[Cite as *State v. Knapp*, 2012-Ohio-2354.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-A-0064**
- vs -	:	
MICHELLE L. KNAPP,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2009 CR 452.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Jason D. Winter, Holly Marie Wilson, and *Courtney J. Trimacco*, Reminger Co., L.P.A., 1400 Midland Building, 101 Prospect Avenue West, Cleveland, OH 44115 (For Defendant-Appellant).

Donald R. Ford, Sr., Ford, Gold & Falgiani Law Group, 8872 East Market Street, Warren, OH 44484 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Michelle L. Knapp ("Knapp"), appeals her convictions for Aggravated Vehicular Homicide, Failure to Stop after an Accident, and Operating a Vehicle while under the Influence, following a jury trial. The charges arose from an incident in which a vehicle operated by Knapp struck and killed Melanie K.

Moretti. Knapp was sentenced to an aggregate prison term of seven years. The issues before this court are: whether Knapp was deprived of a fair trial by the lower court's refusal to instruct the jury on the legal duties of pedestrians, calling certain witnesses as witnesses of the court, allowing the jury to hear testimony that Knapp was speeding at the time of impact, admitting autopsy photographs into evidence and the coroner's conclusion as to the cause of the victim's death; and whether her convictions are against the manifest weight of the evidence. For the following reasons, we affirm the decision of the court below.

{¶2} On January 11, 2010, Michelle Knapp was indicted by the Ashtabula County Grand Jury on one count of Aggravated Vehicular Homicide, a felony of the second degree in violation of R.C. 2903.06(A)(1); one count of Aggravated Vehicular Homicide, a felony of the third degree in violation of R.C. 2903.06(A); one count of Failure to Stop after an Accident, a felony of the third degree in violation of R.C. 4549.02(A) and (B); and one count of Operating a Vehicle while under the Influence, a misdemeanor of the first degree in violation of R.C. 4511.19(A)(1)(a).

{¶3} On January 15, 2010, Knapp was arraigned and entered a plea of not guilty.

{¶4} On July 18, 2011, the State filed a Motion for the trial court to call certain witnesses as witnesses of the court. The first such witness was Michelle Knapp's brother, Jeffrey Knapp ("Jeffrey"). The State claimed Jeffrey was an "essential witness" to the amount of alcohol consumed by Knapp on the night in question. The State further claimed that Jeffrey was a hostile witness by virtue of his relationship with Knapp and had "initially refused to meet with the State in preparation of this trial." Although he

eventually met with prosecutors, Jeffrey "informed the State that his prior statements to law enforcement and the grand jury were not complete as to certain material aspects of the defendant's conduct that night."

{¶5} The State made similar claims with respect to Jeffrey Knapp's girlfriend/Michelle Knapp's friend, Connie Braat. Braat was also a witness to how much alcohol Knapp consumed on the night in question and equivocal about her prior statements to law enforcement officers and before the grand jury.

{¶6} Lastly, the State identified Michelle Knapp's brother, Mark Knapp ("Mark"), as a potentially hostile witness by virtue of his relationship with Knapp and his equivocation with respect to prior testimony. The State asserted Mark was an essential witness because Knapp "drove to his house after hitting the victim."

{¶7} Trial on the charges against Michelle Knapp was held between July 25 and July 29, 2011. The following witnesses gave testimony at trial and on behalf of the State, with the exception of Jeffrey Knapp, Mark Knapp, and Connie Braat, who testified as witnesses for the court:

{¶8} Trooper Michael Royko of the Ohio State Highway Patrol testified that, at about 6:45 p.m., on Saturday, December 12, 2009, he was dispatched to the scene of an accident involving a pedestrian on Fargo Drive in Ashtabula, Ohio. Trooper Royko described this portion of Fargo Drive as flat with a posted speed limit of 25 m.p.h. The surface of the road was dry and there were no adverse weather conditions. Fargo Drive is lit by street lamps, but the one nearest the accident was "working intermittently."

{¶9} Trooper Royko collected evidence and drew a sketch of the scene. Trooper Royko testified that along a seventy-five foot stretch of the roadway, he found

debris from a vehicle, including the casing for the passenger side view mirror; the victim's two shoes in various locations; the victim's body; and blood smears.

{¶10} The victim was identified as Melanie Moretti. Moretti was wearing a black leather jacket with blue jeans.

{¶11} The side view mirror was determined to have possibly come from a white Saturn Outlook, the type of vehicle driven by Knapp that evening. There was no evidence in the road (tire or "yaw marks") that the vehicle had braked or taken evasive action before impact with the victim.

{¶12} In his report, Trooper Royko identified the following "contributing circumstances" to the accident: the pedestrian was wearing dark clothing, was not using a sidewalk, and was walking in the direction of traffic. Trooper Royko also noted that the driver of the vehicle had failed to maintain ACDA (assured clear distance ahead).

{¶13} On Sunday, December 13, Trooper Royko searched for vehicles that matched the side view mirror.

{¶14} On Monday, December 14, Trooper Royko received a tip that Michelle Knapp was involved in the accident. After visiting her home and place of employment, Trooper Royko learned that Knapp was at her attorney's office and that the vehicle was at her brother, Mark Knapp's, home.

