[Cite as *State v. Risden*, 2010-Ohio-991.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 22930
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2007-CR-3231
v.	:	
	:	
RICKEY L. RISDEN, II	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 12th day of March, 2010.

. . . . . .

MATHIAS H. HECK, JR., by KELLY D. MADZEY, Atty. Reg. #0079994, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

WILLIAM O. CASS, JR., Atty. Reg. #0034517, 3946 Kettering Boulevard, Suite 202, Kettering, Ohio 45439
Attorney for Defendant-Appellant

. . . . . .

BROGAN, J.

{¶ 1} Defendant-appellant Rickey L. Risden, II, appeals from his conviction and sentence for tampering with evidence, failure to stop after an accident, and aggravated vehicular homicide. Risden filed a timely notice of appeal with this Court

on September 5, 2008.

I

{¶ 2} The incident which forms the basis of this appeal occurred on the afternoon of August 5, 2007, when Risden and his sister, Amanda Risden, drove to a residence in Trotwood, Ohio, in order to purchase heroin. Once the heroin was purchased, Risden drove Amanda and himself in a black 1995 Mercury Grand Marquis owned by Amanda to a gas station. At the gas station, Risden went into the bathroom and allegedly injected himself with the recently purchased heroin. Risden rejoined Amanda, whom he had left in the vehicle, and the two began traveling back towards the trailer park in which Risden lived.

{¶ 3} At approximately the same time as Risden was driving back to his residence, the victim, Steven Smith, was walking back to his apartment after completing his shift at a nearby Wendy's restaurant. The route Smith took to get home required him to walk down Philadelphia Drive, a residential street with a single lane in each direction and no sidewalks. Smith was walking on the right side of the street near the curb.

{¶ 4} At trial, Darrell Edwards testified that he was driving northbound on Philadelphia Drive at approximately 2:40 p.m. when he passed Smith who was walking in the opposite direction. Almost immediately after passing Smith, Edwards testified that he heard a thump. When Edwards looked in his rear view mirror, he observed Smith's body bouncing off the hood of a black vehicle. The vehicle was later determined to be driven by Risden, who was also traveling northbound on Philadelphia Drive on his way home. Edwards testified that after Smith was hit, the

black vehicle drove around the passenger side of Edwards' vehicle and left the scene. Before the black vehicle was able to drive away, however, Edwards' daughter was able to capture a photograph of the license plate on the black vehicle with the camera on her cell phone. Edwards' wife then called 911 while Edwards went back to check on Smith's condition.

{¶ 5} As a result of being struck, Smith suffered several complex fractures to his right leg, injuries to his right arm and hand, as well as a severe head injury which caused severe bleeding and swelling in his brain. Smith lived for approximately six weeks before succumbing to his injuries on September 19, 2007.

{¶ 6} After striking Smith, Risden drove the damaged vehicle to the residence of Amanda's boyfriend's mother, Bernadette Morris, and parked it behind her house. Risden and his sister, Amanda, told Morris that the vehicle had been damaged when they hit a deer. Morris' boyfriend, Michael Maroney, testified that he inspected the damage to the vehicle and did not believe that the damage was caused by hitting a deer. In fact, Maroney testified that he observed blood stains and cotton fibers in the area where the vehicle had been damaged, and thought that they had hit a person. Both Morris and Maroney ordered Risden to move the vehicle out of Morris' backyard and take it away. Maroney testified that they left for a short time, but when they returned, the vehicle was gone.

{¶ 7} The evidence adduced at trial established that on the day after Smith was hit, Risden drove the vehicle to the river levee near North Dixie Drive. Risden abandoned the vehicle under a bridge abutment where it could not be observed from the road. Risden shoved a pair of scissors into the ignition of the vehicle in order to

make it appear as if the car had been stolen.

{¶ 8} Risden turned himself in to the police on August 7, 2007, and confessed to driving the vehicle that struck and severely injured Smith. During a series of interviews, Risden eventually admitted that he was under the influence of heroin when he fell asleep at the wheel and hit Smith. Risden also confessed to abandoning his sister's vehicle at the river levee and forcing scissors into the ignition to make the car look as if had been stolen.

{¶ 9} On August 15, 2007, Risden was indicted for one count of tampering with evidence, in violation of R.C. § 2921.12(A)(1), a felony of the third degree; one count of failure to stop after an accident, in violation of R.C. § 4549.02, a felony of the fifth degree; one count of aggravated vehicular assault, in violation of R.C. § 2903.08(A)(1), a felony of the second degree; and one count of vehicular assault, in violation of R.C. § 2903.08(A)(2)(b), a felony of the third degree. Risden was re-indicted on January 14, 2008, wherein the State added one count of aggravated vehicular homicide, in violation of R.C. § 2903.06(A)(1), a felony of the first degree, and one count of aggravated vehicular homicide, in violation of R.C. § 2903.06(A)(2)(a).

{¶ 10} Following a jury trial held from July 21, 2008, to July 25,2008, Risden was found guilty on all counts. On August 6, 2008, Risden was sentenced to an aggregate prison term of twenty years. It is from this judgment that Risden now appeals.

II

{¶ 11} Risden's first assignment of error is as follows:

{¶ 12} "THE TRIAL COURT ABUSED ITS DISCRETION AND MATERIALLY PREJUDICED THE APPELLANT WHEN IT PERMITTED THE APPELLEE TO IMPEACH ITS WITNESSES UNDER EVIDENCE RULE 607 AND ADMITTED PRIOR OUT OF COURT STATEMENTS BY THE WITNESSES."

