ORIGINAL

No. 11-0133

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 93737

STATE OF OHIO,
Plaintiff-Appellee,

v.

TIMOTHY BIRO,
Defendant-Appellant.

APPELLANT TIMOTHY BIRO'S MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS FELONY CASE PRESENTS SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS A MATTER OF GREAT PUBLIC AND GREAT GENERAL INTEREST

This case presents this Court with two issues of State-wide importance that are matters of first impression for this Court.

Proposition of Law I: A criminal defendant may cross-examine a State's witness regarding the witness' exculpatory expert opinions even though an expert report has not been prepared.

Pre-trial discovery in a criminal case has always been understood to impose a duty on the party desiring to present a witness' testimony, not on the party that cross-examines that witness. In this case, the Eighth District fundamentally altered that balance. The Eighth District has now held that trial courts can require that a defendant – who desires to cross-examine an expert called by the State as a "fact" witness – refrain from asking any questions requiring an opinion unless the *defendant* has procured an expert report from the State's own witness. Further, the Eighth District has held that this expert-report requirement trumps a defendant's constitutional right to present exculpatory evidence from a State witness.

The Eighth District's decision in this case altered the course of a trial and prevented the defendant from presenting via cross-examination exculpatory evidence in the form of an expert opinion of a police officer/accident reconstructionist. As a result of the jury's not hearing this testimony, Timothy Biro, who had no prior criminal record, finds himself a convicted felon.

But the ramifications of the Eighth District's holding extend well beyond Mr. Biro. Every day in criminal trials, prosecutors call doctors, nurses and police officers with specialized training and expertise to the stand as "fact" witnesses to relate to their trained observations. Prosecutors emphasize in closing argument that jurors should give special weight to observations that are the product of specialized training. That same training qualifies the professional to opine on the significance of those observations, and the line between the factual observations of the

professional and the expert opinion regarding those observations is decidedly fine. The question before this Court is whether a defense counsel is properly precluded from inquiring, on cross-examination, what significance the professional derives from his or her trained observations. Put a different way, if the direct examination can ask "what did you see," then cross-examination must be able to ask, "what does that mean?"

This case of first impression presents this Court with the opportunity to address the confluence of discovery rules with Evid. R. 611's guarantee that cross-examination will be on all relevant matters. Should either party in a criminal case be prevented from obtaining evidence on cross-examination because of a failure to give advance notice of what is ahead on cross-examination? Should not the adversarial process expect that a party who calls a witness will have sufficient opportunity to anticipate cross-examination, particularly when the direct examiner is a prosecutor whose own police officer possesses exculpatory evidence that was never disclosed?

The decisions below are inconsistent with Evid. R. 611(B), which provides that "cross-examination is not limited to the scope of direct examination, but may cover 'all relevant matters'" (*State v. Perez* (2009), 124 Ohio St.3d 122 at ¶ 128), and Crim. R. 16 which requires prosecutors to reveal exculpatory evidence. They are also unworkable – parties cannot reasonably be expected to provide adversaries with "reports" on anticipated cross-examination.

This problem becomes all the more acute under the newly revised Crim. R. 16, the so-called "open discovery" rule. Under the revised Rule 16, all testifying experts must prepare reports. This case further raises the question of whether the Rule should apply to cross-examining the other side's professional "fact" witnesses.

Proposition II: For offenses committed between January 1, 2004 and September 10, 2010, the enhanced penalties attendant to violations of R.C. 4549.02 for leaving the scene of an accident apply only when serious physical harm or death are the result of the offender's having left the scene, not the result of the accident, itself.

The second proposition of law asks this Court, for the first time, to examine R.C. 4549.02, the prohibition on leaving the scene of an accident. Specifically, the Court is asked to determine whether, at the time of Mr. Biro's conduct, the enhancement of the offense from a misdemeanor to a felony was triggered by the "accident or collision" having caused serious physical harm or death, or by the "violation" (i.e. the act of leaving the scene) having caused serious physical harm or death. The operative statutory term has vacillated as the statute has been twice amended since 2003 with each amendment giving rise to a presumption that the General Assembly intended "to change the effect and operation of the law." *Columbus-Suburban Coach Lines, Inc. v. Public Utilities Commission* (1969), 20 Ohio St.2d 125 at 127; *Lynch v. Gallia County Board of Commissioners* (1997), 79 Ohio St.3d 251 quoting *Leader v. Glander* (1948), 149 Ohio St. 1, 5. The Eighth and Fourth Districts, however, accord identical significance to the distinct statutes. See, Opinion below, see also, *State v. Osborne,* Cuyahoga App. No. 88453, 2007-Ohio-3267, *State v. McGraw,* Ross App. No. 08CA3009, 2008-Ohio-6134.[1]

