[Cite as *Columbus v. Lamarca*, 2015-Ohio-4467.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
		No. 15AP-440
v.	:	(M.C. No. 2014 TRC 176804)
Alysse M. LaMarca,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 27, 2015

Richard C. Pfeiffer, Jr., City Attorney, and *Orly Ahroni*, for appellee.

Saia & Piatt, Inc., *Jessica G. D'Varga*, and *Jon J. Saia*, for appellant.

APPEAL from the Franklin County Municipal Court

SADLER, J.

{¶ 1} Defendant-appellant, Alysse M. LaMarca, appeals from the judgment of conviction and sentence entered by the Franklin County Municipal Court for operating a vehicle under the influence ("OVI") in violation of Columbus Traffic Code section 2133.01(A)(1)(a). For the following reasons, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} On September 5, 2014, at 2:00 a.m., city of Columbus police officers cited appellant with OVI in violation of Columbus Traffic Code sections 2133.01(A)(1)(a) and (d), a marked lanes violation of Columbus Traffic Code section 2131.08(a)(1), and a failure to signal violation of Columbus Traffic Code section 2131.14(a). On September 11, 2014, appellant entered a plea of not guilty to all charges, waived her right to a jury trial on the

marked lanes and failure to signal charges, and requested that her trial be held within the statutory time limits. On January 12, 2015, plaintiff-appellee, City of Columbus, voluntarily dismissed the charge under Columbus Traffic Code section 2133.01(A)(1)(d), commonly referred to as "OVI [p]er [s]e," and the remaining OVI charge under Columbus Traffic Code section 2133.01(A)(1)(a), commonly referred to as "OVI [i]mpaired," proceeded to a jury trial held April 13, 14, 15, 16, and 21, 2015. (Appellant's Brief, 6, 7.)

{¶ 3} Prior to the impaneling of a jury, appellant made a motion to dismiss all charges due to a violation of her speedy trial rights, alleging 93 days chargeable to appellee had elapsed since her arrest—3 more days than permitted under the statutory scheme for the level of OVI offense involved. Appellee generally contended that it should not be charged with days attributable to the court's unavailability. In overruling the motion, the court stated that it was "not 100 percent on 93 versus 92 [days], but it does look like we are a bit over," and noted that the court rescheduled the March trial date due to the judge's family health emergency and scheduled the April trial around the availability of a jury. (Tr. 10.) The trial resumed the day following the speedy trial motion, and appellee produced the following relevant evidence in its case-in-chief.

{¶ 4} Michael Voorhis, a police officer with the Columbus Division of Police, testified that he arrested appellant for OVI on September 5, 2014. Voorhis and his partner were patrolling an area near Hamilton Road on the east side of Columbus when, just before 2:00 a.m., they observed a vehicle drift over the dashed white line in the middle of the road several times, drift over the white "fog" line on the side of the road, and change lanes without using a turn signal. (Tr. 67.) Voorhis turned on his overhead lights, and the vehicle stopped on the right shoulder of a stretch of Route 161. He and his partner approached the vehicle and observed appellant in the driver's seat of the car, alone. Her window was down, and Voorhis "detected a strong odor of alcohol coming from the vehicle" and noticed that appellant's eyes were glassy, bloodshot, and "kind of glazed over." (Tr. 70.) Voorhis asked appellant where she was going, and appellant replied that she was not sure where she was, but she had been to a Giant Eagle VIP party in Grandview and was heading to a hotel in Gahanna. Voorhis thought her speech was slightly slurred: she was blending her words together and not pronouncing them clearly. Due to these observations and her driving, he asked appellant to exit the vehicle in order

to administer field sobriety tests. Voorhis testified that, based on his nine years of experience, he considered field sobriety tests, particularly the three tests he utilized with appellant, to be reliable in helping to determine whether or not a person is impaired.

{¶ 5} Voorhis first conducted the horizontal gaze nystagmus ("HGN") test, a test designed to reveal involuntary jerking of the eyeball consistent with alcohol consumption. Voorhis observed six out of six HGN test "clues" in appellant. (Tr. 89.) Next, Voorhis conducted the walk-and-turn test, which involves asking a person to follow specific directions while walking heel-to-toe in a straight line for nine steps before turning and walking in the same manner back to the starting point. Voorhis observed eight out of eight walk-and-turn clues in appellant's performance. Specifically, appellant did not remain balanced at the outset of the test and instead swayed, fell backwards and leaned on the police vehicle, had trouble walking in a straight line in a heel-to-toe manner, made an improper turn, and took 29 steps forward but told the officer she took 7 steps. Lastly, Voorhis administered the one-leg stand test, which involves asking a person to lift one leg six inches off of the ground while counting in a specified manner. Voorhis observed three out of four clues in appellant's execution of the one-leg stand test. Voorhis testified that, based on his experience, he believed that appellant's performance on all three standardized field sobriety tests indicated that she was impaired by alcohol. Voorhis also noted that he smelled alcohol on her breath while he spoke to her face-to-face.

{¶ 6} Due to her performance on the field sobriety tests, her driving, and his observations, including smelling alcohol on her breath and in her car, Voorhis and his partner placed appellant under arrest and impounded her car. Once in the police vehicle, Voorhis read appellant her Miranda rights and asked her a series of standard questions. According to Voorhis, during questioning, appellant rated herself, on a scale of 0 to 10 with 0 representing no impairment, a "3 to a 4" level of impairment. (Tr. 120.) Appellant was cooperative, so the officers used their discretion to take her to the hotel, rather than to jail.

