

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JERRELL WOMACK,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0068

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2018 CR 373

BEFORE:

Carol Ann Robb, Cheryl L. Waite, Judges and Judge Cynthia Westcott Rice, Judge
of the Eleventh District Court of Appeals, Sitting by Assignment.

JUDGMENT:

Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera*, Assistant
Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503,
for Plaintiff-Appellee and

Atty. Andrew Zellers, Richard G. Zellers & Associates, 3695 Boardman-Canfield Road, Building B, Suite 300, Canfield, Ohio 44406, for Defendant-Appellant.

Dated: September 18, 2020

Robb, J.

{¶1} Defendant-Appellant Jerrell Womack appeals from his conviction in Mahoning County Common Pleas Court for involuntary manslaughter, corrupting another with drugs, aggravated drug trafficking, trafficking cocaine, and trafficking heroin. Appellant argues the trial court did not properly instruct the jury on causation as it applies to involuntary manslaughter and corrupting another with drugs. Also, Appellant raises both sufficiency and manifest weight of the evidence arguments as it pertains to the involuntary manslaughter conviction. For the reasons expressed below, the convictions are affirmed.

Statement of Facts and Case

{¶2} Appellant was indicted for the involuntary manslaughter of Richard Harmony in violation of R.C. 2903.04(A), a first-degree felony; corrupting Richard Harmony with drugs in violation of R.C. 2925.02(A)(3), a second-degree felony; drug trafficking (carfentanil) in violation of R.C. 2925.03(A)(C)(1)(a), a fourth-degree felony; trafficking cocaine R.C. 2925.03(A)(C)(4)(a), a fourth-degree felony; and trafficking heroin in violation of R.C. 2925.03(A)(C)(4)(a), a fifth-degree felony. The offenses were alleged to have occurred on or about October 20, 2017. 4/5/18 Indictment.

{¶3} The events leading to the indictment were that in the late hours of October 19, 2017 or the early hours of October 20, 2017, the victim, Richard Harmony went to his friend, Joseph Saadey's apartment located at 4500 Mahoning Avenue, Austintown. This address is also the address of the Upstairs Restaurant, which Saadey owns. Saadey indicated he knew Harmony had a drug habit and a heart condition. Tr. 266, 268. The two friends had a drink and then Saadey went to bed. Tr. 259. Harmony woke Saadey around 3 a.m. and told him he was leaving but would be back. Tr. 259-260. Saadey testified that Harmony came back around 4 am. Tr. 260. Saadey indicated he woke to Harmony snoring. Tr. 262. At 6:00 or 6:30 a.m., Saadey starting cleaning the apartment

and went to wake Harmony. Tr. 262. He heard Harmony gurgling, not snoring and called 911. Tr. 263. He performed CPR until the paramedics arrived. Tr. 263.

{¶4} The firemen were the first to arrive on the scene. Tr. 279. They administered narcan intranasally. Tr. 279. The paramedic explained that when there is a suspected overdose, narcan is administered. Tr. 280. The paramedics arrived second. Harmony was intubated, given three rounds of cardiac drugs, and a second round of narcan. Tr. 279-280. The paramedic indicated she would not have treated Harmony any differently if she had known he had two prior heart attacks and cardiac issues. Tr. 280.

{¶5} Harmony was taken to the hospital where he later died. An autopsy was not performed; however, toxicology screens for substances were performed. Screens were performed on Harmony's femoral blood, urine, and vitreous fluid (fluid from the eye). Tr. 396, 402, 404. The screens tested positive for cocaine, alcohol, narcan, and heroin. Tr. 399, 401, 403, 404. Because the tests did not screen for carfentanil, a separate test was requested later and resulted in a positive test for carfentanil. Tr. 408, 413. Dr. Bartholow from the Mahoning County Coroner's Office explained carfentanil is a designer opiate that is a tranquilizer used for large mammals at zoos. Tr. 415. Its potency is one hundred times more than fentanyl and is much cheaper than heroin. Tr. 415, 459. The death certificate listed the cause of death as multiple drug toxicity due to carfentanil, cocaine and ethanol, and heroin. Tr. 414. The manner of death was listed as an accident. Tr. 414.

