

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
DARKE COUNTY

STATE OF OHIO

Appellee

v.

JOSEPH W. IMPSON

Appellant

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C.A. No. 2025-CA-21

Trial Court Case No. 25-TRC-001-0209

(Criminal Appeal from Municipal Court)

**FINAL JUDGMENT ENTRY &
OPINION**

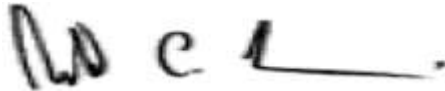
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Pursuant to the opinion of this court rendered on October 23, 2026, the judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings consistent with the opinion.

Costs to be paid as follows: 50% by the appellee and 50% by the appellant.

Pursuant to Ohio App.R. 30(A), the clerk of the court of appeals shall immediately send a copy of the court's ruling to each party and note that action on the docket. Additionally, pursuant to App.R. 27, the clerk of the court of appeals shall send a certified copy of this judgment, which constitutes a mandate, to the clerk of the trial court and note the service on the appellate docket.

For the court,



RONALD C. LEWIS, PRESIDING JUDGE

EPLEY, J., and HANSEMAN, J., concur.

OPINION
DARKE C.A. No. 2025-CA-21

JENNIFER E. MARIETTA, Attorney for Appellant
MICHAEL A. RIEMAN, Attorney for Appellee

LEWIS, P.J.

{¶ 1} Defendant-appellant Joseph W. Impson appeals from his convictions in the Darke County Municipal Court. For the following reasons, we reverse the trial court’s judgment in part, affirm it in part, and remand the cause to the trial court for further proceedings consistent with this opinion.

I. Facts and Course of Proceedings

{¶ 2} On February 18, 2025, Greenville City Police Officer Michaela Colby filed a citation and narrative report in the Darke County Municipal Court relating to a traffic stop of Impson’s vehicle earlier that morning. According to the narrative report, Officer Colby initiated the traffic stop due to the lack of a functioning license plate light. Once she contacted Impson, Officer Colby smelled a strong odor of alcohol. She described Impson’s eyes as bloodshot and glossy and noticed that he was slurring his words. Officer Colby asked him to submit to field sobriety testing, and he agreed. After administering the field sobriety test, Officer Colby arrested Impson for operating a vehicle under the influence of alcohol (“OVI”).

{¶ 3} Impson was charged with OVI in violation of R.C. 4511.19(A)(1)(a), a first-degree misdemeanor, and failure to have a working license plate light in violation of R.C. 4513.05(A), a minor misdemeanor. Impson pleaded not guilty to the charges.

a. Motion to Suppress

{¶ 4} Impson filed a motion to suppress all evidence obtained as a result of: (1) the

traffic stop of his vehicle; (2) the field tests administered during the traffic stop; (3) the Horizontal Gaze Nystagmus (“HGN”) Test administered during the traffic stop; and (4) his arrest. According to Impson’s motion to suppress, the police officer who initiated the traffic stop, “lacked reasonable suspicion [Impson] was under the influence of alcohol or drugs at the time she delayed the traffic stop for the purpose of administering field tests.” Impson argued for suppression of all the evidence obtained because of the prolonged detention. Impson also contended that Officer Colby “did not substantially comply with NHTSA [National Highway Traffic Safety Administration] guidelines when she administered the tests.”

{¶ 5} The trial court held a hearing on Impson’s motion to suppress. The trial court asked Impson to present his case first since it was his motion. Impson called Officer Colby as his only witness. Officer Colby testified that she had conducted the February 18, 2025 traffic stop of Impson’s vehicle. Prior to the traffic stop, Officer Colby had received a communication from a Union City police officer informing her that the light was out on the license plate of Impson’s vehicle. When Officer Colby first saw Impson’s vehicle, she was parked in a cemetery. She began following Impson and noticed that his vehicle’s license plate light was not working. Therefore, she initiated a traffic stop.