1 Such confusion is further evident in indictments under the statute. Citing the same version of the statute, an indictment in Cuyahoga County alleges a third degree felony if the "accident" causes death while an indictment in Mahoning County alleges a third degree felony if the "violation" causes death. See, *State v. Gonzalez*, Mahoning App. No. 06 MA 58, 2008-Ohio-2749 at ¶ 17 (vacating on other grounds but quoting the indictment).

STATEMENT OF THE CASE AND FACTS

This is an appeal from a conviction for the third-degree felony of leaving the scene of an accident where the violation resulted in death. R.C. 4549.02(A).

On September 28, 2008, Timothy Biro was involved in traffic accident with an individual on a bicycle, Terrell Jones. Mr. Jones died at location of this accident. As a result, Mr. Biro was charged in Count I with aggravated vehicular homicide and in Count I with leaving the scene of an accident. Finding that neither recklessness nor negligence had been proven, the trial judge directed an acquittal at the close of the State's case in chief as to aggravated vehicular homicide as charged in Count I as well as any lesser offense.

The critical issue for the jury on the remaining charge was whether, as the prosecutor argued, Mr. Biro "must have seen" the bicyclist his automobile struck and therefore left the scene of an accident, or, as Mr. Biro testified, he thought he hit a large pothole much like the one he had hit earlier that day. To determine that issue, the jury had to decide whether the rider was still upright and on his bicycle at the time of the collision (as the prosecution alleged) or had "ditched" his bicycle in an attempt to avoid the collision, such that the bicycle slid under the car (as the defense contended).

At approximately 9:00 p.m., Mr. Biro left a business gathering at the Cleveland Clinic to return to his home in Hudson. He proceeded easterly on Carnegie Avenue and then proceeded in a southerly direction on East 55th Street in order to access I-490. He was not speeding. There was no alcohol in the vehicle.

As Mr. Biro approached the five-way intersection of East 55th Street, Woodland Ave. and Kinsman Ave., he was in the curb lane southbound on East 55th. The traffic light for southbound traffic on East 55th (i.e. for Mr. Biro) was green. As Mr. Biro drove to the intersection, Mr. Jones

was riding his bicycle westbound across East 55th toward Woodland. He was riding against the red light, did not have a light on his bike and was not wearing reflective clothes.

Loshanda Molica was driving her car on East 55th southbound but was stopped in the middle lane waiting for a left turn arrow. Jones passed in front of Molica from her left to her right. Jones seemed to realize as he was halfway across East 55th Street that he was crossing into traffic. Jones attempted to swerve and Molica observed a look on his face that indicated Jones realized he was crossing into traffic. Molica testified that Jones rode his bike into the door of Mr. Biro's vehicle, perhaps forward of the driver's rearview mirror. According to Molica, Jones then bounced off Mr. Biro's car, hit the ground and went partially underneath Mr. Biro's vehicle. She acknowledged that everything was happening quickly.

Another eyewitness, Jujuan Mays, was a passenger in a vehicle also stopped at the intersection. Mays saw that the bike and car were about to collide. She instinctively closed her eyes and heard, but did not see, the impact. Mays observed Mr. Biro's vehicle clear the intersection in front of her, slow down for a few seconds, and then proceed to accelerate and continue on East 55th. The Mays' vehicle followed Mr. Biro and called the police while en route. According to Mays, Mr. Biro's vehicle proceeded to merge onto I-490.

Mr. Biro continued on I-77 to the Ohio Turnpike. There, he was pulled over by Richfield police officer Richard Gilbert who had heard the police reports and, because the vehicle's license plates corresponded to a Hudson address, anticipated that Mr. Biro would be entering the Turnpike. Mr. Biro was not speeding. He had traveled approximately 17 miles in 18 minutes following the collision with Jones, i.e. an average speed of less than 60 miles per hour.

