

{¶5} Fuller also asked appellant to perform two non-standardized tests. She asked him to say the alphabet starting with “E” and ending with “W;” appellant attempted the test three times and completed from “E” to “V.” He was also asked to count backwards from 67 to 54 and successfully completed the task.

{¶6} Upon completion of these tests, Fuller decided to arrest appellant for O.V.I. based upon the totality of the circumstances. She placed him under arrest and Mirandized him. Appellant was transported to the Lancaster post of the Ohio State Highway Patrol where he submitted to a chemical breath test via the BAC Datamaster at 3:16 a.m. Fuller is a senior operator for the machine. Appellant’s breath alcohol test result indicated a concentration of .093 of one gram by weight of alcohol per two hundred ten liters of his breath.

{¶7} Appellant was charged by Uniform Traffic Ticket with violations of R.C. 4511.19(A)(1)(a) [“impaired driving”] and R.C. 4511.19(A)(1)(d) [“per se”]. Appellant entered pleas of not guilty and filed a motion to suppress evidence from the traffic stop and arrest. Specifically, appellant challenged Fuller’s administration of the horizontal gaze nystagmus (“HGN”) portion of the standardized field sobriety tests because the test was not administered in compliance with National Highway Traffic Safety Administration (NHTSA) guidelines.

{¶8} A suppression hearing was held and the motion to suppress was overruled. The matter proceeded to trial by jury and appellant was found guilty of the per se violation and not guilty of the impaired-driving violation.

{¶9} Appellant now appeals from the judgment entry of conviction and sentence and from the trial court’s decision overruling his motion to suppress.

{¶10} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶11} “I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT’S MOTION TO SUPPRESS.”

{¶12} “II. THE TRIAL COURT ERRED BY GIVING INCORRECT JURY INSTRUCTIONS TO THE JURY.”

ANALYSIS

I.

{¶13} In his first assignment of error, appellant argues the trial court should have granted his motion to suppress because appellee did not admit the NHTSA manual into evidence; the HGN test was not administered properly; and appellee failed to establish probable cause to arrest appellant for O.V.I.

{¶14} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf*, 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State*

v. Williams, 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶15} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See, *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein*, 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See, *Williams*, supra. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry*, 95 Ohio App.3d 93, 96, 620 N.E.2d 906 (8th Dist.1994).

{¶16} Appellant first argues appellee was required to establish the NHTSA guidelines for administration of standardized field sobriety tests by admission of the NHTSA handbook. Appellee marked the NHTSA manual during the suppression hearing, Fuller testified about it on direct, and appellant cross-examined her upon its contents. The manual was not admitted into evidence by either party, though, and appellant argues here appellee thus failed to sufficiently establish what the NHTSA guidelines are.

{¶17} The burden of proof in a motion to suppress the results of a field sobriety test is on the state once the defendant has made an issue of the legality of the test. *State v. Ryan*, 5th Dist. Licking No. 02–CA–00095, 2003–Ohio–2803, ¶ 21. The results of field sobriety tests are admissible at trial if the state presents clear and convincing evidence the officer administered the tests in substantial compliance with the National Highway Traffic Safety Administration (NHTSA) standards. See, R.C. 4511.19(D)(4)(b). Part of the state's burden includes demonstrating what the NHTSA standards are through competent testimony and/or by introducing the applicable portions of the NHTSA manual. *Ryan*, supra.

{¶18} In *State v. Boczar*, the Ohio Supreme Court held that HGN test results are admissible in Ohio without expert testimony if substantial compliance with testing guidelines has been shown and a proper foundation has been established as to the administering officer's ability to administer the test and the officer's actual technique in administering the test. 113 Ohio St.3d 148, 2007–Ohio–1251, ¶ 28. No blanket requirement exists, however, that appellee admit the manual. *State v. Roetzel*, 5th Dist. Ashland No. 12-COA-10, 2012-Ohio-4898, ¶¶ 23-27, citing *State v. Ryan*, supra, 2003–Ohio–2803 at ¶ 18.

{¶19} In this case, Fuller testified to her qualifications and training in administering standardized field sobriety tests, as well as to the NHTSA guidelines for administration of the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand test. She described generally the instructions for these tests as well as specifically how she instructed appellant to complete them and reported appellant's resulting performance.