{¶ 13} In his first assignment, Risden contends that the trial court abused its discretion when it allowed the State to improperly impeach the testimony of two of its own witnesses, Darrell Edwards and Amanda Risden, with out-of-court statements made prior to trial. Risden argues that not only were its witnesses subject to improper impeachment through their out-of-court statements, but the jury was allowed to use the prior statements as substantive evidence.

{¶ 14} The admission or exclusion of evidence rests soundly within the trial court's discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, ¶ 2 of the syllabus. The trial court's decision concerning the admission or exclusion of evidence will not be reversed absent an abuse of that discretion. *Id*. at 182. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio St. Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶ 15} Evid. R. 607(A) provides the following:

{¶ 16} "The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative

damage. * * *"

{¶ 17} As we recently stated in *State v. Dearmond*, 179 Ohio App.3d 63, 68-69, 2008-Ohio-5519:

{¶ 18} "It is the generally accepted view that a prior inconsistent statement is only admissible to impeach the declarant and should not be taken into evidence to prove the truth of the matter asserted. Ohio has long adhered to this general principle. * * * [T]he Supreme Court has said that 'when taken by surprise by the adverse testimony of its own witness, . . . the state may interrogate such witness concerning his prior inconsistent . . . statement . . . for the purpose of refreshing the recollection of the witness, but not for the purpose of offering substantive evidence against the accused.' *State v. Dick* (1971), 27 Ohio St.2d 162, 165 (quoting *State v. Duffy* (1938), 134 Ohio St. 16, 17). Indeed, to allow prior inconsistent statements to be considered for their truth would 'allow men to be convicted on unsworn testimony of witnesses - a practice which runs counter to the notions of fairness on which our legal system is founded.'" *State v. English*, Montgomery App. No. 21915, 2007-Ohio-5979.

{¶ 19} "It is within the broad discretion of a trial court to determine whether a party is taken by surprise by the testimony of a witness called by that party, so as to permit that party to impeach its own witness. (Internal citations omitted). The evident purpose of this rule is to prevent a party from calling a witness with the sole purpose of impeaching that witness by her prior, out-of-court statements, which would otherwise be inadmissible. 'Otherwise [i.e., but for Evid. R. 607(A)], the party would be entitled to call a known adverse witness simply for the purpose of getting a

prior inconsistent statement into evidence by way of impeachment thus doing indirectly what he could not have done directly.'" *State v. Foster*, Greene App. No. 2004-CA-19, 2005-Ohio-439.

{¶ 20} "Ordinarily, 'surprise,' under Evid.R. 607(A), can be shown if the testimony is materially inconsistent with a prior written statement and counsel did not have reason to believe that the witness would recant. (Internal citation omitted). And 'affirmative damage' is established when the witness testifies to facts which contradict, deny, or harm the trial position of the party calling the witness." *State v. Nolan* (March 10, 2000), Clark App. No. 99-CA-24.

A. Darrell Edwards

{¶ 21} Immediately prior to trial, the State became aware that Edwards was unable to be present to testify. The State, therefore, asked for and was granted leave to videotape Edwards' testimony to be played before the jury at trial. On the day of trial, the prosecutor reiterated her intention to show the jury the videotape of Edwards' testimony in a sidebar conference with the court. The sidebar conference consisted of the following exchange:

{¶ 22} "The Court: Is the State ready to call its first witness?

{¶ 23} "The State: We are, Your Honor. May we approach, Your Honor?

{¶ 24} "The Court: Sure.

{¶ 25} "(Bench Conference as follows:)

{¶ 26} "The State: Your Honor, State's first witness is Darrell Edwards. He was here yesterday. As I indicated to you before that I had advised him (indiscernible) out of town. Due to delays (indiscernible) the Court decided that the

jury had had enough.

{¶ 27} "The Court: Correct.

{¶ 28} "The State: And to continue on and it's my understanding (indiscernible) to allow Mr. Edwards to (indiscernible) to do a video deposition to perpetuate his testimony for the jury.

{¶ 29} "The Court: Correct. And what we did is we took the deposition which we'll play shortly. At that time, there was – the State had asked to proceed on Rule 607. We went off the record and discussed it so that the jury would not hear that. But I – what we agreed to was that before we played that the State would voice why they believe – which they are ultimately allowed questioning under 607 and note the defense counsel's objection to that. So you have to treat him as a type of surprise and would you make a record of that?

{¶ 30} "The State: Yes, Your Honor.

{¶ 31} "The Court: Make sure it comes in.

{¶ 32} "The State: The State of Ohio being herself, Sandra Hobson, had made contact with Darrell Edwards the Sunday night before he testified. They interviewed him. At that time he indicated that he did observe the victim in this case, that he approached him walking down the road on Philadelphia Drive. And when I say he observed him walking down the road, he indicated that he was on the part of the road that's not out where traffic goes but the part that's delineated by the white line over to the grass that is not part of the roadway.

{¶ 33} "That [Edwards] was going towards Turner Road in his vehicle and that he observed that victim walking towards him and that the victim was not in the

roadway or traffic, he was not creating a hazard to traffic, and it did not require him to move out of the wayto prevent himself from striking the victim.

{¶ 34} "When [Edwards] – and he also further indicated that shortly after he passed the victim on Philadelphia Drive that he was going passed [sic] Greenhill, the intersection of Greenhill, that he hears a loud sound, looks back in his rearview mirror. At which point he sees the victim [sic] body bouncing off of the black car.

{¶ 35} "In his testimony when he started [Edwards] totally eliminated the part about seeing the victim at any time prior to hearing the noise of the collision. Which was a total surprise to the State. I asked him, on several attempts I asked him, did you see anyone walking towards him and he indicated that he couldn't remember and he said he didn't think so. And at that point the State was truly surprised (indiscernible).

{¶ 36} "The Court: Okay. You objected?

