[Cite as *State v. Dupuis*, 2013-Ohio-2128.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals No. L-12-1035
Appellee	Trial Court No. CR0201101921
v.	
Geoffrey Dupuis	**DECISION AND JUDGMENT**
Appellant	Decided: May 24, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, following a jury trial, in which appellant, Geoffrey Dupuis, was found guilty of one count of murder, in violation of R.C. 2903.02(B), an unclassified felony, and was ordered to serve 15 years to life in prison and pay a $10,000 fine along with other

financial sanctions. On appeal, appellant sets forth the following four assignments of error:

First Assignment of Error

The trial court abused it's [sic] discretion and erred to the prejudice of appellant at sentencing by imposing financial [sic] without consideration of appellant's ability to pay.

Second Assignment of Error

The trial court erred to the prejudice of appellant by allowing evidence under Ohio Rule of Evidence 404(B) whose prejudicial value far outweighed it's [sic] probative value.

Third Assignment of Error

Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Constitution of the State of Ohio

Fourth Assignment of error

The jury's finding of guilty on the charge of murder was against the manifest weight of the evidence presented at trial.

{¶ 2} On June 11, 2011, at approximately 10:00 p.m., appellant and his son, Jacob, drove into the Speedway service station at Secor and Laskey in Toledo, Ohio, in appellant's Oldsmobile minivan. Appellant sent Jacob inside to purchase soft drinks and cigarettes and to prepay for fuel. Appellant became agitated when the gas pump did not

dispense the fuel. After loudly complaining to the store clerk, appellant and Jacob went into the store together. One customer, George Proshek, unsuccessfully attempted to stop appellant from entering the store. Another customer, who was an off-duty 911 dispatcher, called 911 to report the disturbance; however, no officers were available to respond at that time.

{¶ 3} Once inside the store, appellant tried to convince the clerk, Alesha Lewis, to activate the gas pump. Lewis told appellant that Jacob did not pay for gas, after which appellant became even more agitated. As he exited the store, appellant told Proshek that Jacob would "smash [him] into rice." Appellant then got into the van. Jacob turned and punched Proshek in the face before also getting into the van. Customers who observed the incident from outside the store encircled the van and placed their hands on it. One of those customers was Randall York. Appellant, ignoring York's plea for him to get out of the van, put the vehicle in gear and drove forward. York's shoe was caught under the vehicle's left front wheel, and he was pulled under the van. Appellant stopped the vehicle several seconds later, but not before dragging York for several feet and running over him. Several customers lifted the van off of York, even though appellant remained in the vehicle. Witnesses called 911 a second time, but York was pronounced dead when emergency personnel arrived.

{¶ 4} On June 20, 2011, the Lucas County Grand Jury indicted appellant on one count of murder, in violation of R.C. 2903.02(B) and 2929.02. On July 11, 2011, the state filed a petition for the forfeiture of appellant's van pursuant to R.C. 2981.02.

{¶ 5} On September 14, 2011, the state filed a notice of intent to use evidence of appellant's other acts at trial pursuant to R.C. 2945.59 and Crim.R. 404(B). In support, of its motion, the state proffered that, on one prior occasion, appellant attempted to run over Donald Hernandez after the two men engaged in a violent confrontation. The notice further stated that, on another prior occasion, appellant hit a parked car and then threatened to hurt the car's owner with scissors. A hearing was held on October 27, 2011, after which the trial court took the matter under advisement.

{¶ 6} On November 1, 2011, the state filed a motion to consolidate appellant's criminal case, No. CR0201101921, with the forfeiture case, No. MS0201101235, for purposes of trial. On November 3, 2011, the state filed a supplemental brief in support of its intent to use other acts evidence. On November 4, 2011, the trial court granted the motion to consolidate.

