[Cite as *State v. Waldock*, 2015-Ohio-1079.]

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

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 13-14-22**

v.

BRYAN P. WALDOCK, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Seneca County Common Pleas Court
Trial Court No. 13-CR-0118

Judgment Affirmed

Date of Decision: March 23, 2015

APPEARANCES:

Kent D. Nord **for Appellant**

Derek W. DeVine and Brian O. Boos **for Appellee**

ROGERS, P.J.

{¶1} Defendant-Appellant, Bryan Waldock, appeals the judgment of the Court of Common Pleas of Seneca County convicting him of aggravated vehicular homicide and aggravated vehicular assault and sentencing him to a 48-month prison term. On appeal, Waldock argues that the trial court erred by: (1) denying his motion to suppress; (2) entering verdicts that were not supported by sufficient evidence and were against the manifest weight of the evidence; (3) overruling his objections to State's Exhibits 19 and 21; and (4) refusing to grant a limiting instruction to the jury. For the reasons that follow, we affirm the trial court's judgment.

{¶2} On August 1, 2013, the Seneca County Grand Jury indicted Waldock on one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), a felony of the second degree; one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a), a felony of the third degree; one count of aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), a felony of the third degree; and one count of aggravated vehicular assault in violation of R.C. 2903.08(A)(2)(a), a felony of the fourth degree. The indictment arose from a two vehicle crash at the intersection of U.S. 224 and County Road 23. The crash resulted in the death of Joshua Collins, the

driver of one vehicle. David Tripp, one of Collins' passengers, received serious physical injuries as a result of the crash.

Suppression Hearing

{¶3} Waldock filed a motion to suppress evidence and a motion in limine pursuant to Evid.R. 702. In his motion, Waldock argued that the sample of his blood, which was taken to determine his blood-alcohol level, was not withdrawn in conformity to Ohio laws. Specifically, Waldock asserted that the blood draw was not conducted by a proper person under R.C. 4511.19(D)(1); the blood sample was not withdrawn within three hours of the alleged violation; and that the blood sample was not collected in accordance with Ohio Adm.Code 3701-53-05. Waldock also alleged that the results of his blood alcohol test were scientifically unreliable for purposes of Evid.R. 702.

{¶4} The State filed its motion in opposition to Waldock's motion to suppress on December 4, 2013. The State argued that the person who withdrew Waldock's blood was a registered nurse, and thus, qualified to perform the blood draw. It also argued that a nonalcoholic swab was used to prepare Waldock's skin for the blood draw, in conformance with Ohio Adm.Code 3701-53-05(B). Lastly, the State conceded that the blood draw occurred more than three hours after the alleged criminal violation. However, the State argued that the results were still admissible if presented with expert testimony.

{¶5} A suppression hearing was held on January 14, 2014. The State's first witness was Douglas Rohde. Rohde testified that he is employed by the Lake County Crime Laboratory ("LCCL") as a supervisor of chemistry and toxicology. In his position at the LCCL, Rohde performs retrograde extrapolations to determine a person's blood alcohol level at an earlier point in time. Rohde was offered and accepted as an expert witness regarding alcohol analysis, impairment, and retrograde extrapolation.

{¶6} Rohde explained how he performed the retrograde extrapolation in Waldock's case:

> Q: What steps did you take and calculations did you make to assist with that determination?
>
> A: Well, the first thing I needed to do was determine how many minutes separated the event from the draw. And then calculate, based on that, and that was 206 minutes as stated in my report in my opinion. Human beings are designed and created to eliminate foreign substances from the body. * * * So with each type of drug or chemical, this is a process of elimination that occurs in the body.
>
> * * *
>
> With that said, there are still variations in reported elimination rates. And within an individual or within different individuals, there are different elimination rates. What I did in this case, because I have no – I was not provided any history of the Defendant's drinking habits prior to on this day or prior to this day, I used an average of a healthy male. And I used a, a range between .011 to .022 grams per deciliter per hour. This range is fairly conservative and it encompasses a novice drinker up to a social drinker. Maybe into the range of a regular drinker. * * * But in this case, I use the average elimination rate for a healthy male, and that was point, as I said, .011

> grams to .022 grams per deciliter per hour. Using that 206-minute gap, I was able to calculate what the amount of ethanol that would have been eliminated in that time period, and my calculations revealed a range of .037 to .075 grams per deciliter of alcohol. And this is elimination from the blood.
>
> So using the .112 grams per deciliter of alcohol level concentration that the Ohio State Highway Patrol determined on the blood sample collected at 04:39, I calculated that the Defendant's blood alcohol concentration at the time of the event at 01:13 hours was estimated to have been between 0.129 to 0.187 grams per deciliter, and given an average of .163. If you are good with math or quick with math or you have a calculator, you'll see that that's not the average between .149 and .187. It is the average elimination rate of an adult healthy male at .015 grams per deciliter.

Suppression Hearing Tr., Volume I, p. 13-16.

{¶7} Rohde again stated that this was a conservative estimate and that if he had assumed that Waldock was a heavy drinker, then the blood alcohol level would have been higher at the time of the crash. Rohde also testified that the calculations he used are widely used in the scientific community and are designed to reach a conclusion to a reasonable degree of scientific certainty. Further, Rohde testified that Waldock would have been impaired if he was driving with a blood alcohol level between .129 and .187. Specifically, Rohde stated:

> But overall, it is, it has been determined that impairment begins at approximately .04 to .05 grams per deciliter. And that all individuals, at a concentration of .08 grams per deciliter in the blood will exhibit some degree of impairment. What degree of impairment would that be? It's a variable. And once again, without having prior knowledge to the Defendant's drinking history or functional tolerance with alcohol, I can't say specifically what the impairment may have manifested. But there is a, based on this concentration,

> there is a definite influence of alcohol and subsequent impairment while driving.

Id. at p. 22.

{¶8} Rohde stated that he was familiar with the process for obtaining a blood sample as he was a trained medical laboratory technician and was certified by the American Society of Clinical Pathology. Rohde stated that before a blood draw occurs, the skin is cleansed by an antiseptic. There are three different types of swabs that are used in hospitals to cleanse the skin: Betadine swabs, Isopropanol swabs, and Chlorhexidine swabs. Betadine swabs contain iodine and do not contain alcohol. If a Betadine swab is used to prepare an individual's skin, it would have no impact on a blood analysis. The Isopropanol swab contains rubbing alcohol while the Chlorhexidine swab contains Isopropyl alcohol as well as Chlorhexidine. However, Rohde testified that even if an Isopropanol swab or a Chlorhexidine swab was used, they would have no impact on a blood analysis as long as a gas chromatography method was used. He stated that all crime laboratories and coroner office laboratories in Ohio use gas chromatography, which is the "gold standard" for analyzing a blood sample.

{¶9} On cross-examination, Rohde admitted that he made an assumption regarding Waldock's last ingestion of alcohol. Rohde explained that the only information he had regarding any of the alcohol consumption was Waldock's witness statement where he admitted "to having dinner with his parents around

6:30 to 6:45 and having four to five beers in about four hours on Friday, September 28th, 2012." *Id.* at p. 37. Based on this statement, Rohde assumed that Waldock stopped drinking alcohol around 11:00 to 11:30 p.m.