{¶ 6} Officer Colby approached the front, passenger-side window of Impson’s vehicle. She asked him for his license and insurance information. Although Officer Colby did not notice any dexterity issues when Impson retrieved the requested information, she noticed that he was nervous, his eyes were glossy and bloodshot, and there was a strong odor of alcohol emanating from the vehicle. Officer Colby also noticed an open can of beer and a bottle of liquor in the center console of Impson’s vehicle. She caught Impson trying to hide the bottle of liquor. Officer Colby asked Impson if he had been drinking, and he nodded his

head, raised his hands, and said “please.” Officer Colby interpreted this response as Impson admitting that he was intoxicated and asking that she look the other way and not cite him.

{¶ 7} Officer Colby asked Impson to exit his vehicle. As Impson exited the vehicle, Officer Colby noticed a strong odor of alcohol coming from him. Officer Colby provided the following explanation as to why she then asked Impson to perform field sobriety tests: “His –what I observed of him being intoxicated, the glossy bloodshot eyes, the slurred speech, the smell of alcohol, the liquor bottle that I observed in the vehicle, him putting up his hands up saying please when I asked about the liquor bottle.” Suppression Tr. 12-13. While Impson was waiting to perform the HGN test, he held his small dog, which had been traveling with him at the time of the traffic stop. Officer Colby explained to Impson that he could not hold the dog during the HGN test. Impson put the dog on the ground next to him. Officer Colby had Impson perform the HGN test. She asked Impson whether he wore glasses or contacts. Impson initially shook his head no but subsequently said that he wore glasses. He did not wear any glasses or contacts during the HGN test.

{¶ 8} Officer Colby testified that during the HGN test she noticed several clues that supported the finding of impairment. But she conceded that she did not follow proper procedures during the smooth pursuit portion of the HGN test. She also noted that there were a few breaks during the HGN test and that Impson’s dog became a distraction during the test. Officer Colby offered to position Impson’s dog away from him, but he refused. Officer Colby blamed her failure to properly perform portions of the HGN test on Impson’s inability to follow her directions. Officer Colby believed that Impson was stopping the test on purpose and was not affected by the flashlight she was using. Officer Colby had Impson

turn away from traffic and the lights of her police cruiser to help him perform the field sobriety tests.

{¶ 9} Officer Colby explained that one of the steps during the HGN test is to check for distinct and sustained nystagmus at maximum deviation, which typically requires her to hold her finger in certain places for six seconds. She provided the following explanation as to why she did not hold her finger in place for six seconds: “I know that I attempted. It was very hard to do because he kept stopping and saying that he couldn’t do it with his eyes and the flashlight and everything. So it’s—I highly doubt I made it the actual time frame. I don’t even believe I made it to the prior to 45 because he couldn’t complete the test.” *Id.* at 28. Impson refused to perform the walk-and-turn and one-leg-stand field sobriety tests.

{¶ 10} Officer Colby decided to arrest Impson for driving while intoxicated. She based her decision on the open alcohol containers, the strong smell of alcoholic beverage, the glossy and bloodshot eyes, the slurred speech, and the clues that she had gathered from the HGN test. Officer Colby acknowledged that she had not witnessed Impson driving erratically before she initiated the traffic stop.

{¶ 11} After Officer Colby concluded her testimony, the parties offered closing arguments on the motion to suppress. The trial court then denied Impson’s motion to suppress, finding that the traffic stop was lawful and that Officer Colby had reasonable suspicion to believe that Impson was intoxicated. Regarding the HGN test, the trial court concluded, “I tend to agree with the State. I don’t think it’s strict compliance, I think it’s substantial compliance. And I think that the HGN test in this matter was substantially complied with and, therefore, it was a lawful arrest. So I will deny the Motion to Suppress.” Suppression Tr. 62.

b. The Jury Trial

{¶ 12} A jury trial was held on November 21, 2025. Officer Colby testified that she worked for three years for the Darke County Sheriff's Office before she became a patrol officer with the Greenville City Police Department. Owing to the lack of a functioning license plate light on Impson's vehicle, Officer Colby initiated the February 18, 2025 traffic stop of Impson's vehicle at approximately 2:30 a.m. After initiating the stop, Officer Colby walked up to the front, passenger-side window. She explained what she saw from this vantage point:

I noticed pretty immediately the open containers, the bottle of vodka sitting around the middle seat and then the open can of beer sitting in the cup holder by the driver, steering wheel. I observed the bloodshot, glossy eyes from the defendant. I heard the slurred speech when I started asking questions, asking information, and then I could smell the strong odor of alcoholic beverage coming from the vehicle.

