

**IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
SENECA COUNTY**

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**STATE OF OHIO,**

**PLAINTIFF-APPELLEE,**

**CASE NO. 13-22-16**

**v.**

**TIFFANY P. ROBERTSON,**

**O P I N I O N**

**DEFENDANT-APPELLANT.**

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**Appeal from Seneca County Common Pleas Court  
Trial Court No. 21 CR 0020**

**Judgment Affirmed**

**Date of Decision: June 29, 2023**

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**APPEARANCES:**

***Michael H. Stahl* for Appellant**

***Angela M. Boes* for Appellee**

**WALDICK, J.**

{¶1} Defendant-appellant, Tiffany P. Robertson (“Robertson”), brings this appeal from the November 7, 2022, judgment of the Seneca County Common Pleas Court sentencing her to 42 months in prison after she was convicted by a jury of Aggravated Vehicular Homicide in violation of R.C. 2903.06(A)(2)(a), a third degree felony. For the reasons that follow, we affirm the judgment of the trial court.

*Background*

{¶2} On July 25, 2020, shortly before 5:30 p.m., Robertson was driving a rental car between 108 and 113 mph on a county road she was unfamiliar with. The county road had a speed limit of 55 mph, and Robertson went around a curve with a suggested speed of 45 mph. After coming out of the curve, Robertson claimed that she observed a motorcycle being driven on, near, or across the double-yellow center line. Robertson swerved to the left, into the motorcyclist’s lane, claiming that she was trying to avoid a collision; however, Robertson struck the motorcyclist while he was in his lane, *between approximately one-and-a-half feet and four feet from the white fog line*. At the time of the crash, Robertson was traveling between 87 and 98 mph. The motorcyclist, Jeremy Martinez (“Martinez”), was killed as a result of the collision.

{¶3} On February 24, 2021, Robertson was indicted for Aggravated Vehicular Homicide in violation of R.C. 2903.06(A)(2)(a), a third degree felony. She pled not guilty to the charge.

{¶4} The case proceeded to a jury trial, which was held October 3-6, 2022. The State and the defense both presented expert testimony regarding crash reconstruction. Robertson also testified in her own defense. Ultimately the jury found Robertson guilty of Aggravated Vehicular Homicide as charged in the indictment.

{¶5} On November 7, 2022, Robertson was sentenced to serve a 42-month prison term. It is from this judgment that she appeals, asserting the following assignments of error for our review.

#### **First Assignment of Error**

**Tiffany Robertson's right to due process and a fair trial under the Ohio and United States Constitutions were violated when the trial court permitted the case to continue where the State had either destroyed, failed to preserve for independent testing, or failed to engage in statutorily mandated evidence collection which thwarted the truth-seeking function of the court—no fair trial was or is possible in this case.**

#### **Second Assignment of Error**

**The trial court erred when it permitted, over objection, expert testimony contrary to Ohio Criminal Rule 16(K) from the county Coroner which made multiple prejudicial pathology claims which were not presented in a report, as well as the testimony of the State's crash reconstructionist[.]**

### **Third Assignment of Error**

**The trial court erred when it did not impose effective sanctions upon the State to maintain the integrity of the truth-seeking process, denying Ms. Robertson her due process right to present a defense based upon the evidentiary issues raised in Errors I and II above, and for refusing to permit, despite the failure by the State to conduct a statutorily required toxicology test on the decedent (who was in possession of marijuana at the time of the crash), Ms. Robertson to admit evidence of the decedent's multiple prior convictions for, inter alia, Operating a Motor Vehicle While Intoxicated[.]**

### **Fourth Assignment of Error**

**The trial court erred in permitting the State to admit, over objection, overly gruesome and repetitive photographs from the scene of the crash[.]**

### **Fifth Assignment of Error**

**The trial court erred when it refused, despite the above evidentiary issues which challenge the credibility of the State's witnesses and the State's theory of the case in general, and despite credible evidence presented by the defense which supported, at most, a conviction based upon negligence, to instruct the jury on the lesser included offense of vehicular homicide[.]**

### **Sixth Assignment of Error**

**The trial court erred in refusing to provide the jury with an instruction, pursuant to this Court's ruling in *State v. Waldock*, that “[p]roof of excessive speed in the operation of a motor vehicle under a charge of vehicular homicide is generally not by itself sufficient to constitute \*\*\*recklessness.”**

### **Seventh Assignment of Error**

**The cumulative effect of the above errors, taken together, resulted in a trial which did not fulfill its truth seeking objective, and in so**

**failing deprived Tiffany Robertson of her rights to due process and a fair trial under the Ohio and United States Constitutions[.]**

### **Eighth Assignment of Error**

**The jury lost its way in evaluating the conflicting nature of the evidence in this case and rendered a verdict despite the existence of reasonable doubt, making the verdict stand against the manifest weight of the evidence, and the verdict is not supported by sufficient evidence[.]**

{¶6} We will begin our review of Robertson’s appeal with the Eighth Assignment of Error, because a discussion of the evidence in this case will inform the analysis of other assignments of error. We also elect to address the remaining assignments of error out of the order in which they were raised.