{¶6} The scene was secured by the police. At the scene, a Marlboro pack and a plastic baggie were found. Tr. 310. The police believed the plastic baggie contained drug residue. Tr. 312. The police also found Harmony's cell phone, but his white truck was not in the parking lot. Tr. 320, 321. The police contacted Harmony's wife and confirmed she did not have Harmony's truck. Tr. 322. The police believed the person who provided the drugs to Harmony traded the drugs for use of Harmony's truck. Tr. 322.

{¶7} The police testified that the next best thing for evidence in a drug case when there are no live witnesses are cell phones. Within hours after Harmony's death, the police discovered a contact in Harmony's cell phone named "Money." Tr. 333. The text messages indicated that Money had "hooked" Harmony up with something. Tr. 334. Mimicking the language used in the previous texts, the police attempted to set up a buy

for more drugs and to have Money return Appellant's truck that night at the Upstairs. Tr. 334-342.

{¶8} The police were waiting at the Upstairs for the white truck and when it arrived they performed a felony stop. Appellant was in the driver's seat. He was searched and nothing was found. In the truck, the police found two rocks of crack on the back floor of the truck. Tr. 348. While Appellant was being detained in a cruiser, he told the police he had heroin hidden in his pants. Tr. 352.

{¶9} Appellant was interviewed by the police. During the interview, Appellant referred to Harmony as Jason. Tr. 255. He also indicated that he borrowed Harmony's truck four times during the month and two of those times he paid Harmony with crack. Tr. 355. Appellant consented to the search of his phone and in the phone it was discovered that the name attached to Harmony's phone number was "Whip." Tr. 359. The officer explained that "Whip" is a slang term for car rental. Tr. 359-360. It was also discovered that for the month proceeding Harmony's death, Harmony was the second most contacted person in Appellant's phone. Tr. 469. Appellant admitted to selling Harmony \$50-\$70 in crack the last few times, but denied the crack in the truck was his or that he sold or gave the victim heroin. Tr. 364, 368-369. Later in the interview, Appellant admitted to selling/bartering heroin to Harmony prior to dropping him off at the Upstairs on October 20, 2017.

{¶10} The heroin found on Appellant's person, the crack found in the truck, and the baggie found in the room where Harmony slept were sent to the Bureau of Criminal Investigation (BCI) for testing. The substance presumed to be crack tested positive for cocaine. Tr. 497-498. The substance presumed to be heroin tested positive for heroin and carfentanil. Tr. 502. The possible residue in the baggie was not a sufficient amount to be tested. Tr. 500.

{¶11} Following the indictment, a bench warrant was issued for Appellant's arrest. 4/18/18 Bench Warrant. Appellant entered a not guilty plea and bond was set for one million dollars. 12/4/18 Not Guilty Plea. Trial began on May 13, 2019 and the jury found Appellant guilty of all charges in the indictment. 5/17/19 Jury verdicts; 5/22/19 J.E.

{¶12} Sentencing occurred on May 30, 2019. The trial court merged the involuntary manslaughter and the corrupting another with drugs verdicts for purposes of

sentencing. The state elected to have Appellant sentenced for involuntary manslaughter. The trial court imposed an 8-year sentence for involuntary manslaughter. Appellant received 18 months for aggravated drug trafficking, 12 months for trafficking cocaine, and 12 months for trafficking heroin. 5/31/19 Sentencing J.E. The court ordered the drug trafficking sentences to be served concurrent to each other, but consecutive to the sentence imposed for involuntary manslaughter. 5/31/19 Sentencing J.E. Thus, Appellant received an aggregate sentence of 9 years and six months.

{¶13} Appellant timely appealed his convictions raising three assignments of error. 6/18/19 Notice of Appeal.

First Assignment of Error

“The trial court erred in refusing to instruct the jury in accordance with *Burrage v. The United States*, 571 U.S. 204 (2014).”

{¶14} Appellant acknowledges that this assignment of error is reviewed under a plain error analysis because he did not object to the jury instruction. Appellant asserts the trial court did not properly instruct on the causation element of involuntary manslaughter and the predicate offense of corrupting another with drugs. He claims the jury instruction was not in compliance with the United States Supreme Court *Burrage* decision. He finds the instruction on other cause and intervening cause to be problematic. Appellant’s argument is based on the undisputed fact that Harmony had heart issues and on the issue of whether all the drugs in the victim’s system were supplied by Appellant. Appellant asserts considering the instruction given even if the jury concluded Harmony died from his heart issues regardless of the illegal drugs, it would still have had to convict Appellant because of the jury instruction that illegal drugs may have contributed to the result. He also claims that if there was a doubt as to whether drugs were from another source, given the instruction, the jury was still bound to convict Appellant.

