**[Cite as *State v. Andera*, 2010-Ohio-3304.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 92306**

## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## CLEMENT ANDERA

DEFENDANT-APPELLANT

**JUDGMENT:**
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509141

**BEFORE:** Sweeney, J., Boyle, P.J., and Jones, J.

**RELEASED:** July 15, 2010

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

**{¶ 1}** Defendant-appellant, Clement Andera ("defendant"), appeals his convictions in the trial court for aggravated vehicular homicide, aggravated vehicular assault, and operating a vehicle under the influence (OVI). He is also appealing his 15-year prison sentence. After reviewing the facts of the case and pertinent law, we affirm.

**{¶ 2}** On April 5, 2008, defendant was driving his pick-up truck on Madison Avenue in Lakewood when he veered off the road onto the sidewalk and hit two trees. Both trees broke off completely at the base of the trunk. As the trees fell, they struck three girls who were walking on the sidewalk, killing the youngest one, who was 22 months old. The two other victims sustained injuries. The 15 year old had a collarbone fracture, a cervical strain, and a cut on her forehead that required stitches. She returned to school approximately three months after the accident. The five year old had multiple fractures in her skull and collarbone, bleeding inside the brain, and a bruised lung. She also lost partial vision in her right eye.

**{¶ 3}** After the collision, defendant's vehicle came to a stop at the next intersection. The police arrived as defendant was pulling tree branches out of the back of his truck. Defendant told one police officer that he was eating ice cream while driving when his truck suddenly pulled to the right, and he thought he hit a couple of cars. Defendant told another police officer that he drove over a pothole in the road that caused his truck to jump up on the sidewalk. The police

noticed that defendant was unsteady on his feet, he was mumbling and slurring his speech to the point that he was incoherent at times, his eyes were glassy, and he appeared very confused.

**{¶ 4}** The police put defendant in the back of a patrol car to write a statement about what happened. Defendant passed out twice while writing this statement, and a third time after he was finished. The police then had defendant perform field sobriety tests. Defendant was unable to complete the horizontal gaze nystagmus because of a "lazy eye." Defendant failed the one-legged stand and the walk-and-turn. Defendant told the police that he was on medication for back pain, but he does not take it while he drives. The police arrested defendant for operating a vehicle under the influence. Defendant was placed in the back of a police vehicle to be transported to the hospital for a blood test when he passed out again.

**{¶ 5}** The results of defendant's blood test showed that he had approximately ten times the therapeutic dosage of the sedative Diazepam (Valium) and five times the therapeutic dosage of the painkiller Hydrocodone (Vicodin) in his system at the time of the crash.

**{¶ 6}** Defendant was charged with two counts of aggravated vehicular homicide, four counts of aggravated vehicular assault, and one count of OVI. On September 24, 2008, a jury found defendant guilty of one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), two counts of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), and OVI in violation of R.C.

4511.19(A)(1)(a). The court sentenced defendant to seven years in prison for the homicide and four years in prison for each assault, to run consecutively, for an aggregate sentence of 15 years in prison. The court also sentenced defendant to six months in county jail for the OVI, to be served concurrent with his prison sentence. Additionally, the court ordered defendant to pay $26,075 in fines and suspended his driver's license for life.

**{¶ 7}** Defendant appeals and raises twelve assignments of error for our review.

**{¶ 8}** "I. The appellant was denied due process under the Fourteenth Amendment of the Federal Constitution when he was not allowed to cross-examine or question the weight to be afforded the field sobriety tests and whether there was substantial compliance with the standards for administering the field sobriety tests in violation of R.C. 4511.19."

**{¶ 9}** In an OVI case, a police officer may testify about the results of the defendant's field sobriety tests if the prosecution shows that the tests were administered in substantial compliance with the testing standards. R.C. 4511.19(D)(4)(b); *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155. Once the test results are deemed admissible, the reliability of the evidence may be challenged by the defense on cross-examination, and "the trier of fact shall give it whatever weight the trier of fact considers to be appropriate." R.C. 4511.19(D)(4)(b)(iii).

**{¶ 10}** In the instant case, Lakewood Police Investigator Todd Allen was one of the first officers to arrive at the site of the crash, and he later administered defendant's field sobriety tests. He testified extensively about field sobriety tests in general, his training and qualifications to administer them, and defendant's performance of the tests on the night in question. Additionally, defendant cross-examined Investigator Allen about these same issues.