{¶ 7} On November 28, 2011, a jury trial commenced. At trial, Toledo Police Detective Tonya Farrell testified that she was dispatched to the Speedway station on June 11, 2011, and that York was dead at the scene before she arrived. Farrell stated that witnesses at the scene were "hysterical." Farrell further stated that she could tell it was appellant who ran over York. Toledo Police Detective Terry Cousino testified that he arrived on the scene shortly after 11:00 p.m., after which he spoke to other officers, made notes and took photos. Cousino authenticated the photos, which were later entered into evidence. Cousino stated that he found a sandal, a piece of belt, a broken watch, a button and a belt loop on the pavement. All of the items, which were detached from York's

body as he was dragged over the pavement by appellant's van, were bloody. Cousino further stated that appellant's license plate read "MADMAX4." He stated that the floor boards and gas pedal of appellant's van were clear of any obstructions. He also stated that there was a 63-foot "arc" of blood from the point where York's sandal came off, to where the van stopped moving.

{¶ 8} Toledo Fire and Rescue firefighter/paramedic Holly Ann Bennett testified that York had no pulse when she arrived on the scene at 10:45 p.m. Lucas County Sheriff's Deputy Charles Johnson testified that he administered a breathalyzer test to appellant and read appellant his *Miranda* rights. Johnson stated that appellant was not charged with driving while intoxicated because the result of the test was 0.058, which is under the legal limit of 0.08 breath alcohol concentration.

{¶ 9} Off-duty Toledo 911 operator, Tammy Winkler-Pandi, testified that she stopped at the Speedway station after 10:00 p.m. on June 11, 2011, on her way home from work. Tammy stated that, while she was pumping gas, a minivan containing two men who were arguing loudly drove into the station. Tammy also stated that she heard appellant and his son arguing about whether their gas was prepaid or not, and that the conversation included a lot of cursing. Specifically, she remembered hearing appellant say that he was "going to go in and slap that dumb fucking bitch [the store clerk] because he kept punching the button wanting to talk to her over the speaker. [The clerk] responded, sir, he didn't pay for the gas." She said that appellant was screaming at his son, swearing, and "acting kind of belligerent, wild."

{¶ 10} Tammy testified that, since she was still wearing her uniform, she went back into the station, asked the clerk if she was alright, and called police for help. However, there were no officers available at the time to respond. Tammy then saw appellant get back in van and start to speed off before coming back for his son. At that point, she called 911 again.

{¶ 11} Tammy stated that when appellant and Jacob tried to enter the store, George Proshek tried to stop them; however, appellant pushed Proshek out of the way and said "get the fuck out of my way or call the cops. My son will kick your fucking ass any day. He's bigger than you are." When appellant saw Tammy on the phone he told her to "call the fucking cops," and she responded that the police had already been notified. She then told appellant to leave, and she and Proshek followed the two men out of the store. Tammy testified that appellant started to get in van when his son turned and punched Proshek in the face. The son then ran to car and said "Let's go. Come on, let's go."

{¶ 12} Tammy stated that York stood at the front of the van's hood, tapped on it said: "Hey, you can't leave. Your son was just involved in an assault." She then heard appellant start the car, but she was not sure if York was in front of the vehicle at that point. She testified that, as appellant put the van in gear, York hit the hood again and said appellant could not leave, after which appellant "floored it," looked at York, and then "just hit him." Tammy said that York was on the hood for a couple of seconds before falling down, after which appellant "cranked the wheel a hard left and ran right

over body, and when Mr. York was pinned underneath the car between the front tire and the back tire he drug his body across the parking lot."

{¶ 13} When asked where York was standing as appellant started the van, Tammy stated that York was standing in front of the driver's side headlight and that he tried to back up when appellant began driving. However, York fell on the ground instead, and appellant ran over him. She further stated that appellant "took off" quickly, while two other people were still pounding on the van and that after the van stopped, appellant attempted to put the van into reverse; however, he was stopped when other witnesses surrounded the vehicle. Appellant then said "what do I do?" She said that, at that point, the witnesses lifted the van, with appellant still in it, and pulled York's body out.

{¶ 14} Tammy stated that she filled out a witness statement at the scene, however, she left out some of the "swear words" and nuances of body movements. After her testimony, the prosecution played video recordings made by security cameras at the Speedway station and Tammy identified individuals appearing on the recordings. On cross-examination, Tammy again reviewed the security recordings, sometimes frame-by-frame, as the defense attempted to show that York was not directly in front of the van when appellant drove off. On redirect, she stated that she could see appellant looking at York as he "floored" the gas pedal; however, on re-cross, she admitted not being able to see appellant's eyes from her position.