Trial Tr. 87-88.

{¶ 13} Officer Colby asked Impson whether he had been drinking, and he "noded his head yes and then brought his hands up and mouthed the word please." *Id.* at 90. Impson tried to hide the vodka bottle, but Officer Colby had already seen it. She asked him what he had been drinking, and he held up the can of beer and said just the beer. After further questioning, however, Impson admitted to also drinking some vodka. Officer Colby estimated that the beer can found in Impson's vehicle was about three-fourths full and the vodka bottle was about four-fifths full. She asked if she could search the vehicle. Impson consented to the search, and he exited his vehicle.

{¶ 14} After completing her search of the vehicle, Officer Colby asked Impson to perform field sobriety tests. Officer Colby initiated the HGN test. She had been trained on how to properly perform the test according to the NHTSA Manual. During the test, Officer Colby looked for six different clues (three in each eye). She testified that she saw four of the six clues, which indicated impairment, before she stopped the test. Officer Colby noted that Impson's dog was out of his vehicle during the test and that she offered to remove the dog from the area to prevent any distractions during the test, but Impson refused. Officer Colby explained that she had to remind Impson numerous times of the testing procedures and to focus on her during the HGN test. The split focus portion of the test "was a very large struggle" for Impson. Trial Tr. 107. Officer Colby also opined that the lack of smooth pursuit, one of the clues, was obvious in her body camera video.

{¶ 15} On cross-examination, Officer Colby testified that Impson did not wear glasses during the HGN test, but he informed her that he could see the finger that she used to administer the test. Officer Colby turned her flashlight farther away from Impson's eyes after he complained that he was having trouble seeing. Officer Colby believed Impson showed four of six clues on the HGN test by exhibiting lack of smooth pursuit in both eyes and nystagmus at maximum deviation in both eyes. She conceded that portions of the HGN test were not administered for the length of time the NHTSA Manual required, but she blamed this failure on Impson's inability to follow her directions. Officer Colby testified that she saw sufficient signs of impairment before Impson declined to participate in further testing.

{¶ 16} Greenville City Police Sergeant Alan Smith also testified at trial. He witnessed Impson performing the HGN test during the traffic stop. Sergeant Smith believed that, given Impson's head movements, Officer Colby did the best she could. While

Sergeant Smith conceded that portions of the test were not conducted for the duration recommended by the NHTSA Manual, he noted that Impson's actions caused a few interruptions in the test. He stated that forgetting instructions or failing to follow instructions is a sign of impairment. Sergeant Smith believed that Impson was impaired at the time of the traffic stop.

{¶ 17} The jury found Impson guilty of an OVI in violation of R.C. 4511.19(A)(1)(a), a first-degree misdemeanor. The trial court found Impson guilty of a failure to have a working license plate light in violation of R.C. 4513.05(A), a minor misdemeanor. Following a sentencing hearing, the trial court sentenced Impson to 134 days in jail on the OVI conviction. The court suspended 62 days of the sentence and credited Impson with 58 days already served in jail, which left 14 days of jail to be served. The trial court also placed Impson on probation for two years, ordered him to pay a \$750 fine and court costs, and imposed a 545-day driver's license suspension. The trial court did not impose a fine or order Impson to pay court costs on his minor misdemeanor conviction. Impson appealed from the trial court's judgment.

II. Impson's Substantial Rights Were Not Affected by the Trial Court's Decision to Have His Counsel Go First at the Suppression Hearing

{¶ 18} Impson's first assignment of error states:

The Court committed plain error when it procedurally shifted the burden for the Motion to Suppress from the State to the Defense.

{¶ 19} At the suppression hearing, the trial court required Impson's trial counsel to present evidence first, because it was "your motion." Suppression Tr. 4. On appeal, Impson argues that the trial court "conducted the motion to suppress hearing as if the burden were on the defense, requiring them to put on evidence on direct, and allowing the state to

lead their witness as if on cross.” Appellant’s Brief, p. 10. According to Impson, the trial court committed plain error and denied him fair consideration of his motion to suppress.