{¶15} The state counters asserting Appellant cannot demonstrate plain error in this instance. It further contends that one of our sister districts has recently rejected this same argument and the issue has been accepted by the Ohio Supreme Court for review.

{¶16} This assignment of error deals specifically with a jury instruction. The Ohio Supreme Court has explained that a defendant is entitled to have the trial court give complete and accurate jury instructions on all the issues raised by the evidence. *State v.*

Sneed, 63 Ohio St.3d 3, 9, 584 N.E.2d 1160 (1992). In examining the jury instructions, we must review the court's charge as a whole, not in isolation, in determining whether the jury was properly instructed. *State v. Burchfield*, 66 Ohio St.3d 261, 262, 611 N.E.2d 819 (1993).

{¶17} Because there was no objection, we review that instruction under a plain error analysis. Under Crim.R. 52(B), “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” The defendant “bears the burden of proof to demonstrate plain error on the record.” *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22, citing *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 16. To prevail, Appellant must show that “an error occurred, that the error was plain, and that but for the error the outcome of the trial clearly would have been otherwise.” *State v. Ford*, 158 Ohio St.3d 139, 208, 2019-Ohio-4539, 140 N.E.3d 616, at ¶ 124, citing *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69. We recognize plain error “with the utmost caution, under exceptional circumstances and only to prevent a miscarriage of justice.” *Mammone* at ¶ 69, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶18} As stated above, Appellant contends the trial court did not give the proper instruction on causation. The causation instruction pertains to the involuntary manslaughter and corrupting another with drugs charges. Appellant was tried for involuntary manslaughter as defined in R.C. 2903.04(A), which states, “No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony.” The predicate felony in this instance was corrupting another with drugs in violation of R.C. 2925.02(A)(3), which states, “No person shall knowingly * * * [b]y any means, administer or furnish to another or induce or cause another to use a controlled substance, and thereby cause serious physical harm to the other person, or cause the other person to become drug dependent.”

{¶19} Regarding causation, the jury was instructed:

Causation. The state charges that the actions of the defendant caused the death of Richard Harmony. Cause is an act or failure to act which in a

natural and continuous sequence directly produces the death of Richard Harmony and without which it would not have occurred.

Natural consequences. The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's actions. The defendant is also responsible for the natural and foreseeable results that follow in the ordinary course of events from the actions.

Proximate cause. The general rule is that a defendant's conduct is the proximate cause of injury or death to another if the defendant's conduct, (1), is a substantial factor in bringing about the harm and, (2), there is no other rule of law relieving the defendant of liability. A defendant cannot be relieved of criminal liability merely because factors other than his acts contributed to the death, provided such other factors are not the sole probable cause of death.

Other cause is not a defense. There may be one or more causes of an event. However, if a defendant's act or failure to act was one cause, then the existence of other causes is not a defense.

Intervening causes. The defendant is responsible for the natural consequences of the defendant's unlawful act or failure to act, even though death was also caused by the intervening act or failure to act of another person.

Tr. 561-562.

{¶20} Appellant's argument that this instruction amounts to plain error is based on the United States Supreme Court's decision in *Burrage*. We have recently discussed the *Burrage* decision. *State v. Williams*, 7th Dist. Columbiana No. 19 CO 0010, 2020-Ohio-_____, ¶ 24-34. In *Williams* we noted that *Burrage* is not binding on a state court because the matter was decided on nonconstitutional issues regarding the interpretation of a federal statute. *Id.* at ¶ 33. We further explained that under *Burrage* the strict but-for test of causation is not applied if a statute contains a "textual or contextual indication to the contrary" and that such a "textual or contextual indication" can be found when a

statute uses “proximate result” language. *Williams* at ¶ 34, citing *Burrage v. The United States*, 571 U.S. 204, 212 (2014) and *Paroline v. United States*, 572 U.S. 434, 458, 134 S.Ct. 1710 (2014). The involuntary manslaughter statute, R.C. 2903.04(A)(1), uses “proximate result” language and Ohio courts have concluded the statute requires the state to show: (1) actual cause, generally through the but-for test; and then, (2) legal cause, through the foreseeability test. *Williams* at ¶ 35.