**{¶ 11}** The court allowed defense counsel to ask Investigator Allen whether he believed that he complied with the National Highway Traffic Safety Administration's standards for field sobriety tests regarding defendant. Investigator Allen replied, "Yes." Furthermore, the videotape taken from Investigator Allen's dash-cam of defendant performing these tests was shown to the jury twice. Investigator Allen testified that in deciding whether to arrest a suspected impaired driver, the police look at "[e]verything from the initial contact with him till the point where he completes the sobriety test. It's not just based solely on how they do on those tests, but it also depends on your interaction with the person and what other clues or evidence you might pick up while speaking to them." Investigator Allen further testified that, in his opinion, defendant "was impaired and it affected his ability to operate the motor vehicle."

**{¶ 12}** Accordingly, we find that defendant was given the opportunity to challenge the reliability of his field sobriety tests and his due process rights were not violated.

**{¶ 13}** Assignment of Error I is overruled.

**{¶ 14}** "II. Each count the appellant was convicted of lacked a mens rea element and his right to due process and to have each element presented and found by the grand and petit jury was violated under the Ohio and Federal Constitutions. The error was structural as the jury was not instructed on the appropriate mens rea element and the statutes do not plainly indicate a purpose to make each offense a strict liability offense."

**{¶ 15}** In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (*Colon I*), the Ohio Supreme Court held that an indictment for robbery in violation of R.C. 2911.02(A)(2) was defective because it failed to charge an essential element of the crime, namely, the mens rea of recklessness. The court further held that Colon's defective indictment resulted in structural errors permeating his entire trial. Id. at ¶19. The Ohio Supreme Court clarified this holding by issuing *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 (*Colon II*), which limited the structural error analysis to "rare cases * * * in which multiple errors at the trial follow the defective indictment." Id. at ¶8. The standard of review for the remaining defective-indictment cases is plain error. Id. at ¶7.

**{¶ 16}** This defective-indictment challenge does not apply to criminal offenses "that plainly impose strict liability." *Colon I*, at ¶11.

**{¶ 17}** In the instant case, defendant was convicted of three offenses. First, OVI in violation of R.C. 4511.19(A)(1)(a), which states in part: "No person shall operate any vehicle * * * if * * * [t]he person is under the influence of * * *

a drug of abuse * * *." Second, aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), which states in part: "No person, while operating * * * a motor vehicle * * * shall cause the death of another * * * [a]s the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code * * *." Third, aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), which states in part: "No person, while operating * * * a motor vehicle * * * shall cause serious physical harm to another person * * * [a]s the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code."

**{¶ 18}** Revised Code 4511.19(A)(1)(a) is a strict liability statute. *City of Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 573 N.E.2d 32; *State v. Cleary* (1986), 22 Ohio St.3d 198, 490 N.E.2d 574. The State need only prove that an offender was "under the influence" while operating a vehicle. In respect to alcohol, R.C. 4511.19(A)(1)(b)-(i) lists various concentration levels that, if found in an offender's body, constitute a per se violation of the statute. For "drugs of abuse," R.C. 4511.19(A)(1)(j) lists concentration levels of certain controlled substances, such as cocaine or marihuana, that constitute being "under the influence" as a matter of law. However, for controlled substances not listed in the statute, such as the Vicodin and Valium, which defendant had in his system at the time of the offense, no threshold level of concentration is required to find a per se violation under the statute.

**{¶ 19}** Defendant's criminal intent is irrelevant in determining whether he was under the influence in terms of R.C. 4511.19(A)(1)(a). Rather, the relevant

question is whether his ability to operate a motor vehicle was impaired as a result of being "under the influence." This determination is made taking into consideration common-sense observations, field sobriety tests, breath, blood, urine, or hair tests determining the amount of alcohol or drugs in an offender's system, and other indicators that constitute the totality of the circumstances. See *State v. Smith* (Feb. 27, 1998), Ottawa App. No. OT-97-037 (holding that a properly prescribed medication could be the basis for an arrest under R.C. 4511.19(A)(1) if it impaired the user's driving); *State v. BoCook* (Oct. 6, 1992), Ross App. No. 1813 (holding that "[t]he fact that BoCook took only the prescribed dosage of Valium does not make her immune from prosecution under R.C. 4511.19(A)(1) if her driving was impaired"). See, also, *State v. Hardy* (1971), 28 Ohio St.2d 89, 90, 276 N.E.2d 247 (defining "under the influence of alcohol" as "any degree in the consumption of alcohol * * * which tends to deprive the one so using it of the clearness of intellect and control of himself which he would otherwise possess").