{¶ 20} The State concedes that the trial court erred by having defense counsel first question the only witness at the suppression hearing before the State questioned the witness. But the State argues that this error did not rise to the level of plain error and that Impson’s substantial rights were not impacted by the order in which the evidence was presented at the suppression hearing.

{¶ 21} “Once a defendant has demonstrated a warrantless search or seizure and adequately clarified that the ground upon which he challenges its legality is lack of probable cause, the prosecutor bears the burden of proof, including the burden of going forward with evidence, on the issue of whether probable cause existed for the search or seizure.” *Xenia v. Wallace*, 37 Ohio St.3d 216 (1988), paragraph two of the syllabus. Generally, after a defendant identifies grounds for suppressing evidence, the State presents its evidence first at a motion to suppress hearing. The trial court erred by requiring Impson to go first at the suppression hearing. But Impson failed to object to the trial court’s instruction to present his evidence first. Therefore, we review the trial court’s decision for plain error.

{¶ 22} To establish plain error, a defendant must demonstrate that an error occurred, it was obvious, and it affected the defendant’s substantial rights. *State v. Spaulding*, 2016-Ohio-8126, ¶ 64. To have affected the defendant’s substantial rights, the defendant must establish that the outcome of the trial would clearly have been different but for the trial court’s alleged errors. *State v. Waddell*, 1996-Ohio-100, ¶ 10, citing *State v. Moreland*, 50 Ohio St.3d 58, 63 (1990). We recognize plain error ““with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”” *State v. Landrum*,

53 Ohio St.3d 107, 111 (1990), quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶ 23} Although it was very irregular for the trial court to have Impson present his evidence first at the suppression hearing, the record before us does not establish that Impson's substantial rights were affected by the order in which evidence was presented at the hearing. Impson was given a full opportunity at the suppression hearing to present and question any witnesses. All the relevant facts were before the court, and there is no indication in the record that the court misplaced the State's burden of persuasion. Therefore, the court's error in requiring Impson to present his evidence first at the suppression hearing did not affect his substantial rights and did not rise to the level of plain error. See *In re Dunlop*, 1984 WL 14171, *1 (8th Dist. Jan. 5, 1984); *State v. Parks*, 1987 WL 16567, *5 (4th Dist. Sept. 3, 1987) ("Here all of the salient facts were aired. Few were even in dispute. The defendant, therefore, was not prejudiced by the order in which the evidence was presented.").

{¶ 24} The first assignment of error is overruled.

III. The Trial Court Should Have Granted Impson's Motion to Suppress to the Extent It Sought Suppression of the Results of the HGN Test

{¶ 25} Impson's second assignment of error states:

The court erred when it denied Appellant's Motion to Suppress.

{¶ 26} "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *State v. Koon*, 2015-Ohio-1326, ¶ 13 (2d Dist.), quoting *State v. Burnside*, 2003-Ohio-5372, ¶ 8. "Consequently, an appellate court must accept the trial

court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.” *Id.*, quoting *Burnside* at ¶ 8.

{¶ 27} Impson argues that the trial court erred in denying his motion to suppress because the State failed to meet its burden to establish that the traffic stop was lawful and that Officer Colby substantially complied with the required procedures for the HGN test. We address these arguments in turn.

a. Initial Traffic Stop

{¶ 28} Impson argues that any evidence from the traffic stop should have been suppressed because Officer Colby did not observe the traffic violation while Impson's vehicle was in her jurisdiction. Therefore, Impson believes the traffic stop was unlawful. We do not agree.

{¶ 29} “A law enforcement officer must have a ‘reasonable articulable suspicion’ that a person is or has been engaged in criminal activity before he is justified in initiating a traffic stop.” *State v. Asanov*, 2013-Ohio-2754, ¶ 11 (2d Dist.), citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). Officer Colby testified that she stopped Impson due to the lack of a working license plate light in violation of R.C. 4513.05(A). The statute states, in part: “Either a tail light or a separate light shall be so constructed and placed as to illuminate with a white light the rear registration plate, when such registration plate is required, and render it legible from a distance of fifty feet to the rear.”