{¶15} Marcus DeCamillo testified that, at about 6:45 p.m., on Saturday, December 12, 2009, he was driving his truck when he was waved down by a young boy on Fargo Drive. DeCamillo testified that he had no difficulty seeing the boy because "the area was lit up" and "because there was snow on the ground and that helps

illuminate the area a little more." The boy said his friend had just been hit. After checking the victim's pulse, DeCamillo called 911.

{¶16} Timothy Talso, a resident of Fargo Drive, testified that on the evening of Saturday, December 12, 2009, he was watching TV when he heard "a loud noise" and "a loud crash." When he opened the door of his house, he saw a boy holding his arm and a body on the ground. Talso testified that he had no trouble seeing: "I knew where she got hit, because her shoe was laying right underneath the light." Talso testified that the shoe was about 100 feet from his house and that the victim's body was about 70 feet from the shoe. Talso also testified that the street light was going on and off.

{¶17} Nicholas Magda, age 15 at the time of the incident, lived on East 39th Street, near Fargo Drive. Magda testified that on the evening of Saturday, December 12, 2009, he was walking on Fargo Drive with Melanie Moretti. Magda described Moretti as being about five feet three inches tall, "on the shorter side." Magda testified that the streetlights were working and that he had no trouble seeing. Magda was wearing a black Tapout hoodie with a white logo on the lower back and blue jeans. Magda testified that Moretti was walking on his right side in the street, while he was in the grass/snow. Magda testified that three cars passed them as they walked and that, when he saw the headlights and heard the approach, they would move to the side.

{¶18} Magda testified that he was struck by a vehicle and knocked to the ground without being aware of its approach. "I remember getting up and realizing that I just got hit. And looking up, I seen the back of the silhouette of the car. I remember screaming. * * * And then I realized that Melanie wasn't beside me." According to Magda, the vehicle "just kept going" past a stop sign without stopping, until it made a right turn off of

Fargo Drive. "I had looked up at the vehicle and then looked down for her. Then I looked back up, as I was going towards her, and that's when I saw it make the right turn."

{¶19} Jeffrey Knapp, Michelle Knapp's older brother, testified that on the afternoon of Saturday, December 12, 2009, he was with his girlfriend, Connie Braat, when he received a call from Knapp to meet her at Buffalo Wild Wings (BW3s) by the Ashtabula Mall. Jeffrey testified that he arrived about 3:30 p.m., and sat at a high top table in the bar area. They were drinking Great Lakes Christmas Ales in 23-ounce glasses. When he first spoke to law enforcement, Jeffrey said that each of them had had about three or four Christmas Ales. Jeffrey also testified that they split an order of quesadillas and chicken fingers.

{¶20} Jeffrey Knapp testified that service was slow and that he was drinking faster than Knapp and Braat. When he finished a beer, Knapp and Braat would pour some of their beer into his glass. He testified that this happened about three times, so that Knapp did not consume all the beers that she was served. They left BW3s about 6:00 or 6:30 p.m., to go to their aunt's house, who lived nearby. Jeffrey had Braat drive because he had drunk too much and did not feel okay to drive. Jeffrey testified that neither Knapp nor Braat seemed impaired. Because the aunt was not at home, Jeffrey did not exit his vehicle at the aunt's house and left without interacting with Knapp.

{¶21} Jeffrey Knapp testified that, on Sunday, December 13, 2009, he learned that Knapp had been in an accident and had hit a mailbox. He went to his brother, Mark Knapp's, house, where Knapp had spent the night, to view the damage to Knapp's vehicle and then went to look for the mailbox or other object that Knapp had struck.

{¶22} Jeffrey Knapp testified that, on the morning of Monday, December 14, 2009, he watched a story on the television news convincing him that Knapp was involved in Moretti's death. He gave his initial statement to law enforcement officers that afternoon.

{¶23} Connie Braat testified that on the afternoon of Saturday, December 12, 2009, she was with Jeffrey and Michelle Knapp at BW3s drinking Christmas Ale. In her initial statement to law enforcement, she said that Knapp had consumed 3 or 4 beers. She testified that both she and Knapp were pouring their beers into Jeffrey's glass, and that Knapp had done this at least twice. She testified that they ordered quesadillas and chicken fingers and that she and Knapp ate most of the appetizers. She testified that she was only served two beers, of which she drank about one and a half, and spent about an hour of the time at BW3s outside smoking and talking on the phone. Knapp paid the bill at about 5:30 p.m., but they did not leave the bar for another hour. Braat testified that Knapp did not seem impaired when they left BW3s.

{¶24} After leaving BW3s, Braat drove to the home of Lonnie VanGilder, the Knapps' aunt, on East 41st Street, which crosses Fargo Drive. Braat testified that Knapp was already there and standing within the storm door. Braat and Jeffrey left after about ten minutes. Later that evening, they received a call from Knapp who said she was driving home and, after that, a call from Mark Knapp who said that Knapp had been in an accident.

{¶25} Braat testified that on Sunday, December 13, 2009, she spoke with Knapp. Braat testified that Knapp had heard about a fatal crash on Fargo Drive but

believed that she had struck a mailbox, although she was uncertain where that might have occurred.