{¶ 15} At the close of Tammy's testimony, the prosecution renewed its request to present 404(B) evidence to show absence of mistake or accident. No ruling was made at that time.

{¶ 16} Speedway customer Ashley Lipscomb testified that she was in her car, parked two spots away from the door of the station, when she heard male voices arguing around 10:00 p.m. She looked up and saw appellant and a boy arguing beside a van. Appellant was using foul language, and said he was going inside to find out why his money was not applied to the pump so he could pump gas. Lipscomb stated that she heard appellant tell someone "my son will smash you into rice." She then observed appellant's son punching Proshek in the face. Lipscomb testified that, as appellant tried to leave, people circled the van and York stood in front of it. She stated that she was able to see appellant sitting inside the van, looking straight ahead, as he revved the engine and then veered to the left. She heard the sound of York's body hitting the pavement.

{¶ 17} Lipscomb stated that York was standing directly in front of the steering wheel, with his hands on the hood of the car, and that he hit the vehicle's hood at least three times. She said the van moved forward quickly and then turned left, and she saw York "go from a standing position to a flat position, and he was wedged under the car."

{¶ 18} On cross-examination, Lipscomb testified that she heard appellant and his son argue about the station clerk stealing appellant's gas money, and that appellant said he was going inside to "get his fucking money." Lipscomb further testified that she was standing not too far from Proshek when he was punched.

{¶ 19} George Proshek testified at trial that he pulled his vehicle up to the store, opened the door, heard loud voices and saw "really mad people." After that he went into the store, where he heard a woman say "oh, my God here they come." Proshek stated that he walked up to the door and asked appellant and Jacob to calm down, however, appellant brandished a cane at him and said "who the fuck are you to stop me from going into a public place? * * * I will have my son kick your ass anyway" and pushed Proshek away with his cane. Proshek said that he followed the men out of the door and that Jacob turned and punched him. At that point, York got in front of the car and tried to stop appellant and Jacob from leaving.

{¶ 20} Proshek stated that, after appellant attempted to drive off, he saw people running over and York being dragged by the van. At that point, appellant was still mad, and threw up his fist. Proshek testified that appellant drove in a half circle, and that he had to stop because York's body was under the van. On cross-examination, Proshek testified that he did not see York get hit because he was still dazed after being punched by Jacob.

{¶ 21} On redirect, after looking at scenes from the security tapes, Proshek testified that appellant's rage was apparent on his face. He further testified that he saw the van go forward with York underneath it. On further cross-examination, Proshek stated that the rage on appellant's face was the same both in the store and while he was driving the van over York's body.

{¶ 22} Lucas County Deputy Coroner, Maneesha Pandey, testified at trial that an autopsy was performed on June 13, 2011, at which it was determined that York died of multiple blunt force trauma to his head, neck, chest, back and extremities. He also had scraped skin, bruises, rib fractures, contusions, bruising of the lungs, and a dislocated left knee. His skull was crushed into two pieces, also known as a hinge fracture, an injury requiring a large amount of force. Pandey stated that the dura, or covering, of York's brain was torn, an injury that is usually seen in motor-vehicle accidents or where there is repeated hitting with a weapon. Pandey further stated that York had many internal injuries and opined that he may have lived for a little while after being hit. Pandey testified that York had a blood alcohol content of .07, which had nothing to do with his death. Photos of York's injuries and his autopsy were shown to the witness and were later entered into evidence. Pandey stated that York's death was officially ruled a homicide.

{¶ 23} Speedway clerk Alesha Lewis testified at trial that she was working on June 11, 2011, when Jacob Dupuis came in and purchased a "few things." Lewis stated that Jacob mentioned that he wanted gas, but did not pay for it. She further stated that Jacob came in several more times asking about the gas, and that he was nervous and appeared to be arguing with appellant, who was outside making "aggressive gestures."

{¶ 24} Lewis stated that the two men came into the store and had an "immediate confrontation with the people that were there because as soon as they came in like I didn't get a chance to say anything." They were "not calm," and continued to be

confrontational after going back outside. Lewis further stated that, after the men went outside, she heard tires squeal, saw a man fall under the van, and saw the van take off. She then called police.

