[Cite as *State v. Jones*, 2010-Ohio-5211.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. ERRON W. JONES Appellant	C. A. No. 25031 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 07 12 4178

DECISION AND JOURNAL ENTRY

Dated: October 27, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Erron Jones got into a fight with Harvey Bell after Mr. Bell insulted him. An hour or two after the fight, Mr. Bell died from asphyxiation. An autopsy revealed that blunt force trauma fractured his larynx and caused it to lose its rigidity. The trauma also caused bleeding and swelling within the larynx, reducing the passageway for air. Mr. Bell's reduced oxygen intake, heart disease, and alcohol and illicit drug use combined to cause his heart to stop. A Grand Jury indicted Mr. Jones for involuntary manslaughter, a felony of the first degree, and felonious assault, a felony of the second degree. More than a year later, it also indicted him for involuntary manslaughter, a felony of the third degree. A jury convicted Mr. Jones of the felony of the third degree involuntary manslaughter charge, and the trial court sentenced him to three years in prison. Mr. Jones has appealed, arguing that the State violated his right to a speedy trial regarding the supplemental charge, that the trial court incorrectly refused to let a witness testify

about what Mr. Bell had told her about other fights he had been in earlier that day, and that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. This Court affirms because Mr. Bell has not demonstrated that he was prejudiced by the supplemental indictment, the trial court correctly excluded the testimony about Mr. Bell's other fights, and his conviction is supported by sufficient evidence and is not against the manifest weight of the evidence.

FACTS

{¶2} At the time of his death, Mr. Bell was living at a boarding house owned and operated by Cindy Lollar-Owens. On the evening of November 26, 2007, Mr. Bell returned to the house "high and drunk" with bruises on his face. When Ms. Lollar-Owens asked him what had happened, Mr. Bell told her that he had been in a couple of fights just before he got home.

{¶3} Mr. Bell and Ms. Lollar-Owens joined Mr. Jones, Rhonda Williams, and a man named Ricky in a common room of the house. They were sitting around talking when Mr. Jones asked if everyone wanted something to drink. They did, so Mr. Jones gave Mr. Bell some money to go to a store across the street to buy them each a beer. When Mr. Bell returned about 10 minutes later, he distributed the beers and sat down on a couch next to Mr. Jones. As soon as Mr. Bell opened his beer, he called Mr. Jones a bitch. Mr. Jones confronted Mr. Bell about the insult, but Ms. Lollar-Owens diffused the situation and the group continued talking. About 30 to 45 minutes later, everyone had finished their beers, so Mr. Jones asked if they wanted another one. He again gave Mr. Bell money to buy beer from the store across the street.

{¶4} About 15 minutes after Mr. Bell returned from the store a second time, he began insulting Mr. Jones again. Ms. Lollar-Owens told Mr. Jones to ignore him because that was just Mr. Bell's demeanor. Ms. Lollar-Owens got up to use the bathroom, but after she left the room,

she heard some "rumbling." She ran back to the common room and saw Mr. Jones standing over Mr. Bell hitting him. Mr. Bell was lying on his back on the couch. Ms. Lollar-Owens could not see what Mr. Jones was doing with his left hand, but she saw him punch Mr. Bell at least three times in his face or chest with his right hand.

{¶5} According to Ms. Lollar-Owens, she jumped on Mr. Jones's back and tried to pull him away from Mr. Bell. She also called for help from one of the other boarding house residents because the other people in the common room were not doing anything to stop the fight. One of the other residents entered the common room and pulled Mr. Jones into the kitchen. Ms. Lollar-Owens testified that it was possible that Mr. Jones's foot struck Mr. Bell's head as he was being pulled away from Mr. Bell. She did not know whether it would have been because Mr. Jones intentionally kicked Mr. Bell or whether he just lost his balance and his foot came off the floor as he was being pulled backwards.

