[Cite as *State v. Newman*, 2015-Ohio-4283.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA3658
vs.	:	
MICHAEL NEWMAN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Brian Scott Hicks, Lebanon, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecutor, Portsmouth, Ohio, for Appellee.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 10-5-15
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. A jury found Michael R. Newman, defendant below and appellant herein, guilty of (1) aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), and (2) aggravated vehicular assault in violation of R.C. 2911.12(A)(2).

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE COURT ABUSED ITS DISCRETION IN ITS EXPERT WITNESS RULING."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION IN ITS RESTITUTION ORDER."

THIRD ASSIGNMENT OF ERROR:

"THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 3} On November 3, 2012, appellant was involved in a motor vehicle collision that tragically ended his brother's life and seriously injured an innocent third person, Pam Johnson, who had been driving a large sport utility vehicle with a trailer attached. Roy Glenn, an independent witness, happened upon the scene of the crash within ten to fifteen seconds after it occurred and observed appellant sitting in the driver's seat of the silver Kia, yelling for his brother. Glenn later found appellant's brother laying in a ditch. A subsequent investigation revealed that appellant's blood alcohol level exceeded the legal limit.

{¶ 4} On February 28, 2013, a Scioto County grand jury returned an indictment that charged appellant with aggravated vehicular homicide and aggravated vehicular assault. Appellant entered not guilty pleas.

{¶ 5} On August 18, 19, and 20, 2014, the trial court held a jury trial. At trial, the parties presented the following testimony and evidence. Ohio State Highway Patrol Trooper Steven Keating responded to the accident scene and discovered appellant's brother face down in a ditch between Johnson's trailer and the back of her SUV. Trooper Keating briefly spoke with appellant before appellant was transported to the hospital, and appellant stated that he had not been driving the vehicle.

{¶ 6} Trooper Keating examined the crash site and discovered several empty cans inside the Kia, along with a cooler, ice, unopened beer cans, and two broken bottles of alcoholic beverages. The trooper photographed the Kia's damage and noted that the driver's side of the vehicle was "pretty much intact." The driver's side door was "jammed," but neither the driver's side window nor side view mirror was broken. Trooper Keating further observed that the front windshield was shattered, but intact. The right side of the vehicle (the passenger's side) sustained most of the damage: the window broken and the door "bowed." The trooper concluded that the deceased had been ejected from the passenger side of the vehicle.

{¶ 7} EMT Richard Kennison transported appellant to the hospital. Appellant initially told Kennison that appellant was a passenger in the Kia, but, later at the hospital, appellant stated that he had been driving the Kia. Appellant explained to Kennison that appellant told differing accounts because he did not "want to go to jail."

{¶ 8} Later, Ohio State Highway Patrol Lieutenant Carla Taulbee spoke with appellant at the hospital and appellant informed her that appellant was not driving the vehicle at the time of the accident.

{¶ 9} Montgomery County Coroner forensic pathologist Russell Uptegrove performed an autopsy on appellant's brother and discovered "extensive dicing injuries" on the right side of the deceased's face, chest, and abdomen. Uptegrove explained that "dicing" injuries are small cuts and tears of the skin associated with glass, and that these dicing injuries are frequently seen in motor vehicle accidents involving broken glass. Uptegrove stated that the deceased also sustained (1) blunt force injury of the chest and abdomen, (2) fractures of the right ribs 5 through 8 and left ribs 7 and 8, (3) fractures of the right femur, left humerus, pelvis, right ulna and radius,

(4) lacerations of the liver, spleen, right kidney, and bladder, and (5) skin tearing in the right groin region and the right leg. Uptegrove noted that the deceased's left side of the body displayed a "relative lack of injury * * * compared to the right side of his body."

{¶ 10} The state next sought to introduce expert testimony from Ohio State Highway Patrol Trooper Larry Gaskill. Trooper Gaskill testified that in 2009, he received accident reconstruction training and that he has worked in accident reconstruction on a full-time basis since 2010. Gaskill explained that he has taken the following courses, each of which was approximately forty hours: Crush Energy Analysis; Update with the Total Station; Optics, Lighting and Visibility; Advanced Collision Re-construction with CDR Application; Event Data Recorder Use in Traffic Crash Re-construction; Commercial Break and Tires; Pedestrian Crash; Occupant Kinematics; Advanced Motorcycle; and Motorcycle. The trooper further stated that he took a twenty-four hour course on Forensic Mapping, an eighty-hour[1] course entitled, Crash Re-construction, and an eighty-hour course on technical crash investigation. Trooper Gaskill did not provide an exact number of accident reconstruction cases in which he has been involved, but stated that when he first began he worked on approximately thirty accident reconstruction cases, and in subsequent years the number kept increasing. Trooper Gaskill stated that during the year before trial, he was involved in approximately seventy accident reconstruction cases.

{¶ 11} Appellant cross-examined Trooper Gaskill regarding his expert qualifications. The trooper stated that he took a forty-hour course regarding occupant kinematics and that other

[1] The transcript states that the trooper testified that the Crash Re-construction course was "eight" hours. The later context suggests, however, that this is a typo. The trooper states a later response that his first course was "eighty hour[s] also," thus indicating that he had taken another course.

courses also discussed occupant kinematics in relation to the subject matter of the course. The trooper admitted that he is not accredited through the Accreditation Commission for Traffic Accident Reconstruction. Appellant thereupon objected to Trooper Gaskill "testifying as an expert," but the trial court overruled appellant's objection.

