

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090111
Plaintiff-Appellee,	:	TRIAL NO. C-08TRC-39348
vs.	:	<i>JUDGMENT ENTRY.</i>
MICHELLE BOSSE,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Following a jury trial, defendant-appellant Michelle Bosse was convicted of driving under the influence of alcohol as prohibited by R.C. 4511.19(A)(1)(a). In her appeal, she contends that her rights to a fair trial and to confront and cross-examine adverse witnesses had been violated, that the court had improperly admitted prejudicial evidence, and that her conviction was against the weight and sufficiency of the evidence. Bosse's contentions are meritless, and her conviction is affirmed.

In July 2008, Bosse left a Jimmy Buffett concert, and as she was travelling along Kellogg Avenue in Cincinnati, Ohio, she was apprehended by state trooper Chris Sanger for driving under the influence of alcohol.<sup>2</sup>

Sanger testified that he had followed Bosse for about a half mile before he initiated the stop, and that just before the stop, Bosse's automobile had drifted into other lanes of travel: her vehicle had crossed the interspaced white lines on the right

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

<sup>2</sup> R.C. 4511.19(A)(1)(A).

by a couple of feet and the centerline by about a foot. Bosse initially stopped her automobile in the middle of her lane of travel. When Sanger approached the vehicle from the passenger's side, he could smell the odor of alcohol and could see that Bosse's eyes were bloodshot and that she was wearing a tank top and a hula skirt. Sanger instructed Bosse to move her automobile from the middle of her lane to a spot down the road that had a larger berm.

Bosse admitted to having had a "couple of drinks," and Sanger then initiated a battery of field-sobriety tests to determine her level of impairment. Before he began the field-sobriety tests, Sanger noticed the odor of alcohol emanating from Bosse's breath and that her speech seemed sluggish. After conducting the tests, Sanger observed six of the six clues that indicated high levels of intoxication on the horizontal gaze nystagmus test, as well as two of the two clues on the vertical gaze nystagmus test. Sanger then instructed Bosse on how to perform the walk-and-turn test and the one-leg-stand test, but she indicated that she could not perform either of these standardized tests because she had neck and lower-back problems.

Sanger testified that after Bosse had refused to perform the standardized field-sobriety tests, he asked that she attempt some divided-attention skills tests. First Sanger administered the finger-touch test, which is meant to test the subject's ability to listen and then to perform the test as instructed. Bosse was instructed to count and simultaneously touch her fingers, and that she should repeat the test five times. Bosse made multiple mistakes on the finger-touch test: she skipped a finger, and then she stopped mid-test to ask if she was supposed to have continued repeating the exercise. Then the alphabet test was administered, which Bosse passed, though she had started before Sanger had finished giving his instructions. Sanger then instructed Bosse to count backwards from 68 to 53, but she instead counted from 68 to 50 before pausing to ask how far she was supposed to have counted. Sanger then arrested Bosse.

When Sanger had arranged to remove Bosse's car, he asked Bosse if the passenger was able to drive, to which she replied, "[The passenger] had less to drink than [I did]." Bosse was then transported to the police station, where, after being advised of the consequences of refusing a breathalyzer test, she refused to take the test.

On appeal, Bosse first argues that her right to a fair trial had been violated when the court sustained an objection to part of her opening statement. In her opening statement, Bosse commented that no organization, including the National Highway Traffic Safety Administration ("NHTSA"), had endorsed or sanctioned the finger-touch test. The state objected, and the court sustained its objection. Bosse contends that the sustained objection deprived her of the opportunity to comment on what she believed the evidence would show. We are not convinced.

Opening statements serve to inform the jury of the nature of the case and the questions involved, and to outline the facts intended to be proved.<sup>3</sup> But it is well settled that the opening statements of counsel are not evidence.<sup>4</sup> Bosse's opening statement that no organization, including the NHTSA, had endorsed or sanctioned the finger-touch test was misleading. The finger-touch test is a nonstandardized test; it does not follow that the NHTSA does not endorse or sanction it. Bosse's statements were presumably made to discredit the efficacy of the finger-touch test by contending that because it was a nonstandardized test, it was also not endorsed or sanctioned by the NHTSA. Bosse was free to comment that the finger-touch test was a nonstandardized test, but she could not mislead the jury by characterizing the test as being one that was not endorsed or sanctioned by the NHTSA. And even if the trial court erred in sustaining the state's objection, the error was harmless because it

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<sup>3</sup> *Maggio v. Cleveland* (1949), 151 Ohio St. 136, 84 N.E.2d 912.

<sup>4</sup> See, e.g., *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386; *State v. Frazier*, 73 Ohio St.3d 323, 1995-Ohio-235, 652 N.E.2d 1000.

did not affect any substantial right.<sup>5</sup> Bosse's first assignment of error is accordingly overruled.

Bosse also contends that the court erred in overruling her objection to Sanger's testimony that anyone could do the finger test one time, as compared to performing the test multiple times in succession; and that it also erred in sustaining the state's objection to Bosse's statement that "there have been no studies done to see whether people who are under the influence of alcohol can touch their fingers and count correctly if they do it once versus five times." We consider these arguments together.

Sanger's statements were admissible as lay opinion under Evid.R. 701, and on appeal the admissibility of his statements is subject to review under an abuse-of-discretion standard.<sup>6</sup> Sanger testified that the finger-touch test evaluated not only dexterity and coordination, but also the ability to listen to and follow instructions. In this case, Bosse could not recall Sanger's instruction that she repeat the test five times, and she also failed to touch a finger during the test. Sanger's testimony helped to explain that the ability to repeat the test the correct number of times was in fact an element of the test. And the trial court did not abuse its discretion in admitting his testimony over Bosse's objection. This same reasoning applies to Bosse's contention that the court erred in sustaining the state's objection to her statement about the efficacy of repeating the finger-touch test. As we have mentioned, repeating the proper number of times is in fact an element of the test, and her statement to the contrary was prejudicial and irrelevant.

Bosse also asserts that Sanger's testimony that the vertical gaze nystagmus test indicated the presence of high doses of illicit drugs or alcohol ran afoul of our holding in *State v. Grizovic*.<sup>7</sup> In *Grizovic*, we granted a new trial where, in a driving-

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<sup>5</sup> Crim.R. 52.

<sup>6</sup> *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151.

<sup>7</sup> 177 Ohio App.3d 161, 2008-Ohio-3162, 894 N.E.2d 100.

under-the-influence case, the lower court had allowed an officer to testify concerning the statistical probability that the defendant would have tested over .10 if she had consented to a breathalyzer test. This case is not analogous to *Grizovic*. Sanger testified that the vertical gaze nystagmus test indicated the presence of high doses of alcohol. And it does. And that is precisely why it was used in the first instance! Notably Sanger did not speculate on the exact number of drinks or Bosse's probable blood-alcohol content; he merely stated the purpose of the test. Surely an officer may explain to the jury the purpose of the vertical gaze nystagmus test and what is used to indicate. There was nothing improper about Sanger's testimony, and this assignment of error is not well taken.

In her last assignment of error, Bosse argues that her conviction was against the weight and sufficiency of the evidence.

When reviewing the sufficiency of the evidence to support a criminal conviction, we must examine the evidence admitted at trial in the light most favorable to the state. We must then determine whether that evidence could have convinced any rational trier of fact that the essential elements of the crime had been proved beyond a reasonable doubt.<sup>8</sup>

A review of the weight of the evidence puts the appellate court in the role of a "thirteenth juror."<sup>9</sup> We must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.<sup>10</sup> A new trial should be granted only in exceptional cases where the evidence weighs heavily against the conviction.<sup>11</sup>

We are convinced that Bosse's conviction was against neither the weight nor the sufficiency of the evidence. The testimony at trial showed that Bosse's eyes were glassy and bloodshot, that she smelled of alcohol, that she admitted to having

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<sup>8</sup> See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

<sup>9</sup> See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

<sup>10</sup> *Id.*, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211.

<sup>11</sup> *Id.*

consumed alcohol, that her speech was sluggish, that she failed both the horizontal and the vertical gaze nystagmus test, that she (on two occasions) failed to follow instructions on other field-sobriety tests (both counting backwards and the finger-touch test), and that she told the arresting officer that the passenger had had less to drink than she had. There was ample evidence in the record from which a jury could have found Bosse guilty of driving under the influence of alcohol, and the jury did not lose its way in returning a guilty verdict. Her final assignment of error is overruled.

Because Bosse's assignments of error are meritless, we affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HENDON, P.J., SUNDERMANN and MALLORY, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on December 23, 2009

per order of the Court \_\_\_\_\_  
Presiding Judge