{¶ 25} On cross-examination, Lewis testified that appellant did not talk to her in the store. Lewis stated that she did not see what caused the man to fall back, but she did see appellant in the van and saw him hit York, who was standing more toward the driver's side of the van when he was "sucked" under the vehicle. On further direct examination, Lewis stated that she told a 911 operator that appellant "purposely" hit York because "if there's someone in front of your van and you press down on the gas then you know you're going to hit them." On further cross-examination, Lewis said that she could see appellant's back from where she was standing inside the store.

{¶ 26} Lizette Proshek, George Proshek's wife, testified at trial that she stayed inside the car while her husband went into the Speedway store. From there she heard "obnoxious loud nasty talk at one of the pumps." She described the tone as "more than mad." Lizette stated that appellant was driving the van and screaming at Jacob, accusing his son of "ripping him off." She heard appellant tell Jacob to "just fucking hit him" after which Jacob hit her husband. Lizette further stated that people rushed appellant's car after he hit George, and Jacob ran to the car. When appellant started the engine, York was in front of the van, saying "You just assaulted somebody. You're not going anywhere." Lizette said that appellant looked at York, started the van, and "took off and hit him."

{¶ 27} Lizette testified that York hit appellant's van three times before he was hit and then pounded hard three more times before he was drug under the vehicle. She further testified that appellant was facing "forward. He could not have helped but to see the man. He could not have helped but to hear the man. He could not have helped anything."

{¶ 28} On cross-examination, Lizette testified that the whole thing happened quickly, in "minutes." She further testified that appellant was in the van when Jacob punched her husband and, at the time of impact, York was standing in front of the van, slightly to the driver's side, with his hands out.

{¶ 29} After Lizette testified, the state rested. Thereafter, the defense renewed its motion for acquittal, which the trial court denied. Appellant then took the stand to testify in his own defense. Appellant testified that he stopped at the Speedway for gas and pop but, when he went to pump, it did not work with his credit card. He pressed the help button and asked his son Jacob: "what the hell is wrong with this thing?" Appellant said that he was frustrated and yelled at his son to go figure out what was wrong and that Lewis told Jacob she put appellant's charge on another pump. Appellant said that Jacob went back into the store and came out with no answer, after which appellant said "this is fucking bullshit" and backed the van into a spot near the front door. Appellant further stated that when they both went inside, Proshek was standing in the doorway with his arms crossed. Appellant denied pushing Proshek out of the way.

{¶ 30} Appellant testified that he came out of the Speedway after eight to ten seconds and got back in his car, after which Jacob came running up to the vehicle yelling "Dad, let me in. They're going to kill me." Appellant said he unlocked the door, put the van in gear and then "heard a loud bang on the passenger's side and on the rear of the vehicle." He further stated that one person on the passenger's side and several others at the rear were hitting the van hard. When someone grabbed the door handle on the passenger side, he took his foot off the brake and was "coasting forward" when he heard a slam on the driver's side near the left front tire and saw hands coming down on the hood. He denied seeing a person in front of the van. Appellant said he then stepped on the accelerator and turned to the left because it was easier to exit that way. Appellant testified that, after he began driving, Jacob told him he might have hit somebody. He then took his foot off the gas pedal and started coasting. When he checked the rearview mirror and side mirror he saw people running over, and was told there was someone under his car.

{¶ 31} Appellant testified that his license plate says "MADMAX4" because he likes actor Mel Gibson. After viewing the security recordings, appellant stated that York had his left foot in front of appellant's left front tire. Appellant also testified that Jacob got out of the vehicle and he moved over into the passenger seat so the witnesses could pick up his van and get York out from under it.

{¶ 32} On cross-examination, appellant testified that he had been drinking before going to get gas. He also testified that he was frustrated, tired and angry, and admitted

yelling at Lewis and arguing with his own son. He denied an earlier statement to police that he told Jacob to hit Proshek. He also denied telling police that he saw someone in front of the van "beating on the hood" and yelling at him to stop before he attempted to drive forward. He further denied telling his son to "kick someone's ass." Appellant testified that his legs were numb; however, he said the van does not have any handicap modifications. Although he maintained that he is physically incapable of hurting anyone, appellant admitted that a van is capable of injuring someone.