{¶ 12} Trooper Gaskill testified that he reviewed the materials and information gathered from the accident scene in order to report his findings and conclusions. Trooper Gaskill opined that the Kia struck Johnson's SUV in the left front, then rotated counterclockwise and caused the right front quarter of the Kia to strike the left front undercarriage and "A pillar" of the SUV. The inside of the Kia's right front door bowed outward from occupant contact, and the outside of the right front door displays a crease that resulted when the door made contact with the SUV's left-side running board. The damage to the outside of the right front door indicates that the door was in a partially open position as the Kia rotated away from the SUV. After the initial contact, the Kia continued to rotate counterclockwise and made a secondary contact with the rear, striking the left front corner of the trailer attached to the SUV.

{¶ 13} The trooper's written report explained the Kia's occupants' movements during the crash as follows:

> "The occupants of the Kia are going to move in a general direction parallel and opposite to the forces acting upon the vehicle.
>
> The unrestrained occupants will continue on their path and direction as established prior to the Kia striking the [SUV] until they are acted upon by outside forces (contact with vehicle components) causing a change in direction or arrest of their movement. The initial frontal contact would cause a forward movement of the occupants and deployment of the airbags. As the vehicle is rotated counter-clockwise and engages the undercarriage and A pillar of the [SUV] it is rotated out from under the occupants. The driver's movement is arrested by the center console and arm rest. The passenger is forced against the right door causing the outward bowing which together with the front of the vehicle being

> forced to the left contributes to the door disengaging the latch and opening * * * . The right front passenger's head and face would also have significant contact with the window causing it to break (dicing injuries noted on coroner's report). As the passenger is ejected from the Kia there is evidence * * * that contact is made with the left rear quarter of the [SUV]. After striking the side of the [SUV] the passenger is struck by the left hitch frame rail of the trailer being towed by the [SUV]. This contact with the trailer hitch is likely the cause of the significant flank injury noted on the coroner report * * *; the passenger is then dragged to final rest by the trailer."

{¶ 14} Trooper Gaskill also noted in his report that the Kia did not sustain the type of damage he would have expected to see if the deceased, who weighed approximately 350 pounds, had been driving the car when the accident occurred and then ejected through the passenger's side of the vehicle. The trooper explained that he did not observe

> "any significant damage or scuffing [inside the Kia] that would be expected if a subject the size of the deceased had moved from the driver position. There is no scuffing of the center console arm rest and no apparent significant displacement of the actual center console or emergency brake lever * * * . The bowing of the right door appears to begin at a lower level than would be expected if the subject striking had been moved from a driver position and was being transitioned over the seated passenger and at least partially inflated airbag."

The trooper ultimately concluded that the totality of the circumstances surrounding the accident indicated that appellant had been driving the Kia at the time of the accident.

{¶ 15} Trooper Gaskill later supplemented his report after appellant submitted photographs showing injuries to appellant's body. The trooper evaluated the photographs to ascertain whether they supported appellant's claim that he was "a restrained passenger" in the vehicle at the time of the crash. Trooper Gaskill concluded that the photographs did "not show the extensive chest, lower abdomen and shoulder bruising and abrasions from the seatbelt that would be expected from a crash of this severity." The trooper stated that the "driver's movement in relation to the car will generally be forward and right during the initial contact and

vehicle movement. This movement will result in the driver's hips and lower abdomen to have opportunity to interact with the lower rim of the steering wheel." The trooper concluded that appellant's left anterior hip injury likely resulted from contact with the lower rim of the steering wheel.

{¶ 16} After Trooper Gaskill's testimony, the state rested.

{¶ 17} Appellant's primary defense is that he had not been driving the Kia at the time of the accident. The deceased's wife, Jennifer Newman, testified that the deceased owned the Kia and that he "never" let anyone drive his vehicle. She admitted, however, that she did not actually know who had been driving the Kia at the time of the accident.

{¶ 18} Appellant testified that on November 3, 2012, he and his brother were drinking at a bar and when they left the bar in the Kia, appellant was in the passenger's seat with his seat belt fastened. Appellant explained that he does not recall the moments immediately before and after the accident.

{¶ 19} After the trial court submitted the case to the jury, the court received a question from the jury that stated, "a jury member has asked for a transcript of Mr. Glenn's testimony, is that possible. [sic]" Neither appellant nor the state objected to the court allowing the jury to review Glenn's testimony. Later, the court asked the jury if it wished to continue to deliberate into the evening hours, or return in the morning. The jurors informed the court that they had "reached an impasse and will not be able to bring about verdicts on either count[]." The court then provided the jury with further instructions to see if a possibility existed to reach a verdict. The jury agreed to deliberate further the next day and also requested that it be allowed to review Trooper Gaskill's testimony.