### *Eighth Assignment of Error*

{¶7} In her eighth assignment of error, Robertson argues that there was insufficient evidence to convict her of Aggravated Vehicular Homicide and that her conviction was against the manifest weight of the evidence.

### **Standard of Review**

{¶8} “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259 (1991), paragraph two of the syllabus. Consequently, “[t]he 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.” *Id.* “In deciding if the evidence was sufficient, we neither resolve evidentiary conflicts nor assess the credibility of witnesses, as both are functions reserved for the trier of fact.” *State v. Jones*, 1st Dist. Hamilton Nos. C-120570 and C-120571, 2013-Ohio-4775, ¶ 33.

{¶9} By contrast, when reviewing whether a verdict was against the manifest weight of the evidence, the appellate court sits as a “thirteenth juror” and examines the conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. In doing so, this court must review the entire record, weigh the evidence and all of the reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the factfinder “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Id.*

{¶10} Nevertheless, a reviewing court must allow the trier-of-fact appropriate discretion on matters relating to the credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230, 231 (1967). When applying the manifest-weight standard, “[o]nly in exceptional cases, where the evidence ‘weighs heavily against the conviction,’ should an appellate court overturn the trial court’s judgment.” *State v. Haller*, 3d Dist. Allen No. 1-11-34, 2012-Ohio-5233, ¶ 9, quoting *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 119.

Controlling Authority

{¶11} Robertson was convicted of Aggravated Vehicular Homicide in violation of R.C. 2903.06(A)(2)(a), which reads as follows:

(A) No person, while operating \* \* \* a motor vehicle \* \* \* shall cause the death of another \* \* \* in any of the following ways:

\* \* \*

(2) In one of the following ways:

(a) Recklessly[.]

The mental culpability element of the preceding statute, recklessly, is defined in R.C. 2901.22(C) as follows:

A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

Evidence Presented at Trial<sup>1</sup>

{¶12} On July 25, 2020, shortly before 5:30 p.m., Daniel Gerschutz was in his home on West County Road 59, in Carey, Ohio, when he heard a motorcycle traveling down the road. Daniel once had a motorcycle, and he missed riding, so he went to the window and watched as the motorcycle passed his house. Daniel saw a

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<sup>1</sup> Although this Court has reviewed the entire record in this case, what follows is a *summary* of the evidence presented at trial. Failure to mention any specific testimony does not indicate we did not consider it.

man on the motorcycle in the middle of his lane, with both hands on his handlebars. Daniel testified that the man looked happy, and Daniel guessed that the motorcycle was traveling approximately 50 mph.

{¶13} Daniel watched the motorcycle until it went out of sight, but as he turned around to go into the other room he heard a loud crash. When Daniel looked outside again, he saw his mailbox go “flying across the yard with this car following it, and then the car pulled out on the road and stopped.” (Tr. at 145). Daniel saw the driver of the vehicle get out of her car and run down the road. Daniel went outside but the driver returned to the area of her vehicle and told him not to go down to the crash site, because the motorcyclist’s body was all over the road.

{¶14} Law enforcement, paramedics, and the fire department responded to the scene. The crash scene itself stretched between 200 and 300 yards.

{¶15} Trooper Michael Wiley of the Ohio State Highway Patrol arrived at the scene and spoke with Robertson. She told Trooper Wiley that she was driving approximately 60 mph, and that after she came around the curve in the road she saw the motorcyclist on the center line, moving toward her lane. Robertson stated that she made the split-second decision to swerve to the left, further into the motorcyclist’s lane, in order to avoid a head-on collision. However, her decision still resulted in a crash.



{¶16} Trooper Wiley began his investigation of the crash scene and determined that some of the physical evidence did not match Robertson's story, particularly her claim that she was only traveling approximately 60 mph. For example, Trooper Wiley observed tire marks in the eastbound lane (Robertson's lane of travel) that crossed over the center line onto the north side of the roadway. Trooper Wiley attributed those tire marks to Robertson going too fast around the curve, which had a suggested speed of 45 mph. Trooper Wiley specifically testified that tire marks began in the eastbound lane, near where the curve started, then they went over into the westbound lane (the motorcyclist's lane) *prior* to the area of impact. (Tr. at 182). The area of impact was in the westbound lane (the motorcyclist's lane), and the evidence at the scene showed that Martinez was dragged down the roadway for some distance. Martinez's body was separated into multiple pieces by the force of the collision.

{¶17} Approximately 45 minutes after he had first made contact with Robertson, Trooper Wiley went to speak with her again, having her sit in his patrol car to provide a written statement. During his conversation with Robertson, Trooper Wiley learned that Robertson was driving a rental car, that she was not familiar with the road she was driving on, and that she was driving around to kill time before she had to meet her boyfriend and his parents.

{¶18} While speaking with Robertson, Trooper Wiley detected an odor of an alcoholic beverage emanating from her breath. When Trooper Wiley asked Robertson if she had consumed any alcoholic beverages, Robertson said that she had two, twelve-ounce Miller Lite cans around 3 p.m. She also stated that she had an Adderall prescription that she took each morning in a low dose. As a result of her statements, and the odor of alcohol, Trooper Wiley had Robertson perform field sobriety tests. Through the testing Trooper Wiley determined that Robertson was not impaired at the time she performed the field sobriety tests. (Tr. at 201).