{¶ 33} On redirect, appellant testified that when he initially spoke to police a few hours after the incident he was traumatized and in shock. He also testified that he does not always recount events the same way each time. He denied pushing Proshek, and stated that he only saw hands on the driver's side of the hood of his van, not in front. He stated that York was standing "approximately at wheel level." On further cross-examination, after again reviewing the security videos, appellant disagreed with the prosecutor's statement that York was in front of his vehicle, and also stated he was not turning left before York was dragged under the vehicle. The final exchange between the prosecutor and appellant on cross-examination was as follows:

> Mr. Dupuis, have you ever done anything like this before?
>
> Like what, sir?
>
> Drive your car at anyone?
>
> No.
>
> Thank you.

{¶ 34} At the close of appellant's testimony, the defense rested and renewed its motion for acquittal, which the trial court denied. The state then asked for permission to call Hernandez to the stand in rebuttal. After noting that appellant argued to the jury that York's death was an accident, the court granted the state's request for the limited purposes of rebuttal and to show that York's death was not due to mistake or accident.

{¶ 35} Hernandez testified on rebuttal that appellant and his girlfriend, Mariah Weizlogel, used to be friends; however, "trouble" had developed between the two. Hernandez further testified that, approximately 18 months before York's death, he went to Mariah's house after being told that appellant and Jacob were attempting to break in. When Hernandez arrived and told appellant and his son to leave, appellant reacted by getting into his vehicle, making a "U" turn, and attempting to run over Hernandez. Hernandez said that appellant attempted to run over him four or five times, and that he had to hide behind a tree for safety before the two finally drove away. Hernandez stated that he did not call the police at the time, and that he was only testifying against appellant because he is acquainted with York's two sons.

{¶ 36} After Hernandez testified, the defense rested. Appellant's motion for acquittal was renewed and denied. In response to the defense's request, the trial court stated it would give a jury instruction as to the lesser included offense of reckless homicide. Later, during a discussion as to the substance of Hernandez' testimony, the trial court stated that it would also give a "prophylactic" limiting instruction concerning "other acts evidence just to be safe."

{¶ 37} After the parties' closing arguments, the trial court instructed the jury as to the applicable law, including instructions regarding other acts evidence, murder, felonious assault, use of a deadly weapon, and the lesser included offense of reckless homicide. After a period of deliberation, the jury found appellant guilty of murder.

{¶ 38} A sentencing hearing was held on December 15, 2011, at which statements were made by the state, appellant's appointed defense counsel, appellant, and York's son, Daniel York. Thereafter, the trial court stated that, in spite of appellant's claim, York's death was "anything but an accident." The trial court also recounted the circumstances of York's death and stated that appellant's claim of accident demonstrates his lack of remorse and a refusal to accept responsibility for his crime. The trial court also stated that it: "considered the record, the oral statements, the victim impact statement, the pre-sentence investigation report as well as the principles and purposes of sentencing under 2929.11 * * * [and] has also balanced the seriousness and recidivism factor under 2929.12."

{¶ 39} After stating that appellant was convicted by a jury of murder, in violation of R.C. 2903.02(B), an unclassified felony, the court ordered appellant to serve a prison term of 15 years to life. Appellant was informed that he would be subject to five years of postrelease control in the event that he is released from prison, and was also informed of the consequences of violating any such postrelease control. In addition to a prison sentence, appellant was ordered to pay restitution in the amount of $320.20 to Kimberly Hawk, York's ex-wife; $1,391.74 to York's widow, Shirley York; $1,843.21 to York's

family; and $7,500 to the Ohio Victims of Crime Compensation Program. Appellant was also ordered to pay his court-appointed counsel fees, other fees pursuant to R.C. 2929.18(A)(4), and a fine of $10,000. The trial court specifically found that appellant had the ability to pay. On February 1, 2012, appellant, through counsel, filed a motion for delayed appeal, which was granted by this court on February 23, 2012.

{¶ 40} In his first assignment of error, appellant asserts that the trial court erred by ordering him to pay financial sanctions without considering his present or future ability to pay. In support, appellant argues that, although the trial court found at sentencing that he had the ability to pay, there is no evidence in the record to support such a finding.