{¶10} The State's next witness was Elaine Sbelgio. She testified that she is employed at Tiffin Mercy Hospital as a registered nurse. Sbelgio testified that she has been a nurse for 52 years and is licensed in the State of Ohio. When conducting a blood draw for the State Highway Patrol, Sbelgio always uses the kit the trooper provides. Sbelgio stated that the kit contains a syringe, Betadine swabs, and tape. She then had the following exchange:

> Q: When you're doing a blood draw from [sic] the State Highway Patrol, how often do you use the Betadine swabs from the kits?
>
> A: All the time.
>
> Q: Ever remember a time where you just said, you know what, forget this Betadine thing? I'm just going to use the hospital swab?
>
> A: You mean the hospital alcohol swab?
>
> Q: Yeah.
>
> A: No.
>
> Q: Ever remember a time where the trooper's swab was maybe expired or dried out and you had to use a different swab?
>
> A: Well, we have Betadine swabs on our IV cart, so we would use one of those.

> Q: Okay. So you're saying if that were to happen – which first, let me ask you this: Do you ever remember a time where that's ever happened?
>
> A: I've never encountered it, no.
>
> Q: But if that were to happen, you would use the hospital's Betadine swabs?
>
> A: Correct.
>
> Q: Because you have your own at the hospital?
>
> A: Uh-huh.

Id. at p. 46-47.

{¶11} Sbelgio only knows of three types of swabs Tiffin Mercy Hospital uses: Betadine, Isopropanol, and Chlorhexidine. Sbelgio testified that she was working on September 29, 2012, from 6:00 p.m. to 6:00 a.m. She stated that Waldock's chart indicated that he came in because he was involved in a motor vehicle accident. Further, she testified that his blood was drawn for alcohol testing.

{¶12} On cross-examination, Sbeligo stated that of the three different types of swabs, only the Betadine swab would leave a yellowish residue on the arm. She also stated that she drew Waldock's blood at 4:43 a.m.

{¶13} Trooper Jonathan Weasner of the Ohio State Highway Patrol was the next witness to testify. Trooper Weasner testified that he has been involved in roughly 150 OVI cases. Trooper Weasner explained the process he must go

through in order to obtain a blood sample. He would first read a suspect a Form 2255, which asks for consent to draw blood. If the individual does not consent, then Trooper Weasner must apply for a search warrant. Once the search warrant is obtained, Trooper Weasner has a phlebotomist or a registered nurse draw the blood. Trooper Weasner testified that he will hand the phlebotomist or nurse an OVI kit. In the OVI kit are Betadine swabs. Trooper Weasner testified that he uses these OVI kits "every time" he seeks a blood draw. *Id.* at 62. He then had the following relevant exchange:

> Q: Okay. Have you ever had an issue with a Betadine swab being dried out or unusable?
>
> A: No, sir.
>
> Q: Ever remember a nurse or phlebotomist telling you that or complaining to you about that issue?
>
> A: No, sir.
>
> Q: Ever remember a single occasion where the person performing the blood draw did not use the Betadine swab provided in the OVI kit?
>
> A: No, sir.

Id. at p. 63.

{¶14} On the evening September 29, 2012, Trooper Weasner was dispatched to a crash scene at the intersection of U.S. 224 and County Road 23. That night, Trooper Weasner determined that Waldock may have been driving

impaired. Trooper Weasner stated that his supervisor, Lieutenant Gockstetter observed slurred speech, "[r]ed shot [sic], glassy eyes," and the smell of alcoholic beverage on his breath. *Id.* at p. 66. When Waldock was transported to the hospital, Trooper Weasner made contact with him and observed those same things too. Further, Trooper Weasner testified that the fire chief told him that Waldock was displaying aggressive behavior and was yelling and throwing car parts at the crash scene.

{¶15} Trooper Weasner then identified State's Exhibit 5, which was Waldock's traffic crash witness statement. In his witness statement, Waldock stated that he went to dinner with his girlfriend and parents around 6:30-6:45 pm. and "had 4-5 beers in about 4 hours." Suppression Hearing Tr., State's Exhibit 5, p. 3. Trooper Weasner stated that he did not find any beer cans or alcohol containers in his vehicle or at the crash scene.

{¶16} After Waldock arrived at the hospital, Trooper Weasner asked for Waldock's consent to draw his blood, but he refused. Therefore, Trooper Weasner left the hospital to obtain a search warrant. Trooper Weasner testified that he remembered the blood draw and testified that the nurse who performed the blood draw utilized the OVI kit.

{¶17} On cross-examination, Trooper Weasner stated that the crash occurred at 1:13 a.m. He also stated that a woman was present in the emergency

room with Waldock. Trooper Weasner testified that she was upset, had blood shot and glassy eyes, and he could smell an odor of alcoholic beverage on her person. However, he did not perform any field sobriety tests on her. Trooper Weasner did not notice anything different about Waldock's arm either before or after his blood was drawn.

{¶18} After Trooper Weasner's testimony, the suppression hearing was continued until January 30, 2014. Waldock recalled Rohde as his first witness. Rohde testified that trauma may have an effect on the body's ability to process alcohol, but it depended on the severity of the trauma and which particular organs were involved. When asked whether the elimination rate Rohde used to calculate Waldock's blood alcohol level was specific to Waldock, Rohde replied:

> I don't know [Waldock's] exact elimination rate, correct. But I can assure you if I had the ability to do a metabolic study on the Defendant, it would be in that range or higher, which would make the retrograde extrapolation rate even higher. I am reluctant to do that, as I mentioned before, with any Defendant unless I had verified proof that they are in the heavy, heavy drinker.

Suppression Hearing Tr., Volume II, p. 54.

{¶19} Rohde admitted that one of the pitfalls of retrograde extrapolation is that you must make certain assumptions when making calculations. However, Rohde stated that "I am aware of the problems and pitfalls and that's why I'm very careful in what I do. Why I am very conservative and that's why I give ranges." *Id.* at p. 59.

{¶20} Rohde assumed that Waldock was at full absorption at the time of the crash. He came to this assumption based upon the fact that Waldock told police officers that he had 4-5 beers during a dinner that ended around 11:00 p.m. Rohde admitted that if the assumption of full absorption is incorrect, then his calculations would not be accurate.

{¶21} Patrick Waldock was then called to testify. Patrick testified that he was Waldock's father and was with his son on the night of the crash. Patrick was in the hospital room with Waldock when the blood draw occurred. After the needle came out of Waldock's arm, Patrick testified that there was no discoloration to his arm.

{¶22} On cross-examination, Patrick admitted to consuming alcohol the night of crash, but stated he only had two beers. He also testified that he did not remember this detail until "months" after the crash, and thought of it only after talking with Waldock's attorney.

{¶23} Christy Bogner then testified for the defense. Bogner stated that she is Waldock's girlfriend and was also at the hospital at the time of the blood draw. She then had the following relevant exchange:

Q: * * * Did you observe the nurse take blood from [Waldock]?

A: Yes.

Q: Could you describe what she did and how she did it?

> A: She prepared the skin with a clear fluid. No color change noted on [Waldock's] right antecue. She drew the blood and handed the specimen to the trooper.
>
> * * *
>
> Q: You mentioned the skin was prepped with a clear fluid?
>
> A: Correct.
>
> Q: Are you absolutely certain of that?
>
> A: Absolutely.

