

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

HERSCHEL C. ROBERTS,

Defendant-Appellant.

Case No. 12-1980

On Appeal from the Cuyahoga County  
Court of Appeals Eighth Appellate District

C.A. Case No. CR-538472

**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT HERSCHEL C. ROBERTS**

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**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTION QUESTION.**

This case should be considered of public or great general interest and involves a substantial constitution question because it involves the issue of whether the bicyclist, Sylvia Bingham, violated Ohio Revised Code 4511.28, a provision prohibiting vehicles from passing on the right. [Ohio Revised Code 4511.28: "Overtaking and passing upon the right of another vehicle. (A) The driver of a vehicle or trackless trolley may overtake and pass upon the right of another vehicle or trackless trolley only under the following conditions: (1) When the vehicle or trackless trolley overtaken is making or about to make a left turn; (2) Upon a roadway with unobstructed pavement of sufficient width for two or more lines of vehicles moving lawfully in the direction being traveled by the overtaking vehicle. (B) The driver of a vehicle or trackless trolley may overtake and pass another vehicle or trackless trolley only under conditions permitting such movement in safety..."]

Also, it involves Ohio Revised Code 4511.55(A) which states a bicycle is considered to be a vehicle and a cyclist may only pass other traffic on the right, provided the cyclist does so only while exercising due care. [Ohio Revised Code 4511.55: (A) "Operating bicycles and motorcycles on roadway. Every person operating a bicycle upon a roadway shall ride as near to the right side of the roadway as practicable obeying all traffic rules applicable to vehicles and exercising due care when passing a standing vehicle or one proceeding in the same direction."]

The issues in this case will affect other cases relative to accidents involving vehicles and bicycles and should therefore be worthy of review.

## STATEMENT OF THE CASE AND THE FACTS

This Memorandum in Support of Jurisdiction is being submitted by appellant because he believes that this case is of public or great general interest and involves a substantial constitutional question and believes it is worthy of review.

On the morning of September 15, 2009, appellant was driving a large box truck making deliveries for his employer. He was traveling east on Prospect Avenue after leaving the "Q." A young woman, Sylvia Bingham, was also traveling east on Prospect Avenue on her bicycle. Appellant's truck was stopped at the traffic light at the corner of Prospect Avenue and East 21<sup>st</sup> Street. It is not known whether the cyclist came to a complete stop or not at or near that intersection while the traffic light was red. As the light turned green, traffic began to move; and appellant turned right onto East 21<sup>st</sup> Street heading in a southerly direction. The bicyclist collided with the right side rear of the truck and was run over by the dual rear wheels of the truck. She died shortly thereafter. Appellant continued south on East 21<sup>st</sup> Street absolutely unaware the accident had occurred.

In the opinion filed by the Eighth District Court of Appeals, it is stated under "I. Factual and Procedural History" that "...appellant was driving a large box truck...traveling east on Prospect Avenue...Sylvia Bingham...was also traveling east on Prospect on her bicycle. The two stopped at a red light at the intersection of East 21<sup>st</sup> Street and Prospect. Witnesses testified the bike was stopped somewhere close to the truck or just behind it...As the light turned green, traffic began to move, and appellant turned right onto East 21<sup>st</sup> Street. Bingham was run over by the dual rear wheels of the box truck..."

This statement is not accurate nor in harmony with the trial transcript. Not one of the three witnesses stated that the bicyclist ever came to a complete stop before proceeding easterly on Prospect Avenue through the intersection of Prospect Avenue and East 21<sup>st</sup> Street. That being the case, the bicyclist was in violation of Ohio Revised Code 4511.28 because she passed on the right of the appellant's truck without exercising due care.

The Court of Appeals stated in ¶28 of its opinion "...testimony was adduced to show that appellant was going straight through the intersection, but then turned at the last minute. It was permissible for Bingham to continue through the intersection next to the appellant." And in ¶29 of its opinion it mentions "Appellant's sudden turn in the intersection..." However, this was the opinion of only one of the witnesses and said opinion should be considered questionable in light of the fact that the appellant's truck was loaded with electrical equipment including numerous, various bulbs which would have been easily broken if he had made such a turn.

