[Cite as *State v. Green,* 2016-Ohio-4915.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 14 BE 0055
V.	)	
	)	OPINION
ROBERT WILLIAM GREEN,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Belmont County, Ohio Case No. 13 CR 0002
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	No brief filed
For Defendant-Appellant	Attorney John M. Jurco P.O. Box 783 St. Clairsville, Ohio 43950

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: June 16, 2016

[Cite as *State v. Green*, 2016-Ohio-4915.]
DONOFRIO, P.J.

{¶1} Defendant-appellant, Robert William Green, appeals from a Belmont County Common Pleas Court judgment convicting him of aggravated vehicular homicide and failing to stop after an accident, following a jury trial.

{¶2} Sometime between midnight and 2:00 a.m. on August 8, 2012, Jason Cattane was walking eastbound on U.S. 40. Shortly thereafter, the State Highway Patrol was called to respond to what was reported as a "hit-and-skip" accident. Troopers found Cattane's body at the scene. Cattane died after apparently having been struck by a vehicle that had left the scene. Troopers also found a mirror at the scene that had broken off a vehicle. After some research, the troopers were able to determine that the mirror came from a Chevrolet S-10 pickup truck.

{¶3} The troopers began discussing the mirror and the vehicle it may have come from. Trooper Ralph Hendershot recalled that he frequently noticed a white S-10 pickup truck parked in the Beech Hill Bar parking lot, which happened to be located across the street from the State Highway Patrol post. The troopers believed that appellant was the owner of the pickup truck that was frequently seen at the Beech Hill Bar. Trooper Rocky Hise remembered that he had given appellant a ride home previously and he knew where appellant lived. Based on this information, Troopers Hendershot, Hise, and Jeffery Herink went to appellant's residence.

{¶4} When the troopers arrived at appellant's residence, they noticed his white S-10 pickup truck parked in the driveway. The truck had damage to the passenger-side hood and fender, the lower right-hand corner of the windshield was broken, and the truck was missing a mirror. The troopers also noticed a key underneath the windshield wiper blade. While the troopers were in the driveway, appellant approached them. They informed him they were investigating an accident. Appellant indicated that he was the truck's owner and stated that he was driving the truck the previous night. Appellant told the troopers he hit a mailbox.

{¶5} Witnesses placed appellant at the Beech Hill Bar drinking beer until close to midnight on the night of August 7, 2012. Eric Perzanowski, another bar patron, helped appellant out of the bar and to his truck that night because appellant

was "visibly intoxicated." Perzanowski placed appellant's key under his windshield wiper blade. When Perzanowski left, appellant was "practically asleep" in his truck.

{¶6} Blood and hair were found on appellant's windshield. DNA testing matched the blood and hair samples to Cattane.

{¶7} On January 2, 2013, a Belmont County Grand Jury indicted appellant on one count of aggravated vehicular homicide, a second-degree felony in violation of R.C. 2903.06(A)(1)(a); and one count of failing to stop after an accident, a third-degree felony in violation of R.C. 4549.02(A). Appellant pleaded not guilty.

{¶8} Appellant filed a motion to suppress all evidence obtained by the troopers on August 8, 2012, as a result of the search of his vehicle and the area surrounding his residence. He claimed the officers unlawfully entered his property and vehicle. Appellant further sought to suppress his written consent form, claiming he signed the form due to intimidation or harassment. Finally, appellant sought to suppress any statements he made to the troopers at that time.

{¶9} The trial court held a hearing on appellant's motion. The court heard testimony from appellant and the officers involved. It subsequently overruled appellant's motion to suppress.

{¶10} The matter proceeded to a jury trial. The jury found appellant guilty as charged. The court later held a sentencing hearing where it sentenced appellant to eight years in prison for aggravated vehicular homicide and 24 months for failing to stop after an accident. The court ordered appellant to serve his sentences consecutively for a total of ten years. Additionally, the court revoked appellant's driver's license for life.

{¶11} Appellant filed a timely notice of appeal on November 17, 2014. Appellant now raises five assignments of error.

{¶12} Appellant's first assignment of error states:

> TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE DID NOT HIRE AN EXPERT TO LAY THE FOUNDATION FOR ADMISSIBILITY OF THE DECEDENT'S

ALCOHOL AND MARIJUANA INTOXICATION.

THE TRIAL COURT ERRED IN (A) EXCLUDING THE DECEDENT'S ALCOHOL AND MARIJUANA INTOXICATION AS EVIDENCE THAT THE DECEDENT WAS THE SOLE PROXIMATE CAUSE OF HIS OWN DEATH; AND (B) INSTRUCTING THE JURY THAT "OTHER CAUSE IS NOT A DEFENSE."

{¶13} In this case, appellant's counsel sought to introduce evidence regarding alcohol and marijuana that were in Cattane's body at the time of his death. (Trial Tr. 204). Counsel wanted to use this evidence to establish that appellant's driving was not the proximate cause of Cattane's death but instead it was due to Cattane's impaired judgment causing him to walk at night with his back to traffic. (Trial Tr. 205). The trial court did not allow the evidence. First, the court stated that without expert testimony as to how a .07 test would impact the victim's ability to function on the night in question, the evidence would not be relevant. (Trial Tr. 209). Second, the court stated that any contributory negligence of a decedent is not a defense to vehicular homicide unless it is the sole proximate cause. (Trial Tr. 209-210). Therefore, the court found the evidence to be irrelevant. (Trial Tr. 211).

{¶14} Appellant argues that the trial court erred in excluding the alcohol/marijuana evidence because it could have been used to explain to the jury why Cattane was walking on the wrong side of the road. He asserts this evidence was relevant as to whether Cattane was the sole proximate cause of his own death. He further asserts it could have been used to explain that Cattane was unable to appreciate the threat of oncoming traffic and could have been used to explain that Cattane was physically unable to move out of the way.

{¶15} The admission or exclusion of evidence is within the trial court's broad discretion and this court will not reverse its decision absent an abuse of that discretion. *State v. Mays,* 108 Ohio App.3d 598, 617, 671 N.E.2d 553 (1996). Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's judgment was unreasonable, arbitrary, or unconscionable. *State v. Adams,* 62

Ohio St.2d 151, 157, 404 N.E .2d 144 (1980).

{¶16} Appellant wished to introduce evidence that Cattane had a blood alcohol level of .07 and also had evidence of marijuana in in his body at the time of his death. This evidence, as the trial court found, was inadmissible. There were no witnesses who could describe how or where Cattane was walking when appellant struck him. No one testified as to how Cattane was walking before he was struck or if he stumbled or appeared to be impaired in some way. Without some testimony as to how the alleged alcohol or marijuana actually affected Cattane, any evidence that marginal amounts of these substances may have been present in his body when appellant struck him was irrelevant. The level of alcohol was below the legal limit of .08 for statutory impairment. Because there was no foundation as to how the amounts of alcohol and marijuana actually affected Cattane, the trial court did not abuse its discretion in excluding this evidence.