**{¶ 20}** Because defendant's OVI conviction is a strict liability offense, his convictions for aggravated vehicular homicide and aggravated vehicular assault, which were predicated upon his violation of R.C. 4511.19(A)(1), are strict liability offenses as well. See *State v. Gagnon*, Lucas App. No. L-08-1235, 2009-Ohio-5185; *State v. West*, Montgomery App. No. 23547, 2010-Ohio-1786.

**{¶ 21}** Accordingly, the indictment need not allege, and the State need not prove, a particular mens rea for defendant to be found guilty of these offenses.

**{¶ 22}** Assignment of Error II is overruled.

**{¶ 23}** "III. The appellant's confidential medical records and communications with his physicians and other health care providers were admitted against him improperly in violation of state and federal law."

**{¶ 24}** Specifically, defendant argues that the court erred when it allowed the State to introduce his medical records and accompanying testimony unrelated to the incident in question, such as the Ohio Automated Rx Reporting System list of prescription medications defendant filled for an approximate one-year period prior to the date of the crash. In addition, medical records and testimony was introduced regarding treatment defendant received from two physicians for back pain he experienced following a separate automobile accident. The testimony about this treatment focused mainly on the Valium and Vicodin prescriptions written for defendant, which were listed on the aforementioned Rx Report.

**{¶ 25}** In general, pursuant to R.C. 2317.02, a person's medical records are privileged and may not be introduced in court. *Ohio State Med. Bd. v. Miller* (1989), 44 Ohio St.3d 136, 541 N.E.2d 602. This privilege may be waived under various scenarios described in R.C. 2317.02(B)(1). For example, when a person files a civil action that puts his or her health at issue, the doctor-patient privilege is waived as to that health condition. R.C. 2317.02(B)(1)(a)(iii). See, also, *Gill v. Gill*, Cuyahoga App. No. 81463, 2003-Ohio-180 (holding that a party seeking custody of a child puts her mental and physical condition at issue and constitutes a waiver of the physician-patient privilege).

**{¶ 26}** In the instant case, defendant repeatedly raised the issue of his medical condition. From the time of his arrest, he admitted to taking prescription pills for a back injury and used his back pain as an excuse for failing the one-legged-stand field sobriety test. He never denied that he was "under the influence" when driving; rather, his defense was that this tragedy was an accident because he was following the advice of his doctors by taking his prescription medication. Defendant's cross-examination of multiple witnesses probed into whether he took his medication as prescribed.

**{¶ 27}** Ultimately, this defense is futile because R.C. 4511.19 is a strict liability statute. Whether an offender took medication prescribed to him or ingested an illegal drug, such as heroin or crack cocaine, that he bought off the street is irrelevant. Whether an offender was under the influence when operating a motor vehicle is the issue-at-hand. Our review of the record shows that defendant's medical history had no relevance to the case-at-hand. However, the properly admitted evidence against him was overwhelming.

**{¶ 28}** The results of defendant's blood test showed an excessive amount of drugs in his system. This evidence is admissible pursuant to R.C. 2317.02(B)(1)(c). Several police officers testified that defendant was impaired at the time of the offense, slurring his speech, swaying back and forth, and nodding off. Defendant failed two field sobriety tests and was unable to complete a third. This evidence is enough to show defendant was "under the influence of * * * a drug of abuse." Defendant's medical records, other than the blood test results,

were cumulative and irrelevant, and as a general rule, would be privileged and inadmissible in an aggravated vehicular homicide case, had defendant not opened the door to admissibility by raising the issue.

**{¶ 29}** Additionally, any error in allowing defendant's medical records at trial would have been harmless in light of the overwhelming evidence against him. Crim.R. 52(A).

**{¶ 30}** Assignment of Error III is overruled.

**{¶ 31}** "IV. The trial court erred to the prejudice of the appellant in admitting Metro Health Medical records in violation of the appellant's right to confront his accuser under the Sixth and Fourteenth Amendments of the Federal Constitution."

**{¶ 32}** Specifically, defendant argues that the medical records relating to the two assault victims were improperly admitted into court because the health care providers who authored these records did not testify. Defendant argues this violates his right to confront witnesses against him. See *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.