{¶ 30} It is undisputed that Impson did not have a working license plate light when he was pulled over by Officer Colby. Moreover, at the suppression hearing, Officer Colby testified that a Union City police officer had alerted her that Impson was headed in the

direction of Greenville and that he did not have a working license plate light. As Impson approached the city limits of Greenville, Officer Colby observed his traffic violation. She then followed Impson's vehicle and witnessed the violation within the city limits before she initiated the traffic stop. Her testimony was sufficient to justify the traffic stop of Impson's vehicle. Therefore, the trial court did not err in denying Impson's motion to suppress to the extent that it sought the suppression of *all* evidence obtained after the traffic stop was initiated.

b. HGN Test Results

{¶ 31} Impson also argues that the trial court erred by overruling his motion to suppress to the extent it sought suppression of the results of the HGN test. According to Impson, Officer Colby did not provide instructions to Impson in compliance with the NHTSA Manual. In particular, “[s]he told Impson to look at her finger, but not her fingertip, and told him to keep his head still, not straight,” and she did not instruct Impson to keep looking at the stimulus until the test was over. Appellant's Brief, p. 17. Impson contends that Officer Colby also conceded that she failed to properly perform portions of the HGN test.

{¶ 32} “R.C. 4511.19(D)(4)(b) provides that the results of field sobriety tests are admissible at trial as long as the state presents clear and convincing evidence that the officer administered the tests in substantial compliance with the NHTSA standards.” *State v. Davis*, 2009-Ohio-3759, ¶ 15 (2d Dist.). “Clear and convincing evidence is that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶ 33} “In the HGN test, an officer holds a stimulus, (generally a pen) twelve to fifteen inches away from an individual’s face, and the individual is directed to follow the stimulus with his or her eyes. Alcohol is indicated if the eyes have a lack of smooth pursuit, i.e., do not follow the stimulus or bounce around.” *State v. Adams*, 2017-Ohio-7743, ¶ 11 (2d Dist.). “The second part of the test measures sustained nystagmus at maximum deviation, and the third is onset prior to 45 degrees. These latter tests also use a stimulus and the presence of alcohol is indicated if the eyes bounce around or if there is involuntary jerking of the eyes.” *Id.*

{¶ 34} The NHTSA Manual provides the following verbal instructions that a police officer should give in conducting the HGN test: (1) put your feet together and hands at your side; (2) keep your head still; (3) look at the stimulus; (4) follow the movement of the stimulus with your eyes only; and (5) keep looking at the stimulus until you are told the test is over. Defendant’s Exhibit E. After providing those instructions, the officer should position the stimulus approximately 12 to 15 inches in front of the suspect’s nose and slightly above eye level. The officer should next check the suspect’s pupils to determine if they are equally sized, check the suspect’s ability to track the stimulus, and check whether the suspect’s tracking is smooth. The NHTSA Manual instructs that there should be a clear, distinguishable break between the check for equal tracking and the check for lack of smooth pursuit. The officer then should check the suspect for nystagmus at maximum deviation and for onset of nystagmus prior to 45 degrees. *Id.*

{¶ 35} The NHTSA Manual provides additional guidelines for the various portions of the HGN test. For instance, when checking for smooth pursuit, the officer should make at least two complete passes with the stimulus, and the stimulus must be moved in a smooth, continuous manner without stopping at either side or the center. When checking for distinct

nystagmus at maximum deviation, the officer must hold the stimulus at maximum deviation for a minimum of four seconds. The Manual cautions, “In order to ‘count’ this clue as evidence of impairment, the nystagmus must be distinct and sustained for a minimum of 4 seconds.” *Id.* The Manual explains that “[i]f the person is impaired, the eye is likely to exhibit distinct and sustained jerking when held at maximum deviation for a minimum of 4 seconds.” *Id.*

{¶ 36} At the suppression hearing, Officer Colby agreed that she had not followed the proper procedure for the smooth pursuit portion of the HGN test. Suppression Tr. 27. She also “highly doubted” whether she made it to the “actual time frame” stated in the NHTSA Manual for the maximum deviation portion of the HGN test, and she did not believe that she was able to check each eye twice for the maximum deviation portion. She blamed the failure on Impson’s lack of cooperation. Officer Colby also conceded that she did not execute the proper number of sweeps during her administration of the HGN test. She stated that her failure to do so was due to “the defendant’s inability to perform the test.” *Id.* at 32.