{¶17} Appellant also argues that his trial counsel was ineffective because he failed to hire an expert to lay the foundation for the admissibility of Cattane's potential alcohol and marijuana intoxication. Had counsel hired such an expert, appellant argues, the trial court would not have been able to exclude this evidence because counsel would be using expert testimony to explain the effects of these substances in Cattane's body.

{¶18} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. Second, appellant must demonstrate that he was prejudiced by counsel's performance. *Id*. To show that he has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, at paragraph three of the syllabus.

{¶19} Appellant bears the burden of proof on the issue of counsel's

ineffectiveness. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). In Ohio, a licensed attorney is presumed competent. *Id*.

{¶20} Proximate cause does not require that the defendant's conduct be the sole cause of an injury. *State v. Dunham*, 5th Dist. No. 13CA26, 2014-Ohio-1042, ¶ 48. There can be more than one proximate cause of an injury. *Id*., citing *Taylor v. Webster*, 12 Ohio St.2d 53, 231 N.E.2d 870 (1967) and *Strother v. Hutchinson*, 67 Ohio St.2d 282, 423 N.E.2d 467 (1981). Moreover, "it is well settled that any contributory negligence of the decedent cannot be a defense to vehicular homicide, unless it is the sole proximate cause of the accident." *State v. Langenkamp*, 137 Ohio App.3d 614, 621, 2000-Ohio-1831, 739 N.E.2d 404, 409.

{¶21} In this case, as will be seen from the evidence discussed at length below, the state proved that appellant drove his truck while intoxicated, struck Cattane, and did not stop. Even if the court had permitted appellant to present evidence that Cattane had alcohol or marijuana in his system, this would not prove that Cattane was the sole proximate cause of the accident. Assuming for the sake of argument that Cattane was partially responsible for the accident due to some state of intoxication, this still would not have relieved appellant from criminal liability. It would only mean that Cattane was contributorily negligent. As stated above, there can be more than one proximate cause of an injury.

{¶22} As long as the state proves beyond a reasonable doubt that the defendant's actions were a cause of death, it is irrelevant whether there were any other contributory causes. *Dunham*, 2014-Ohio-1042, at ¶ 51. Thus, even if appellant's counsel had hired an expert to testify as to the possible effects of alcohol and marijuana in Cattane's system, this would not present a defense for appellant.

{¶23} Moreover, as discussed above, there were no eyewitnesses to describe Cattane's actions as he was walking down the road. Without some testimony as to how Cattane was behaving when he was struck, expert testimony as to the general effects of marginal amounts of alcohol and marijuana would be irrelevant.

{¶24} Consequently, appellant cannot demonstrate that his counsel's

performance was deficient or that he suffered any prejudice due to an alleged deficiency.

{¶25} Appellant also argues in this assignment of error that the trial court erred in giving the jury an "other-cause-is-not-a-defense" instruction. But the jury instructions are not included in the trial transcript. Appellant recognized this and filed with this court an alleged copy of the jury instructions. This court, however, put on a judgment entry stating that because there was no certification from the court reporter that the instructions were transcribed from her notes, we could not accept the purported jury instructions as part of the record on appeal. (December 7, 2015 Judgment Entry). Without the jury instructions, we cannot review appellant's argument here. Also, as explained above, another cause of this accident is not a defense unless it is the sole cause of the accident.

{¶26} Accordingly, appellant's first assignment of error is without merit.

{¶27} Appellant's second assignment of error states:

> THE TRIAL COURT ERRED IN CONVICTING THE APPELLANT OF AGGRAVATED VEHICULAR HOMICIDE BECAUSE THERE WAS INSUFFICIENT EVIDENCE AND/OR THE APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶28} In this assignment of error, appellant contends his conviction for aggravated vehicular assault is against both the sufficiency and the weight of the evidence. Appellant does not take issue here with his conviction for failing to stop after an accident.

{¶29} Appellant argues the state failed to prove that his intoxication caused Cattane's death. He points to testimony by the defense expert that appellant would have had to have seen Cattane at a distance of 145 feet in order to avoid hitting him. He asserts the state failed to prove that he saw or should have seen Cattane at this distance. Furthermore, appellant asserts the state failed to prove that his alleged

intoxication caused his failure to avoid Cattane. He claims the state was required to provide evidence that someone who was not intoxicated and who saw Cattane at 145 feet would have been able to avoid the accident. Appellant asserts that because the state failed to use expert evidence, it did not meet its burden.

{¶30} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing 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. *Smith*, 80 Ohio St.3d at 113.

{¶31} The jury convicted appellant of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), which provides that no person, while operating a motor vehicle shall cause the death of another as the proximate result of committing a violation of R.C. 4511.19(A). R.C. 4511.19(A) is the operating a vehicle while intoxicated (OVI) statute. R.C. 4511.19(A)(1)(a) provides that no person shall operate a vehicle if he or she is under the influence of alcohol.

{¶32} We must determine if the state presented evidence as to all of the essential elements of aggravated vehicular homicide. The state presented the following witnesses.

{¶33} Trooper Jeffrey Herink responded to the scene of Cattane's death. Trooper Herink testified a mirror was found at the scene that had broken off an automobile. (Trial Tr. 240). He stated the troopers were able to determine that the mirror came from a Chevy S-10 truck. (Trial Tr. 241). As part of the investigation, Trooper Herink went to appellant's residence. (Trial Tr. 242). When he arrived, Troopers Hendershot and Hise were already there. (Trial Tr. 245). Trooper Herink

observed a white S-10 pickup truck with damage to the right front hood and fender. (Trial Tr. 246). He also noticed that the windshield was broken in the lower right-hand corner and there were scuffs on the right front tire. (Trial Tr. 246). Trooper Herink stated that appellant told him he hit a mailbox on his way home from a friend's house. (Trial Tr. 247).

{¶34} Trooper Ralph Hendershot also responded to the scene of Cattane's death. Later that day, Trooper Hendershot stated that several troopers were at the patrol post discussing the case. (Trial Tr. 262). He stated they were able to link the mirror found at the scene to an S-10 pickup truck. (Trial Tr. 262). Trooper Hendershot mentioned that he frequently saw an S-10 parked at the Beech Hill Bar, which was located across from the patrol post. (Trial Tr. 262-263). Eventually, the trooper stated, he and Trooper Hise went to appellant's residence. (Trial Tr. 263). Trooper Hendershot saw a white S-10 sitting in front of the garage with a missing mirror and contact damage to the passenger side windshield. (Trial Tr. 263). Appellant approached the troopers while they were still in their cruiser. (Trial Tr. 264). Appellant told them he was the truck's owner and that he was driving the truck the previous night. (Trial Tr. 264). Appellant told the troopers he hit a mailbox. (Trial Tr. 265).