{¶ 37} "Defense Counsel: Our objection is that there were legal mechanisms by which to potentially refresh his recollection or other legal remedies as opposed to proceeding under 607. We objected based upon those grounds.

{¶ 38} "The Court: Yes. And based upon the fact that it was what we said yesterday was that his story was always consistent with what Ms. Hobson said up to like twelve o' clock the night before. I allowed the direct questioning under 607. So, we'll play the tape now."

{¶ 39} During the videotaped direct testimony of Edwards, the following exchange occurred:

{¶ 40} "The State: Your Honor, may I approach?

{¶ 41} "The Court: Sure. Let's go off the record.

{¶ 42} "(Off the record)

{¶ 43} "The State: Your Honor, [the] State would move that you allow us to question this witness under Evid. R. 607.

{¶ 44} "Defense Counsel: I'm going to object.

{¶ 45} "The Court: And based upon the reason set forth on the previous record I'm overruling that objection. You may proceed.

{¶ 46} "The State: Thank you, Your Honor.

{¶ 47} "(In open court)

{¶ 48} "The State: Mr. Edwards, you previously talked to me before, is that correct?

{¶ 49} "Edwards: Yes.

{¶ 50} "Q: In fact, you talked to me late last night, is that correct?

{¶ 51} "A: Yes.

{¶ 52} "Q: At that time did you not in fact tell me that you saw the individual prior to the accident happening?

{¶ 53} "A: Yes.

{¶ 54} "Q: You told me that?

{¶ 55} "A: Yes.

{¶ 56} "Q: Did you say at that time that you saw the person – that you actually passed the person walking –

{¶ 57} "A: Coming up –

{¶ 58} "Q: Coming?

{¶ 59} “A: Up.

{¶ 60} “Q: Coming up?

{¶ 61} “A: Right.

{¶ 62} “Q: Towards you?

{¶ 63} “A: Right.

{¶ 64} Q: On Philadelphia Drive?

{¶ 65} “A: Yes.

{¶ 66} “Q: Okay. And did you also tell me at that time that that person was not walking in the roadway?

{¶ 67} “A: **No. He wasn’t walking in the road**.

{¶ 68} “Q: And did you also tell me that that person was not obstructing traffic in any way?

{¶ 69} “A: Right.

{¶ 70} “Q: Did you also tell me at that time that you did not have to go out of your way to swerve or anything to get – to prevent you from hitting him?

{¶ 71} “A: Right.

{¶ 72} “Q: **Because he was not in the roadway, is that correct**?

{¶ 73} “A: **Yes**.”

{¶ 74} After a thorough review of the record as well as the relevant case law, we find that under the circumstances presented in this case, the State mistakenly relied upon Evid. R. 607 in order to impeach Edwards’ trial testimony with his out-of-court statements that were made to the prosecutor during an interview before the trial began. While the question of surprise is entrusted to the discretion of the

trial court, "affirmative damage" can be established only if the witness testifies to facts which contradict, deny, or harm the calling party's trial position. *Dayton v. Combs* (1993), 94 Ohio App.3d 291, 299. "'Affirmative damage' is not shown where the witness denies knowledge of the facts contained in his prior statement or where he states that he does not remember the facts stated therein." *Id*.

{¶ 75} Clearly, the State was surprised by Edwards' testimony that he did not remember if he saw anyone walking in the opposite direction on Philadelphia Drive before the accident. Edwards' testimony, however, was insufficient to establish that the State was "affirmatively damaged" for the purpose of impeaching Edwards, its own witness, since his testimony neither contradicted, denied, nor harmed the State's trial position. Thus, the trial court improperly relied on Evid. R. 607 when it allowed the State to question Edwards regarding his prior statement.

{¶ 76} The trial court, however, did not abuse its discretion when it allowed the State to ask Edwards leading questions with respect to his prior statement since such questioning was permissible under Evid. R. 611(A) and (C), which state in pertinent part:

{¶ 77} "(A) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth ***;

{¶ 78} "(C) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. *** When a party calls a hostile witness, an adverse party, or a witness

identified with an adverse party, interrogation may be by leading questions."

{¶ 79} It is clear from the record that the State's purpose in asking Edwards leading questions regarding his prior statements was not to impeach his credibility. Rather, it is apparent that the State only wished to elicit testimony from Edwards that was consistent with the statements that he made to the prosecutor prior to the trial. Thus, the trial court did not abuse its discretion since the State's leading questions were permissible pursuant to Evid. R. 611(C) in order to develop Edwards' testimony.

B. Amanda Risden

{¶ 80} Risden also argues that the trial court abused its discretion when it allowed the State to attempt to impeach the testimony of his sister, Amanda, with prior inconsistent statements pursuant to Evid. R. 607. Specifically, Risden argues that there was insufficient evidence of surprise that would enable the State to impeach Amanda with her prior inconsistent statements because the State should have known that Amanda would be evasive in regards to providing any incriminating evidence against her brother at trial.

{¶ 81} After Amanda was called to testify, the following exchange occurred:

{¶ 82} "The State: Let me direct your attention to the date of August 5, 2007. Were you with your brother on that date?

{¶ 83} "Amanda: Yes.

{¶ 84} "Q: And who is your brother?

{¶ 85} "A: Rickey Risden.

{¶ 86} "Q: And were you with him for the whole day or most of the day or what?

{¶ 87} “A: Most of the day.

{¶ 88} “Q: I want to direct your attention and ask you on that particular date did you and your brother ever have occasion to be inside a motor vehicle?

{¶ 89} ***

{¶ 90} “A: Yes.

{¶ 91} “Q: Whose car were you in?

{¶ 92} “A: My car.