{¶19} Trooper Wiley did note that he found a small, unbroken glass jar in the roadway a couple feet from the motorcycle. The jar contained a green leafy substance that appeared to be marijuana; however, the substance was not tested and it was subsequently destroyed. Trooper Wiley also testified that Martinez did not have a motorcycle endorsement, and that there was no helmet located at the scene.

{¶20} Sergeant John Banta of the Ohio State Highway Patrol responded to the scene to investigate the crash and he performed an accident reconstruction analysis. He was qualified as an expert at trial and he testified regarding his findings. Sergeant Banta testified that five seconds prior to impact, Robertson's wheel speed was between 108-113 mph. He testified that at the speed Robertson was traveling, she could not maintain her lane of travel when negotiating the curve, which had a suggested speed of 45 mph. The collision occurred approximately 80 feet east of the

curvature in the roadway. At the time of impact, Robertson was traveling between 87-98 mph.

{¶21} Sergeant Banta testified that the physical evidence established that prior to the collision, the motorcyclist was in his (westbound) lane of travel. Sergeant Banta indicated that there was no physical evidence indicating that Martinez ever left his lane of travel. He also testified that the collision occurred less than one-and-a-half feet from the north white fog line in the westbound lane (the motorcyclist's lane). Further, Sergeant Banta testified that the primary damage to Robertson's vehicle was on the right, passenger-side. Sergeant Banta testified that the damage to the motorcycle and the gouges in the roadway indicated to him that the motorcycle was in the process of going to the ground when it was struck.

{¶22} Dr. Mark Akers, the Seneca County Coroner, testified that he determined Martinez's official cause of death, which was "Blunt Force Trauma from Motor Vehicle Collision." The evidence established, and multiple witnesses indicated, that Martinez's body was separated into multiple pieces in the roadway. Dr. Akers testified he did not order an autopsy because the cause and manner of death was readily apparent. Further, he testified that he did not order any toxicology testing of Martinez because it would not have contributed to the cause of death, which was all Dr. Akers was concerned with in his analysis. Nevertheless, when pressed by the defense, Dr. Akers acknowledged that R.C. 313.13(B) required him

to conduct a toxicology analysis in this instance, and he testified that he did not conduct that analysis.

{¶23} Further, Dr. Akers testified on cross-examination that there were potential medical issues or drugs that could have hypothetically impacted Martinez's ability to drive and these issues would have showed up in a toxicology screening. However, Dr. Akers testified that knowing that Martinez was driving fine according to a witness seconds before the crash made speculation of other causes of death such as a sudden heart attack or a fentanyl overdose unlikely.

{¶24} After the State rested its case, Robertson presented expert testimony from her own accident reconstructionist, Eric Brown. The defense indicated that Brown had more experience investigating crashes than the State's expert. Nevertheless, Brown agreed with some of Sergeant Banta's findings. For example, he agreed that Robertson's wheel speed at the time of the crash was 87-98 mph. He also agreed that the crash occurred in Martinez's lane, though he felt the collision occurred approximately four feet from the white fog line rather than between one and two feet.

{¶25} Brown testified that pursuant to his analysis, Martinez was actually also speeding at the time of impact, traveling 66 to 70 mph. Further, Brown testified that the motorcycle was more likely standing up at the time of impact, contradicting the State's expert testimony that the motorcycle was in the process of going to the

ground. In addition, Brown concluded that Martinez was straddling the double-yellow center line at the time that Robertson made her decision to swerve into Martinez's lane in an attempt to avoid the crash.

{¶26} Notably, Brown did testify that his analysis was done several months after the crash, and that he worked from photographs, among other things, because the wrecked, rented Ford had already been released before his investigation. However, through Brown's testimony, the defense emphasized that since Martinez did not have a motorcycle endorsement, since Martinez was not wearing a helmet, and since Martinez was speeding, Martinez was unlawfully operating his motorcycle. Thus the defense indicated Robertson's version of events was more likely true, being that she only left her lane of travel to avoid a head-on collision.

{¶27} Robertson testified in her own defense that she had extensive driving experience and that she had been driving her rental vehicle for several days, so she was used to operating it. She testified that although she had consumed alcohol earlier that day, it was in a small quantity and well before the accident. She testified that hours had passed and she had eaten since then.

{¶28} Robertson acknowledged that she was unfamiliar with the road and that she was not paying attention to her speed, but she did not think she was going as fast as it was recorded. She testified that she did not see the caution sign suggesting speed for the curve at 45 mph. When she was asked whether it was a

good idea to take a curve between 87 to 98 mph, she testified simply that she thought she could make it.

{¶29} Robertson claimed again that Martinez was on the center line in the road when she saw him. She testified that she assumed that he was coming back into her lane. Robertson testified that if she went straight there would have been a head-on collision, and that there were trees and a fence to her right, so she made the sudden decision to swerve left, further into Martinez's lane to try and avoid the crash.