{¶35} Upon further examining the truck, Trooper Hendershot found a key under the windshield wiper blade. (Trial Tr. 266). Trooper Hendershot also noticed hair, blood, and skin on the window. (Trial Tr. 272).

{¶36} Trooper Rocky Hise was at the patrol post when the other troopers returned from the accident scene and was involved in the discussion of the Cattane case. Trooper Hise testified that during the discussion Sgt. Britton made the statement that he bet whoever struck Cattane was at the Beech Hill Bar. (Trial Tr. 289). This led to Trooper Hendershot stating that he frequently saw a white Chevy truck at the bar. (Trial Tr. 289). Trooper Hise then stated that he had contact with appellant, who drove a white truck, and had driven him home before. (Trial Tr. 289). Trooper Hise stated that he knew where appellant lived and suggested that they talk

to appellant. (Trial Tr. 289). Thereafter, he and Trooper Hendershot went to appellant's residence. (Trial Tr. 289).

{¶37} Sergeant Mike Warner responded to the crash scene. Sgt. Warner took the mirror from the scene to a Chevrolet dealership and was told the mirror came from a late 90's or early 2000's Chevy S-10, Blazer, or GMC Sonoma. (Trial Tr. 321). Sgt. Warner stated his next involvement was at appellant's residence. (Trial Tr. 325). He stated the vehicle at appellant's residence "had an obvious head strike in the windshield." (Trial Tr. 325). He also stated that there was what appeared to be hair and scalp tissue embedded in the windshield. (Trial Tr. 326). Sgt. Warner collected the evidence and then transferred it to the Ohio Bureau of Criminal Identification and Investigation (BCI) for analysis along with known samples from Cattane. (Trial Tr. 326, 340, 345-346). Sgt. Warner testified that BCI generated a report with their findings. (Trial Tr. 347). The report concluded that the DNA profile for the hair sample and blood swab from the windshield was consistent with Cattane's DNA. (Trial Tr. 347-348).

{¶38} Trooper Larry Gaskill is a crash reconstructionist who responded to the scene of the crash. Trooper Gaskill testified that based on the absence of marks on the roadway, there was no evasive action taken here such as a hard brake application either before or after the crash. (Trial Tr. 379).

{¶39} Dr. Troy Balgo, is the Belmont County Coroner. Dr. Balgo responded to the scene. He determined that Cattane's time of death was between midnight and 2:00 a.m. (Trial Tr. 424).

{¶40} Carey Digman, appellant's friend, was with appellant on August 7, 2012, at the Beech Hill Bar. (Trial Tr. 223). Digman stated that appellant arrived at the bar at approximately 2:00 p.m. (Trial Tr. 223). She left the bar at approximately 7:30 p.m. (Trial Tr. 224). When she left, appellant remained at the bar. (Trial Tr. 224). Digman did not see appellant after she left the bar. (Trial Tr. 224). Digman stated that appellant had been drinking from 2:30 until 7:30 p.m., but that he was not intoxicated when she left the bar. (Trial Tr. 228).

{¶41} Brenda Carter was a bar patron and bar tender at the Beech Hill Bar on the night of August 7, 2012. She arrived at approximately 6:45 p.m. and noticed appellant was already there. (Trial Tr. 280, 282). Carter testified that appellant "was a little intoxicated" but was not "falling down drunk." (Trial Tr. 283). During the two-and-one-quarter hours that she was there, Carter recalled serving appellant two beers. (Trial Tr. 284-285). Carter left the bar at approximately 9:00 p.m. (Trial tr. 284).

{¶42} Eric Perzanowski was a patron at the Beech Hill Bar on August 7, 2012. Perzanowski was familiar with appellant from the bar. (Trial Tr. 430). Perzanowski testified that on August 7, he arrived at the Beech Hill Bar between 9:30 and 10:00 p.m. (Trial Tr. 431). Appellant was there when he arrived. (Trial Tr. 431). Perzanowski observed that appellant was drinking beer and he appeared to be intoxicated. (Trial Tr. 432). According to Perzanowski, appellant was slurring his speech and having a hard time standing. (Trial Tr. 432). Around midnight, Perzanowski decided to leave. (Trial Tr. 432). Before he left, however, he and the bar's owner helped appellant outside to his truck. (Trial Tr. 433). Perzanowski stated appellant was having a hard time walking so he "got under" one of appellant's arms and the bar's owner got under appellant's other arm to stabilize him and helped him out. (Trial Tr. 433-434). They opened up appellant's truck and put him in the front seat. (Trial Tr. 434). They also took the key out of appellant's ignition and placed it under his windshield wiper. (Trial Tr. 434). Perzanowski testified at that time appellant was "just about out of it," meaning he was practically asleep. (Trial Tr. 435). Perzanowski then left the bar. (Trial Tr. 435).

{¶43} The state's evidence was sufficient to prove that appellant caused Cattane's death while operating his truck. Appellant told the troopers that he had been driving his Chevy S-10 pickup truck on the night in question. A mirror from a Chevy S-10 pickup truck was found at the scene. Appellant's truck had contact damage to the right front fender and windshield and the right mirror was missing. Blood, skin, and hair were found on appellant's windshield. DNA matching Cattane's

DNA was found on the windshield of appellant's truck.

{¶44} Moreover, the evidence was sufficient to prove that appellant was operating his truck while he was under the influence of alcohol at the time he struck and killed Cattane. When considering the testimony of the other bar patrons, appellant was at the Beech Hill Bar from approximately 2:00 p.m. until midnight. He had been drinking this entire time. The bar patrons' testimony demonstrates that appellant became increasingly intoxicated as the day went on. Digman, who was at the bar with appellant from 2:00 until 7:30 p.m., stated that appellant had been drinking since 2:30 but was not intoxicated when she left at 7:30. Carter, who was at the bar with appellant from 6:45 until 9:00 p.m., stated appellant was "a little intoxicated" but was not "falling down drunk" when she was there. Perzanowski, who was with appellant at the bar from 10:00 p.m. until midnight, stated appellant was intoxicated as was seen by his slurred speech and difficulty standing. Perzanowski further stated that by midnight, appellant had to be helped to his car and he was "just about out of it." Finally, the coroner determined Cattane's time of death was between midnight and 2:00 a.m.