{¶ 41} Pursuant to R.C. 2947.23, the trial court is required to impose "the costs of prosecution" on all convicted defendants, including those who are determined to be indigent for purposes of obtaining appointed defense counsel at trial. *State v. Blessing*, 2d Dist. No. 2011 CA 56, 2013-Ohio-392, ¶ 52. Although the trial court has the discretion to waive such costs, "an indigent defendant must move for such waiver at sentencing." *Id.* at ¶ 52, citing *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 11-12. The record does not show that appellant either objected to the imposition of costs or made a motion for waiver at the time of sentencing.

{¶ 42} As to the remaining financial sanctions, a determination of indigency for purposes of appointing counsel does not necessarily support a finding of inability to pay court ordered sanctions (a fine). *In re J.G.*, 8th Dist. No. 98625, 2013-Ohio-583, ¶ 14. Accordingly, indigency "does not prevent imposition of financial sanctions, including

restitution." *State v. Conway*, 10th Dist. No. 03AP-1120, 2004-Ohio-5067, ¶ 6. However, a defendant's indigent status does create an inference of inability to pay. *State v. Hancock*, 2d Dist. No. 95 CA 65, 1996 WL 303607 (June 7, 1996). Further, pursuant to R.C. 2929.19(B)(5), the trial court is required to at least consider the issue of whether any offender has the present or future ability to pay the amount of any fines or sanctions imposed pursuant to R.C. 2929.18.

{¶ 43} While there are no express factors to be considered in determining a defendant's ability to pay, Ohio courts have consistently held that the record must contain at least "some evidence * * * to show that the court did consider this question." *State v. Burns*, 8th Dist. No. 95465, 2011-Ohio-4230, ¶ 42; *State v. Lang*, 12th Dist. No. CA2011-03-007, 2011-Ohio-5742, ¶ 12. Compliance with R.C. 2929.19(B)(5) can be demonstrated through its review of a PSI report. *Id.* at ¶ 13. (Other citations omitted.)

{¶ 44} As set forth above, the trial court stated on the record of the sentencing hearing that it had considered appellant's PSI report, which contained information as to his income, after which it made the finding that appellant has the ability to pay the court-imposed financial sanctions. Accordingly, the record contains at least some evidence to both demonstrate that the trial court considered appellant's ability to pay and to support the conclusion reached by the trial court. Appellant's first assignment of error is not well-taken.

{¶ 45} In his second assignment of error, appellant asserts that the trial court erred when it allowed Hernandez to testify as a rebuttal witness at trial. In support, appellant

argues that, although the trial court stated that Hernandez' testimony was permissible under Evid.R. 404(B) to prove lack of mistake or accident, any probative value in that regard was outweighed by unfair prejudice to appellant and, therefore, it was inadmissible under Evid.R. 403.

{¶ 46} Generally, the decision of whether or not to allow evidence is within the sound discretion of the trial court, and will not be disturbed on appeal absent a finding of an abuse of that discretion. *Moran v. Radtke*, 10th Dist. No. 11AP-604, 2012-Ohio-1379, ¶ 6. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 276 (1983).

{¶ 47} Evid.R. 404(B) provides, in relevant part, that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. * * *

{¶ 48} Pursuant to Evid.R. 403(B), relevant evidence may nevertheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice * * *."

{¶ 49} At a hearing on its motion to introduce other acts evidence pursuant to Evid.R. 404(B), the state argued that Hernandez' testimony would be used to show that appellant's actions on June 11, 2011, were not the result of mistake or accident. In response, the defense argued that the evidence, even if relevant, was highly prejudicial. The state then asked the court to issue a limiting instruction to the jury. The trial court did not rule on the state's motion before the trial. Later, after hearing the evidence presented by both parties at trial, which included appellant's testimony that he had never before attempted to hurt anyone with a motor vehicle, the trial court allowed Hernandez to testify. As set forth above, the trial court also issued a "prophylactic" limiting instruction pursuant to Evid.R. 404(B).