{¶ 93} “Q: What kind of car did you own on that date?

{¶ 94} “A: It’s a ‘95 Mercury Grand Marquis.

{¶ 95} “Q: What color was it?

{¶ 96} “A: Black.

{¶ 97} “Q: And you owned that vehicle?

{¶ 98} “A: Yes.

{¶ 99} “Q: Did you ever have occasion to go into Trotwood, Ohio on that date?

{¶ 100} “A: Yes.

{¶ 101} “Q: Who was driving the car at that time?

{¶ 102} “A: My brother.

{¶ 103} “Q: Your brother, Rickey Risden?

{¶ 104} “A: Yes.

{¶ 105} “Q: And why were you going to Trotwood, Ohio?

{¶ 106} “A: The whole day is so cloudy to me. We had so many things on our agenda. We ended up stopping somewhere. I’m trying to remember everything that was on our agenda that day.

{¶ 107} "Q: Let me ask you why were you – why did you all go to Trotwood, Ohio.

{¶ 108} "A: *We ended picking up some drugs*, well, that was the intent, but I don't know exactly what had happened because we went somewhere. My brother had got out of the car and he got back into the car and then we drove over to a gas station.

{¶ 109} "***

{¶ 110} "Q: And did you all in fact go to Trotwood, Ohio?

{¶ 111} "A: Yes, we did.

{¶ 112} "Q: Did you go to a location in Trotwood, Ohio for the purpose of buying drugs?

{¶ 113} "A: Yes.

{¶ 114} "Q: In the motor vehicle?

{¶ 115} "***

{¶ 116} "A: Yes. I'm sorry

{¶ 117} "Q: At any point in time when you got to that location in Trotwood, Ohio, did you get out of the car to purchase drugs?

{¶ 118} "A: No.

{¶ 119} "Q: Did your brother, Rickey Risden, get out of the car to purchase drugs?

{¶ 120} "Defense Counsel: Objection.

{¶ 121} "The Court: Overruled.

{¶ 122} "A: He got out of the car, but I don't know if that was the intent at that

exact – what was – that was not talked about. It wasn't clear or anything – it was based on assumption.

{¶ 123} "Q: Is that the location you all were going to to buy drugs? Where he got out at?

{¶ 124} "A: That's not where I would particularly go so it was like I said. It wasn't talked about.

{¶ 125} "The State: Your Honor, may we approach?

{¶ 126} "The Court: Sure.

{¶ 127} (Bench Conference as follows:)

{¶ 128} "The State: Your Honor, at this point in time, the State claims surprise (indiscernible) she and brother's intention to go to Trotwood to buy drugs. That they did in fact drive to that location. He went into that location. And he came back and at that point in they then drove to a service station in Trotwood where he gets out of the car and goes into the bathroom. (Indiscernible) what she's saying now (indiscernible).

{¶ 129} "Defense Counsel: Obviously she knows that this is not a surprise. It's my belief that the witness has explained this to the State and simply because this is not the theory of the case and this is not the way they like the evidence coming out that this is not a surprise. This potentially is not consistent with their theory but it's my belief that this has been her position in discussions with them and that this is no way a surprise.

{¶ 130} "The Court: Well, you weren't in those discussions so I'm asking you.

{¶ 131} "The State: On Wednesday our last discussion with her she

specifically stated that she and Rickey went to a Trotwood address for that purpose of getting drugs. That Rickey got out of the car, went in there and got them, came back, and that at that point in time he got back in the car, drove to the service station, and then he went inside to the restroom.

{¶ 132} "The Court: I think I'm going to allow it. I'm a little concerned about intention. I think the word may be planned. If they discussed something that's one thing. And that was your objection. I overruled the one you said – the way you said intent it was for both of them. But when you're talking about she wouldn't know his intention but she would know what the plan is.

{¶ 133} "I'm going to allow you to direct her at this point as far as going to Trotwood and going into the gas station because it does appear to be much different that what she told you the other day. When you move on to the next part however, back to regular questioning unless you can demonstrate surprise again. Okay?

{¶ 134} (End of bench conference)

{¶ 135} "The Court: You may proceed."

{¶ 136} At that point the State proceeded to ask Amanda leading questions regarding the events leading up to the accident. In doing so, the State was permitted to use Amanda's prior statements to direct her questioning pursuant to Evid. R. 607. While the State may have been surprised by Amanda's testimony that she was unsure regarding her and Risden's purpose in driving out to Trotwood, Amanda's testimony was insufficient to establish that the State was "affirmatively damaged" for the purpose of impeaching Amanda, its own witness, since his testimony neither contradicted, denied, nor harmed the State's trial position. Thus,

the trial court improperly relied on Evid. R. 607 when it allowed the State to question Amanda regarding her prior statement. This error, however, is harmless in light of the fact that Amanda clearly testified, prior to the State introducing her prior inconsistent statements, that their purpose in driving to Trotwood was to buy drugs and that Risden did, in fact, purchase drugs once they stopped at a residence in Trotwood. The fact that Amanda attempted to later downplay her testimony by stating that she was suffering from low sugar which affected her perception of events at the time was noteworthy, but otherwise unremarkable. Simply put, Amanda had already conclusively admitted that they drove to Trotwood and bought drugs before the trial court permitted the State to ask Amanda leading questions based on her prior inconsistent statements.