{¶26} Mark Knapp is also Michelle Knapp's brother, and lives on Shadyside Avenue, in Ashtabula. On the evening of Saturday, December 12, 2009, he received a call from Knapp that she had hit a mailbox and that she was coming over. After arriving, Knapp had a glass of wine and fell asleep in a recliner. The next day, Mark learned about the death of Moretti. He drove Knapp to her home and then to church. Mark testified that he drove her because he was suspicious that she was involved in Moretti's death and because he was concerned about the damage to her vehicle.

{¶27} On Monday, December 14, 2009, Mark gave a statement to law enforcement, part of which he wrote and part of which was written by a trooper. According to the statement transcribed by the trooper, Mark described Knapp as "impaired or drunk" on Saturday night. At trial, Mark testified that it was the trooper who insisted on using those words, although he signed the statement and did not ask the trooper to correct them. At trial, Mark explained that Knapp seemed very tired, such as he had "never * * * seen her like that before," but that she had no difficulty walking or speaking and did not smell of alcohol.

{¶28} Mark Knapp testified that he has Attention Deficit Disorder for which he takes Adderall. Although he is not supposed to drink, he was drinking on Saturday night to celebrate his wife's birthday. Mark testified that the combination of medication and alcohol affects his perception and memory of events.

{¶29} Trooper William Bancroft of the Ohio State Highway Patrol testified regarding the damage to Knapp's vehicle. Trooper Bancroft testified that there was

"crumpling" to the hood and fender, caused by "an object that was not stationary, possibly a pedestrian." He testified that, underneath the hood, the filler neck of the radiator was cracked so that fluid had leaked out. He testified that the object that was struck "was swept off and went up over the hood and down across the right front and took the [side view] mirror off." He also testified that "it doesn't look like it was a very high speed impact."

{¶30} Trooper Daniel Jesse of the Ohio State Highway Patrol testified regarding exhibits obtained from BW3s. Knapp's tab for Saturday, December 12, 2009, indicated that it was opened at 3:32 p.m., and closed at 5:34 p.m. On the tab were eleven 23-ounce Christmas Ales, an order of quesadillas, and an order of chicken tenders. There was a Visa receipt for $100 worth of gift cards purchased by Knapp at 3:20 p.m. On this receipt, Knapp's signature is legible. There was another Visa receipt for the bar tab of $82.76 paid at 5:33 p.m. On this receipt, Knapp's signature is not legible. A tip of $4 was added to the bar tab, but the total amount charged was miscalculated as $86.78 instead of $86.76.

{¶31} Catherine Rotko was employed as a second-shift bartender at BW3s on Saturday, December 12, 2009. She testified that it was a BW3 policy that, because of their high alcohol content, a man could only be served a total of three 23-ounce Christmas Ales and a woman could only be served a total of two 23-ounce Christmas Ales. Rotko was familiar with Knapp through BW3s and through mutual acquaintances.

{¶32} On Saturday, December 12, 2009, Rotko arrived at BW3s at 5:00 p.m., after Knapp's tab had been closed. There were five people at Knapp's table and all glasses were empty. She came to Knapp's table to clean up a glass that was broken on

the table in front of Knapp's seat. Thereafter, Knapp and her friends left the table. Rotko testified that she found a paper left on the table belonging to Knapp and that Knapp's purse was left on a chair. Knapp came back into the bar for her purse and spoke with Rotko for a few minutes. Rotko described Knapp's condition as impaired. According to Rotko, Knapp was unsteady and was continually leaning on her brother, Jeffrey, for support. Knapp was also slurring, "repeated herself a lot," and "seemed really confused." When they had finished speaking, Knapp was "stumbling and staggering" as she walked toward the exit.

{¶33} Dr. Pamela Lancaster, the coroner for Ashtabula County, testified that the cause of Moretti's death, according to the Coroner's Verdict, was "blunt impacts to head, neck, chest and extremities." Dr. Lancaster testified that the manner of death, according to the Coroner's Verdict, was a "homicide." Dr. Lancaster explained that classification of "homicide" means "the taking of the life of one person [by] the other, [whether] intentional or unintentional" and that this classification applied to all pedestrian deaths caused by an automobile.

{¶34} Dr. Dan Galita is a Forensic Pathologist and Deputy Medical Examiner for the Cuyahoga County Coroner's Office, and conducted the autopsy of Melanie Moretti. Using autopsy photographs, Dr. Galita explained the extent of Moretti's injuries. These injuries included abrasions to her forehead, right temple, right eyebrow, bridge of the nose, the left forearm, and the back. There were contusions behind the right knee, on both sides of the torso, and the left buttock/lower back. Internally, there were "occipital skull fractures and a ring fracture of the base of the skull" and "contrecoup contusions." There was also a cervical spine fracture at the C6/C7 level. Dr. Galita testified that

Moretti's injuries were caused by a "very severe hyperextension of the neck backwards, which broke the spine and injured the cord." Further, "all these injuries are consistent with the impact with the hood of a car, because the body is hit hard, hyperextends back, slides on the hood and then rolls * * * over and fall[s] on the ground."