Id. at p. 119. Bogner testified that she is familiar with Betadine because she is a respiratory therapist and has done blood draws before. Bogner admitted to drinking that night, but could not recall how much she drank. However, she stated that she would not have driven that night.

{¶24} Bogner testified, on cross-examination, that she did not discuss the swab that was used on Waldock's arm with anyone until 11 months after the accident.

{¶25} The trial court denied Waldock's motion to suppress on February 14, 2014. The trial court found that Sbeligo was a registered nurse and was a proper person under R.C. 4511.19(D)(1) to perform the blood draw. It also found that providone-iodine[1] was used to prep Waldock's arm before the taking of the blood sample and was not taken in violation of Ohio Adm.Code 3701-53-05. Lastly, the

[1] We note that Betadine is a brand name of providone-iodine.

trial court found that although the blood sample was taken over three hours after the alleged violation, the State presented the expert testimony of Rohde who testified, with a reasonable degree of scientific certainty, that Waldock's blood alcohol concentration was somewhere between 0.149-0.187.

Trial Proceedings

{¶26} This matter proceeded to trial on May 19, 2014 and ended on May 22, 2014. The State's first witness was Amy Tripp, who was dating Joshua Collins' father at the time of the car accident. Tripp testified that on September 28, 2013, she was moving from Attica to Mansfield with her children and Collins. She testified that the move took two trips and they utilized two vehicles for the move. Tripp was driving her van, while Collins was following her in a Chevrolet S-10 truck. Around 1:13 a.m. on September 29, 2013, Tripp cleared the intersection at U.S. 224 and County Road 23. She drove westbound on U.S. 224, when she noticed that "lights [were] coming very fast." Trial Tr., p. 182. She testified that the lights were headed east and were in the opposite lane. Tripp stated that she knew that the vehicle was going to hit Collins' vehicle so she slowed down and looked out her side view mirror. After the vehicle hit Collins' truck, Tripp pulled over and ran towards the accident. By the time she reached the scene, she was already on the phone with 911.

{¶27} She testified that Collins and her son David were both taken to the hospital by life flight. David suffered a large laceration on his eyelid and had a fracture to his front left pelvis. He spent three days in intensive care. After he was discharged from the hospital, he was in a wheelchair and then a walker for several months.

{¶28} The State's second witness was Lieutenant Brett Gockstetter of the Ohio State Highway Patrol. He testified that he was dispatched to a crash scene on September 29, 2012. Lieutenant Gockstetter testified that when he first arrived either a firefighter or EMT told him that Waldock was acting "very aggressively" and was throwing car parts into the road. *Id.* at p. 212. However, when Lieutenant Gockstetter made contact with Waldock, he seemed to have calmed down and was not throwing anything.

{¶29} A video and audio recording from Lieutenant Gockstetter's patrol car that night was played for the jury. Lieutenant Gockstetter then identified a witness statement Waldock made, wherein Waldock described what happened. The statement says, in relevant part:

> I was driving down St. Rt. 224. Approximately 60 mph cruise was set. I was going to Custom AG Shop to retrieve phone charger. I come over the hill on St. Rt. 224 to intersection CR 23 and St. Rt., 224. Regular cab S10 is pulling out, I slammed my brakes, it didn't help!! My truck rolled. I got out came up to truck. Kid was on the ground breathing heavily. Boy in middle bleeding. Girl was just in shock.

(State's Exhibit 2, p. 1).

{¶30} Lieutenant Gockstetter stated that he then dictated an exchange he had with Waldock. The rest of the statement read:

> Q: Are you injured?
>
> A: My shoulders hurt, my neck, my back, my wrists are cut up.
>
> Q: Were you wearing your seat belt?
>
> A: Yes
>
> Q: When did you first see the other truck?
>
> A: As soon as I came over the hill
>
> Q: What did you do when you first saw the truck[?]
>
> A: I hit my brakes and steered to the right
>
> Q: Do you know if the other truck had stopped at the stop sign or ran thru it without stopping?
>
> A: That I couldn't tell you
>
> Q: Did you have your headlights on?
>
> A: Yes
>
> Q: Did the other car have headlights on?
>
> A: Yes
>
> Q: Where were you coming from?
>
> A: Tiffin
>
> Q: Where at in Tiffin?

A: My house

Q: Do you know about what time you left your house?

A: I don't remember

Q: Did you go anywhere else after leaving your house?

A: No

Q: Were there any other vehicles on the roadway near the crash?

A: I think just one other car came over the hill westbound

Q: How much had you drank prior to the crash?

A: Me and my girlfriend went to dinner with my parents around 6:30-6:45 and had 4-5 beers in about 4 hours

Q: Did you have anything other then [sic] that?

A: No sir

Q: Is there anything you would like to add to your statement?

A: The other truck was completely in my lane when I came over the hill.

Id. at p. 2-3.

{¶31} Lieutenant Gockstetter stated that the weather was 50 degrees, there was no precipitation, and that the roadways were dry on September 29, 2012. Further, he testified that the speed limit on U.S. 224 was 55 miles per hour with a suggested speed limit of 35 miles per hour. According to Lieutenant Gockstetter,

there were no tire marks at the scene of the collision. He then had the following exchange:

> Q: You said even at very slow speeds, but Lieutenant, your training, education, and experience of a vehicle with anti-lock brakes that was traveling at a speed of approximately 75 miles an hour and the driver slammed his brakes, would you expect to see brake marks?
>
> A: Oh, absolutely. No doubt.

Id. at p. 225.

{¶32} While Lieutenant Gockstetter testified that Waldock and his car smelled of alcoholic beverage, he did not find any beer cans or bottles in Waldock's car at the scene of the collision.

{¶33} On cross-examination, Lieutenant Gockstetter testified generally that Waldock was cooperative with his investigation and that he did not observe any aggressive behavior from Waldock. He also stated that Waldock initially consented to a blood draw but then his girlfriend intervened and convinced him to withdraw his consent. Further, Lieutenant Gockstetter acknowledged that Collins' failure to yield was a contributing factor in the collision.

{¶34} Next to testify was Douglas Rohde, who was offered and accepted as an expert witness. Since Waldock's blood draw occurred at 4:39 a.m., Rohde used retrograde extrapolation to determine Waldock's blood alcohol level at the time of the crash. Rohde stated that his opinion has two parts: the calculation of

Waldock's blood alcohol level and the effect of the calculated blood alcohol level on the individual at a particular time. Rohde testified that his calculation revealed that Waldock's blood alcohol concentration at the time of the accident "is estimated to have been between 0.149 and 0.187 grams per deciliter, with an average of 0.163." *Id.* at p. 350. Rohde then testified, with a reasonable degree of scientific certainty, that Waldock's ability to operate a motor vehicle would have been impaired. Rohde then testified to the different signs and symptoms of alcohol influence and intoxication:

> Signs and Symptoms of Stage Two Alcohol Influence and Intoxication. This is with a blood alcohol concentration from 0.030 to 0.120. And that's grams per 100 mL. The signs and symptoms of this stage generally include the following: Mild euphoria. Talkativeness. Increased self-confidence. Decreased inhibitions. Diminution of attention, judgment, and control. Loss of efficiency in finer performance tests.
>
> Signs and Symptoms of Stage Three Alcohol Influence/Intoxication. This is a blood alcohol concentration of 0.090 to 0.250 grams per 100 millimeter [sic]. Generally include the following: Emotional instability. Decreased inhibitions. Loss of critical judgment. Impairment of memory and comprehension. Decreased sensitory [sic] response. Increased reaction time. And some muscular incoordination.
>
> Signs and Symptoms of Stage Four Alcohol Influence and Intoxication. With a blood alcohol concentration between 0.180 and 0.300 grams per 100 mL. Generally include the following: Disorientation. Mental confusion. Dizziness. Exaggerated emotional states. Disturbance of sensation and of perceptions of color, form, motion, dimensions. Decreased pain sense. Impaired balance, muscular incoordination. Staggering gait. And slurred speech.

