[Cite as *State v. Horst,* 2025-Ohio-332.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

LOWELL D. HORST,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 24 CO 0007

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2023 CR 217

BEFORE:
Cheryl L. Waite, Mark A. Hanni, Judges, and Scot A. Stevenson, Judge of the Ninth District Court of Appeals, Sitting by Assignment.

JUDGMENT:
Affirmed.

Atty. Vito J. Abruzzino, Columbiana County Prosecutor and *Atty. Shelley M. Pratt,* Assistant Prosecutor, for Plaintiff-Appellee

Atty. Michael J. McGee and *Atty. James R. LaPolla*, Harrington, Hoppe & Mitchell, Ltd., for Defendant-Appellant

Dated: January 28, 2025

WAITE, J.

{¶1} Appellant Lowell D. Horst appeals a March 8, 2024 judgment entry of the Columbiana County Court of Common Pleas convicting him of aggravated vehicular homicide and vehicular assault. Appellant argues that a juror was improperly excluded based on his religion. In addition, Appellant argues that the trial court improperly prohibited his expert witness, Henry Lipian, from providing Perception Response Time ("PRT") testimony which could have negated a finding of recklessness. In addition, Appellant argues the court erred by failing to instruct the jury on the lesser-included offense of vehicular homicide. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} In the early evening of September 23, 2022, Appellant was driving a 2009 Chevy Silverado on State Route 172 near Zepernick Lake Park, West Township, Columbiana County. Importantly, Zepernick Lake is a public park which has a parking lot leading onto State Route 172. There is a stop sign at the exit of the parking lot. A left-hand turn out of this parking lot would place a driver in the eastbound lane and a right-hand turn would place a driver in the westbound lane. State Route 172 is a winding road that curves around a bend as it approaches the parking lot. A driver traveling in the westbound lane would have limited visibility of the parking lot and its entrance on approach to this bend, as it is lined with foliage, obstructing the view. Because of the foliage, the bend in the road, and the entrance/exit to the parking lot, the speed limit is reduced to fifty-five miles per hour.

{¶3} Appellant was traveling westbound on State Route 172. As Appellant admits, he was driving in excess of the posted speed limit around the bend while watching a YouTube sports highlight video on his phone, which was mounted to the dashboard on the right side of his steering wheel. He also conceded that he "was half watching the road, half watching [the video]." (Body camera 2, 42:02.)

{¶4} As Appellant operated his vehicle in excess of the posted speed limit, around the foliage lined bend and while watching a YouTube video, his vehicle crossed the center line and fully entered the eastbound lane. Appellant collided head-on into a GMC occupied by an elderly couple. The female front seat passenger of the GMC died at the scene due to her injuries. The driver of the GMC, her husband, suffered a heart attack either during the accident or shortly thereafter, and died three to four months following the collision. At the scene, he was not coherent, and was unable to assist the officer's investigation into the events leading up to the crash.

{¶5} Ohio State Highway Patrol Troopers did speak to Appellant at the scene. At the time, Appellant led the officers to believe that he had been operating his vehicle in an undistracted manner and saw the GMC exit the Zepernick Lake parking lot without stopping at the stop sign and enter the road in front of him. He claimed that he braked hard and swerved to the right to avoid the GMC.

{¶6} An investigation of the scene cast doubt on Appellant's initial version of the facts. First, investigators found no skid marks on the road to support Appellant's claim that he had forcefully applied his brake at any point. Second, investigators were able to determine from markings on the road that the collision had occurred while both vehicles were located completely within the eastbound lane, which was completely left of center

for Appellant's vehicle and the correct lane of travel for the GMC. This negated Appellant's story that he had swerved to the right to avoid the collision, as it showed Appellant instead moved to the left into the GMC's lane of travel. A move to the right would have caused Appellant's vehicle to avoid the GMC altogether.

{¶7} As a result, Sergeant Daniel Morrison of the Ohio State Highway Patrol asked Appellant to appear at a State Highway Patrol post for an interview so that they could resolve certain issues that had arisen in the investigation. Sgt. Morrison was direct in his communications with Appellant and provided him with the investigative findings to date and how they conflicted with Appellant's initial statements. For approximately fifty minutes, Appellant continued to repeat his initial story and Sgt. Morrison repeatedly cautioned Appellant that his version of the facts did not match the evidence found at the scene, and advised that it would best serve Appellant to be forthcoming with the truth.

