[Cite as *State v. Barnhart*, 2019-Ohio-1184.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO,	:	
	:	Case Nos. 18CA8
Plaintiff-Appellee,	:	18CA15
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
RICHARD BARNHART, JR.,	:	
	:	
Defendant-Appellant.	:	**Released: 02/12/19**

APPEARANCES:

K. Robert Toy, Toy Law Office, Athens, Ohio, for Appellant.

James K. Stanley, Meigs County Prosecuting Attorney, Pomeroy, Ohio, for Appellee.

McFarland, J.

{¶1} This is a consolidated appeal from a Meigs County Court of Common Pleas judgment entry convicting Appellant, Richard Barnhart, Jr., of four felonies and one misdemeanor, as well as another judgment entry denying Appellant's motion for a new trial. Specifically, Appellant was convicted of one count of aggravated vehicular homicide, a first-degree felony in violation of R.C. 2903.06(A)(1)(a) and (B)(2)(b) and (c), one count of aggravated vehicular homicide, a first-degree felony in violation of R.C. 2903.06(A)(2)(a) and (B)(3), one count of vehicular manslaughter, a first-

degree misdemeanor in violation of R.C. 2903.06(A)(4) and (D), one count of OVI, a fourth-degree felony in violation of R.C. 4511.19(A)(1)(a) and (G)(1)(d), and one count of OVI, a fourth-degree felony in violation of R.C. 4511.19(A)(1)(f) and (G)(1)(d). On appeal, Appellant contends that 1) the trial court erred when it failed to grant a new trial pursuant to Ohio Rule of Criminal Procedure 33; 2) the trial court erred when it denied his motion to suppress all evidence obtained from the warrantless seizure; 3) the verdict finding him guilty was against the manifest weight of the evidence; and 4) trial counsel provided ineffective assistance of counsel in regards to obtaining an affidavit in support of a motion for new trial.

{¶2} Because we find no error in the trial court's denial of his motion to suppress, Appellant's second assignment of error is overruled. Likewise, as Appellant's convictions were not against the manifest weight of the evidence, his third assignment of error is overruled. Further, in light of our finding that the trial court did not abuse its discretion in denying Appellant's request for a new trial, his first assignment of error is overruled. Finally, because we conclude any deficient performance by counsel in obtaining an affidavit in support of a motion for a new trial did not affect the outcome of the ruling on the motion, his fourth assignment of error is overruled. Accordingly, the decision of the trial court is affirmed.

FACTS

{¶3} Appellant, Richard Barnhart, Jr., was involved in a motor vehicle accident on January 13, 2017, at approximately 10:10 p.m. on State Route 143 in Meigs County, Ohio. When first responders initially arrived at the scene of the accident, they found an individual identified as Jesse Carr deceased and underneath the vehicle in a ditch area. They also found Appellant, initially moaning but otherwise unresponsive, partially ejected through the windshield of the vehicle. The record reveals that the victim, Jesse Carr, had been pronounced dead and Appellant had already been transported to the hospital by the time law enforcement reached the scene of the accident. The investigation of the accident, however, ultimately led to Appellant's indictment on February 16, 2017 on multiple charges, including: 1) a first-degree felony in violation of R.C. 2903.06(A)(1)(a) and (B)(2)(b) and (c); 2) one count of aggravated vehicular homicide, a first-degree felony in violation of R.C. 2903.06(A)(2)(a) and (B)(3); 3) one count of vehicular manslaughter, a first-degree misdemeanor in violation of R.C. 2903.06(A)(4) and (D); 4) one count of OVI, a fourth-degree felony in violation of R.C. 4511.19(A)(1)(a) and (G)(1)(d); and 5) one count of OVI, a fourth-degree felony in violation of R.C. 4511.19(A)(1)(f) and (G)(1)(d).

{¶4} Appellant pleaded not guilty to the charges and the case proceeded through the discovery process. Appellant filed a very general, yet lengthy, motion to suppress on March 20, 2017. Pertinent to the issues presently raised on appeal, Appellant sought suppression of the evidence obtained from Appellant while he was at the hospital, specifically the test results from a blood draw ordered by law enforcement, claiming it was involuntary, unconstitutionally coerced and without cognizance of his mental capacity at the time. Appellant also argued that the withdrawal of his blood was not conducted within two hours of the alleged violation. Appellant further argued that the provisions of Ohio's Implied Consent statute contained in R.C. 4511.191 were not applicable because Appellant was not validly arrested.

{¶5} A suppression hearing was held on May 24, 2017, and was followed by the submission of written arguments. The State presented testimony by Sergeant Robert L. Hayslip, the officer who initially responded and investigated the accident scene. The State also presented testimony by Trooper Chris Finley, the trooper who responded to the hospital and ordered a sample of Appellant's blood be drawn, as well as Kelci Wanat, the Holzer Medical Center Emergency Room nurse who was attending Appellant and who drew the blood upon Trooper Finley's request. The trial court

ultimately denied Appellant's motion on June 29, 2017, finding that Appellant was unconscious at the time his blood was drawn pursuant to Ohio's Implied Consent statute and that he was never in custody or under arrest that night. The trial court further determined that Appellant's blood was drawn within the applicable three-hour time limitation. Further, in denying Appellant's motion, the trial court reasoned that a warrant to draw Appellant's blood was not needed due to the consent exception (here, implied consent), as well as the exigent circumstances exception to the warrant requirement.

{¶6} Thus, the matter proceeded to a jury trial beginning on January 30, 2018. The State presented several witnesses in support of its case, including: 1) Ronald Haning, Jr., a neighbor who witnessed or at least heard a portion of the accident; 2) Luther Lee Osborne, Jr., whose yard the vehicle ultimately came to rest in after the accident; 3) Dr. Dan Whitely, the Gallia County Coroner; 4) Ohio State Highway Patrol Crime Lab Criminalist/Toxicologist Nicholas Baldauf, who testified to performing tests upon Appellant's blood which identified .269 grams by weight of alcohol per one hundred milliliters of whole blood (more than three times the legal limit

in Ohio); 5) Sergeant Robert L. Hazlett,[1] who responded to and investigated the accident scene; 6) Trooper Marvin Pullins, who was trained in accident reconstruction and noted there were no tire or skidmarks on the roadway where the accident occurred, and virtually no damage to the driver's side of the vehicle; 7) Rutland Fire Department fire fighter Jason McDaniel, who was the first responder to encounter Appellant while he was still partially ejected through the windshield; 8) Rutland Fire Department fire fighter Brad Smith, who also responded to assist Appellant; 9) Trooper Shawn Cunningham, who photographed the accident scene; and 10) Trooper Christopher Finley, who made contact with Appellant at the hospital, obtained a blood sample, and then reported to the accident scene where he took the statement of Ronald Haning, Jr. Appellant only presented one witness in his defense, and that was his friend, Leslie Nicholson, who testified that Appellant and the victim had been at her house earlier in the evening on the night of the accident, and had left at approximately 6:00 or 6:30 p.m., with Jesse Carr driving the vehicle. More detailed discussion regarding the State's witness's testimony is set forth below.

{¶7} Defense counsel's theory at trial was that Appellant was not the driver of the vehicle and that even if he was the driver, his driving did not

[1] This individual is listed as Sergeant Robert L. Hayslip in the suppression hearing transcript. After reviewing and comparing the suppression hearing testimony and the trial testimony, it appears this is the same individual, however, it is unknown which last name is correct.

cause the accident which caused the death of Jesse Carr. Instead, he argued that the oncoming dark-colored SUV, reported by Mr. Haning to have been driving left of center, caused the accident to occur. The State argued that Appellant was, in fact, the driver of the vehicle as evidenced by statements of the first responders as to his location in the vehicle as well as a statement made by Appellant to first responders that "I fucked up, didn't I[,]" when asked by a medic if he was the driver of the vehicle. The State also argued Appellant, not the driver of the dark-colored SUV, caused the accident, relying on Mr. Haning's second statement which described the SUV as only driving on the center line, not being left of center, and stating that both vehicles should have been able to pass.