{¶ 20} On August 21, 2014, the jury found appellant guilty as charged in the indictment. At the sentencing hearing, the court noted that it had received a "list of restitution." The prosecutor indicated that he gave appellant and the court a list to document the restitution figure–$92,261.50. Johnson testified in support of restitution and explained the economic losses she suffered as a result of the accident: (1) $4,000 for the SUV; (2) $5,200 for "stair lifts;" (3) $300 for orthopedic shoes; (4) $3,500 for a bone stimulator; (5) $300 for physical therapy; (6) $800 for a brace and shoes; (7) $30,000 for lost wages; (8) $23,259.50 for care-giver wages; (9) $1,300 for an electric scooter; (10) $1,000 for a carrier trailer for the electric scooter; (11) $52 for a cane; (12) $5,000 for a sixteen-foot box trailer; (13) $2,550 for merchandise destroyed during the accident; and (14) $15,000 for medical expenses.

{¶ 21} On cross-examination, Johnson stated that her $30,000 in lost wages is not based upon reduced sales at her store, but instead represented the salary the store would have paid her if she had been able to work at the store the year following the accident. Johnson explained that her husband is the president of the company that owns the store. Appellant's counsel then asked Johnson: "And so rather than your husband paying you, he just kept the money to himself? Do you understand you correctly on that? [sic]" Johnson answered, "Yeah, yeah."

{¶ 22} On September 9, 2014, the trial court (1) sentenced appellant to serve forty-eight months in prison for the aggravated vehicular assault conviction; (2) ordered appellant to pay $92,261.50 in restitution; (3)sentenced appellant to serve four years in prison for the aggravated vehicular homicide conviction; and (4) ordered appellant to serve the sentences concurrently to one another. This appeal followed.

I

{¶ 23} In his first assignment of error, appellant asserts that the trial court abused its discretion by permitting Trooper Gaskill to testify as an expert witness in occupant kinematics. Appellant contends that Trooper Gaskill lacked sufficient knowledge, skill, experience, training, or education to qualify as an expert in occupant kinematics.

A

EVID.R. 103(A)(1)

{¶ 24} Initially, we question whether appellant properly preserved this specific issue for appellate review. Evid.R. 103(A)(1) states:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.] * * *

{¶ 25} In the case at bar, appellant did not specify the reason he objected to Trooper Gaskill testifying as an expert. Appellant's counsel simply stated: "[W]e object to him testifying as an expert." Nowhere did appellant specifically state that he objected to the trooper testifying as an expert in occupant kinematics. Nevertheless, we believe that the context of appellant's objection could be arguably construed to reveal that appellant challenged the trooper's status as an expert in occupant kinematics. Appellant's cross-examination of the trooper during the qualification inquiry focused upon the trooper's training and experience in occupant kinematics. Thus, even though appellant did not explicitly state a specific ground for objecting to the trooper

testifying as an expert, the specific ground is apparent from the context. Thus, appellant properly preserved this issue for appeal.[2]

B

STANDARD OF REVIEW

{¶ 26} The "admissibility of expert testimony is a matter generally within the discretion of the trial judge and will not be disturbed absent an abuse of discretion." Miller v. Bike Athletic Co., 80 Ohio St.3d 607, 616, 687 N.E.2d 735 (1998); accord State v. Hartman, 93 Ohio St.3d 274, 285, 754 N.E.2d 1150 (2001). A trial court abuses its discretion if its decision is unreasonable, arbitrary, or unconscionable. E.g., State v. Keenan, – Ohio St.3d —, 2015-Ohio-2484, – N.E.3d –, ¶7. Generally, an abuse of discretion includes a situation in which a trial court did not engage in a "'sound reasoning process.'" State v. Morris, 132 Ohio St.3d 337, 2012–Ohio–2407, 972 N.E.2d 528, ¶14, quoting AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). We further observe that "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." State v. Darmond, 135 Ohio St.3d 343, 2013–Ohio–966, 986 N.E.2d 971, ¶34.

C

EXPERT WITNESS TESTIMONY

{¶ 27} Evid.R. 104(A) requires trial courts to determine whether an individual qualifies as an expert witness. State v. Hartman, 93 Ohio St.3d 274, 285, 754 N.E.2d 1150 (2001). The

[2] We observe, however, that appellant did not object when the trooper testified that appellant was driving the car at the time of the accident.

rule states: "Preliminary questions concerning the qualification of a person to be a witness * * * shall be determined by the court." Courts should favor the admissibility of expert testimony when the expert testimony is relevant and meets the Evid.R. 702 criteria. See State v. Williams, 4 Ohio St.3d 53, 57, 446 N.E.2d 444 (1983), quoting State v. Williams, 388 A.2d 500, 503 (Me. 1978) (explaining that the "'fundamental philosophy'" expressed in the Rules of Evidence generally favors the admissibility of expert testimony when helpful and relevant).

{¶ 28} Evid.R. 702[3] permits a trial court to qualify a witness as an expert when the following three criteria are satisfied: (1) the witness's testimony "either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;" (2) the witness is "qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;" and (3) the witness's testimony is "based on reliable scientific, technical, or other specialized information."

---

[3] The rule provides:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * * * *

{¶ 29} In the case sub judice, appellant's assignment of error focuses upon the second criterion listed above. Appellant asserts that Trooper Gaskill does not qualify as an occupant kinematics expert because he lacks sufficient knowledge, skill, experience, training, or education regarding that subject matter.