{¶45} Given this evidence, the state met the sufficiency of the evidence standard. After viewing the evidence in the 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." *Smith*, 80 Ohio St.3d at 113. The jury had sufficient evidence to find that appellant was operating his truck while he was intoxicated when he struck Cattane. Therefore, the evidence was sufficient to support appellant's conviction for aggravated vehicular homicide.

{¶46} Next, we must consider whether the jury's verdict was against the manifest weight of the evidence.

{¶47} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of

justice that the conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.'" *Id.* (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id*. at 390.

{¶48} Yet granting a new trial is only appropriate in extraordinary cases where the evidence weighs heavily against the conviction. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). This is because determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts who sits in the best position to judge the weight of the evidence and the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *State v. Rouse*, 7th Dist. No. 04-BE-53, 2005-Ohio-6328, 2005 WL 3190810, ¶ 49, citing State v. Hill, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Thus, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99-CA-149, 2002-Ohio-1152.

{¶49} In addition to the evidence set out above, we must also consider the evidence appellant offered in his defense in determining whether appellant's conviction was against the manifest weigh of the evidence.

{¶50} Appellant presented one witness, Henry Lipian. Lipian is an accident reconstructionist who testified as an expert. Based on his investigation, Lipian opined that Cattane was walking with his back to traffic on the roadway when he was struck. (Trial Tr. 520-521). Lipian spent a great deal of time discussing response time. He testified that for a "normally alert driver" who has a pedestrian come into view, the time to perceive and react is two-and-a-half seconds. (Trial Tr. 524). He stated that if the driver is travelling at 40 miles per hour, which is 58 feet per second,

then in two-and-a-half seconds, the driver will have travelled 145 feet. (Trial Tr. 525). So Lipian concluded that if the driver is to have any hope of taking an evasive action, the driver would have to detect the pedestrian at a distance of at least 145 feet. (Trial Tr. 525). Lipian stated that appellant had to drive "in an assured clear distance ahead" but that he had "to drive an assured clear distance ahead" relative to an object that he could reasonably discern in sufficient time to avoid the crash. (Trial Tr. 530).

{¶51} On cross examination, Lipian admitted that his testimony referred to a "normally alert person." (Trial Tr. 538). He also admitted that alcohol, at sufficient levels, can have a very measurable effect on perception-response time. (Trial Tr. 535).

{¶52} Considering all of the evidence, we conclude that the jury's verdict was supported by the manifest weight of the evidence. The troopers testified that a mirror was recovered at the scene of the crash that was determined to have come from a Chevy S-10 pickup truck. The troopers' discussions led them to appellant's residence where they saw appellant's Chevy S-10 pickup truck parked in the driveway. The truck was missing a mirror. It also had contact damage to its windshield and right front fender. Appellant admitted to the troopers that he had been driving the truck the previous night and stated he had hit a mailbox. The windshield, however, had blood, skin, and hair embedded in it. DNA testing found the samples from the windshield were consistent with Cattane's DNA. Patrons of the Beech Hill Bar testified that appellant was at the bar from 2:00 p.m. until approximately midnight when he had to be helped to his truck. Appellant became increasingly intoxicated during his time at the bar. The last person to see appellant before the crash stated that appellant was "just about out of it" and he left appellant basically asleep in the front seat of his truck around midnight. The coroner determined Cattane's time of death to be between midnight and 2:00 a.m. Thus, it was reasonable for the jury to conclude that appellant drove his truck while he was still intoxicated and struck Cattane.

{¶53} Relying on Lipian's testimony, appellant asserts the state had to prove that he saw or should have seen Cattane from 145 feet away. But Lipian's testimony was based on a "normally alert driver," not a driver who was so intoxicated he had to be helped to his truck. Moreover, appellant asserts the state failed to prove his intoxication caused his failure to avoid striking Cattane. But the jury was able to draw this reasonable inference from the evidence presented.

{¶54} When considering all of the evidence, we cannot conclude that the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse appellant's conviction. The jury's verdict is supported by the manifest weight of the evidence.

{¶55} Accordingly, appellant's second assignment of error is without merit.

{¶56} Appellant's third assignment of error states:

> THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S FINAL MOTION FOR CONTINUANCE RESULTING IN A TRIAL AFTER THE STATE PREPARED ITS CASE FOR 1 2/3RDS YEARS WHILE THE NEW TRIAL COUNSEL ONLY HAD 2 MONTHS TO PREPARE.

{¶57} Here appellant argues the court erred in overruling his prior counsel's motion to continue the August 5, 2014 trial date to November 4, 2014. He asserts that Atty. Warhola had been involved with the case since January 2013, and knew it in detail. Appellant asserts that if Atty. Warhola, who had worked on the case for a year and a half, needed until November 4, 2014, to prepare for trial then the public defender, who had only been appointed in July 2014, must have needed at least that long.

{¶58} This assignment of error requires an examination of the history of the case.

{¶59} Appellant initially retained Atty. Warhola to represent him in this case. Trial was set for April 2, 2013. On Atty. Warhola's February 7, 2013 motion, the trial

court continued the trial. After numerous hearings and pretrial conferences, the court set the trial for April 29, 2014.

{¶60} On March 21, 2014, Atty. Warhola filed another motion to continue. Atty. Warhola also asked the court to appoint him as appellant's counsel because appellant now had no funds with which to pay him. The court granted the continuance. It also appointed Atty. Warhola to represent appellant. Trial was then set for August 5, 2014.

{¶61} On July 14, 2014, Atty. Warhola requested another continuance or asked, in the alternative, to withdraw. He asked that the court continue the trial until after the November 4 election. (July 16, 2014, Tr. 10). As the basis for his motion to continue the trial, Atty. Warhola cited his "busy practice," his judicial campaign, and "personal family issues" as the reasons he could not be ready for an August 5 trial. (July 16, 2014, Tr. 10). The trial court overruled the motion for a continuance. But it sustained Atty. Warhola's request to withdraw. The court then appointed the public defender to represent appellant. Appellant's new counsel requested a continuance to prepare for trial. The court granted this continuance and set the trial for September 30. The trial commenced on September 30.

{¶62} Whether to grant or deny a continuance is within the trial court's sound discretion. *State v. Landrum*, 53 Ohio St.3d 107, 115, 559 N.E.2d 710 (1990). Therefore, we will not reverse absent an abuse of discretion.

{¶63} In considering a request for a continuance, the trial court must consider the circumstances including, "the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case." *State v. Unger*, 67 Ohio St.2d 65, 67-68, 423 N.E.2d 1078 (1981).

{¶64} In this case, Atty. Warhola requested a continuance on July 14, 2014.

But he also requested, in the alternative, that the court allow him to withdraw from the case. And while the court denied Atty. Warhola's requested continuance, it did grant his request to withdraw. Thus, the court did not force Atty. Warhola to proceed with a trial on August 5, for which he stated he was not prepared.