Id. at p. 353-354.

{¶35} On cross-examination, Rohde stated that he did not personally observe Waldock on the night of the accident. Rohde explained that impairment can begin with a person's first drink. However, he testified that "research and science has shown that everyone will exhibit some degree of impairment with a blood alcohol [concentration] of .08 or greater." *Id.* at p. 366. Further Rhode had the following relevant exchange:

> Q: Would you agree with me that from a clinical scientific standpoint, there is no way that Mr. Waldock could have been tested at the levels that you determined if his only consumption was four to five beers over that [four hour] period?
>
> A: I agree with that.
>
> Q: There is no way you can reconcile his statement with your results?
>
> A: Well, the results of the Ohio State Highway Patrol.
>
> Q: Well, that's interesting. That's, that's interesting because the results of the Ohio State Highway Patrol, their test [is] at a .112, that would be possible. You could have four to five beers and test a .112, correct?
>
> A: Not in this timeframe and not at that time.
>
> Q: Not in that timeframe and not at that time. So we either have a problem with Mr. Waldock not telling the truth or we have a calculation on the retrograde extrapolation?
>
> A: Well, I can tell you[,] you have no problem with that calculation.

Id. at p. 386-387.

{¶36} Jeff Turnau, a criminalist with the Ohio State Highway Patrol, testified that he analyzes blood and urine specimens for alcohol content. Turnau was offered and accepted as an expert witness. Turnau analyzed the blood sample from Waldock and found that "[t]he ethanol present was 0.112 grams by weight of alcohol per 100 milliliters." *Id.* at p. 402.

{¶37} Trooper Jonathan Weasner of the Ohio State Highway Patrol then testified for the State. Trooper Weasner stated that he asked Waldock for consent to withdraw his blood, but was denied consent. Therefore, Trooper Weasner applied for a search warrant to obtain a blood sample. In his search warrant, under a section titled "Indicia of Alcohol and/or Drug Usage", Trooper Weasner stated that the smell of alcoholic beverage was on Waldock's breath; his eyes were red, blood shot, and glassy; and that Waldock admitted to consuming alcoholic beverages that night. However, in his search warrant, Trooper Waldock did not indicate that Waldock's speech was slurred; that he had difficulty producing his driver's license or other documentation; or that he was unsteady or unstable on his feet.

{¶38} On cross-examination, Trooper Weasner testified that a cell phone was found in Collins' truck. However, no one from the Ohio State Highway Patrol analyzed the phone to determine if it was being used at the time of the traffic accident. He also stated that he did not attempt to get any statements from

the passengers in Collins' vehicle. Trooper Weasner testified that Collins was 19-years old at the time of the crash.

{¶39} Dr. Prasad Kakarala testified next for the State. Dr. Kakarala was offered and accepted as an expert witness. He testified that David Tripp has been a patient of his since 2009. As a result of the car accident, David received a fractured pelvis, a concussion, and multiple lacerations and contusions. Due to those injuries, David was on a strong dose of pain medication, had physical therapy, and had to attend follow-up appointments with several specialists. Dr. Kakarala also testified that David has suffered psychological problems as a result of the crash. Specifically, he testified that "[s]tarting from December 2012, he started showing some signs of anxiety stemming from the accident. He needed medication to control his anxiety." *Id.* at p. 444.

{¶40} Dr. Maneesha Pandey, a deputy coroner and forensic pathologist at the Lucas County Coroner's Office, testified that she performed the autopsy of Collins. Dr. Pandey, who was also offered and accepted as an expert witness, testified that it was her opinion that Collins died of multiple blunt force traumas and that those injuries were consistent with a motor vehicle crash.

{¶41} Trooper Ryan Thomas, a crash reconstruction expert for the Ohio State Highway Patrol, testified next. After being qualified as an expert witness, Trooper Thomas explained that crash reconstruction is the scientific analysis to

determine what caused the crash and what occurred during the crash. Trooper Thomas testified that he inspected Waldock's and Collins' vehicles. He testified that he "viewed the calibers [sic] and the brake pads [and they] appeared to be sufficient. They didn't appear to be broken. The calibers [sic] didn't appear to be cracked. They appeared to be in working order." *Id.* at p. 466. Further, he testified that he looked for skid marks at the scene of the crash but found none.

{¶42} Trooper Thomas then testified as to the data he received from Waldock's air bag control module. At two seconds prior to the air bag deployment, Waldock was traveling at 81 miles per hour. At one second prior to the crash, Waldock was still traveling at 81 miles per hour. Finally, at a half second prior to the air bag deployment, Waldock's speed dropped to 78 miles per hour. Moreover, Trooper Thomas testified that Waldock's brake circuit switch was activated somewhere between one second and a half second prior to impact.

{¶43} On cross-examination, Trooper Thomas stated that there was no evidence that Collins had stopped at the stop sign, but it was an assumption he made. He also acknowledged when making his calculations he assumed that Collins was operating his vehicle legally at all times.

{¶44} After Trooper Thomas' testimony, the trial court received all of the State's exhibits into evidence, except for Trooper Thomas' crash report. Specifically, the court found that the report was based upon the assumption that

Collins' stopped at the stop sign, which was neither perceived by the witness nor established by any evidence in his report. The State then rested. Waldock moved for an acquittal pursuant to Crim.R. 29, but the trial court denied the motion. Waldock presented no witnesses or exhibits, and renewed his Crim.R. 29 motion after the defense rested.

{¶45} On May 22, 2014, the jury returned guilty verdicts on count two, aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a); and count four, aggravated vehicular assault in violation of R.C. 2903.08(A)(2)(a). Waldock was found not guilty on counts one and three of the indictment.

{¶46} This matter proceeded to sentencing on July 10, 2014. After hearing evidence and arguments relating to the issue of punishment, the trial court imposed the following sentence: 48 months in prison for the one count of aggravated vehicular homicide; and 16 months in prison for the one count of aggravated vehicular assault. Further, the trial court ordered that the prison terms be served concurrently. On July 16, 2014, the trial court issued a judgment entry journalizing Waldock's conviction and sentence.

{¶47} Waldock timely appealed this judgment, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE

BLOOD SAMPLE WAS NOT WITHDRAWN BY A PROPER PERSON AS REQUIRED BY REVISED CODE SECTION 4511.19(D)(1), THE BLOOD SAMPLE WAS TAKEN IN VIOLATION OF OHIO ADMINISTRATIVE CODE 3701-53-05(B) AND THE BLOOD SAMPLE WAS NOT WITHDRAWN WITHIN THREE HOURS OF THE TIME OF THE ALLEGED VIOLATION UNDER REVISED CODE SECTION 4511.19 AND ADEQUATE EXPERT TESTIMONY WAS NOT OFFERED.

