

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080736
Plaintiff-Appellee,	:	TRIAL NO. C07CRB-28719
vs.	:	<i>JUDGMENT ENTRY.</i>
BRIAN SAUER,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant, Brian Sauer, appeals the judgment of the Hamilton County Municipal Court convicting him of vehicular manslaughter under R.C. 2903.06(A)(4), a misdemeanor of the second degree. He was convicted after a jury trial.

Sauer and Richard Hilbert were travelling in opposite directions on a two-lane highway. Sauer made a left turn in front of Hilbert’s motorcycle, and in the resulting collision, Hilbert was killed. Corporal Brian Shepherd of the Hamilton County Sheriff’s Department investigated the crash and determined that Hilbert had been riding the motorcycle within the posted speed limit.

In his first assignment of error, Sauer now argues that the trial court erred in finding Shepherd to be an expert in accident reconstruction. This argument is

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

without merit. Although Sauer filed a motion in limine seeking the exclusion of Shepherd's testimony, he did not preserve the issue by objecting at trial.<sup>2</sup> In fact, he affirmatively stated that he had no objection to the testimony. Accordingly, we overrule the first assignment of error.

In his second assignment of error, Sauer argues that the trial court erred in partially denying his motion for a separation of witnesses. Specifically, he contends that the court improperly permitted Hilbert's wife to remain in the courtroom after she had testified.

This assignment is also without merit. Hilbert's wife was the first witness to testify and therefore could not have altered her testimony in response to other evidence. And though Sauer argues that the jury was tacitly invited to sympathize with her, there is no indication in the record that her presence alone had any effect on the verdict. Sauer has failed to demonstrate any prejudice,<sup>3</sup> and the second assignment of error is overruled.

In his third assignment of error, Sauer argues that the trial court erred in permitting Shepherd to testify about the ultimate issue of Sauer having failed to yield the right of way to Hilbert. The essence of Shepherd's testimony was that Hilbert had been driving within the posted speed limit and had therefore not forfeited the right of way.

We find no merit in the assignment. Under Evid.R. 704, an expert's opinion "is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." Here, Shepherd's opinion was based on his evaluation of the physical evidence found at the scene of the accident and his application of accepted

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<sup>2</sup> See, e.g., *State v. Harris*, 12th Dist. No. CA2007-11-280, 2008-Ohio-4504, ¶128.

<sup>3</sup> See *State v. Walker*, 10th Dist. No. 02AP-679, 2003-Ohio-986, ¶132 (failure to grant or to enforce a separation order is not reversible error absent prejudice.)

scientific principles to that evidence. Accordingly, the evidence was admissible,<sup>4</sup> and we overrule the third assignment of error.

In his fourth assignment of error, Sauer argues that the trial court erred in limiting his cross-examination of Shepherd on the issue of Hilbert's speed. We are not persuaded.

While a defendant has a right to cross-examine witnesses under the Sixth Amendment to the United States Constitution, a trial court retains wide latitude in placing reasonable limits on cross-examination.<sup>5</sup> Here, Sauer was permitted an extensive and thorough cross-examination on the issue of Hilbert's speed. Although the trial court did not permit him to use a text on accident reconstruction to cross-examine Shepherd, the court's refusal was based on Sauer's failure to inform the state of his intent to use the text. There was no abuse of discretion, and we overrule the fourth assignment of error.

In the fifth assignment of error, Sauer maintains that the trial court erred in refusing to give a jury instruction on what he terms the "lesser included offense" of failure to yield the right of way under R.C. 4511.42.

The vehicular-manslaughter statute, R.C. 2903.06(A)(4), states that "[n]o person, while operating \* \* \* a motor vehicle \* \* \* shall cause the death of another \* \* \* [a]s the proximate result of committing a violation of any provision of any section contained in Title XLV of the Revised Code that is a minor misdemeanor \* \* \*." In this case, the alleged underlying minor misdemeanor was a violation of R.C. 4511.42.

We find no error in the jury instructions. A violation of R.C. 4511.42 is not a lesser-included offense of vehicular manslaughter; it is merely the predicate offense

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<sup>4</sup> See *State v. Leach*, 150 Ohio App.3d 567, 2002-Ohio-6654, 782 N.E.2d 631, ¶153.

<sup>5</sup> *State v. Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903, ¶144.

in this particular case. Under the terms of the statute itself, vehicular manslaughter can be committed when any one of a number of traffic offenses results in the death of another.

And in any event, an instruction on a lesser-included offense is warranted only where the evidence supports both an acquittal on the greater offense and a conviction on the lesser.<sup>6</sup> Here, Sauer's failure to yield the right of way, if proved, was the only conceivable cause of Hilbert's death. The evidence therefore did not support both an acquittal under R.C. 2903.06(A)(4) and a conviction under R.C. 4511.42. We overrule the fifth assignment of error.

In the sixth assignment of error, Sauer argues that the trial court erred in denying his motion to dismiss the complaint. The basis of the motion was that the complaint alleged Hilbert's death to have been *a proximate* result of Sauer's failure to yield instead of *the proximate* result as provided for in R.C. 2903.06(A)(4).

We are not persuaded. The complaint and accompanying affidavit described in detail the factual allegations and included the numerical revised code section under which Sauer was being charged. These were sufficient to apprise Sauer of the allegations under Crim.R. 3. And Sauer's motion to dismiss had been filed more than three months prior to trial, thus indicating that he had been aware of the asserted inaccuracy in the complaint within ample time to prepare a defense. We overrule the sixth assignment of error.

In his seventh and final assignment of error, Sauer argues that the cumulative effect of errors in the trial proceedings rendered the conviction improper. Having found no prejudicial errors in the proceedings, we also hold that there was no

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<sup>6</sup> *State v. Nesbitt*, 1st Dist. No. C-080010, 2009-Ohio-972, ¶120.

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cumulative reversible error. We overrule the seventh assignment of error and affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HENDON, P.J., HILDEBRANDT and SUNDERMANN, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on July 8, 2009  
per order of the Court \_\_\_\_\_.  
Presiding Judge