**{¶ 33}** A cursory review of the transcript shows that Dr. Gerald Maloney, the emergency room physician who treated the victim's injuries following the crash, testified regarding the medical records in question. Defendant had the opportunity to cross-examine him, but chose not to.

**{¶ 34}** As there was no *Crawford* violation, Assignment of Error IV is overruled. "V. The admission of 'other acts' evidence denied the appellant a fair trial and due process under the State and Federal Constitutions."

**{¶ 35}** Specifically, defendant argues that evidence that he was involved in a traffic accident one month prior to the date of the offense in the instant case, and a traffic accident one day before the incident in the instant case, was improperly admitted.

**{¶ 36}** Generally, evidence of other crimes committed by a defendant is inadmissible to prove that the defendant committed the offense in question. "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." Evid.R. 404(B).

**{¶ 37}** Additionally, R.C. 2945.59 states that a defendant's other acts that "tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

**{¶ 38}** We review the admission of evidence under an abuse of discretion standard. *State v. Mauer* (1984), 15 Ohio St.3d 239, 473 N.E.2d 768. "The

term ‘abuse of discretion’ connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. Furthermore, the Ohio Supreme Court has held that “R.C. 2945.59 and Evid.R. 404(B) codify the common law with respect to evidence of other acts of wrongdoing, and are construed against admissibility.” *State v. Lowe* (1994), 69 Ohio St.3d 527, 530, 634 N.E.2d 616.

**{¶ 39}** The State in the instant case argues that the other acts evidence was admissible to show the absence of an accident under Evid.R. 404(B) and R.C. 2945.59. However, our reading of the rules, statutes, and case law concerning other acts evidence leads us to a different conclusion. In *State v. Davis* (Sept. 26, 1995), Columbiana App. No. 94-CO-12, the Seventh District Court of Appeals summed up the meaning of “accident” in terms of the admissibility of other acts evidence as follows:

**{¶ 40}** “The accident referred to in [Evid.R. 404(B) and R.C. 2945.59] is an accidental act on the part of a defendant which results * * * in [injury or death]. It is more or less a situation of confession and avoidance. The defendant admits that he or she was involved in an act which caused the death of another or caused the commission of some crime, but presents evidence that it was purely accidental and not in any way intended.”

**{¶ 41}** Under our analysis of defendant’s second assignment of error, we determined that the offenses he was convicted of are strict liability offenses;

therefore, defendant's intent is irrelevant. Accordingly, although what happened as a result of defendant's impaired driving that day is commonly referred to as a "traffic accident," legally speaking, there was nothing accidental about it. Defendant drove his vehicle while under the influence of drugs, which resulted in the death of one girl and severe injuries to two other girls.

**{¶ 42}** It was error for the trial court to allow defendant's history of impaired driving into evidence because it had no purpose other than to show that defendant had a propensity to drive erratically. This is exactly the type of evidence that is generally inadmissible. *State v. Mann* (1985), 19 Ohio St.3d 34, 482 N.E.2d 592. However, after reviewing the record, we conclude that this error was harmless, as "the remaining, properly introduced evidence overwhelmingly establishes appellant's guilt." *State v. Williams* (1988), 38 Ohio St.3d 346, 351, 528 N.E.2d 910.

**{¶ 43}** Assignment of Error V is overruled.

**{¶ 44}** "VI. The trial court erred to the prejudice of the appellant by excusing two jurors sua sponte over the objection of the appellant and in violation of due process under the Fourteenth Amendment of the Federal Constitution and in violation of Crim.R. 24."

**{¶ 45}** R.C. 2945.29 states, in pertinent part, "[i]f, before conclusion of the trial, a juror * * * is unable to perform his duty, the court may order him to be discharged." In *State v. Clay*, 181 Ohio App.3d 563, 576, 2009-Ohio-1235, 910 N.E.2d 14, this Court held the following: "The trial court's removal of a juror and

replacement of that juror with an alternate is within the trial court's discretion, under R.C. 2945.29 and Crim.R. 24(F)(1)."

**{¶ 46}** In the instant case, the court excused one juror because she twice violated the court's admonition to not use cell phones. In excusing this juror, the court stated the following on the record: "I don't trust [juror] number 10 to follow any of my rules anymore. She's left the jury room and she's been on the phone. I believe number 10 was deliberate * * *. [A]s I told you yesterday, we have rules for a reason. And jurors have been caught on cell phones talking to people about cases. They have been caught talking about what's going on in the courtroom and we can't have any confidence in the system if people break the rules. So I'm not trying to be arbitrary with you. There's really a reason behind the rules."