{¶8} During the initial stage of the interview, Appellant claimed that he first saw the GMC traveling approximately thirty-five miles per hour while it was still in the parking lot. He claimed the GMC failed to stop at the sign before entering the roadway. Appellant indicated that he did not see the vehicle again until the moment before the collision. Sgt. Morrison pointed out it was unlikely the elderly couple traveled at that rate of speed in a parking lot, and that it was impossible for Appellant to have seen the GMC drive through the stop sign, but not see the vehicle again until the moment of collision. Sgt. Morrison also pointed out that Appellant's claim he swerved to the right was not supported by the evidence, as the accident occurred while Appellant's vehicle was left of center, in the GMC's lane of travel.

{¶9} Thereafter, Appellant admitted that he had been "distracted" due to the fact that he "had YouTube playing that day." (Body camera 2, 18:40.) He confessed that his phone was mounted on the dash to the right of his steering wheel and that at the time he "was half watching the road, half watching [the video]." (Body camera 2, 42:02.) Hence, he was not sure if the GMC had entered the road from the parking lot or if it had been traveling in the eastbound lane for some time prior. He opined that the former made more sense, based on his contention that he observed the GMC traveling almost thirty-five miles per hour and then lost sight of it until just before the collision. (Body camera 2, 41:33.)

{¶10} In addition to Sgt. Morrison's body camera, which captured the interview in its entirety, Sgt. Morrison also conducted a written "Q&A" style interview with Appellant. Sgt. Morrison wrote down questions and Appellant wrote his answers underneath these questions. In these, Appellant also made written admissions concerning the crash.

{¶11} On April 12, 2023, Appellant was indicted on one count of aggravated vehicular homicide, a felony of the third degree in violation of R.C. 2903.06(A)(2)(a), and one count of vehicular assault, a felony of the fourth degree in violation of R.C. 2903.08(A)(2)(b).

{¶12} Appellant indicated to Sgt. Morrison that he anticipated he would only be ticketed and receive some sort of fine after the crash. Once he was criminally charged, he began to walk back his admissions. He hired an expert, Henry Lipian, to provide PRT testimony at trial seeking to demonstrate two things: the GMC likely entered the road from the Zepernick Lake parking lot, meaning it crossed in front of Appellant in his lane of travel; and that PRT calculations showed that Appellant acted appropriately in braking

within the time a reasonable person would have reacted, thus proving he did not act recklessly, as this was an element of the charged crime.

{¶13} Following a motion in limine filed by the state, Lipian was allowed to testify in a limited fashion. Once trial commenced and Lipian took the stand, the court revisited its motion in limine concerning Lipian's limitations. Consistent with its prior ruling on the motion in limine, the court ruled that Lipian could provide PRT testimony to opine that the GMC entered the roadway from the parking lot, but could not provide an opinion on whether Appellant acted recklessly prior to the collision. The court did allow Lipian to proffer his complete testimony outside of the jury's presence.

{¶14} At the conclusion of the three-day trial, the jury found Appellant guilty on all counts as charged within the indictment. On March 8, 2024, the court imposed the following sentence: thirty-six months of incarceration with a fifteen-year driver's license suspension for aggravated vehicular homicide, and nine months with a two-year driver's license suspension for vehicular assault to run concurrently, for an aggregate total of thirty-six months of incarceration and a fifteen-year driver's license suspension. The court also imposed a two-year optional postrelease control term following Appellant's release. The court also awarded Appellant three days of jail-time credit. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED WHEN IT ALLOWED THE PROSECUTION TO USE A PEREMPTORY CHALLENGE, PURPOSELY EXCLUDING A POTENTIAL JUROR, IN VIOLATION OF THE DEFENDANT'S EQUAL PROTECTION RIGHTS GUARANTEED UNDER THE FOURTEENTH

AMENDMENT AND ARTICLE 1 SECTION 2 OF THE OHIO CONSTITUTION, ON THE BASIS OF THE PROSPECTIVE JUROR'S RELIGIOUS AFFILIATION.

{¶15} Appellant argues that the trial court erred in allowing the state to use a peremptory challenge to excuse a potential juror based on his religious affiliation. Appellant claims that United States Supreme Court caselaw prohibits the removal of a potential juror based on discrimination. He concedes, however, no caselaw currently applies to bar a religious-based peremptory challenge.

{¶16} The United States Supreme Court has held that where a peremptory challenge is racially motivated, use of such challenge violates the Equal Protection Clause of the United States Constitution. See *Batson v. Kentucky*, 476 U.S. 79, (1986). Where it is believed that a peremptory challenge is racially motivated, a *Batson* challenge can be asserted.

{¶17} Appellant asserts in this matter that the state's decision to use a peremptory challenge is improperly based on religion. The following discussion took place during jury *voir dire*:

VENIREPERSON: Yes. I'm a minister at a Mennonite church just north of Columbiana. So may I ask a question?