{¶ 137} Lastly, Risden argues it was error for the trial court to fail to provide the jury with a limiting instruction stating that Dep. Evers' testimony regarding Amanda's prior inconsistent statements was not to be considered as substantive evidence, only as impeachment evidence. As noted by the State, Risden did not object to the trial court's failure to instruct the jury in this regard. Based upon Risden''s failure to object to the instructions and bring the issue to the trial court's attention for consideration, we must address this assignment under the doctrine of plain error. *State v. Williford* (1990), 49 Ohio St.3d 247. In order to prevail under a plain error analysis, Risden bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the errors. *State v. Long* (1978), 53 Ohio St.2d 91; Crim R. 52(B). Notice of plain error "is taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of

justice." *State v. Long*, 53 Ohio St.2d 91 at paragraph 3 of the syllabus. We will not reverse a conviction due to error in the jury instructions unless the error is so prejudicial that it may induce an erroneous verdict.

{¶ 138} In view of the strong direct and circumstantial evidence of Risden's guilt in this record, we cannot say that there exists a reasonable probability that Risden would have been acquitted had the trial court provided the jury with a limiting instruction regarding the proper use of Dep. Evers' testimony about Amanda's prior inconsistent statements. Thus, we reject Risden's contention that it was plain error for the trial court to have failed to give a limiting instruction regarding the prior inconsistent statements.

{¶ 139} Risden's first assignment of error is overruled.

III

{¶ 140} Risden's second assignment of error is as follows:

{¶ 141} "THE TRIAL COURT ERRED WHEN IT ALLOWED THE APPELLANT'S CONFESSION TO BE ADMITTED BECAUSE THE APPELLEE HAD NOT ESTABLISHED THE CORPUS DELICTI OF THE OFFENSES OF AGGRAVATED VEHICULAR HOMICIDE AND TAMPERING WITH EVIDENCE."

{¶ 142} In his second assignment of error, Risden contends that the trial court erred when it allowed his confession to be admitted because the State had failed to first establish the corpus delicti of the offenses of aggravated vehicular homicide and tampering with evidence. In particular, Risden argues that the evidence adduced prior to the admission of his confessions did not establish that he was under the

influence of a drug of abuse or acting recklessly. Further, Risden argues that the evidence did not establish that he was the individual who hid the vehicle used in the homicide.

{¶ 143} Corpus delicti has two elements, "1) the act, and 2) the criminal agency of the act." *State v. Van Hook* (1988), 39 Ohio St.3d 256, 261; *State v. Maranda* (1916), 94 Ohio St. 364. Corpus delicti must be established by evidence outside of a defendant's out-of-court confession before the confession can be admitted. *Id*. "The quantum or weight of such outside or extraneous evidence is not of itself to be equal to proof beyond a reasonable doubt, nor even enough to make it a prima facie case." *State v. Maranda* (1916), 94 Ohio St. 364. Corpus delicti, however, only requires "some evidence outside of the confession that tends to prove some material element of the crime charged." *Id*.

{¶ 144} In *State v. Edwards* (1976), 49 Ohio St.2d 31, overruled on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155, the Ohio Supreme Court noted that the historical origins of the corpus delicti rule were designed to protect an accused from being convicted of a crime that never occurred. The court stated that, in light of the "vast number of procedural safeguards protecting the due process rights of criminal defendants, the corpus delicti rule is supported by few practical or social-policy considerations." *Id*. at 35-36. The *Edwards* court found "little reason to apply the rule with a dogmatic vengeance." *Id*. Thus, the burden upon the State to provide some evidence of the corpus delicti is minimal. *Id*. at 36.

{¶ 145} Contrary to Risden's assertions, evidence was adduced at trial which demonstrated that Risden was under the influence of heroin when he was driving the

vehicle that struck Steven Smith on August 5, 2007. At trial, the State called Jenna Willaman to testify regarding a conversation she had with Risden a short time after the accident.[1] Willaman testified that on August 14, 2007, Risden specifically told her that he was under the influence of narcotics when he struck Smith. Moreover, Amanda testified that she and Risden drove to Trotwood, Ohio, on the morning of August 5, 2007, in order to purchase heroin. Amanda further testified that although she did not personally observe Risden ingest or inject any heroin prior to the accident, they stopped at a gas station after Risden purchased the heroin, and Risden got out the car and went into the bathroom for approximately five minutes. When he returned to the vehicle, Risden had not made any purchases at the gas station. The clear inference from Amanda's testimony was that Risden went into the gas station bathroom and injected himself with heroin. Shortly after the stop, Risden hit Smith as he was walking down Philadelphia Drive. From the record before us, evidence outside Risden's confession existed which clearly demonstrated that he was under the influence of heroin when the accident occurred.

{¶ 146} Risden also argues that no evidence was adduced which established that he acted recklessly when he struck Smith. Risden's assertion in this regard is undermined by the testimony of Edwards who testified that he drove past Smith who was walking on Philadelphia Drive just seconds before Smith was hit by Risden. Edwards testified that Smith was not walking in the road or obstructing traffic in any way. Moreover, Edwards testified that he did not have to swerve to avoid Smith

[1] Willaman was Risden's parole officer, but this fact was not disclosed to the jury at anytime during the trial.

when he drove past him. The inference to be drawn from Edwards' testimony was since Smith was not walking in the road, the individual driving the vehicle that struck him must have been driving recklessly when the accident occurred. Thus, circumstantial evidence existed which established that Risden was driving recklessly when he struck Smith.

{¶ 147} In order to establish the elements of tampering with evidence, in violation of R.C. § 2921.12(A)(1), the State had to prove that Risden altered, destroyed, concealed, or removed evidence knowing that an investigation was in progress or likely to be instituted. Risden argues that the State adduced no direct evidence at trial which established that he was the individual who concealed the vehicle or placed scissors in the vehicle's ignition in order to make it seem as if the vehicle had been stolen. Risden's argument, however, represents a misapplication of the doctrine of corpus delicti. The doctrine does not require that the State produce evidence that a particular defendant committed a crime prior to the admission of a defendant's confession to actually committing said crime. Rather, the doctrine of corpus delicti only requires that the State produce "some evidence outside of the confession that tends to prove some material element of the crime charged." It is undisputed that the black 1995 Mercury Grand Marquis was abandoned and concealed under a bridge abutment where it could not be observed from the road. The evidence also established that someone shoved a pair of scissors into the ignition of the vehicle in order to make it appear as if the car had been stolen. Thus, the State clearly established the corpus delicti of the offense of tampering with evidence.

