[Cite as *State v. Barnum*, 2025-Ohio-1105.]

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

State of Ohio — Court of Appeals No. F-24-003

Appellee — Trial Court No. 23 CR 043

v.

Baylor Barnum — **DECISION AND JUDGMENT**

Appellant — Decided: March 28, 2025

* * * * *

T. Luke Jones, Fulton County Prosecuting Attorney
and Paul H. Kennedy, Assistant Prosecuting Attorney, for appellee.

Michael H. Stahl and Michael G. Aird, for appellant.

* * * * *

MAYLE, J.

{¶ 1} Appellant, Baylor Barnum, appeals the March 6, 2024 judgment of the Fulton County Court of Common Pleas sentencing him following his conviction of vehicular manslaughter, aggravated vehicular homicide, and vehicular assault. Because the trial court failed to excuse two jurors for cause, we reverse.

I. Background and Facts

{¶ 2} Barnum was indicted on one count each of vehicular manslaughter in violation of R.C. 2903.06(A)(4), a second-degree misdemeanor (count 1); aggravated

vehicular homicide in violation of R.C. 2903.06(A)(2)(a), a third-degree felony (count 2); vehicular assault in violation of R.C. 2903.08(A)(2)(b), a fourth-degree felony (count 3); aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), second-degree felony (count 4); and aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), a third-degree felony (count 5).

{¶ 3} This case arose from an October 2022 car accident outside of Delta. Barnum was driving a Mitsubishi Eclipse Cross and ran a stop sign, colliding with the Jeep Cherokee that J.T. was driving. J.T.'s seven-year-old son, K.T., was a passenger in the Jeep. J.T. and K.T. both sustained serious injuries in the crash. K.T. died from his injuries within days of the accident.

A. Voir Dire

{¶ 4} Barnum's case was tried to a jury. During voir dire, two of the jurors—juror 152 ("wife") and juror 159 ("husband")—disclosed that they are married. In addition, they have a relationship with Ke.T., K.T.'s grandfather and J.T.'s ex-father-in-law.

{¶ 5} During general voir dire, the trial court asked husband if he (1) thought that he could "realistically" serve on a jury with wife and "give her . . . thoughts the same consideration as you would other people . . ." and (2) if he would be influenced by wife being on the jury. Husband responded, "No. It would be ok" to the first question and "No" to the second. The court asked wife if she thought she could "sit fairly on a jury" with husband and give his thoughts the same consideration as other jurors'. Wife responded, "I do" and "Yes." The court also asked if she "believe[d] that [she] could be fair and impartial[.]" Wife said, "Absolutely."

{¶ 6} Husband also disclosed that he knew J.T., who was the "ex-wife of some friends of ours' son[,]" and K.T.'s grandfather was the best man at his wedding. When the court asked wife about knowing K.T.'s grandfather, wife (who worked at Fulton County Health Center, the hospital where Barnum was treated) responded, "[the court] named a lot of names at the hospital, . . . I don't know them personally but I know of them and it would not affect me in any way but as far as [K.T.'s grandfather], the family is a good family and I don't know—[.]" The court cut off the end of wife's response.

{¶ 7} Wife also said during general voir dire that she thought "it's very illegal" to drink and drive, driving after smoking marijuana is "illegal too[,]" and driving after taking prescription medication is illegal unless the medicine "isn't an altering drug . . . is not mind altering." She later amended her statement about drinking and driving: "I shouldn't say completely illegal with one drink. If you are a certain weight, that affects someone who is a lot heavier than somebody who is lighter. Everyone is affected differently."

{¶ 8} Later, the court and attorneys questioned husband and wife in chambers to discuss their relationship with J.T. and K.T.'s family. Husband, whom the parties questioned first, said that he might have met K.T. once at a local festival. He and K.T.'s grandfather "were good friends growing [up]" but had "kind of parted ways . . . [they] don't visit each other but when we see them, we still are acquaintances—friends . . ." but he does not "hang with [K.T.] or [J.T.] . . . ." Husband and wife married in 1984. The court asked husband "if [he] were sitting on this jury, and let's say you acquitted Mr. Barnum and you see [K.T.'s grandfather] and his family in the street, . . . do you think

that knowing that that could happen, would cause you to be unfair to Mr. Barnum or in favor of the State . . . ?" Husband responded, "Well honestly it wouldn't. . . [I]f he got acquitted, it would be because of the evidence so I mean if anybody knows the [] family, . . . they know the law and they know that's the way it goes. Evidence is evidence and if he gets acquitted, he gets acquitted. If he gets found guilty—I mean—[.]"

{¶ 9} In response to defense counsel asking "what if [K.T.'s grandfather] had a different idea of what he thought the evidence showed . . . [,]" husband said,

> we don't hang with each other at houses anymore or anything like that so I mean I really don't know what to say about that. I mean if I seen him—if it was—[unintelligible]—then so be it—I mean—Honestly it's just all about evidence. . . . I remember when this incident occurred. It made the news and it proved nothing—absolutely nothing. I've heard nothing since then. We haven't talked to the [family] since then. We haven't heard anything. We gave them our condolences."

(First brackets in original.) He and wife were out of town when the accident happened and learned about it from their daughter. K.T.'s grandfather's wife babysat husband's children (who were 34 and 38 years old at the time of trial) when they were in elementary school. When husband heard the news, he "was sad. Like anything else. Nobody should lose a kid. . . . I mean it's a tragedy to say but accidents happen . . . [.]" When counsel asked if husband could remain fair and impartial in light of his relationship with the family, husband said, "evidence will I am sure play out *but no* I mean we know the family but around a town like this you pretty much know everybody in all honesty." (Emphasis added.) When counsel asked if husband would want him on the jury if he were in Barnum's position, husband said,

> I guess that would be up to him but when I say that we're not—I don't know. Me being like friends with [K.T.'s grandfather] is like an old high school classmate that you know I haven't seen—I mean we go to like their kids' weddings but that's only because we grew up together and I mean I guess that's up to you guys. If there's a hundred other people to choose from out there, maybe your Defendant would be better off having one of those. But if I couldn't be impartial, I would tell you. . . . [I]t would be easy to say that I wouldn't be impartial and I could just walk out right now but I can be impartial. No matter who it is.

In response to counsel asking if husband thought he might be "more affected than a regular person" by the "pretty gruesome" and "horrible" evidence and testimony, he said, "That's hard to say until it comes because I'm sure there [sic] whole family is probably going to be in there during the trial . . . we still here [sic] if there's an event that goes on. Maybe it's best to not have me. I don't want to cause anymore issues in the courtroom . . . ."

{¶ 10} When she was questioned, wife said that she and husband did not see J.T. and K.T.'s family "as often as we would like too [sic]. We run into them at the fair, we run into them at social events. We don't go hangout. Nothing like that. So, it's kind of like if they needed something and they called then we would be there but it ain't like we hangout or play cards or any of that." The last time they "hung out" with K.T.'s grandfather's family was at K.T.'s funeral. Before that, it was a "long time" ago, possibly at one of the weddings of K.T.'s grandfather's children. Aside from the funeral, it had been years since they had seen K.T.'s grandfather's family, and "[e]xcept for weddings[,]" it "[p]robably" could have been as long as ten years ago.

{¶ 11} When the court asked if her relationship with K.T.'s grandfather would cause her to "do something different than what [she] would otherwise do[,]" considering

the possibility that she would acquit Barnum and see K.T.'s grandfather's family in public, wife responded,

> No. I don't think so. I think that everybody is human. Accidents are accidents. Everybody has an opinion. . . . [I]f someone is asking me a question about anything, I have to see it as it is—what is placed in front of me anyway. . . . [I]f I wasn't there I can't say anything. I don't even know how to answer this. I don't feel like it would affect in any way. People are who they are and we are all human so the law is the law. I am not going to say that isn't the case. . . . I am a rule follower. I am a big rule follower.

{¶ 12} When defense counsel asked if wife would want her on the jury if she were in Barnum's position, she said, "Well I feel like the facts are the facts. That's what it is. And yea[h], my heart goes out to the [family] for what happened—[.]" She was "[a]bsolutely" very sympathetic to the family, "[a]s would [she] be to anybody. . . . [I]t's a terrible situation if you are talking about the little one. . . . I feel like accidents happen and it's tragic. Should he have been behind the wheel if he was drinking—no. It's the law. You shouldn't be behind the wheel but that's with anybody. It doesn't matter like who." When the court followed this answer by asking if she would be able to follow the instructions the court gave, she said that she "[a]bsolutely" could. When defense counsel asked "how do you think Mr. Barnum should feel if you were in his position[,]" wife responded, "He would probably feel uncomfortable but I don't know him as he doesn't know me. Just because he knows I know the [family], he doesn't know anything about me and I don't know anything about him. . . . I'm sure he probably is a little concerned about it but—the law is the law." Regarding a hypothetical scenario in which wife ran into K.T.'s grandfather and his wife after the jury rendered a verdict that the victims' family was unhappy with, wife said, "There's nothing we could do about it. It was all put

there—all in front of us. It is what it is. So I feel like I could be just very partial to everything like I can this is it—these are the facts that were given. What it is, it is. So we have to rule in one way or the other—reasonable doubt."

{¶ 13} Barnum sought to excuse husband and wife for cause. The trial court decided that it was "keeping the husband and wife based upon their answers. I believe there [sic] responding language and the way they answered the questions and tone of their voice that they were being honest and believe that they could serve impartially . . . ." Barnum objected.

{¶ 14} Barnum ultimately used two of his four peremptory challenges to strike husband and wife from the jury and exhausted his peremptory challenges.

B. State's case

{¶ 15} During the state's case, J.T., who was driving the car that Barnum hit and is K.T.'s mother, testified that she was driving on County Road E in the early evening of October 13, 2022, before it was fully dark. K.T., who was wearing his seatbelt, was directly behind her in the back left seat. She described the area as "pretty flat" and said that there were bean fields on two corners of the intersection, a cornfield on one corner, a park on one corner, and no streetlights.

{¶ 16} As she approached the intersection with County Road 10, she was watching for deer that might jump out from the surrounding cornfields. As she drove through the intersection, she "felt [her] car kind of shaking and the next thing [she] kn[e]w is [she was] sitting in a cornfield." She did not see Barnum's car before the crash. Although she was disoriented, J.T. searched for her phone so she could call 911 and went to check on

K.T. The back door on her side of the car was "smashed in" and she could not open it. She entered the back seat from the other side and saw K.T. sitting in his seat, not moving. J.T. tried to remove his seatbelt, which was jammed, and tried to wake him, but he was unresponsive. She said that he opened his eyes to look at her once and did not wake up again.

{¶ 17} While she was in the back seat, Barnum and a woman came up to the car. The woman was on the phone and asked J.T. questions about K.T.'s condition. Barnum was beside K.T.'s door. J.T. said, "[Barnum] just kept looking at me—and I'm fighting to get my kid out of the car and fighting with the seatbelt and this person is looking at me and saying 'it was my brakes. I'm sorry. It was my brakes' and just kept repeating that and at which point, I looked at [Barnum] and I said very clearly, I don't care about that right now, please help me save my son . . . ." Barnum "kind of broke down" after that. J.T. said he "just seemed off" and was crying, upset, and "talking about his brakes." She thought that his behavior was "kind of strange." Barnum told J.T. "he was sorry."

{¶ 18} After J.T. got K.T. out of the car, Barnum came over to them. J.T. performed CPR on K.T. When she stopped because she was "bleeding into his mouth and [] was worried that [she] was going to do more harm than good . . . [,]" Barnum "did a [chest] compression but then just kind of stopped and was staring at . . ." K.T., so J.T. continued until police and EMS arrived and took over K.T.'s care.

{¶ 19} J.T. recalled that her "arm hurt really bad," her "ankle was huge," and "it hurt to walk." She was taken to the hospital and stayed overnight. The hospital did not want her to leave the next day, but she had learned that K.T. was going to be taken off of

life support and "insisted that they let [her] leave" so she could be with him. Because of the accident, J.T. had cartilage and tendon damage in her foot, which required surgery, a broken nose, and the "flaps that hold your spine and your neck together . . ." had "come off." Beginning from the date of the accident, it hurt to walk and "do basic life things most days . . . ."

{¶ 20} The next day, when J.T. went to the hospital K.T. had been transferred to, she realized that "things were not going well." K.T. had a 1 percent chance of survival, and if he survived, he would never walk, talk, or respond and would be on a feeding tube. She and K.T.'s father made the decision to take him off of life support.

{¶ 21} L.B., who was driving home on County Road 10 shortly after the accident, saw Barnum run into the middle of the intersection while she was at the stop sign at County Road E. He told her to call 911. L.B. thought that he "seemed like he was in a state of shock." At first, L.B. only saw Barnum's car, which was on its roof, but saw J.T.'s car when she and Barnum went into the cornfield.

{¶ 22} While L.B. was on the phone with 911, Barnum was asking her and the other woman who stopped "what we needed to do." After L.B. told him that the 911 operator said not to move K.T., Barnum told her that he needed to get something from his car. He came back with a bookbag and a "moonshine looking jug" that he put on the ground. Barnum continued asking L.B. if there was something he could do. When the 911 operator told L.B. that K.T. needed CPR, the other woman tried to pull K.T. out of the car, and Barnum helped. L.B. thought that Barnum had tried to start CPR but could not remember if she saw Barnum's hands on K.T.'s chest.

{¶ 23} L.B. said that Barnum seemed "a little off," like he was shocked, "a little wobbly on his feet[,]" and "very out of it." Emotionally, Barnum seemed "very distressed . . . very sad . . . [and] like he was very, very, shocked from the whole situation." He was also worried about K.T. and "in the beginning seemed occupied about . . . what was in his vehicle then [sic] what was going on for a minute . . . ." Barnum did not say anything about his brakes.

{¶ 24} On cross-examination, L.B. said that there was a stand of trees at the park and agreed with defense counsel that the stop sign on the opposite corner kind of blended in with the trees. Although Barnum was injured, he was concerned about the people in the other car, not himself. She thought that his concern was sincere. He did not try to dispose of or hide the contents of his bookbag or the jug. Based on the accident she saw, she would expect Barnum to be shocked and a little wobbly. L.B. did not tell anyone that Barnum was under the influence of drugs or alcohol.

{¶ 25} Deputies Alexa Miller and Kevin Bogner of the Fulton County Sheriff's Department both responded to the accident. Miller was the first officer on the scene. At first, she assisted with CPR on K.T. When someone else arrived and took over, she saw Barnum "just kind of walking around. He had made the comment that his brakes weren't working and then he apologized and then he said I'm so sorry . . . ." She saw that he had a backpack, which she "thought was very odd." She also noticed the odor of fresh marijuana when Barnum was around but did not know where on his person the smell came from and did not recall how strong it was. She did not notice anything else about his demeanor, emotional state, speech, or manner of walking.

{¶ 26} On cross, Miller agreed with defense counsel that Barnum was "very apologetic, very sad, very upset" and responded appropriately when she asked him questions and gave him directions. She also said that she did not tell anyone from the State Highway Patrol about the odor of marijuana she smelled. She did not smell alcohol on Barnum's breath.

{¶ 27} Bogner saw Barnum walking out of the field soon after arriving at the scene. He said Barnum was unsteady on his feet, "bloody, . . . disoriented, [and] didn't know what was going on[,]" and described him as "kind of irritated, upset, [] emotional[,]" and worried about the people in the other car. Bogner got Barnum to sit down and asked him to take off his backpack, but Barnum did not want to. Bogner did not smell alcohol or marijuana on Barnum, and Barnum answered his questions appropriately.

{¶ 28} In the video from Bogner's body camera, Barnum appears upset and unsteady on his feet. He asks if K.T. is going to be okay and twice says that his brakes were not working.

{¶ 29} Daniel Timpe, the paramedic who treated Barnum, testified that Barnum told him he was going 60 to 70 m.p.h. at the time of the accident and had taken Adderall and medical marijuana. Adderall is a stimulant that makes people more alert and is prescribed for ADHD. He did not smell marijuana or alcohol on Barnum. Barnum was able to answer the questions Timpe asked him to determine if he was "alert to person, place, time and event . . ." but was "very slow to respond"—Timpe estimated that there "probably was a three to four second lapse"—which could be a sign of head injury. He

attributed Barnum's delayed reactions to the accident. While they were on the way to the hospital, Barnum's blood pressure dropped significantly, which Timpe attributed to him going into shock.

{¶ 30} Sergeant Michael Ziehr of the Ohio State Highway Patrol was the trooper who responded to the scene of the crash and investigated the accident. When he spoke to Barnum in the ambulance, he noticed that Barnum's eyes were red, he appeared to have dry mouth and was constantly coughing, he had some eyelid tremors, incorrectly estimated the passing of 30 seconds, and his speech was "slow and labored," which Ziehr said were signs of marijuana impairment.

{¶ 31} Ziehr recorded two interactions with Barnum on his body camera. The first was taken in the ambulance after the crash. On the video, Barnum told Ziehr that he was driving home to Kentucky after visiting a friend in Michigan; he saw the stop sign and tried to slow down but his brakes did not work; he was not distracted by anything at the time of the crash; he was going 60 to 70 m.p.h. at the time of the crash; he had taken Adderall, which was prescribed for his ADD, "to stay awake on the road trip," but did not take more than normal; he had not had any alcohol that day; and he smoked "medical marijuana" about two hours before he left his friend's house, but was "completely fine" when he left. Barnum also asked about K.T.'s condition.

{¶ 32} The second video was taken at the hospital later that night. Ziehr saw the same signs of impairment as he did at the scene. The jug that Barnum had with him at the scene was sitting on the table beside Barnum's bed, and Barnum was drinking from it, but Ziehr did not see a backpack.

{¶ 33} As part of his investigation, Ziehr inventoried the contents of Barnum's car before it was towed. He found marijuana gummies in unopened containers, an empty cannabis vape cartridge, and an empty beer can in the car. The gummies' containers showed that they came from a store in Michigan. Although he contacted the store, it did not save its surveillance video, so Ziehr was unable to determine when Barnum bought the gummies. Ziehr also obtained Barnum's phone records, but was unable to find the friend Barnum met with that day.

{¶ 34} In his written statement, Barnum said that he was driving home from visiting a friend in Michigan. He was going 60 to 70 m.p.h. when he noticed the stop sign. He tried to slow down, but his brakes failed. He hit the other car, and his car flipped over. In response to specific questions from Ziehr, Barnum said that he was not distracted and did not look away from the road; he had an Adderall prescription and took two pills that day, one around lunchtime and one when he left Michigan; he smoked marijuana two or three hours before he left Michigan and used the vape cartridge about 45 minutes before he left; he did not consume any alcohol that day; and he was following directions from Google Maps.

{¶ 35} On cross, Ziehr said that he did not look through Barnum's phone the day of the accident, get any information from Google Maps, or get any GPS information from Barnum's car. The stop sign at the intersection of County Road E and County Road 10 was not lighted, and a driver in Barnum's position who was driving toward the stop sign would see the trees at the park behind the stop sign. As far as he knew, no one did a "crush cavity analysis" to confirm the speeds shown by the cars' airbag control modules.

Barnum was cooperative with Ziehr. Ziehr also agreed with counsel that Barnum was a "[l]arge individual," it would take "substantially more" drugs to impair a larger person, and one gram of cannabis vape oil is not a "large quantity[.]" Although he spoke to some of the deputies at the scene, Ziehr did not speak to the EMTs, doctors, or nurses before filing the charges against Barnum. He was not aware that Barnum was going into shock while he was in the ambulance. He did not notice the backpack either in the ambulance or at the hospital, did not check the contents of the jug, and did not smell marijuana on Barnum. Ziehr noted in his preliminary report that Barnum was impaired on marijuana. He admitted that Barnum's slow responses could have been because of shock or a concussion.

{¶ 36} Ohio State Highway Patrol trooper Kyle Baxter is the crash reconstructionist who investigated the accident. As part of the reconstruction, he obtained data from the cars' airbag control modules. A car's airbag control module generally records information about change in velocity. Depending on the make and model, it will also record 2.5 to 5 seconds of pre-crash data in .1 to .5 second increments, including speed, braking, steering, cruise control use, engine r.p.m., what gear the transmission is in, and accelerator use.

{¶ 37} Regarding the crash in this case, Baxter said that he did not map the scene himself, but used measurements taken by another reconstructionist. The evidence the other person documented included "tire marks, gouge marks, [] stop sign location, edges of the roadway, [and] vehicles at final rest." The bulk of the damage to the Cherokee was

on the left rear side, including the left rear passenger door, and the bulk of the damage to the Eclipse was on the front end and roof.

{¶ 38} The crash data report from the Cherokee showed that in the five seconds before the crash, the Cherokee was traveling in a relatively straight line at 62 m.p.h. with the cruise control on, and the driver was wearing a seatbelt. At .1 seconds before the crash, the Cherokee's speed and engine r.p.m. were decreasing and the brakes were applied. The data also showed that the Cherokee recorded two collisions; Baxter concluded that the second one was due to the Cherokee hitting a utility pole guidewire before it went into the cornfield.

{¶ 39} The crash data report from the Eclipse showed that the car was in a "frontal collision" on the passenger side of the vehicle and rolled toward the passenger side. At 5 seconds before the crash, the Eclipse was going 86.4 m.p.h., the cruise control was not activated, and the driver was wearing a seatbelt. From 5 seconds to 2.5 seconds before the crash, the accelerator pedal was not pushed at all and the speed and engine r.p.m. were decreasing. The car's brakes were applied from 4.5 seconds to 3 seconds before the crash, and were not applied beginning 2.5 seconds before the crash. Beginning 2 seconds before the crash, the Eclipse's speed started to increase from 72.7 m.p.h., the percentage of accelerator pedal pressure increased from 0 percent to over 90 percent, and the engine r.p.m. increased. Baxter said that the Eclipse's engine would have made "quite a bit more noise" as the r.p.m. increased from 2,500 to over 4,300. At .5 seconds before the crash, the car's speed was 74.6 m.p.h., and neither the accelerator pedal nor the brake

pedal was being pressed. The steering data indicated that the driver did not try to turn the wheel to avoid the crash.

{¶ 40} Based on his analysis of the data, Baxter determined that

> one vehicle, ah, failed to stop at the stop sign, um, traveled into the intersection above the posted speed limit, striking the other vehicle. Um, both vehicles traveled off the same corner of the intersection, which I would expect given their directions of travel. Um, the data that I have helps me to state that there was contact with a roadside object by the Jeep. And again this data helps me to say that yes indeed the Mitsubishi did roll over.

The data Baxter retrieved from the cars was consistent with other information he had learned about the crash.

{¶ 41} Additionally, based on the data from the Eclipse, Baxter determined that "it appear[ed] that the brakes were working . . . ." He could not recall a case that he was involved in "where brakes on a newer vehicle have failed to the point that someone can't bring their vehicle to a stop[.]" He admitted that he did not examine the Eclipse's brakes because there was "no indication at the scene or . . . evidence that suggest[ed] that there might have been a problem with any of the vehicle features." Signs of brake malfunction could include data showing that the antilock brakes were activated, but without marks at the scene showing that the vehicle was braking, such as "skips in tire marks [or] a lengthy tire mark that didn't arrive at the vehicle at final rest . . . ."

{¶ 42} On cross, Baxter conceded that the crash data report said that the information in the report was "intended to assist you to read [] data from the airbag control unit. [It was] not intended to provide specific information regarding the interpretation of this data. Event data should be considered in conjunction with other

available physical evidence from the vehicle and scene." The only calculation that Baxter did using evidence from the scene was determining the vehicles' change of velocity. He did not put the comparison of the changes in velocity in his report. He did not know how often—if at all—a vehicle's airbag control module was calibrated. An event data recorder in a car calculates the vehicle's speed using an average of the speeds of each tire; "if there's consistency through all four [tires] then the average [speeds] would be the same" and would reflect how fast the vehicle was traveling. A tire's speed calculations could be affected by the size of the tire and "grossly underinflated" air pressures, but he did not think that the temperature of the road, the material of the road surface, or the wetness of the road would affect the rotation of the tires. Baxter did not account for the airbag control module's error rate when determining the vehicles' speeds. Baxter could use the "crush cavities" of the vehicles to determine their speeds "[i]f you didn't have other tools at your disposal . . . ." He did not do so in this case.

{¶ 43} Baxter admitted that "it might be possible" that Barnum had mistaken the gas pedal for the brake pedal while he was attempting to brake before the accident. In that situation, it would likely take a driver about one second to switch from pressing the accelerator to pressing the brake once he realized his mistake. Barnum had pressed his accelerator for between 1 and 1.5 seconds. Baxter said that the data did not indicate that Barnum had applied improperly working brakes because the Eclipse slowed down and its engine r.p.m. decreased during the few seconds when the brakes were applied. He was not aware when he was assessing the vehicles that Barnum claimed that his brakes failed. Baxter did not visit the scene of the accident during his initial investigation. The stop

sign that Barnum ran "was just a stop sign with a single red reflector post[,]" and there were not any rumble strips before the stop sign or a sign underneath the stop sign informing drivers that cross traffic did not stop.

{¶ 44} Regarding the Cherokee, one section of the event data report showed that the cruise control was engaged from five seconds before the accident until two seconds before the accident, and another section showed that it was engaged from five seconds before the accident until the point of impact. From three seconds before the accident until the point of impact, the data showed that the Cherokee was attempting to steer to the right.

{¶ 45} On redirect, Baxter said that the cars' tires were all the manufacturers' recommended size. When that is the case, the "speed reported on the [data recorder] is also is the same as what would be present on the speedometer." He did not see any inconsistencies in the Eclipse's data that would indicate to him that the information from its airbag control module was inaccurate. If Barnum had accidentally pressed the accelerator instead of the brake pedal the Eclipse would have responded with an "increase in engine noise, increase in the odometer [sic] on the dash that your RPMs are going up rather than continuing to decrease, [] depending on the speed at which you're traveling increased wind noise or road noise."

{¶ 46} After Baxter's testimony, the state rested.

{¶ 47} Barnum moved for acquittal on the aggravated vehicular homicide charge in count 4 and the aggravated vehicular assault charge (i.e., the offenses alleging that Barnum was impaired) under Crim.R. 29. The trial court denied his motion.

C. Barnum's case

{¶ 48} During his case, Barnum first presented the testimony of Dr. Nael Bahhur, who works in the emergency department of the Fulton County Health Center and treated Barnum after the accident. According to Bahhur, Barnum's medical chart showed that he had a perfect score on the Glasgow Coma Scale, which indicated that he was fully alert. Barnum appropriately followed instructions and answered questions, was oriented to place and time, and was not "very slow" to respond. There were no notes in Barnum's chart indicating that he was impaired by alcohol or drugs. Bahhur did not smell alcohol or marijuana on him or notice that his eyes were bloodshot or glassy.

{¶ 49} On cross, Bahhur said that Barnum did not have a brain bleed or signs of a concussion. He admitted that he might not have smelled marijuana on Barnum if the marijuana product he used was something with a "controlled spread and wasn't like the marijuana cigarette where plume is all over the place . . . ."

{¶ 50} The state also asked Bahhur about the medical effects of Adderall and marijuana. Although Adderall prescribed for ADHD "stimulates the brain[,] . . . makes [a person] more alert, helps their recall to be better, their focus is better[,]" taking Adderall to stay awake is not its intended purpose. Someone who took a "heavy dose" of marijuana could appear "very slowed," fatigued and "almost . . . sleep-like," and might not answer questions properly. He said the effects of taking marijuana and Adderall at the same time would depend on the person; for one person the drugs might "balance each other out and you may not look altered in any way[,]" and for another person the drugs "could make you very sick."

{¶ 51} Barnum's other witness was Stephanie Wyse, a nurse who treated him in the emergency department at the Fulton County Health Center the night of the accident. As part of her duties at the hospital, Wyse was responsible for periodically checking on patients and entering the information into the patient's electronic medical record. If Barnum had appeared impaired, Wyse would have entered it in his records, but there were no such notations in the records.

{¶ 52} On cross, Wyse said that she did not notice Barnum exhibiting any signs of a concussion. Barnum reported to her that he went through a stop sign and hit another car, he thought his brakes were not working, he smoked marijuana sometime before driving, and took an Adderall before driving to help him stay awake. Although Wyse did not have personal experience with Adderall, she had heard from others that "if you need to stay up and study all night that taking Adderall would help keep you awake . . . ."

{¶ 53} Following Bahhur's and Wyse's testimony, Barnum rested. He again moved for dismissal of the impairment-based charges, which the court again denied.

{¶ 54} In addition to the testimony and exhibits, Barnum and the state agreed to several stipulations. In them, Barnum admitted that (1) he was driving the Eclipse, (2) he ran the stop sign at the intersection of County Road E and County Road 10 and caused the accident, and (3) the accident caused K.T.'s death and caused serious physical harm to J.T.

D. Outcome and sentencing

{¶ 55} The jury found Barnum guilty of vehicular manslaughter, aggravated vehicular homicide in count 2, and vehicular assault. It found him not guilty of aggravated vehicular homicide in count 4 and aggravated vehicular assault.

{¶ 56} The trial court sentenced Barnum to 90 days in jail on the vehicular manslaughter conviction, 60 months in prison on the aggravated vehicular homicide conviction, and 18 months in prison on the vehicular assault conviction. The court ordered Barnum to serve the jail term consecutively with the aggravated vehicular homicide sentence, and the aggravated vehicular homicide and vehicular assault sentences consecutively, for an aggregate sentence of 78 months. Although the court raised the issue of merging the vehicular manslaughter and aggravated vehicular homicide convictions, it ultimately decided that it was "not going to merge those after giving it additional consideration."

{¶ 57} Barnum now appeals, raising six assignments of error:

> I. The trial court erred when it failed to excuse two jurors for cause upon motion of the defense, resulting in the unnecessary expenditure of two of Mr. Barnum's preemptory [sic] strikes, acting to Mr. Barnum's prejudice and requiring reversal due to the denial of a fair trial under the Ohio and United States Constitutions[.]
>
> II. The convictions are insufficient to sustain a conviction under the United States and Ohio Constitutions, and further, the convictions stand contrary to the manifest weight of the evidence[.]
>
> III. The trial court erred, when responding to the jury's question regarding speed, in not providing an instruction on long-standing Ohio law that speed alone cannot establish recklessness, or alternatively counsel was ineffective for not requesting this instruction[.]

> IV. Mr. Barnum was denied his due process right to a fair trial when the prosecution improperly informed the jury that the defense had requested a lesser included instruction, and mocked and derided the credibility of the defendant regarding braking without any evidence or even *investigation* to back it up[.]
>
> V. The trial court erred in imposing consecutive sentences upon Mr. Barnum because the courts [sic] findings are not supported by the record[.]
>
> VI. Cumulative error

II. Law and Analysis

A. The trial court erred by denying Barnum's for-cause challenges of husband and wife.

{¶ 58} In his first assignment of error, Barnum argues that the trial court erred by denying his challenges for cause of husband and wife, which forced him to use two of his peremptory challenges to remove them from the jury. He contends that husband and wife had personal relationships with K.T.'s family, wife had "improper and incorrect knowledge of the case gleaned before the trial[,]" and their answers about whether they could be impartial were "inconsistent." The state responds that the trial court's decision to keep husband and wife was not an abuse of discretion because each "said that they would render a verdict based only upon the facts in evidence."

{¶ 59} For a defendant to receive a fair trial, the jurors hearing the case must be impartial. *State v. Clinton*, 2017-Ohio-9423, ¶ 88. The bases for challenging a juror for cause are listed in R.C. 2313.17, R.C. 2945.25, and Crim.R. 24(C). Most relevant here, R.C. 2313.17(B)(9) permits a challenge for cause if the prospective juror "discloses by the[ir] answers that the[y] cannot be a fair and impartial juror or will not follow the law as given to the person by the court"; R.C. 2313.17(D) permits a challenge for cause "on

suspicion of prejudice against or partiality for either party . . . or other cause that may render the juror at the time an unsuitable juror"; R.C. 2945.25(B) and Crim.R. 24(C)(9) permit a challenge for cause if the prospective juror "is possessed of a state of mind evincing enmity or bias toward the defendant or the state . . ."; and R.C. 2945.25(O) and Crim.R. 24(C)(14) permit a challenge for cause if the prospective juror is, for any other reason, "otherwise unsuitable . . . to serve as a juror."

{¶ 60} The trial court is responsible for determining the validity of a for-cause challenge. R.C. 2313.17; R.C. 2945.25; Crim.R. 24(C). In doing so, the court "must determine whether the prospective juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *State v. White*, 82 Ohio St.3d 16, 20 (1998), quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980). Put another way, "'the ultimate question is whether the juror swore that he could set aside any opinion he might hold and decide the case on the evidence, and whether the juror's protestation of impartiality should be believed.'" *State v. Knuff*, 2024-Ohio-902, ¶ 75, quoting *State v. Madison*, 2020-Ohio-3735, ¶ 42. Because that determination involves a judgment on credibility, "'deference must be paid to the trial judge who sees and hears the juror.'" *Id.* The trial court has "broad discretion in determining a juror's ability to be impartial." *Clinton* at ¶ 74. Therefore, we will uphold a trial court's decision on a for-cause challenge "'unless it is unsupported by substantial testimony, so as to constitute an abuse of discretion.'" *Knuff* at ¶ 75, quoting *Madison* at ¶ 42. The court's erroneous denial for a for-cause challenge "'is prejudicial only if the accused eliminates the challenged venireman with a peremptory challenge and exhausts his

peremptory challenges before the full jury is seated.'" (Emphasis deleted.) *State v. Hale*, 2008-Ohio-3426, ¶ 87, quoting *State v. Tyler*, 50 Ohio St.3d 24, 30-31(1990).

{¶ 61} The fact that a prospective juror knows the victim of the offense does not automatically require the trial court to dismiss that prospective juror for cause. *State v. Sheppard*, 84 Ohio St.3d 230, 235 (1998). Generally speaking, a prospective juror who has a relationship with someone involved in the case "is permitted to serve so long as her relationship to [the] person in the case is distant and casual, rather than close and ongoing." *State v. Beasley*, 2018-Ohio-493, ¶ 128, citing *Hale* at ¶ 208. A close and ongoing relationship calls into question a juror's assessment that they can be fair and impartial. *See Wolfe v. Brigano*, 232 F.3d 499, 502 (6th Cir. 2000). Cause for challenging a prospective juror based on bias can exist if the prospective juror has "substantial emotional involvement with the facts or nature of the case which would adversely affect impartiality in the average person . . . ." *State v. Zerla*, 1992 WL 55433, *2 (10th Dist. Mar. 17, 1992).

{¶ 62} Here, the trial court abused its discretion by denying Barnum's for-cause challenges of husband and wife. Although we give deference to the trial court's determination that husband's and wife's "responding language and the way they answered the questions and tone of their voice . . ." showed that they were "being honest and believe that they could serve impartially . . . [,]" their answers also showed that their relationship with grandfather was more "close and ongoing" than "distant and casual," *Beasley* at ¶ 128, which calls into question their claims to the trial court that they could be impartial. *See Wolfe* at 502.

{¶ 63} First, we note that two prospective jurors being married, standing alone, does not require the trial court to excuse them. *See State v. Bagley*, 1979 WL 207385, *3 (6th Dist. Dec. 7, 1979) (Appellant "contend[ed] that he was denied a fair and impartial trial because there were three sets of husband and wife prospective jurors to which defense counsel did not object. There is no judicial precedent nor good reason to support this contention."); *Dunlap v. Commonwealth*, 435 S.W.3d 537, 585-586 (Ky. 2013), quoting *Harris v. Commonwealth*, 313 S.W.3d 40, 49-50 (Ky. 2010) (finding, under statute similar to Ohio's, that jurors who were married to each other were not presumptively biased because "'[b]ias . . . refers generally to a juror's favoring or disfavoring one side of the case or the other, a risk not posed by relationships between jurors'"); *but see State v. Miracle*, 1986 WL 13268, *3 (12th Dist. Nov. 24, 1986) (Jones, J., concurring) ("I find it incomprehensible that counsel [and] the trial judge all found it perfectly proper for a husband and wife to serve on the same jury. . . . I strongly believe comparable situations should be avoided, and that the court should take such action as is necessary to eliminate the inherent possibility of permitting outside influences to affect the outcome of a jury trial. Spouses should not sit on the same jury.").

{¶ 64} Although husband and wife's marriage did not require the court to excuse them, their relationship with K.T.'s family did. Husband and wife each said that their relationship with K.T.'s family was not as close as it was when K.T.'s grandfather was the best man at their wedding 40 years earlier. But they admitted to still being friends, attending K.T.'s grandfather's children's weddings, and knowing the family well enough that their daughter told them about the accident while they were on vacation. Moreover,

husband and wife *attended K.T.'s funeral*—which not only demonstrates more than a distant and casual relationship to the victims, but also a "substantial emotional involvement with the facts or nature of the case which would adversely affect impartiality in the average person . . . ." *Zerla*, 1992 WL 55433, at *2 (10th Dist.).

{¶ 65} For these reasons, the record here shows that husband and wife had more than a "distant and casual" relationship with the victims, and the trial court erred by denying Barnum's for-cause challenge. *Compare, e.g., Hale*, 2008-Ohio-3426, at ¶ 207-209 (trial counsel were not ineffective by failing to challenge juror who "remembered [the victim] as an entertainer who had been known locally when the juror was in her teens[,]" but "'didn't know him personally'" and did not have any meaningful interactions with him); *State v. Hill*, 2010-Ohio-709, ¶ 82 (11th Dist.) (defendant not denied an impartial jury when the trial court denied for-cause challenge of juror who worked with victim's relative because juror did not know the victim and did not know about the underlying crime before trial); *State v. Williams*, 2019-Ohio-2657, ¶ 30-33 (6th Dist.) (trial court did not commit plain error by denying for-cause challenge of juror whose grandson was formerly married to victim's girlfriend because juror did not actually know victim, did not have a close family relationship with victim or the girlfriend, and was unsure if her grandson and the girlfriend had a child together); *State v. Newsome*, 2012-Ohio-6119, ¶ 51-55 (3d Dist.) (trial counsel was not ineffective by failing to challenge juror who knew of the crime, was defendant's neighbor about ten years earlier, and had contact with defendant through his cousin (who was defendant's friend), but had not seen defendant in three or four years); *Beasley* at ¶ 125, 128

(defendant did not show a close and ongoing relationship between witness and juror who knew witness and his family, had become friends with witness in the month and a half before trial, played basketball with witness, and whose daughter was "very good friends with" witness's daughter); *Porter v. Gramley*, 112 F.3d 1308, 1318 (7th Cir. 1997) (appellant was not entitled to federal habeas corpus relief based on allegedly biased trial juror; although juror attended victim's funeral and knew victim's mother from church, juror had a habit of attending the funeral of anyone connected to the church and her only connection to mother was attending the same 3,000-member church); *Sanders v. Norris*, 529 F.3d 787, 793 (8th Cir. 2008) (appellant was not entitled to federal habeas relief based on trial juror who failed to disclose that he was the coroner who went to the scene of the murder and the funeral director who conducted victim's funeral; appellant did not present evidence of actual bias and court would not presume juror was biased because his interactions with the victim were "not as a friend or family member but as part of his regular duties as a coroner and a mortician"); *State v. Mundt*, 2007-Ohio-4836, ¶ 69 (no close, ongoing relationship where juror's nephew attended school with the victim).

{¶ 66} We acknowledge that, during individual voir dire, husband and wife each said that they could be fair and impartial. Their relationship with K.T.'s family, however, makes those claims patently untenable. For example, although husband initially agreed with the trial court that he could be fair, he later admitted that he might not be a good choice for a juror because of his relationship with K.T.'s family. In addition, when asked if he could handle the "pretty gruesome" and "horrible" evidence and testimony, husband said, "[t]hat's hard to say until it comes because I'm sure there [sic] whole family is

probably going to be in there during the trial . . . ." And, although wife said that she could be impartial and follow the law, she also commented, unprompted, that K.T.'s family "is a good family" and said that she "[a]bsolutely" felt very sympathetic toward them. In situations where prospective jurors have close relationships with someone involved in the case, "[a] court's refusal to excuse a juror will not be upheld 'simply because the court ultimately elicits from the prospective juror a promise that he will be fair and impartial. . . .'" (Ellipsis in original.) *Wolfe* at 502, quoting *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147, 156 (3rd Cir. 1995).

{¶ 67} Moreover, despite whatever promises they made during voir dire, the two prospective jurors' attendance at K.T.'s funeral unquestionably shows "a substantial emotional involvement with the facts of the case that would adversely affect the impartiality of the average person"—and provided more than sufficient cause to excuse the two jurors for bias under Crim.R. 24(C)(9). *Zerla*, 1992 WL 55433, at *2 (10th Dist.).

{¶ 68} In light of the close, ongoing relationship husband and wife had with the victim's family—including but not limited to their attendance at K.T.'s funeral—the court acted unreasonably by denying Barnum's for-cause challenges. The court's denial of his for-cause challenges forced Barnum to use two of his four peremptory challenges to strike husband and wife from the jury, and he exhausted his peremptory challenges. As a result, Barnum was prejudiced and his conviction must be reversed. Barnum's first assignment of error is well-taken.

B. Barnum's convictions are supported by sufficient evidence.

{¶ 69} In his second assignment of error, Barnum argues that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Because we are reversing Barnum's convictions based on the trial court's failure to excuse jurors for cause, his manifest weight argument is moot. *State v. Solt*, 2023-Ohio-2779, ¶ 20 (10th Dist.); *State v. Moss*, 2020-Ohio-2862, ¶ 40 (6th Dist.). Our decision on the first assignment of error does not moot Barnum's sufficiency argument, however, because "[a]n assignment of error going to the sufficiency of the evidence supporting a criminal count is always potentially dispositive of that count." *State v. Gideon*, 2020-Ohio-6961, ¶ 27. This is because the Double Jeopardy Clause bars the state from retrying the defendant when a conviction is reversed on sufficiency grounds. *Id.*, citing *State v. Mathis*, 2020-Ohio-3068, ¶ 78 (6th Dist.); *Girard v. Giordano*, 2018-Ohio-5024, ¶ 10. Therefore, we will address Barnum's sufficiency argument.

1. We are bound to follow Supreme Court precedent on circumstantial evidence.

{¶ 70} In this assignment of error, Barnum first argues that we should alter our standard of review in cases where convictions are based on circumstantial evidence. Specifically, he contends that we should return to using the standard outlined in *State v. Kulig*, 37 Ohio St.2d 157 (1974), syllabus, *overruled by State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph one of the syllabus. He claims that "this standard is required under Ohio due process, which includes a prohibition on the denial of justice."

{¶ 71} In *Kulig*, the Ohio Supreme Court held that "[c]ircumstantial evidence relied upon to prove an essential element of a crime must be irreconcilable with any

reasonable theory of an accused's innocence in order to support a finding of guilt." *Id.* In *Jenks*, at paragraph one of the syllabus, the court specifically overruled *Kulig*, holding that

> [c]ircumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.

This is the standard for evaluating circumstantial evidence that we continue to use today.

{¶ 72} Although Barnum asks us to make "new law" by returning to the *Kulig* standard, we are bound to follow Ohio Supreme Court precedent. *State v. Fips*, 2020-Ohio-1449, ¶ 10, citing *Smith v. Klem*, 6 Ohio St.3d 16, 18 (1983); and *Merrick v. Ditzler*, 91 Ohio St. 256, 264 (1915) ("We also take this opportunity to remind the lower courts in this state that they are required to follow our precedent."). That court overruled *Kulig* more than 30 years ago, and we are required to abide by that ruling. *State v. Mallory*, 2023-Ohio-4864, ¶ 6 (rejecting defendant's request to adopt *Kulig* standard).

{¶ 73} Barnum also cursorily raises the Ohio Constitution's Due Course of Law Clause as a basis for reverting to the *Kulig* standard, but he does not develop this argument. And we doubt that the Ohio Constitution provides greater protection than the Due Process Clause of the United States Constitution, as Barnum implies. The two provisions are "'virtually identical,'" *State v. Gardner*, 2008-Ohio-2787, ¶ 76, quoting *State v. Brown*, 2003-Ohio-3931, ¶ 28 (O'Connor, J., dissenting) and "[s]ince 1887, [the Supreme Court] has equated the Due Course of Law Clause in Article I, Section 16 of the

Ohio Constitution with the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *State v. Aalim*, 2017-Ohio-2956, ¶ 15.

{¶ 74} In short, we reject Barnum's request to change our review of circumstantial evidence.

2. The evidence sufficiently supports Barnum's convictions.

{¶ 75} Turning to the substance of Barnum's argument, relying on *Kulig*, he primarily argues that the state's failure to investigate his claim that his brakes failed and its use of data from the airbag control modules (some of which is inaccurate) is insufficient to support his convictions. The state responds that Barnum does not dispute his vehicular manslaughter conviction, and it presented evidence of his recklessness beyond his speed, including taking Adderall to stay awake on his drive home, approaching the stop sign at a speed "well above the posted limit[,]" and hitting the accelerator instead of the brake immediately before the crash.

{¶ 76} In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Smith*, 80 Ohio St.3d 89, 113 (1997). We do not weigh the evidence or assess the credibility of the witnesses. *State v. Were*, 2008-Ohio-2762, ¶ 132. "Rather, we decide whether, if believed, the evidence can sustain the verdict as a matter of law." *State v. Richardson*, 2016-Ohio-8448, ¶ 13. Naturally, this requires "a review of the elements of the charged offense and a review of the state's evidence." *Id.*

Whether there is sufficient evidence to support a conviction is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

{¶ 77} To convict Barnum of aggravated vehicular homicide, the state was required to prove that Barnum, while operating a motor vehicle, recklessly caused K.T.'s death. R.C. 2903.06(A)(2)(a). To convict Barnum of vehicular assault, the state was required to prove that Barnum, while operating a motor vehicle, recklessly caused J.T. serious physical harm. R.C. 2903.08(A)(2)(b).[1] A Mitsubishi Eclipse Cross is a motor vehicle. *See* R.C. 4511.01(B). A person's conduct is "reckless" when, "with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk . . ." that their conduct is likely to cause a certain result or be of a certain nature. R.C. 2901.22(C).

{¶ 78} Barnum stipulated that he was operating the Eclipse, ran a stop sign, caused the accident, caused K.T.'s death, and caused J.T.'s serious physical harm—i.e., he stipulated to every element of the offenses except recklessness. Parties may choose to stipulate to facts rather than presenting evidence on those points. *State v. Pavlich*, 2011-Ohio-802, ¶ 28 (6th Dist.). When "'an adverse party is willing to stipulate to the truth of a certain allegation, the party having the burden of proving that allegation is relieved from proving it.'" *Id.*, quoting *State v. Barstow*, 2003-Ohio-7336, ¶ 37 (4th Dist.). Stipulations a defendant makes at trial are binding and enforceable against him, and after agreeing to stipulations, the defendant is bound by them. *Id.*

[1] Barnum does not raise any arguments related to his vehicular manslaughter conviction, so we will not address it.

{¶ 79} Because Barnum stipulated to nearly every element of the aggravated vehicular homicide and vehicular assault charges, the state was relieved of its burden of proving all but the "recklessly" element, *Pavlich* at ¶ 28, and we find that there is sufficient evidence of these elements.

{¶ 80} Regarding Barnum's recklessness, he argues (under the *Kulig* standard that we have rejected) that the state did not sufficiently prove recklessness because Baxter was unaware of his claim that his brakes failed—and, therefore, did not investigate the possibility of mechanical failure—and because the information from the Cherokee's airbag control module appears to include some incorrect data, all the information from the airbag control modules is suspect. The state responds that its evidence showing that Barnum (1) was speeding as he approached the stop sign, (2) had taken Adderall to stay awake, and (3) hit the accelerator instead of the brake just before the accident was sufficient evidence of recklessness.

{¶ 81} We agree with the state that it presented sufficient evidence that Barnum was reckless. He was driving on unfamiliar country roads after taking a combination of marijuana and Adderall before he started driving, was going more than 30 m.p.h. over the speed limit five seconds before the crash, and hit the accelerator instead of the brake during the two seconds before the crash. Taken together, these facts, if believed, show that Barnum was acting with heedless indifference to the consequences of his actions and disregarded a substantial and unjustifiable risk that his conduct was likely to cause a motor vehicle accident that results in serious physical harm or death. *See State v. Swihart*, 2013-Ohio-4645, ¶ 52 (3d Dist.), quoting *State v. Speer*, 2008-Ohio-6947, ¶ 26 33.

(6th Dist.) ("[F]or a defendant to be guilty of aggravated vehicular homicide, 'a jury must find behavior that goes beyond negligence and *includes an additional factor[*, such as] use of alcohol or drugs, a perverse and deliberate disregard for the safety of others, or some other aggravating circumstance that is beyond a mere lapse in judgment.'" (Emphasis and second brackets in original.)); *State v. Moore*, 2009-Ohio-3766, ¶ 8-9 ("A driver's grossly excessive speed, particularly when combined with other factors, . . ."—including driving on unfamiliar roads—"will support a finding of recklessness."). Barnum's actions show more than a "mere lapse in judgment," *Swihart* at ¶ 52, and, in combination, show that he acted recklessly.

{¶ 82} Moreover, Baxter's failure to examine the Eclipse's brakes and an apparent error in the *Cherokee's* airbag control module data do not change our analysis. Baxter testified that he had not seen a case in which "the brakes on a newer vehicle have failed to the point that someone can't bring their vehicle to a stop[,]" the Eclipse's airbag control module data did not indicate an issue with the brakes, and there was nothing at the scene of the crash to indicate brake failure. Beyond that, the Eclipse's data showed that, although Barnum was initially braking, he hit the accelerator and had the pedal nearly to the floor just seconds before the accident. And the fact that the data from the Cherokee might have been flawed does not automatically mean that the data from the Eclipse—a different vehicle with a different airbag control module—was also flawed.

{¶ 83} Considering the facts in a light most favorable to the state, we find that it presented sufficient evidence to prove that Barnum was acting recklessly when he caused the accident. Therefore, Barnum's second assignment of error is not well-taken.

C. Barnum's remaining assignments of error are moot.

{¶ 84} Our reversal of Barnum's convictions because of the jury issue moots his remaining assignments of error. Therefore, Barnum's third, fourth, fifth, and sixth assignments of error are not well-taken.

III. Conclusion

{¶ 85} Based on the foregoing, the March 6, 2024 judgment of the Fulton County Court of Common Pleas is reversed, and this case is remanded for retrial. The state is ordered to pay the costs of this appeal under App.R. 24.

Judgment reversed
and remanded.

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

Thomas J. Osowik, J. _____
JUDGE

Christine E. Mayle, J. _____
JUDGE

Gene A. Zmuda, J.
CONCUR. _____
JUDGE