{¶ 30} "Under Evid.R. 702(B), an expert may be qualified by specialized knowledge, skill, experience, training, or education to give an opinion that will assist the jury to understand the evidence and determine a fact at issue." Hartman, 93 Ohio St.3d at 287. The proffered expert need only demonstrate "some knowledge on the particular subject superior to that possessed by an ordinary juror." Scott v. Yates, 71 Ohio St.3d 219, 221, 643 N.E.2d 105 (1994), citing State Auto Mut. Ins. Co. v. Chrysler Corp., 36 Ohio St.2d 151, 160, 304 N.E.2d 891, 897 (1973). Thus, "[a] witness does not need either complete knowledge of a field or special education or certification to qualify as an expert." State v. Thompson, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶120, citing State v. Baston, 85 Ohio St.3d 418, 423, 709 N.E.2d 128 (1999); Hartman, 93 Ohio St.3d at 285; State v. Williams, 4th Dist. Ross No. 03CA2736, 2004-Ohio-1130, ¶12, citing State v. Mack, 73 Ohio St.3d 502, 511, 653 N.E.2d 329 (1995). Instead, "[p]rofessional training and experience in a particular field may be sufficient to qualify one as an expert." Mack, 73 Ohio St.3d at 511, citing State v. Beuke, 38 Ohio St.3d 29, 43, 526 N.E.2d 274 (1988). "Moreover, '"[i]t is a general rule that the expert witness is not required to be the best witness on the subject. * * * The test is whether a particular witness offered as an expert will aid the trier of fact in the search for the truth."'" Hartman, 93 Ohio St.3d at 287, quoting State v. Tomlin, 63 Ohio St.3d 724, 728, 590 N.E.2d 1253, 1257 (1992), quoting Alexander v. Mt. Carmel Med. Ctr., 56 Ohio St.2d 155, 159, 383 N.E.2d 564 (1978).

{¶ 31} In the case at bar, we do not believe that the trial court abused its discretion by determining that Trooper Gaskill demonstrated some knowledge regarding occupant kinematics superior to the knowledge that the average juror possesses. Trooper Gaskill explained that he has worked for the Ohio State Highway Patrol for eighteen years and received accident reconstruction training in 2009. Since 2009, he has worked exclusively in accident reconstruction and has experience reconstructing numerous accidents. The trooper also stated that he received initial accident reconstruction training, then subsequently attended numerous accident reconstruction-related seminars, including a forty-hour seminar dedicated to occupant kinematics. The trooper stated that some of the other seminars also discussed occupant kinematics and explained that occupant kinematics is part of accident reconstruction. On cross-examination, the trooper stated that when looking at accident reconstruction, "how * * * people move" is part of the crash. We believe that the foregoing facts show that the trooper possessed some knowledge regarding occupant kinematics that is superior to an average juror's knowledge regarding occupant kinematics.

{¶ 32} Moreover, even if the trooper does not have extensive knowledge, skill, experience, training, or education regarding occupant kinematics, "extensive" is not the Evid.R. 702(B) standard. Instead, the rule requires the proffered expert witness to possess "specialized" knowledge, skill, experience, training, or education. In the case at bar, the facts amply demonstrate that Trooper Gaskill possesses specialized knowledge, skill, experience, training, or education in occupant kinematics. Consequently, we do not believe that the trial court abused its discretion by permitting Trooper Gaskill to testify as an expert. Cf. State v. Rutter, 4th Dist. Hocking No. 02CA17, 2003-Ohio-373, ¶54 (concluding that trial court did not abuse its

discretion by permitting trooper to opine that the defendant was driving vehicle at the time of accident when trooper had taken courses in automobile crashes, had investigated thousands of automobile crashes, and had received training in recognizing air bag injuries and in determining whether the person receiving the air bag injury was sitting in the driver's or passenger's seat); Reed v. Jordan, 4th Dist. Scioto No. 94CA2229 (July 31, 1995) (determining trial court did not abuse its discretion by permitting trooper to testify as an accident reconstruction expert when trooper had training in accident investigation, had investigated several hundred accidents prior to the accident in question, and did not rely upon scientific methodology to reach his conclusions, but instead relied upon his own observations and collection of data to reach his opinion). Contra Scott v. Yates, 71 Ohio St.3d 219, 221, 643 N.E.2d 105 (1994) (concluding that officer was not qualified to render an opinion regarding the cause of an automobile accident when officer had only two weeks accident investigation training, was unfamiliar "with the theory of conservation of momentum and did not know how it might affect the post-impact course of motor vehicles involved in a crash," did not "know the formula for calculating the speed of motor vehicles, either before or after impact, or what effect speed would have upon the post-impact course of vehicles," and admitted that he was not an accident reconstructionist, that he never had the opportunity to work with an accident reconstructionist, and that he had never reconstructed an accident).

{¶ 33} Appellant nevertheless asserts that our decision in State v. Coyle, 4th Dist. Ross No. 99CA2480 (Mar. 15, 2000), demonstrates that the trial court abused its discretion by qualifying Trooper Gaskill as an occupant kinematics expert. Appellant contends that because

Trooper Gaskill does not possess the same qualifications as the witness in Coyle, he is not sufficiently qualified to render an expert opinion regarding occupant kinematics.