{¶8} The jury ultimately accepted the State's version of events and found Appellant guilty on all counts of the indictment, as charged, including specifications included due to the fact that Appellant had been convicted of four previous OVI offenses. Appellant was sentenced to an aggregate prison term of fourteen years and now brings his timely appeal, setting forth four assignments of error for our review.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT A NEW TRIAL PURSUANT TO OHIO RULE OF CRIMINAL PROCEDURE 33.

II THE TRIAL COURT ERRED WHEN IT SUPPRESSED [SIC] DEFENDANT-APPELLANT'S MOTION TO SUPPRESS ALL EVIDENCE OBTAINED FROM THE WARRANTLESS SEIZURE OF THE DEFENDANT-APPELLANT.

III. THE VERDICT FINDING THE DEFENDANT-APPELLANT GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

IV. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN REGARDS TO OBTAINING AN AFFIDAVIT IN SUPPORT OF A MOTION FOR NEW TRIAL."

ASSIGNMENT OF ERROR II

{¶9} For ease of analysis, we address Appellant's assignments of error out of order, beginning with his second assignment of error, in which Appellant contends the trial court erred in denying his motion to suppress all evidence obtained from a warrantless search. More specifically, Appellant argues the evidence obtained from him at the hospital, which was a blood sample that was taken while he was unconscious, should have been suppressed. In support of his argument, he contends that Ohio's Implied Consent statute was not applicable unless he was arrested, and the State concedes he was not arrested. He also argues that his blood was required be drawn within two hours of the accident, rather than three as found by the trial court. Appellant further contends that the United States Constitution requires a warrant for the seizure of bodily fluids, including blood, that Ohio's Implied Consent statute violated his right to refuse consent, and did

not provide an exception to the warrant requirement. Finally, Appellant argues the exigent circumstances exception to the warrant requirement did not apply here.

{¶10} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Gurley*, 2015–Ohio–5361, 54 N.E.3d 768, ¶ 16 (4th Dist.); citing *State v. Roberts*, 110 Ohio St.3d 71, 2006–Ohio–3665, 850 N.E.2d 1168, ¶ 100. At a suppression hearing, the trial court acts as the trier of fact and is in the best position to resolve factual questions and evaluate witness credibility. *Id*.; *State v. Burnside*, 100 Ohio St.3d 152, 2003–Ohio–5372, 797 N.E.2d 71, ¶ 8. Thus, when reviewing a ruling on a motion to suppress, we defer to the trial court's findings of fact if they are supported by competent, credible evidence. *Gurley* at ¶ 16; citing *State v. Landrum*, 137 Ohio App.3d 718, 722, 739 N.E.2d 1159 (4th Dist.2000). However, "[a]ccepting those facts as true, we must independently determine whether the trial court reached the correct legal conclusion in analyzing the facts of the case." *Id*.; citing *Roberts* at ¶ 100.

{¶11} " 'The Fourth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 14, prohibit unreasonable searches and seizures.' " *State v. Shrewsbury*, 4th Dist. Ross No. 13CA3402, 2014–Ohio–716, ¶ 14; quoting *State v. Emerson*, 134 Ohio St.3d 191, 2012–Ohio–

5047, 981 N.E.2d 787, ¶ 15. "This constitutional guarantee is protected by the exclusionary rule, which mandates the exclusion of the evidence obtained from the unreasonable search and seizure at trial." *Id*.; citing *Emerson* at ¶ 15; *see also State v. Lemaster*, 4th Dist. Ross No. 11CA3236, 2012–Ohio–971, ¶ 8 ("If the government obtains evidence through actions that violate an accused's Fourth Amendment rights, that evidence must be excluded at trial.").

{¶12} The Fourth Amendment protects against two types of unreasonable intrusions: 1) searches, which occur when an expectation of privacy that society is prepared to consider reasonable is infringed upon, and 2) seizures, which occur when there is some meaningful interference with an individual's liberty or possessory interest in property. *See State v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652 (1984).

{¶13} "[S]earches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507 (1967). "Once the defendant demonstrates that he was subjected to a warrantless search or seizure, the burden shifts to the state to establish that the warrantless search or seizure was constitutionally permissible." *State*

v. Johnson, 2014–Ohio–5400, 26 N.E.3d 242, ¶ 13; citing *State v. Roberts*, 110 Ohio St.3d 71, 2006–Ohio–3665, 850 N.E.2d 1168, ¶ 98.

{¶14} Turning now to the specific arguments raised under this assignment of error, we note that Appellant initially argues Ohio's Implied Consent statute is not applicable because he was not arrested at the time his blood was drawn. However, this Court recently considered this argument in *State v. Bloomfield*, 4th Dist. Lawrence No. 14CA3, 2015-Ohio-1082, and reached a different conclusion. More specifically, Bloomfield argued his blood alcohol tests should have been suppressed because no search warrant was authorized for the blood draw, and the implied consent statute did not apply because he was never arrested before the sample was drawn. *Id.* at ¶ 27. Bloomfield also argued it was "impossible to ascertain which of the two occupants was actually operating the vehicle at the time of the crash." *Id.* Thus, Appellant's arguments are essentially identical to Bloomfield's arguments.

{¶15} In *Bloomfield*, we generally observed the following with respect to Ohio's Implied Consent statute:

> "Under Ohio's implied-consent statute, R.C. 4511.191, '[a]ny person who operates a vehicle * * * upon a highway * * * shall be deemed to have given consent to a chemical test or tests of

the person's whole blood, blood serum or plasma, * * * to determine the alcohol * * * content of the person's whole blood, blood serum or plasma * * * if arrested for a violation of division (A) or (B) of section 4511.19 of the Revised Code, section 4511.194 of the Revised Code, section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance, or a municipal OVI ordinance.' R.C. 4511.191(A)(2). R.C. 4511.191(A)(4) further specifies that '[a]ny person who is dead or unconscious, or who otherwise is in a condition rendering the person incapable of refusal, shall be deemed to have consented as provided in division (A)(2) of this section, and the test or tests may be administered subject to sections 313.12 to 313.16 of the Revised Code.' ' "R.C. 4511.191 * * * was enacted to protect innocent motorists and pedestrians from injury and death caused by irresponsible acts of unsafe drivers on Ohio streets and highways. The broad purpose of the implied-consent statute is to clear the highways of and to protect the public from unsafe drivers." ' *State v. Uskert*, 85 Ohio St.3d 593, 598, 709 N.E.2d 1200 (1999),

> quoting *Hoban v. Rice*, 25 Ohio St.2d 111, 114, 54 O.O.2d 254, 256, 267 N.E.2d 311, 314 (1971)." *Bloomfield* at ¶ 27.

We further noted that "[o]ne of the well-delineated exceptions to the general prohibition against a warrantless search occurs when the person consents to the search." *Id.* at ¶ 29; citing *State v. Ossege*, 2014-Ohio-3186, 17 N.E.3d 30, ¶ 13 (12th Dist.); *State v. Morris*, 42 Ohio St.3d 307, 318, 329 N.E.2d 85 (1975).

{¶16} Further, and importantly, we observed as follows with regard to the applicability of Ohio's Implied Consent statute in circumstances where an accused is not arrested:

> "R.C. 4511.191(A)(4) specifically deems an unconscious or incapacitated person to have consented to a blood test if there is probable cause to believe that the person has been operating a motor vehicle while intoxicated. *See, generally*, Weiler and Weiler, Ohio Driving Under the Influence Law, Section 8:6 (2014 Ed.); *State v. Troyer*, 9th Dist. Wayne No. 02–CA–0022, 2003–Ohio–536, ¶ 26 ('the Fourth Amendment does not require an arrest before a blood sample may be taken from an unconscious driver believed to have been driving under the influence of alcohol'); *State v. Taylor*, 2 Ohio App.3d 394, 395,

> 442 N.E.2d 491 (12th Dist.1982) ('We read [former] R.C. 4511.191(B) [now R.C. 4511.191(A)(4)] to authorize the withdrawal of blood from an unconscious individual by an officer who has reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways of this state while under the influence of alcohol, whether or not the unconscious person is actually placed under arrest'). This typically occurs when the person has been involved in a serious accident and is unconscious or unresponsive at the scene or shortly thereafter. Weiler and Weiler, Ohio Driving Under the Influence Law at Section 8:6." *Bloomfield* at ¶ 30.