{¶6} According to Ms. Williams, who was sitting across from Mr. Bell and Mr. Jones, the fight started after Mr. Bell got in Mr. Jones's face and called him a bitch again. She testified that Mr. Jones yanked Mr. Bell up and began punching him with his right hand. Because Mr. Jones came at Mr. Bell so quickly, Mr. Bell was overcome with shock and did not try to fight back. She testified that she saw Mr. Jones punch Mr. Bell four or five times in the chest.

{¶7} After the fight, Mr. Bell looked worn out. He went into the kitchen, however, and apologized to Mr. Jones. He then went upstairs. Ms. Lollar-Owens followed him upstairs and asked if he was all right. According to Ms. Lollar-Owens, she checked on Mr. Bell again about a half hour later when he was in the bathroom. She then left the house for a little while. About two hours later, she received a call from her son telling her that he had discovered Mr. Bell in the

bathroom and that he was not moving. She returned to the boarding house and called 911, but the paramedics were unable to resuscitate Mr. Bell.

SPEEDY TRIAL

{¶8} Mr. Jones's first assignment of error is that the State violated his right to a speedy trial by trying him on the supplemental indictment. His second assignment of error is that his lawyer was ineffective for not arguing that the supplemental indictment violated his speedy trial rights. Because these assignments of error are related, we will consider them together.

{¶9} "The right of an accused to a speedy trial is recognized by the Constitutions of both the United States and the [S]tate of Ohio." *State v. Pachay*, 64 Ohio St. 2d 218, 219 (1980). "The statutory speedy trial provisions, R.C. 2945.71 et seq., constitute a rational effort to enforce the constitutional right to a public speedy trial of an accused charged with the commission of a felony or a misdemeanor . . . ." *Id.* at syllabus. Accordingly, "for purposes of bringing an accused to trial, the statutory speedy trial provisions of R.C. 2945.71 *et seq.* and the constitutional guarantees found in the United States and Ohio Constitutions are coextensive." *State v. O'Brien*, 34 Ohio St. 3d 7, 9 (1987). "[T]he constitutional guarantees may be found to be broader than [the] speedy trial statutes in some circumstances." *Id.*

{¶10} Section 2945.71(C)(2) of the Ohio Revised Code provides that "[a] person against whom a charge of felony is pending . . . [s]hall be brought to trial within two hundred seventy days after the person's arrest." "[E]ach day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E). "Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by [R.C. 2945.71]." R.C. 2945.73(B).

{¶11} "It is well-settled law that an accused may waive his constitutional right to a speedy trial provided that such a waiver is knowingly and voluntarily made." *State v. King*, 70 Ohio St. 3d 158, 160 (1994) (citing *Barker v. Wingo*, 407 U.S. 514, 529 (1972)). "To be effective, an accused's waiver of his or her constitutional and statutory rights to a speedy trial must be expressed in writing or made in open court on the record." *Id*. at syllabus. If a speedy trial waiver does not mention a specific time period, it is unlimited in duration. *State v. Skorvanek*, 9th Dist. No. 08CA009399, 2009-Ohio-3924, at ¶13 (citing *State v. Kovacek*, 9th Dist. No. 00CA007713, 2001 WL 577664 at *4 (May 30, 2001)). In addition, if it "fails to include a specific date as the starting point for the tolling of time, the waiver is deemed to be effective from the date of arrest." *Id*. (quoting *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶8).

{¶12} On December 27, 2007, the Grand Jury indicted Mr. Jones for involuntary manslaughter "in that he did cause the death of Harvey Bell as a proximate result of . . . committing or attempting to commit a felony, in violation of Section 2903.04(A) of the [Ohio] Revised Code, a felony of the first degree . . . ." It also indicted him for felonious assault based on the same incident. Mr. Jones signed a written waiver of his speedy trial rights. He also requested a number of continuances, which tolled the speedy trial deadline. R.C. 2945.72(E). On January 23, 2009, the Grand Jury issued a supplemental indictment, charging Mr. Jones with involuntary manslaughter "in that he did cause the death of Harvey Bell as a proximate result of . . . committing or attempting to commit the offense of [a]ssault, . . . in violation of Section 2903.04(B) . . . a felony of the third degree . . . ."