{¶ 148} Risden's second assignment of error is overruled.

IV

{¶ 149} Because they are interrelated, Risden's third and fourth assignments of error will be discussed together as follows:

{¶ 150} "THE APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 151} "THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE APPELLANT'S CONVICTIONS."

{¶ 152} In his third assignment of error, Risden claims his convictions for the charged offenses were against the manifest weight of the evidence because the evidence adduced at trial demonstrated that Amanda, not Risden, was operating the vehicle when Smith was struck.

{¶ 153} "A challenge to the sufficiency of the evidence differs from a challenge to the manifest weight of the evidence." *State v. McKnight*, 107 Ohio St.3d 101,112, 2005-Ohio-6046. "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' (Internal citations omitted). A claim that a jury verdict is against the manifest weight of the evidence involves a different test. 'The 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" Id. (Internal citations omitted).

{¶ 154} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 155} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 156} After a thorough review of the record, it is clear that the jury did not lose its way when it found that Risden was the individual driving the black Mercury Grand Marquis when it struck Smith. Dep. Evers testified that during his investigation of the accident, he interviewed numerous individuals who witnessed the hit and run. Dep. Evers testified that all of the witnesses consistently stated that the

black vehicle which struck Smith was driven by a white male with a white female sitting in the front passenger seat of the vehicle.

{¶ 157} The State also presented the testimony of Michael Maroney and Bernadette Morris, who both encountered Risden and his sister Amanda walking near Morris' house a short time after the accident. Maroney testified that when he questioned Risden regarding the reason for Amanda's vehicle being parked behind Morris' house, Risden told Maroney that he was driving the vehicle when he struck a deer and then ran out of gas.

{¶ 158} Willaman also testified that when she spoke with Risden regarding the accident, he told her that he was driving the vehicle when he hit someone. Willaman further testified that Risden initially explained his reason for not stopping was because he did not have a driver's license. Willaman testified that Risden later told her he did not stop after hitting Smith because he was under the influence of heroin.

{¶ 159} Although portions of her testimony were arguably inconsistent, Amanda repeatedly and unequivocally testified that Risden was driving the vehicle when it struck Smith. Despite her reluctance to testify against her brother, her testimony never wavered in regards to the fact that Risden was driving the vehicle at all times before, during, and after the hit and run which ultimately resulted in the death of Smith.

{¶ 160} Lastly, during his interview with Dep. Evers, Risden confessed that he was driving the vehicle that struck Smith. Although he initially blamed the accident on inattention due to Amanda's medical issues, he eventually told Dep. Evers that he

struck Smith because he had nodded off at the wheel after shooting up with heroin. The record is clear that Risden always acknowledged that he was the driver of the vehicle. Thus, we find that the trial court had before it competent, credible evidence by which it could find that Risden was the driver of the vehicle that struck Smith, and the jury's verdict was not against the manifest weight of the evidence.

{¶ 161} Risden contends that the evidence adduced during trial was insufficient to support his convictions for aggravated vehicular homicide, vehicular assault, and failure to stop after an accident. Specifically, Risden argues that the evidence was insufficient to establish that his actions amounted to recklessness and that the evidence failed to demonstrate that he knowingly left the scene of an accident.

{¶ 162} In order to obtain a conviction for failure to stop after an accident, pursuant to R.C. § 4549.02(A), the State is required to prove that the defendant had knowledge of an accident which was due to his driving of a motor vehicle. R.C. § 2901.22(B) defines the culpable mental state of "knowingly" as follows:

{¶ 163} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 164} Thus, to find a defendant guilty of failure to stop after an accident, the State must prove that the defendant acted "knowingly."

{¶ 165} Upon review, the evidence presented by the State is more than sufficient to sustain a finding that Risden knew that he had hit Smith, a human being,

and not a deer. Amanda testified that immediately after the accident occurred, she believed that Risden had struck an individual walking down the street. Amanda testified that she retrieved her cell phone and attempted to call 911. Amanda further testified that Risden slapped the cell phone out of her hand and told her not to call. Risden then drove away from the scene of the accident and concealed the damaged vehicle behind Morris house. After he parked the vehicle, Risden found a rag and began wiping the vehicle down in the area where the impact with Smith's body occurred. The actions taken by Risden in the moments immediately after the accident occurred are sufficient to establish that Risden knew that he had hit a person, and not a deer. We also note that in his written statement to Dep. Evers, Risden admitted that when he was roused from his drug induced stupor after the impact with Smith, Amanda immediately informed him that he had "hit someone." Once Risden became aware that he struck someone, he had a duty to stop and wait for the police and emergency services. The evidence establishes, however, that Risden, with full knowledge that he had just struck a pedestrian, chose to drive away from the scene and conceal the evidence that he had committed a crime.