{¶ 7} On cross-examination, Voorhis agreed that appellant's driving did not trigger many of the other OVI visual detention cues stated in the 2006 Detection & Standardized Field Sobriety Testing Student Manual ("training manual") beyond drifting and failing to signal and that appellant promptly and properly stopped her vehicle when

he put his lights on. He likewise agreed that appellant's behavior did not trigger many of the other personal contact cues stated in the training manual beyond slightly slurred speech, an odor of alcohol, an admission of drinking that evening, and her bloodshot eyes, which Voorhis agreed could be caused by many other factors besides alcohol consumption. Voorhis confirmed she did not have trouble exiting the car or walking to the back of the car when requested. Regarding the field sobriety tests, Voorhis agreed he conducted them "a little different" than the training manual requirements. (Tr. 193.) Specifically, during the HGN test, flashing lights were visible, and he turned appellant to the side rather than completely away from the lights. Voorhis also confirmed that appellant conducted the walk-and-turn and one-leg stand tests in bare feet, and the one-leg stand took place on a "slight" slant. (Tr. 188.) Voorhis further confirmed that, once under arrest, appellant answered questions in an appropriate, understandable manner.

{¶ 8} Appellee then called Mike Muscarello, a patrol officer and Voorhis' partner on the night they encountered appellant. Muscarello testified that he observed appellant weaving and failing to signal while driving and, once they made personal contact with her, described her eyes as "glassy," her speech as "[s]lurred," her stride as not "smooth," and noted that "she had a strong odor of alcoholic beverage coming from her." (Tr. 231-32.) According to Muscarello, appellant stated that she had been drinking that night and had consumed two glasses of wine. Muscarello testified that, based on his 15 years of experience, appellant performed "poorly" on the field sobriety tests, particularly her failure to follow directions correctly, and believed the result of the tests to be a reliable indicator of whether or not someone is impaired. (Tr. 236.)

{¶ 9} Appellee played for the jury, and admitted into evidence, the video from the police wagon cameras showing, among other activity, appellant driving and performing the field sobriety tests. Appellee then rested its case. Appellant moved the court for a Crim.R. 29 acquittal, which the court overruled. The trial court admitted one photograph offered by appellant along Route 161 showing a sign indicating a lane of travel would end; the court sustained appellee's objection to another photograph.

{¶ 10} Appellant then moved to admit under Evid.R. 612 the entire 2006 training manual, including appendices of various studies, as Voorhis refreshed his memory with it during his cross-examination. Appellee objected, pointing to the scientific content

contained within it and a lack of proper foundation. The court determined that admission of the entire manual was prohibited because the manual referenced scientific material inappropriate for an impaired, rather than a per se, case and posed a danger to the jury without the benefit of expert testimony.

{¶ 11} Each party then rested its case. The jury found appellant guilty of OVI impaired, and the court imposed a jail term of 180 days with 177 days suspended and the remaining 3 days served in attendance at a driver intervention program. The judge also imposed community control of one year with conditions and a fine of $375 plus court costs. In addition, the court found appellant guilty of failure to maintain lanes and failure to signal and imposed a fine of $75 for each violation. Appellant has filed a timely appeal.

II. ASSIGNMENTS OF ERROR

{¶ 12} Appellant raises the following five assignments of error for our review:

> 1. The trial court erred in denying Appellant's Motion to Dismiss for violation of her statutory and Constitutional speedy trial rights.
>
> 2. The trial court erred in limiting testimony regarding the relevance of standardized field sobriety testing in determining an individual's impairment.
>
> 3. The trial court erred in refusing to permit counsel for Appellant to cross-examine the arresting officer regarding his understanding of the results of field sobriety testing and the NHTSA manual.
>
> 4. The trial court erred in refusing to admit the NHTSA manual at the motion of Defendant at the close of evidence.
>
> 5. The unreasonable length of the trial in this case violated Ms. LaMarca's Due Process rights.

III. DISCUSSION

A. First Assignment of Error

{¶ 13} Appellant asserts appellee violated both her statutory and constitutional rights to a speedy trial and, therefore, the trial court erred in denying her motion to dismiss. We disagree.

{¶ 14} Generally, "[a]n appellate court's review of a trial court's decision regarding a motion to dismiss based upon a violation of the speedy-trial provisions involves a mixed question of law and fact." *State v. Williams*, 10th Dist. No. 13AP-992, 2014-Ohio-2737, ¶ 9, citing *State v. Watson*, 10th Dist. No. 13AP-148, 2013-Ohio-5603, ¶ 12. An appellate court must give due deference to a trial court's findings of fact if supported by competent, credible evidence but must independently review whether the trial court properly applied the law to the facts of the case. *Id.* When reviewing legal issues presented in a speedy trial claim, we must strictly construe the relevant statutes against the state. *Watson*.