{¶21} Here, the jury instruction given by the trial court complied fully with the Ohio Jury Instructions. Admittedly, the trial court did not use the language “but for”, however, it did state “Cause is an act or failure to act which in a natural and continuous sequence directly produces the death of Richard Harmony and without which it would not have occurred.” This language “without which” encapsulates “but-for” causation. *Williams* at ¶ 35. Therefore, even if there was error in the jury instruction it did not rise to the level of plain error.

{¶22} Admittedly, currently pending before the Ohio Supreme Court is a jury instruction question involving *Burrage*. *State v. Price*, 157 Ohio St.3d 1417, 2019-Ohio-3797, 131 N.E.3d 952. *Price* is certified a conflict and a discretionary appeal. *Id.* The certified issue accepted was: “Whether the ‘but-for causality’ rationale of *Burrage v. United States*, 571 U.S. 204, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014), applies to the ‘cause serious physical harm to [another]’ element of R.C. 2925.02(A)(3).” *Id.* Oral arguments in *Price* were held before the Ohio Supreme Court on June 16, 2020. *Price* argued the instruction was lacking because it needed a layman’s definition of but-for causation. In making this argument, counsel for *Price* asserted that the definition of but-for needed to include that it was the drug that was “independently sufficient to cause death.” Furthermore, counsel for *Price* admitted that the instruction given did contain the but-for test and followed the Ohio law on causation and jury instructions.

{¶23} Considering that the instruction given here fully complied with the Ohio Jury Instructions, and that a but-for instruction was given, we find no merit with this assignment of error. We decline to hold this case in abeyance pending the Ohio Supreme Court’s decision in *Price*. This assignment of error lacks merit.

Second and Third Assignments of Error

“The Defendant’s convictions were against the manifest weight of the evidence.”

“The Defendant’s convictions were not supported by sufficient evidence.”

{¶24} These assignments of error are addressed simultaneously since both parties addressed them together.

{¶25} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Smith*, 80 Ohio St.3d at 113.

{¶26} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine 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. *Thompkins*, 78 Ohio St.3d at 387. “Weight of the evidence concerns ‘the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.’” *Id.* In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id.* at 390. Granting a new trial is only appropriate in extraordinary cases where the evidence weighs heavily against the conviction. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). This is because determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts who sits in the best position to judge the weight of the evidence and the witnesses’ credibility by observing their gestures, voice inflections, and demeanor. *State v. Rouse*, 7th Dist. Belmont No. 04-BE-53, 2005-Ohio-6328, ¶ 49, citing *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶27} Appellant’s argument under these assignments of error are focused solely on his conviction for involuntary manslaughter. Appellant contends the evidence does not indicate that the drugs were the proximate cause of Harmony’s death. He asserts that under a but-for analysis the death must result from the use of the unlawful drug and not from a combination of factors to which the drug merely contributed.

{¶28} There are two parts to the argument presented by Appellant. The first pertains to the drugs and which drug was the but-for cause of death. It appears Appellant is arguing he did not provide the crack cocaine and it must be shown that the but-for cause of death was the heroin/carfentanil compound and not a mixture of crack and the heroin/carfentanil compound. The second part of the argument concerns Harmony’s heart condition. He contends that the evidence shows it was a combination of the drugs and heart condition and thus, there was not sufficient evidence to convict him of involuntary manslaughter. The state counters arguing there was an abundance of evidence presented to the jury for it to find Appellant guilty of corrupting another with drugs and involuntary manslaughter.

{¶29} Concerning the drugs and which drugs were provided by Appellant, given the evidence, the jury could have found that Appellant provided both the heroin/carfentanil compound and crack cocaine to Harmony.

{¶30} The testimony from the officer that interviewed Appellant indicated Appellant changed his story multiple times about whether he gave the victim heroin. At first, Appellant denied ever giving Harmony heroin. Tr. 369. However, towards the end of the interview, he admitted to providing heroin to Harmony on his way back to dropping Harmony off at the Upstairs at 5:30 a.m. on October 20. Tr. 357, 360, 369-371. Additionally two baggies of heroin/carfentanil compound were seized from Appellant’s person when he was arrested. The testimony at trial, indicated that in setting up the controlled buy, the police had made Appellant believe Harmony was still alive, wanted the same drugs he had gotten from Appellant the previous night/morning, and wanted his truck back. Thus, Appellant was coming back to the Upstairs to complete this transaction. This evidence could lead to the conclusion that Appellant provided the victim with the heroin/carfentanil compound.