Assignment of Error No. II

THE CONVICTION IN THE TRIAL COURT SHOULD BE REVERSED BECAUSE IT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND BECAUSE THE EVIDENCE SUPPORTING IT WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THE CONVICTION OF APPELLANT BEYOND A REASONABLE DOUBT.

Assignment of Error No. III

THE TRIAL COURT ERRED WHEN IT OVERRULED THE TRIAL COUNSEL'S OBJECTION REGARDING EXHIBIT 19 AND ERRED WHEN IT ADMITTED STATE'S EXHIBIT 19 OVER APPELLANT'S OBJECTION. STATE'S EXHIBIT 19 CONTAINED ASSUMPTIONS AND WAS EXTREMELY PREJUDICIAL.

Assignment of Error No. IV

THE TRIAL COURT ERRED WHEN IT OVERRULED TRIAL COUNSEL'S OBJECTION TO TROOPER THOMAS TESTIFYING REGARDING EXHIBIT 21 AND ERRED WHEN IT ADMITTED STATE'S EXHIBIT 21 OVER APPELLANT'S OBJECTION. STATE'S EXHIBIT 21 CONTAINED ASSUMPTIONS AND WAS EXTREMELY PREJUDICIAL.

Assignment of Error No. V

THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT A LIMITING INSTRUCTION TO THE JURY AFTER THE ADMISSION OF THE STATE'S EXHIBIT 21.

{¶48} Due to the nature of the assignments of error, we elect to address Waldock's fourth and fifth assignments of error together.

Assignment of Error No. I

{¶49} In his first assignment of error, Waldock argues that the trial court erred when it denied his motion to suppress. Specifically, Waldock argues that his blood sample was not withdrawn by a proper person; that the nurse did not use a Betadine swab to cleanse his skin before the blood draw; and that the blood test was not performed within three hours of the alleged violation and that adequate expert testimony was not offered. We disagree.

Standard of Review

{¶50} "Appellate review of a decision on a motion to suppress presents a mixed question of law and fact." *State v. Burnsid*e, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. The trial court serves as the trier of fact and is the primary judge of the credibility of the witnesses and the weight to be given to the evidence presented. *State v. Johnson*, 137 Ohio App.3d 847, 850 (12th Dist.2000). Therefore, when an appellate court reviews a trial court's ruling on a motion to suppress, it must accept the trial court's findings of facts so long as they are

supported by competent, credible evidence. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100. The appellate court must then review the application of the law to the facts de novo. *Burnsid*e at ¶ 8.

{¶51} R.C. 4511.19(D) governs the admissibility of alcohol-test results and "provides that a defendant's blood, breath, or urine 'shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director of health pursuant to section 3701.143 of the Revised Code.' " *Burnside* at ¶ 9. Pursuant to this statutory mandate, the Director of Health promulgated alcohol-testing regulations in Ohio Adm.Code 3701-53-05. *Id.* at ¶ 10. These regulations require the State to "(1) use an aqueous solution of a nonvolatile antiseptic on the skin, (2) use a sterile dry needle to draw blood into a vacuum container with a solid anticoagulant, (3) seal the blood container in accordance with the appropriate procedure, and (4) refrigerate the blood specimen when it is not in transit or under examination." *Id.* at ¶ 21.

{¶52} "[W]hen results of blood-alcohol tests are challenged in an aggravated-vehicular-homicide prosecution that depends upon proof of an R.C. 4511.19(A) violation, the state must show substantial compliance with R.C. 4511.19(D)(1) and Ohio Adm. Code Chapter 3701-53 before the tests results are admissible." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, ¶ 48. The

Supreme Court of Ohio expanded its holding on what is necessary to admit challenged blood tests in *State v. Hassler*, 115 Ohio St.3d 322, 2007-Ohio-4947. In *Hassler*, the Court held that "a blood sample taken outside of the time frame set out in R.C. 4511.19(D) is admissible to prove that a person was under the influence of alcohol * * * provided the administrative requirements of R.C. 4511.19(D) are substantially complied with and expert testimony is offered." *Id.* at ¶ 2.

R.C. 4511.19(D)(1)(b)

{¶53} Waldock makes a cursory argument that his blood draw was not conducted by a proper person as required by Ohio law. However, he does not explain why Elaine Sbeligo was unqualified to perform his blood draw. Under R.C. 4511.19(D)(1)(b), "Only a physician, a registered nurse, an emergency medical technician-intermediate, an emergency medical technician-paramedic, or a qualified technician, chemist, or phlebotomist shall withdraw a blood sample for the purposes of determining the alcohol * * * content of the whole blood, blood serum, or blood plasma."

{¶54} At the suppression hearing, the State presented the testimony of Sbelgio, a registered nurse at Tiffin Mercy Hospital. Sbelgio testified that she conducted Waldock's blood draw and that she has been a registered nurse for 52

years. The State also offered State's Exhibit 3 into evidence, which showed that Sbeligo is a registered nurse in Ohio and that her license is current.

{¶55} Therefore, we find Waldock's argument that Sbelgio was not a "proper person" under R.C. 4511.19(D)(1)(b) to be meritless.

Ohio Adm.Code 3701-53-05(B)

{¶56} Next, Waldock argues that the blood sample was taken in violation of Ohio Adm.Code 3701-53-05 because Sbeligo did not use a Betadine swab to cleanse Waldock's skin before the blood draw. If a Betadine swab was not used, Waldock contends that "it is very likely that the agent used would have compromised the test." (Appellant's Br., p. 12). We find that there is competent credible evidence to support the trial court's finding that a Betadine swab was used.

{¶57} At the suppression hearing, Sbeligo had the following relevant exchange:

> Q: When you're doing a blood draw from the State Highway Patrol, how often do you use the Betadine swabs from the kits?
>
> A: *All the time*.
>
> Q: Ever remember a time where you just said, you know what, forget this Betadine thing? I'm just going to use the hospital swab?
>
> A: You mean the hospital alcohol swab?
>
> Q: Yeah.

A: *No*.

(Emphasis added.) Suppression Hearing Tr., Volume I, p. 46-47. Further, Trooper Weasner testified that Betadine swabs are in his OVI kits, and that he uses these OVI kits "every time" he seeks a blood draw. *Id.* at p. 62. Trooper Weasner testified that he did not remember a single time where the person performing the blood draw did not use the Betadine swab provided in his OVI kit.

{¶58} Waldock presented two witnesses at the suppression hearing, who both testified that they did not see any discoloration to Waldock's arm. There was also testimony that Betadine swabs will usually leave a yellowish tint on the skin that is difficult to remove. However, both witnesses testified that they were drinking on the night of the accident. Also, they both admitted that they did not remember this detail until almost a year after the crash, and only after discussing the matter with Waldock and/or his attorney.