{¶ 37} We have reviewed the video evidence submitted at the suppression hearing, which consisted of video footage from body and police cruiser cameras. Prior to starting the HGN test, Officer Colby instructed Impson to stand with his feet together, his hands down at his side, and his head “perfectly still.” She then told him to keep his head straight and to follow her finger with only his eyes. Officer Colby started her finger in the center, moved it to the right and paused, moved it back to the center and paused, and moved it to the left and paused. While she did this, Impson moved his head slightly and put up his hand to block the flashlight from shining in his eyes as she paused her finger on the left. Officer Colby stopped the test and adjusted where she was pointing her flashlight. She reminded

Impson to keep his head straight and his hands down by his sides. Officer Colby then did two additional passes with her finger in which she paused in the middle and at each end before she changed the direction of her finger. Impson took his eyes off her finger during the second of the two additional passes and asked how long the test would last. She said it was almost done, asked him to keep his hands down at his sides, and asked him if he was ready to keep going. Officer Colby finished the test by attempting to do one more pass in each direction, but Impson did not stay focused on the finger. During this portion of the test, Officer Colby did not hold her finger at maximum deviation for the four-second minimum.

{¶ 38} The burden was on the State to show by clear and convincing evidence that the field sobriety test was performed in substantial compliance with the NHTSA Manual. There was insufficient evidence in the record to support the trial court's finding that Officer Colby performed the HGN in substantial compliance with the NHTSA Manual. Instead, Officer Colby's testimony and the video evidence established that she failed to follow the instruction of the NHTSA Manual when performing the smooth pursuit and maximum deviation portions of the HGN test. Notably, she inserted several pauses during the smooth pursuit portion of the test and failed to pause for the necessary four seconds in the maximum deviation portion of the HGN test. While we acknowledge that Impson did not help the situation by failing to follow some of Officer Colby's directions, we are ultimately concerned with whether the State presented clear and convincing evidence that Officer Colby administered the tests in substantial compliance with the NHTSA standards. The State did not. Therefore, the trial court should have sustained Impson's motion to suppress to the extent that it sought exclusion of the results of the HGN field sobriety test.

{¶ 39} Due to the trial court's failure to suppress the results of the HGN test, Impson is entitled to a new trial on his OVI offense. During this new trial, the State will not be able to introduce the results of the HGN test. However, even though the results of the HGN test must be suppressed, this does not prohibit Officer Colby and Sergeant Smith from testifying about their general observations of Impson while Officer Colby attempted to administer the HGN test. *Middleburg Hts. v. Gettings*, 2013-Ohio-3536, ¶ 27, citing *State v. Schmitt*, 2004-Ohio-37. For example, Officer Colby and Sergeant Smith would be allowed to again testify that Impson had difficulty following or remembering directions during the test, which may be a sign of impairment.

{¶ 40} The second assignment of error is sustained in part and overruled in part.

IV. Impson's Conviction for Driving While Intoxicated Was Supported by Sufficient Evidence

{¶ 41} Impson's fourth assignment of error states:

There was not sufficient evidence to present the case to the Jury.

{¶ 42} Unlike the remaining assignments of error, this assignment of error is not rendered moot by our disposition of Impson's second assignment of error. *State v. Gideon*, 2020-Ohio-6961, ¶ 29 ("An assignment of error raising the sufficiency of the evidence is thus potentially dispositive of a particular count and cannot be moot."). Whether the evidence presented at trial is legally sufficient to sustain a conviction is a question of law that an appellate court reviews de novo. *State v. Groce*, 2020-Ohio-6671, ¶ 7, citing *In re J.V.*, 2012-Ohio-4961, ¶ 3. "During a sufficiency review, the reviewing court considers the evidence 'in a light most favorable to the prosecution' 'to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. McClain*, Slip Opinion No. 2026-Ohio-3934, ¶ 20, quoting *State v. Jenks*,

61 Ohio St.3d 259 (1991), paragraph two of the syllabus, *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 1997-Ohio-355, ¶ 49, fn. 4. An appellate court does not engage in a determination of witnesses' credibility when reviewing the sufficiency of the evidence. *State v. Goff*, 1998-Ohio-369, ¶ 86, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Nor does an appellate court assess whether the evidence admitted at trial should be believed. Rather, an appellate court assesses "whether the State produced adequate evidence of each element of the offense." *McClain* at ¶ 21. "We will not disturb the verdict unless we find that reasonable minds could not reach the conclusion reached by the trier of fact." *State v. Treesh*, 2001-Ohio-4, ¶ 91, citing *Jenks* at 273.