THE COURT: Yes.

VENIREPERSON: Okay. So regarding the defendant, so I don't know, I assume he's Mennonite.

THE COURT: I don't know his --

VENIREPERSON: By his last name and address. We're probably in a different stream of Mennonites but I don't know if his congregation is in this area, there may be some factions in my congregation. Just wanted to let you know. So I don't have any connections, but I also didn't grow up Mennonite. There's many people in my congregation that many people that are Mennonites in this area that are related to each other. There's Horsts [Appellant's last name is Horst] and there's Hursts and so I just want to make you aware of that.

THE COURT: Has anyone brought to your attention anything about this case or have you heard anything?

VENIREPERSON: I don't know anything about this case.

THE COURT: That would be the main issue, if someone had attempted to approach you who may have known you were a juror or had come to your congregation maybe, you know, asked to pray on something or, you know, be counseled by you on this case. That would be the concern.

VENIREPERSON: Okay.

THE COURT: If none of that has happened, I don't believe that there's an issue there. But anything in -- just due to that, do you feel -- you've already sat on a jury, you know what to expect. And you were fair

and impartial there. I assume that that applies here, that nothing changed you from that experience.

VENIREPERSON: It's not my preference. I can -- I can do it. I did it last time. Like I said, it's not my preference, but --

THE COURT: I think you would be in the majority in that, too; all right?

. . .

MR. YACAVONE: So you mentioned you're a minister.

VENIREPERSON: That's correct.

MR. YACAVONE: All right. And one of the questions I always have, when I have ministers, pastors, priests before on juries is, you know, especially the fact you might have family members in your congregation or in another congregation, would there be any issue with you essentially being the juror that may judge this individual? Are there any issues there of standing in judgment of Mr. Horst because there may be some connection -- not a connection you know about, but there might be some familial connection?

VENIREPERSON: I don't like to stand in judgment of someone. I don't think that's a different question than what you're asking. . .

. . .

VENIREPERSON: Yeah, there's questions that of my vocation as a minister that make it probably, possibly a little, especially as Anabaptist Mennonite that make it a little bit more challenging.

MR. YACAVONE: I guess what I'm asking you, sir, is it going to be challenging enough to where if you go in the back there's going to be a point where you say I can't do this. And that's what we want.

VENIREPERSON: No. That's --

MR. YACAVONE: That's not going to happen in this case?

VENIREPERSON: I guess I'm trying to stress this is not my preference but I've had to do it before, I can do it. Okay?

(Trial Tr., pp. 134-138.)

{¶18} From this, we can glean the potential juror, himself, admits he would have difficulty in pronouncing judgment over another, even though he ultimately stated that he could do so. Regardless, Ohio law does not prohibit the use of a peremptory challenge based on religion.

{¶19} Appellant claims that the issue is "unclear" as no Ohio case has directly addressed this issue, however he concedes that the Ohio Supreme Court has "suggested" that a peremptory challenge based on religious beliefs is permissible. See *State v. Gowdy*, 88 Ohio St.3d 387 (2000). In *Gowdy,* the Court clarified that *Batson*

applies to race, not religion. In fact, the *Gowdy* Court went a step further and acknowledged that "[r]eligion is often the foundation for an individual's moral values, so religious beliefs can be an important consideration for both sides in seating an impartial jury." *Id.* at 394. Hence, it was not error to allow this peremptory challenge.

{¶20} In this case, the record shows the prosecutor also had other grounds for his peremptory challenge, including prior conduct the potential juror exhibited in an earlier trial, where he actually served on a jury. The following discussion occurred regarding this incident:

> MR. YACAVONE: Okay. All right. And then it says after the last trial you were called back and had to testify. What was -- because I don't know anything about that prior trial, if you don't mind discussing the circumstances. That would be unique.
>
> VENIREPERSON: Yeah, I'd be glad to. So I took lots of notes during the trial.
>
> MR. YACAVONE: Okay.
>
> VENIREPERSON: And I did not realize you were not allowed to bring the notes home.
>
> MR. YACAVONE: Okay.
>
> VENIREPERSON: So after the verdict was given, I told I think someone, the prosecutor, because they said to leave your notes behind and

that's the moment I realized -- I had not been going home and talking with family but then I had to tell them that I had been taking my notes home. So my encouragement would be you cannot take notes home.

MR. YACAVONE: From a lesson learned.

VENIREPERSON: Yes. I learned that the hard way. So I had to come back during the sentencing. I think during sentencing they asked me questions, did you talk to anyone. That was what that was.

(Trial Tr. Vol. 1, p. 138.)