{¶ 15} An accused is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Ohio Constitution, Article I, Section 10. *State v. Vasquez*, 10th Dist. No. 13AP-366, 2014-Ohio-224, ¶ 19, *appeal not allowed*, 142 Ohio St.3d 1448, 2015-Ohio-1591. Ohio's speedy trial statutes were implemented "to comply with constitutional standards by designating specific timetables for which an accused must be brought to trial." *Id.* If an accused is not brought to trial within the speedy trial time limits, on motion, the court must discharge the defendant. R.C. 2945.73(B). However, even if statutory timetables are complied with, "constitutional guarantees may be broader than statutory provisions in some circumstances." *State v. Sellers*, 10th Dist. No. 08AP-810, 2009-Ohio-2231, ¶ 12, citing *State v. O'Brien*, 34 Ohio St.3d 7 (1987).

{¶ 16} Pursuant to R.C. 2945.71(A) and (B)(2), respectively, the city must bring a defendant arrested on a minor misdemeanor charge to trial within 30 days after her arrest or service of summons and bring a defendant arrested on a first-degree misdemeanor charge to trial within 90 days of her arrest or service of summons. However, if a defendant has multiple charges of different degrees pending, all of which arose out of the same act or transaction, the city must bring the defendant to trial on all of the charges within the time period required for the highest degree of offense charged. R.C. 2945.71(D). Further, the arrest date is not chargeable to the state in computing speedy trial time, and the time period in which to bring a defendant to trial may be extended for any of the reasons enumerated in R.C. 2945.72. *Vasquez* at ¶ 20.

{¶ 17} Specifically, R.C. 2945.72 provides, in pertinent part, that the statutorily mandated time for trial may be extended by:

> (E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;
>
> * * *
>
> (H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion.

{¶ 18} Here, 219 days elapsed from September 6, 2014, the day after appellant's arrest and summons, through April 13, 2015, the trial start date. On demonstrating that more than 90 days elapsed before trial, a defendant establishes a prima facie case for dismissal based on a speedy trial violation. *Id.* at ¶ 21; *State v. Carmon*, 10th Dist. No. 11AP-818, 2012-Ohio-1615, ¶ 15. Once a defendant establishes a prima facie case for dismissal, the state bears the burden to prove that time was sufficiently tolled and the speedy trial period extended. *Vasquez* at ¶ 21, citing *State v. Miller*, 10th Dist. No. 06AP-36, 2006-Ohio-4988, ¶ 9; *State v. Butcher*, 27 Ohio St.3d 28, 31 (1986). Hence, the proper standard of review in speedy trial cases is to simply count the number of days passed, while determining to which party the time is chargeable, as directed in R.C. 2945.71 and 2945.72. *Id.*; *State v. Pritchard*, 10th Dist. No. 12AP-695, 2013-Ohio-1255, ¶ 5. In considering the appeal of a trial court's denial of a motion to dismiss based on a statutory speedy trial violation, the appellate court independently calculates whether the time to bring a defendant to trial expired. *Id.* at ¶ 10-13; *State v. Gonzalez*, 10th Dist. No. 08AP-716, 2009-Ohio-3236, ¶ 9-10, *appeal not allowed*, 123 Ohio St.3d 1495, 2009-Ohio-6015.

{¶ 19} The first tolling event occurred when appellant filed for discovery on September 12, 2014. "A defendant's motion for discovery tolls the statutory speedy trial period pursuant to R.C. 2945.72(E)." *State v. Truitt*, 10th Dist. No. 10AP-473, 2010-Ohio-5972, ¶ 11, citing *Gonzalez* at ¶ 22, citing *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, syllabus. However, the record does not indicate when appellee responded to the discovery request. Although appellant argued on appeal that she received a discovery packet from appellee at the arraignment date, as she contends is standard practice in the municipal court, the record on appeal is devoid of this occurrence. Moreover, even if

appellee provided a discovery packet at arraignment, discovery does not appear to have been completed at that time, as appellant filed a request for discovery the next day and subsequently sought to obtain the cruiser video.

{¶ 20} In such a case, this court has repeatedly held that "tolling occurred during what would have been a reasonable time for the state's response." *State v. Vrapi*, 10th Dist. No. 11AP-700, 2012-Ohio-1018, ¶ 7, *appeal not allowed*, 132 Ohio St.3d 1482, 2012-Ohio-3334 ("While discovery can sometimes be turned over immediately in an uncomplicated case, and the state may have done so here, we conclude that the 19 days from the discovery request to the original date of trial was a reasonable tolling period."); *Truitt* at ¶ 12 (finding, in an OVI-impaired case where record did not show that discovery was provided by the state, that the 24 days between the arraignment and the next scheduled hearing to be a reasonable period of time for the state to respond to the discovery request). Appellee argues that a reasonable time for its discovery response in this case is the pre-trial hearing set for October 3, 2014 and, thus, 21 days tolled for discovery under R.C. 2945.72(E). Considering that in *Truitt* we found 24 days to be a reasonable period for the state to respond to discovery in an OVI-impaired case, we agree that 21 days is a reasonable time for appellee's response. Therefore, between September 5 and October 2, 2014, six days are chargeable to appellee.

{¶ 21} The second tolling event occurred on October 3, 2014 when, at appellant's request, the court continued the pre-trial hearing to November 4, 2014. A continuance granted at a defendant's request is a tolling event under R.C. 2945.72(H) and, therefore, none of the days from October 3 to November 3, 2014 are chargeable to appellee.