{¶65} The court appointed new counsel, who indicated he could not be ready by the August 5 trial date. (July 16, 2014, Tr. 19). The court proposed a trial date of September 30, 2014, which the new attorney agreed to. (July 16, 2014, Tr. 25-26). Thus, the trial court willingly accommodated the new attorney's request for a continuance.

{¶66} Additionally, appellant's new counsel likely benefitted from Atty. Warhola's work on the case. And appellant's new counsel had two-and-a-half months to prepare for trial. Importantly, there was no indication at trial that counsel was not prepared for trial.

{¶67} Moreover, the trial court had accommodated Atty. Warhola's previous requests for continuances. And, in denying Atty. Warhola's last request for a continuance, the court stated that it was reluctant to continue the trial because it was concerned that counsel's request was not going to lead to a trial until much later in the year. (July 16, 2014, Tr. 11).

{¶68} Given the above circumstances, the trial court did not abuse its discretion in denying the motion for a continuance. Accordingly, appellant's third assignment of error is without merit.

{¶69} Appellant's fourth assignment of error states:

> THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

{¶70} Prior to trial, appellant moved to suppress all evidence obtained as a result of the search of his property and vehicle on August 8, 2012. He also moved to suppress the consent form he signed. The court held a hearing on these issues. It then overruled appellant's motion.

{¶71} The trial court made very detailed findings as follows. It was undisputed that at the time the troopers decided to go to appellant's residence: (1) there were no eyewitnesses; (2) the mirror found at the scene came from a late 90's or early 2000 Chevy S-10 or Sonoma; (3) there was no information as to the color of the vehicle; (4) they had no information as to the direction the vehicle was travelling at the time of the accident and they did not know whether the driver was from Belmont County or from another area; (5) no effort was made to determine appellant's current address and/or whether he owned any motor vehicles; (6) no effort was made to obtain a search warrant or to telephone appellant, and, at the time, there was no reason to believe anyone at appellant's residence had engaged in criminal activity.

{¶72} The court found that during a discussion about the case at the highway patrol post, it was suggested that the driver could have been at the Beech Hill Bar that evening. Trooper Hendershot mentioned that there was always a white S-10 pickup truck at the Beech Hill Bar. Trooper Hise recalled that he had arrested someone for OVI, who was driving a white Chevy S-10, who lived off of Route 40 nearby. Troopers Hendershot and Hise then left the post to check the location where Trooper Hise had returned appellant on the night of his previous arrest.

{¶73} The court noted that the property belonged to appellant's parents, which was located on an unmarked roadway off of Route 40. It noted that appellant's parents owned a nine-acre tract on land adjacent to Route 40. Numerous residences and one business are located on the land as well as numerous unattached buildings, all of which are adjacent to the unmarked private roadway that provides ingress and egress to the residences and business. The area where the troopers observed the S-10 truck cannot be seen from Route 40 because of the elevation of the property and obstructions of other buildings.

{¶74} Trooper Hendershot testified that as they proceeded along the roadway and past an unattached garage, he saw the white truck in the driveway of the garage in plain sight. He stated they saw obvious damage to the right front fender and

windshield and the right mirror was missing. The troopers stated they saw everything on the right side of the truck while they were parked in the roadway.

{¶75} While the troopers were in the roadway, appellant came toward the garage from his residence, asked why the troopers were there, and admitted he owned the truck. The troopers advised appellant of his Miranda rights. Appellant then stated he had hit a mailbox with his truck. Appellant was not placed under arrest nor was he handcuffed at any time. The troopers did restrict his movement to the extent that they did not permit him to cross the area where his truck was located to enter his garage. However, at appellant's request, a trooper went into the garage to retrieve appellant's cigarettes for him. Appellant claimed the troopers did not tell him he had a right to refuse consent to search. But the consent form he signed clearly indicated this right in italics.

{¶76} Appellant described his demeanor as fearful. He admitted the troopers twice advised him of his Miranda rights. He chose to speak after the first warning. After the second warning, he chose not to speak and no further questions were posed to him. Appellant also admitted that prior to giving his consent to search, the troopers advised him that they intended to secure the scene and get a search warrant or he could provide his consent.

{¶77} The court went on to find the troopers had the authority to be on the unmarked, private roadway immediately adjacent to and connected to Route 40, which provided ingress and egress to appellant's residence. It found the unmarked, private roadway was implicitly open to the public as a means to approach the residence, noting the absence of "No Trespassing" or similar signs. Therefore, the court found the truck was in plain view from the troopers' lawful vantage point. The court further found the truck was not parked on the curtilage of appellant's residence. It noted the detached garage was 100 feet from appellant's residence, there is no enclosure of appellant's residence, there is no reasonable expectation of privacy in the area of the driveway leading to the unattached garage, and no steps were taken by appellant to protect the area from observation by people passing by. Therefore,

the court found the troopers were justified in observing appellant's truck.

{¶78} Finally, the court addressed the issue of appellant's consent. It found that appellant freely, intelligently, and voluntarily consented both orally and in writing to allow the search of his truck. The court noted appellant was not detained but came voluntarily to the scene from the direction of his home. He voluntarily remained and conversed with the troopers after they advised him of his Miranda rights. The court further noted that Sgt. Donald Britton informed appellant he could either consent to the search of the truck or the troopers would secure a warrant. The court pointed out that the threat to obtain a warrant does not invalidate a voluntary consent. The court also pointed out that appellant was not arrested at that time and was permitted to return to his home. Based on all of the circumstances, the court concluded appellant voluntarily gave his consent both orally and in written form.

{¶79} Appellant argues that Sgt. Britton stated that troopers went to his house on a "hunch" without reasonable suspicion. Because the troopers did not have a minimal level of objective justification to believe appellant committed the homicide, appellant argues they were not able to enter onto his private property. Therefore, he asserts, all evidence should have been suppressed as the "fruit of the poisonous tree."

{¶80} Additionally, appellant argues the trial court erred in finding that his vehicle, located in the driveway, was not in the curtilage, which would have afforded it the protections of the Fourth Amendment.

{¶81} Our standard of review with respect to a motion to suppress is first limited to determining whether the trial court's findings are supported by competent, credible evidence. *State v. Winand*, 116 Ohio App.3d 286, 288, 688 N.E.2d 9 (7th Dist.1996), citing *Tallmadge v. McCoy*, 96 Ohio App.3d 604, 608, 645 N.E.2d 802 (9th Dist.1994). Such a standard of review is appropriate as, "[i]n a hearing on a motion to suppress evidence, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Venham*, 96 Ohio App.3d 649, 653, 645 N.E .2d 831 (4th

Dist.1994). An appellate court accepts the trial court's factual findings and relies upon the trial court's ability to assess the witness's credibility, but independently determines, without deference to the trial court, whether the trial court applied the appropriate legal standard. *State v. Rice*, 129 Ohio App.3d 91, 94, 717 N.E.2d 351 (7th Dist.1998). A trial court's decision on a motion to suppress will not be disturbed when it is supported by substantial credible evidence. *Id*.