{¶35} Dr. Galita also testified that Moretti's injuries were "consistent with a medium speed, around 35, 45 miles an hour" and began to explain the nature of low, medium, and high speed impacts. Counsel for Knapp objected and moved for a mistrial, primarily "based on the fact that this witness's testimony is not contained in his report." The trial court overruled the motion for mistrial, and instructed the jury: "Ladies and gentlemen, the testimony that you recently heard concerning the low speed, medium speed, high speed impact * * * any of that testimony you are instructed to disregard, as though you never heard it."

{¶36} Lieutenant Jerad Sutton, of the Ohio State Patrol, testified regarding the written statement given by Knapp on Monday, December 14, and admitted into evidence. According to her written statement, Knapp had "about three" drinks at BW3s on the night in question and did not feel impaired when she left for her aunt's house. She drove down Fargo Drive, which she travelled "a few times a month or less." She was aware that she "struck something," an unidentified object, on Fargo Drive. She did not recall seeing any pedestrians. That evening, she only noticed "slight" damage to her vehicle. She learned that she had struck a person for the first time on Monday, December 14, when her brother, Jeffrey, called and told her.

{¶37} Lieutenant Sutton also testified regarding a call Knapp made to her vehicle's OnStar System, at 7:18 p.m., on December 12, 2009. The transcript of the call

indicates that Knapp initially told the OnStar operator that she has a problem and asked about a five-digit number. Knapp then asked the operator about her route. The operator responded, "no we can only see the prior route which was Gilmour Academy Middle * * * School." Knapp thanked the operator and terminated the call.

{¶38} Douglas Rohde, a supervisor of chemistry and toxicology at the Lake County Crime Laboratory in Painesville, testified and was asked to give an opinion as to Knapp's probable blood alcohol content (BAC) on the evening of December 12, 2009, under various factual scenarios. Rohde testified that, according to the information that the brewery is required to provide on the product's label, the alcohol by volume content of Great Lakes Christmas Ale is 7.5 percent. Rohde noted, however, that this figure is an approximation and that the actual alcohol content is "rarely exactly what is printed on the bottle." In the present case, Rohde was unable to test the actual beverage or batch consumed by Knapp.

{¶39} Rohde testified as to Knapp's BAC with the assumptions that she was a heavy drinker (thus producing a more conservative estimate of her BAC, given the higher alcohol elimination rate of heavier drinkers) and had not eaten food. Based on a reported weight of 160 pounds, Rohde opined that Knapp's BAC would be between 0.075 and 0.110 after consuming two 23-ounce Christmas Ales, between 0.165 and 0.200 after consuming three 23-ounce Christmas Ales, and between 0.255 and 0.290 after consuming four 23-ounce Christmas Ales. Rohde testified that factoring for the consumption of food would reduce Knapp's actual BAC by five to ten percent.

{¶40} The following witnesses gave testimony at trial and on behalf of Knapp:

{¶41} Barbara Fusselman was employed as a day-shift bartender at BW3s on Saturday, December 12, 2009. Fusselman testified that she waited on Knapp and a party of six or seven other persons that afternoon. Fusselman testified that she only served Knapp two Christmas Ales that afternoon, with about an hour of time intervening. Fusselman did not notice any change in Knapp's demeanor during the course of the afternoon. Fusselman further testified that no one at Knapp's table was served more than two Christmas Ales.

{¶42} Michelle Knapp testified that she arrived at BW3s on Saturday, December 12, 2009, before Jeffrey and Braat. She purchased gift cards and then ordered a beer, which was served about the time Jeffrey and Braat arrived. Because service was slow, she poured some of her beer into Jeffrey's glass. About an hour later, Knapp ordered a second Christmas Ale. Again, she poured some of the beer into Jeffrey's glass to refill it. Thereafter, she ordered a third Christmas Ale, which she directed the bartender to serve to Jeffrey. During the course of the afternoon, they ordered and consumed a chicken quesadilla and boneless chicken wings, which came with fries. Knapp testified that she only consumed about one and a half of the two beers she was served.

{¶43} Michelle Knapp testified that they finished drinking about 5:30 p.m., at which time someone bumped the table and broke a glass, and left the bar about 6:30 p.m. She returned to the bar with Jeffrey to retrieve her keys. Knapp testified that while she spoke with Rotko she held on to Jeffrey "to keep him straight" as he was a little unsteady.

{¶44} Michelle Knapp testified that Fargo Drive was "fairly dark" that evening. She was driving at an appropriate speed with the radio on. Knapp remembered "hitting

something, and it * * * made a little bit of bump, but * * * it didn't make any real impact." Knapp guessed that it was a mailbox or something brought into the road by a snow plow. At her aunt's house, she noticed some damage to her vehicle ("just the front corner"). She did not notice the full extent of the damage, including the missing side view mirror, until the next day.

{¶45} After leaving her aunt's house, Michelle Knapp testified that she attempted to redial a telephone number using her vehicle's OnStar Service, but inadvertently summoned a navigational operator.

{¶46} Michelle Knapp testified that she avoided driving her vehicle on Sunday, December 13, 2009, so Jeffrey would be able to look at the damage. Although she learned of the fatality on Fargo Drive the next day, Knapp did not think she could be involved because she did not know the name of the street she was travelling on when she struck the object. Knapp testified that she only realized her involvement with Moretti's death on the morning of Monday, December 14, 2009, when Jeffrey gave her a description of the vehicle involved.