In addition, when the Court of Appeals compiled its opinion, it did not take into account that one of the witnesses, Mr. Jonathan Olenski stated in his testimony that the construction taking place further east on Prospect Avenue was in the middle lane, not the curb lane, so the truck could have continued easterly on Prospect without being hindered by the construction as Ms. Sheena Durham opined. Also, Detective Richard Cerny, one of the State's witnesses, in his testimony relative to Ohio Revised Codes 4511.28 and 4511.55(A) stated "If Mr. Roberts had stopped or if he's turning, then the bicyclist should have been behind the truck in the right lane." All of the witnesses stated that they saw the truck stopped at the red light before proceeding to make the right turn.

It should also be noted, Mr. Olenski stated that the bicyclist was unable to stop her bike, that she tried to put her feet down to stop, that as a result of her inability to stop, she ran into the truck. If she was stopped at the light behind the truck as she should have been in compliance with Ohio Revised Codes 4511.28 and 4511.55(A), then it would be unlikely that she could have picked up enough speed to be unable to stop when she realized the truck was making a right turn. (Please note that even Judge Gaul himself stated “Let’s assume by the time he [appellant] got to the intersection of 21<sup>st</sup> and Prospect and he has stopped at the light – because we’re assuming he’s stopped at the light because we know the bicyclist caught up to him or was catching up to him, because we don’t know that the bicyclist ever stopped or continued on...”)

It also becomes of great importance in regard to compliance with Ohio Revised Codes 4511.28 and 4511.55(A) to determine the reason for the appellant’s truck to appear to be straddling the lanes when crossing East 18<sup>th</sup> Street and Prospect Avenue. At that time of morning, there are always parked cars on the south side of Prospect Avenue from the easterly corner of East 18<sup>th</sup> Street to approximately one hundred feet or so from East 21<sup>st</sup> Street. Therefore, the truck would have to be partially in the middle lane as it approached East 21<sup>st</sup> Street and would then have to angle back toward the curb lane in order to make the right hand turn onto East 21<sup>st</sup> Street. The bicyclist would have been riding between the parked cars and the traffic straddling the lanes in order to proceed in the curb lane toward East 21<sup>st</sup> Street. As she approached the intersection, once again, if the truck was stopped at the light, she should have stopped behind him in compliance with Ohio Revised Codes 4511.28 and 4511.55(A) and to be exercising due care.

## PROPOSITION OF LAW

1. The appellate court erred to the prejudice of the defendant-appellant when it upheld the trial court's verdict of guilty against the manifest weight of the evidence.

The conviction of the defendant-appellant is against the manifest weight of the evidence where it is not supported by competent, credible evidence which proves his guilt beyond a reasonable doubt.

### Authorities

*State v. Thompkins*, 78 Ohio St.3d 380, 578 N.E.2d 541 (1997)  
*Tibbs v. Florida*, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982)  
Black's Law Dictionary (6<sup>th</sup> Edition 1990)  
*State v. Davis*, 49 Ohio App.3d 109, 550 N.E.2d 966 (8<sup>th</sup> Dist. 1998)  
R.C. 2903.06  
R.C. 2901.22  
*Potonak v. Whitmore*, 8<sup>th</sup> Dist. App. No. 86046, 2005-Ohio-6344  
R.C. 4511.28  
R.C. 4511.39  
*Birch v. Heropulos*, 5<sup>th</sup> Dist. App. No. 2007 CA 00016, 2007-Ohio-4252  
*Rutherford v. Lister*, 4<sup>th</sup> Dist. App. No. 1580, 1983 WL 3165 (March 29, 1983)

2. The appellate court erred to the prejudice of the defendant-appellant in upholding the trial court's denial of his motion for acquittal made pursuant to Crim.R.29(A).

The trial court erred in denying the defendant-appellant's Crim.R.29 Motion for Acquittal on the charges against him where the State failed to present sufficient evidence to establish beyond a reasonable doubt that the defendant-appellant acted recklessly.

### Authorities

Crim.R.29(A)  
*State v. Bridgeman*, 55 Ohio St.2d 261, 381 N.E.2d 184 (1978)  
*State v. Kilby*, 50 Ohio St. 2d 21, 361 N.E.2d 1336 (1977)  
*State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991)  
*State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997)

3. The appellate court erred in upholding the trial court's error of sentencing the defendant-appellant to a term of imprisonment where its findings were not supported by the record.