{¶82} The evidence from the suppression hearing supports the court's findings. The witnesses testified as follows.

{¶83} Trooper Hise testified that there was a discussion at the patrol post where Trooper Hendershot mentioned that he frequently noticed a white Chevy S-10 pickup truck at the Beech Hill Bar. (Sup. Part 1, Tr. 72). Trooper Hise then mentioned that he had arrested someone for OVI at an earlier time who had been driving a white S-10 and he knew where the person lived. (Sup. Part 1, Tr. 72).

{¶84} Trooper Hendershot testified that, after the discussion at the patrol post, he and Trooper Hise went to the property where Trooper Hise had dropped off appellant after arresting him for OVI. (Sup. Part 1, Tr. 16-17). Trooper Hendershot stated they turned off of Route 40 onto a paved road or driveway. (Sup. Part 1, Tr. 18). From that road/driveway, the troopers saw a white pickup truck parked outside. (Sup. Part 1, Tr. 18-19, 74). They could see damage to the truck's right fender area, contact damage to the windshield, and the right mirror was missing. (Sup. Part 1, Tr. 19-20, 76-77). The troopers stated that the truck was parked in a driveway and was out in the open. (Sup. Part 1, Tr. 22, 76). They were able to see it from the paved road/driveway. (Sup. Part 1, Tr. 64, 76).

{¶85} Based on their observations, Trooper Hendershot called for Sgt. Britton and Sgt. Warren to come to the scene. (Sup. Part 1, Tr. 20). Trooper Hendershot then exited the vehicle as appellant approached from the area of a nearby residence. (Sup. Part 1, Tr. 20). Trooper Hendershot asked appellant if he owned the truck and appellant stated that he did. (Sup. Part 1, Tr. 20). By that time, Trooper Herink had also arrived. (Sup. Part 2, Tr. 8). Trooper Herink advised appellant of his Miranda

rights. (Sup. Part 2, Tr. 8). Appellant told the troopers that he had hit a mailbox. (Sup. Part 1, Tr. 21; Sup. Part 2, Tr. 8).

{¶86} Sgt. Britton testified that they recovered a mirror from the scene that they matched to an S-10 pickup truck. (Sup. Part 1, Tr. 104). He stated that during the discussion at the patrol post, he made the comment that he bet whoever hit Cattane was at the Beech Hill Bar across the street. (Sup. Part 1, Tr. 107). When asked why he made that comment, Sgt. Britton replied: "I've been doing this for close to 24 years. Just call it intuition, hunch; whatever. The place is known for people to go over there and drink heavily. Just been our experience that we've had a lot of incidents that that's where people were coming from. So it was a hunch more than anything else. I just felt that way." (Sup. Part 1, Tr. 107).

{¶87} Sgt. Britton further testified that Troopers Hendershot and Hise contacted him after they located appellant's truck. (Sup. Part 1, Tr. 108). He and Sgt. Warner then went to appellant's residence as well. (Sup. Part 1, Tr. 108).

{¶88} Sgt. Britton told appellant that he could give them consent to search his truck or they would secure the scene and obtain a search warrant. (Sup. Part 1, Tr. 113). He stated appellant voiced his consent by saying, "well, go ahead and take it." (Sup. Part 1, Tr. 119-120). Sgt. Warner testified that he presented appellant with a consent to search form. (Sup. Part 2, Tr. 58-59). He did not read appellant the form. (Sup. Part 2, Tr. 83). But he gave appellant the opportunity to read it. (Sup. Part 2, Tr. 87). Sgt. Warner stated appellant took about ten seconds to read the form and then signed it. (Sup. Part 2, Tr. 59, 90). Sgt. Warner stated he did not threaten appellant or make any promises to him. (Sup. Part 2, Tr. 59). He simply told appellant the form was giving consent for the troopers to collect the evidence and the vehicle. (Sup. Part 2, Tr. 60). Sgt. Warner stated appellant signed the form while standing outside. (Sup. Part 2, Tr. 60). The consent form stated in part: "I understand that I have the right to refuse the consent to search described above and to refuse to sign this form. I further state that no promises, threats of force or physical or mental coercion of any kind whatsoever have been used against me to

get me to consent to the search described above or to sign this form." (Sup. Part 2, Tr. 172).

{¶89} Appellant testified that while he felt nervous and scared, he did not feel compelled or coerced into signing the consent form. (Sup. Part 2, Tr. 162). But he stated he did not read the form before he signed it. (Sup. Part 2, Tr. 162-163). He claimed there was no writing on the form when he signed it. (Sup. Part 2, Tr. 163).

{¶90} After appellant signed the form, Sgt. Warner asked appellant to go to the patrol car where Sgt. Warner advised appellant of his Miranda rights again. (Sup. Part 2, Tr. 60-61). Appellant told Sgt. Warner he wanted to speak with a lawyer. (Sup. Part 2, Tr. 62). That was the end of the discussion. (Sup. Part 2, Tr. 64). Appellant then watched for a while as the troopers collected evidence from his truck. (Sup. Part 2, Tr. 63). Appellant then got on a golf cart with his father and left. (Sup. Part 2, Tr. 63).

{¶91} Sgt. Britton testified that appellant was not handcuffed and was not placed under arrest that day. (Sup. Part 1, Tr. 128, 134). Trooper Herink also testified that appellant had eight prior OVI convictions. (Sup. Part 2, Tr. 17). And on two of those occasions, appellant refused to take the breath, blood, or urine tests. (Sup. Part 2, Tr. 18). Additionally, one of the troopers retrieved appellant's cigarettes for him from his garage. (Sup. Part 2, Tr. 185).

{¶92} Appellant's mother, Virginia Green, testified about her property. Mrs. Green stated that she and her husband own approximately ten acres adjacent to Route 40 with various buildings and residences located on it. (Sup. Part 2, Tr. 105, 107-110). The access to her property is by way of a private road. (Sup. Part 2, Tr. 107). In addition to accessing her property, neighbors use the private road to access their properties. (Sup. Part 2, Tr. 121-122). Additionally, Mrs. Green testified a business is located on her property. (Sup. Part 2, Tr. 120-121). The business also uses Mrs. Green's private driveway. (Sup. Part 2, Tr. 121-122, 130). Mrs. Green stated there are no signs posted to indicate the road is "private." (Sup. Part 2, Tr. 128).