Officer Gilbert testified that he was expecting the vehicle to have only one working headlight in light of the preceding collision. Instead, the vehicle had only minor damage in the lower area of the front fender, driver's side – a slight dent and damaged fog light. Officer Gilbert

testified as a fact witness that, upon approaching Mr. Biro, Mr. Biro was puzzled as to why he had been stopped. According to Officer Gilbert, Mr. Biro did not have a clue as to why he had been pulled over. When Gilbert advised Mr. Biro that there had been a collision involving personal injury to someone else, Mr. Biro became visibly upset. Officer Gilbert also testified as a breathalyzer expert for the State that Mr. Biro was administered a breath-alcohol test which revealed a BAC of .014 milligrams per liter, well under the legal limit of .08.

Over defense objection and accompanying proffer, Officer Gilbert was not allowed to testify that he was an expert accident reconstructionist and that, in his professional opinion, the damage on the vehicle revealed that the bike was already on the ground when it was struck by Mr. Biro's vehicle, and that Jones was not on the bike at the time. The trial court, in refusing to allow the proffered testimony, stated "[s]o he [i.e. Gilbert] may be qualified to testify, however, he prepared no report and have you conducted no further investigation." (sic). The trial court made this ruling despite being advised by the defense that they had no prior notice of Officer Gilbert's exculpatory opinion. Defense counsel learned of this information while speaking to Officer Gilbert in the courthouse just before the state called him to the witness stand.

The State introduced forensic evidence that revealed a pattern consistency between the sidewall of Mr. Jones' bike tire and a pattern on the undercarriage of Mr. Biro's vehicle. There was also consistency between another pattern on the undercarriage of the vehicle and a bike pedal. Paint damage on the bike was consistent with paint found on the lower front fender of Mr. Biro's vehicle. The lower front portion of the front fender of Mr. Biro's vehicle had leather residue that was consistent with the composition of the brake lever of Jones' bike.

Mr. Jones died from blunt trauma that caused extensive internal bleeding. According to the coroner, Mr. Jones was most likely on his stomach when he sustained these serious injuries.

Mr. Jones' injuries were consistent with having been run over by a car but nothing in the examination of the exterior of the body indicated that he had been run over.

Mr. Biro testified on his own behalf. He has been employed in various management and consultation capacities related to the business aspects of the health care industry. On September 23, 2008, Mr. Biro was attending a business dinner at the Cleveland Clinic. He testified that on his way to the Clinic which was in the afternoon, he had struck a pothole on Carnegie Avenue. Mr. Biro left the Clinic at 9:00 p.m., and was on his way home via his normal route. He was not speeding. He recalled that, at the intersection of East 55th and Woodland he "hit a bump that felt similar to what you would expect if you hit a pothole." The car's movement was similar to what he had experienced earlier that day when he hit a pothole on the way to the Clinic. He never saw a bicycle. Mr. Biro slowed down and looked behind to see what he believed was a pothole. He saw nothing in his rearview mirror except headlights of vehicles that were behind him. Seeing nothing else, he drove away. Contrary to Mayes' testimony, he testified that he did not speed. Mr. Biro testified that he had no idea that he was leaving the scene of a collision with a bicycle, although he did not doubt, based in hindsight on the evidence presented at trial, that he had actually been in such an accident.

Regarding Count II, the leaving the scene of an accident charge, the indictment alleged that the "accident in question" resulted in the death of Terrell Jones. In its instructions to the jury, the trial court stated that, if the jury found that Mr. Biro had knowingly left the scene of an accident, that they must go on to make a further finding as to whether the "accident or collision" caused death. Similarly, the verdict form stated that the "accident" resulted in the death of Terrell Jones. The jury returned a verdict of guilty to the Count II, leaving the scene of an accident as well as the penalty enhancing specification.