{¶ 166} Risden also argues that the evidence was insufficient to establish that he operated his vehicle recklessly when he struck Smith. When we review a verdict for sufficiency, we do not evaluate "whether the state's evidence is to be believed, but whether, if believed, the evidence against the defendant would support a conviction." *State v. Harr*, 158 Ohio App.3d 704, 718, 2004-Ohio- 5771, at ¶144. For purposes of the present case, the state was required to show that Risden, while operating a motor vehicle, recklessly caused serious physical harm to another

person. R.C. 2903.08(A)(2)(b). A person is reckless:

{¶ 167} "when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

{¶ 168} We have already disposed of this argument in our second assignment wherein we found that the testimony of Darrell Edwards demonstrated that Risden drove recklessly. Specifically, Edwards testified that he observed that Smith was walking on the side of Philadelphia Drive and not obstructing traffic when he was struck by Risden. The inference to be drawn from Edwards' testimony was since Smith was not walking in the road, Risden must have been driving recklessly when the accident occurred.

{¶ 169} Additionally, the evidence submitted at trial demonstrated that Risden had injected heroin, a dangerous intoxicant, immediately prior to hitting Smith. The evidence further established that Risden had "nodded out" from the effects of the drug when he struck Smith.

{¶ 170} The instant case is comparable to a relatively recent decision that we issued in which we found that a finding of recklessness may be supported by evidence that a defendant was driving under the influence of alcohol. *State v. Culver*, 160 Ohio App.3d 172, 2005-Ohio-1359, citing *State v. Ward*, Ross App. No. 03CA2703, 2003-Ohio-5847, at ¶9. This is because " '[a] licensed driver is charged with the knowledge that driving while under the influence is against the law, and

creates a substantial risk to himself and others.' " Id. The court in *Ward* further found that sufficient evidence supported a conviction for aggravated vehicular homicide where the defendant's intoxication caused "decreased motor control, decreased attention, loss of critical judgment including the ability to make decisions, and impairment of memory including the ability to interpret what he sees." Id. at ¶11. The same factors are present in this case and clearly support a finding that Risden acted recklessly when he struck Smith.

{¶ 171} Risden's third and fourth assignments of error are overruled.

V

{¶ 172} Risden's fifth and final assignment of error is as follows:

{¶ 173} "THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 174} In his final assignment, Risden argues that he received ineffective assistance when his trial counsel failed to object to the admission of Dep. Evers' testimony regarding prior inconsistent statements made to him by Amanda. Risden also claims that his counsel was deficient for failing to request that the court instruct the jury that Dep. Evers' testimony regarding Amanda's prior inconsistent statements could not be used as substantive evidence that Risden committed the crimes for which he was accused. Risden contends that the these errors by his trial counsel severely prejudiced him, and that but for his errors, he would have been acquitted. We disagree.

{¶ 175} "When considering an allegation of ineffective assistance of counsel, a

two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Bradley* (1989), 42 Ohio St.3d 136, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135.

{¶ 176} The above standard contains essentially the same requirements as the standard set forth by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, supra, at 687-688. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. Thus, counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *Id*.

{¶ 177} For a defendant to demonstrate that he has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, absent counsel's errors, the result of the trial would have been different. *Bradley*, supra, at 143. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, supra, at 694.

{¶ 178} Moreover, an appellant is not deprived of effective assistance of counsel when counsel chooses, for strategic reasons, not to pursue every possible trial tactic. *State v. Brown* (1988), 38 Ohio St.3d 305, 319. The test for a claim of ineffective assistance of counsel is not whether counsel pursued every possible defense; the test is whether the defense chosen was objectively reasonable. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052. A reviewing court may not second-guess decisions of counsel which can be considered matters of trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98. Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in hindsight, it looks as if a better strategy had been available. *State v. Cook* (1992), 65 Ohio St.3d 516, 524.

{¶ 179} Risden contends that his counsel's failure to object to Dep. Evers' testimony regarding Amanda's prior inconsistent statements resulted in ineffective assistance. As we have consistently held in the past, however, failure to object is within the realm of trial tactics and therefore, does not definitively establish deficient performance by counsel. *State v. Gray*, Montgomery County App. No. 20980, 2007-Ohio-4549. The record fails to disclose any articulated reason for defense counsel's failure to object to the admission of Dep. Evers' testimony regarding Amanda's prior inconsistent statements or his failure to request a limiting instruction from the court with respect to the same. Thus, we will presume that counsel was motivated by trial strategy and did not render ineffective assistance of counsel. Additionally, in light of the overwhelming evidence of Risden's guilt, it is highly unlikely that absent defense counsel's alleged errors and omissions the result of the

trial would have been any different.

{¶ 180} Risden's final assignment of error is overruled.

VI

{¶ 181} All of Risden's assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

GRADY, J., concurs.

FAIN, J., concurring in the judgment:

{¶ 182} I write separately for two purposes.

I

{¶ 183} My first purpose is to express my views concerning Risden's First Assignment of Error.

{¶ 184} With respect to the witness Darrell Edwards, the issue is whether his prior inconsistent statement was used, not just to impeach his trial testimony (in the form of a perpetuation deposition), but to prove the truth of the matters asserted in that prior inconsistent statement, which is beyond the purpose of impeachment for which introduction of a prior inconsistent statement is authorized by Evid. R. 607. Whether leading questions are used is, in my view, immaterial; the issue is what was sought to be accomplished by introduction of the prior inconsistent statement.

{¶ 185} With respect to Edwards, I find the issue close. Because the State offered all of Edwards's testimony, in the form of the perpetuation deposition, it was not surprised, and there was nothing for it to impeach. By offering the testimony, none of which was a surprise to the State when it was offered, the State vouched for the credibility of its witness. The only apparent purpose for each of the questions relating to what Edwards had previously told the prosecutor was to prove the truth of those prior statements, which is not a proper purpose for the admission of prior, inconsistent, out-of-court statements.

{¶ 186} But it is possible that the two most significant answers Edwards gave during the deposition were statements of material facts, not just statements informing the listener what Edwards had previously told the prosecutor. These are the answers bolded in the excerpted portion of Edwards's testimony quoted in Judge Brogan's opinion for the court:

{¶ 187} "Q: Okay. And did you also tell me at that time that that person was not walking in the roadway?