{¶ 22} From November 4, 2014 to January 12, 2015, several overlapping tolling events occurred. On November 4, 2014, appellant filed a motion to suppress, a motion hearing was set for December 4, 2014, and on November 6, 2014, appellant requested and the court granted a continuance of the motion hearing until December 18, 2014. After the court sua sponte continued the motion hearing due to its unavailability, the motion to suppress was ultimately resolved on January 12, 2015. Reviewing these events, we find that in addition to the continuances which toll time under R.C. 2945.72(H) as indicated above, appellant's motion to suppress is a tolling event under R.C. 2945.72(E). *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶ 44; *State v. Arrizola*, 79 Ohio App.3d 72,

76 (3d Dist.1992); *State v. McClain*, 2d Dist. No. 26602, 2015-Ohio-3690, ¶ 25. As such, no days are chargeable to appellee for the period of October 3, 2014 through January 11, 2015.

{¶ 23} Appellee concedes that no tolling events cover the 37-day period between the January 12, 2015 resolution of the motion to suppress and the trial date set at the motion hearing for February 18, 2015. On February 18, 2015, the court continued the trial at appellant's request until March 16, 2015, tolling 26 days under R.C. 2945.72(H). Therefore, between January 12 and March 15, 2015, 37 days are chargeable to appellee.

{¶ 24} On March 16, 2015, the court continued the trial without objection and on its own motion due to court unavailability, as reflected on the court's written entry, to the ultimate trial date of April 13, 2015. As indicated above, on March 16, 2015, appellee was only chargeable with 43 days total, meaning 47 speedy trial days remained. Therefore, appellant's April 13, 2015 trial occurred well within the 90-day time limit required by R.C. 2942.71. Accordingly, appellant's statutory speedy trial argument is without merit.

{¶ 25} Appellant also claims that she was deprived of her constitutional right to a speedy trial. In analyzing a claim that appellee violated a defendant's constitutional speedy trial rights, courts utilize a two-pronged inquiry. *Williams* at ¶ 10-11, citing *Barker v. Wingo*, 407 U.S. 514 (1972). " 'First, the defendant must make a threshold showing of a "presumptively prejudicial" delay to trigger application of the *Barker* analysis.' " *Id.* at ¶ 11, quoting *Sellers* at ¶ 14, citing *Doggett v. United States*, 505 U.S. 647, 651-52 (1992). Generally, delay is presumptively prejudicial as it approaches one year. *Vasquez* at ¶ 43. "If a presumptively prejudicial delay exists, then the second inquiry requires the court to consider (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the speedy-trial right, and (4) the resulting prejudice to the defendant." *Williams* at ¶ 11, citing *Doggett* at 651.

{¶ 26} From the date of arrest, this case was pending for 219 days, and during that time, at least 148 days were tolled for discovery and various continuances leaving a maximum of 71 days of delay. This court and other Ohio appellate districts have found delays longer than 71 days in this case not to be presumptively prejudicial. *See, e.g., Vasquez* at ¶ 44 (finding delay of 98 days not to be presumptively prejudicial); *State v. Billups*, 10th Dist. No. 91AP-68 (Aug. 15, 1991) (delay of 148 days not presumptively

prejudicial); *State v. Webb,* 4th Dist. No. 01CA32, 2002-Ohio-3552, ¶ 26 (delay of 186 days not presumptively prejudicial); *State v. Pinson*, 4th Dist. No. 00CA2713 (Mar. 16, 2001) (delay of six and one-half months not presumptively prejudicial). Considering the foregoing, we do not find the delay of 71 days in this case to be presumptively prejudicial. Because appellant has not made the threshold showing that there was a presumptively prejudicial delay in this case, we need not weigh the remaining *Barker* factors. *Vasquez* at ¶ 45. Therefore, we conclude appellant's constitutional speedy trial rights were not violated.

{¶ 27} Accordingly, finding no violation of appellant's statutory or constitutional speedy trial rights,[1] we overrule appellant's first assignment of error.

B. Second, Third, and Fourth Assignments of Error

{¶ 28} Because appellant's second, third, and fourth assignments of error are interrelated, we will consider them together. Specifically, all three assignments of error argue that the trial court erred "in refusing to permit all relevant evidence related to an officer's training with regard to DWI detection and standardized standard field sobriety training, including the evidentiary relevance of standard field sobriety testing and the complete training and resources provided an officer during such training." (Appellant's Brief, 6.)

{¶ 29} As a preliminary issue, we note that appellant's second assignment of error points to the place in the record where the trial court ruled on what both parties agree was, in essence, a motion in limine by appellee during appellant's opening statement. "[A] motion in limine does not preserve for purposes of appeal any error in the disposition of the motion in limine." *Columbus v. Zimmerman*, 10th Dist. No. 14AP-963, 2015-Ohio-3488, ¶ 9. An appellate court need not review the trial court's decision to sustain a motion in limine unless the proponent preserves the error. *Id.*; *Morgan v. Ohio State Univ. College of Dentistry*, 10th Dist. No. 13AP-287, 2014-Ohio-1846, ¶ 34, *appeal not allowed*, 140 Ohio St.3d 1522, 2014-Ohio-5251. The proponent of evidence may do so by "draw[ing] the court's attention to possible error" when the issue is actually reached during the trial, typically by proffering or otherwise seeking the introduction of the

[1] As such, appellee's argument regarding appellant's alleged waiver of her speedy trial rights is moot.

evidence at trial. *Gold v. Burnham*, 10th Dist. No. 14AP-603, 2015-Ohio-1431, ¶ 14; *State v. Grubb*, 28 Ohio St.3d 199, 203 (1986).