{¶ 34} In Coyle, law enforcement officers arrived on the scene of a fatal crash minutes after it occurred and found the defendant in the driver's side area with his head against the dash and steering wheel. Two other occupants were located in the vehicle: one in the rear passenger compartment, and the other in the front passenger area. At trial, the trooper opined that the defendant was driving the car at the time of the fatal crash. The defendant asserted that the trooper was not qualified to offer an opinion regarding who was driving the vehicle. The defendant asserted that the trooper lacked sufficient knowledge, skill, experience, training, or education regarding occupant kinematics. The defendant asserted that the trooper's formal training in occupant kinematics consisted of only four to six hours of classroom instruction and two seminar projects. Additionally, the trooper admitted that he had never testified as an accident reconstructionist when the driver's identity was at issue. We determined that the trial court did not abuse its discretion by permitting the trooper to testify as an expert in occupant kinematics. We observed that the trooper had been involved in fifty to one hundred cases as either an investigator or reconstructionist where driver identity was at issue. We thus found that he had practical experience in the field of occupant kinematics. We further noted that the trooper had studied recognized authorities on occupant kinematics, including a number of research articles and two accident reconstruction manuals.

{¶ 35} We do not agree with appellant that Coyle shows that the trial court in the case sub judice abused its discretion by permitting the trooper to testify as an expert in occupant kinematics. The trooper in Coyle had only one four to six hour course in occupant kinematics

and two "seminar projects."[4] In the case at bar, Trooper Gaskill attended a forty-hour course devoted solely to occupant kinematics. Furthermore, he stated that several other accident reconstruction seminars he attended discussed occupant kinematics. Additionally, Trooper Gaskill explained that he had eighteen years of experience with the highway patrol, with the last two to three years specifically devoted to accident reconstruction. Although Trooper Gaskill may not have testified that he investigated thousands of cases like the trooper in Coyle, we do not believe that the number of accidents investigated is determinative of a witness's qualification as an expert. Instead, in determining a witness's qualifications, courts must focus on the totality of the witness's specialized knowledge, skill, experience, training, or education, and not on any one factor in isolation. State v. Crawford, 1st Dist. Hamilton No. C-070816, 2008-Ohio-5764, ¶61.

{¶ 36} In the case sub judice, after we look at the totality of the trooper's specialized knowledge, skill, experience, training, and education, we cannot state that the trial court abused its discretion by qualifying him as an occupant kinematics expert.

{¶ 2} Additionally, we do not believe that Coyle defines the minimum standard for a witness to qualify as an expert in occupant kinematics. See Mack, 73 Ohio St.3d at 511 ("Qualifications which may satisfy the requirements of Evid.R. 702 are multitudinous."). Rather, Coyle recognized that the trooper's qualifications in that case showed that the trial court did not abuse its discretion by permitting the trooper to testify as an expert.

{¶ 1} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

---

[4] The Coyle decision does not reveal the nature of these "seminar projects," and we reject appellant's suggestion that the two "seminar projects" consisted of eighty hours of course work in occupant kinematics.

II

{¶ 2} In his second assignment of error, appellant asserts that the trial court abused its discretion by ordering him to pay restitution. In particular, appellant asserts that the court failed to consider appellant's present or future ability to pay. Appellant further contends that the trial court awarded damages that the victim did not sustain.

A

PLAIN ERROR

{¶ 3} Initially, we observe that although appellant generally objected to the trial court's restitution order, he did not specify a particular basis for his objection. Appellant did not inform the court that he objected to the court imposing restitution because the court failed to inquire whether he had a present or future ability to pay, or because the court awarded damages that the victim did not sustain. Because appellant did not raise these specific arguments at a time when the trial court could have corrected any error, he has forfeited the right to raise these arguments on appeal. State v. Mendez, 7th Dist. Mahoning No. 13MA86, 2014-Ohio-2601, ¶11, quoting State v. Potts, 7th Dist. Harrison No. 07HA4, 2008–Ohio–643, ¶7 ("[A]n offender who does not raise his ability to pay a financial sanction at the time the sanction is imposed waives any argument concerning his ability to pay on direct appeal."). We may, however, review appellant's third assignment of error for plain error. See State v. Leslie, 4th Dist. Hocking Nos. 10CA17 and 10CA18, 2011–Ohio–2727, ¶27 (applying plain error doctrine when defendant failed to object to trial court's restitution order).

{¶ 4} Plain error exists when the error is plain or obvious and when the error "affect[s] substantial rights." Crim.R. 52(B). The error affects substantial rights when but for the error,

the outcome of the proceeding would have been different. State v. White, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶57. Courts ordinarily should take notice of plain error "with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." State v. Gardner, 118 Ohio St.3d 420, 2008–Ohio–2787, 889 N.E.2d 995, ¶78. In the case sub judice, we do not believe that plain error exists.

B

STANDARD OF REVIEW

{¶ 5} A trial court possesses discretion to order a felony offender to pay restitution to the victim of the offense. State v. Lalain, 136 Ohio St.3d 248, 2013–Ohio–3093, 994 N.E.2d 423, ¶24. Thus, a reviewing court ordinarily will not reverse a trial court's restitution order unless the court abused its discretion. State v. Stump, 4th Dist. Athens No. 13CA10, 2014-Ohio-1487, ¶11; State v. Dennis, 4th Dist. Highland No. 13CA6. 2013–Ohio–5633, ¶7.