{¶93} This evidence supports the trial court's findings of fact. Each factual finding the court made is supported by witness testimony.

{¶94} Next, we must determine whether the trial court applied the appropriate legal standard in denying the motion to suppress. Here, the analysis is twofold. First, we must determine whether the troopers were lawfully on the Green property when they saw appellant's truck. Second, we must determine whether the truck, located in the driveway, was in the curtilage of the Green property, which would have afforded it the protections of the Fourth Amendment. Appellant does not take issue with the trial court's ruling that the troopers lawfully obtained his consent to search.

{¶95} "Unreasonable searches and seizures are constitutionally prohibited. Ohio Const. Sec. 14, Art. I; U.S. Const. Amend. IV and XIV; *Maryland v. Buie* (1990), 494 U.S. 325, 331; *State v. Robinette* (1997), 80 Ohio St.3d 234, 238-239. For a search or seizure to be reasonable, it must be supported by a warrant or based upon an exception to the warrant requirement. *Katz v. United States* (1967), 389 U.S. 347, 357." *State v. Adams*, 7th Dist. No. 08 MA 246, 2011-Ohio-5361, ¶ 34.

{¶96} One exception to the warrant requirement is the plain-view doctrine. Pursuant to the plain-view doctrine, the warrantless search or seizure by a law enforcement officer of an object in plain view does not violate the Fourth Amendment if (1) the officer did not violate the Fourth Amendment in arriving at the place where the object could be plainly viewed, (2) the officer has a lawful right of access to the object, and (3) the incriminating character of the object is immediately apparent. *State v. Robinson*, 103 Ohio App.3d 490, 494, 659 N.E.2d 1292 (1st Dist.1995) citing *Horton v. California*, 496 U.S. 128, 136-137, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

{¶97} The question here is whether the troopers were lawfully on the private road when they observed appellant's truck.

{¶98} The evidence as to the nature of the Green property was not disputed. Appellant's parents, Mr. and Mrs. Green, own approximately ten acres of property located adjacent to Route 40. Mrs. Green testified that numerous buildings are located on the Green property including Mr. & Mrs. Green's home (where appellant

resided), another home that the Greens used as a rental property, a commercial countertop manufacturing business, a storage building, a picnic shelter, and the garage near which appellant's truck was seen. (Sup. Part 2, Tr. 106-118). Mrs. Green testified that the road leading to these buildings is private. (Sup. Part 2, Tr. 107). Nonetheless, there are no signs indicating the road is private. (Sup. Part 2, Tr. 128). Moreover, at least two neighbors use the road as the sole means to access their properties. (Sup. Part 2, Tr. 115-116, 179-180). And commercial trucks use the road to access the countertop business. (Sup. Part 2, Tr. 130). Thus, while the Greens' road may technically be a private road, many people use it as a means to access multiple homes and a business. Therefore, the troopers were lawfully on the road when they saw appellant's truck.

{¶99} Homeowners, and other legal occupiers of a residence, do not have a reasonable expectation of privacy as to what can be routinely viewed from their driveway, sidewalk, doorstep, or other normal routes of ingress to or egress from the home. *State v. Smith*, 11th Dist. No. 2013-A-0066, 2014-Ohio-4984, ¶ 23, citing *State v. Durch*, 17 Ohio App.3d 262, 263, 479 N.E.2d 892 (11th Dist.1984), *State v. Golubov*, 9th Dist. No. 05CA0019, 2005-Ohio-4938, at ¶ 11, *State v. Alexander*, 2d Dist. No. 2000-CA-6, 2000 WL 1475578 (Oct. 6, 2000). Areas such as the doorway to a residence, a porch, or the residence's driveway may be considered a public place even though it is on the homeowner's private property. *State v. Eberhart*, 1st Dist. No. C-010346, 2002-Ohio-1140.

{¶100} While the troopers were on the road on the Green property, they were able to observe appellant's truck parked in a driveway leading to a garage. The truck was out in the open, not in the garage. And the troopers testified they were able to view the truck from their cruiser on the road. Not only could they see the truck, they were also able to see the damage to the truck's front right fender and windshield. And they were able to see that a mirror was missing. Thus, the incriminating nature of the truck was readily apparent to the troopers from their vantage point in their cruiser.

{¶101} The private road on which the troopers travelled was the normal route of ingress and egress to several homes and a business. The road can be considered a public place even though it is the Greens' private property. Therefore, appellant did not have a reasonable expectation of privacy as to the driveway where his truck was parked, which could routinely be viewed from the road providing ingress and egress to various buildings. And the troopers were lawfully on the private road when they observed the truck and its damage.

{¶102} A law enforcement officer, acting without a warrant, has the same rights on another's property as any other visitor. *State v. Ash*, 4th Dist. No. 15CA1, 2015-Ohio-4974, ¶ 11. As such, a police officer may go onto private property in areas impliedly open to the public. *Id*., citing *State v. Tallent*, 6th Dist. No. L-10-1112, 2011-Ohio-1142. Given the above factors, the private road which the troopers traversed and from which they saw appellant's truck was impliedly open to the public. Therefore, they were able to lawfully observe appellant's truck without obtaining a search warrant.

{¶103} In sum, the troopers lawfully travelled on the road leading to the driveway where appellant's truck was located. The truck was then in the troopers' plain view from their vantage point in their cruiser on the road. Therefore, the trial court properly denied appellant's motion to suppress.

{¶104} Accordingly, appellant's fourth assignment of error is without merit.

{¶105} Appellant's fifth assignment of error states:

> THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO THE MAXIMUM 8 YEAR PRISON TERM FOR HIS CONVICTION OF AGGRAVATED VEHICULAR HOMICIDE AND TO A 2 YEAR PRISON TERM FOR HIS CONVICTION OF NOT STOPPING AFTER ACCIDENT; EXCHANGE OF IDENTITY INFORMATION AND VEHICLE REGISTRATION, AND FOR RUNNING THOSE SENTENCES CONSECUTIVELY.

{¶106} In his final assignment of error, appellant asserts his sentence is contrary to law. Appellant argues the ten-year sentence exceeds the maximum prison term he faced for the most serious offense for which he was convicted. Appellant goes on to argue that none of the factors indicating that his conduct was more serious than conduct normally constituting the offense apply, while several factors indicating his conduct was less serious than conduct normally constituting the offense do apply. Appellant also alludes to the assertion that the trial court should not have ordered him to serve the sentence consecutively.