{¶47} Regarding her written statement that she had had "about three" drinks, Michelle Knapp explained that this meant the equivalent of three drinks, rather than that she had consumed three 23-ounce Christmas Ales.

{¶48} On July 29, 2011, the jury found Michelle Knapp guilty of all charges.

{¶49} On August 12, 2011, Michelle Knapp filed a Motion for New Trial and Motion for Judgment of Acquittal.

{¶50} On September 1, 2011, the trial court denied Michelle Knapp's Motions.

{¶51} On September 12, 2011, a sentencing hearing was held. At the conclusion of the hearing, the trial court imposed a prison term of six years for second degree Aggravated Vehicular Homicide; merged the third degree Aggravated Vehicular Homicide charge with the second degree charge; imposed a prison term of one year for Failure to Stop after an Accident; and imposed a jail term of six months for Operating a Vehicle while under the Influence. The court ordered the sentences for second degree Aggravated Vehicular Homicide and Failure to Stop after an Accident to be served consecutively with each other and concurrently with the sentence for Operating a Vehicle while under the Influence, for an aggregate prison term of seven years. Additionally, the court imposed a lifetime license suspension and ordered the paying of court costs.

{¶52} On October 11, 2011, Michelle Knapp filed a Notice of Appeal. On appeal, Knapp raises the following assignments of error:

{¶53} "[1.] The trial court committed reversible error in failing to instruct the jury relative to the legal requirements for pedestrians as set forth in RC § 4511.50."

{¶54} "[2.] The trial court committed reversible error in calling Connie Braat, Mark Knapp, and Jeffrey Knapp as witnesses of the court."

{¶55} "[3.] The trial court committed reversible error when it denied Michelle Knapp's motion for mistrial presented during the testimony of Dr. Dan A. Galita."

{¶56} "[4.] The trial court committed reversible error in admitting into evidence gruesome and irrelevant autopsy photographs."

{¶57} "[5.] The trial court committed reversible error in allowing the jury to hear evidence of the Coroner's conclusion that Melanie Moretti's death was a homicide."

{¶58} "[6.] The jury conviction was against the manifest weight of the evidence."

{¶59} "[7.] The cumulative error committed in this case deprived Michelle Knapp of a fair trial."

{¶60} The first assignment of error arises from the trial court's failure to charge the jury with the following jury instruction, regarding pedestrians walking along a highway: "Where there are usable sidewalks, a pedestrian must not walk along or on a roadway. * * * Where a sidewalk is not available for use, a pedestrian walking along or on a highway must walk only on a shoulder as far as he can from the edge of the roadway. * * * Where neither a sidewalk nor a shoulder is available for use, a pedestrian walking along and on a highway must walk as near as he can to the outside edge of the roadway, and if on a two-way roadway, he must walk only to the left side of the roadway facing oncoming traffic." 1 *Ohio Jury Instructions*, Section 411.99, at 262 (2008); *compare* R.C. 4511.50(A), (B), and (C).

{¶61} The trial court did instruct the jury as follows regarding "other causes": "There may be one or more causes of an event. If the defendant's act or failure to act was one of them, then the existence of other acts is not a defense, unless you find that the decedent's conduct, that's Melanie Moretti, was the sole and proximate cause of her death."

{¶62} "In a criminal case, if requested special instructions to the jury are correct, pertinent and timely presented, they must be included, at least in substance, in the general charge." *Cincinnati v. Epperson*, 20 Ohio St.2d 59, 253 N.E.2d 785 (1969), paragraph one of the syllabus, *overruled in part on other grounds*, *State v. Carter*, 72 Ohio St.3d 545, 651 N.E.2d 965 (1995). "Abstract rules of law or general propositions,

even though correct, ought not to be given unless specifically applicable to facts in issue." *State v. Guster*, 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981). Generally, "it is within the sound discretion of the trial court to determine whether the evidence presented at trial is sufficient to require that instruction be given." *State v. Lessin*, 67 Ohio St.3d 487, 494, 620 N.E.2d 72 (1993). However, the issue of whether a court is legally obligated to give a particular instruction when there is a factual basis for doing so is a question of law, and so reviewed under a de novo standard. *See id.* (a trial court is obligated to give, as a matter of law, an instruction that constitutionally protected conduct may not serve as the basis of a criminal conviction).

{¶63} Knapp argues that the evidence at trial demonstrated that Moretti violated R.C. 4511.50, by walking in the roadway and on the wrong side of the roadway, if there were no sidewalk available. According to Knapp, the trial court's refusal to instruct the jury on Moretti's undisputed negligence "effectively stripped [her] of her ability to demonstrate to the jury that she was not the proximate cause of the decedent's death." We disagree. The issue of whether Moretti violated R.C. 4511.50 is neither relevant nor pertinent to the issue of whether Moretti's conduct was the sole proximate cause of her death.