{¶21} From this, it appears the state was concerned not only about the juror's self-admitted hesitancy in judging another person, but about that potential juror's prior conduct in another trial.

{¶22} Accordingly, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED BY PROHIBITING TESTIMONY AND EVIDENCE RELATED TO THE APPELLANT/DEFENDANT'S PERCEPTION RESPONSE TIME AS SUCH EVIDENCE IS ADMISSIBLE, THUS, DEPRIVING THE APPELLANT/DEFENDANT OF A PROPER DEFENSE.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF VEHICULAR HOMICIDE DESPITE CREDIBLE EVIDENCE PRESENTED BY DEFENSE WHICH SUPPORTED A CONVICTION BASED UPON NEGLIGENCE.

{¶23} Appellant contends that it was error for the trial court to limit Lipian's expert testimony and prohibit him from providing his opinion in full based on his PRT testimony. In short, Appellant sought expert testimony by means of PRT to address the moment in time in which a person (in this case, Appellant) recognizes a hazard (in this case, the collision path with the GMC). At this moment, the person must evaluate and implement potential reactions, including evasive actions (in this case, breaking and swerving to avoid the vehicle). According to Appellant, his proffered PRT testimony was relevant to compare the calculated PRT time in which he reacted to that of any other normal person in order to determine whether he acted recklessly. Appellant cites Ohio caselaw that expert testimony on the ultimate issue to be decided by the trier of fact is admissible unless it is not essential to the jury's understanding of the issue and the jury can reach a conclusion without the testimony. Appellant asserts that the trial court's decision not to allow testimony on the ultimate issue prevented him from "refut[ing] the Defendant's own admission, that he was distracted[.]" (Appellant's Brf., p. 15.) Thus, Appellant sought to have Lipian's opinion based on his PRT testimony introduced to refute his own pretrial admissions.

{¶24} "A decision to admit the testimony of an expert, once qualified, is generally within the broad discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion." *State v. Reiner*, 89 Ohio St.3d 342, 356 (2000), judgment rev'd on other grounds. An abuse of discretion requires more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶25} Pursuant to Evid.R. 702(A), a witness may offer testimony as an expert where "[t]he witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons[.]"

{¶26} Evid.R. 704, titled "Opinion on ultimate issue," provides that: "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact."

{¶27} The combined effect of these rules provides that an expert witness may provide testimony as to the ultimate issue where either that testimony goes beyond the knowledge or experience of a layperson or to address a misconception among laypersons that must be dispelled.

{¶28} Critically, we must look at the real issue before the jury, which serves as the basis for the criminal charges at issue. The issue for the jury to resolve was simply whether Appellant's admitted actions in watching a YouTube video while driving around a foliage-lined bend leading to a park entrance in excess of the posted speed limit amounted to recklessness. Thus, contrary to the Appellant's position, the crux of this case was not the actions he took once he perceived and attempted to avoid the collision,

but his actions in causing that collision. This guided the court's determination regarding relevance, and thus admissible evidence.

{¶29} At the scene, there is no question Appellant failed to disclose he was subject to any distraction. His failure to disclose continued throughout the later interview with Sgt. Morrison, for roughly fifty minutes. During those fifty minutes, Sgt. Morrison warned Appellant several times that his version of the facts did not comport with the physical evidence obtained at the scene.

{¶30} For instance, Appellant continually claimed that he braked hard when he learned the vehicles were on course to collide. However, Sgt. Morrison pointed out that there was no evidence to support this, noting particularly the absence of skid marks on the road. Next, Appellant claimed that he "gradually" swerved to the right. However, Sgt. Morrison informed him that the evidence demonstrated that the collision occurred when the GMC was located completely in the eastbound lane. To collide with the vehicle in that lane, which was Appellant's left of center, he either must have swerved into that lane or was already traveling in that lane.

{¶31} Next, Appellant claimed that he first saw the GMC while it was traveling an estimated thirty-five miles per hour in the Zepernick Lake parking lot, and then saw it speed through the stop sign. Sgt. Morrison noted two problems with this statement. First, it was extremely unlikely that the elderly couple were traveling at that high rate of speed in such a short distance. Second, even if Appellant saw the GMC in the parking lot and even if they had failed to stop at the stop sign, Appellant claimed he never saw the GMC once it actually turned onto Route 172. For Appellant to have seen the GMC leave the parking lot and then to collide with that vehicle in the opposite lane without seeing it

traveling towards him on the road would be impossible. Appellant finally agreed with Sgt. Morrison that scenario was impossible, at which point Appellant began to explore the possibility that the GMC had simply been traveling in the eastbound lane the entire time, and had never been in the parking lot. In addition to casting doubt on Appellant's veracity regarding the facts, Appellant still could not explain why he claimed to have lost site of the GMC traveling in front of him for a period of time.