{¶31} As to cocaine, Appellant testified that in the past when he borrowed Harmony's truck he gave Harmony crack cocaine. Tr. 355. Appellant stated on the day in question, he took Harmony to get drugs, specifically crack cocaine, from a friend of his on Florida Avenue. Tr. 356, 372. Appellant admitted that he sold Harmony \$50 to \$70 worth of crack cocaine the last few times he dealt with him. Tr. 364. However, Appellant adamantly denied the two rocks of crack cocaine found in the truck when the police arrested him at the Upstairs were his. Tr. 368. This evidence could lead to the conclusion that Appellant provided the victim with the crack cocaine that was found in the victim's system.

{¶32} Consequently, there was sufficient evidence and it was not against the manifest weight of the evidence for a jury to find that Appellant provided Harmony with both the crack cocaine and heroin/carfentanil compound that caused his death.

{¶33} As to the victim's heart condition, whether the state met its burden of production and/or burden of persuasion under the but-for causation test is dependent on the deputy coroner/forensic pathologist Dr. Bartholow's testimony. It is undisputed that Harmony had a heart condition, mural thrombosis, which is a blood clot that attaches to the wall of the heart, and that he had previous stent procedures. It is also undisputed that an autopsy was not performed in this case, but toxicology screens were done on femoral blood, urine, and vitreous fluid. Tr. 390, 396, 402, 404.

{¶34} The femoral blood screens tested positive for cocaine and subsequent metabolites of cocaine. Tr. 398-399. The blood also tested positive for cocaethylene, which is produced from a combination of cocaine and ethanol. Tr. 399. Ethanol is the type of alcohol people drink. Tr. 399. Naloxone, which is Narcan, was also present in the blood. Tr. 401. In an additional later test, the blood tested positive for carfentanil and the concentration was listed as 30.5 picograms per millimeter. Tr. 409, 412-413.

{¶35} Appellant's urine was also tested and it tested positive for cocaine and heroin. Tr. 402. Cocaine metabolites, morphine and 6-monoacetylmorphine were present. Tr. 403. Dr. Bartholow explained that morphine and 6-monoacetylmorphine are breakdowns of heroin; "Heroin starts out as diacetylmorphine; and then it breaks down into 6-monoacetylmorphien. And then eventually into morphine." Tr. 403.

{¶36} The vitreous fluid, fluid from the eye, was also tested. Tr. 404. This test usually shows the presence of alcohol and that was positive in this case. Tr. 404.

{¶37} The cause of death described on the medical certificate was multiple drug toxicity due to carfentanil, cocaine, ethanol, and heroin. Tr. 414. Dr. Bartholow testified, “to the best of my knowledge, based upon a review of information available to me, my opinion is that he would have died from the multiple drug toxicity of carfentanil, cocaine, ethanol and then the heroin.” Tr. 424.

{¶38} It is noted that when Appellant argues the evidence does not show but-for causation, Appellant argues there are two independently significant explanations for Harmony’s death. This language of independent explanations is more in the line with the independent cause test, which is not the same as the but-for causation test. *Williams*, 7th Dist. Columbiana No. 19 CO 0010, 2020-Ohio-____ at ¶ 39-41. The *Burrage* Court’s conclusion of law specifically stated: if the situation does not satisfy the independent cause test, then but-for causation would apply. *Burrage*, 571 U.S. at 218-219. This was after pointing out that the independent cause test was not before the Court. *Id.* at 215 (as there was no testimony that the decedent would have died from heroin alone). Therefore, in applying the but-for causation test to actual cause, the Supreme Court did not require the prosecution to show the drug supplied would have killed the decedent if there were no other drugs in her system. Rather, the Court expressly said but-for causation required the prosecution to show the decedent would have survived if not for the drug the defendant supplied. *Id.* at 219. The fact that there was a mixed drug overdose but the defendant only supplied one drug is not dispositive. See *id.* at 211 (pointing to the straw that broke the camel’s back), 216 (but-for causation would be satisfied by the presentation of testimony stating that even though multiple drugs were in the decedent’s system, he would not have died without the addition of the drug at issue).

{¶39} Here, Dr. Bartholow was not specifically asked and did not explicitly state that if Harmony did not have these drugs he would not have died that night/morning, i.e., but-for the drugs he would not have died. However, he does make specific statements as to carfentanil and even cocaine that indicate those drugs alone would have caused the death regardless of the heart condition.

{¶40} As to cocaine, the doctor testified that while 141 nanograms of cocaine was detected in Harmony's system, they do not actually ascribe any quantitative value to cocaine lethality because it is capable of causing cardiac toxicity and there is no therapeutic dose of cocaine. Tr. 433. He further stated:

Cocaine is potentially arrhythmogenic it can cause toxicity to the heart. So therefore, we consider it, just its presence in the system as opposed to the actual amount in the system for cocaine. * * * So it's really, even though there's a value reported. Really the most important thing to us is that there is cocaine in the system. We have cocaine in the system at the moment and we have carfentanil in the system at the moment.

Tr. 433-434.

{¶41} When asked if he could say the dosage was lethal to somebody, Dr. Bartholow responded, "To a particular individual, we , we – I can't give a particular dose. I think that makes more of dose-response relationship. We know that cocaine itself is causing a cardiac arrhythmia. We know that cocaine is present. We know that carfentanil is capable of causing respiratory suppression." Tr. 434.

{¶42} While this testimony could potentially be described as inconclusive as to whether the amount of cocaine alone would have caused Harmony's death, the testimony concerning the amount of carfentanil and its effects is clear. Dr. Bartholow testified that the amount of carfentanil detected was sufficient to cause the death:

A. * * * And I actually spoke with Axis Toxicology [Tester] about it. From Axis Toxicology's perspective, the presence of carfentanil is sufficient to explain a cause of death, irrespective of the dose, basically its potency and comparison to fentanyl and morphine. So they report a value.

But I called them prior to coming in, spoke to the toxicologist. And he said that even though they report a value, for them it's sufficient by being present to explain a death.

Q. In an amount that is fairly insignificant?

A. Well, again you're saying insignificant. I'm not saying insignificant. I'm talking 30 picograms you know per milliliter.

Q. Which is about .03 nanograms. Which is, you know –

* * *

A. But it's the potency, keep in mind. Even though it's a low technical number.

Q. I understand it's a potent drug.

A. Right.

Q. But it is, on the scale of things it, you know based on tolerance of the person and based on the weight and height and metabolism of a person it could be anywhere, you don't know that?

A. Well, you know, I mean, you know, you correctly can't. There's nowhere in the lab where you give an individual a certain amount of the drug, watch them metabolize it. And then, you know, observe that same person over and over. When I talk to the person at Axis Technology they had no problem with this range being adequate to explain the death. They said they've seen lower as a cause of death than 30.

Q. And they've probably seen higher?

A. Oh, yes. They've seen higher, too. Like I said, you know, it's one of those situations where you can't really design a randomized controlled experiment to give an individual a dose of a drug, watch them metabolize the entire thing. But you know, so you can't really do that. So you know, we rely on the best information possible from toxicology studies and toxicologists. You know, when I spoke to him, their perspective and Axis – and it's the same perspective as to whenever I worked out in Franklin

County – the presence of carfentanil is sufficient to explain that, the presence in the system.

Q. So they're saying just because it has carfentanil in there that's what's killing people? Just the basis – just by having it in there is causing death?

A. Well, the mechanism associated with carfentanil death is usually respiratory suppression. So you lose your breathing, your drive to breathe.

Tr. 434-436.

{¶43} This testimony indicates the carfentanil dosage was sufficient to cause death/serious physical harm. However, even if it alone was not sufficient, when Dr. Bartholow was asked hypothetical questions about whether an autopsy would have revealed whether it was the drugs or heart that caused the death and would he have changed the cause of death on the death certificate, he responded that he would not have changed the cause of death because they are looking at what caused the death and what are the inciting factors and the drugs in his opinion were the inciting factors. Tr. 440-442. Dr. Bartholow stated, "He may have had underlying heart disease but he has a respiratory suppressant and a drug with known cardiotoxic effects in his system. But Like I said, I'm speaking in terms – I didn't do any autopsy so I can't comment on, you know, I can't – that's a hypothetical." Tr. 441-442. On redirect he then added:

Well, you know, like I said in the finding, I said you can talk about obvious examples. If a person has drugs in their system and they're shot three times in the head, well, then that changes the situation. But you know, if we're talking about a person whose autopsy, or whose findings would be unremarkable except for a diseased heart, then I would still go with the drugs as cause of death because they're the acute thing.

There's what, what's happening today. We know the guy has had a diseased heart for a long time. But the drugs are in his system acutely. For us that help answer the question of well, why today.

Now, if the drugs wouldn't have been in his system, to a reasonable degree of medical certainty, you can just conclude, you know, hypertensive and atherosclerotic cardiovascular disease, or even attribute his underlying medical history, or someone's underlying medical history.

Tr. 444-445.

{¶44} This testimony taken in conjunction with the carfentanil testimony is sufficient to indicate that but-for the carfentanil the victim would not have died that day. Thus, neither the sufficiency of the evidence, nor the manifest weight of the evidence argument have merit. The testimony when viewed in the light most favorable to the prosecution could lead a reasonable juror to find but-for causation. Furthermore, given the testimony, the jury clearly did not lose its way and create a manifest miscarriage of justice.

{¶45} As stated above, the second component of causation is legal cause through the foreseeability test. *Williams*, 7th Dist. No. Columbiana No. 19 CO 0010, 2020-Ohio-_____, at ¶ 35. A “defendant will be held responsible for those foreseeable consequences which are known to be, or should be known to be, within the scope of risk created by his conduct.” *State v. Sabo*, 3d Dist. Union No. 14-09-33, 2010-Ohio-1261, 2010 WL 1173088, ¶ 25, quoting *State v. Losey*, 23 Ohio App.3d 93, 95, 491 N.E.2d 379 (10th Dist.1985). “[T]hat means that death [or serious physical harm] reasonably could be anticipated by an ordinarily prudent person as likely to result under these or similar circumstances.” *Id.*, quoting *Losey* at 95, 491 N.E.2d 379. Many courts have pointed out “[t]he possibility of overdose is a reasonably foreseeable consequence of the sale of heroin.” *Id.* at ¶ 56, citing *State v. Patterson*, 11th Dist. Trumbull No. 2013-T-0062, 2015-Ohio-4423, ¶ 91; *State v. Veley*, 6th Dist. Lucas No. L-16-1038, 2017-Ohio-9064, ¶ 30; *State v. Wells*, 12th Dist. Warren No. CA2016-02-009, 2017-Ohio-420, ¶ 39; *State v. Zusman*, 11th Dist. Lake No. 2014-L-087, 2015-Ohio-3218. Furthermore, it is probably also reasonably foreseeable that heroin and even cocaine being sold today are being mixed with fentanyl, carfentanil, or another designer opiate. Given the potency of fentanyl and carfentanil it is reasonably foreseeable these drugs will cause an overdose, serious physical harm, and even death. As the Third Appellate District Court noted:

Further, this court and other appellate jurisdictions in Ohio have rejected arguments contending that it was unforeseeable for the offender to have known that the victim had toxic levels of other significant drugs in their system when the offender provided the drug at issue. See, e.g., *Sabo* at ¶ 27; *Vogt*, 2018-Ohio-4457, at ¶ 105 (“Other Ohio courts have consistently found that the possibility of an overdose is a reasonably foreseeable consequence of providing a controlled substance to another.”); *Wells*, 2017-Ohio-420, at ¶ 39 (“There is nothing extraordinary or surprising about the manner of [the victim’s] death in relation to appellant’s actions. Appellant provided drugs to a known drug abuser. The possibility of an overdose is a reasonably foreseeable consequence of providing a controlled substance to another.”); *Veley*, 2017-Ohio-9064, ¶ 25, 30. See also *State v. Luce*, 5th Dist. Ashland No. 17 COA 040, 2018-Ohio-3865, 2018 WL 4613720, ¶ 30 (rejecting Luce’s argument that the victim’s overdose-death from a compound containing Carfentanil that Luce provided the victim was not foreseeable since Luce “ ‘only’ sought to sell [the victim] heroin” because Luce “was still choosing to engage in the dangerous and illegal business of street-level trafficking in controlled substances”).

State v. Carpenter, 2019-Ohio-58, 128 N.E.3d 857, ¶ 62 (3d Dist.).

{¶46} Consequently, there was sufficient evidence of foreseeability and the jury did not lose its way in finding it foreseeable.

{¶47} The second and third assignments of error lack merit.

Conclusion

{¶48} All three assignments of error lack merit. The convictions are affirmed.

Waite, P.J.concurs.

Rice, J. concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.