{¶59} On appeal, Waldock argues that his witnesses were "confident" that there was no discoloration to his skin, whereas the State's witnesses could not remember exact details from the night. In essence, Waldock is arguing that his witnesses were more credible than the State's, and that the trial court should have believed his witnesses. The trial court apparently found Sbelgio's and Trooper Weasner's testimony to be more credible than the defense witnesses. We note that "[c]redibility determinations are made by the trier of fact, as much in a

suppression hearing as in the trial itself." *State v. Campbell*, 90 Ohio St.3d 320, 333 (2000), citing *State v. Fanning*, 1 Ohio St.3d 19, 20 (1982); *see also State v. Goble*, 6th Dist. Huron No., 2014-Ohio-3967, ¶ 7 ("On a motion to suppress, the trial court assumed the role of finder of fact and, as such, is in the best position to determine witness credibility * * *."). The court's credibility determination was supported by the evidence, as both defense witnesses testified that they had been drinking the night of the accident and that they did not remember this small detail until having discussions about the case with Waldock and/or his attorney, months after the blood draw had occurred.

Timely Blood Draw

{¶60} The last argument Waldock makes regarding his suppression hearing is that the State failed to withdraw his blood within the time limit found in R.C. 4511.19 and that adequate expert testimony was not offered. Both parties agree that the blood draw did not occur within three hours of Waldock's alleged violation. However, in *Hassler*, the Supreme Court of Ohio stated that a blood sample taken outside the statutory time requirements is "admissible to prove that the person is under the influence of alcohol * * * provided that the administrative requirements of R.C. 4511.19(D) are substantially complied with and expert testimony is offered." *Hassler*, 2007-Ohio-4927, ¶ 19.

{¶61} On appeal, Waldock argues that Rohde's testimony was not adequate expert testimony because his testimony was not based on reliable scientific, technical, or other specialized information. Specifically, Waldock is critical of the "assumptions" Rohde made while performing his calculations.

{¶62} The admissibility of expert testimony is a matter committed to the sound discretion of the trial court, and the trial court's ruling will not be overturned absent an abuse of that discretion. *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶ 9. A trial court will be found to have abused its discretion when its decision is contrary to law, unreasonable, not supported by the evidence, or grossly unsound. *State v. Boles*, 2d Dist. Montgomery No. 23037, 2010-Ohio-278, ¶ 16-18. When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. *State v. Slappey*, 3d Dist. Marion No. 9-12-58, 2013-Ohio-1939, ¶ 12.

{¶63} When assessing the admissibility of expert testimony, the threshold question to determine is whether the testimony was relevant under Evid.R. 401. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. These provisions produce a low threshold of admissibility, which "reflect[s] the

policy favoring the admission of relevant evidence for the trier of fact to weigh." *State v. Kehoe*, 133 Ohio App.3d 591, 606 (12th Dist.1999).

{¶64} If the testimony satisfies the threshold determination of relevancy, our inquiry transitions to the dictates of Evid.R. 702, which provides as follows:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> > (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
> >
> > (2) The design of the procedure, test, or experiment reliably implements the theory;
> >
> > (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

When performing this analysis, we are mindful that "courts should favor the admissibility of expert testimony whenever it is relevant and the criteria of Evid.R. 702 are met." *State v. Nemeth*, 82 Ohio St.3d 202, 207 (1998).

{¶65} Although Waldock argues that Rohde's reliance on assumptions made his expert testimony unreliable, it actually relates to the relevancy of Rohde's testimony. An expert's testimony "must 'fit' under the facts of the case so that 'it will aid the jury in resolving a factual dispute.' " *Meadows v. Anchor Longwall & Rebuild, Inc.*, 306 Fed.Appx. 781, 790 (3d Cir.2009), quoting *Lauria v. Natl. RR. Passenger Corp.*, 145 F.3d 593, 599 (3d Cir.1998). "The 'fit' element has been described as encompassing 'the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case.' " *Allstate Ins. Co. v. Hamilton Beach/Proctor-Silex, Inc.*, W.D.Pa No. 2:06CV1186, 2008 WL 3891259, *5 (Aug. 19, 2008), quoting *United States v. Downing*, 753 F.2d 1224, 1237 (3d Cir.1985). Therefore, when the expert's testimony is logically connected to the questions at issue and assists the trier of fact to understand the evidence, the testimony is relevant. *Id.* However, when "expert testimony is based on assumptions that lack any factual support in the record[,]" the testimony should be excluded. *Id.*, citing *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 414 (3d Cir.2002); *see also Meadows*, 206 F.Appx. at 790 ("In other words, expert testimony based on assumptions lacking factual foundation in the record is properly excluded."); *Evans v. Mathis Funeral Home, Inc.*, 996 F.2d 266, 268 (11th Cir.1993) (not error to exclude expert testimony when expert's testimony was based on assumptions not supported in the

record); *Garwood v. Internatl. Paper Co.*, 666 F.2d 217, 223 (5th Cir.1982) (same).

{¶66} Here, the assumptions Rohde made were based on facts supported in the record. Specifically, Rohde made the assumption that Waldock was in the post-absorptive phase at the time of the crash. This assumption was based on the statement Waldock made to the police that he did not consume any alcohol after dinner. This statement was "very critical in [Rohde's] assumption that [Waldock] was in the post-absorptive phase." Suppression Hearing Tr., Volume II, p. 55. Rohde also admitted that he did not know Waldock's exact elimination rate, which is why he used a range of elimination rates. Since Rohde did not have any evidence before him that Waldock was a heavy drinker, he used elimination rates of novice drinkers and social drinkers. However, Rohde testified that if Waldock was actually a heavy drinker, his blood alcohol content would have been *higher* than his calculations. *Id.* at p. 94-95. Thus, the assumptions Rohde made in his calculations were based upon facts in the record, namely, Waldock's statement he made to the police. Therefore, we find that the trial court did not error in admitting Rohde's expert testimony.

{¶67} In sum, we find that Sbelgio was a proper person to perform Waldock's blood draw. We also find that the trial court did not err in determining

that the State substantially complied with R.C. 4511.19(D) and Ohio Adm.Code 3701-53-05(B).

{¶68} Accordingly, we overrule Waldock's first assignment of error.

Assignment of Error No. II

{¶69} In his second assignment of error, Waldock argues that his convictions were not supported with sufficient evidence and were against the manifest weight of the evidence. We disagree.

A. Insufficient Evidence

{¶70} When an appellate court reviews the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 47. Sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997), *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89 (1997). Accordingly, the question of whether the offered evidence is sufficient to sustain a verdict is a question of law. *State v. Wingate*, 9th Dist. Summit No. 26433, 2013-Ohio-2079, ¶ 4.