The trial court erred when it imposed a prison term where its findings under R.C. 2929.12 were not supported by the record and where it failed to give careful and substantial deliberation to the relevant statutory considerations.

## Authorities

*State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912  
*State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856  
R.C. 2929.11  
R.C. 2929.12  
R.C. 2953.08  
*State v. Cantrell*, 2<sup>nd</sup> Dist. App. No. 2005-CA-4, 2006-Ohio-404  
*State v. Harris*, 2<sup>nd</sup> App. No. 20841, 2005-Ohio-6835  
*State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-110  
*Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983)  
*State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980)  
*State v. Fails*, Portage App. No. 2000-P-0119, 2000-Ohio-8902  
*State v. Martin*, 136 Ohio App. 355, 1999-Ohio-814

#### 4. Appellate received ineffective assistance of appellate counsel.

Appellate counsel was ineffective because he did not raise the issue of the reason for the appellant's truck to be straddling the lanes on Prospect Avenue between East 18<sup>th</sup> Street and East 21<sup>st</sup> Street and the subsequent positions of the truck and the bicyclist near East 21<sup>st</sup> Street which is relative to Ohio Revised Code 4511.28. Nor did he raise the issue of the bicyclist's failure to properly comply with Ohio Revised Code 4511.55(A).

## CONCLUSION

For the above stated reasons, this Court should accept jurisdiction.

Respectfully submitted,

*Marla Roberts, PLLC  
for Herschel C. Roberts*  
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Herschel C. Roberts, A621-172

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was forwarded by regular U.S. Mail to Timothy J. McGinty, Esq., Cuyahoga County Prosecuting Attorney/Kevin R. Filiatraut, Esq., Assistant Prosecuting Attorney, Cuyahoga County, Cuyahoga County Prosecutor's Office, The Justice Center Building / 1200 Ontario Street, 8<sup>th</sup> Floor, Cleveland, OH 44113-1604, this 23<sup>rd</sup> day of November, 2012.

*Marla Roberts, PLLC  
for Herschel C. Roberts*  
SIGNATURE

Herschel C. Roberts, A621-172

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OCT 11 2012

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 97709

**FEE**  
**3**  
**TAXED**

**STATE OF OHIO**

**PLAINTIFF-APPELLEE**

vs.

**HERSCHEL ROBERTS**  
*a 621172*

**DEFENDANT-APPELLANT**

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**JUDGMENT:**  
**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-538472

**BEFORE:** Celebrezze, P.J., Jones, J., and Cooney, J.

**RELEASED AND JOURNALIZED:** October 11, 2012

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PER APP.R. 22(C)**

**OCT 11 2012**

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CLERK OF THE COURT OF APPEALS  
BY: [Signature] DEP.**

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FRANK D. CELEBREZZE, JR., P.J.:

{¶1} This appeal by appellant Herschel Roberts stems from the tragic death of Sylvia Bingham and appellant's resultant conviction for aggravated vehicular homicide. Appellant claims his conviction cannot stand because it is against the manifest weight of the evidence, is unsupported by sufficient evidence, and also that his sentence is excessive. After a thorough review of the record and law, we affirm appellant's conviction and sentence.

### I. Factual and Procedural History

{¶2} On the morning of September 15, 2009, appellant was driving a large box truck making deliveries for his employer. He was traveling east on Prospect Avenue in Cleveland, Ohio. A young woman, Sylvia Bingham, was also traveling east on Prospect on her bicycle. The two stopped at a red light at the intersection of East 21st Street and Prospect. Witnesses testified the bike was stopped somewhere close to the truck or just behind it. As the light turned green, traffic began to move, and appellant turned right onto East 21st Street. Bingham was run over by the dual rear wheels of the box truck about eight feet into the intersection. She died shortly thereafter. Appellant continued south on East 21st Street, apparently unaware of the tragic events left behind.

{¶3} Bingham's death was witnessed by three individuals who came forward and provided statements to police. Jonathan Olenski, a delivery driver for an auto parts supplier, was behind appellant's truck and observed Bingham

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stop her bike just behind appellant's truck off to the right, next to the curb. He stated he did not notice if the truck used its turn signal. He testified that once the light turned green, he observed appellant's truck move forward and "bow out left" as it proceeded through the intersection. He then observed it turn right and strike Bingham as she tried to stop or avoid the collision, but was unable to because of the condition of the pavement at the intersection. Olenski testified the truck did not stop, but continued to accelerate down East 21st Street. He followed the truck and was able to get the license plate number, then returned to the intersection and waited for the police.