{¶ 188} "A. No. He wasn't walking in the road.

{¶ 189} " * * * *

{¶ 190} "Q: Because he was not in the roadway, is that correct?

{¶ 191} "A: Yes."

{¶ 192} It is possible that the first response quoted above is not just Edwards testifying that he previously told the prosecutor that the victim was not

walking in the roadway, but is Edwards presently testifying that the victim was, in fact, not walking in the roadway. It is even more likely, although not certain, that Edwards interpreted the second question quoted above as asking not just what Edwards had previously told the prosecutor, but as asking whether, in fact, the victim was in the roadway.

{¶ 193} The trial court, which was present at the perpetuation deposition, could have found these two of Edwards's answers to be direct testimony, rather than references to his prior statement to the prosecutor. They constituted evidence of the most significant proposition of fact to come out of Edwards's testimony – that the victim was not in the roadway when he was hit. That Risden hit the victim is virtually undisputed. Risden confessed to that, and his sister Amanda, in testimony untainted by any references to her prior inconsistent statements concerning Risden's having taken, or not having taken, drugs, testified that Risden struck the victim with the car.

{¶ 194} I conclude, therefore, that the improper admission of testimony concerning Edwards's out-of-court statements was harmless, because that testimony concerned facts that were not seriously in dispute; whereas Edwards's testimony that the victim was not in the roadway, which was material to the element of recklessness, could have been found by the trial court to have been direct testimony concerning that fact, rather than testimony concerning Edwards's prior, out-of-court statement.

{¶ 195} As for Amanda, she had already testified directly concerning the fact that Risden had purchased drugs with the intention of taking them, before any reference to her prior, out-of-court statements. This rendered superfluous the State's improper reference to her prior, out-of-court statements to that effect. Again, the error in the admission of Amanda's prior, out-of-court statements for purposes other than impeachment was harmless.

{¶ 196} Because I find that the admission of the prior, inconsistent statements by these witnesses for purposes other than impeachment was harmless, I join in overruling Risden's First Assignment of Error.

{¶ 197} In all other respects, I concur in the reasoning set forth in Judge Brogan's opinion for the court.

II

{¶ 198} My second purpose in writing separately is to continue my war against one of the most unfortunate formulations – if not the most unfortunate formulation – to appear in Ohio appellate jurisprudence:

{¶ 199} "The term 'abuse of discretion' connotes more than an error of law or of judgment."

{¶ 200} I have traced this offensive formulation as far back as *Steiner v. Custer* (1940), 137 Ohio St. 448, 450, which, in turn, cites Black's Law Dictionary (2 Ed.), 11 as authority. The definition of "abuse of discretion" in Black's Law Dictionary, Eighth Edition (2004), at 11, offers no support for the offensive formulation:

{¶ 201} "1. An adjudicator's failure to exercise sound, reasonable, and legal

decision-making. 2. An appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence."

{¶ 202} Interestingly, the definition of "abuse of discretion" in Black's Law Dictionary, Fourth Edition (1968), which was the edition of Black's Law Dictionary extant when this author was in law school, not only does not support the offensive formulation, it contradicts it:

{¶ 203} " 'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion. * * * * . *It is a strict legal term indicating that appellate court is simply of opinion that there was a commission of an error of law in the circumstances*. * * * * . And it does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge but means the clearly erroneous conclusion and judgment – one is that [sic] clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; an improvident exercise of discretion; *an error of law*. * * * * .

{¶ 204} "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. * * * * . Unreasonable departure from considered precedents and settled judicial custom, *constituting error of law*. * * * * . The term is commonly employed to justify an interference by a higher court with the exercise of discretionary power by a lower court and is said by some authorities to imply not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. The exercise of an honest judgment, however erroneous it may

appear to be, is not an abuse of discretion. * * * * . Where a court does not exercise a discretion in the sense of being discreet, circumspect, prudent, and exercising cautious judgment, it is an abuse of discretion. * * * * . Difference in judicial opinion is not synonymous with 'abuse of discretion' as respects setting aside verdict as against evidence. * * * * ." (Citations omitted; emphasis added.)

{¶ 205} I can only speculate that the origins of the offending formulation lay in an attempt to make the following point too succinctly:

{¶ 206} When a pure issue of law is involved in appellate review, the mere fact that the reviewing court would decide the issue differently is enough to find error.[2] By contrast, where the issue on review has been confided to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.

{¶ 207} I know, all too well, that the offending formulation can be found in a plethora of appellate opinions, including decisions of the Ohio Supreme Court. But I am not aware of any Ohio appellate decisions, and I hope I never become aware of any, in which it is declared, as part of the *holding,* that a trial court may, in the exercise of its discretion, commit an error of law.

{¶ 208} I will save the enterprising researcher the trouble of combing through opinions in which I appear as the author by freely admitting that, on numerous occasions, I have been too lazy to delete a quotation or paraphrase of the offending formulation from a staff attorney's draft. I am confident, however, that in none of the

[2]Of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review.

opinions I have authored is it part of the *holding* that a trial court may, in the exercise of its discretion, commit an error of law.

{¶ 209} So let me close by boldly declaring that no court – not a trial court, not an appellate court, nor even a supreme court – has the authority, within its discretion, to commit an error of law.[3]

. . . . . .

Copies mailed to:

Mathias H. Heck, Jr.
Kelly D. Madzey
William O. Cass, Jr.
Hon. Barbara P. Gorman

[3]This does not, of course, obviate the existence of frequent and lively disagreements between courts and individual judges as to what the law is.