{¶13} Mr. Jones has argued that his speedy trial waiver and the tolling that applied to the original charges do not apply to the supplemental charge. In *State v. Adams*, 43 Ohio St. 3d 67,

syllabus (1989), the Ohio Supreme Court held that, "[if] an accused waives the right to a speedy trial as to an initial charge, th[e] waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver." It has applied the same rule to pretrial motions that toll the speedy trial deadline under Section 2945.72(E). *State v. Homan*, 89 Ohio St. 3d 421, syllabus (2000) ("[If] a criminal defendant files a pretrial motion and the state later files against the defendant additional, related criminal charges, R.C. 2945.72(E) does not extend the time within which the defendant must be brought to trial on those additional charges."). In *State v. Blackburn*, 118 Ohio St. 3d 163, 2008-Ohio-1823, it concluded that *Homan* does not apply if the State dismisses an indictment and later charges the defendant with a new crime arising out of the same set of facts. *Id*. at syllabus. *Blackburn*, however, recognized only a narrow exception to *Homan*, which does not apply in this case. See *State v. Henrick*, 9th Dist. No. 24771, 2010-Ohio-877, at ¶28.

{¶14} The facts of this case are similar to *State v. Henrick*, 9th Dist. No. 24771, 2010-Ohio-877. In that case, Mr. Henrick was indicted on two felonies. The State, therefore, had 270 days to bring him to trial. Some of that time was tolled because of motions Mr. Henrick filed. More than 270 days after the initial indictment, the State filed a supplemental indictment, charging Mr. Henrick with a new crime arising out of the same facts and circumstances as the initial charges. Following *Homan*, we concluded that the pretrial motions Mr. Henrick filed before the supplemental indictment was issued "did not extend the time within which [Mr.] Henrick was to be brought to trial on the supplemental charge." *Id*. at ¶29. Because Mr. Henrick was not brought to trial on the supplemental charge until well after the statutory 270-day period elapsed, we concluded that the trial court incorrectly denied his motion to dismiss the supplemental charge. *Id*.

{¶15} In this case, Mr. Jones was indicted on the supplemental charge more than 270 days after the original indictment. It is not disputed that all of the charges against Mr. Jones arose out of the same set of circumstances. Because the supplemental charge arose out of the same circumstances as the original charges, the date that the speedy trial time began to run on it is the same as for the original charges. See R.C. 2945.71(D). The waiver and tolling that applies to the initial charges, however, do not apply to it. *State v. Overholt*, 9th Dist. No. 03CA0119-M, 2004-Ohio-4969, at ¶12. Accordingly, at the time the Grand Jury indicted Mr. Jones on the supplemental charge, the speedy trial time for it had already expired. *Id*.

{¶16} Although the supplemental indictment was untimely, Mr. Jones was not prejudiced by that fact. The original indictment charged Mr. Jones with involuntary manslaughter under Section 2903.04(A) and felonious assault under 2903.11(A)(1). The supplemental indictment charged him with involuntary manslaughter under Section 2903.04(B). If the felony underlying a charge of involuntary manslaughter under Section 2903.04(A) is felonious assault under Section 2903.11(A)(1), then involuntary manslaughter under Section 2903.04(B) is a lesser-included offense of the Section 2903.04(A) charge. *State v. Turner*, 2d Dist. No. 18026, 2000 WL 1064021 at *6 (Aug. 4, 2000). "Lesser included offenses need not be separately charged in an indictment, because when an indictment charges a greater offense, it 'necessarily and simultaneously charges the defendant with lesser included offenses as well.'" *State v. Evans*, 122 Ohio St. 3d 381, 2009-Ohio-2974, at ¶8 (quoting *State v. Smith*, 121 Ohio St. 3d 409, 2009-Ohio-787, at ¶14). The original indictment charged Mr. Jones with violating Section 2903.04(A) and the underlying felony was felonious assault under Section 2903.11(A)(1). The State, therefore, could have requested a jury instruction on the lesser-

included offense of involuntary manslaughter under Section 2903.04(B) even if it had not supplemented the indictment.