**{¶ 47}** The court then excused a second juror right before closing arguments because the juror had an out of town business trip scheduled for the next day. The court reasoned that this juror had brought his business trip to the court's attention twice, "and it's obviously starting to become something that's distracting * * *." The court added that it did not want the jury rushing through deliberations. The court replaced both excused jurors with alternate jurors.

**{¶ 48}** Defendant argues that this was "fundamentally unfair" and he "was entitled to the [jurors] he selected to be the 12 who would decide his fate." However, defendant fails to support this argument with legal authority and he fails to argue how the court abused its discretion in excusing the two jurors.

**{¶ 49}** We find no abuse of discretion, therefore, Assignment of Error VI is overruled.

**{¶ 50}** "VII. The trial court failed to consider the appellant's present and future ability to pay a fine in the amount of $26,075 in violation of R.C. 2929.19(B)(6) and whether counsel was ineffective under the Sixth and Fourteenth Amendments of the Federal Constitution by not objecting."

**{¶ 51}** Pursuant to R.C. 2929.19(B)(6), "the court shall consider the offender's present and future ability to pay" before imposing a financial sanction or fine. However, "there are no express factors that must be taken into consideration or findings regarding the offender's ability to pay that must be made on the record. Moreover, the trial court is not required to hold a hearing in order to comply with R.C. 2929.19(B)(6), although it may choose to do so pursuant to R.C. 2929.18(E)." *State v. Martin* (2000), 140 Ohio App.3d 326, 338, 747 N.E.2d 318. Furthermore, "Ohio law does not prohibit a court from imposing a fine on an indigent defendant." *State v. Ramos*, Cuyahoga App. No. 92357, 2009-Ohio-3064, at ¶7; *State v. Gipson* (1998), 80 Ohio St.3d 626, 687 N.E.2d 750.

**{¶ 52}** In the instant case, the court ordered defendant to pay the following fine: "You are to pay a $15,000 fine on Count 1, and $10,000 fine combined in Counts 3 and 4. You are also to pay the full fine of $1,075 in the misdemeanor count of Count 7 for a total amount of fines of $26,075." The court did not state anything on the record about defendant's present and future ability to pay this

amount, nor did the court order or review a presentence investigation report before sentencing defendant. The court's sentencing journal entry states that "the court considered all required factors of the law."

**{¶ 53}** While it facilitates appellate review when a court states that it specifically considered the defendant's ability to pay, we cannot say that a cursory reference in the record does not meet the low threshold of R.C. 2929.19(B)(6), as a matter of law. In the instant case, defendant hired counsel to represent him at the trial level. In addition, evidence in the record showed that before the date of this offense, defendant was employed at Cleveland Public Power for over ten years. Nothing in the record suggests that defendant would be prevented from working upon his release from prison.

**{¶ 54}** Accordingly, the trial court did not err in imposing the fine and Assignment of Error VII is overruled.[1]

**{¶ 55}** "VIII. The trial court erred to the prejudice of the appellant in failing to give requested lesser included offenses [instructions] to the jury in violation of the Fourteenth Amendment of the Federal Constitution and *State v. Evans*."

**{¶ 56}** In *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, the Ohio Supreme Court established a three-part test to determine whether a jury instruction on a lesser included offense is appropriate. "An offense may be a

[1]Defendant's seventh assignment of error asserts that counsel was ineffective by not objecting to the imposition of fines. However, defendant does not make this argument separately in his brief, nor does he cite legal authority to support this allegation. See App.R.12(A)(2) and 16(A)(7). Therefore, we disregard this argument.

lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense." Id. at paragraph three of the syllabus.

**{¶ 57}** Furthermore, in *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, the Ohio Supreme Court held that "[e]ven though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." Id. at paragraph two of the syllabus.

**{¶ 58}** In the instant case, defendant requested lesser included offense instructions for the aggravated vehicular homicide counts under R.C. 2903.06. Defendant was indicted for violating subsection (A)(1), which governs causing the death of another as a result of driving under the influence. He requested instructions for subsections (A)(3)(a), which governs causing the death of another "negligently" and (A)(4), which governs causing the death of another as a result of committing a minor misdemeanor violation of R.C. Title 45 of the Revised Code.