#### Analysis

{¶30} Although Robertson's stated assignment of error indicates that her conviction for Aggravated Vehicular Homicide was not supported by sufficient evidence, her actual argument focuses on contradicting evidence and credibility of witnesses. Importantly, however, evaluation of a witness's credibility, and any conflicting testimony, is simply not relevant to a sufficiency analysis. *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, ¶ 207. Rather, a sufficiency determination concerns whether the State's evidence could establish the elements of the offense beyond a reasonable doubt.

{¶31} Here, the State clearly presented evidence of Robertson's excessive speed, of Robertson striking Martinez *in his lane of travel*, and of Martinez dying as a result of the collision. This testimony, when viewed in the light most favorable

to the State, is sufficient to establish the conviction. Thus Martinez's argument with regard to sufficiency is not well-taken.

{¶32} In arguing that her conviction for Aggravated Vehicular Homicide was against the manifest weight of the evidence, Robertson contends that although there was uncontroverted evidence of speeding in this case, "virtually everything else" was contradicted or, at the very least, in question. However, Robertson's argument ignores the fact that the evidence established, including through her own admission, that she left her lane of travel while speeding excessively. She deliberately chose to move into Martinez's lane to try and avoid a collision. Further, the evidence was uncontroverted that the collision occurred *in* Martinez's lane of travel. In fact, the collision was within four feet of the white fog line even if Robertson's expert's testimony was accepted over the State's expert. These are *significant* facts from which a jury could conclude that Martinez was operating her vehicle recklessly and that she caused the death of Martinez.

{¶33} Moreover, although Robertson emphasizes that her expert came to some different conclusions than the State's expert, the jury saw and heard the testimony of both experts. The Supreme Court of Ohio has held that, "When the jury hears testimony from competing experts with opposite opinions, such that the evidence was susceptible to more than one interpretation, as here, the jury's verdict

is not against the manifest weight of the evidence.” *State v. Garrett*, \_\_\_ Ohio St.3d \_\_\_, 2022-Ohio-4218, ¶ 139.

{¶34} Furthermore, we emphasize that Robertson testified in her own defense so the jury was able to directly evaluate the credibility of her claims. The jury was free to find that her claim that Martinez was in her lane of travel was not credible, particularly given where the crash occurred and the speed Robertson was traveling, which she acknowledged she was evidently very wrong about. *State v. DeHass*, 10 Ohio St.2d 230, 231 (1967).

{¶35} Finally, under the manifest-weight standard, “[o]nly in exceptional cases, where the evidence ‘weighs heavily against the conviction,’ should an appellate court overturn the trial court’s judgment.” *State v. Haller*, 3d Dist. Allen No. 1-11-34, 2012-Ohio-5233, ¶ 9, quoting *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 119. Here, the evidence simply does not weigh heavily against the conviction. Robertson was excessively speeding in a rental car on a road she was unfamiliar with, she left her lane of travel, and caused the death of Martinez. Based on these facts and circumstances, we cannot find that the jury clearly lost its way or created a manifest miscarriage of justice by convicting Robertson of Aggravated Vehicular Homicide. Therefore, Robertson’s eighth assignment of error is overruled.



*Sixth Assignment of Error*

{¶36} In her sixth assignment of error, Robertson argues that the trial court erred by refusing to provide a jury instruction indicating that proof of excessive speed is not generally, by itself, sufficient to constitute recklessness.

*Standard of Review*

{¶37} A trial court has broad discretion in instructing a jury. *State v. Dayton*, 3d Dist. Seneca No 13-18-41, 2019-Ohio-2635, ¶ 37. We review a trial court's refusal to provide a requested jury instruction for an abuse of discretion in light of the facts and circumstances of the case. *State v. Woolens*, 44 Ohio St.3d 64 (1989). An abuse of discretion is present when a trial court's decision is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

*Analysis*

{¶38} Prior to trial, and at the close of evidence, Robertson requested that the trial court provide a jury instruction pursuant to a legal statement this Court made in *State v. Waldock*, 3d Dist. Seneca No. 13-14-22, 2015-Ohio-1079, ¶ 72. In *Waldock*, we reviewed a sufficiency of the evidence challenge to an aggravated vehicular homicide conviction and we broadly stated that Ohio courts, including the Supreme Court of Ohio, have held that proof of excessive speed in the operation of a motor vehicle is not generally, by itself, sufficient to constitute the element of

recklessness. Robertson argued that under *Waldock*, and the cases it cited, the jury should be instructed that speed alone *cannot* constitute recklessness for purposes of an aggravated vehicular homicide conviction. The trial court denied Robertson's request and Robertson now renews her argument on appeal, asserting that because *Waldock* contained a "correct" statement of the law the requested instruction should have been provided.

{¶39} In our review of the matter, we first emphasize that the seminal case from the Supreme Court of Ohio indicating that "[e]xcessive speed in the operation of an automobile is not of itself sufficient to constitute an act of wantonness," was a civil case decided nearly a century ago on facts where the speed at the time of the accident was not even clear. *Morrow v. Hume, Adm 'x*, 131 Ohio St. 319 (1936), at syllabus; *State v. Earlenbaugh*, 18 Ohio St.3d 19, 21-22 (noting that the definition of wantonness was substantially similar in wording and effectively identical in meaning to the definition of recklessness contained in R.C. 2901.22). It is not readily evident that the *Morrow* case intended to suggest that speed of vehicles with today's capabilities can never, as a matter of law, constitute wantonness or recklessness. *See State v. Wasson*, 10th Dist. Franklin No. 02AP-211, 2002-Ohio-5963, ¶ 29 (rejecting the proposition that speeding and recklessness are, as a matter of law, mutually exclusive).<sup>2</sup>

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<sup>2</sup> This is particularly true given that "excessive speed" is not defined in *Morrow*. Excessive is defined as "exceeding what is usual, proper, necessary, or normal[.]" *Merriam-Webster's Dictionary*,

{¶40} Furthermore, while *Morrow*'s syllabus does state that "Excessive speed in the operation of an automobile is not of itself sufficient to constitute an act of wantonness," this language should not be divorced from its greater context in the case, which requires looking at the "concomitant facts." *Morrow* indicated that certain facts, when combined with speed, can establish wantonness/recklessness such as "an unusually dangerous situation and a consciousness on the part of the driver that his conduct will in common probability result in injury to another of whose dangerous position he is aware, and he drives on without any care whatever, and without slackening his speed." *Id.*

{¶41} In other words, when considering whether speed is reckless, certain surrounding issues are paramount such as how fast the vehicle was actually going, where the speeding was occurring, when the speeding was occurring, and what may be in the area. Thus whether speeding can constitute recklessness must be looked at on a case-by-case basis, with particular emphasis on the circumstances surrounding the speeding. Therefore, we do not find that the trial court abused its discretion by refusing to provide a jury instruction based on *Waldock/Morrow* that is an inaccurate statement of the law when it is divorced from its context.

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<https://www.merriam-webster.com/dictionary/excessive>. Accessed 22 May. 2023. Thus "excessive speed" could be, hypothetically, just a few mph over the speed limit. If that was the case, then "excessive speed" would not even be an apt descriptor for this case; rather, perhaps the proper description would be something more akin to "grossly excessive speed," and *Morrow/Waldock* would be entirely inapplicable.

{¶42} Notwithstanding the prior points, we would emphasize that the “concomitant facts” noted by the Supreme Court of Ohio in *Morrow* are already strikingly similar to the general jury instruction on recklessness, which was given to the jury in this case:

Recklessly is defined, a person acts recklessly when, with heedless indifference to the consequences, she disregards a substantial and unjustifiable risk or a conduct that’s likely to cause a certain result. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, she disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

(Tr. at 737). As the instruction provided to the jury on recklessness directly reflects an accurate statement of the law on an element of the offense, we do not find that the trial court abused its discretion here. *See State v. Dodson*, 10th Dist. Franklin No. 10AP-603, 2011-Ohio-1092, ¶ 6 (indicating it is not an abuse of discretion to refuse to instruct a jury on an instruction that is effectively redundant).

{¶43} Finally, we note that the trial court’s rejection of Robertson’s request for an instruction regarding speed alone being insufficient to constitute recklessness is also supported by the fact that Robertson left her lane of travel and went into Martinez’s lane. Thus this was never a case of speed alone purportedly constituting recklessness. For this entirely separate reason, the trial court did not abuse its discretion by denying her request for an instruction pursuant to *Waldock*.

{¶44} For all of these reasons, Robertson’s sixth assignment of error is overruled.

*Fifth Assignment of Error*

{¶45} In her fifth assignment of error, Robertson argues that the trial court erred by failing to instruct the jury on the lesser-included offense of Vehicular Homicide.

Standard of Review

{¶46} We review a trial court’s refusal to give a requested instruction, including an instruction on a lesser-included offense, under an abuse of discretion standard. *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989).

Relevant Authority

{¶47} A trial court must view the evidence in the light most favorable to the defendant when deciding whether to instruct the jury on a lesser included offense. *State v. Campbell*, 69 Ohio St.3d 38, 47–48 (1994). However, the lesser-included-offense instruction is not warranted every time “some evidence” is presented to support the lesser offense. *State v. Shane*, 63 Ohio St.3d 630, 632 (1992). Rather, a court must find “sufficient evidence” to “allow a jury to *reasonably* reject the greater offense and find the defendant guilty on a lesser included (or inferior degree) offense.” (Emphasis sic.) *Id.* at 632–633.

Analysis

{¶48} Prior to trial, Robertson filed a written request that the jury be instructed on the lesser-included-offense of Vehicular Homicide, which differed

from the Aggravated Vehicular Homicide charge only in the mental culpability element. Vehicular Homicide only required that a person act “negligently,” whereas Aggravated Vehicular Homicide required that a person act “recklessly.” The trial court addressed the lesser-included-offense issue directly on the record, finding that the evidence, even when looked at in the light most favorable to the defendant, did not warrant an instruction on the lesser-included-offense. In making its determination, the trial court considered that the accident occurred in Martinez’s lane, that within five seconds prior to the crash Robertson was traveling 108-113 mph, and that Robertson was traveling 87 to 98 mph at the time of impact.

{¶49} Robertson now argues that the trial court failed to consider the evidence in the light most favorable to her. For example, she argues that the trial court did not accept her statement as true that Martinez was in her lane of travel when she came around the curve, or at the very least Martinez was on the center line.

{¶50} In our own review of the matter, we emphasize that it is undisputed that Robertson drove into Martinez’s lane of travel, regardless of the reason. This decision was done “with heedless indifference to the consequences” and disregarded a “substantial and unjustifiable risk,” both of which constitute recklessness. *See* OJI 417.17 (defining criminal recklessness). This is far greater than a negligent act for

a mere “failure to perceive or avoid a risk.” *See* Negligence, OJI 417.19 (defining criminal negligence).

{¶51} Under the specific facts and circumstances of this case, we cannot find that the trial court abused its discretion by declining to give an instruction on Vehicular Homicide, or by determining that the evidence does not *reasonably* support both an acquittal of the crime charged, and a conviction of the lesser-included-offense of Vehicular Homicide. Therefore, Robertson’s fifth assignment of error is overruled.

*First Assignment of Error*

{¶52} In her first assignment of error, Robertson argues that her right to due process was violated in this case because the coroner did not comply with the statutory mandate in R.C. 313.13(B) to conduct a chemical test of Martinez’s blood to determine whether Martinez had any intoxicating substances in his system at the time of the crash.

*Relevant Authority*

{¶53} Robertson argues that the coroner in this case failed to comply with R.C. 313.13(B), which reads as follows:

If the office of the coroner is notified that a person who was the operator of a motor vehicle that was involved in an accident or crash was killed in the accident or crash or died as a result of injuries suffered in it, the coroner, deputy coroner, or pathologist shall go to the dead body and take charge of it and administer a chemical test to the blood of the deceased person to determine the alcohol, drug, or

alcohol and drug content of the blood. This division does not authorize the coroner, deputy coroner, or pathologist to perform an autopsy, and does not affect and shall not be construed as affecting the provisions of section 313.131 of the Revised Code that govern the determination of whether and when an autopsy is to be performed.

#### Analysis

{¶54} It is undisputed in this case that the coroner did not conduct a chemical test of Martinez's blood to determine whether he had any drugs or alcohol in his system. Robertson argued to the trial court that the coroner's failure to conduct the chemical test that was statutorily required should result in a dismissal of the case against her because evidence of the victim's intoxication could have proven beneficial to Robertson's defense. The trial court held a hearing on Robertson's motion to dismiss, and issued a written entry overruling the motion.

{¶55} In its entry, the trial court determined that the coroner's statutory violation did not equate to the constitutional/due process violation Robertson was asserting. Further, the trial court determined that Robertson did not establish that the evidence would materially affect the outcome of her trial.

{¶56} Robertson now argues that the trial court erred on appeal, especially because evidence at trial indicated that Martinez may have been speeding, and because she testified that Martinez may have been on or over the double-yellow center line when Robertson first saw him. Robertson argues that evidence of Martinez being intoxicated could have further supported her version of events.



{¶57} At the outset of our review, we emphasize that the primary issue with Robertson's argument is that R.C. 313.13(B) does not contain *any* remedy indicating that a case should be dismissed or even that certain evidence should be suppressed for noncompliance with the statute. Revised Code 313.13(B) simply provides a duty for a coroner to conduct a toxicology test in these circumstances. For this reason alone we could overrule Robertson's assignment of error.

{¶58} Nevertheless, even delving deeper, the United States Supreme Court has determined that if evidence is lost and it is only "potentially useful" a defendant must show "bad faith" on the part of the State in failing to preserve the evidence before there is some type of due process violation. *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). Here, Dr. Akers testified that he was unfamiliar with R.C. 313.13(B), but regardless he did not order a toxicology test because it was clear how Martinez died, thus conducting a toxicology test would not have aided his analysis. Moreover, Dr. Akers stated that performing a toxicology test would have been difficult due to all the blood lost by Martinez.

{¶59} However, even assuming the toxicology test could have been performed, which was testified to by one of Robertson's witnesses, there simply is no evidence of bad faith in this case leading to a Due Process issue. Dr. Akers explained his reasoning for not performing a toxicology test and there was no indication that he tried to hide evidence or prevent it from being discovered.

{¶60} Furthermore, we have no indication beyond pure speculation that the toxicology test would have returned any relevant information. Robertson suggests that because there was a glass jar of suspected marijuana located near the motorcycle it was likely that Martinez was intoxicated. However, this is building an inference on an inference, because it first must be inferred that the marijuana belonged to Martinez.

{¶61} Finally, Robertson argues that the case should have been dismissed because the State failed to preserve the Ford that Robertson wrecked so that it could be analyzed by the defense. As the Ford was a rental, it was released to its owner after the State completed its investigation. Robertson never requested that the vehicle be preserved, and all of the information acquired by the State was provided to the defense and its expert. The defense's expert actually testified that it was not uncommon for him to do an analysis based on photos of the vehicle rather than the vehicle itself.

{¶62} Again, Robertson does not establish bad faith on behalf of the State, particularly given that she is suggesting only the potential that further exculpatory evidence may have existed. *See Youngblood, supra*. However, her own argument is undermined by her expert testifying that law enforcement did an excellent job photographing the scene and photographing the Ford so he was able to conduct his analysis. For all of these reasons, Robertson's first assignment of error is overruled.

*Second Assignment of Error*

{¶63} In her second assignment of error, Robertson argues that the trial court erred by permitting the county coroner to testify as an expert in this case despite the fact that he did not present a report, CV/resume, or summary of his testimony other than what was stated in the death certificate, in violation of Crim.R. 16(K). Further, she argues that the State's accident reconstructionist also did not provide a CV/resume in contravention of Crim.R. 16(K), thus he should not have been permitted to testify.

*Relevant Authority*

{¶64} Criminal Rule 16 governs discovery in criminal cases. With regard to expert witnesses, Crim.R. 16(K) provides as follows:

Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

*Analysis*

{¶65} In March of 2021, over eighteen months prior to the trial in this case, the State filed a Crim.R. 16(K) disclosure indicating that the defense had been provided with a reconstruction report from Sergeant Banta, and a death certificate

by Dr. Akers. The defense did not raise any issue with regard to the State's expert witnesses or their reports until the second day of trial when the defense made oral motions *in limine* to exclude the testimony of Sergeant Banta and Dr. Akers. Defense counsel argued that with regard to Dr. Akers, the defense never received a CV/resume, or a report other than the death certificate. With regard to Sergeant Banta, the defense argued that it did not receive Sergeant Banta's CV/resume until the week prior to trial, well under the 21-day requirement.

{¶66} The State responded that the only document prepared by Dr. Akers in this case was the certificate of death, and that would constitute his testimony. In addition, the State argued that defense counsel would have a full opportunity to cross-examine Dr. Akers on his qualifications. With regard to Sergeant Banta, the State argued that they supplied the CV/resume as soon as they had it, and, in any event, Sergeant Banta had been on the witness list for nearly two years. At that point in the case, defense counsel's expert reconstructionist had already reviewed, examined, and responded to Sergeant Banta's report.

{¶67} After hearing the arguments of the parties, the trial court denied defense counsel's motions *in limine*. Robertson now argues on appeal that the trial court should have precluded the testimony of both witnesses under the plain language of Crim.R. 16(K).

{¶68} In our own review of the matter, we emphasize that despite the fact that Robertson had been aware of the State's expert witnesses for over eighteen months, Robertson never raised the issue of the lack of CVs/resumes until the second day of trial. At that time, Robertson actually had Sergeant Banta's CV/resume, even if she had not received it 21 days prior to trial. Robertson was also able to fully cross-examine the State's experts about their qualifications and their findings. Thus even if there was error, it would be harmless in this case. *See State v. Boaston*, 160 Ohio St.3d 46, 2020-Ohio-1061 (wherein the Supreme Court of Ohio indicated that a harmless error analysis applies even when a trial court improperly admits testimony despite a Crim.R. 16(K) violation).

{¶69} Moreover, although Robertson also argued that she never received an expert report from Dr. Akers, the State indicated that the death certificate was the *only report it had*, and, effectively, the primary information Dr. Akers was covering in his very limited testimony. Robertson had this information for over eighteen months. Given that there was no surprise in this case and defense counsel had both adequate time to prepare, and had an adequate opportunity to cross-examine the witnesses, we can find no error here. Further, even if there was error, it would have been harmless. For all of these reasons, Robertson's second assignment of error is overruled.

*Third Assignment of Error*

{¶70} In her third assignment of error, Robertson argues that the trial court failed to impose effective sanctions upon the State for the due process violations alleged in the first and second assignments of error. More specifically, Robertson argues that because the coroner did not conduct the statutorily-mandated toxicology tests pursuant to R.C. 313.13(B), she should have been permitted to introduce evidence of Martinez's prior criminal record, which pursuant to her established proffer, included multiple OVI convictions. Robertson contended that because a jar of suspected marijuana was found at the crash scene, she should have been able to introduce evidence to show that Martinez might have been intoxicated at the time of the crash, which could have corroborated her claim that Martinez was actually speeding and in her lane.

{¶71} The trial court denied Robertson's request to introduce evidence of Martinez's prior criminal record, finding simply that it was not probative for purposes of the trial and not necessarily relevant. After reviewing the matter, we agree with the trial court. Martinez's prior record has absolutely no bearing on whether *Robertson* recklessly caused his death. Simply put, Martinez's potential intoxication was not at issue at trial; rather, the issue was whether Robertson recklessly caused his death by driving too fast and driving out of her lane.

{¶72} Moreover, we note that Robertson was able to ask numerous witnesses about the marijuana found at the scene and the potential intoxicating effects of marijuana, and even fentanyl, despite the fact that there is no indication Martinez had ever used fentanyl, obviating any error here even if there was one.

{¶73} In sum, Robertson seeks to have some “corrective measure” put into place due to the “errors” of the trial court and the State; however, we have not found any error that specifically required a remedy here. As the evidence Robertson sought to introduce was not relevant to the trial, we do not find that the trial court erred. Therefore, Robertson’s third assignment of error is overruled.

#### *Fourth Assignment of Error*

{¶74} In her fourth assignment of error, Robertson argues that the trial court erred by permitting the introduction of “overly gruesome and repetitive photographs from the scene of the crash.” (Appt.’s Br. at 13).

#### *Standard of Review*

{¶75} The mere fact that a photograph is gruesome or horrendous is not sufficient to render it *per se* inadmissible. *State v. Kirkland*, 160 Ohio St.3d 389, 2020-Ohio-4079, ¶ 101. The Supreme Court of Ohio has held that gruesome photographs are admissible only if their probative value outweighs the danger of prejudice to the defendant. *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, ¶ 237. In addition, a photograph that satisfies the balancing test is still inadmissible if

it is repetitive or cumulative. *Id.* When a trial court decides that a photograph satisfies the preceding standard, the admission of the photographs is reviewed under an abuse of discretion standard. *Id.*

#### Analysis

{¶76} Robertson objected to four specific photographs that were presented at trial by the State: State's Exhibits 8, 9, 25, and 26. State's Exhibit 8 is a photograph of what appears to be the top-half of Martinez's body in the roadway at the crash scene. State's Exhibit 9 is a photograph a few steps up the road looking back at the top-half of Martinez's body along with some debris from the wreckage. State's Exhibit 25 is a photograph taken from a distance that showed the top-half of Martinez's body, some crash debris and viscera in the road, and another piece of Martinez's body that was in the grass closer to another piece of debris. State's Exhibit 26 is a photograph showing where "the body appears to come to rest \* \* \* [with] fluid leading up to it." (Tr. at 330). Sergeant Banta testified that he took all the photographs to document his investigation so that an individual could "kind of see what [he's] seeing" as he walked the path of the wreckage. (*Id.* at 335).

{¶77} Robertson argued to the trial court that State's Exhibits 8, 9, 25, and 26 were gruesome, and unnecessary given that there were other photographs that showed the various pieces of Martinez's body in the background. Robertson felt that the photographs were unduly prejudicial.



{¶78} The State countered by arguing that the photographs were necessary for multiple purposes. First, the State argued that the photographs helped establish how forceful the impact actually was, countering any assertions by the defense that Robertson was traveling the speed limit. Second, the State noted that defense counsel had rigorously questioned the Seneca County Coroner about his decision not to conduct an autopsy, and his failure to do a toxicology analysis on the body. The State argued that the photographs helped corroborate the coroner’s testimony that an autopsy seemed unnecessary, and a toxicology test would have been difficult.

{¶79} After hearing the arguments of the parties, the trial court overruled Robertson’s objections, noting that one of the issues in the case was whether Robertson was driving recklessly, and that concerned, at least in part, her speed at the time of the accident. The trial court stated that while the photographs were gruesome, they were not unduly prejudicial because they go to the “weight of the speed that was involved at this crash scene[.]” (Tr. at 343).

{¶80} After reviewing the record, we do not find that the trial court abused its discretion in this matter. The photographs were relevant and probative both to the manner of Martinez’s death and to an analysis of the crash scene. *See Ford, supra*, at ¶ 239. Further, as the State argued, the photographs demonstrate the

severity of the injuries suffered by Martinez. *See State v. Irwin*, 4th Dist. Hocking Nos. 03CA13, 03 CA14, 2004-Ohio-1129, ¶ 2.

{¶81} While some of the photographs may have been gruesome, they were important in this case for a jury to determine what to believe, particularly given there was conflicting testimony from the experts. The final resting places of various body parts and the crash debris were relevant to the case at hand. Moreover, Robertson has not shown that the photographs were needlessly cumulative as they were taken from different locations and angles. *State v. Baskerville*, 9th Dist. Summit No. 28148, 2017-Ohio-4050, ¶ 34. Therefore we find that the trial court did not abuse its discretion by determining that the probative value of the photographs was not outweighed by unfair prejudice. Accordingly, Robertson’s fourth assignment of error is overruled.

#### *Seventh Assignment of Error*

{¶82} In her seventh assignment of error, Robertson argues that she was deprived of a fair trial by the cumulative effect of numerous errors in this trial.

{¶83} Under the cumulative-error doctrine, “a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial court error does not individually constitute cause for reversal.” *State v. Spencer*, 3d Dist. Marion No. 9-13-50, 2015-Ohio-52, ¶ 83. “To find cumulative error, a court must first find *multiple* errors

committed at trial and determine that there is a reasonable probability that the outcome below would have been different but for the combination of the harmless errors.” (Emphasis added.) *In re J.M.*, 3d Dist. Putnam No. 12-11-06, 2012-Ohio-1467, ¶ 36.

{¶84} Here, we have not found multiple errors in this case, thus the cumulative error doctrine does not apply. *State v. Thompson*, 3d Dist. Crawford No. 3-22-06, 2022-Ohio-3602, ¶ 60. Therefore, Robertson’s seventh assignment of error is overruled.

*Conclusion*

{¶85} Having found no error prejudicial to the appellant in the particulars assigned and argued, the judgment of the Seneca County Common Pleas Court is affirmed.

***Judgment Affirmed***

**WILLAMOWSKI and ZIMMERMAN, J.J., concur.**

**/jlr**