{¶20} Appellant argues Fuller conducted the "onset of nystagmus prior to 45 degrees" portion of the test incorrectly because she took the stimulus (her pen) all the way to appellant's shoulder. Fuller testified she was not sure at what angle the onset for appellant's nystagmus began but she took the stimulus to his shoulder because NHTSA estimates that to be a 45-degree angle. The following exchange then took place upon cross-examination:

* * * *

[DEFENSE COUNSEL:] So you don't stop when you see nystagmus? You actually take it to forty-five degrees not matter what and hold it there?

[TROOPER FULLER:] If I observe it beforehand I do, but for [appellant's] case, I don't remember exactly at what angle I, you know, stopped, but I'll always take it out to the shoulder.

[DEFENSE COUNSEL:] That's my question. I guess that's the, the question I'm having. Your testimony is you always take the pen out to the shoulder for the onset of nystagmus at forty-five, prior to forty-five degrees?

[TROOPER FULLER:] Yes.

[DEFENSE COUNSEL:] Okay.

(Pause)

[DEFENSE COUNSEL:] Was there any white showing in my client's eye, uh, during that test, portion of the test?

[TROOPER FULLER:] Yes sir, there was.

* * * *

T. 37-39.

{¶21} Upon redirect, the prosecutor asked Fuller why she continues to move the stimulus on to the shoulder even if she sees nystagmus prior to forty-five degrees, and the trooper responded, "Just because the NHTSA Manual states that the shoulder is forty-five degrees and that's typically what I'm most comfortable with, stopping at the shoulder where I can see the light, I know I'm at forty-five degrees according to NHTSA. That, that's why I do it that way." (T. 45-46).

{¶22} Appellant presented no evidence at the suppression hearing and did not move to admit the NHTSA manual, either. Upon argument to the trial court, counsel argued "the NHTSA manual indicates that when you see a sign of jerking prior to forty-five degrees, you are to stop, verify that the jerking continues." This contention is not in evidence. Appellee concedes Fuller did not conduct the "onset of nystagmus prior to 45 degrees" portion in strict compliance with the NHTSA guidelines but the standard is substantial compliance. Fuller explained her methodology based upon the NHTSA guidelines. Appellant has not rebutted her statement with any evidence to the contrary. We are unwilling to overrule the trial court's finding of substantial compliance on this record and we find appellee otherwise demonstrated the applicable NHTSA standards by means of the trooper's testimony. *Roetzel*, supra, 2012-Ohio-4898 at ¶ 27. We find the HGN test was conducted in substantial compliance with NHTSA. Moreover, even if we found a portion of the HGN test not to be in substantial compliance, such error would be harmless because appellant was sentenced on the per se violation. *State v. Bull*, 5th Dist. Ashland No. 14-COA-007, 2014-Ohio-4230, ¶ 22.

{¶23} Finally, appellant argues the trooper did not have probable cause to arrest him for O.V.I. A police officer has probable cause for an arrest if the facts and circumstances within his knowledge are sufficient to cause a reasonably prudent person to believe that the defendant has committed the offense. *State v. Cummings*, 5th Dist. Stark No.2005–CA–00295, 2006–Ohio–2431, ¶ 15, citing *State v. Heston*, 29 Ohio St.2d 152, 280 N.E.2d 376 (1972). In making this determination, the trial court must examine the totality of facts and circumstances surrounding the arrest. See *State v. Miller*, 117 Ohio App.3d 750, 761, 691 N.E.2d 703 (11th Dist.1997); *State v. Brandenburg*, 41 Ohio App.3d 109, 111, 534 N.E.2d 906 (2nd Dist.1987). A police officer does not have to observe poor driving performance in order to effectuate an arrest for driving under the influence of alcohol if all the facts and circumstances lead to the conclusion that the driver was impaired. See *State v. Harrop*, 5th Dist. Muskingum No. CT2000–0026, unreported, 2001 WL 815538, (July 2, 2001), *2, citing *Atwell v. State*, 35 Ohio App.2d 221, 301 N.E.2d 709 (8th Dist.1973).

{¶24} In this case, Trooper Fuller testified she based her decision to arrest appellant upon the totality of the circumstances, including the strong odor of an alcoholic beverage emanating from the car and from appellant's person; his bloodshot, glassy eyes; his performance upon the standardized field sobriety tests and the non-standardized field sobriety tests; and appellant's admission to drinking.¹

¹ Fuller also administered a roadside portable breath test or "P.B.T." which indicated a result of "0.10" but she testified she made the decision to arrest appellant before administering this test.