{¶17} Mr. Jones has not argued that his trial on the original indictment was untimely. Because he could have been convicted of violating Section 2903.04(B) under the original indictment, whether the supplemental indictment should have been dismissed is immaterial. See Crim. R. 52(A). Accordingly, because Mr. Jones has not demonstrated that the outcome of his case would have been different, even if the supplemental indictment had been dismissed, we conclude that he has failed to demonstrate that the trial court's failure to dismiss the supplemental indictment was plain error or that his lawyer was ineffective for not moving to dismiss it. See Crim. R. 52(B); *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, at ¶204. Mr. Jones's first and second assignments of error are overruled.

HEARSAY STATEMENTS

{¶18} Mr. Jones's third assignment of error is that the trial court incorrectly refused to let him cross-examine a witness regarding fights Mr. Bell claimed to have been involved in just before arriving at the boarding house. The trial court determined that such testimony was inadmissible hearsay. He has argued that the testimony was admissible under the present sense impression, excited utterance, and existing state of mind exceptions to the hearsay rule.

{¶19} Under Rule 802 of the Ohio Rules of Evidence, "[h]earsay is not admissible except as otherwise provided by . . . these rules . . . ." "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid. R. 801(C).

{¶20} Evidence Rule 803 provides a number of exceptions to the hearsay rule. Under Rule 803(1), a present sense impression is "[a] statement describing or explaining an event or

condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness." Ms. Lollar-Owens testified that, when Mr. Bell arrived at the boarding house, he "had bruises and stuff on his face and . . . was kind of beat up." He appeared "kind of agitated and very much intoxicated." Ms. Lollar-Owens was not alarmed by Mr. Bell's appearance because he had arrived at her place like that before. She asked him what had happened to him, and he told her that he had been "in a couple of fights." He told her that the fights had occurred "[j]ust before he got there," "[p]retty immediately" before she asked him what had happened.

{¶21} The trial court determined that Ms. Lollar-Owens's testimony was unclear about the correlation between when Mr. Bell was in the alleged prior fights and when he told her about them. Moreover, it determined that, in light of Ms. Lollar-Owens's "unequivocal testimony on two or three occasions that Mr. Bell was highly intoxicated . . . there is ample evidence of a lack of trustworthiness of his ability to recount for her the particulars of what he had just gone through . . . ."

{¶22} Mr. Jones has argued that the trial court incorrectly concluded that Mr. Bell was not trustworthy because he "came home very high and drunk every day." The Staff Notes to Evidence Rule 803(1) indicate that the rule's "lack of trustworthiness" provision vests the trial court with discretion regarding that question "for the purpose of narrowing the availability of [the] exception." We conclude that the trial court exercised proper discretion when it concluded that, just because Mr. Bell was often intoxicated, it did not mean that the statements he made to Ms. Lollar-Owens did not lack trustworthiness.

{¶23} Under Evidence Rule 803(2), excited utterances are statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused

by the event or condition." "The excited-utterance exception is essentially a codification of Ohio common law governing spontaneous exclamations." *State v. Wallace*, 37 Ohio St. 3d 87, 89 (1988). "At common law, [courts] applied a four-part test in determining what constituted a spontaneous exclamation: '(a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination *continued* to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.'" *Id.* (quoting *Potter v. Baker*, 162 Ohio St. 488, paragraph two of the syllabus (1955)). The Staff Notes for Rule 803(2) provide that "[t]o qualify as an excited utterance consideration must be given to (a) the lapse of time between the event and the declaration, (b) the mental and physical condition of the declarant, (c) the nature of the statement and (d) the influence of intervening circumstances."