1. R.C. 2903.06(A)(2)(a)

{¶71} Ohio's aggravated vehicular homicide statute relevantly provides as follows: "No person, while operating or participating in the operation of a motor vehicle * * * shall cause the death of another * * * recklessly." R.C. 2903.06(A)(2)(a). The Revised Code declares that "[a] person acts reckless when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C). It further states that "[a] person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." *Id.* Based on the terms of R.C. 2903.06(A)(2)(a), the State was required to prove the following elements to secure a conviction in this matter: (1) the defendant operated a motor vehicle; (2) in a reckless fashion; (3) which caused the death of another. *State v. Swihart*, 3d Dist. Union No. 14-12-25, 2013-Ohio-4645, ¶ 50. Waldock's sufficiency argument challenges only the second and third elements, which we will discuss below.

a. Evidence of Waldock's Recklessness

{¶72} Waldock argues that there was insufficient evidence to prove that he recklessly caused Collins' death. Drawing from the statutory definition of recklessness, this court has previously described the recklessness element of

aggravated vehicular homicide as focusing on "the state of mind of the defendant as to (1) the known risk, and (2) his perverse disregard of the same with heedless indifference to the consequences." *State v. Gates*, 10 Ohio App.3d 265, 267 (3d Dist.1983). In applying this formulation of recklessness, Ohio courts have long recognized that "[p]roof of excessive speed in the operation of a motor vehicle under a charge of vehicular homicide is generally not by itself sufficient to constitute * * * recklessness." *State v. Speer*, 180 Ohio App.3d 230, 2008-Ohio-6947, ¶ 26 (6th Dist.), *aff'd* 124 Ohio St.3d 564, 2010-Ohio-649, citing *Akers v. Stirn*, 136 Ohio St. 245 (1940), paragraph one of the syllabus; *accord State v. Roberts*, 8th Dist. Cuyahoga No. 97709, 2012-Ohio-4715, ¶ 17 ("[S]peed alone is not sufficient to constitute recklessness."). Rather, for a defendant to be guilty of aggravated vehicular homicide, "a jury must find behavior that goes beyond negligence and include an additional factor[, such as] use of alcohol or drugs, a perverse and deliberate disregard for the safety of others, or some other aggravating circumstances that is beyond a mere lapse in judgment." *Speer* at ¶ 29; *see*, *e.g.*, *Swihart* at ¶ 55 (finding sufficient evidence of recklessness where defendant was driving between 47 and 65 miles per hour around a known curve in the road); *State v. O'Brien*, 11th Dist. Lake No. 2011-L-011, 2013-Ohio-13, ¶ 83-84 (finding sufficient evidence of recklessness to support aggravated vehicular homicide where the defendant was driving at a high rate of speed and in a

"zigzagging" manner); *State v. Ward*, 4th Dist. Ross No. 03CA2703, 2003-Ohio-5847, ¶ 12 (finding sufficient evidence of recklessness to support aggravated vehicular homicide where defendant was driving under the influence of alcohol).

{¶73} We find there was sufficient evidence offered by the State to support Waldock's conviction for aggravated vehicular homicide. Evidence was presented that on the night of the crash Waldock was traveling from his house to his place of work to retrieve a cell phone charger. (State's Exhibit 2, p. 1). Thus, Waldock should have been familiar with this route and been aware of the hill and the suggested speed limit. The State presented evidence that Waldock was traveling 26 miles per hour over the speed limit and 46 miles per hour over the suggested speed limit. Multiple witnesses testified that the crash happened at night, a time when visibility is further compromised.

{¶74} There was also testimony that Waldock failed to brake. Lieutenant Gockstetter, Trooper Weasner, and Trooper Thomas all testified that there were no skid marks on the road, which would have indicated that Waldock applied his brake before the accident. The State also presented the evidence of the air bag control module, which showed that Waldock did not activate his brakes until a half a second to one second before impact. Further, Waldock was only able to reduce his speed to 78 miles per hour at the time of impact.

{¶75} Lastly, there was evidence that Waldock was driving impaired on the night of the crash. Waldock admitted that he consumed alcoholic beverages that night in his statement to police. Both Trooper Weasner and Lieutenant Gockstetter testified that Waldock had red and glassy eyes, and that he smelled of alcoholic beverage. First responders also observed Waldock acting aggressively and throwing car parts in the middle of the road. Finally, Rhode's expert opinion stated that Waldock was driving with a blood alcohol level of 0.149-0.187 at the time of the crash.

{¶76} The State presented evidence that Waldock was driving impaired at night and at an excessive speed. The State also presented evidence that showed that Waldock did not apply his brakes until less than one second before the impact. Therefore, we find that the State presented sufficient evidence to demonstrate that Waldock was driving recklessly.

b. Evidence of Causation

{¶77} Waldock also argues that the State failed to show that he caused Collins' death. Specifically, he argues that it is not clear whether Collins caused the crash since there was no evidence that he stopped at the stop sign. However, Waldock ignores the testimony from Tripp who testified she saw Collins stop at the stop sign. Trial Tr., p. 197. Again, the State presented evidence that Waldock was driving at 81 miles per hour—46 miles over the suggested speed limit—while

he was impaired. Viewing the evidence in the light most favorable to the prosecution, we find that there was sufficient evidence that Waldock's reckless operation of his vehicle caused Collins' death.

2. R.C. 2903.08(A)(2)(b)

{¶78} Revised Code 2903.08(A)(2)(b) provides, in relevant part: "No person, while operating or participating in the operation of a motor vehicle * * * shall cause serious physical harm to another person * * * recklessly." Since we have already discussed how the State presented sufficient evidence that Waldock was operating a motor vehicle recklessly, we must determine if Waldock caused serious physical harm to another person. Dr. Kakarala testified that as a result of the crash, David Tripp received a fractured pelvis, concussion, and multiple lacerations and contusions. Thus, the State presented sufficient evidence that Waldock caused serious physical harm to David Tripp as a result of his reckless operation of a vehicle.

B. Manifest Weight of the Evidence Standard

{¶79} When an appellate court analyzes a conviction under the manifest weight standard, it "sits as the thirteenth juror." *Thompkins*, 78 Ohio St.3d at 387. Accordingly, it must review the entire record, weigh all of the evidence and its reasonable inferences, consider the credibility of the witnesses, and determine whether the fact finder "clearly lost its way" in resolving evidentiary conflicts and

"created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). When applying the manifest weight standard, a reviewing court should only reverse a trial court's judgment "in exceptional case[s]" when the evidence "weighs heavily against the conviction." *Id.* at paragraph three of the syllabus.

{¶80} Having disposed of Waldock's sufficiency arguments, we similarly reject his manifest weight arguments. Waldock argues that the jury made all assumptions in Collins' favor and that its verdict is against the manifest weight of the evidence. The jury heard from Tripp that Collins stopped at the stop sign. It also heard evidence that Waldock was traveling 81 miles per hour, at night, while he was impaired. The jury also heard evidence that Waldock failed to apply his brakes until less than one second before impact.

{¶81} Further, Waldock's statement that he made to Lieutenant Gockstetter was contradicted by almost every expert witness the State presented. For example, Rohde testified that it was not possible to reconcile Waldock's statement about alcohol consumption with his test results. Further, data from Waldock's air bag module contradicted his statement that he was only traveling 60 miles per hour and that his car was set on cruise control. Trooper Thomas and Lieutenant Gockstetter testified there were no skid marks on the road which was inconsistent

with Waldock's statement that he "slammed [his] brakes." Further, Trooper Thomas inspected Waldock's brakes after the crash and found them to be in working order.

{¶82} Thus, it appears the jurors found the State's witnesses more credible than Waldock's own statement. *See State v. Wareham*, 3d Dist. Crawford No. 3-12-11, 2013-Ohio-3191, ¶ 25 ("[J]urors are entitled to believe the testimony offered by the State's witnesses"); *State v. Clark*, 101 Ohio App.3d 389, 400 (8th Dist.1995) ("It is well established that the * * * credibility of witnesses [is] primarily [a] matter[] for the trier of fact."). After a thorough review of the record, we cannot say that this is the exceptional case where the trier of fact lost its way and committed a miscarriage of justice by finding Waldock guilty of aggravated vehicular homicide and aggravated vehicle assault.