C

R.C. 2929.18(A)(1)

{¶ 6} R.C. 2929.18(A)(1) allows a sentencing court to order a felony offender to pay restitution to the victim of the offender's crime in an amount based on the victim's economic loss. The statute permits the court to base the restitution order "on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information." Id. The court may not, however, order restitution in an amount exceeding "the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense." Id. A trial court does, in fact, abuse its discretion if it orders restitution in an amount greater than the economic

loss that the victim suffered as a direct and proximate result of the offender's commission of the offense. Lalain at syllabus. Accord State v. Rizer, 4th Dist. Meigs No. 10CA3, 2011–Ohio–5702, ¶53; quoting State v. Johnson, 4th Dist. Washington No. 03CA11, 2004-Ohio–2236, ¶11 (explaining that trial court abuses its discretion "'when it orders restitution in an amount that has not been determined to bear a reasonable relationship to the actual loss suffered as a result of the defendant's offense'"). Furthermore, "[t]he amount of the restitution must be supported by competent, credible evidence from which the court can discern the amount of the restitution to a reasonable degree of certainty." State v. Gears, 135 Ohio App.3d 297, 300, 733 N.E.2d 683 (6th Dist. 1999); accord Johnson at ¶10. "A trial court commits plain error in awarding restitution that is not supported by competent, credible evidence." State v. Norton, 8th Dist. Cuyahoga No. 102017, 2015-Ohio-2516, ¶44.

{¶ 7} R.C. 2929.19(B)(5) also requires a court that is imposing restitution to consider the offender's present and future ability to pay the amount of restitution. State v. Martin, 140 Ohio App.3d 326, 338, 747 N.E.2d 318 (4th Dist. 2000). The statute does not, however, specify any particular factors that the court must consider or findings that the court must make when considering the offender's present and future ability to pay. Id. A trial court abuses its discretion when the record fails to show that the court conducted "'even a cursory inquiry into the offender's present and future'" ability to pay the amount imposed. State v. Rickett, 4th Dist. Adams No. 07CA846, 2008-Ohio-1637, ¶4, quoting State v. Bemmes, 1st Dist. Hamilton No. C-010522, 2002-Ohio-1905, ¶9; State v. Dennis, 4th Dist. Highland No. 13CA6, 2013-Ohio-5633, ¶14. We note, however, that a trial court need not expressly state on the record that it considered an offender's ability to pay. Rickett at ¶6 (citations omitted). Thus,

the absence of an explicit statement does not necessarily require a reversal of a court's restitution order. Instead, when a trial court fails to make an explicit finding regarding an offender's ability to pay, a reviewing court may consider the entire record to ascertain whether this finding may be inferred. Rickett at ¶6; accord State v. Brewer, 2014-Ohio-1903, 11 N.E.3d 317, 326, ¶45 (4th Dist.); State v. Bulstrom, 2013-Ohio-3582, 997 N.E.2d 162, ¶15 (4th Dist.).

{¶ 8} In the case at bar, we do not believe that the trial court's restitution order constitutes an abuse of discretion. As we explain below, we believe that the record contains competent, credible evidence to support the restitution order and a finding that the victim's economic losses directly resulted from appellant's criminal conduct. Moreover, our review of the entire record allows us to infer that the trial court considered appellant's present and future ability to pay.

1

Amount of Restitution

{¶ 9} We first observe that, although the state prepared a listing of the victim's economic losses and referred to it during the sentencing hearing, this document is not included in the record transmitted to this court. Our review of the entire sentencing hearing transcript suggests, however, that the trial court and the appellant reviewed the document, which showed the victim's total economic losses to be $92,261.50. Additionally, the victim testified regarding the economic losses that she suffered as a result of the car accident. She explained each item and the corresponding cost as listed on the document that outlined her losses. The total amount of the losses that the victim claimed is $92,261.50. The victim's testimony constitutes competent, credible evidence to support the trial court's restitution order. State v. Graham, 2nd

Dist. Montgomery No. 25934, 2014-Ohio-4250, ¶59 (stating that "the trial court was permitted to base its restitution order on [the victim's] testimony alone"); State v. McClain, 5th Dist. Licking No. 2010CA39, 2010–Ohio–6413, ¶34 ("R.C.2929.18(A)(1) allows the trial court to rely upon the amount of restitution recommended by the victim, and does not require written documentation.").

{¶ 10} Appellant nevertheless asserts that the victim's testimony demonstrates that she did not suffer a loss of $92,261.50, but instead, suffered a loss of $62,261.50. Appellant notes that the victim testified that she lost wages in the amount of $30,000. She stated that the $30,000 "would be my wages paid to me from the company" in 2013. On cross-examination, the victim stated that her husband is the president of the company. Appellant's counsel asked the victim: "[S]o rather than your husband paying you, he just kept the money to himself? Do you understand you [sic] correctly on that?" The victim answered, "Yeah, yeah." Appellant argues that the victim's testimony shows that her husband retained the $30,000 and that the victim's household income did not, therefore, decline by $30,000.

{¶ 11} We again observe that appellant did not raise this specific argument before the trial court and did not argue that the court should have ordered $62,261.50 in restitution. Thus, he failed to raise this issue at a time when the trial court could have evaluated it and clarified the victim's testimony, as needed. Under these circumstances, appellant forfeited the right to raise this argument on appeal. We may, however, sustain his argument if the record does not contain competent, credible evidence to show that the victim lost $30,000 in wages.