{¶64} Where a statutory enactment prescribes a specific course of conduct, the violation of that statute generally constitutes negligence per se. *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 374-375, 119 N.E.2d 440 (1954). In tort law, a finding of negligence per se "conclusively establishe[s] that the defendant breached the duty that he or she owed to the plaintiff." *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 697 N.E.2d 198 (1998). A finding of negligence per se is not determinative of the

issue of proximate cause. *Id.*; *Merchants Mut. Ins. Co. v. Baker*, 15 Ohio St.3d 316, 318, 473 N.E.2d 827 (1984) ("[s]imply because the law may presume negligence from a person's violation of a statute or rule does not mean that the law presumes that such negligence was the proximate cause of the harm inflicted").

{¶65} This court has held that "[i]t is well established that the definition of 'cause' in criminal cases is identical to the definition of 'proximate' cause in civil cases. * * * The general rule is that a defendant's conduct is the proximate cause of injury or death to another if the defendant's conduct (1) is a 'substantial factor' in bringing about the harm and (2) there is no other rule of law relieving the defendant of liability." (Citation omitted.) *State v. Lennox*, 11th Dist. No. 2010-L-104, 2011-Ohio-5103, ¶ 23. As the civil law concept of negligence per se pertains to the concept of duty, rather than causation, it is not relevant in a criminal prosecution. Accordingly, "[t]he contributory negligence of the decedent is not a defense to a charge of vehicular homicide * * *, unless it is the sole proximate cause of the accident." *State v. Howiler*, 11th Dist. No. 10-216, 7 (Sept. 30, 1985); *State v. Palmer*, 1st Dist. No. C-060754, 2007-Ohio-6870, ¶ 24.

{¶66} Whether Moretti was the sole proximate cause of her own death must be established by the facts in the record, such as her dark clothing and walking with traffic in the roadway, regardless of whether this conduct violated the statutory duties imposed on pedestrians. Thus, the trial court did not err by refusing to instruct the jury regarding R.C. 4511.50. *In re Williams*, 3rd Dist. No. 9-10-64, 2011-Ohio-4338, ¶ 41 ("[b]ased upon the proximate cause theory of criminal liability in these types of homicides, the

victim's identity or status as a comparative wrongdoer does not matter as long as the victim's death proximately results from the commission of the underlying offense").

{¶67} The first assignment of error is without merit.

{¶68} The second assignment of error arises from the court's decision to call Jeffrey Knapp, Connie Braat, and Mark Knapp as witnesses of the court.

{¶69} Ohio Evidence Rule 614(A) provides that "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." The decision whether to call individuals as witnesses of the court is left to the "sound discretion" of the trial court. *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980), paragraph four of the syllabus. "It is well-established that a trial court does not abuse its discretion in calling a witness as a court's witness when the witness's testimony would be beneficial to ascertaining the truth of the matter and there is some indication that the witness's trial testimony will contradict a prior statement made to police." *State v. Schultz*, 11th Dist. No. 2003-L-156, 2005-Ohio-345, ¶ 29 (cases cited therein).

{¶70} Michelle Knapp argues that the trial court abused its discretion by calling Jeffrey, Braat, and Mark as witnesses in the absence of "any evidence of specific inconsistencies which would demonstrate the witnesses all planned to contradict prior statements made to the police." Knapp relies on the case of *State v. Cleary*, 2nd Dist. No. 24217, 2011-Ohio-3725, which held: "Where the basis of a motion to declare an individual a court's witness is that the witness's trial testimony will contradict prior statements the witness has made to police, the court must be presented with and know

the specific inconsistencies involved in order to exercise its discretion in ruling on the motion." *Id.* at ¶ 87.

{¶71} With respect to the issue of whether Evid.R. 614(A) requires a prior showing of inconsistent testimony, this court has held:

> **{¶72}** In the seminal case of *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144, the court found no abuse of discretion in the calling of a court's witness even though the alleged prior inconsistent statements were not identified, nor had the witness been called by the state and made any inconsistent statements prior to being called as a court's witness. See *Adams,* Note 7. Determining the witness is varying materially from prior statements before calling her as a court's witness for impeachment purposes generally may be the most prudent course of action. See *State v. Brewer* (Feb. 25, 1986), Franklin App. No. 84AP-852, unreported. However, Evid.R. 614(A) does not state such a requirement. This procedure is not necessary where the trial judge is reasonably justified in believing that the calling of the person as a court witness would benefit the jury in performing its fact-finding responsibilities. *Adams,* at 158.

{¶73} *State v. Davis*, 11th Dist. No. 92-L-089, 1993 Ohio App. LEXIS 5917, *8-9 (Dec. 10, 1993). *Accord State v. Bowles*, 11th Dist. No. 99-L-075, 2001 Ohio App. LEXIS 2145, *9 (May 11, 2001) ("a trial court does not abuse its discretion under Evid.R. 614(A) by not requiring a prior showing of inconsistent testimony").

{¶74} In *Davis*, the witness in question was the defendant's sibling and had made prior statements to the police implicating the defendant in the crimes charged. *Davis* at *9. Prior to trial, the prosecutor moved the court to have the witness called as the court's witness, arguing that the witness had expressed the intention that her trial testimony would be contrary to her prior statements. *Id.* This court held that "[c]ourts presented with state's witnesses having a personal interest in the outcome of the case, and where there is the suggestion that trial testimony will diverge from prior statements made to police, have acted similarly [by granting the motion] and were upheld on appeal." *Id.* at *9-10 (cases cited therein).