After finding there was probable cause to believe Bloomfield was operating a motor vehicle while intoxicated, we affirmed the trial court's denial of Bloomfield's motion to suppress, and also found that an arrest was not necessary before law enforcement could obtain a blood sample. *Id.* at ¶ 32-33.

{¶17} Here, the evidence introduced at the suppression hearing included Sergeant Robert Hazlett's testimony that he arrived at the crash scene to find Appellant had already been transported to the hospital for medical treatment. He testified he spoke with first responders and observed

beer cans in and around the crashed vehicle. He then contacted Trooper Chris Finley and advised him to go straight to the emergency room to make contact with Appellant, due to the fact that there had been a fatality and the possibility Appellant, who had been determined to the driver, was impaired. He testified he directed Trooper Finley to obtain a blood draw, if needed, explaining on cross-examination that it would ultimately be Trooper Finley's decision whether to obtain a blood draw.

{¶18} Trooper Finley testified that he made contact with Appellant at Holzer Medical Center in Pomeroy, Ohio, where he found Appellant to be unconscious, with a "breathing tube."[2] He testified that although he had not been to the crash scene, he had been "advised that alcohol abuse was probably going to be in the nature of the crash." He further testified that when he arrived at the hospital, he could smell alcohol on Appellant's person. He then testified as follows:

> "Um, looking at Mr. Barnhart's record and the nature of a crash, it being a fatal crash. Um, Mr. Barnhart had three (3) prior OVI convictions in a previous six (6) years, I know it's ten (10) years now is our lookback period, but it was six (6)

[2] Emergency Room nurse Kelci Wanat also testified at the suppression hearing, stating that Appellant was initially somewhat coherent upon arrival, but that his condition deteriorated and he ended up having to be intubated. She testified that Appellant was sedated and unconscious at the time of the blood draw.

> years at the time. So it would make it a felony OVI in case. Um, so that was the reason for the draw."

Further, with respect to why Trooper Finley believed Appellant to be the driver, he testified as follows:

> "Uh, my supervisor was the one that was on the scene and he was advising me that Mr. Barnhart was going to be the driver of the vehicle. And there was also testimony from the first responders, which would be the fire department members, that advised the nature of the crash."

{¶19} We believe, based upon the record before us, that probable cause existed to believe to Appellant was not only the driver of the vehicle but also that he had operated his vehicle while under the influence of alcohol. *See State v. Roar*, 4th Dist. Pike No. 13CA842, 2014-Ohio-5214 (also involving a trooper that was dispatched directly to the hospital to make contact with a driver suspected of being under the influence which led to a traffic crash). In *Roar*, we upheld a probable cause finding based upon facts that included the trooper's reliance upon information from other officers present at the scene of a fatal collision, which included alcohol containers present at the scene, as well as the fact that a positive HGN test was performed on the driver while he was strapped to a backboard at the

hospital, and despite the fact that the trooper did not note the smell of alcohol on the driver.) Based upon the foregoing, we conclude that an arrest was not necessary before law enforcement could obtain Appellant's blood for testing, pursuant to Ohio's implied consent statute, as the trooper possessed probable cause to believe Appellant was driving under the influence of alcohol. Accordingly, we reject this portion of Appellant's argument.

{¶20} Next, Appellant argues that his blood had to be drawn within two hours of the accident, and that it was not. However, contrary to Appellant's argument, we note that R.C. 4511.19(D) states, in relevant part, that a trial court may admit evidence of the "concentration of alcohol * * * at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within *three hours* of the time of the alleged violation." R.C. 4511.19(D)(1)(b) (emphasis added); *see also State v. Barger*, 2017-Ohio-4008, 91 N.E.3d 277, ¶ 32 (permitting blood test results to be admitted where blood was drawn from a defendant more than three hours after an alleged violation and holding the results were admissible to prove that a person was under the influence of alcohol as proscribed by R.C. 4511.19(A)(1)(a) in the prosecution for a violation of R.C. 2903.06, provided that the administrative requirements of R.C. 4511.19(D) are

substantially complied with and expert testimony is offered, citing *State v. Hassler*, 115 Ohio St.3d 322, 2007-Ohio-4947, 875 N.E.2d 46, ¶ 2, in support).

{¶21} Here, expert testimony was offered and Appellant stipulated to the reliability of the test results, aside from the timing requirement. Further, evidence introduced at the suppression hearing indicated the accident occurred at approximately 10:10 p.m. on January 13, 2017. Appellant's blood sample was drawn by hospital personnel at 12:13 a.m. on January 14, 2017. These times are not disputed by Appellant. Thus, based upon the record before us, we cannot conclude the trial court erred in finding Appellant's blood was drawn in a timely manner, within the three hour window provided in R.C. 4511.19(D)(1)(b).

{¶22} Appellant's next two arguments are interrelated and we address them in conjunction with one another. Appellant contends that the United States Constitution requires a warrant for the seizure of blood, that Ohio's Implied Consent statute violated his right to refuse to give a blood sample, and that implied consent is not an exception to the warrant requirement. It is true that the United States Supreme Court has recently determined, in *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2162, 2172-2186 (2016), that "the taking of a blood sample or the administration of a breath test is

search[,]" and that "[t]he Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving but not warrantless blood tests." However, after thorough research, we are not persuaded that the holding in *Birchfield* invalidates the blood draw at issue sub judice, or Ohio's Implied Consent statute, in general.

{¶23} In *Birchfield*, the Court was confronted with three different petitioners from two different states, all of which faced criminal penalties under their respective states' implied consent laws for refusal of blood or breath testing. The holding in *Birchfield* was as follows:

> "1. The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests. * * *
>
> 2. Motorists may not be criminally punished for refusing to submit to a blood test based on legally implied consent to submit to them. It is one thing to approve implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit. * * *" *Birchfield* at 2163, 2165.

{¶24} The Sixth District Court of Appeals recently considered an argument based upon *Birchfield* in *State v. Speelman*, 2017-Ohio-9306, 102 N.E.3d 1185, ultimately holding that Speelman's consent to a blood draw was implied pursuant to statute, which provides a person who is dead or unconscious to be deemed to have consented. *Id.* In upholding the blood draw under the implied consent statute, the trial court concluded probable cause existed to believe Speelman "was unlawfully operating [his] motorcycle under the influence of alcohol at the time of the fatal accident." *Id.* at ¶ 15. The *Speelman* court also upheld the denial of the motion to suppress the blood draw under the exigent circumstances exception to the warrant requirement, reasoning that Speelman's "body was naturally processing the blood so as to potentially destroy evidence if the blood was not secured in a timely fashion[,] [and] there was not a reasonable opportunity to secure a warrant prior to the blood retrieval." *Id.* at ¶ 17.

{¶25} Further, the court rejected Speelman's argument that "Ohio's implied consent statute is unconstitutional given the recent Unites States Supreme Court ruling in Birchfield * * *[,]" finding "it to be materially distinguishable from, and inapplicable to, the instant case." *Id.* at ¶ 23. The *Speelman* court stated as follows:

> "[O]ur scrutiny of the ruling makes clear that it is only applicable in those cases in which a suspect is conscious and physically able to alternatively furnish a less intrusive breath test for the detection of the potential presence of alcohol." *Id*. at ¶ 24.

The court went on to explain that *Birchfield* clearly stated, regarding blood tests, that " '[t]heir reasonableness must be judged in light of the availability of the less invasive alternative of a breath test[,]' " while noting that the facts before it indicated Speelman, by contrast, "was severely injured, unconscious, unable to communicate, and clearly unable to perform a less invasive breath test." *Id.* at ¶ 25. The court contrasted those facts with the facts in *Birchfield*, which involved "parties capable of participating in an alternative breath test." *Id.* Thus, the *Speelman* court reasoned that "[g]iven the unavailability of conducting a breath test in the instant case, *Birchfield* does not implicate the propriety of the subject blood test." *Id.* Much like Speelman, and in contrast to the parties in *Birchfield,* Appellant was injured, sedated, intubated, unconscious and unable to perform a breath test at the time his blood was drawn.