{¶ 12} Additionally, we do not believe that the victim's affirmative response to the question whether her husband "kept" the money necessarily shows that the victim did not lose

wages in the amount of $30,000. Instead, a review of the entire transcript shows that the victim did not receive her typical $30,000 salary the year following the car accident due to the injuries that she suffered. The company, which her husband managed, did not pay the victim. If the victim's husband managed the company's expenses and salaries, then presumably her husband did not intermingle the business and household finances, but rather kept the business finances separate until and unless properly payable to the household. Thus, even though the victim may have admitted that her husband "kept" the money, what she appears to have meant is that her husband, as president of the company, kept the money in the business account. We therefore do not believe that the trial court plainly erred by determining that the victim's economic losses sustained as a direct and proximate result of appellant's offense amounted to $92,261.50.

2

Ability to Pay

{¶ 13} We also do not agree that the trial court failed to consider appellant's present and future ability to pay restitution. Although the court did not explicitly state that it considered appellant's ability to pay, our review of the entire record suggests that it did so. See State v. Bulstrom, 2013-Ohio-3582, 997 N.E.2d 162, ¶¶16-17 (4th Dist.) (upholding trial court's restitution order and concluding that court sufficiently considered the defendant's ability to pay, even though the trial court did not explicitly state that it considered the defendant's ability to pay, when the court's sentencing entry indicated that the court had "considered the record" and when the record contained "pertinent information" regarding the defendant's financial situation). Appellant testified, and the court had the opportunity to view his demeanor and to evaluate whether he would be capable of seeking gainful employment. Appellant was forty-one years old

at the time of the sentencing hearing and graduated from high school. He had prior employment and maintained an active lifestyle. Nothing in the record suggests that appellant suffers from any physical or mental disability or will otherwise be unemployable after his release from prison. Moreover, the trial court sentenced appellant to four years in prison. Thus, his sentence is not so long as to preclude him from seeking employment following his release from prison. Consequently, we believe that the record contains adequate, pertinent information regarding appellant's financial situation to indicate that the court sufficiently considered appellant's present and future ability to pay.

{¶ 14} We also disagree with appellant's implication that the absence of a PSI means that the trial court did not consider appellant's ability to pay. This court has held: "If the record shows that the court considered a presentence investigation report that provides pertinent information about the offender's financial situation and his ability to pay the financial sanction, it has met its obligation under R.C. 2929.19(B)(5)." State v. Petrie, 4th Dist. Meigs No. 12CA4, 2013-Ohio-887, ¶5; e.g., Bulstrom at ¶15; accord State v. Ayers, 2d Dist. Greene No. 2004CA0034, 2005–Ohio–44, ¶25 ("Information contained in a presentence investigation report relating to defendant's age, health, education and employment history, coupled with a statement by the trial court that it considered the presentence report, has been found sufficient to demonstrate that the trial court considered defendant's ability to pay a financial sanction."). Courts have, however, upheld restitution orders even in the absence of a PSI.

{¶ 15} In State v. Philbeck, 2nd Dist. Montgomery Nos. 26466 and 26467, 2015-Ohio-3375, ¶30, the appellate court observed that the record did not contain a PSI, but noted:

> "the trial court had ample opportunity to observe and interact with [the defendant] throughout the course of a bench trial in one case and plea hearing in a second case. Based on its observations, the trial court explicitly found that [the defendant], at age thirty-three, had the present physical and mental ability to work while in prison, and therefore contribute to paying towards his restitution order. Furthermore, the trial court noted that [the defendant] would only be forty years old when he was released from prison."

Additionally, in State v. Brewer, 2014-Ohio-1903, 11 N.E.3d 317, ¶46 (4th Dist.), we upheld the trial court's restitution order even though the record did not contain a PSI. We noted that the record indicated that the defendant was twenty-eight years old, suffered from no major physical or mental problems, and was an experienced carpenter and forklift operator. We also recognized that the defendant had posted two bonds in the amounts of $500 and $100. Thus, the lack of a PSI does not preclude a finding that the trial court sufficiently considered appellant's present and future ability to pay restitution to the victim.

{¶ 16} Moreover, we again observe that appellant failed to object to the restitution order on the basis that the trial court did not consider his ability to pay. Had appellant believed that he lacked the present or future ability to pay, he could have objected and presented testimony or evidence to that effect.

{¶ 17} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error.

III

{¶ 18} In his third assignment of error, appellant contends that his conviction is against the manifest weight of the evidence. Specifically, he asserts that the jury lost its way by determining that appellant was the driver of the vehicle at the time of the accident.

{¶ 19} When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court "review[s] 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." State v. Beverly, —– Ohio St.3d ——–, 2015–Ohio–219, ——– N.E.3d ——–, ¶17 (internal quotation marks omitted); e.g., State v. Hunter, 131 Ohio St.3d 67, 2011–Ohio–6524, 960 N.E.2d 955, ¶119; State v. Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); State v. Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983). The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. State v. Issa, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); State v. Murphy, 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶31. "'Because the trier of fact sees and hears the witnesses and is particularly competent to decide "whether, and to what extent, to credit the testimony of particular witnesses," we must afford substantial deference to its determinations of credibility.'" Barberton v. Jenney, 126 Ohio St.3d 5, 2010–Ohio–2420, 929 N.E.2d 1047, ¶20, quoting State v. Konya, 2nd Dist. Montgomery No. 21434, 2006–Ohio–6312, ¶6, quoting State v. Lawson, 2nd Dist. Montgomery No. 16288 (Aug. 22, 1997). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact-finder, as long as a rational basis exists in the record for its decision. State v. Picklesimer, 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶24; accord State v. Howard,

4th Dist. Ross No. 07CA2948, 2007–Ohio–6331, ¶6 ("We will not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight.").