{¶83} Accordingly, his second assignment of error is overruled.

Assignment of Error No. III

{¶84} In his third assignment of error, Waldock argues that the trial court erred when it overruled his counsel's objection to State's Exhibit 19 and then when it admitted the same exhibit over his objection. We disagree.

{¶85} Trial courts have the broad discretion in determining whether to admit or exclude evidence. *Deskins v. Cunningham*, 3d Dist. Union No. 14-05-29, 2006-Ohio-2003, ¶ 53, citing *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83

(1985). "Accordingly, a trial court's ruling on the admissibility of evidence will not be disturbed on appeal absent an abuse of discretion." *Moore v. Moore*, 182 Ohio App.3d 708, 2009-Ohio-2434, ¶ 15 (3d Dist.).

{¶86} At trial, Waldock only objected to the admission of the coroner's verdict on the second page of the autopsy report. He did not object to the "rest of the document, which would include the case summary on the death of Joshua Collins and the report of autopsy and the forensic toxicology report * * *." Trial Tr., p. 548. Thus, Waldock has waived all but plain error except as to the second page of the autopsy report. *State v. Underwood*, 3 Ohio St.3d 12 (1983), syllabus; *State v. Adams*, 62 Ohio St.2d 151, 153 (1980).

{¶87} Waldock objected to the coroner's verdict because the coroner did not testify at trial and because the "language in the verdict that indicates that the cause of death was the auto accident." Trial Tr., p. 549. While Waldock makes these same arguments on appeal, it is unclear if he is only challenging the admission of the coroner's verdict or the entire autopsy report.

{¶88} It must be noted that the first page of the autopsy report—which Waldock did not object to—also states that Collins' cause of death was from an automobile accident.[2] Thus, even if the trial court abused its discretion in admitting the coroner's verdict, Waldock was not prejudiced since the same

[2] Specifically, the case summary states:

statement was made in the case summary. Therefore, even assuming the trial court erred, it was harmless error. If Waldock is actually challenging the admission of the entire autopsy report, he does not explain how the admission was plain error. Waldock has failed to demonstrate how he was prejudiced by the admission of the report since neither party disputed that Collins died from the injuries he received during the crash. Further, the coroner's report attributed the cause of death to blunt force trauma as the result of an automobile accident, but it did not assess fault to a specific individual. *See* (State's Exhibit 19, p. 1-2). Therefore, regardless if the autopsy report was properly authenticated and admitted, its admission was not reversible error.

{¶89} Accordingly, we overrule Waldock's third assignment of error.

Assignment of Error Nos. IV & V

{¶90} In his fourth and fifth assignments of error, Waldock argues the trial court erred by admitting State's Exhibit 21 and also when it refused to grant a limiting instruction to the jury after the admission of the exhibit. We disagree.

{¶91} Jury instructions, like the admission of evidence, are within the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of discretion is shown. *State v. Orians*, 179 Ohio App.3d 701, 2008-Ohio-

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Cause of death: MULTIPLE BLUNT FORCE TRAUMA (HOUR(S))
How injury occurred: AUTO VS AUTO
Manner of death: Accident

(Emphasis sic.) (State's Exhibit 19, p. 1).

6185, ¶ 10 (3d Dist.). Therefore, "when reviewing a trial court's jury instructions, the proper review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Dailey*, 3d Dist. Hancock No. 5-99-56, 2000 WL 567894, *1 (May 9, 2000); *see also State v. Wolons*, 44 Ohio St.3d 64, 68 (1989).

{¶92} State's Exhibit 21 was a scaled drawing of the crash scene that Trooper Thomas made. The drawing depicted the vehicles at their final resting place. The drawing also showed tire marks from Collins' vehicle as well as marks Waldock's car made on the road when it overturned. Below the drawing were several measurements that Trooper Thomas made that depicted the distances between different reference points.

{¶93} Waldock objected to State's Exhibit 21 as well as the testimony of Trooper Thomas regarding that exhibit. Specifically, Waldock argued:

> Defense Counsel: If you look at [State's Exhibit] 21, Your Honor, you can see that – actually, and I didn't even realize this until I took a second look at it – this diagram actually has Mr. Waldock's vehicle moving ever so slightly to the left as it travels down the road. You can see the –
>
> Trial Court: I see. I see what you're trying to say.
>
> Defense Counsel: All right. There is no evidence to support that. None. In fact, as it relates to the placement of what Mr. Waldock's vehicle in what I would call the middle of the hill, for lack of a better term, or just, I guess that would be to the west of the approaching

> intersection, the trooper made no, offered no testimony regarding how he placed the vehicle there. And then at impact, it actually shows my client's vehicle drifting to the left, and there was no evidence regarding that. And that is not consistent with the prior field sketches that were done on this case.

Trial Tr., p. 560-561. While the State admitted that Waldock made some valid points, it argued that those arguments go towards the weight of the exhibit and not to the admissibility of the exhibit.

{¶94} After the court made its ruling on State's Exhibit 21, the following relevant exchange occurred:

> Defense Counsel: I would like the Court to consider instructing the jury, if the Court's going to let them see [Exhibit] 21, that – I'm, I'm concerned about the position of those vehicles on that diagram. And I'm, I would like the Court to instruct the jury that the position of those vehicles on the diagram is illustrative only and is not to be utilized by them as evidence of the placement, the exact placement of those vehicles in relation to either one another or the center line of the roadway at the time of the impact.
>
> * * *
>
> State: I don't think it's, it's necessary. The jurors have heard the testimony. He didn't testify that – he testified those, those vehicles were there for representations of the distance, not their position in the lane.
>
> Trial Court: Okay. And therefore I will not give any limiting instruction or any cautionary instruction or anything as it relates – or that is illustrative in nature as to State's Exhibit 21. It is what is. Okay.

Id. at p. 579-580.

{¶95} We do not find that the trial court abused its discretion in admitting State's Exhibit 21 into evidence. The exhibit was used to show the distances between different reference points. It was not offered to depict the exact positions of the vehicles at the time of the crash, which is what Waldock complains of on appeal. Waldock had the opportunity to cross-examine Trooper Thomas about the positions of the vehicles and how they may not have been accurately portrayed in the exhibit. Therefore, we find that this goes towards the credibility of the exhibit, not its admissibility. We are unsure why the trial court denied Waldock's request for a limiting instruction regarding State's Exhibit 21. However, on appeal, Waldock does not provide this court with any legal authority to support his position on this issue, which violates App.R. 16(A)(7). But even if we found that the trial court abused its discretion in denying Waldock's limiting instruction, we find that such error would be harmless. Waldock does not provide us with any argument about how the failure to give a limiting instruction somehow reduced the import of the other overwhelming evidence that supported Waldock's convictions or affected the outcome of the trial.

{¶96} Accordingly, we overrule Waldock's fourth and fifth assignments of error.

{¶97} Having found no error prejudicial to Waldock in the particulars assigned and argued, we affirm the trial court's judgment.

Judgment Affirmed

SHAW and PRESTON, J.J., concur.

/jlr