{¶ 30} During trial, appellant did attempt to introduce the evidence at issue both during her cross-examination of Voorhis, the subject of her third assignment of error, and in seeking admission of the entire training manual, the subject of her fourth assignment of error. Thus, appellant did preserve the issue for appellate review. Regardless, for the following reasons, we disagree with appellant that the trial court abused its discretion in its decision on the motion in limine and its subsequent evidentiary rulings on those issues at trial.

{¶ 31} "The trial court has broad discretion in admitting evidence based on scientific processes," and a reviewing court generally will not reverse an evidentiary ruling absent an abuse of discretion that materially prejudices the affected party. *State v. Bresson*, 51 Ohio St.3d 123, 129 (1990); *Amoako-Okyere v. Church of the Messiah United Methodist Church*, 10th Dist. No. 14AP-441, 2015-Ohio-3841, ¶ 41. The trial court's ruling on a motion in limine is likewise generally left to the sound discretion of the trial court. *Ross v. Nappier*, 185 Ohio App.3d 548, 2009-Ohio-6995, ¶ 17 (11th Dist.2009). An abuse of discretion implies an arbitrary, unconscionable, or unreasonable attitude on the part of the trial court. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). A reviewing court may not substitute its judgment for that of the trial court when applying the abuse of discretion standard. *Berk v. Matthews*, 53 Ohio St.3d 161 (1990).

{¶ 32} Appellant's second assignment of error specifically contends the trial court erred in its decision to limit testimony regarding the relevance of standardized field sobriety testing in determining an individual's impairment and argues that "the trial court should have permitted *all relevant* testimony regarding the relevance of [field sobriety testing] in determining impairment." (Emphasis sic.) (Appellant's Reply Brief, 13.) On appeal, appellant asserts she was not attempting to bring in the actual blood alcohol content ("BAC") percentages that the tests may predict.

{¶ 33} However, appellant's statements on appeal do not accurately reflect appellant's position to the trial court. In the motion in limine discussion, appellant clearly sought to introduce evidence, without providing an expert, that the purpose of the field

sobriety tests is to determine various percentages of probability of someone testing over a .08 BAC level and that any other purpose is inaccurate. For example, appellant argued:

> [T]he sole purpose of that [HGN] test is to determine the probability of someone's alcohol level if they were given a chemical test. * * * It's not a test used to determine whether or not someone's under the influence.
>
> * * *
>
> You're going to hear no evidence -- I will guarantee you that the court is going to hear no evidence that the field sobriety tests are good for anything other than the percentage of probability of someone testing over a .08. * * * I know that the court may believe that these tests are * * * valid * * * to predict that someone is under the influence, but they are not. The sole purpose of these tests are to determine the percentage of probability, that there's 77 percent chance for the HGN if there's four clues; 68 percent for the walk-and-turn, 65 for the one-leg stand if two clues are exhibited. * * * I can show you the study from the National Highway Traffic Safety Administration that says that these tests are not to determine if someone's under the influence * * *.
>
> * * *
>
> [W]e'd be giving bad, false information to this jury if this jury is led to believe that these tests can be used to determine if someone's under the influence.
>
> * * *
>
> The only purpose of them would be to determine the probability of testing over a certain alcohol level, and ours is .08. There is no other reason for these tests.
>
> * * *
>
> I'm saying the officer [who would testify, based on their personal knowledge, that people who test a certain way on the field sobriety tests are impaired] is a liar, absolutely.
>
> * * *
>
> [Appellant's argument is] that the purpose -- the primary purpose of standardized field sobriety tests are to determine

> the probability of testing over a .08 if someone is administered a chemical test after being subjected to the administration of field sobriety tests and exhibiting more than four clues on the [HGN] test, two clues on the walk-and-turn and two clues on the one-leg stand * * *.
>
> * * *
>
> I would never argue that field sobriety tests are not indicators of impairment. * * * I'm okay with the field sobriety tests coming in, but the purpose for which they're coming in are to determine whether or not someone will test over a -- .08.

(Tr. 24-35.)

{¶ 34} Our review of the transcript shows that the trial court did not limit testimony regarding the field sobriety tests as they relate to impairment generally but specifically limited any attempts to leak the statistical probability. Such a limitation is not arbitrary, unconscionable, or unreasonable considering the Supreme Court of Ohio's ruling in *Bresson* and this court's ruling in *State v. Allen*, 10th Dist. No. 09AP-853, 2010-Ohio-4124.

{¶ 35} In *Bresson*, the Supreme Court considered the reliability of the HGN test in determining whether a person is under the influence of alcohol and whether expert testimony is required to introduce such evidence. The court first held: "the HGN test to be a reliable test in determining whether a person is under the influence of alcohol, especially when used in conjunction with other field sobriety tests and an officer's observations of a driver's physical characteristics." *Id.* at 129. Next, the court held that:

> [A] properly qualified officer may testify at trial regarding a driver's performance on the HGN test as to the issues of probable cause to arrest and whether the driver was operating a vehicle while under the influence of alcohol. See R.C. 4511.19(A)(1).[2] However, such testimony may not be admitted to show what the exact alcohol concentration level of the driver was for purposes of demonstrating a violation of R.C. 4511.19(A)(2),[3] (3), or (4).