{¶4} Paul Silvestro, a project coordinator for a large telecommunications and cable company, was walking to a meeting. He was reviewing some notes for the meeting as he waited at the crosswalk on the north side of Prospect. He heard a metallic scraping sound and looked up to see appellant's truck speeding away from a crumpled bike and a woman laying in the road. He ran to the woman and called 911. He testified he did not see the accident, but was able to identify the truck.

{¶5} Finally, Sheena Durham was on her way to class at Cleveland State University. She parked at the parking garage just south of Prospect on East 21st Street. She was waiting just south of the intersection and observed appellant's truck and Bingham stopped at the intersection. She testified she noticed Bingham because of the glint from her reflectors. She did not know

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whether appellant used his turn signal. When asked about appellant's turn signal, she testified, "I wasn't looking so I didn't pay attention to that." She stated she was not paying attention until she heard the enormous roar of a large engine. She looked up to see appellant's truck accelerating away from the intersection as if he was going to continue straight on Prospect, but it then turned right midway through the intersection and accelerated rapidly down East 21st Street. She did not see the truck strike Bingham because the turning truck blocked her view. She noted that the engine roar was not typical city traffic noise and that the truck reached approximately 40 miles per hour by the time it reached Carnegie Avenue and made a left turn. She then saw Bingham laying in the road and realized what had occurred.

{¶6} As a result of the accident, Bingham suffered fatal injuries. Detective Richard Cerny of the Cleveland Police Accident Investigation Unit was one of the officers tasked with investigating the incident. After the police received reports of an accident, along with the name of the business on the side of the truck, officers went to the business and were able to contact appellant and request that he return to the warehouse where he had started his day. Appellant was interviewed by Detective Cerny and seemed not to realize he was involved in a fatal hit-skip accident.

{¶7} Detective Cerny testified that appellant did not appear to be intoxicated or impaired, but appellant's supervisor insisted that federal

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Department of Transportation regulations required appellant to undergo mandatory drug testing. Appellant's supervisor, David Panczyk, took appellant to an independent lab that performed a urinalysis on a sample taken from appellant approximately two to three hours after the accident. The laboratory conducting the test followed federal guidelines. However, these guidelines differ from state guidelines applicable to admissible test results in criminal prosecutions.

{¶8} Appellant filed a motion to suppress the drug test results. The trial court held a suppression hearing where it determined the two standards were not substantially similar, and the test procedure used by the independent lab did not meet the requirements in Ohio for admissible results in a criminal proceeding. The trial court suppressed the results. Even though the drug test and its results were suppressed, the trial court allowed Panczyk to testify about the test over objection.

{¶9} The state's accident reconstruction expert, Mickey Atchley, testified that appellant could not legally turn right when the bicycle was there because both vehicles occupied the lane. He testified that appellant did not exercise due care when making the turn. Atchley documented the mirrors attached to the truck appellant was driving and opined that appellant had the opportunity to observe Bingham. He also testified that appellant had passed Bingham on

{¶ 13} The court sentenced appellant to three years in prison on November 21, 2011. Appellant then timely instituted the instant appeal raising three assignments of error:

I. The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence.

II. The trial court erred to the prejudice of the defendant-appellant in denying his motion for acquittal made pursuant to Crim. R. 29(A).

III. The trial court erred by sentencing the defendant-appellant to a term of imprisonment where its findings were not supported by the record.

## II. Law and Analysis

### A. Sufficiency and Manifest Weight of the Evidence

{¶ 14} In appellant's first and second assignments of error, he argues that his conviction is against the manifest weight of the evidence and his Crim. R. 29(A) motion should have been granted because the state did not present sufficient evidence to convict him. A ruling made pursuant to Crim. R. 29(A) addresses the sufficiency of the state's evidence. The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. No. 92266, 2009-Ohio-3598, ¶ 12. An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's

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guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶15} A manifest weight challenge, on the other hand, questions whether the prosecution met its burden of persuasion. *State v. Ponce*, 8th Dist. No. 91329, 2010-Ohio-1741, ¶ 17, citing *State v. Thomas*, 70 Ohio St.2d 79, 80, 434 N.E.2d 1356 (1982). A reviewing court may reverse the judgment of conviction if it appears that the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387. A finding that a conviction was supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *Id.*

{¶16} Appellant was convicted of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a), which states, "[n]o person, while operating or participating in the operation of a motor vehicle \* \* \* shall cause the death of another \* \* \* [r]ecklessly[.]"