{¶75} Under *Davis*, the trial court was well within its discretion to call Jeffrey, Braat, and Mark as the court's witnesses.

{¶76} Moreover, even under *Cleary*, the State in the present case sufficiently indicated the likely discrepancies with the witnesses' prior testimony. In the case of Jeffrey and Braat, the State informed the trial court that the witnesses had advised that their prior statements to law enforcement and to the grand jury "were not complete as to certain material aspects" of Knapp's conduct, specifically the amount of alcohol consumed by Knapp. In the case of Mark, the State informed the court that he "was reluctant to confirm the contents of his prior statements to law enforcement and the grand jury," and that Knapp drove to his house immediately after hitting the victim. In *Cleary*, by contrast, the State never claimed affirmative damage to its case as a result of the inconsistent testimony, and the alleged inconsistency was merely the witness's inability to recall certain details of the prior statement. *Cleary*, 2011-Ohio-3725, at ¶ 86 ("[a] lack of recollection is not an inconsistency").

{¶77} The second assignment of error is without merit.

{¶78} The third assignment of error arises out of Dr. Galita's testimony that Moretti's injuries were "consistent with a medium speed, around 35, 45 miles an hour." Counsel for Knapp moved for a mistrial on the grounds that this testimony was not contained in the expert's report. The trial court overruled the motion for mistrial, but ordered the testimony stricken, issued a curative instruction, and ordered the witness to refrain from testifying about the speed on impact.

{¶79} "A new trial may be granted on motion of the defendant for any * * * [i]rregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial." Crim.R. 33(A)(1). "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected; this determination is made at the discretion of the trial court." *State v. Reynolds*, 49 Ohio App.3d 27, 33, 550 N.E.2d 490 (2nd Dist.1988). "The granting of a mistrial is necessary only when a fair trial is no longer possible." *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001).

{¶80} Michelle Knapp contends Dr. Galita's testimony was especially prejudicial because "[i]t is axiomatic that speeding is an indicia of impairment." Reply brief of appellant, citing *State v. Penix*, 11th Dist. No. 2007-P-0086, 2008-Ohio-4050, ¶ 16. Knapp further contends that the curative instruction was "too little, too late," since it was "impossible for the defense to counter this testimony during trial." We disagree.

{¶81} The case law holding that speeding is indicia of impairment is relevant in the context of a suppression hearing, specifically whether an officer possesses a

reasonable suspicion of intoxication justifying the administration of field sobriety tests. *Id.* at ¶ 19. In the present case, there was no testimony that speed was a factor in the collision and the jury was not so instructed. On the contrary, Trooper Bancroft, a technical crash investigator, testified "it doesn't look like it was a very high speed impact." Knapp testified that she was travelling "approximately 25 miles per hour." In closing argument, the prosecutor argued before the jury that some indication of the speed at which Knapp was driving could be inferred from the severity of Moretti's injuries, but conceded "I don't know how fast she was going." Accordingly, the prejudice resulting from Dr. Galita's testimony was not so significant as to preclude the possibility of a fair trial.

{¶82} With respect to the curative instruction, "[a] trial jury is presumed to follow the instructions given to it by the judge." *State v. Henderson*, 39 Ohio St.3d 24, 33, 528 N.E.2d 1237 (1988). In the present case, there is no evidence or suggestion that the jury was unable or unwilling to follow the trial court's instruction to "disregard, as though you never heard it."

{¶83} The third assignment of error is without merit.

{¶84} The fourth assignment of error arises out of the trial court's admission of Moretti's autopsy photographs.

{¶85} "The admission in evidence of photographs of an autopsy is committed to the sound discretion of the trial judge." *State v. Wilson*, 30 Ohio St.2d 199, 203-204, 283 N.E.2d 632 (1972). "Although a photograph may be rendered inadmissible by its inflammatory nature, the mere fact that it is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would

prove useful to the jury." *State v. Woodards*, 6 Ohio St.2d 14, 25, 215 N.E.2d 568 (1966); Evid.R. 403(A) ("[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury").

{¶86} Knapp claims the photographs at issue were unfairly prejudicial in that they were gruesome and repetitive, and in that the defense was willing to stipulate to Moretti's injuries. With respect to this last point, the Ohio Supreme Court has held that "[t]he fact that appellant stipulated the cause of death does not automatically render the photographs inadmissible." *State v. Maurer*, 15 Ohio St.3d 239, 265, 473 N.E.2d 768 (1984).

{¶87} The photographs at issue in the present case are thirteen in number. There is a full-length photograph of the victim clothed; three photographs of the victim's head (one in its condition on arrival at the morgue); one full-length photograph of the victim, naked, from the back; and nine photographs showing injury to particular parts of the victim's body, principally the backside.

{¶88} The number of photographs is not excessive, and they are illustrative of the testimony of Dr. Galita. The majority of the victim's injuries consist of contusions and abrasions, the nature of which are better communicated by photograph rather than descriptive testimony. The photographs are not particularly gruesome or inflammatory.