{¶26} To that extent, this case, like Speelman, is materially distinguishable from *Birchfield*. We further note that in *Birchfield*, as

referenced above, the United States Supreme Court appears to reference, with approval, state implied consent statutes that impose civil, as opposed to criminal, liability for refusal to submit to testing. *Birchfield* at 2165. Ohio's Implied Consent statute provides only civil penalties, and what the *Birchfield* Court describes as "evidentiary consequences" for motorists who refuse to comply. Additionally, in *State v. Martin*, 111 N.E.3d 730, 2018-Ohio-1705, ¶ 19, the Ninth District Court of Appeals, noted, with regard to implied consent statutes, that the Supreme Court in *Birchfield* "determined that motorists 'cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense' due to the fact that blood tests are invasive and implicate significant privacy concerns." Quoting *Birchfield* at 2184-2186. The *Martin* court then went on to reason as follows at ¶ 19:

> "* * * the Supreme Court noted that its decision only pertained to implied consent statutes that imposed *criminal penalties* for chemical test refusals. [*Birchfield*] at 2185. It specified that its opinion should not be read to cast doubt on prior opinions that 'referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.' *Id*."

The *Martin* court ultimately found *Birchfield* to be inapplicable because Martin was not criminally charged with refusal to undergo chemical testing, but rather, his refusal would have had evidentiary consequences for him in the prosecution of his OVI charge. *Id.* at ¶ 20.

{¶27} Importantly, in reaching its decision, which was issued post-*Birchfield*, the Ninth District acknowledged the Ohio Supreme Court's prior determination that Ohio's implied consent statute is constitutional, and violates neither the search and seizure requirements of the Fourth Amendment nor the Fifth Amendment right against self-incrimination." *Martin* at ¶ 16-17; citing *State v. Walters*, 9th Dist. Medina No. 11CA0039-M, 2012-Ohio-2429, ¶ 20; citing *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993, 916 N.E.2d 1056, ¶ 17. Thus, in light of the foregoing, we reject Appellant's arguments that the United States Constitution required a warrant for the seizure of blood in this particular case, that Ohio's Implied Consent statute violated his right to refuse to give a blood sample, and that implied consent is not an exception to the warrant requirement.

{¶28} Finally, Appellant contends the exigent circumstances exception to the warrant requirement is not applicable to the facts of his case. Initially, we note that even the *Birchfield* Court recognized that the exigent circumstances exception to the warrant requirement may apply in

drunk driving cases where the subject is unconscious. *Birchfield* at 2165 (where the subject is unconscious nothing prevents police from either seeking a warrant or relying on the exigent circumstances exception to the warrant requirement if it applies); *See also Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966) (holding that drunk driving *may* present exigent circumstances but that such determination requires a case-specific analysis); *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552 (holding that dissipation of alcohol from the bloodstream does not *always* constitute an exigency justifying the warrantless taking of a blood sample, and thus rejecting Missouri's request for a per se rule).

{¶29} In *Schmerber*, the Court affirmed the conviction for drunk driving in a case involving a defendant who was arrested at a hospital after an automobile accident, where time had to be taken to bring the accused to the hospital and to investigate the accident, and where there was no time to seek a warrant. *Schmerber* at 770-771.[3] Based upon those facts, the Court found the officer did not need a warrant for the blood draw. We believe the principles contained in *Schmerber* apply here. In the case sub judice,

[3] However, as this Court recently noted in *State v. Roar*, 4th Dist. Pike No. 13CA842, 2014-Ohio-5214, ¶ 23 "[t]here now seems to be universal agreement among the courts that have addressed the question that an arrest is not integral to the *Schmerber* holding and, consequently, that a warrantless extraction of blood from a driver lawfully suspected of DUI, does not violate the [F]ourth [A]mendment even in the absence of an arrest or actual consent."; quoting *State v. King*, 1st Dist. Hamilton No. C-010778, 2003-Ohio-1541, ¶ 26. (additional internal citations omitted); *but see State v. Taggart*, 4th Dist. Washington No. 86CA21, 1987 WL 15982 (citing to *Schmerber* to support the proposition that probable cause to arrest negated consent to test, but noting *Schmerber* is limited to situations where search is incident to arrest).

Appellant was taken to the hospital after a serious accident which involved the death of his passenger. Believing alcohol to be a factor in the accident, which occurred late at night on a weekend, the officer, also faced with the facts that Appellant was unconscious and was being readied for transport to another facility, was justified in requesting a blood draw based upon the exigent circumstances exception to the warrant requirement.

{¶30} Trooper Finley testified at the suppression hearing that the accident occurred at 10:10 p.m. and that he did not arrive at the hospital until 11:55 p.m. This would have left him with just over an hour to secure a warrant for a blood draw. The trooper further testified that there would have been no way to obtain a warrant before Appellant was transferred to another facility. Further, the E.R. nurse testified that she drew Appellant's blood at the trooper's request just before he was transferred. Based upon these specific facts, we conclude the exigent circumstances exception to the warrant requirement permitted Appellant's blood to be drawn while he was unconscious, without a warrant. *See State v. Roar*, supra at ¶ 30 (holding that drawing the appellant's blood was justified due to the evanescent nature of the evidence and because the trooper had probable cause to arrest the appellant for driving under the influence of alcohol and/or drugs); *see also State v. Kiger*, 2018-Ohio-592, 105 N.E.3d 751, ¶ 22-23.

{¶31} In light of the foregoing, and based upon the totality of the circumstances, we conclude that the blood sample obtained from Appellant, which was taken while he was unconscious at the hospital and being prepared for transfer to another facility, was both lawful and constitutionally valid pursuant to Ohio's Implied Consent statute, as well as both the consent and exigent circumstances exceptions to the warrant requirement. As such, we reject the arguments raised by Appellant under his second assignment error and affirm the trial court's denial of Appellant's motion to suppress.

ASSIGNMENT OF ERROR III

{¶32} In his third assignment of error, Appellant contends that the verdict finding him guilty was against the manifest weight of the evidence. In support of this assignment of error, Appellant notes this was a circumstantial evidence case with "absolutely no evidence of anyone seeing Defendant-Appellant driving the motor vehicle at the time of the crash." Appellant argues the State "failed to provide any scientific evidence to determine who was driving the motor vehicle on January 13, 2017." However, Appellant goes on to argue there was "insufficient evidence to support a conviction when the evidence was clear that a dark colored SUV drove the 1998 Audi off the road in a narrow section of State Route 143 in order to avoid a head on collision." Appellant sums up his argument by

asking this Court to "find that there was a lack of sufficient evidence and that the jury's verdict should be overturned." Thus, as it is unclear whether Appellant is raising a manifest weight or sufficiency argument, we will address both in the interests of justice.

{¶33} "When an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily includes a finding that sufficient evidence supports the conviction." *State v. Puckett*, 191 Ohio App.3d 747, 2010–Ohio–6597, 947 N.E.2d 730, ¶ 34; citing *State v. Pollitt*, 4th Dist. Scioto No. 08CA3263, 2010–Ohio–2556. "Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id*.; quoting *State v. Lombardi*, 9th Dist. Summit No. 22435, 2005–Ohio–4942, ¶ 9; in turn, quoting *State v. Roberts*, 9th Dist. Lorain No. 96CA006462, 1997 WL 600669 (Sept. 17, 1997). Therefore, we first consider whether Appellant's convictions were against the manifest weight of the evidence.

{¶34} "In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest

miscarriage of justice that the conviction must be reversed." *State v. Brown*, 4th Dist. Athens No. 09CA3, 2009–Ohio–5390, ¶ 24; citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541. A reviewing court "may not reverse a conviction when there is substantial evidence upon which the trial court could reasonably conclude that all elements of the offense have been proven beyond a reasonable doubt." *State v. Johnson*, 58 Ohio St.3d 40, 42, 567 N.E.2d 266 (1991); citing *State v. Eskridge*, 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph two of the syllabus (1988).