{¶ 50} On consideration of the foregoing we find that Hernandez' testimony was admissible pursuant to Evid.R. 404(B), in order to refute appellant's claim that York's death was an accident. Accordingly, we cannot say that the trial court abused its discretion by allowing Hernandez' testimony. Appellant's second assignment of error is not well-taken.

{¶ 51} Appellant asserts in his third assignment of error that he received ineffective assistance of trial counsel. In support, appellant argues that trial counsel failed to object to the imposition of financial sanctions and failed to object to the introduction of hearsay testimony and "speculative statements" made by witnesses to the accident. Specifically, appellant objects to statements made by Officer Tonya Farrell, who stated that witnesses observed appellant running over York. He also objected to

Winkler-Pandi's statements regarding her conversation with George Proshek before appellant came into the Speedway station. Finally, appellant objects to Lizette Proshek's statement that she saw appellant looking "straight ahead" as he drove the van over York's body.

{¶ 52} It is well-established that claims of ineffectiveness assistance of counsel are reviewed under the standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prove ineffective assistance of counsel, the appellant must show both that the performance of trial counsel was defective and must also establish that, but for that defect, the trial outcome would have been different. *Id*. at 687.

{¶ 53} As to counsel's failure to waive costs, as set forth above, the trial court properly considered appellant's ability to pay a court-imposed fine, and appellant has not attempted to demonstrate what, if any, evidence could have been offered to support the waiver of costs.

{¶ 54} As to whether counsel was ineffective for failing to object to inadmissible hearsay and "speculative testimony," the term "hearsay" is defined in Evid.R. 801(C) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A statement is not hearsay if it is offered "against a party and is * * * the party's own statement * * *." Evid.R. 801(D).

{¶ 55} Upon consideration, we find that Farrell's testimony arguably contained hearsay. However, appellant admitted at trial that he ran over York, an act which he claimed was accidental. Tammy Winkler-Pandi's testimony does not qualify as hearsay at all, because it was offered to show George Proshek's reason for trying to stop appellant and Jacob from the entering the Speedway store. As such, its content had no bearing on whether or not York's death was accidental. Finally, Lizette Proshek's testimony was based on her own observations, which she admitted were limited due to her viewpoint.

{¶ 56} For all the foregoing reasons, we find that appellant has not demonstrated that the performance of his appointed trial counsel was defective or that, but for the alleged defects, the outcome of his criminal trial would have been different. Accordingly, appellant has failed to show that he received ineffective assistance of trial counsel, and his third assignment of error is not well-taken.

{¶ 57} In his fourth assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence and was not supported by sufficient evidence as to every element of the crime of murder. In support, appellant argues that the evidence presented at trial more accurately supports the crime of reckless homicide, and that the jury "lost its way" due to the highly emotional content of that evidence. We disagree.

{¶ 58} In determining whether a verdict is against the manifest weight of the evidence, "an appellate court weighs the evidence and all reasonable inferences, and considers the credibility of witnesses." *State v. Joyner*, 6th Dist. No. L-09-1058, 2010-Ohio-2794, ¶ 10. Thereafter, the court sits as a "thirteenth juror" and "determines

whether the fact finder lost its way, resulting in a manifest miscarriage of justice, such that the conviction must be reversed." *Id.*, citing *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶ 59} The trial court instructed the jury as to the elements of the crime of murder, pursuant to R.C. 2903.02, which states that: "(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree * * *."

{¶ 60} The underlying violent offense with which appellant was charged is felonious assault pursuant to R.C. 2903.11(A)(2), which states that "[n]o person shall knowingly * * * cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." Pursuant to R.C. 2901.22(B), "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."

{¶ 61} In Ohio, a vehicle, such as a car or minivan, is recognized as a "deadly weapon" as set forth in R.C. 2901.22. *State v. Griffith,* 8th Dist. No. 97366, 2013-Ohio-256, ¶ 13.

{¶ 62} In contrast R.C. 2903.041(A), which sets forth the crime of reckless homicide, states that "[n]o person shall recklessly cause the death of another * * *."

{¶ 63} On consideration, we find nothing in the record to support appellant's claim that the jury lost its way and created a manifest miscarriage of justice when it

concluded that appellant was guilty of murder rather than reckless homicide. Appellant's fourth and final assignment of error is not well-taken.

{¶ 64} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE