[Cite as *State v. Gonzalez*, 2008-Ohio-2749.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 06 MA 58
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
JOSEPH GONZALEZ	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 04 CR 428
JUDGMENT:	Affirmed in part. Reversed and Vacated in part.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Rhys B. Cartwright-Jones Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Atty. Louis M. DeFabio 4822 Market Street, Suite 220 Youngstown, Ohio 44512
JUDGES:	
Hon. Cheryl L. Waite Hon. Joseph J. Vukovich Hon. Mary DeGenaro	
	Dated: June 3, 2008

[Cite as *State v. Gonzalez*, 2008-Ohio-2749.]
WAITE, J.

{¶1} Appellant Joseph Gonzalez appeals his felony conviction for aggravated vehicular homicide and a related misdemeanor conviction for failure to stop after an accident. Appellant presents four issues for review. He argues, in part, that the indictment for failure to stop after an accident was defective and we agree with this argument, particularly because the indictment fails to mention the mens rea element of the crime. We therefore vacate his conviction for failure to stop after an accident. The remaining alleged errors concern evidentiary issues. Appellant contends that certain photographs of the victim should not have been admitted into evidence. He claims that evidence of an alleged physical altercation at a bar should have been excluded under Evid.R. 404. Finally, he argues that the manifest weight of the evidence does not support his aggravated vehicular homicide conviction. We reject these arguments, and affirm the conviction for aggravated vehicular homicide.

BACKGROUND OF THE CASE

{¶2} At approximately 2:30 a.m. on March 21, 2004, Shaun Summerville and Richard Bussey were walking on the sidewalk on Wilson Avenue in Campbell, Ohio. Appellant, who was driving his brother's truck on Wilson Avenue at the time, struck and killed Mr. Summerville. Appellant did not stop at the time of the accident. Appellant's brother noticed that his truck had been damaged, and Appellant initially told him that a friend had used the truck and struck a pole. Appellant later claimed that he may have hit a dog or some other animal. After the news of Mr. Summerville's death was reported in the local media, Appellant hired an attorney and then turned himself over to the Campbell Police Department.

{¶3} On March 25, 2004, Appellant was indicted on one count of aggravated vehicular homicide, a second degree felony, R.C. 2903.06(A)(2), and one count of failure to stop after an accident, a third degree felony, R.C. 4549.02(A). Trial began on February 7, 2006. At trial, Mr. Bussey testified that he was walking on the sidewalk on Wilson Avenue on the morning of the accident, and that Mr. Summerville was walking next to him, partly on the sidewalk and partly on the grass. They were walking in very close proximity to one another. Mr. Summerville was closer to the road. Mr. Bussey noticed a truck come from behind them. He heard a thump, and then realized that his friend, Mr. Summerville, was gone. He said the truck had swerved up onto the sidewalk, driving in between telephone poles and rocks, when it hit Mr. Summerville. When Mr. Bussey looked for his friend, he found him laying face up, showing no signs of life. He ran to a nearby house, and called his aunt to tell her that Mr. Summerville was dead. He then returned to the body and knelt down and cried. Other people began arriving at the scene, including the local police.

{¶4} Appellant's brother, Jonathan Centeno, testified that he owned a red and white Ford Bronco truck. On the night prior to the accident, he left his truck and his keys at his mother's house. At approximately 3:00 a.m. on the morning of the accident, he received a phone call from Appellant concerning damage to the truck. Appellant told Mr. Centeno that a woman had used the truck and hit a pole. Appellant drove the truck back to Mr. Centeno, who noticed that the right side of the vehicle had been damaged. Appellant gave no further explanation about the damage to the truck, and Mr. Centeno went back to bed. After he awoke again that afternoon,

Appellant told him that he heard on the news that there was some type of accident on Wilson Avenue and that he may have hit something on Wilson Avenue, possibly a dog. Appellant then contacted his attorney.

{¶5} Randall Benner, a paramedic, testified that he was called to the scene of the accident on March 21, 2004. Mr. Benner determined that the victim was dead, and had sustained a severe trauma to the head. He also noticed that one of the victim's shoes had been knocked off and was lying some distance from the body. Benner testified that an impact forceful enough to knock a person's shoe off is generally a fatal impact.

{¶6} Dr. Robert Belding, a forensic pathologist, testified about the autopsy he performed on the victim. He testified that the victim sustained massive head injury, as well as numerous other abrasions, scrapes, bruises and bone fractures. He stated that virtually every organ in the victim's abdomen had been damaged, and that death had been very rapid due to the tremendous trauma to the body. The state introduced photographs into evidence supporting Dr. Belding's testimony, including an autopsy photograph of the head injury.

{¶7} Campbell Police Officer Kevin Sferra testified that he was called to investigate the accident. He testified that he found pieces of debris that had broken off from the vehicle at the time of the accident. An examination of some of the debris indicated that the vehicle in question was a red and white Ford Bronco.

{¶8} Ohio State Trooper Joel T. Hughes testified. Trooper Hughes was called to the scene of the accident soon after it occurred. He testified as to

measurements he took of the crime scene, including the exact location of the body, the victim's shoe, the roadway, the telephone poles along the road, and the tire tracks and scuff marks that were found near the body.

{¶9} Appellant also testified at trial. He admitted he took his brother's truck a few hours prior to the accident and drove to a bar called Pal Joey's. He left the bar at approximately 2:00 a.m. He admitted that he may have hit something as he drove on Wilson Avenue after he left the bar. He testified that he did not stop because he panicked at the time, particularly since his license was under suspension. He stated that he turned himself into the police after he heard about the accident in the morning news.

{¶10} The jury convicted Appellant of aggravated vehicular homicide, a second degree felony, and of misdemeanor failure to stop after an accident. Sentencing took place on March 13, 2006. The court sentenced him to six years in prison on count one and six months in prison on count two, to be served concurrently. The sentencing judgment entry was filed on April 5, 2006, and this timely appeal followed.

{¶11} Appellant presents four assignments of error on appeal, which will be treated out of order to facilitate our analysis.

ASSIGNMENT OF ERROR NO. 4

{¶12} "THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO DISMISS COUNT 2 (FAILURE TO STOP AFTER AN ACCIDENT) AS THE INDICTMENT CHARGING THIS OFFENSE FAILED TO STATE ALL THE ESSENTIAL ELEMENTS OF THE OFFENSE."

{¶13} Appellant contends that he was never properly charged with the offense of failure to stop after an accident, and therefore, he could not have been convicted of that offense. Appellant was charged with violating R.C. 4549.02(A), which states, in pertinent part:

{¶14} "(A) In case of accident to or collision with persons or property upon any of the public roads or highways, due to the driving or operation thereon of any motor vehicle, the person driving or operating the motor vehicle, having knowledge of the accident or collision, immediately shall stop the driver's or operator's motor vehicle at the scene of the accident or collision and shall remain at the scene of the accident or collision until the driver or operator has given the driver's or operator's name and address and, if the driver or operator is not the owner, the name and address of the owner of that motor vehicle, together with the registered number of that motor vehicle, to any person injured in the accident or collision or to the operator, occupant, owner, or attendant of any motor vehicle damaged in the accident or collision, or to any police officer at the scene of the accident or collision.

{¶15} "In the event the injured person is unable to comprehend and record the information required to be given by this section, the other driver involved in the

accident or collision forthwith shall notify the nearest police authority concerning the location of the accident or collision, and the driver's name, address, and the registered number of the motor vehicle the driver was operating, and then remain at the scene of the accident or collision until a police officer arrives, unless removed from the scene by an emergency vehicle operated by a political subdivision or an ambulance."

{¶16} The portion of Appellant's indictment relating to the crime of failure to stop after an accident contained the following language:

{¶17} "The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County of Mahoning, on their oaths, and in the name and by the authority of the State of Ohio, do find and present that on or about March 21, 2004 at Mahoning County, JOSEPH GONZALEZ did fail to stop his vehicle after an accident, said violation resulting in the death of Shaun Summerville. In violation of Section 4549.02(A)(B) of the Revised Code, a Felony of [the] Third Degree, against the peace and dignity of the State of Ohio."

{¶18} Appellant contends that the language in the indictment fails to charge him with the offense described in R.C. 4549.02(A). He argues that, "if a vital and material element identifying or characterizing an offense is omitted from an indictment, the indictment is insufficient to charge an offense and cannot be remedied by the court." *State v. Cimpritz* (1953), 158 Ohio St. 490, 493, 110 N.E.2d 416. He contends that the indictment fails to mention any mens rea element of the

crime and omits other elements as well, such as whether he failed to remain at the scene or failed to provide his identifying information.

{¶19} An indictment must give a defendant notice of all the elements of the offense with which the defendant is charged. Crim. R. 7(B). A criminal defendant has a constitutional right to have all elements of the crime charged stated in the indictment. *State v. Shuttlesworth* (1995), 104 Ohio App.3d 281, 286, 661 N.E.2d 817. A conviction based on an indictment that fails to include all essential elements of the crime, including the element of a culpable mental state, is void for lack of subject matter jurisdiction. *Cimpritz*, supra, at paragraph six of the syllabus; *State v. Sarver*, 7th Dist. No. 05-CO-53, 2007-Ohio-0601, ¶12.

{¶20} Appellee argues in rebuttal that R.C. 4549.02(A) does not contain a scienter element, and thus, the indictment was not faulty for this omission. Although the statute does refer to "having knowledge of the accident or collision," the state contends that this is not the same as the mens rea element that a person must "knowingly" commit the crime. Despite the use of the word "knowledge" in R.C. 4549.02(A), Appellee contends that it is a strict liability crime with no mens rea element.

{¶21} We are not persuaded by this argument. R.C. 2901.21(B) sets forth the requisite test for determining whether a criminal statute is a strict-liability offense. R.C. 2901.21(B) provides:

{¶22} "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the

conduct described in the section, then culpability is not required for a person to be guilty of the offense."

{¶23} Hence, mens rea is always a factor in a criminal conviction unless both of two requirements are met: (1) the language of the statute setting out the offense does not specify a degree of mens rea, and (2) this language on its face clearly intends to impose strict liability for the offense.

{¶24} With respect to failure to stop after an accident, it does not appear that either requirement of R.C. 2901.21(B) is present when we review the statutory language setting forth this crime. First, the criminal statute does contain a mens rea element corresponding to the culpable mental state of "knowingly". R.C. 2901.22(B) defines the culpable mental state of "knowingly" as follows: "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." The second part of this definition states that "knowingly" means having "knowledge of circumstances." In order to criminally charge someone with failure to stop after an accident, then, the statute requires there be proof as to "having knowledge of" an accident. In other words, that person has acted "knowingly."

{¶25} Secondly, the statutory language setting forth the crime of failure to stop after an accident does not plainly indicate a purpose to impose strict liability. The legislature's intent to impose strict liability must appear in the very words of the statute. *State v. Moody*, 104 Ohio St.3d 244, 2004-Ohio-6395, 819 N.E.2d 268, ¶16.

The mere use of the word "shall" in the criminal offense is not an indicator that it is a strict-liability crime. Id. There is nothing in R.C. 4549.02 that clearly indicates strict liability, and thus, it should not be treated as imposing strict liability.

{¶26} Appellee also argues that Appellant failed to object to any error in the indictment prior to trial, and has therefore waived any right to have the language of the indictment reviewed on appeal. Although errors in the indictment generally must be made prior to trial, there are exceptions, as noted by Crim.R. 12(C)(2):

{¶27} "(C) **Pretrial motions**. Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

{¶28} "* * *

{¶29} "(2) Defenses and objections based on defects in the indictment, information, or complaint (*other than failure to show jurisdiction in the court or to charge an offense*, which objections shall be noticed by the court at any time during the pendency of the proceeding);" (Emphasis added.)

{¶30} Appellant's argument on appeal is that the indictment fails to charge an offense because certain essential elements of the crime were omitted, including the scienter element. Appellant raised this objection to his indictment after the state had concluded presenting its evidence. This qualifies as an objection raised "at any time during the pendency of the proceeding" and refutes Appellee's waiver argument. Furthermore, the Ohio Supreme Court has very recently ruled that, "[w]hen an indictment fails to charge a mens rea element of a crime and the defendant fails to

raise that defect in the trial court, the defendant has not waived the defect in the indictment." *State v. Colon*, ___ N.E.2d, 2008-Ohio-1624, syllabus.

{¶31} Because the indictment failed to include at least one essential element, the scienter, and Appellant is permitted to raise this issue on direct appeal even without objection to the trial court, we sustain this assignment of error and vacate the conviction for failure to stop after an accident. We also dismiss this count in the indictment.

ASSIGNMENT OF ERROR NO. 1

{¶32} "THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBITS 4, 5 AND 6 AS EACH CONSTITUTED HIGHLY INFLAMMATORY AND GRUESOME PHOTOGRAPHS OF THE DECEDENT THAT WERE NOT RELEVANT AND, EVEN IF RELEVANT, THE PREJUDICIAL EFFECT OF SAID PHOTOGRAPHS OUTWEIGHED ANY PROBATIVE VALUE."

{¶33} Appellant objected at trial to the admission of three photographs of the victim, Mr. Summerville, taken immediately prior to his autopsy. One photograph that shows an extensive injury to the victim's head is undeniably gruesome. The other two photographs portray the front of the victim's face and a lengthwise view of his body, fully clothed, prior to the autopsy. Appellant contends that these photographs were irrelevant to any issues in dispute at trial, and were highly prejudicial and inflammatory, particularly the photograph of the head injury.

{¶34} Decisions on the admissibility of photographs are "left to the sound discretion of the trial court." *State v. Slagle* (1992), 65 Ohio St.3d 597, 601, 605

N.E.2d 916. The test for exclusion of evidence under Evid.R. 403 is that relevant evidence, including photographic evidence, should only be excluded when, "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." A photo should not be excluded from evidence simply because it is gruesome. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, 473 N.E.2d 768. The Ohio Supreme Court has held that: "Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number." Id. at paragraph seven of the syllabus.

{¶35} We disagree with Appellant that the photographs were irrelevant or lacked any probative value. First, the photographs corroborate the testimony of the state's witnesses. The photographs particularly enhance the testimony of Dr. Belding, who conducted the autopsy. Dr. Belding went into great detail about the extreme force of the impact and the extensive damage done to the victim's head, neck, spine, torso, and virtually every organ below the victim's chest. The impact was so severe that it separated the bones of the victim's skull. Dr. Belding concluded that the injury to the victim's neck, severing his spinal column, was the immediate cause of death. The photo of the head injury is corroborative evidence that the collision was so violent, particularly to the victim's head, that it very likely snapped his spinal column.

{¶36} The photograph of the severe head injury also corroborates the evidence indicating how the crash occurred. This evidence helped establish Appellant's mens rea in this case. In order for Appellant to be convicted of aggravated vehicular homicide, the state had to prove that Appellant acted with the mens rea of, at least, recklessness. Recklessness is defined in R.C. 2901.22(C): "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his 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, he perversely disregards a known risk that such circumstances are likely to exist."

{¶37} The state attempted to prove recklessness, in part, by showing that Appellant swerved off the road beyond the grassy area next to the road that was lined with telephone poles, and then continued to swerve all the way onto the sidewalk where the victim and Mr. Bussey were walking. Various other aspects of the evidence show that Appellant left the roadway driving at a high rate of speed. For example, Mr. Bussey described the moment of impact as occurring so fast that he did not see it happen. He only heard a swishing sound and a thump, and then realized his friend was no longer walking next to him. Other evidence reveals that the victim's body was found a long distance from the point of impact, approximately 150 feet away. The photo of the severe head injury tends to corroborate this testimony by showing that Appellant was, in fact, driving in such a manner and at such speed so as to cause massive injuries to the victim's head. This information

helps establish that Appellant acted at least recklessly in steering his car off the road, up onto the sidewalk, late at night, at a considerable speed, when he hit the victim with the Ford Bronco truck.

{¶38} We do not know what the actual speed limit was on the road where Appellant was driving, but driving faster than the speed limit is not the only indication of recklessness. Appellant testified that it was snowing at the time of the accident and it was very late at night. The state's evidence indicates that Appellant swerved far off the road. He was driving fast enough to injure practically every internal organ in the victim's body. The impact was so hard that one of the victim's shoes was knocked far away from where the victim was found, which the record indicates is usually a sign of a fatal accident. In this context, the photograph of the head injury indicates that Appellant was driving fast enough to cause massive damage to the victim's skull and brain, thus underscoring the other evidence of recklessness.

{¶39} Appellant contends that he did not dispute the manner in which the victim died, and thus, the victim's injuries were not relevant. Our review of the record does not reflect that Appellant admitted any material fact prior to trial or during the state's presentation of its case in chief. Once the state was finished presenting its case, Appellant took the stand and testified that he was driving the Ford Bronco truck in the area where Shaun Summerville was killed on the night of the crime. He did not admit that he hit Mr. Summerville. He testified that he may have hit a dog; he only remembered that he felt a thump while he was driving. He also tried to establish that the damage to the truck may not have been caused by whatever it was that he may

have hit on Wilson Avenue. Instead, he claimed that his woman friend ran into a metal pole as she was driving out of a parking lot that night, causing the damage. Further, he denied that he swerved or left the roadway where the accident occurred. It appears from the record that Appellant contested most of the circumstances of the crime. Thus, the state could not allow any aspect of the crime to go unchallenged, including the exact cause of death.

{¶40} The trial court did not abuse its discretion in allowing the photographs to be admitted, and we therefore overrule Appellant's first assignment of error.

ASSIGNMENT OF ERROR NO. 2

{¶41} "THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE OTHER ACTS EVIDENCE."

{¶42} Appellant contends that the state introduced evidence of "prior bad acts" in violation of Evid.R. 404(B), which prohibits the admission of, "[e]vidence of other crimes, wrongs, or acts," if used to show that a person has a bad character or acted in conformity with that bad character. The rule also provides a non-exclusive list of exceptions in which "prior bad acts" evidence is admissible, e.g., to prove someone's motive, to intent, to establish someone's identity, or to show that certain events did not occur by accident or mistake. A more extensive list of exceptions is codified in R.C. 2945.59. The trial court's determination as to the admissibility of "prior bad acts" evidence is reviewed for abuse of discretion: in other words, whether the trial court acted unreasonably, arbitrarily, or unconscionably. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-810, 848 N.E.2d 810, ¶62.

{¶43} The evidence in dispute regards comments by Mr. Bussey about a fight between Appellant and the victim which occurred at some time prior to the fatal collision. The record does not support Appellant's interpretation as to the manner in which Mr. Bussey's comments were introduced into evidence, or the content of that evidence. During the state's direct examination of Mr. Bussey, there was no mention of any fight. Without discussing anything about prior crimes or bad acts, Mr. Bussey testified vaguely that he had his own suspicions about who killed his friend, Mr. Summerville. The prosecutor questioned Mr. Bussey as follows on direct examination:

{¶44} "Q Do you remember later that day and over the next couple of days you had several conversations with the Campbell Police Department?

{¶45} "A Yes. I knew beforehand. I had my suspicions.

{¶46} "Q Okay. Well, all right. You had your suspicions of what?

{¶47} "A That I knew -- I knew who it was." (Tr., p. 253.)

{¶48} Mr. Bussey said nothing else about his suspicions at this time, and Appellant's counsel did not object to this testimony on any grounds. There is nothing in this dialogue that refers to a prior crime or bad act. Mr. Bussey simply stated, without giving any particular details, that he suspected someone. He did not even state that he suspected Appellant.

{¶49} On cross-examination, Appellant's counsel further questioned Mr. Bussey about his suspicions:

{¶50} "Q And didn't you tell us today that right after the accident you had suspicions?

{¶51} "A I knew. I didn't know right on, but I knew -- yeah, I knew, you might as well say that, yeah."

{¶52} "Q Well, you didn't write down any of those suspicions on that statement, did you?

{¶53} "A No." (Tr., p. 277.)

{¶54} Appellant's counsel then asked a series of questions in order to challenge Mr. Bussey's credibility concerning how many times he had seen the Ford Bronco truck prior to trial. Mr. Bussey testified on direct examination that he had seen the truck at the time the crime occurred and then later at the Campbell Police Station garage. Appellant's counsel attempted to have Mr. Bussey admit that he did not actually see the truck prior to the time he identified it at the police garage. (Tr., p. 278 ff.) Mr. Bussey, though, during cross-examination, stated that he had also seen the truck on Wilson Avenue prior to the accident.

{¶55} During redirect examination, the prosecutor asked a number of questions clarifying Mr. Bussey's suspicions and elaborating as to when he saw the truck prior to the night of the crime:

{¶56} "Q Now, you talked about, when you were being questioned, that you knew who it was.

{¶57} "A I had my suspicions.

{¶58} "Q What were your suspicions?

{¶59} "MR. JUHASZ: Objection.

{¶60} "THE COURT: Overruled.

{¶61} "A I can answer that?

{¶62} "Q Yes.

{¶63} "A Well, there was a fight prior to that before it happened, and I recognized -- I recognized the Blazer.

{¶64} "Q And what was your suspicions as to who it was?

{¶65} "MR. JUHASZ: Objection.

{¶66} "THE COURT: Overruled. You opened the door.

{¶67} "A Its was Joseph.

{¶68} "Q Joseph who?

{¶69} "A Gonzalez." (Tr., pp. 288-289.)

{¶70} It is difficult to even characterize any of this testimony as referring to character evidence or prior bad acts of Appellant. Mr. Bussey did not identify who was involved in the fight, who instigated it, whether it was a verbal or a physical altercation, or any other relevant fact about the alleged fight. Mr. Bussey also referred to a "Blazer" rather than a Ford Bronco, and it is not clear what vehicle he had in mind or how it relates to Appellant.

{¶71} Even if we can assume that this testimony relates to a prior fight between Appellant and the victim, such testimony would tend to establish a motive for the crime, and evidence of motive is a well-established exception to the rule excluding prior bad acts evidence. As Evid.R. 404(B) states: "Evidence of other

crimes, wrongs, or acts * * * may, however, be admissible for other purposes, such as proof of motive * * *." Motive, being the mental state that induces one to act, is relevant to most criminal trials in that it helps corroborate that certain acts took place because a person had a reason to act in a certain manner. *State v. Nichols* (1996), 116 Ohio App.3d 759, 764, 689 N.E.2d 98.

{¶72} Finally, the trial judge is correct that Appellant's counsel opened the door to the testimony about the prior fight by challenging whether Mr. Bussey had actually entertained any suspicions about who killed his friend, and by trying to get Mr. Bussey to testify that he had never seen the Ford Bronco truck prior to his identification of it at the police station. Appellant's counsel did not object when Mr. Bussey discussed his suspicions, and in fact, furthered that discussion. The prosecutor's subsequent questions to Mr. Bussey on redirect examination seem to be nothing more than an attempt to rebut some of the questioning done during cross-examination. Once a party opens the door to a subject, the trial court has wide latitude in allowing the opposing party to cross-examine the witness on the same subject matter. *Sims v. Dibler*, 172 Ohio App.3d 486, 2007-Ohio-3035, 875 N.E.2d 965, ¶34.

{¶73} Appellant's argument is not supported by the record, and there was no abuse of discretion in allowing Mr. Bussey to testify about a prior fight involving Appellant. This assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 3

{¶74} "THE JURY'S VERDICT AS TO COUNT 1 OF THE INDICTMENT (AGGRAVATED VEHICULAR HOMICIDE) IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND MUST BE REVERSED AS A MATTER OF LAW."

{¶75} Appellant contends that the state's evidence, particularly the testimony of Mr. Bussey, was not credible and that weight of the evidence did not establish the elements of the crime of aggravated vehicular homicide. The weight of the evidence is a question about the persuasiveness: "a reviewing court asks whose evidence is more persuasive–the state's or the defendant's?" *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25. The manifest weight of the evidence standard in a criminal case was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541:

{¶76} " 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " Id. at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 485 N.E.2d 717.

{¶77} Although the credibility of witnesses is a factor in reviewing the manifest weight of the evidence, a reviewing court must also keep in mind that the credibility of

the witnesses is primarily determined by the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus. The cold, hard pages of the printed record do not lend themselves well to testing the credibility of the witnesses.

{¶78} Appellant was charged with aggravated vehicular homicide under R.C. 2903.06(A)(2) and (B)(3). The state was required to prove that Appellant recklessly caused the death of another while operating a motor vehicle, and in order to increase the degree of the crime to a second degree felony, the state also had to prove that Appellant's license was suspended at the time. Appellant contends that the state did not prove recklessness. The record indicates that Summerville and Bussey were walking behind a row of telephone poles away from the paved portion of the road. Mr. Bussey was on the sidewalk, and Mr. Summerville was either on the sidewalk, or partly on the sidewalk and partly on the grassy area between the sidewalk and the road. The vehicle that hit Mr. Summerville swerved around a telephone pole, then continued swerving over the grassy area and onto the sidewalk. The vehicle then swerved back again onto the road, avoiding another telephone pole. There was also evidence establishing the severity of the impact, the distance the body was thrown and the considerable damage to the vehicle. These facts were established by various aspects of the evidence, not only from the testimony of Mr. Bussey. There is nothing incredible about Mr. Bussey's testimony in light of all the evidence presented, particularly the testimony of Trooper Hughes. Therefore, the manifest weight of the evidence supports the jury's verdict, and we hereby overrule this assignment of error.

{¶79} In conclusion, we sustain Appellant's fourth assignment of error due to the deficiencies in count two of the indictment. Appellant's conviction and sentence for failure to stop after an accident are vacated, and the count is dismissed. We overrule Appellant's remaining assignments of error. We discern no error in the admission of autopsy photographs of the victim, or in the admission of certain comments by Mr. Bussey concerning a fight that Appellant may been involved in. We also conclude that the manifest weight of the evidence supports the guilty verdict for aggravated vehicular homicide, and we hereby affirm the conviction and the sentence for count one in the indictment. Appellant's prison term will not be reduced by our decision because the 6-month prison term for failure to stop after an accident was to be served concurrently with the 6-year prison term for aggravated vehicular homicide. Although we have vacated the 6-month prison term from count 2 in the indictment, Appellant will continue to serve the remainder of his 6-year prison term pursuant to count 1.

Vukovich, J., concurs.

DeGenaro, P.J., concurs in part and dissents in part; see concurring in part and dissenting in part opinion.

DeGenaro, P.J., concurring in part and dissenting in part.

{¶80} I concur in the majority's resolution of Appellant's fourth assignment of error and believe, therefore, that Appellant's conviction for failure to stop after an accident should be vacated. However, I respectfully disagree with the majority's conclusion regarding the aggravated vehicular homicide conviction. Specifically, I disagree with the majority's conclusion that the trial court did not abuse its discretion by admitting certain photographs and evidence of prior bad acts.

Gruesome Photographs

{¶81} In this case, Appellant objected to the admission of three photographs of the victim taken at the medical examination which took place after the victim's death. Appellant argues that these pictures are irrelevant and that any possible probative value is substantially outweighed by their prejudicial effect.

{¶82} Evid.R. 402 states that relevant evidence is generally admissible, but that "[e]vidence which is not relevant is not admissible." "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. However, even relevant evidence can be inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). A trial court's decision on both the relevance of any evidence and the admissibility of that evidence under Evid.R. 403(A) is reviewed for an abuse of discretion. *State v. Allen*, 73 Ohio St.3d 626, 633, 1995-Ohio-0283; *State v. Lyles* (1989), 42 Ohio St.3d 98, 99. The phrase "abuse of discretion" implies that the trial court's attitude, as evidenced by its decision, was unreasonable, arbitrary, or unconscionable. *State v. Busch*, 76 Ohio St.3d 613, 616, 1996-Ohio-0082. The trial court must make this decision with regard to each allegedly gruesome photograph. *State v. Woodards* (1966), 6 Ohio St.2d 14, 25.

{¶83} Although the majority concedes that one of the pictures in question is gruesome, it never describes the contents of these photographs. The first of these three pictures, Exhibit 4, is a photograph of decedent lying on a coroner's table taken

lengthwise by someone standing at the decedent's feet. The decedent is clothed, but the photo reveals abrasions on the decedent's right arm and lower left leg and foot.

{¶84} The second photograph, Exhibit 5, is a close-up picture of the decedent's head and shoulders. The decedent's head is resting sideways on the coroner's table. The shape of the decedent's face is distorted. There are cuts on the decedent's face, most of which are in and around the decedent's mouth. The photograph also shows multiple cuts on the decedent's tongue. There is also a visible cut under the decedent's chin which looks large, but the angle of the picture makes it impossible to see the severity of that injury. It appears the wounds which this picture shows have been cleaned.

{¶85} The third photograph, Exhibit 6, is similar to the second, but the decedent's head has been held straight up, revealing the extent of the injury which could only be glimpsed in the second photograph. This photo reveals a large laceration, which appears to be inches long, wide, and deep, in the decedent's head from just below his chin to above and behind his ear. The photograph shows that the wound has been cleaned. Nevertheless, there are still large pieces of flesh hanging loosely around the opening. The picture also shows a clear view into a vacant space inside of the decedent's head.

{¶86} Appellant argues that these photographs are gruesome, but "the mere fact that [a photograph] is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury." *State v. Maurer* (1984), 15 Ohio St.3d 239, 265. Such photographs may corroborate the testimony of witnesses, help establish the intent of the accused, or show the nature and circumstances of the crime. See *State v. Jalowiec*, 91 Ohio St.3d 220, 230, 2001-Ohio-0026.

{¶87} I agree with the majority that these photographs have some relevance. As the majority points out, the photographs corroborated the coroner's testimony about Summerville's appearance and that "blunt force" caused these injuries. Thus, they tend to support the idea that Summerville was killed after being struck by a

motor vehicle and are relevant to the issues involved in this case. The trial court did not abuse its discretion by finding these pictures relevant to the facts at issue.

{¶88} However, I strongly disagree with the majority's conclusion that either it or the jury possessed the expertise to judge whether these photographs demonstrated that Appellant was acting recklessly when he struck Summerville. The majority concludes that Appellant must have been driving too fast for the conditions to cause the injuries inflicted upon Summerville. In making this conclusion, the majority is engaging in a form of accident reconstruction, i.e. determining what must have led up to an accident based on the results of that accident. However, the Ohio Supreme Court has held that accident reconstruction is an area of expertise that no one without the required training and/or experience, not even experienced police officers who have investigated multiple accidents, are qualified to give any opinion. *Scott v. Yates*, 71 Ohio St.3d 219, 221, 1994-Ohio-0462. Neither courts nor juries can say that a victim's injury surely happened because a criminal defendant was driving too fast for the conditions without some expert assistance. Such a conclusion is simply outside our competency. Thus, the fact that Summerville suffered grievous wounds which killed him is not probative of whether Appellant was acting recklessly when he struck Summerville.

{¶89} The real question is whether these photographs should have been excluded under Evid.R. 403(A), which requires the trial court to weigh their prejudicial effect against their probative value.

{¶90} In this case, the photographs have very little probative value. As stated above, they corroborate the coroner's testimony, the main point of which was that Summerville was killed by being struck by a motor vehicle. However, Appellant did not seriously dispute the fact that Summerville was struck and killed by an automobile. Appellant's counsel conceded during closing argument that Summerville died from being struck by an automobile driven by Appellant.

{¶91} However, not all of the photographs are gruesome and, therefore, likely to inflame the jury. Photographs are gruesome when they depict actual bodies or body parts in a way that will shock the jury. *State v. Smith*, 80 Ohio St.3d 89, 108-

109, 1997-Ohio-0355. Photographs of head wounds can be gruesome even if the wound has been cleaned. *State v. Scott*, 98 CA 124, 2001-Ohio-3359, at 17.

{¶92} Exhibit 4 is not a gruesome photograph. It depicts Summerville's body lying on the coroner's table, but does not show any appreciable blood or gore. Likewise, it does not appear as if Exhibit 5 is a gruesome photograph. It is a close-up of Summerville's face and shows that the face is distorted. However, it does not depict a serious wound. It is unlikely that the admission of either of these photographs was prejudicial to Appellant. Therefore, the trial court did not abuse its discretion in admitting these photographs.

{¶93} Exhibit 6, on the other hand, is clearly a gruesome photograph. As described above, it depicts a large wound which, even though it has been cleaned, still shows blood, and gore in a way that is likely to shock a jury.

{¶94} Given the very limited probative value of this picture and the extent to which it would shock the jury, the trial court abused its discretion when it admitted this exhibit into evidence. This photograph does little to help prove the State's case, while inflaming the jury's sensibilities at the same time. The State illustrated this point when it gave its justification for admitting the picture, i.e. that the jury should be able to see "what his injuries were." This is irrelevant to the facts at issue. There was *no real need whatsoever* for the State to introduce this evidence for any purpose other than to inflame the jury.

{¶95} Appellant timely objected to the admission of this photograph. When a defendant objects to an error in the trial court, an appellate court reviews the error under the "harmless error" standard in Crim.R. 52(A). *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-0297, at ¶15. Crim.R. 52(A) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." The government bears the burden of demonstrating that an error is harmless. *Perry* at ¶15. "An appellate court must reverse a conviction if the government does not satisfy this burden; unlike Crim.R. 52(B), Crim.R. 52(A) is mandatory, not permissive, and thus affords the appellate court no discretion to disregard the error." Id.

{¶96} In its appellate brief, the State does not even bother meeting that burden. Instead, it incorrectly claims that Appellant bears the burden of proving that the error is harmful. Moreover, the evidence shows that the evidence in favor of Appellant's conviction is not overwhelming. Most of the evidence of Appellant's guilt comes from the testimony of Summerville's friend, Bussey. Bussey's testimony at trial differed from the statement he gave to police after the accident in some material aspects. For example, Bussey testified that Summerville was walking on the sidewalk when he was struck. However, in his statement Bussey said that Summerville was walking in the grass next to the road. Furthermore, there is some indication that Bussey is prejudiced against Appellant from a prior incident. These facts give reason to doubt Bussey's credibility.

{¶97} In conclusion, one of the pictures the trial court admitted was gruesome and, while marginally relevant, had little probative value. In my judgment, the probative value of that picture was clearly outweighed by its prejudicial effect. The State has not tried to demonstrate how this error is harmless. Moreover, the evidence of Appellant's guilt was not overwhelming. Accordingly, I would find Appellant's first assignment of error is meritorious.

Other Acts Evidence

{¶98} Appellant also maintains that the trial court erred when it allowed Bussey to testify about a fight prior to the accident. Bussey had testified that he had "suspicions" about who was driving the vehicle which hit Summerville both in direct examination, cross-examination, and on redirect examination. On direct examination, Bussey stated that there had been an incident between Summerville and Appellant in a bar about a week before Summerville died. On redirect examination, Appellant testified that he suspected that Appellant was driving the vehicle because of "a fight prior to that before it happened" over objection.

{¶99} Appellant contends that this testimony was improper "other acts" evidence and prejudiced him by inflaming the jury. The majority disagrees, questioning whether the testimony in question actually implicates Appellant in a prior

bad act and concluding that the evidence would be proper evidence of motive, even if it was prior bad acts evidence.

{¶100} Evid.R. 404(B) prohibits the use of prior bad acts to prove a person's character and that they acted in accordance with that character, but allows this evidence to be used for different reasons. It provides:

{¶101} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶102} The exceptions within this Rule have been codified in R.C. 2945.59, which states:

{¶103} "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶104} Both R.C. 2945.59 and Evid.R. 404(B) are to be strictly construed against the State and conservatively applied by trial courts. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 194. Thus, this evidence is not admissible unless it tends to show by substantial proof one of the issues enumerated. *State v. Broom* (1988), 40 Ohio St.3d 277, 282. Furthermore, courts cannot admit these acts into evidence merely because the State asserts a proper purpose for it; the matter sought to be proved by this kind of evidence must genuinely be at issue in the case. *State v. Hawn* (2000), 138 Ohio App.3d 449, 462. Under the statute and Rule, evidence of prior bad acts "is admissible, not because it shows that the defendant is crime prone, or even that he has committed an offense similar to the one in question, but in spite of such facts." *State v. Burson* (1974), 38 Ohio St.2d 157, 158.

{¶105} A trial court's decision to admit or exclude evidence under Evid.R. 404(B) is reviewed for an abuse of discretion. *State v. Lowe*, 69 Ohio St.3d 527, 532, 1994-Ohio-0345.

{¶106} The majority questions whether testimony that Appellant was previously in a fight with the victim is actually character evidence subject to Evid.R. 404(B) since the circumstances surrounding that fight were not explained. However, statements that someone was in a fight clearly leads to the conclusion that they were a violent person, without the explanation of some mitigating circumstances. A criminal defendant should not be forced to explain why he is not actually violent, even though he had been in a fight. Thus, evidence of the fight was clearly evidence of a prior wrong or bad act.

{¶107} Neither at trial nor on appeal has the State explained how the admission of this evidence is proper under any of the grounds set forth in either Evid.R. 404(B) or R.C. 2945.59 and the only grounds which appear to apply to this case is proof of identity.

{¶108} In *Lowe*, the Ohio Supreme Court stated that "[i]dentity is the least precise of the enumerated purposes of Evid.R. 404(B)" and can be used in two situations. Id. at 530-531.

{¶109} "First are those situations where other acts 'form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment,' and which are 'inextricably related to the alleged criminal act.' *State v. Curry* (1975), 43 Ohio St.2d 66, 73, 72 O.O.2d 37, 41, 330 N.E.2d 720, 725. For instance, if someone had seen Lowe trespassing on Mullet's property on the evening of the attack, or had seen him speeding away from the crime scene, or had found him trying to remove evidence from the crime scene, or had seen him threatening a witness, such evidence could be admitted to prove identity. Such evidence would directly tie Lowe to the crime at issue. The other acts the state seeks to introduce do not tie Lowe to the immediate background of, nor are they inextricably related to, the murders. The other acts in this case are separate from the planning, carrying out, and aftermath of the crimes at issue.

{¶110} "Other acts may also prove identity by establishing a modus operandi applicable to the crime with which a defendant is charged. 'Other acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under Evid.R. 404(B).' *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180, syllabus. '"Other acts" may be introduced to establish the identity of a perpetrator by showing that he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was used in the commission of the charged offense.' *State v. Smith* (1990), 49 Ohio St.3d 137, 141, 551 N.E.2d 190, 194. While we held in *Jamison* that 'the other acts need not be the same as or similar to the crime charged,' *Jamison*, syllabus, the acts should show a modus operandi identifiable with the defendant. *State v. Hutton* (1990), 53 Ohio St.3d 36, 40, 559 N.E.2d 432, 438." Id. at 531.

{¶111} The other acts evidence which the State introduced in this case does not fall into either of these two categories. Clearly, the other acts evidence in this case does nothing to establish a modus operandi. Furthermore, the fact that Summerville and Appellant were in a fight a week before the accident does nothing to directly tie Appellant to the crime at issue in this case.

{¶112} Instead, this evidence goes to prove motive, i.e. that Appellant purposefully ran his car into Summerville in retaliation for or continuation of the prior fight. However, Appellant was not charged with purposefully killing Summerville. Instead, he was charged with aggravated vehicular homicide, which deals with recklessly causing the death of another, and failure to stop after an accident, which deals with knowingly failing to stop after an accident. R.C. 2903.06; R.C. 4549.02. Evidence which tends to prove that Appellant may have had a motive for killing Summerville is irrelevant to either of these charges and was likely to prejudice the jury against Appellant.

{¶113} Finally, Appellant did not open the door to this testimony. On direct examination, Bussey testified that he had his suspicions about who killed Summerville, but did not state what those were. On cross-examination, Appellant asked whether Bussey had written those suspicions down, but did not ask Bussey

about what those suspicions actually were. On redirect, Bussey testified that he suspected Appellant because of the prior fight.

{¶114} The doctrine of "opening the door" is "dangerously prone to overuse." *United States v. Winston* (C.A.D.C.1971), 447 F.2d 1236, 1240. The introduction of otherwise inadmissible evidence under the "shield of this doctrine is permitted 'only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence.'" Id., quoting *California Ins. Co. v. Allen* (C.A.5, 1956), 235 F.2d 178, 180. In this case, Bussey's testimony on redirect about Appellant's fight did not even begin to address the issues which Appellant raised in his cross-examination of Bussey; the reasons for Bussey's suspicions are not related to why Bussey did not write those suspicions down.

{¶115} The State argues that Appellant cannot show that the outcome of the trial would have been different had this evidence not been introduced. However, it once again fails to appreciate that it bears the burden of proving a lack of prejudice since Appellant objected to this testimony. For the reasons given above, the evidence of Appellant's guilt was overwhelming, so I cannot conclude that the admission of this evidence is harmless. Accordingly, the trial court abused its discretion when it admitted this evidence and Appellant's second assignment of error is also meritorious.

Conclusion

{¶116} In this case, the trial court committed prejudicial error when it admitted both gruesome photographs into evidence, since their prejudicial effect clearly outweigh their minimal probative value, and evidence that Appellant got into a fight with Summerville a week before Summerville's death, since that was irrelevant to the facts at issue and prejudicial. Therefore, Appellant's convictions should be vacated and this case remanded to the trial court for a new trial on the count of aggravated vehicular homicide. Since the majority disagrees with this conclusion, I must respectfully dissent from this aspect of its opinion.