{¶35} Even in acting as a thirteenth juror we must still remember that the weight to be given evidence and the credibility to be afforded testimony are issues to be determined by the trier of fact. *State v. Frazier*, 73 Ohio St.3d 323, 339, 652 N.E.2d 1000; citing *State v. Grant*, 67 Ohio St.3d 465, 477, 620 N.E.2d 50. The fact finder "is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984) (per curiam). Thus, we will only interfere if the fact finder clearly lost its way and created a manifest miscarriage of justice. Moreover, "[t]o reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on

the court of appeals panel reviewing the case is required." *Thompkins* at paragraph four of the syllabus, construing and applying Section 3(B)(3), Article IV of the Ohio Constitution.

{¶36} As set forth above, Appellant was convicted on count one of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a) and (B)(2)(b) and (c), a first-degree felony, which provides as follows:

> "(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of another or the unlawful termination of another's pregnancy in any of the following ways:
>
> (1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance[.]
>
> * * *
>
> (B)(1) Whoever violates division (A)(1) or (2) of this section is guilty of aggravated vehicular homicide and shall be punished as provided in divisions (B)(2) and (3) of this section.
>
> (2)(a) Except as otherwise provided in division (B)(2)(b) or (c) of this section, aggravated vehicular homicide committed in

violation of division (A)(1) of this section is a felony of the second degree and the court shall impose a mandatory prison term on the offender as described in division (E) of this section.

(b) Except as otherwise provided in division (B)(2)(c) of this section, aggravated vehicular homicide committed in violation of division (A)(1) of this section is a felony of the first degree, and the court shall impose a mandatory prison term on the offender as described in division (E) of this section, if any of the following apply:

(i) At the time of the offense, the offender was driving under a suspension or cancellation imposed under Chapter 4510. or any other provision of the Revised Code or was operating a motor vehicle or motorcycle, did not have a valid driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege, and was not eligible for renewal of the offender's driver's license or commercial driver's license without examination under section 4507.10 of the Revised Code.

(ii) The offender previously has been convicted of or pleaded guilty to a violation of this section.

(iii) The offender previously has been convicted of or pleaded guilty to any traffic-related homicide, manslaughter, or assault offense.

(c) Aggravated vehicular homicide committed in violation of division (A)(1) of this section is a felony of the first degree, and the court shall sentence the offender to a mandatory prison term as provided in section 2929.142 of the Revised Code and described in division (E) of this section if any of the following apply:

(i) The offender previously has been convicted of or pleaded guilty to three or more prior violations of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance within the previous ten years.

(ii) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance within the previous ten years.

(iii) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(3) of

section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance within the previous ten years.

(iv) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(1) of this section within the previous ten years.

(v) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(1) of section 2903.08 of the Revised Code within the previous ten years.

(vi) The offender previously has been convicted of or pleaded guilty to three or more prior violations of section 2903.04 of the Revised Code within the previous ten years in circumstances in which division (D) of that section applied regarding the violations.

(vii) The offender previously has been convicted of or pleaded guilty to three or more violations of any combination of the offenses listed in division (B)(2)(c)(i), (ii), (iii), (iv), (v), or (vi) of this section within the previous ten years.

> (viii) The offender previously has been convicted of or pleaded guilty to a second or subsequent felony violation of division (A) of section 4511.19 of the Revised Code."

R.C. 4511.19, as referenced in R.C. 2903.06, prohibits driving while under the influence of alcohol or drugs.

{¶37} Appellant was also convicted on count two of one count of aggravated vehicular homicide, a first-degree felony in violation of R.C. 2903.06(A)(2)(a) and (B)(3), which provides as follows:

> "(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of another or the unlawful termination of another's pregnancy in any of the following ways:
>
> * * *
>
> (2) In one of the following ways:
>
> (a) Recklessly;
>
> * * *
>
> (B)(1) Whoever violates division (A)(1) or (2) of this section is guilty of aggravated vehicular homicide and shall be punished as provided in divisions (B)(2) and (3) of this section.

* * *

(3) Except as otherwise provided in this division, aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the third degree. Aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the second degree if, at the time of the offense, the offender was driving under a suspension or cancellation imposed under Chapter 4510. or any other provision of the Revised Code or was operating a motor vehicle or motorcycle, did not have a valid driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege, and was not eligible for renewal of the offender's driver's license or commercial driver's license without examination under section 4507.10 of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense. The court shall impose a mandatory prison term on the offender when required by division (E) of this section.

> In addition to any other sanctions imposed pursuant to this division for a violation of division (A)(2) of this section, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of section 4510.02 of the Revised Code or, if the offender previously has been convicted of or pleaded guilty to a traffic-related murder, felonious assault, or attempted murder offense, a class one suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(1) of that section."

{¶38} Appellant was also convicted on count three of one count of vehicular manslaughter, a first-degree misdemeanor in violation of R.C. 2903.06(A)(4) and (D), which provides as follows:

> "(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of

another or the unlawful termination of another's pregnancy in any of the following ways:

* * *

(4) As the proximate result of committing a violation of any provision of any section contained in Title XLV of the Revised Code that is a minor misdemeanor or of a municipal ordinance that, regardless of the penalty set by ordinance for the violation, is substantially equivalent to any provision of any section contained in Title XLV of the Revised Code that is a minor misdemeanor.

* * *

(D) Whoever violates division (A)(4) of this section is guilty of vehicular manslaughter. Except as otherwise provided in this division, vehicular manslaughter is a misdemeanor of the second degree. Vehicular manslaughter is a misdemeanor of the first degree if, at the time of the offense, the offender was driving under a suspension or cancellation imposed under Chapter 4510. or any other provision of the Revised Code or was operating a motor vehicle or motorcycle, did not have a valid driver's license, commercial driver's license, temporary

> instruction permit, probationary license, or nonresident operating privilege, and was not eligible for renewal of the offender's driver's license or commercial driver's license without examination under section 4507.10 of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense.
>
> * * *."

{¶39} Finally, Appellant was convicted on counts four and five of the indictment on two fourth-degree felony counts of OVI, the first in violation of R.C. 4511.19(A)(1)(a) and (G)(1)(d), and the second in violation of R.C. 4511.19(A)(1)(f) and (G)(1)(d). R.C. 4511.19 provides, in pertinent part as follows:

> "(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:
>
> (a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.
>
> * * *

(f) The person has a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in the person's whole blood.

* * *

(G)(1) Whoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. Whoever violates division (A)(1)(j) of this section is guilty of operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance. The court shall sentence the offender for either offense under Chapter 2929 of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section:

* * *

(d) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within ten years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses or an offender who, within twenty years of

> the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature is guilty of a felony of the fourth degree. * * *."

{¶40} As discussed above, Appellant was convicted of each of these offenses based upon the State's allegations that he was the driver of the vehicle that crashed on January 13, 2017, which resulted in the death of Jesse Carr, the victim herein. Appellant's convictions were also based upon the State's theory that it was the impaired driving of Appellant that led to the crash and Carr's death, rather than defense counsel's theory that an oncoming dark-colored SUV driving left of center caused the vehicle at issue herein to swerve to avoid a collision, ultimately resulting in the fatal accident. At trial, Appellant raised two primary arguments: 1) that Carr, rather than himself, was driving at the time the accident occurred; and 2) the driver of the dark-colored SUV who was driving left of center caused the accident, not the driver of the vehicle that crashed, whether it be Appellant or Carr. Thus, from a manifest weight and sufficiency standpoint, it appears Appellant only challenges the identity and causation elements of the offenses at issue. Thus, we will limit our analysis to those issues.

{¶41} The identity of the accused is an implicit, if not an express, element of any crime. As to the issue of who was driving the car on the

night of the accident, the State presented the following evidence that Appellant was, in fact, the driver. Additional evidence presented by the State indicated the occupants of the vehicle had been drinking beer. As set forth above, the State presented several witnesses in support of its case at trial. Luther Lee Osborne was one of the witnesses who testified on behalf of the State. He testified that he lives on State Route 143 and the crashed vehicle came to a stop in his yard after the accident. Per his testimony, he immediately went outside to see what happened. He testified that upon approaching the vehicle he saw the victim, Jesse Carr, under the car and he saw Appellant laying across the windshield. He thought Appellant was dead. He testified that Appellant started stirring when first responders arrived and he heard Appellant state "I fucked up didn't I?" He also testified that he saw beer cans laying in the car and a twelve pack of beer about a foot from the car. He testified that he keeps his yard clean and the beer was not there prior to the accident. Mr. Osborne further testified that when he initially looked in the car, he saw Appellant laying right across the top of the steering wheel, with his body on the driver's side of the car. He testified that Appellant came out of the vehicle on the passenger side.