{¶89} This court's decision in *State v. Warner*, 11th Dist. No. 2006-P-0048, 2007-Ohio-3016, is distinguishable. In that case, the State submitted 23 autopsy photographs of the victim, the majority of which this court found probative and admissible. *Id.* at ¶ 87. Six of the photographs depicted the victim's head in various

stages of reflection and were found gruesome and prejudicial, although this court did not "conclude the results of the trial would have been different without the admission of these photographs." *Id.* at ¶ 89-90.

{¶90} The photographs in the present case depict the victim's body essentially as it was, without any additional cuttings or alteration, except for the washing of blood from the victim's face. Although Dr. Galita testified to internal injuries, none of the photographs attempted to depict them. The trial court's decision to admit the photographs did not constitute an abuse of discretion.

{¶91} The fourth assignment of error is without merit.

{¶92} The fifth assignment of error arises from the trial court allowing the Ashtabula County Coroner, Dr. Lancaster, to testify that the manner of the victim's death was classified as a homicide.

{¶93} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991).

{¶94} The Ohio Revised Code provides that "[t]he cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death * * *." R.C. 313.19. "[I]t is clearly within the expertise of the coroner to give an opinion on whether a death is a homicide," and "such an opinion is not objectionable because it goes to a 'legal' rather than a

'medical' issue, nor is it objectionable because it goes to an ultimate issue in the case." (Citation omitted.) *State v. Simpson*, 11th Dist. No. 93-L-014, 1994 Ohio App. LEXIS 4472, *21 (Sept. 30, 1994).

{¶95} Michelle Knapp argues that, although the coroner is permitted to give an expert opinion as to the legally accepted cause of one's death, "it was clearly confusing to the jury to hear a state elected official testify as to his belief that Ms. Moretti was the victim of a 'homicide' when this was the same issue they were charged with determining." According to Knapp, the trial court should have redacted this word from the Coroner's Report.

{¶96} The danger of unfair prejudice or confusion of the issues did not substantially outweigh the probative value of Dr. Lancaster's testimony on the issue of the manner or mode of death. Dr. Lancaster explained that the classification of homicide only meant "the taking of the life of one person [by] the other, intentional or unintentional," and the classification applied to all pedestrian deaths when caused by a collision with a vehicle. Thus, "[a] determination by the coroner that a person's death is the result of a homicide does not attach any 'criminal responsibility or non-responsibility of any human agency involved in the causal chain." (Citation omitted.) *State v. Stewart*, 11th Dist. No. 2001-A-0011, 2002-Ohio-3842, ¶ 44. Knapp has not demonstrated the likelihood of the jury's misinterpreting the import of Dr. Lancaster's testimony.

{¶97} The fifth assignment of error is without merit.

{¶98} In the sixth assignment of error, Knapp argues that her conviction is against the manifest weight of the evidence.

{¶99} A challenge to the manifest weight of the evidence involves factual issues. The "weight of the evidence addresses the evidence's effect of inducing belief." (Citation omitted.) *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25; *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997) ("[w]eight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial'") (emphasis sic) (citation omitted). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Wilson* at ¶ 25.

{¶100} "The [appellate] court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus; *State v. Thomas*, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982), syllabus. However, when considering a weight of the evidence argument, a reviewing court "sits as a 'thirteenth juror'" and may "disagree[] with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). "The only special deference given in a manifest-weight review attaches to the conclusion reached by the trier of fact." *Id.* at 390 (Cook, J., concurring).

{¶101} The only element of her conviction that Knapp challenges under this assignment of error is whether she was impaired, i.e., under the influence of alcohol, at the time of the accident. R.C. 4511.19 (A)(1)(a) and R.C. 2903.06(A)(1)(a). Knapp contends that the prosecution's witnesses were contradictory and unreliable; there was no physical evidence of intoxication; and the State's expert, Rohde, failed to account for the food consumed by Knapp, independently test the alcohol content of Christmas Ale, and confirm the amount of fluid held by the bar glasses served to Knapp.

{¶102} Knapp's convictions did not constitute a miscarriage of justice. The State's evidence of Knapp's intoxication was compelling. Two eyewitnesses, Rotko and Mark, testified that she was impaired. By her own testimony, as well as that of Jeffrey and Braat, Knapp drank a sufficient quantity of alcohol to render her legally intoxicated. Knapp's impairment may be inferred from her testimony, if believed, that she did not realize she had struck a human being, despite the fact that Moretti's body was carried for a distance of 70 feet on the hood of Knapp's vehicle causing significant damage thereto. Knapp's impairment may also be inferred from the illegibility of her signature after drinking for two hours and inability to correctly calculate a four-dollar tip, despite her being a professional accountant. Although Knapp, Jeffrey, Braat, and Mark attempted to equivocate with respect to their initial statements to law enforcement, we find no reason to disagree with the jury's resolution of the conflicting testimony in this case.

{¶103} The sixth assignment of error is without merit.

{¶104} In the seventh and final assignment of error, Knapp argues that the cumulative effect of the trial court's errors deprived her of a fair trial. This assignment of

error may be summarily dismissed since we have found no errors in the court's conduct of the trial.

{¶105} The seventh and final assignment of error is without merit.

{¶106} For the foregoing reasons, the judgment of the Ashtabula County Court of Common Pleas, finding Knapp guilty of Aggravated Vehicular Homicide, Failure to Stop after an Accident, and Operating a Vehicle while under the Influence, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.