**{¶ 59}** A review of the evidence in the record shows that defendant operated a vehicle while under the influence of prescription drugs; it does not show that defendant acted negligently. Additionally, defendant's conviction

under R.C. 4511.19 is a first degree misdemeanor, not a minor misdemeanor. As such, jury instructions on 2903.06(A)(3)(a) and (A)(4) were not warranted.

**{¶ 60}** Defendant also requested lesser included offense instructions for the four aggravated vehicular assault charges under R.C. 2903.08. Specifically, defendant requested that he be charged with violating R.C. 2903.08(A)(1), which governs causing serious physical harm to someone as a result of unsafely operating an aircraft. Defendant also requested an instruction on R.C. 2903.08(A)(3), which governs causing serious physical harm to another as the result of operating a vehicle in a construction zone. Although defendant argued to the court that R.C. 2903.08(A)(3) was "not limited to a construction zone," we find no law to support this assertion. Neither do we find evidence in the record regarding a construction zone nor an aircraft.

**{¶ 61}** Accordingly, the court did not err in denying defendant's request for lesser included offense instructions. Assignment of Error VIII is overruled.

**{¶ 62}** "IX. Prosecutorial misconduct deprived the appellant of a fair trial in violation of the Fourteenth Amendment of the Federal Constitution."

**{¶ 63}** Specifically, defendant argues that the prosecutor violated his rights in three ways: first, by introducing his medical records at trial as argued in his third assignment of error; second, by introducing "other acts" evidence at trial as argued in his fifth assignment of error; and third, by making improper comments during closing arguments that "appeal[ed] to the passion of the jury."

**{¶ 64}** We overruled defendant's third and fifth assignments of error, and as a result, we conclude that the prosecution's introduction of defendant's medical records and "other acts" evidence does not amount to misconduct. We review the prosecutor's remarks during closing arguments under the proper standard.

**{¶ 65}** "The test for prosecutorial misconduct is whether remarks are improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293. When misconduct is alleged during closing arguments, an appellate court must examine the entire statement to determine whether the result of the proceedings would have been different had the prosecutor not made the remarks at issue. *State v. Treesh,* 90 Ohio St.3d 460, 2001-Ohio-4, 739 N.E.2d 749; *State v. Loza* (1990), 71 Ohio St.3d 61, 641 N.E.2d 1082.

**{¶ 66}** In the instant case, defendant argues that it was improper for the prosecutor to say the following during closing arguments: "take [defendant] off [of] the streets of our community." We find nothing inflammatory or prejudicial about this comment. As stated earlier in this opinion, the evidence against defendant was overwhelming, and we will not conclude that his convictions were the result of an improper appeal to the jury's passions.

**{¶ 67}** Assignment of Error IX is overruled.

**{¶ 68}** "X. The admission of the decedent's autopsy photos violated Evid.R. 403(A) and the Fourteenth Amendment of the Federal Constitution."

**{¶ 69}** The admissibility of photographs at trial is reviewed for an abuse of discretion. Autopsy photographs in particular are admissible, despite being gruesome, if the probative value of the picture outweighs the danger of it being prejudicial to the accused. *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621; Evid.R. 403(A).

**{¶ 70}** In the instant case, the State introduced into evidence two autopsy photographs of the 22-month-old victim. In admitting the pictures, the court stated that "this is the most restrained set of autopsy photos I've ever been asked to introduce. There are no duplicatives. Yes, they're horrible to look at but they do show the injuries so they're absolutely relevant."

**{¶ 71}** Defendant did not dispute the cause of death; therefore, the probative value of the photographs was limited. However, defendant failed to argue how these photographs were prejudicial given the strength of the State's case against him. We reached a similar conclusion in *State v. Goshay* (Nov. 18, 1993), Cuyahoga App. No. 63902. "The admission of this photograph into evidence was harmless error beyond a reasonable doubt. * * * [I]t possessed no probative value upon which the jury could reasonably base any inference of guilt. Although the photograph may have been gruesome to some individuals, it was not so macabre or sensually shocking that it would inflame the jury or impair its ability to make an objective determination." The *Goshay* court concluded the error harmless in light of "overwhelming evidence in support of Goshay's conviction." Id.

**{¶ 72}** Assuming arguendo that the court abused its discretion in admitting the autopsy photographs in the instant case, we hold that the error was harmless. Nothing in the record suggests that the jury convicted defendant based on the photographs.