{¶42} Jason McDaniel, a volunteer fire fighter who was first responder, testified that he was the first one to arrive at the vehicle, where he

found Appellant draped over the steering wheel with his body slightly angled toward the center of the vehicle and sticking out of the windshield. He testified that Appellant's feet were in the driver's side compartment and his heels were below seat level. He testified that when he lifted Appellant's feet up into the driver's seat, Appellant woke up and removed himself from the windshield. He testified that Appellant began asking where his friend was and then, when a medic asked him if he was driving, he stated "I fucked up." Mr. McDaniel further testified that he saw a Bud Light can in the driver's seat and several other cans around the car. Brad Smith, another volunteer fire fighter who arrived with Jason McDaniels, testified that he observed Appellant in the middle of the car, with his "butt" on the console, his body facing right out of the glass, and his feet laying the floorboard of the driver's side. He testified that he remembered Appellant saying "I fucked up, didn't I?"

{¶43} Sergeant Robert L. Hazlett, the officer who responded to the scene and oversaw the investigation, also testified. He testified that when he arrived at the scene of the accident, Appellant had already been transported to the hospital. He testified that when he arrived he looked at the crash scene, talked to the first responders, took photos, prepared scene sketches and then contacted Trooper Chris Finley and directed him to go straight to

the emergency room and that Appellant was "possibly" impaired. He further testified that he observed beer cans in the seat and center console of the car as well as a twelve pack of Bud Light outside the car. When cross-examined about whether he directed Trooper Finley to have blood drawn, he testified that he told the trooper Appellant was "possibly impaired."

{¶44} Trooper Christopher Finley, the officer who followed up with Appellant at the hospital, also testified. He testified that he was dispatched directly to the hospital by Sergeant Hazlett before responding to the accident scene. He testified that Sergeant Hazlett advised him to make contact with Appellant, who was reported to be the driver, as it was suspected that alcohol was a factor. He testified that when he encountered Appellant, that he was unconscious, had a "breathing tube," and had an odor of alcoholic beverage present on his person. He testified that once he was able to identify Appellant through dispatch, he obtained information that Appellant had prior OVI convictions, specifically four prior OVI convictions, two of which occurred in 2015, one in 2011 and one in 2008, and also that he had four active license suspensions. Therefore, he requested a blood draw from Appellant by hospital staff on the basis of implied consent, as Appellant was unconscious. He testified that blood was drawn from Appellant at approximately 12:13 a.m. on January 14, 2017 by hospital staff. Appellant

testified that thereafter, he responded to the accident scene where he obtained a statement from a man living nearby by the name of Ronald Haning. Appellant testified that after arriving at the crash scene, he obtained information indicating the black Audi vehicle involved in the accident was registered to Jenna Vernon, who shared the same address as Appellant.

{¶45} Ohio State Highway Patrol Crime Lab Criminalist/Toxicologist Nicholas Baldauf also testified at trial. He testified that tests performed on Appellant's blood revealed alcohol results of .269 grams by weight of alcohol per one hundred milliliters of whole blood, which is more than three times the legal limit. Furthermore, Dr. Dan Whitely, the Gallia County Coroner, also testified. He testified that Jesse Carr died from multiple blunt force trauma due to a motor vehicle accident. He testified that the fact there was very little blood indicated Mr. Carr died within seconds of the accident.

{¶46} Finally, pertinent to the issues herein, Mr. Ronald Haning, Jr. testified. He testified that he lives near where the accident occurred and happened to be working on his roof at the time of the accident. Mr. Haning gave two different statements that were inconsistent to law enforcement regarding what he witnessed. The first statement was given to Trooper Finley just a few hours after the accident occurred. In that statement Mr. Haning stated that just prior to the accident he observed a dark-colored SUV

traveling in the opposite direction of Appellant and the victim, and that he was "very" certain the SUV went left of center, causing the vehicle that crashed to go off the road to avoid hitting them. Mr. Haning gave another statement to law enforcement two days later, stating that he couldn't say 100% whether the SUV was left of center. He stated that he thought the SUV "could have been slightly left of center or on the yellow center lines. But both vehicle [sic] should have been able to pass without hitting." In response to being asked what he thought caused the crash, Mr. Haning stated in his second statement that "It looked like it was an overreaction." When asked at trial to explain the discrepancies in his statements, Mr. Haning testified that when he gave the second statement he had had more time to think about what he saw, and reasoned that if one car was only on the center line, there should have been room to pass. He testified that he heard the SUV coming down the hill because its tires were hitting the reflectors on the yellow line. He testified the next thing he heard was gravel pecking a guardrail, and then he looked up, saw a power pole fall, and heard the sound.

{¶47} Based upon the foregoing, the evidence presented by the State at trial reasonably supports the conclusion that Appellant was the driver of the vehicle on the night of the accident. Further, despite the fact that the evidence was circumstantial, we note “that it is well-established * * * that a

defendant may be convicted solely on the basis of circumstantial evidence." *State v. Colley*, 2017-Ohio-4080, 92 N.E.3d 1, ¶ 60; citing *State v. Wickersham*, 4th Dist. Meigs No. 13CA10, 2015-Ohio-2756, ¶ 39; quoting *State v. Nicely*, 39 Ohio St.3d 147, 151, 529 N.E.2d 1236 (1988). This is because "[c]ircumstantial evidence and direct evidence inherently possess the same probative value." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph one of the syllabus (1991). "Circumstantial evidence is defined as '[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved. * * *' " *Nicely* at 150; quoting Black's Law Dictionary (5th Ed.1979).

{¶48} Further, with regard to Appellant's argument that the driver of the SUV actually caused the accident and therefore the death of Jesse Carr, the jury heard arguments both ways at trial and considered the testimony of Mr. Haning regarding whether and to what extent the black SUV was over the center line. Apparently the jury resolved this question in favor of the State and that decision was within its province to decide. As we have already explained, the weight to be given evidence and the credibility to be afforded testimony are issues to be determined by the trier of fact. *State v. Frazier, supra*, at 339; citing *State v. Grant*, at 477. The jury, as the trier of

fact, is free to accept or to reject any and all of the evidence and to assess witness credibility. Further, a verdict is not against the manifest weight of the evidence simply because the fact-finder opts to believe the state's witnesses. *State v. Brooks*, 4th Dist. Ross No. 15CA3490, 2016-Ohio-3003, ¶ 32; citing, *e.g.*, *State v. Chancey*, 4th Dist. Washington No. 15CA17, 2015-Ohio-5585, ¶ 36; citing *State v. Wilson*, 9th Dist. Lorain No. 12CA010263, 2014-Ohio-3182, ¶ 24; citing *State v. Martinez*, 9th Dist. Wayne No. 12CA0054, 2013-Ohio-3189, ¶ 16. A fact-finder is free to believe all, part, or none of a witness's testimony. *Brooks* at ¶ 32; citing *State v. Scott*, 4th Dist. Washington No. 15CA2, 2015-Ohio-4170, ¶ 25; *State v. Jenkins*, 4th Dist. Ross No. 13CA3413, 2014-Ohio-3123, ¶ 37. Thus, in the case sub judice, the jury, after hearing and observing the witnesses, obviously found the testimony of the state's witnesses credible. "It is not our job to second-guess the jury where there is evidence from which it could reach a guilty verdict; we must defer to the jury's credibility and weight determinations." *State v. Burris*, 4th Dist. Athens No. 16CA7, 2017-Ohio-454, ¶ 31. Furthermore, we cannot conclude this is an " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins*, *supra*, at 387; quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶49} As such, after reviewing the entire record, we cannot say that the jury lost its way or created a manifest miscarriage of justice when it found Appellant guilty of all counts of the indictment. Accordingly, we find that Appellant's convictions were not against the manifest weight of the evidence. Thus, we necessarily also conclude that sufficient evidence supports his convictions. We therefore overrule Appellant's third assignment of error.