(Footnotes added.) *Id.* at 130.

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[2] Formerly the statutory section for OVI impaired.
[3] Formerly the statutory section for OVI per se.

{¶ 36} In *Allen*, we analyzed *Bresson* in the context of an officer who testified, based on what he learned in training, regarding the statistical probability of an individual's BAC when he fails the HGN or walk-and-turn field sobriety test. The officer did not testify regarding what he believed to be the appellant's actual or specific BAC level. We held the officer's testimony to be problematic and in error in the absence of expert testimony. Due to the facts of that case, we also held the error to be harmless.

{¶ 37} Our review of the transcript shows appellant was not merely trying to discuss the relevance or purpose of the tests generally, as cast on appeal, but rather she specifically sought to introduce testimony regarding the statistical probability of BAC levels associated with performance on the field sobriety tests without providing an expert. As such, in light of *Bresson* and *Allen*, the trial court did not abuse its discretion in limiting this testimony. Therefore, appellant's second assignment of error is overruled.

{¶ 38} In a related argument, appellant's third assignment of error contends that the trial court erred in refusing to permit appellant to cross-examine the arresting officer regarding his understanding of the results of field sobriety testing and the NHTSA manual and contends appellee opened the door by asking Voorhis "what do you find [the tests] to be indicators of?" (Appellant's Reply Brief, 20.)

{¶ 39} "Absent an abuse of discretion, the trial court's determination to limit appellant's cross-examination of [a witness] will not be disturbed on appeal." *State v. Woodard*, 68 Ohio St.3d 70, 74 (1993). The trial court's discretion in this arena extends to determinations regarding whether to allow the introduction of otherwise inadmissible evidence once a party " 'open[s] the door.' " *State v. Dunivant*, 5th Dist. No. 2003CA00175, 2005-Ohio-1497, ¶ 12, quoting *United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir.1988) (" 'Under the rule of curative admissibility, or the "opening the door" doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission.' ").

{¶ 40} We first note that the trial court did permit appellant to cross-examine the officers about the field sobriety tests, as they relate to impairment, but specified that "any attempts to leak the statistical probability is * * * prejudicial and inadmissible." (Tr. 50.) On direct examination, appellee asked Voorhis whether he believed, in his practical use of

field sobriety tests, that the tests were reliable. Voorhis answered yes, and the following exchanged occurred:

> Q. And what do you find them to be indicators of?
>
> A. I can't remember the -- the exact numbers.
>
> Q. Without getting into numbers --
>
> A. Yes, I don't remember them.
>
> Q. -- what is it that you gain from the observations of the tests?
>
> A. Well, based on the three tests put together, I can determine whether or not a person is impaired.

(Tr. 72-73.)

{¶ 41} On cross-examination of Voorhis, appellant asked him "during direct examination, you were asked by [appellee], So what does this mean, the results of the standardized field sobriety tests; and you started to say, I don't know the numbers. Do you recall that?" (Tr. 193.) Appellee objected, and the parties approached for a sidebar. Appellant claimed appellee opened the door for appellant's question and that she was not going to ask about numbers or percentages. The court sustained the objection, finding no reason for appellant to be discussing numbers, as it was not a per se case. Appellant then immediately questioned Voorhis about the honesty of his previous answer stating that the tests determine impairment. Facing another objection, appellant again stated she would not ask about numbers but contended that Voorhis' answer was incorrect and not honest based on a scientific study in the manual. The trial court again sustained the objection. Appellant proceeded, without objections, to cross-examine Voorhis about the lack of correlation between the tests and a person's ability to drive and the "whole purpose" of the tests to determine probable cause. (Tr. 201.)

{¶ 42} On this record, the trial court did not act arbitrarily, unconscionably, or unreasonably. Despite appellant's promises to the contrary, appellant's line of questioning on cross-examination clearly attempted to have the jury consider statistical probabilities and BAC which, as we already discussed, are inappropriate without an

expert and particularly problematic in an OVI-impaired case. Further, we cannot say that the trial court acted arbitrarily, unconscionably, or unreasonably in determining that appellee did not open the door to this questioning. Appellee clearly did not elicit information about statistical probabilities and BACs, and Voorhis merely mentioned "numbers" generally. (Tr. 72.) This is information appellant sought to have in front of the jury, rather than prejudicial information necessitating a curative measure on cross-examination. *See State v. Rivera*, 9th Dist. No. 93CA005592 (Sept. 28, 1994). As such, the trial court did not abuse its discretion in limiting appellant's cross-examination of Voorhis. Therefore, appellant's third assignment of error is overruled.

{¶ 43} Appellant argues in her fourth assignment of error that the trial court erred in refusing to admit into evidence the 2006 training manual on her motion, pursuant to Evid.R. 612, or, alternatively, pursuant to judicial notice under Evid.R. 201. We disagree.