{¶32} Shortly after this, Appellant first admitted to Sgt. Morrison he had not been fully paying attention while driving, explaining "I had YouTube playing that day." (Body camera 2, 18:40.) He then candidly addressed his inability to see the GMC on the road and his lack of awareness that he had traveled completely left of center by admitting he "must have been distracted." (Body camera 2, 31:13.)

{¶33} As to why he changed his story about the location of the GMC he explained: "obviously I was distracted and that probably made me think that they were in Zepernick parking lot." (Body camera 2, 41:33.) Hence, he explicitly conceded that he did not see the GMC on the road because he was distracted. (Body camera 2, 52:32.)

{¶34} Although Appellant stated he did not feel guilty for causing the accident and the injuries that resulted, he did think he "could have been paying a little more attention to the road" and conceded that he "was half watching the road, half watching [the video]." (Body camera 2, 34:42, 42:02.)

{¶35} During the interview, Sgt. Morrison also conducted a written "question and answer" style interview with Appellant which included the following admissions:

Q: IS IT POSSIBLE THE GMC TERRAIN WAS TRAVELING EASTBOUND ON STATE ROUTE 172 AND IT WAS NEVER IN ZEPERNICK LAKE'S PARKING LOT?

A: It is possible that they were and thought they were in the lake parking lot. L.H.

Q: WHAT WERE YOU DOING WITH YOUR CELL PHONE LEADING UP TO THE CRASH?

A: I had it on the dash playing a YouTub[e] vidio (sic) mounted on a vent magnet to the right of the steering wheel. L.H.

Q: WHAT VIDEO WERE YOU WATCHING ON YOUTUBE?

A: Sport's highlights. L.H.

Q: DID WATCHING THE SPORTS HIGHLIGHTS ON YOUTUBE CAUSE YOU TO TRAVEL LEFT OF CENTER AND STRIKE THE GMC TERRAIN HEAD ON IN THE EASTBOUND LANE?

A: It could have. I was distracted by watching YouTube on my phone. L.H.

. . .

Q: DID YOU NOT REMEMBER HOW FAR AWAY YOU WERE FROM THE GMC TERRAIN WHEN IT FIRST ENTERED STATE ROUTE 172 BECAUSE YOU WERE WATCHING YOUTUBE?

A: Yes because I was distracted. L.H.

(State's Exh. 23, pp. 4-5.)

{¶36} These admissions have a significant impact on the admissibility of the PRT evidence sought to be offered as to Appellant's reaction time. Preliminarily, it remained unclear whether the GMC entered the road from the Zepernick Lake parking lot or had been traveling in the eastbound lane of Route 172 for some distance. The front passenger of the GMC died at the scene and the driver suffered serious injuries and had a heart attack either during the accident or immediately after. He was incoherent at the scene and no statement could be obtained, and he died three to four months later. Appellant is the only other party to the accident, and he admittedly did not know where the GMC was physically located because he was distracted and not paying attention to the road.

{¶37} Regardless, even if the GMC had been in the parking lot and turned left onto State Route 172, all the evidence showed that it had fully entered its proper lane and began traveling entirely within that lane before the collision. Because the accident occurred head-on in a lane that was left of center for Appellant's vehicle, Appellant either swerved into, or had already been traveling in, that lane.

{¶38} Lipian's PRT evidence was sought to accomplish two goals: to prove the GMC had pulled onto the road from the parking lot, and to prove Appellant had observed

the GMC coming out of that lot at the earliest possible opportunity and had taken appropriate evasive action (braking). Appellant wanted his expert to opine that despite his multiple admissions that he was distracted, and the evidence from his phone showing he was playing a YouTube video while driving, he was not reckless, because he took evasive action and applied his brake (once he noticed the GMC) within the same amount of time a non-distracted person would have taken to brake. At oral argument in this matter, Appellant's counsel stated multiple times that Lipian would have provided testimony regarding whether Appellant operated the vehicle in a distracted manner.

{¶39} The trial court permitted Lipian's testimony and opinion on the first category of PRT evidence, which tended to show where the GMC was located prior to the collision. Lipian acknowledged that no conclusive evidence existed as to whether the GMC was already on the roadway or had entered Route 172 from the parking lot. Lipian used PRT expertise and certain evidence from the scene to conclude that the GMC had turned onto the roadway from the parking lot. He also used his PRT expertise to opine that the speeds of the vehicles just before collision suggested that the GMC did not stop at the parking lot stop sign prior to entering the road. Lipian also pointed to data suggesting that, despite the absence of skid marks, Appellant had activated his brake one second before impact.