ASSIGNMENT OF ERROR I

{¶50} In his first assignment of error, Appellant contends the trial court erred when it failed to grant a new trial pursuant to Ohio Rule of Civil Procedure 33. A review of the record reflects that Appellant filed a motion for a new trial within one month of his sentencing on the basis of newly discovered evidence, namely the affidavit of Warren "Chase" Payne, which stated Mr. Payne had a brief interaction with Appellant and the victim shortly before the accident occurred, and also alleged the victim, not Appellant, was driving the car at that time. The State, however, argues the newly discovered evidence alleged by Appellant was not material to the case, and did not disclose a strong probability it would change the result if a new trial was granted.

{¶51} The Ohio Rules of Criminal Procedure provide that a motion for new trial may be made on several grounds including, inter alia, "newly discovered evidence." Crim.R. 33 provides, in pertinent part, as follows:

> "(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> * * *
>
> (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses."

{¶52} The decision to grant or deny a motion for new trial is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54, paragraph one of the syllabus (1990). " 'To prevail on a motion for a new trial based on newly discovered evidence, a defendant must show: the new evidence has been discovered since trial; the new evidence is material to the issues; the new evidence could not have been discovered before trial even with the exercise of due diligence; the new evidence is not cumulative to the former evidence; the new evidence discloses a strong probability that it will change the result if a new trial is granted; and the new evidence does not merely impeach or contradict former evidence.' " *State v. Nichols*, 4th Dist. Adams No. 11CA912, 2012-Ohio-1608, ¶ 61; citing *State v. Urbina*, 3rd Dist. No. 4–06–33, 2007–Ohio–3131, ¶ 20; citing *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370, syllabus (1947).

{¶53} Here, the State does not dispute Appellant has demonstrated four of the six factors necessary for granting a new trial. For instance, the State concedes the new evidence has been discovered since trial, the new evidence could not have been discovered before trial even with the exercise of due diligence, the new evidence is not cumulative to the former evidence, and the new evidence does not merely impeach or contradict former

evidence. The State disputes, however, that Appellant has demonstrated the new evidence is material to the issues, and that the new evidence discloses a strong probability that it will change the result if a new trial is granted.

{¶54} With respect to whether the new evidence is material to the issues, the State contends that although the new evidence, in the form of Warren Payne's testimony, if believed, appears to be material to the issue of who was driving the vehicle at the time of the accident, because Mr. Payne ultimately could not confirm the exact date or time of his meeting with Appellant and the victim prior to the accident, his testimony was not material to the issue of who was driving when the accident occurred at 10:10 p.m. on January 13, 2017. The State argues this is especially true in light of photographs taken of the vehicle after the accident which demonstrate very little damage to the driver's side, compared to the passenger side of the vehicle. The State argues a jury would have to ignore simple physics to believe the victim was driving the vehicle and Appellant was in the passenger seat, but then somehow "miraculously" switched places at the time of the crash. The State also cites to the statement made by Appellant to first responders, "I fucked up, didn't I[]" as substantial proof Appellant was the driver of the vehicle. Further, we have already determined under Appellant's third assignment of error that his convictions were supported by

sufficient evidence and were not against the manifest weight of the evidence, which necessarily included a determination that Appellant was, in fact, the driver of the vehicle at the time of the accident.

{¶55} With respect to whether the newly discovered evidence discloses a strong probability that it will change the result if a new trial is granted, the State contends it is "quite clear" that it does not. The State argues Mr. Payne's testimony lacked credibility and that a reasonable person would not know which part of his testimony to believe due to the inconsistency of the testimony regarding the date and time of his alleged encounter with Appellant and the victim prior to the accident. The State further argues this newly discovered evidence would not change the result of a new trial.

{¶56} Based upon our review of the record before us, which includes Appellant's motion for a new trial along with Mr. Payne's supporting affidavit, transcripts from Mr. Payne's interview with law enforcement, as well as Mr. Payne's testimony given during the hearing held on the motion for a new trial, we agree with the State and conclude Appellant has failed to demonstrate the newly discovered evidence was material to the issues at trial or discloses a strong probability that it will change the result if a new trial is granted. Although Appellant argues on appeal that Mr. Payne's testimony

demonstrated he saw the victim, Jesse Carr, and Appellant at Zion Church, which is located approximately .4 miles from the accident scene, at approximately 9:50 p.m. on January 13, 2017, the night of the accident, and that the victim was driving the car, we find that a review of his testimony fails to establish any of those facts with sufficient certainty. As Appellant notes, no one has disputed that Mr. Payne saw Appellant and the victim at Zion Church at some time; however, Mr. Payne's testimony was, at best, inconsistent and confusing as to when exactly this meeting occurred in relation to the time of the accident.

{¶57} As indicated above, after the jury trial was concluded in this matter and the verdict was announced, Warren "Chase" Payne came forward and contacted Appellant's attorney informing him he had information about the case. It appears Appellant's trial counsel at the time prepared an affidavit for Mr. Payne's signature, which was filed as an attachment in support of Appellant's motion for a new trial.[4] In summary, the new evidence presented by Appellant in support of his motion consisted of an affidavit from Mr. Payne averring, in pertinent part, that he left his home at

[4] As will be discussed more fully under Appellant's fourth assignment of error, Appellant's trial counsel prepared an affidavit for Mr. Payne to sign based upon recorded conversations between Mr. Payne and Appellant's sister. Counsel then met with Mr. Payne to obtain his signature on an already-prepared and notarized affidavit. It appears that Mr. Payne pointed out several inaccuracies in the affidavit, but went ahead and signed it after he was told by Appellant's counsel that the affidavit would be corrected before filing. However, it also appears the affidavit was not corrected before it was filed in support of the motion for new trial.

9:30 p.m. on the evening of January 13, 2017, and headed towards the gas station to buy snacks for his wife. He averred that he saw a black Audi stopped near the church at the foot of Horner Hill near the intersection of Zion Road and State Route 143, which is located about .4 miles from where the accident at issue occurred. He further averred that because he recognized the vehicle as belonging to Appellant, he stopped and then also saw both Appellant and the victim, Jesse Carr, whom he also knew, standing outside the car. He averred that after discussing (for a minute or two) with the victim that Appellant was intoxicated, the victim informed him he was going to drive. He further averred that he observed the victim get into the driver's seat, while Appellant was in the passenger seat, and then drive away turning left (which as it turns out was in the direction of where the accident occurred).

{¶58} The record indicates thereafter Mr. Payne voluntarily appeared at the Gallia County Patrol Post to be interviewed by Trooper James D. Hannon. During this interview, Mr. Payne was less precise, stating he left his house on the night in question "around 9:00, around 9:30, 9:25…" He further stated he sat in the church lot talking to Appellant and the victim for "probably five, six minutes, so I'd say uh, 9:55, between 9:55 and 10:00." Mr. Payne also informed the trooper he helped the victim put Appellant in

the passenger seat, and the victim got into the vehicle and drove away. This version of events was not included in his affidavit. Further questioning by the trooper led to the discovery that several statements in Mr. Payne's affidavit were incorrect, including that Mr. Payne recognized the black car as an Audi, or that it was owned by Appellant, that Mr. Payne estimated the distance from the crash scene to be .4 miles, that Appellant was standing outside the vehicle when Mr. Payne initially stopped, and the length of time of the conversation that took place that night. Mr. Payne explained to the trooper that the affidavit was prepared by Appellant's counsel and had already been notarized when he signed it, and that he pointed out several errors that were supposed to be corrected, but apparently were not corrected before the affidavit was filed.

{¶59} Before the interview concluded, however, Mr. Payne changed his account of the night in question, stating he actually left his house at 9:45. He then stated was not absolutely sure what the time was when he saw Appellant and the victim, only that it was dark out. He agreed it could have been 8:00 or 8:30, or even 6:00, but maintained he was sure the date was January 13, 2017. However, the record before us indicates that after the interview was concluded, Mr. Payne exited the station but then returned and

told the trooper he may have actually seen the men the night of the January 12, 2017, rather than January 13, 2017.