{¶107} When reviewing a felony sentence, an appellate court must uphold the sentence unless the evidence clearly and convincingly does not support the trial court's findings under the applicable sentencing statutes or the sentence is otherwise contrary to law. *State v. Marcum*, Slip Opinion No. 2016-Ohio-1002, ¶ 1.

{¶108} Appellant asserts his sentence falls under R.C. 2953.08(A)(1) and is, therefore, contrary to law. R.C. 2953.08(A)(1) provides:

> (A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony *may appeal as a matter of right* the sentence imposed upon the defendant on one of the following grounds:
>
> (1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:
>
> (a) The sentence was imposed for only one offense.
>
> (b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(Emphasis added).

{¶109} Appellant argues his sentence included the maximum eight-year sentence allowed for aggravated vehicular homicide, the maximum sentence was not required for the offense, the court imposed a sentence for two or more offenses arising from a single incident, and the court imposed the maximum sentence for the offense of the highest degree.

{¶110} Appellant appears to read something into the statute that is not there. R.C. 2953.08(A)(1)(b) simply gives appellant *the right* to appeal his sentence under these circumstances. See *State v. Crutchfield*, 5th Dist. No. 11-COA-049, 2012-Ohio-2892; *State v. Tierney*, 8th Dist. No. 78847, 2002-Ohio-2607. The statute in no way suggests that appellant's sentence is contrary to law. Instead, we must review appellant's sentence and determine if the trial court complied with the applicable statutes.

{¶111} Appellant also asserts his sentence falls under R.C. 2953.08(C)(1) and is, therefore, contrary to law. In relevant part, that section provides:

> In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (C)(3) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted.

R.C. 2953.08(C)(1).

{¶112} Thus, by its terms, this section only applies to consecutive sentences imposed under R.C. 2929.14(C)(3). R.C. 2929.14(C)(3) provides:

> If a prison term is imposed for a violation of division (B) of section

> 2911.01 of the Revised Code, a violation of division (A) of section 2913.02 of the Revised Code in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of section 2921.331 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

As can be seen, R.C. 2929.14(C)(3) only applies to sentences for violations of three specific statutory sections: R.C. 2911.01(B), R.C. 2913.02(A), and R.C. 2921.331(B). R.C. 2911.01 is the aggravated robbery statute. R.C. 2913.02(A) is the theft and aggravated theft statue. And R.C. 2921.331(B) is the failure to comply with an order or signal of a police officer statute.

{¶113} Appellant was not convicted of any of these offenses. Therefore, R.C. 2953.08(C)(1) does not apply to this case.

{¶114} Appellant was convicted of a second-degree felony and a third-degree felony. The possible sentences for a second-degree felony are two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). The possible sentences for a third-degree felony are nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.

{¶115} The trial court sentenced appellant to eight years for the second-degree felony and 24 months for the third-degree felony. So both sentences were within the applicable statutory ranges.

{¶116} The trial court did sentence appellant to a maximum sentence for the second-degree felony. But although the General Assembly has reenacted the judicial fact-finding requirement for consecutive sentences, it has not revived the requirement for maximum sentences. *State v. Riley*, 7th Dist. No. 13 MA 180, 2015-Ohio-94, ¶ 34. Therefore, the trial court was not required to make any special findings before sentencing appellant to a maximum sentence.

{¶117} In sentencing a felony offender, the court must consider the overriding principles and purposes set out in R.C. 2929 .11, which are to protect the public from future crime by the offender and others and to punish the offender. The trial court

shall also consider various seriousness and recidivism factors as set out in R.C. 2929.12(B)(C)(D)(E).

{¶118} At the sentencing hearing, the trial court stated that it considered the purposes and principles of sentencing pursuant to R.C. 2929.11. (Sen. Tr. 7). It also stated that it considered the seriousness and recidivism factors relevant to the offense and the offender. (Sen. Tr. 7). The court noted that the following factors applied: appellant has a history of criminal convictions including eight for OVI, two for driving under suspension, and one for disorderly conduct; appellant had not responded to sanctions previously imposed; except for his statement in court that day, appellant failed to express genuine remorse and minimized his responsibility for the victim's death; appellant has demonstrated an extensive drug and alcohol abuse pattern; he has failed to acknowledge his pattern of alcohol abuse and/or to enter into good faith treatment; and appellant increased the risk of harm to the victim by failing to stop after he struck the victim. (Sen. Tr. 8-9). The court also found that none of the statutory mitigating factors applied. (Sen. Tr. 9). Thus, the court considered the statutory factors.

{¶119} Finally, we must consider appellant's consecutive sentences.

{¶120} R.C. 2929.14(C)(4) requires a trial court to make specific findings when imposing consecutive sentences:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a

> sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶121} It has been held that although the trial court is not required to recite the statute verbatim or utter "magic" or "talismanic" words, there must be an indication that the court found (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public, and (3) one of the findings described in R.C. 2929.14(C)(4)(a), (b), or (c). *State v. Bellard*, 7th Dist. No. 12-MA-97, 2013-Ohio-2956, ¶ 17. The court need not give its reasons for making those findings however. *State v. Power*, 7th Dist. No. 12 CO 14, 2013-Ohio-4254, ¶ 38.

{¶122} The Ohio Supreme Court recently held, however, that the trial court must make its findings at the sentencing hearing and not simply in the sentencing judgment entry:

> In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings.

State v. Bonnell, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. The court stressed the importance of making the findings at the sentencing hearing, noting this gives notice to the offender and to defense counsel. *Id.* at ¶ 29. The trial court should also incorporate its statutory findings into the sentencing entry. *Id*. at ¶ 30.

{¶123} The transcript of the sentencing hearing must make it "clear from the record that the trial court engaged in the appropriate analysis." *State v. Hill*, 7th Dist. No. 13 CA 82, 2014-Ohio-1965, ¶ 27.

{¶124} At the sentencing hearing, the trial court found that consecutive sentences were necessary to protect the public from future crimes and to punish appellant. (Sen. Tr. 10). This complied with the first required finding. The court then found that consecutive sentences were not disproportionate to the seriousness of appellant's conduct and to the danger appellant posed to the public. (Sen. Tr. 10). This complied with the second required finding. Finally, the court found that appellant committed his multiple offenses as part of a course of conduct and the harm caused was so great that a single term did not adequately reflect the seriousness of the conduct. (Sen. Tr. 10). This complied with the third and final required finding. The trial court repeated each of these findings in its sentencing judgment entry. (Nov. 7, 2014 Judgment Entry). Thus, the trial court made all of the required findings at the hearing and in the judgment entry to sentence appellant to consecutive sentences.

{¶125} In sum, the trial court complied with all applicable sentencing statutes and appellant's sentence is not contrary to law. Accordingly, appellant's fifth assignment of error is without merit.

{¶126} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Robb, J., concurs.