{¶ 43} R.C. 4511.19(A)(1)(a) provides that "[n]o person shall operate any vehicle, streetcar, or trackless trolley 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." Officer Colby and Sergeant Smith testified that, based on their observations of Impson during the traffic stop, they believed that he was driving under the influence. Officer Colby explained that she observed open alcohol containers in Impson's vehicle, his bloodshot and glossy eyes, and his slurred speech, and she smelled a strong odor of alcoholic beverage. She also testified that Impson admitted to drinking alcohol, he showed four of the six clues on the HGN test, and he struggled to follow her directions, which is a sign of impairment. Sergeant Smith also testified that Impson's inability to remember or follow instructions was a sign of impairment.

{¶ 44} Despite the testimony of Officer Colby and Sergeant Smith, Impson argues that there was insufficient evidence of impairment to submit the case to the jury because he did not commit any moving violations, he was able to cooperate with the police officer, and

he had no trouble exiting his vehicle. Impson contends that any inadequacies in his performance on the HGN test were attributable to the poor directions given to him by Officer Colby, the distractions by his dog, and the cold weather. While the evidence cited by Impson was relevant, it did not preclude a finding that there was sufficient evidence provided by the State to support his OVI conviction. Rather, based on the record before us, after viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found Impson guilty of OVI beyond a reasonable doubt.

{¶ 45} The fourth assignment of error is overruled.

V. Impson's Third Assignment of Error Is Moot

{¶ 46} Impson's third assignment of error states:

Defense Counsel was ineffective.

{¶ 47} Impson argues that his trial counsel was ineffective "for failing to object to the order of evidence during the Motion to Suppress, failing to object to numerous improper leading questions by the State, and failing to make a Crim.R. 29 Motion." Based on our resolution of the second and fourth assignments of error, this assignment of error is overruled as moot. App.R. 12(A)(1)(c).

VI. Impson's Fifth Assignment of Error Is Moot

{¶ 48} Impson's fifth assignment of error states:

The conviction was against the Manifest Weight of the evidence.

{¶ 49} Based on our resolution of the second assignment of error, this assignment of error is overruled as moot. App.R. 12(A)(1)(c).

VII. Impson Withdrew His Sixth Assignment of Error

{¶ 50} Impson's sixth assignment of error states:

The Court improperly entered a finding on the minor misdemeanor charge at

sentencing without no procedural record that the case was submitted to the trier of fact.

{¶ 51} In his sixth assignment of error, Impson argued in his initial appellate brief that his minor misdemeanor violation of R.C. 4513.05 was not presented to the jury for a verdict and no bench trial was held on the charge. He contended the trial court had no procedural grounds to enter a finding of guilty on the license plate light offense. The State responded that the trial court indicated that it would review the evidence related to the license plate light offense during the trial, which made its guilty finding on that offense proper. Appellee's Brief, p. 9, citing Trial Tr. 7-8.

{¶ 52} In reply, Impson has conceded that the trial court properly addressed the issue on the record. He has withdrawn his sixth assignment of error and no longer challenges the validity of his conviction for violating R.C. 4513.05. Accordingly, the sixth assignment of error is overruled, and Impson's conviction for violating R.C. 4513.05 is affirmed without further discussion.

VIII. Impson's Seventh Assignment of Error Is Moot

{¶ 53} Impson's seventh assignment of error states:

Prosecutorial misconduct by the prosecution unfairly prejudiced the outcome of the trial.