{¶25} We find the facts and circumstances within Fuller's knowledge were sufficient to cause a reasonably prudent person to believe appellant committed the offense of O.V.I. and his arrest is therefore supported by probable cause.

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

II.

{¶27} In his second assignment of error, appellant argues the trial court incorrectly instructed the jury upon the per se O.V.I. offense [R.C. 4511.19(A)(1)(d)]. We disagree.

{¶28} The portion of jury instructions challenged by appellant states:

* * * *

Ladies and gentlemen, a per se violation is committed where the amount of alcohol concentration in an operator's bodily substance, such as breath, exceeds the prescribed amount as shown by a properly administered test taken on a substance withdrawn within three hours of the Defendant's operation of a vehicle.

* * * *

T. 190.

{¶29} Appellant argues the instruction essentially imposes "strict liability" upon a defendant who exhibits a prohibited concentration within three hours of operating a vehicle and omits the element of "at the time of operation." The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Martens*, 90 Ohio App.3d 338, 629 N.E.2d 462 (3rd Dist.1993). In order to find an abuse of that discretion, we must

determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Jury instructions must be reviewed as a whole. *State v. Coleman*, 37 Ohio St.3d 286, 290, 525 N.E.2d 792(1988).

{¶30} We note that immediately prior to the challenged portion of the instruction, the trial court stated:

* * * *

Operation of a vehicle with a prohibited concentration of alcohol, the elements of the offense of operating a vehicle with a prohibited concentration of alcohol in violation of Section 4511.19(A)(1)(d) of the Ohio Revised Code, a per se violation, and which the State of Ohio must prove beyond a reasonable doubt are as follows: (1) that the offense took place in the county of Fairfield, state of Ohio; (2) that the offense took place on or about the 29th day of December, 2013; (3) that the above time and place, the [appellant] was operating a vehicle; (4) that [appellant] operated a vehicle with the concentration of eight hundredths of one gram or more, but less than seventeen hundredths of one gram by weight of alcohol per two hundred and ten liters of [appellant's] breath. The amount that was presented was .093.

T. 189-190.

{¶31} The trial court's instructions therefore mirrored the statute. Then, immediately after the challenged portion of the instructions, the trial court instructed the

jury on the definition of each element of the statute, including the following in relevant part:

Some definitions for you. Operate. Operate means to cause or have caused movement of the vehicle.

* * * *

Under the influence. This means that [appellant] consumed some alcohol, whether mild or potent, in such a quantity, whether small or great, that it adversely affected and appreciably impaired [appellant's] actions, reactions, or mental processes under the circumstances then existing and deprived [appellant] of that clearness of intellect and control of himself, which he would otherwise have possessed. The question is not how much alcohol would affect an ordinary person, the question is what effect did any alcohol consumed by this [appellant] have on him at the time and place involved. If the consumption of alcohol so affected the nervous system, brain or muscles of [appellant] so as to impair to an appreciable degree his ability to operate the vehicle, then the [appellant] was under the influence of alcohol.

* * * *

T. 190-191.

{¶32} We find the challenged portion of the instructions is not a misstatement of the law; nor is it ambiguous. When the jury instructions are read as a whole, the instructions do not create the labored reading suggested by appellant: that "a person

could have nothing to drink at all prior to driving his car to a bar, proceed to consume enough alcohol inside the bar to raise his blood alcohol concentration above the legal limit, leave the bar by foot within three hours of driving there, and be arrested for driving under the influence of alcohol while walking home." (Brief, 8). The instructions instead indicate a finding of guilt upon the per-se violation requires the elements of a prohibited breath alcohol concentration *and* operation of a vehicle.

{¶33} Appellant argues here, and at trial, the jury could have found his blood alcohol concentration was under the legal limit at the time of operation. The evidence established, however, that Fuller's attention was drawn by appellant's brake lights; appellant stated he pulled over "just in time" to prevent his passenger from throwing up inside the car; and the passenger was throwing up at the roadside as Fuller approached. The jury could reasonably conclude Fuller came upon appellant within moments of his operation of his vehicle.

{¶34} The trial court's challenged instruction to the jury is not an abuse of discretion, does not misstate the law, and does not mislead the jury in the context of the jury instructions as a whole. Appellant's second assignment of error is overruled.

CONCLUSION

{¶35} Appellant's two assignments of error are overruled and the judgment of the Fairfield County Municipal Court is affirmed.

By: Delaney, J. and

Gwin, P.J.

Baldwin, J., concur.