A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances

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when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

R.C. 2901.22(C).

{¶17} "[T]o constitute recklessness, one must act with full knowledge of the existing circumstances." *State v. Whitaker*, 111 Ohio App.3d 608, 613, 676 N.E.2d 1189 (6th Dist.1996). Evidence that appellant acted recklessly can be found in his very rapid acceleration away from the intersection, as testified to by Durham. However, speed alone is not sufficient to constitute recklessness.

[P]roof of excessive speed in the operation of an automobile is not itself sufficient to constitute wantonness. "Wantonness" has been defined as follows: "[A] wanton act is an act done in reckless disregard of the rights of others which evinces a reckless indifference of the consequences to the life, limb, health, with full knowledge of the surrounding circumstances, recklessly and inexcusably disregards the rights of other motorists, his conduct may be characterized as wanton. (Citations omitted). *State v. Earlenbaugh* (1985), 18 Ohio St.3d 19, 21-22, 479 N.E.2d 846." In *Earlenbaugh*, the supreme court noted that this definition of wantonness was "substantially similar in wording and effectively identical in meaning" to the definition of recklessness contained in R.C. 2901.22. *Id.* at 22.

*Id.*, quoting *In Re Gilbert*, 12th Dist. No. CA86-10-144, 1987 Ohio App. LEXIS 8876 (Sep. 28, 1987).

{¶18} Other evidence of recklessness includes appellant's failure to use his mirrors and Durham's testimony indicating appellant turned in the intersection at the last minute.

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{¶19} The state demonstrated that appellant failed to check his mirrors when he made his turn after having passed Bingham at East 18th Street. The state's accident reconstruction expert, Mickey Atchley, documented the condition of the truck's three side-view mirrors and demonstrated that they were operational and provided a very good view of the passenger side of the truck. Appellant's expert opined that Atchley had not done the rigorous analysis necessary to document what appellant could see in the mirrors, but admitted it was his opinion that if appellant had looked in the mirrors, he would have seen Bingham.

{¶20} Further, Atchley testified that appellant knew or should have known that a cyclist was traveling on Prospect with him. Atchley testified that video evidence showed that appellant must have passed Bingham just prior to East 18th Street on Prospect Avenue, and so he was aware of her presence on Prospect.

{¶21} This, combined with Durham's testimony, shows appellant acted recklessly. Durham testified that appellant appeared to her to be going straight through the intersection, but then suddenly turned at the last minute.

{¶22} Before making his turn, appellant recklessly disregarded the safety of those around him and caused the tragic death of Bingham. The evidence, viewed in a light most favorable to the state, shows appellant acted recklessly.

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This evidence shows a perverse disregard for her safety and constitutes recklessness.

{¶23} The state also argues that appellant's failure to use his turn signal should be considered. It is unclear from the record whether appellant used his turn signal. No witness could testify whether appellant was using his signal. The state did not demonstrate beyond a reasonable doubt that appellant failed to use his turn signal.

{¶24} Appellant insists the state failed to meet its burden. Appellant's expert explained that a truck turning when it is well into an intersection is something large trucks often do to avoid driving up onto the street curb when making a right-hand turn — a practice known as "off-tracking." However, this does not negate the evidence of recklessness produced by the state.

{¶25} Appellant also argues that evidence of a positive drug test was impermissibly elicited at trial. The trial court allowed appellant's supervisor to testify that he took appellant for drug testing after the accident, and, over objection, that the testing facility reported a positive test result.

{¶26} While we generally review the admission of evidence for an abuse of discretion,<sup>1</sup> here the trial court recognized that it was already aware of the drug test and the results, having presided over the motion to suppress. Therefore, assuming the brief testimony about appellant's drug test was

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<sup>1</sup> *State v. Jacks*, 63 Ohio App.3d 200, 207, 578 N.E.2d 512 (8th Dist. 1989).