{¶40} Lipian explained that the first point of perception (the moment the drivers noticed one another) was limited, due to the foliage surrounding the bend in the roadway. Because of this, Lipian testified that Appellant would likely have first been able to perceive the GMC three seconds before impact. (Trial Tr., p. 490.) Shortly after this testimony, the state lodged an objection, and the jury was dismissed in order to allow arguments to

the judge, revisiting the state's motion in limine on the issue of the further scope of Lipian's testimony.

{¶41} After hearing from both sides on the matter, the court aptly explained that Appellant's further intended use of PRT testimony was not relevant to the question of recklessness in this particular case, and admission of additional PRT testimony would only serve to confuse the jury. The court highlighted Appellant's admission that he had been distracted by the YouTube video and that his attention was divided between watching the road and the video. He admittedly sought to refute his own admissions in this case. ("[T]he Defendant should have been allowed to present evidence that directly refutes the Defendant's own admission and directly contradicts the State's theory of recklessness." Appellant's Brf., p. 17.)

{¶42} The court noted not only Appellant's admission that he operated the vehicle while distracted, but that his distraction prevented him from seeing the GMC on the road prior to the collision. The court also noted no evidence had been provided as to what Appellant perceived before he applied his brake; whether he reacted to seeing the GMC as Lipian seemed to indicate (despite Appellant's admission that he had not seen the GMC on the road); whether he overreacted to the curve in the road; or whether he noticed he was traveling in the wrong lane. (Trial Tr., p. 510.) The court ultimately concluded that as Appellant admitted he was distracted as a result of watching his phone, the issue for the jury to determine was whether that distraction rose to the level of recklessness in this case. What his response would have been absent the distraction was irrelevant, as Appellant himself admitted to distraction and that he did not see the GMC on the road until the moment before the collision. (Trial Tr., pp. 500-501.)

{¶43} Thus, the court did not permit Lipian to use PRT testimony to opine that Appellant did not act recklessly. The court did not decide that an expert in PRT could never provide any testimony relating to the facts. Instead, the court determined that, in this case, the expert could not "come to an opinion based on the data as to recklessness" because the data on which the expert opinion was based completely omitted the question of whether Appellant's actions were recklessly caused by his distracted operation of the vehicle. (Trial Tr., pp. 501-502.)

{¶44} We note Appellant erroneously relies on *State v. Green,* 2016-Ohio-4915 (7th Dist.). As Appellant concedes, while PRT testimony was discussed during the *Green* trial, the admissibility of that evidence was not ever an issue in later appeals, and so, was not addressed. *Green* cannot support the contention the trial court's decision as to admissibility must be reversed, here. Appellant attempts to use *Green* to suggest that PRT testimony is routine and routinely admitted. Citation to one case does not prove that such testimony is "routinely admitted."

{¶45} We have found two other cases which deal with PRT testimony. It was also Lipian who provided the expert testimony in these cases. The first is *Wade v. Mancuso*, 2018-Ohio-1563, ¶ 1 (9th Dist.). The issue in *Wade* was limited to whether a pedestrian had been walking in the street when struck by a vehicle, or whether the vehicle left the roadway and struck the pedestrian. *Id.* at ¶ 13. Significantly, the PRT testimony was admitted only to assist with reconstruction efforts as to the crash location, not to address the issue of recklessness. *Id.* at ¶ 25. While there was evidence that the driver in that case may have been distracted by a cell phone call, Lipian did not provide PRT expert

testimony related to that issue. In fact, Lipian testified that he did not have enough evidence to address the issue of distraction, and focused his efforts on accident location.

{¶46} Similarly, in a case before the Second District, Lipian was permitted to provide PRT testimony as to where a collision took place. *Fry v. King*, 2011-Ohio-963, ¶ 8 (2d Dist.). The disputed portion of Lipian's testimony involved a report he generated that was based on certain measurements, and which resulted in a scaled drawing of the accident site. *Id.* at ¶ 99. Directly at issue was the measurement of a skid mark from a motorcycle involved in the crash. The PRT expert testimony at issue in *Fry* is in no way comparable to the type of testimony sought to be admitted, here. In fact, the trial court in the instant case allowed Lipian to opine as to the possible location of the vehicles before impact.