{¶ 20} We further observe that "'[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony.'" State v. Cooper, 170 Ohio App.3d 418, 2007–Ohio–1186, 867 N.E.2d 493, ¶17 (4th Dist.), quoting State v. Mason, 9th Dist. Summit No. 21397, 2003–Ohio–5785, ¶17; accord State v. Harper, 4th Dist. Lawrence No. 14CA19, 2015–Ohio–671, ¶12 ("When conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the testimony presented by the state."). One function of the jury is to ascertain witness credibility. State v. Walker, 55 Ohio St.2d 208, 213, 378 N.E.2d 1049 (1978). Thus, a jury "can simply reject the defendant's defense and find the evidence in the state's case-in-chief more persuasive." Harper at ¶12. A reviewing court should not disturb the fact-finder's resolution of conflicting evidence unless the fact-finder clearly lost its way. See, generally, State v. Davis, 4th Dist. Washington No. 09CA28, 2010-Ohio-555, ¶¶16-17.

{¶ 21} In the case at bar, after our review of the record we do not believe that the jury clearly lost its way by determining that appellant was the driver of the car at the time of the accident. Nor do we believe that this is an exceptional case in which the evidence weighs heavily against conviction. Instead, the state presented substantial competent and credible evidence upon which the jury could have concluded, beyond a reasonable doubt, that appellant was the driver of the vehicle at the time of the crash. First, the state presented evidence that appellant was in the driver's seat seconds after the crash. The first witness arrived at the

accident scene within ten to fifteen seconds after the crash and stated that when he arrived, appellant was sitting in the driver's seat behind the wheel. State v. Klein, 9th Dist. Summit No. 26573, 2013-Ohio-3514, ¶7-8 (concluding that jury's finding that defendant driving vehicle at time of accident was not against the manifest weight of the evidence when paramedics and police officers who responded to the scene testified that defendant was seated on driver's side of the vehicle, in front of the steering wheel, with his feet by the pedals).

{¶ 22} Additionally, appellant gave conflicting accounts regarding whether he was driving the vehicle. Although he told several first-responders that he was not driving the vehicle at the time of the accident, one witness testified that appellant informed him that appellant told others that he was not driving the vehicle so that appellant would not go to jail. Also, the deceased's and appellant's injuries support logical inferences that appellant was the driver and the deceased was the passenger. The forensic pathologist explained that the deceased sustained "dicing" injuries from broken glass, primarily on the right side of his body, which would have been the side directly against the passenger's side of the vehicle where the window had broken. The pathologist further noted that the deceased had a relative lack of injuries to the left side of his body as compared to the right side of his body. This testimony supports a reasonable inference that the deceased sustained most of his right-sided injuries because he was seated on the right side, i.e., the passenger side, of the vehicle.

{¶ 23} Trooper Gaskill also testified that appellant's injuries were not consistent with being seated in the passenger's side of the vehicle. Trooper Gaskill explained that appellant's left-sided injury likely resulted when appellant's left hip hit the lower rim of the steering wheel. The trooper also explained that he did not observe injuries on appellant's body to support

appellant's claim that he had been seat-belted in the passenger's seat. The trooper stated that he did not see the extensive bruising he would expect to see if appellant had indeed been wearing a seat belt.

{¶ 24} Additionally, the evidence shows that the passenger side window broke, but appellant did not have any of the "dicing" injuries observed on the deceased's body. This supports a reasonable inference that appellant was not in proximity to the passenger side window at the time it broke, i.e., the time of the accident. Trooper Gaskill also stated that he did not believe that the deceased could have been sitting in the driver's seat and then ejected through the passenger's side door. Trooper Gaskill explained that the Kia's interior did not sustain the type of damage that he would have expected if the deceased's body had left the driver's seat, moved through the passenger area, and then ejected through the passenger door. Also, the airbags deployed and would have narrowed the passageway between the driver's side and the passenger's side of the vehicle.

{¶ 25} The evidence also shows that appellant did not sustain any significant left-sided injuries that he likely would have suffered if the deceased's body had moved from the driver's seat to the passenger's side of the vehicle, where appellant claims he had been sitting. The jury could have found it unfathomable to believe that a 350 pound individual could be ejected from the driver's side of a vehicle, through the passenger's side door where a passenger was seated, without causing significant injury to the passenger.

{¶ 26} Appellant nevertheless asserts that the jury clearly lost its way by crediting Trooper Gaskill's testimony. He notes that the jurors reported an impasse after initial deliberations, and contends that Trooper Gaskill's testimony "was the decisive factor which

broke the impasse." However, simply because the jury asked to review Trooper Gaskill's testimony does not mean that it clearly lost its way by convicting appellant. The reason or reasons why the jury requested to review Trooper Gaskill's testimony are legion and we can only speculate as to its reason for the request to review the testimony. We do not believe, however, that the request to review Trooper Gaskill's testimony establishes that the jury lost its way. To the contrary, we believe that it shows that the jury carefully deliberated to ensure that it reached a just verdict. Thus, we cannot state that appellant's conviction was a manifest miscarriage of justice.

{¶ 27} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's third assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.