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admitted in error, that error was harmless. Where there is no reasonable possibility that the unlawful testimony contributed to a conviction, the error is harmless, and therefore, will not be grounds for reversal. *State v. Lytle*, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976), paragraph three of the syllabus. When discussing the evidence and its verdict, the trial court recognized the drug test results were inadmissible and stated that it was not considering them for any purpose in this case. Therefore, any error in admission of this information was harmless.

{¶27} Finally, appellant argues that Bingham violated R.C. 4511.28, a provision prohibiting vehicles from passing on the right, and therefore, he was not reckless or even negligent when causing her death. This argument is not persuasive.

{¶28} As R.C. 4511.55(A) makes clear, a cyclist may pass other traffic on the right, provided the cyclist does so while exercising due care. *See also Potonak v. Whitmore*, 8th Dist. No. 86046, 2005-Ohio-6344. This statute states, "[e]very person operating a bicycle upon a roadway shall ride as near to the right side of the roadway as practicable obeying all traffic rules applicable to vehicles and exercising due care when passing a standing vehicle or one proceeding in the same direction." Here, testimony was adduced to show that appellant was going straight through the intersection, but then turned at the last minute. It was

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permissible for Bingham to continue through the intersection next to appellant. The statute specifically contemplates such activity for bicycles and sanctions it.

{¶29} Appellant's sudden turn in the intersection, as testified to by Durham, combined with the other instances of reckless behavior proven by the state, demonstrate that appellant's conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. Appellant's first and second assignments of error are overruled.

#### B. Length of Sentence

{¶30} Appellant received a three-year term of imprisonment for his third-degree felony conviction. He argues that the trial court failed to consider necessary factors before imposing a sentence above the minimum.

{¶31} Generally, this court reviews sentencing decisions in a two-step approach advanced by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 6. However, appellant acknowledges that the sentence is not contrary to law, so the first step of this process can be skipped, and the sentence can be reviewed for an abuse of discretion. *Id.* at ¶ 19. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶32} According to Ohio sentencing guidelines set forth in R.C. 2929.11 and 2929.12, a trial court should be guided by several considerations when

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imposing sentence. Those factors include the probability of recidivism, whether the conduct constituting the crime is more or less serious than conduct normally constituting the offense, and the particulars of the victim and the injury inflicted. R.C. 2929.12. The trial court must balance these considerations and craft a sentence appropriate to the situation before it, selecting "the minimum sanctions that the court determines accomplish" the purposes and principles of felony sentencing "without imposing an unnecessary burden on state or local government resources." R.C. 2929.11.

{¶33} Here, the trial court acknowledged appellant's prior criminal history, which included two prior felony convictions from between 22 and 30 years ago. The court considered this as both evidence of a prior criminal history and that appellant had led a law-abiding life for a significant period of time. The court also noted the serious harm caused to the victim and her family. Appellant claims the court did not give appropriate weight to his expression of remorse in crafting his sentence. "[T]he weight to be given any R.C. 2929.12 factor is within the trial court's discretion." *State v. Balta*, 8th Dist. No. 97755, 2012-Ohio-3462, ¶ 17. Appellant faced a sentence between one to five years. The trial court balanced the factors in R.C. 2929.12 in this case and determined that a sentence of three years was appropriate. Nothing in the record indicates this was arbitrary, unconscionable, or unreasonable. Therefore, appellant's third assignment of error is overruled.

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### III. Conclusion

{¶34} The state produced substantial evidence that appellant recklessly caused the death of Sylvia Bingham. The trial court's verdict finding appellant guilty of aggravated vehicular homicide is supported by sufficient evidence and is not against the manifest weight of the evidence. Appellant's sentence also does not constitute an abuse of discretion. It was within the statutory bounds and adequately punished appellant for causing the death of another.

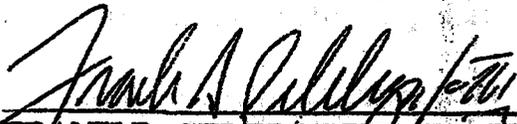
{¶35} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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



FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

LARRY A. JONES, SR., J., and  
COLLEEN CONWAY COONEY, J., CONCUR

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