{¶47} Based on this record, the trial court's decision to limit the PRT testimony in this case was correct. Significantly, at best, Lipian could only testify as to when a reasonable person could have perceived the oncoming vehicle, not when Appellant actually saw the GMC. The exact moment Appellant perceived the GMC in this case, as pointed out by the trial court, is information only Appellant could provide. Appellant clearly did provide this evidence, as he informed Sgt. Morrison that he did not see the GMC on the road, or notice that he had traveled left of center, because he was distracted by the video playing on his phone.

{¶48} Appellant admitted that he operated his vehicle while distracted, and that because of the distraction, he did not notice the GMC also traveling on the roadway. While Appellant now wishes to sidestep his admission, it is a critical piece of evidence in this case. More importantly, the proposed PRT expert testimony regarding normal

reaction time would not have any relevance, as Appellant was traveling left of center and collided with the GMC while that vehicle was traveling in its appropriate lane. Appellant's vehicle was entirely left of center, in the GMC's lane of travel. Whether or not he quickly applied his brake, the inescapable fact, here, is that Appellant was moving at a high rate of speed into oncoming traffic, traffic which clearly had the right of way. The trial court appropriately denied the proposed expert testimony intended to address the ultimate question of recklessness based on these facts. Any evidence regarding a normal person's reaction in braking time is irrelevant to this case.

{¶49} Not only is this evidence irrelevant, it does not take into account the fact that the only person who could tell us when, if at all, he perceived the GMC on the roadway admitted more than once that he never saw the vehicle on the road until seconds before impact because he was distracted by a YouTube video playing on his phone. The overwhelming evidence of record clearly shows that Appellant did not see the GMC, or notice that he had traveled left of center, because he was distracted by sports highlights on a YouTube video. Whether this rose to the level of recklessness was solely a jury question. Even if the trial court had erred in limiting the expert testimony on the ultimate issue in this case, any error would only be harmless based on the plethora of evidence provided directly by Appellant, himself.

{¶50} Turning to whether the court erred in failing to instruct the jury on the lesser included offense of vehicular homicide, this issue is reviewed for an abuse of discretion.

> A jury charge on a lesser-included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser or inferior offense. See,

> e.g., *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus. In making this determination, the court must view the evidence in a light most favorable to the defendant. *State v. Smith*, 89 Ohio St.3d 323, 331, 731 N.E.2d 645 (2000). Nevertheless, an instruction is not warranted every time any evidence is presented on a lesser-included offense. There must be sufficient evidence to allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser-included offense. *State v. Shane*, 63 Ohio St.3d at 632-633, 590 N.E.2d 272; *State v. Conway*, 108 Ohio St.3d 214, 240, 2006-Ohio-791, 842 N.E.2d 996, 1027, at ¶ 134.
>
> When reviewing a trial court's jury instructions, the proper standard of 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. Miku*, 5th Dist. Stark, 2018-Ohio-1584, 111 N.E.3d 558, ¶ 53.

State v. Bordeau, 2023-Ohio-2040, ¶ 35-36 (5th Dist.).

{¶51} The difference between aggravated vehicular homicide and vehicular homicide is the presence of recklessness. As discussed above, there is a plethora of evidence in the instant matter supporting a finding of recklessness. First, the accident occurred near the entrance of a public park, which would cause a reasonable person to anticipate some degree of traffic near the entrance and exit area. Second, Appellant operated his vehicle at a speed of sixty-eight miles per hour in an area with a posted

speed limit of fifty-five miles per hour, thirteen miles per hour over the posted speed limit. (State Exh. 33, p. 11.) Third, the westbound lane in which Appellant traveled contained a bend and was lined with foliage, which limited the view of the road ahead. Fourth, Appellant admitted that he operated his vehicle in a distracted manner as he was watching a YouTube video that was playing on his phone. (Body camera 2, 34:42, 42:02.) Fifth, Appellant conceded that this distraction prevented him from noticing the GMC as it traveled within its proper lane of traffic, which was left of center for Appellant. The accident occurred completely within in the eastbound lane, meaning Appellant traveled entirely within that lane of traffic without realizing it or noticing the GMC traveling in that lane until it was too late.

{¶52} Pursuant to R.C. 2903.06(A)(2), the aggravated vehicular homicide subsection:

> (A) No person, while operating . . . a motor vehicle . . . shall cause the death of another . . .
>
> . . .
>
> (2) In one of the following ways:
>
> (a) Recklessly[.]

{¶53} "Recklessly," is defined in R.C. 2901.22(C) as follows:

> A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk

that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

{¶54} Pursuant to R.C. 2903.06(A)(3), the subsection addressing vehicular homicide,

(A) No person, while operating . . . a motor vehicle . . . shall cause the death of another . . .

. . .

(3) In one of the following ways:

(a) Negligently[.]