{¶24} The Ohio Supreme Court has "continued to follow the *Potter* criteria since adoption of the Rules of Evidence." *State v. Taylor*, 66 Ohio St. 3d 295, 301 n.2 (1993). According to the Supreme Court, "[t]he standard for reviewing decisions of the trial judge on excited-utterance exceptions was set forth by Judge Taft in *Potter* . . . : 'It is elementary that the trial judge is to decide those questions of fact which must be decided in order to determine

whether certain evidence is admissible. . . . If his decision of those questions of fact, as reflected in his ruling on the admissibility of . . . [the] declaration, was a reasonable decision, an appellate court should not disturb it.'" *State v. Wallace*, 37 Ohio St. 3d 87, 90 (1988) (quoting *Potter v. Baker*, 162 Ohio St. 488, 500 (1955)).

{¶25} The only support for Mr. Jones's argument that Mr. Bell's statements to Ms. Lollar-Owens were excited utterances is Ms. Lollar-Owens's testimony that, when Mr. Bell arrived at the boarding house, he appeared "kind of agitated." We conclude that, even assuming the alleged fights were "occurrence[s] startling enough to produce a nervous excitement" in Mr. Bell, Ms. Lollar-Owens's limited testimony did not establish that the excitement caused him "to lose a domination over his reflective faculties" or that "such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs" at the time he spoke to her. *State v. Wallace*, 37 Ohio St. 3d 87, 89 (1988) (quoting *Potter v. Baker*, 162 Ohio St. 488, paragraph two of the syllabus (1955)). The trial court reasonably concluded that the excited utterance exception did not apply.

{¶26} Under Evidence Rule 803(3), a statement regarding "[t]hen existing, mental, emotional, or physical condition" is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Although this exception allowed Ms. Lollar-Owens to testify about what Mr. Bell said to her about how he felt at the time he arrived at the boarding house, it did not allow her to testify about what Mr. Bell told her about the details of his prior fights. *State v. Leonard*, 104

Ohio St. 3d 54, 2004-Ohio-6235, at ¶101 (concluding that Rule 803(3) "does not permit witnesses to relate why the declarant held a particular state of mind.").

{¶27} Mr. Jones has argued that, under the state of mind exception, Ms. Lollar-Owens should have been allowed to testify that Mr. Bell told her that the reason he antagonized Mr. Jones was because Mr. Jones would not go after the people who had just beaten him up. He has argued that that testimony would have established Mr. Bell's anger toward Mr. Jones and his plan to start a fight with him. The problem with Mr. Jones's argument, however, is that he never attempted to ask Ms. Lollar-Owens whether she knew why Mr. Bell was upset with Mr. Jones or about Mr. Bell's state of mind regarding Mr. Jones. The only thing he asked Ms. Lollar-Owens about was Mr. Bell's state of mind when he arrived at the boarding house, which was before they went into the common room. Mr. Jones's third assignment of error is overruled.

INVOLUNTARY MANSLAUGHTER

{¶28} Mr. Jones's fourth assignment of error is that the trial court incorrectly denied his motion for judgment of acquittal. Under Rule 29(A) of the Ohio Rules of Criminal Procedure, a defendant is entitled to a judgment of acquittal on a charge against him "if the evidence is insufficient to sustain a conviction . . . ." Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced an average juror of Mr. Jones's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶29} The jury convicted Mr. Jones "of the offense of Involuntary Manslaughter as a proximate result of committing or attempting to commit Assault." Under Section 2903.04(B) of

the Ohio Revised Code, "[n]o person shall cause the death of another . . . as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree . . . ." Assault is generally a misdemeanor of the first degree. R.C. 2903.13(C). A person commits assault by either "knowingly caus[ing] or attempt[ing] to cause physical harm to another . . . [or] recklessly caus[ing] serious physical harm to another . . . ." R.C. 2903.13(A), (B). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶30} Ms. Williams testified that the fight started when Mr. Bell got in Mr. Jones's face and called him a bitch a second time. She said that Mr. Jones pulled Mr. Bell up and began punching him. By the time Ms. Lollar-Owens entered the room, Mr. Bell was lying on the couch and Mr. Jones was standing over him, still punching him. According to Ms. Williams and Ms. Lollar-Owens, Mr. Jones punched Mr. Bell at least three to five times. Ms. Williams testified that the punches were to Mr. Bell's chest, while Ms. Lollar-Owens testified that she could not say whether they were to his head or chest.