{¶ 44} " 'The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.' " *State v. Paletta*, 9th Dist. No. 00CA007717 (Oct. 31, 2001), quoting State v. Sage, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. Evid.R. 612 permits a party to use a writing to refresh a witness's memory for the purpose of testifying either while the witness is testifying or before the witness testifies. Evid.R. 612; *State v. Jewett*, 10th Dist. No. 11AP-1028, 2013-Ohio-1246, ¶ 63, *appeal not allowed*, 136 Ohio St.3d 1453, 2013-Ohio-3210. If the court, in its discretion, determines it is necessary in the interest of justice, an adverse party is entitled to have the writing used to refresh a witness's memory produced at the hearing. Evid.R. 612. If it is claimed that the writing contains matters irrelevant to the witness's testimony, the court must examine the writing in camera, excise irrelevant portions, and deliver the remainder to the adverse party. Evid.R. 612.

{¶ 45} If so produced, the adverse party is entitled to inspect the writing, cross-examine the witness regarding it, and introduce into evidence those portions of the writing which relate to the testimony of the witness. Evid.R. 612. Thus, under Evid.R. 612, "[t]he writing used to refresh the witness's recollection is not admitted into evidence unless admission is requested by the adverse party." *Dayton v. Combs*, 94 Ohio App.3d 291, 298 (2d Dist.1993), citing Evid.R. 612. However, a writing introduced into evidence under Evid.R. 612 "has no substantive evidentiary significance." *Id.*; *Jewett* at ¶ 64, citing

State v. O'Keefe, 11th Dist. No. 2002-A-0015, 2004-Ohio-5300, ¶ 74. Rather, "[t]he substantive evidence before the jury is the witness's testimony based upon their refreshed recollection." *Id.*, citing *O'Keefe* at ¶ 74. *See also State v. Johnson*, 10 Ohio App.3d 14, 17 (10th Dist.1983).

{¶ 46} The facts here show that appellant, rather than appellee, sought to use the 2006 training manual to refresh Voorhis' memory during his testimony. Regarding introduction of the entire manual, although appellant contends that Voorhis used the entire manual to refresh his memory, Voorhis testified to the contrary. Our review of the transcript shows Voorhis testified to reviewing the 2006 manual to refresh his memory for his own training generally but not in preparation for testifying. Therefore, the transcript does not support appellant's theory advocating introduction of the entire manual into evidence under Evid.R. 612.

{¶ 47} Voorhis did, however, without objection from the state, review the manual during trial to refresh his memory regarding specific field testing cues and procedures stated in the manual. As previously discussed, Voorhis was properly precluded from testifying regarding statistical probabilities and BAC. As such, those portions of the training manual discussing statistics and BAC information would not "relate" to Voorhis' testimony under Evid.R. 612, while those portions of the manual discussing cues and procedures would relate to Voorhis' testimony.

{¶ 48} Because appellant raises, for the first time on appeal, the argument that portions of, rather than, the entire 2006 manual should have been introduced into evidence, she has effectively waived all but plain error review for this issue. *See State v. Batty*, 4th Dist. No. 13CA3398, 2014-Ohio-2826, ¶ 16; Crim.R. 52(B) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). "Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects substantial rights, i.e., affects the outcome of the trial." *State v. Sidibeh*, 192 Ohio App.3d 256, 2011-Ohio-712, ¶ 30 (10th Dist.), citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Id.*

{¶ 49} Appellant has not argued how the trial court's exclusion of portions of the training manual discussing field testing cues and procedures affected the outcome of the trial. Appellant cross-examined Voorhis about these issues, and his testimony conformed with the manual. Although appellant was precluded from cross-examining Voorhis regarding the statistical, BAC "purpose" of the tests, appellant did, as discussed, cross-examine Voorhis, without objection, about the lack of correlation between the tests and a person's ability to drive. This link between the tests and driving impairment, or lack thereof, seems to be the crux of appellant's evidentiary arguments on appeal. The jury convicted appellant despite Voorhis agreeing with appellant's line of questioning on this issue. Therefore, even if an error occurred in the trial court's evidentiary decisions discussed above, such error did not affect the outcome here.

{¶ 50} Finally, the trial court did not err in refusing to admit the training manual under Evid.R. 201, which governs judicial notice. Under Evid.R. 201(B), "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Judicial notice is mandatory when a party requests notice of an appropriate fact and provides the trial court with the necessary information. Evid.R. 201(D). A trial court also possesses the discretion to take judicial notice of an appropriate matter sua sponte. Evid.R. 201(C).

{¶ 51} Because, as discussed, the manual included a significant amount of statistical and scientific information, unexplained by an expert, the trial court did not abuse its discretion in declining to take judicial notice of the entire manual, as requested by appellant. Further, although appellant requested judicial notice during the trial, we additionally cannot find that she provided necessary information for mandatory judicial notice. The cases cited by appellant to the trial court, *State v. Stritch*, 2d Dist. No. 20759, 2005-Ohio-1376, ¶ 15-17, and *State v. Frazee*, 12th Dist. No. CA2004-07-085, 2005-Ohio-3513, ¶ 19,[4] stand for the proposition that a trial court may take judicial notice of the

[4] Appellant also cited, at trial, *Columbus v. Webber*, 10th Dist. No. 06AP-845, 2007-Ohio-5446, ¶ 23, which did not involve judicial notice, and, on appeal, *State v. Cook*, 6th Dist. No. WD-04-029, 2006-Ohio-6062, which followed *Stritch* and *Frazee*, above.

training standards governing the administration of field sobriety tests and are, therefore, subject to judicial notice under Evid.R. 201(B). They do not address the issue here—statistical and scientific information within the training manual, without expert testimony—and are, therefore, not dispositive on this issue. As such, we find the trial court did not err in not taking mandatory judicial notice under Evid.R. 201(D) under the facts of this case.