**{¶ 73}** Assignment of Error X is overruled.

**{¶ 74}** "XI. The appellant's sentence is contrary to Ohio law and the trial judge abused her discretion by imposing a cumulative sentence of 15 years and a lifetime driver's license suspension for 'strict liability' offenses when no mens rea was alleged or proven."

**{¶ 75}** In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court, in a plurality decision, addressed the standard for reviewing felony sentencing. See, also, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Appellate courts must apply the following two-step approach: "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *Kalish*, supra, at ¶26.

**{¶ 76}** In the instant case, defendant was sentenced to seven years in prison for the homicide, which is a second degree felony punishable by two to eight years in prison and fours years in prison for each assault, third degree felonies punishable by one to five years in prison. The court ran defendant's

sentences consecutively, for a total of 15 years in prison. This is within the statutory range for defendant's convictions. Additionally, the court suspended defendant's driver's license for life, which is also within the statutory range. R.C. 4511.19(G); R.C. 4510.02. As such, defendant's sentence is not contrary to law.

**{¶ 77}** In turning to the second prong of *Kalish*, we review defendant's sentence for an abuse of discretion. Defendant argues that his sentence is not proportionate to other sentences in similar cases. R.C. 2929.11(B) states that a felony sentence shall be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

**{¶ 78}** Consistency in felony sentencing is ensured by the statutory factors and guidelines found in R.C. 2929.11, R.C. 2929.12, R.C. 2929.13, and R.C. 2929.14. Thus, for a sentence to be "inconsistent," it must be contrary to law or the trial court must have abused its discretion by imposing it. See *State v. Georgakopoulos*, Cuyahoga App. No. 81934, 2003-Ohio-4341, at ¶23 (holding that "[s]imply pointing out an individual or series of cases with different results will not necessarily establish a record of inconsistency"); *State v. Rutter*, Muskingham App. No. 2006-CA-0025, 2006-Ohio-4061 (applying *Georgakopoulos* post-*Foster*).

**{¶ 79}** The court stated that it sentenced defendant in the instant case to "punish you for this crime, to protect the public from your selfish actions in the

future." The court noted that defendant knew what he was doing when he took "all the pills [he] wanted," then hid behind the argument that he was following his doctor's orders. The court also stated that defendant abused drugs, had prior accidents when driving impaired, and took no responsibility for his actions. The court stated in its final judgment entry that it took all the statutory factors into consideration when sentencing defendant.

**{¶ 80}** This case is factually different from many other vehicular homicide and assault cases because defendant denied guilt and went to trial. In many of the OVI related cases that defendant brought to the court's attention, the offenders pled guilty to driving under the influence, and in a sense, took responsibility for their actions.

**{¶ 81}** Accordingly, we find no abuse of discretion in the court's sentencing defendant and Assignment of Error XI is overruled.[2]

**{¶ 82}** "XII. The cumulative errors in this case deprived the appellant of a fair trial and [a] fair sentencing hearing in violation of the Fourteenth Amendment."

**{¶ 83}** The Ohio Supreme Court has held that "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the

[2]The court also sentenced defendant to six months in jail for the first degree misdemeanor. Pursuant to R.C. 2929.24(A)(1), this is the maximum sentence for a first degree misdemeanor. We review misdemeanor sentences for an abuse of discretion and "a reviewing court will presume that the trial judge followed the standards in R.C. 2929.22, absent a showing to the contrary." *State v. Jick*, Mahoning App. No. 08 MA 110, 2009-Ohio-4966, at ¶20 (internal citations omitted). In the instant case, defendant points to nothing in the record showing an abuse of the court's discretion.

constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623.

**{¶ 84}** In the instant case, we found two instances of harmless error. First, the introduction of "other acts" evidence at trial and second, the submission to the jury of autopsy photographs. We found these two errors harmless because of the overwhelming evidence against defendant that he drove his truck while impaired and under the influence of drugs, killing one child and severely injuring two others.

**{¶ 85}** Accordingly, defendant's showing of isolated instances of harmless error are "substantially, if not completely, diluted" by the State's case against him. *State v. Blanton*, Montgomery App. No. 18923, 2002-Ohio-1794 (citing *State v. Hamilton* (Feb. 12, 1988), Montgomery App. No. 10007).

**{¶ 86}** Assignment of Error XII is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

JAMES J. SWEENEY, JUDGE

MARY J. BOYLE, P.J., and
LARRY A. JONES, J., CONCUR