{¶60} Nevertheless, a hearing on Appellant's motion for a new trial was subsequently held. Mr. Payne testified at the hearing and the inconsistency in his testimony was substantial. He claimed that although he told the trooper he believed the date he saw the men was actually January 12, 2017, he now believed it was the 13th because it was the day he purchased a Pontiac, which he said he was driving that night. However, later in his testimony he departed from this theory and again stated it could have been on the 12th and he may have been driving a borrowed vehicle that night. Ultimately, Mr. Payne could not definitely confirm he saw the men on January 13, 2017. Further, as to the time, Mr. Payne could only confirm with 75% certainty that he encountered the men at 9:45. In fact, he testified during the hearing that it was "[h]onestly probably, probably closer to six[,]" and that the only reason he told everybody it was 9:30 was because "that seemed logical." It was clear during the hearing that all he could really recall was that it was dark outside. Interestingly, he also testified that he had no independent recollection as to what vehicle he was driving that night, but rather was operating off of a statement his wife made.

{¶61} Upon review, it appears Mr. Payne was an extremely agreeable witness, practically agreeing with anything and everything that was suggested to him to the point it was impossible to discern when his meeting with Appellant and the victim actually occurred. For instance, the following exchange took place during his cross-examination:

"Q: So is it safe to say you have no idea whatsoever what time this happened?

A: Yes Sir.

Q: Okay. And you indicated that you believe that this happened on the thirteenth because of your new vehicle but you also told me that it could have been the twelfth because you was [sic] in your buddy's vehicle?

A: Right.

Q: Correct? And Attorney Toy uh pointed out um something about the clock and nine forty-five and when he mentioned the clock you thought that it had to been [sic] the Pontiac but uh, would you agree that most vehicles have a clock in them?

A: Most of em, yea.

Q: And in fact it could have been your buddy's vehicle that you looked at it and it had a clock?

A: Right.

Q: But even that time nine forty-five you don't know if that's accurate either right?

A: Right.

Q: So what we're left here with your testimony is you can't tell this Court for sure, one hundred percent for sure that this happened on the thirteenth?

A: Right.

Q: And you can't say for sure, one hundred percent for sure, at what time this happened?

A: Right.

Q: Nothing further Your Honor."

Despite what appeared to be a genuine truth-seeking mission by both defense counsel and the prosecutor, and despite numerous rounds of re-direct and re-cross, it still remained unclear what day or time Mr. Payne encountered Appellant and the victim.

{¶62} Considering Mr. Payne's testimony in full, we cannot conclude that Appellant demonstrated the newly discovered evidence was material to the issues of whether Appellant was the driver at the time the accident occurred or that it disclosed a strong probability that it would change the result if a new trial was granted. As such, we are unable to conclude that the trial court abused its discretion in denying Appellant's motion for a new trial. Accordingly, Appellant's first assignment of error is overruled and the trial court's denial of Appellant's motion is affirmed.

ASSIGMENT OF ERROR IV

{¶63} In his fourth assignment of error, Appellant contends trial counsel provided ineffective assistance in regards to obtaining an affidavit in support of a motion for new trial. Appellant argues defense counsel was seriously deficient in the performance of his duties in obtaining an affidavit from a crucial witness, Warren "Chase" Payne. More specifically, Appellant argues that his trial counsel should have either recorded conversations with Mr. Payne himself or allowed Mr. Payne to write out his own affidavit, rather than taking information from recorded conversations between Mr. Payne and Appellant's sister and then having Mr. Payne sign a pre-prepared affidavit that contained a number of inaccuracies. Appellant contends that "pre-preparing an affidavit of a crucial witness and not [making] corrections

before the affidavit was signed * * * lead [sic] to the denial of a motion for new trial which should have been granted." The State responds by arguing that although trial counsel's performance in obtaining Mr. Payne's affidavit was inappropriate, and likely unethical, it was not deficient because obtaining the affidavit accomplished the goal of obtaining a motion hearing. The State further argues the motion was denied, not because of any deficiency in the affidavit, but rather because Mr. Payne's testimony during the hearing on the motion for a new trial was "confusing, convoluted, and unbelievable[,]" which created credibility issues unrelated to any issue with his affidavit.

{¶64} Criminal defendants have a right to counsel, including a right to the effective assistance from counsel. *McMann v. Richardson*, 397 U.S. 759, 770, 90 S.Ct. 1441 (1970); *State v. Stout*, 4th Dist. Gallia No. 07CA5, 2008-Ohio-1366, ¶ 21. To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). "In order to show deficient performance, the defendant must prove that counsel's

performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95 (citations omitted). "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52, (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

{¶65} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. "A properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10; citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by

demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988).

{¶66} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that but for counsel's errors, the result of the trial would have been different. *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but must require that prejudice be affirmatively demonstrated. *See State v. Clark*, 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 22; *State v. Tucker*, 4th Dist. Ross No. 01CA2592, 2002-Ohio-1597; *State v. Kuntz*, 4th Dist. Ross No. 1691, 1992 WL 42774.

{¶67} Here, as indicated above, Appellant's counsel obtained an affidavit from Chase Payne and filed it with the trial court in support of a motion for a new trial. Without going into great detail which we find ultimately to be inconsequential, counsel prepared an affidavit for Mr. Payne's signature based upon recorded conversations between Mr. Payne and Appellant's sister. Apparently counsel never met with or spoke to Mr. Payne personally before preparing the affidavit. Further, it appears the

affidavit was already notarized before counsel obtained Mr. Payne's signature. Additionally, upon meeting with Mr. Payne and being informed there were several inaccuracies in the affidavit, counsel went ahead and obtained Mr. Payne's signature and represented to him that the affidavit would be corrected before filing. Counsel then filed the affidavit without making corrections. Errors in the affidavit became apparent during Mr. Payne's interview with Trooper Hannon, as the information Mr. Payne was giving was inconsistent with the affidavit, which had been reviewed by the trooper. Upon questioning, Mr. Payne explained the details regarding the signing of the affidavit.

{¶68} The errors in the affidavit were also discussed at length during the hearing on the motion for the trial. In fact, as noted by the State, the trial court essentially went over the affidavit line by line with Mr. Payne to get an understanding of what was accurate and what was not. It does not appear from the record that the trooper, the prosecutor or the judge held the inaccuracies or inconsistencies in the affidavit against Mr. Payne as compared to his testimony. Further, while we certainly do not condone Appellant's counsel's methods used in preparing the affidavit and, in fact, we share in the State's belief that such actions were improper, we cannot conclude that the actions of counsel in preparing and filing the affidavit

resulted in deficient performance. This is because, as argued by the State, despite the fact that the affidavit was inaccurate and improperly prepared, the trial court still held a hearing on the motion. To that extent, counsel's performance was not necessarily deficient. However, to the extent it could be argued such action resulted in deficient performance, Appellant cannot show prejudice in light of the fact he was still granted a hearing on his motion and the trial court appears to have decided the motion on the merits of Mr. Payne's hearing testimony rather than any deficiency in the affidavit filed in support of the motion.

{¶69} We agree with the State that Appellant's motion was denied, not because of any failure with regard to Mr. Payne's affidavit, but rather due to Mr. Payne's hearing testimony. As discussed more fully and quoted verbatim, in part, above, Mr. Payne could not state with certainty the time or date he saw Appellant and victim. It was unclear throughout his testimony whether he was driving his new Pontiac or a borrowed vehicle at the time. It was also unclear whether he saw them on January 12th or January 13th. It was also unclear whether he saw them at 6:00 p.m., 8:00 p.m., 9:00 p.m or closer to 10:00 p.m. The only things Mr. Payne was certain about were that he saw them prior the accident, that it was dark outside, and that at that time the victim, rather than Appellant, was driving the car. As we noted above,

this newly discovered evidence did not warrant a new trial. Further, it was the deficiencies in Mr. Payne's hearing testimony that resulted in the denial of the motion, not the preparation or filing of the affidavit by trial counsel.

{¶70} As such, based upon a review of the record, we cannot say Appellant's motion for a new trial would have been granted in the absence of deficient performance on the part of defense counsel in obtaining the affidavit in support of the motion. And here, Appellant has not demonstrated prejudice. Thus, we find no merit to Appellant's fourth assignment of error. Accordingly, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J. & Hoover, J.: Concur in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.