{¶ 52} Accordingly, for all the stated reasons, appellant's second, third, and fourth assignments of error are overruled.

C. Fifth Assignment of Error

{¶ 53} In her fifth assignment of error, appellant asserts that her due process rights were violated by the unreasonable length of the trial. Specifically, appellant contends that the length of the trial was unnecessarily delayed due to the state's objections and resulting lengthy discussions and due to a four-day recess. This delay, according to appellant, "could have had an adverse affect on the jury and ultimately the jury's verdict in this case" and forced her to miss six days of work and obtain hotel accommodations for six nights. (Appellant's Brief, 31.)

{¶ 54} As a preliminary issue, appellant apparently[5] did not raise this argument to the trial court or otherwise object to the length of the trial. As such, she has effectively waived review of this argument for all but plain error. *See Batty* at ¶ 16; Crim.R. 52(B) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). "Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects substantial rights, i.e., affects the outcome of the trial." *Sidibeh* at ¶ 30, citing *Barnes* at 27. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Id.*

{¶ 55} "Due process affords appellant the right to a fair trial before an impartial tribunal." *Batty* at ¶ 15. *See also Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944), quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941) ("The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts

[5] We note that the transcript provided on appeal does not include proceedings past Thursday, April 16, 2015.

to a disregard of 'that fundamental fairness essential to the very concept of justice,' and in a way that 'necessarily prevents a fair trial.' "). "The accused, therefore, has a constitutional guarantee to a trial free from prejudicial error, not necessarily one free of all error." *State v. Jones*, 8th Dist. No. 101514, 2015-Ohio-2151, ¶ 58.

{¶ 56} Under R.C. 2945.03, "[t]he judge of the trial court shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding the matters in issue." "When engaged in a jury trial, a trial judge should make that proceeding the court's primary focus and not allow unrelated or ancillary hearings to disrupt the flow of the trial." *Cleveland v. Gonzalez*, 8th Dist. No. 85070, 2005-Ohio-4413, ¶ 16 (holding that delays and interruptions in a jury trial for misdemeanor assault, resulting in a 12-day trial for a case that was scheduled to last 2 days, were not prejudicial error and did not deprive the defendant of his due process rights, where many of the delays were caused by defense tactics, a juror was excused from the panel, a bomb scare required a recess, and the court otherwise proceeded with trial in an orderly fashion).

{¶ 57} Here, several delays occurred. On the first day set for trial, Monday, April 13, 2015, the court addressed appellant's motion to dismiss based on the 90-day speedy trial violation. On Tuesday, April 14, appellant's opening statement was interrupted to discuss appellant's repeated contention that field sobriety testing does not indicate impairment and to allow both parties to present legal support for whether appellant could present evidence, without an expert, that the purpose of the field sobriety tests is to determine a percentage of probability of someone testing over .08. The discussion between the parties and the court on this issue was extensive, and appellant's change of position on her argument, shifting from the "sole" to the "primary" purpose of the tests, added to the confusion and extended the conversation. (Tr. 28, 34.) Finally, after both parties rested their cases on the afternoon of Thursday, April 16, 2015, the trial court delayed closing arguments until Tuesday, April 21, 2015 due to jury conflicts on Friday, April 17, and Monday, April 20, 2015. In discussing the jury conflicts, appellant stated a preference for returning Tuesday instead of Monday, and appellee expressed concern that it would have a disadvantage due to the four-day lag.

{¶ 58} Our review of the record finds that the trial court conducted the trial within its authority under R.C. 2945.03. The delays on April 13 and 14 are largely attributable to appellant's defense strategy, and the four-day break was attributable to juror availability and the parties' stated preferences for moving the trial forward. Appellant agreed to delay the trial to Tuesday, April 21, 2015 under the circumstances, rather than pursue other options to truncate the trial.

{¶ 59} Further, appellant presented no argument that the outcome of her case was affected by the delay beyond stating that the delay affected the jury's memory and could have had an adverse effect on the verdict. However, the record of this case does not support this contention. Each party apparently[6] had a chance to present closing arguments to remind the jury about key points of evidence.[7] Moreover, the jury was able to revisit evidence provided by the cruiser video which showed appellant performing very poorly on the walk-and-turn test, among other indications that appellant was under the influence of alcohol. Finally, appellant provides no record support for her alleged hotel and work interruption costs and, regardless, provides no authority linking out-of-pocket costs associated with an incrementally increased trial length with the deprivation of due process. Therefore, we cannot say that the length of the trial here or the delays and interruptions which contributed to the length of the trial were prejudicial to appellant and prevented her from receiving a fair trial in contravention to her due process rights.

{¶ 60} Accordingly, appellant's fifth assignment of error is overruled.

IV. CONCLUSION

{¶ 61} Having overruled appellant's five assignments of error, we hereby affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

KLATT and BRUNNER, JJ., concur.

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[6] As previously indicated, appellant did not provide a transcript for the April 21, 2015 proceedings.
[7] The record on appeal does not show whether jurors were permitted to take and review notes during trial.