{¶ 54} Impson argues that the prosecutor made speculative remarks during witness examinations and closing arguments that were so prejudicial that they impacted the outcome of the trial. According to Impson, the prosecutor repeatedly stated that when Impson said "please" to Officer Colby, he was begging for mercy or asking Officer Colby to look the other way. Impson notes that the prosecutor made this point during opening statements, three times during the examination of Officer Colby, and at least four times during closing

statements. Impson concedes that he did not object to the prosecutor's speculative statements. Impson also contends that the prosecutor improperly influenced the jury by speculating during closing statements that before Officer Colby initiated the February 2025 traffic stop, Impson was probably at a party. According to Impson, the jury was clearly influenced by the prosecutor's party comment because, during deliberations, the jury submitted a question to the judge asking whether there was any testimony about where Impson had been before he was pulled over by Officer Colby. Impson believes it was plain error for the trial court to permit all these speculative statements by the prosecutor. Impson asks that we grant him a new trial due to this alleged prosecutorial misconduct.

{¶ 55} This assignment of error is rendered moot by our resolution of the second assignment of error. But we would be remiss if we did not address the comments made by the prosecutor during closing arguments speculating that Impson likely was coming from a party when Officer Colby initiated the traffic stop. The prosecutor stated:

But when you get somebody driving through our city, into our city at 2:30 in the morning with an open beer in one hand and open bottle of vodka in the other and he is trying to tell you that, oh, this is just the first drink I had or I haven't had any for a while, that is not a realistic explanation for what you are seeing.

A realistic explanation is that he is impaired. He has been drinking at least two different kinds of alcohol. He is drinking them actively as he is driving. It's 2:30 in the morning. He didn't start drinking at 2:20 in the morning.

He was probably at a party. He was probably drunk, like he—that's the likely explanation.

Trial Tr. 199-200. Defense counsel did not object to the prosecutor's speculation but tried to minimize the potential damage by responding in closing argument: "The State has also painted a picture that they want you to believe that Mr. Impson was at a party. You were offered no evidence to that. You have no idea what Mr. Impson was doing before or after. The officer failed to ask Mr. Impson when he consumed alcohol. You don't know if Mr. Impson consumed that alcohol 12 hours prior." *Id.* at 203. Seemingly undeterred, the prosecutor doubled down on speculation in the rebuttal closing. The prosecutor stated, "Is it reasonable to think, again, that that was the very beginning of the point that he was drinking, or was he dropping somebody off, giving them a ride home from a bar or a party or something and then coming back through town and just finishing his night off with an extra beer and a little bit of vodka?" *Id.* at 206.

{¶ 56} There was no testimony or evidence about Impson attending a party in the hours immediately before the traffic stop was initiated. "Neither the defense nor the prosecution may refer to evidence that is not in the record." *State v. McKelton*, 2016-Ohio-5735, ¶ 286, quoting *State v. Brown*, 38 Ohio St.3d 305, 316, fn. 7 (1988). Speculating that Impson had been at a party was clearly designed to get the jury to believe Impson had consumed more alcohol than what was missing from the beer can and bottle of vodka in his car. The prosecutor knew that there was no evidence in the record that Impson had recently been at a party prior to the traffic stop. Moreover, the prosecutor's statements clearly caught the attention of the jury, as evidenced by its question during deliberations asking whether there was any evidence of where Impson had been before the traffic stop was initiated. The jury ultimately came to a guilty verdict before receiving an answer to its question.

{¶ 57} In a case like this one that had conflicting evidence as to whether Impson had consumed enough alcohol to be legally impaired, the improper comments made by the prosecutor during closing arguments had a greater possibility of being prejudicial to the defense. We take this opportunity to remind parties, their counsel, and trial courts that closing arguments should be limited to arguments based on evidence that was presented during the trial, not speculation. If that rule is ignored, the likelihood of a fair trial will decrease.

{¶ 58} The seventh assignment of error is overruled as moot. App.R. 12(A)(1)(c).

IX. Impson's Eighth Assignment of Error Is Moot

{¶ 59} Impson's eighth assignment of error states:

Appellant was not properly afforded all jail credit to which he is entitled.

{¶ 60} Given our resolution of the second assignment of error, this assignment of error is overruled as moot. App.R. 12(A)(1)(c).

X. Conclusion

{¶ 61} Having sustained the second assignment of error, in part, we reverse the trial court's judgment in part and affirm it in part. We reverse Impson's OVI conviction and affirm Impson's conviction for failure to have a working license plate light in violation of R.C. 4513.05(A). The cause is remanded for a new trial on the OVI offense consistent with this opinion.

.....

EPLEY, J., and HANSEMAN, J., concur.