{¶55} "Negligently" is defined within R.C. 2901.22(D):

(D) A person acts negligently when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that the person's conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that such circumstances may exist.

{¶56} This matter is similar to a case arising out of the Third District. *State v. Robertson,* 2023-Ohio-2200 (3d Dist.). Robertson operated his vehicle in excess of the posted speed limit around a curve in the road. In so doing, he crossed a double yellow line and struck a motorcycle that had been traveling within the oncoming lane of traffic, causing the motorcyclist's death. *Id.* at ¶ 2. The Third District noted the excessive speed of the vehicle, but particularly focused on Robertson's action in crossing into the motorcycle's lane of traffic and causing a collision:

> In our own review of the matter, we emphasize that it is undisputed that Robertson drove into Martinez's lane of travel, regardless of the reason. This decision was done "with heedless indifference to the consequences" and disregarded a "substantial and unjustifiable risk," both of which constitute recklessness. *See* OJI 417.17 (defining criminal recklessness). This is far greater than a negligent act for a mere "failure to perceive or avoid a risk." *See* Negligence, OJI 417.19 (defining criminal negligence).

Id. at ¶ 48.

{¶57} The instant case contains facts even more egregious than those in *Robertson.* Thus, we cannot find that the trial court abused its discretion by declining to provide an instruction for vehicular homicide. Accordingly, Appellant's third assignment of error is without merit and is overruled.

Conclusion

{¶58} Appellant argues that the state's use of a peremptory challenge violates the Equal Protection Clause of the United States Constitution. Based on the facts of this

case, the challenge did not violate relevant law. Appellant next contends that the trial court erred by limiting certain PRT testimony offered by his expert witness. As that evidence was irrelevant and would not assist the trier of fact, the court's decision was proper. Appellant also argues that the court erred by failing to instruct the jury on a lesser-included offense. Under Ohio law and the facts of this case, the court did not abuse its discretion in deciding not to so instruct. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Hanni, J. dissents; see dissenting opinion.

Stevenson, J. concurs.

Hanni, J., dissenting.

{¶59} With regard and respect to my colleagues, I must dissent from the majority opinion. I would find that the trial court erred in excluding Appellant's expert testimony regarding perception response time and should have given a jury instruction on the lesser-included offense of vehicular homicide.

{¶60} 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). Evid.R. 401 defines "relevant evidence" as 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. And Evid.R. 702 provides that a witness may testify as a qualified expert where the witness's testimony "relates to matters beyond the knowledge or experience possessed by lay persons" and the testimony is based "on reliable scientific, technical, or other specialized information."

{¶61} Based on the evidentiary rules, Lipian's perception response time (PRT) testimony was both relevant (relating to how quickly he reacted to seeing the GMC vehicle) and relating to matters beyond the knowledge of lay people (the calculation of perception response time).

{¶62} I would conclude that the trial court abused its discretion in excluding Lipian's PRT testimony. This testimony would have assisted the jury in determining whether his distraction from the YouTube video slowed his response time in reaction to seeing the GMC vehicle. Lipian was to offer scientific testimony that was meant to aid the jurors when they considered the question of whether Appellant acted recklessly. Thus, I would find the court acted unreasonably in excluding this testimony.

{¶63} The error of not allowing Lipian's PRT testimony also comes into play when considering whether the trial court abused its discretion in failing to give the instruction Appellant requested on the lesser-included offense of vehicular homicide.

{¶64} "Vehicular homicide under R.C. 2903.06(A)(3) is a lesser-included offense of aggravated vehicular homicide under R.C. 2903.06(A)(2)(a)." *State v. Whitterson*, 2012-Ohio-2940, ¶ 30 (1st Dist.). The elements are the same for the two offenses except that aggravated vehicular homicide requires the State to prove recklessness, but vehicular homicide only requires proof of negligence.

{¶65} "A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C). In contrast, "[a] person acts negligently when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that the person's conduct may cause a certain result or may be of a certain nature." R.C. 2901.22(D).

{¶66} Had Lipian been able to explain PRT to the jury and offer his opinion that Appellant completed the perception response time process in a manner consistent with a driver who was not distracted and who was paying reasonable attention to the driving task and was normally alert, it could possibly lead to the conclusion that Appellant acted negligently as opposed to recklessly. In other words, had Lipian been permitted to offer the PRT testimony, I would find that a lesser-included offense instruction on vehicular homicide would have been warranted.

{¶67} For these reasons, I would reverse Appellant's conviction and remand the matter for further proceedings.

For the reasons stated in the Opinion rendered herein, Appellant's assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

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

NOTICE TO COUNSEL

This document constitutes a final judgment entry.