{¶31} According to the State's forensic pathologist, there were a number of small abrasions on Mr. Bell's face, which were caused by blows to the face. The top and back of Mr. Bell's head had a number of bruises caused by 14 overlapping impacts. He also suffered about a dozen blows to his back. Those injuries, however, did not play any role in his death.

{¶32} The forensic pathologist testified that it was the injuries to Mr. Bell's neck that caused his death. There were fingernail gouges on his neck, suggesting that it had been gripped vigorously. There was swelling and bleeding inside his larynx and some of its cartilage was fractured. The injuries were the result of blunt force, a "strangulation type injury." According to

the forensic pathologist, Mr. Bell would not have died from his neck injuries right away. It would have taken about an hour for him to die.

{¶33} Viewing the evidence in a light most favorable to the prosecution, the State's witnesses established that Mr. Jones knowingly caused physical injury to Mr. Bell, resulting in his death. Although Ms. Lollar-Owens and Ms. Williams did not remember seeing Mr. Jones choke Mr. Bell, they could not remember what he was doing with his left hand while he was punching Mr. Bell with his right hand. Ms. Williams testified that Mr. Jones "yanked" Mr. Bell up and Ms. Lollar-Owens testified that Mr. Jones was standing over Mr. Bell while Mr. Bell was lying on the couch. Mr. Bell weighed 132 pounds. It is reasonable to infer that Mr. Jones pulled Mr. Bell up by his neck and then held him down against the couch with his left hand clenched around his throat, fracturing his larynx and causing the bleeding and swelling that led to his death.

{¶34} The timing of Mr. Bell's death is consistent with the State's evidence. After Mr. Bell got to the boarding house, he sat in the common room, talking and drinking with the other occupants for over an hour. He also made two trips to a store across the street. He did not die until between a half hour and two and a half hours after fighting with Mr. Jones. That was consistent with the forensic pathologist's testimony that it would have taken about an hour for Mr. Bell's injuries to kill him. We, therefore, conclude that the trial court correctly denied Mr. Jones's motion for judgment of acquittal. His fourth assignment of error is overruled.

MANIFEST WEIGHT

{¶35} Mr. Jones's fifth assignment of error is that his conviction is against the manifest weight of the evidence. If a defendant argues that his conviction is against the manifest weight of the evidence, this Court "must review the entire record, weigh the evidence and all reasonable

inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶36} Mr. Jones called a forensic pathologist who mostly agreed with the State's expert. He disagreed slightly about how Mr. Bell's neck injury ultimately contributed to his death, but agreed that it was caused by blunt force trauma, either from a direct impact or compression. He agreed that Mr. Bell's death would not have been sudden or prolonged, but would have taken between 30 minutes and two hours from the time of the injury. He also testified that someone with the type of neck injuries that Mr. Bell had might experience "harsh, raspy" breathing because of the airway restriction. The sound would be distinguishable from someone who was merely breathing heavily.

{¶37} Mr. Bell sat in the common room drinking and talking with the other occupants for more than an hour after returning to the boarding house, and he made two beer runs for the group. None of the witnesses testified that he was having any difficulty breathing during that time. According to the timeline given by Ms. Lollar-Owens, he died between a half hour and two and a half hours after fighting with Mr. Jones. That was consistent with the mortality timeframe given by both forensic pathologists. We conclude that the jury did not lose its way when it found that Mr. Bell's death was the proximate result of physical harm that Mr. Jones knowingly caused. Mr. Jones's fifth assignment of error is overruled.

CONCLUSION

{¶38} Mr. Jones was not prejudiced by the trial court's failure to dismiss the supplemental indictment, the trial court properly prohibited Ms. Lollar-Owens from testifying

about the details of the fights Mr. Bell said he had been in earlier in the day, and Mr. Jones's conviction for involuntary manslaughter is supported by sufficient evidence and is not against the manifest weight of the evidence. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

NEIL P. AGARWAL, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.