ARGUMENT

Proposition of Law I: **A criminal defendant may cross-examine a State's witness regarding the witness' exculpatory expert opinions even though an expert report has not been prepared.**

During trial, defense counsel learned for the first time that Officer Gilbert who also happened to be a trained accident reconstructionist, was of the opinion that the event happened in a manner that supported Mr. Biro's claim that he did not know he was in an accident. The court, however, barred defense counsel from asking Gilbert about these exculpatory opinions as a discovery sanction because, even though the officer was called by state and even though Mr. Biro only learned of this exculpatory opinion when the officer was on the witness stand, Mr. Biro had not obtained an expert report from Officer Gilbert in advance of trial. This resulted in a denial of Mr. Biro's constitutional rights to present a full defense, his right to a fair trial and due process of law, in violation of the U.S. Constitution's Fifth, Sixth, and Fourteenth Amendments and Article I, Section 10 and 16 of the Ohio Constitution.

A. Officer Gilbert's Opinion Was Critical to Mr. Biro's Defense.

Officer Gilbert is a trained accident reconstructionist. His opinion would have been crucial to Mr. Biro's defense. The essence of this case was whether Mr. Biro knew he had struck a person. The testimony of Ms. Molica was damaging to the defense because she specifically testified that Jones was still on the bike when he crashed into the forward portion of Mr. Biro's vehicle, i.e., that he did not lay the bike down prior to the collision. Thus, according to Molica, Jones, riding on a bike, would have been at a level where he would have been visible to Mr. Biro.

The prosecution seized on Molica's testimony when it specifically confronted Mr. Biro and asked him on cross examination how he could have missed seeing Jones.

> Q. But the question is, how can you not **see** this if this is no more than five or six feet in front of you where you're sitting in the driver's seat of your car; how can you miss that?

A. I don't know. I did not see it. Again, had I seen it, I would have applied my brakes and tried to stop. But I did not see it.

The answer to the prosecutor's question of "how did you not see it?" lay in Officer Gilbert's proffered testimony: Mr. Biro did not see Jones on his bike because he was already on the ground, as was the bike, when Mr. Biro's car came upon them. Had the defense been able to elicit that testimony from Officer Gilbert during cross-examination, the jury would have understood Mr. Biro's testimony.

Moreover, Officer Gilbert's expert testimony would have explained why the evidence of impact to the vehicle was all at the lower fender and undercarriage. This would have also helped the jury evaluate the credibility of Mr. Biro's testimony that he never saw the bicyclist.

The Eighth District's conclusion that the omission of this evidence was harmless ignores these realities and erroneously speculates that a State's eyewitness somehow would have trumped the jury's consideration of Officer Gilbert's expert analysis. Finally, the fact that Officer Gilbert did not perform an exhaustive analysis of the entire vehicle, a point argued by the State and mentioned in the Opinion below, similarly misses the mark. Officer Gilbert's observations of the fender damage were sufficient to allow him to render an opinion regarding the location of the bicycle at the moment of impact.

B. Even Though the State Never Disclosed this Exculpatory Evidence, the Trial Court Precluded Cross-Examination as a Discovery Sanction Because Mr. Biro Did Not Obtain an Expert Report Prior to Trial.

The most critical piece of evidence to support Mr. Biro's defense was **unknown** to Mr. Biro prior to trial. The State never disclosed this opinion. Defense counsel only learned of Officer Gilbert's exculpatory opinion in the moments prior to the State calling Gilbert to witness stand. Yet, even though the defense only learned of the existence of this exculpatory evidence **during** trial, the trial court precluded defense counsel from cross-examining Officer Gilbert about these opinions because defense counsel did not obtain an expert report **prior** to trial.

C. Ohio Law Should Not Require that a Criminal Defendant Obtain an Expert Report from a State's Witness Prior to Cross-Examining that Witness.

The trial court's decision to preclude cross-examination as a discovery sanction for not obtaining an expert report from a state's witness is wrong for a number of reasons. First, there was no discovery violation by the defense. Crim. R. 16, in both its pre-amendment and post-amendment forms, does not require production of expert reports as a prerequisite to cross-examination – only expert reports for a party's own witness must be produced.[2] By requiring an expert report as a condition of cross-examination, the trial court violated Evid. R. 611's guarantee that cross-examination will be on all relevant matters. Second, the discovery violation that had taken place was the *State's* failure to have provided the defense with exculpatory evidence in the form of Officer Gilbert's opinion. This not only violated Crim. R. 16's requirement that exculpatory evidence be produced, it also violated federal due process. See *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; See also, *D'Ambrosio v. Bagley*, N.D. Case No. 1:00CV2521 at *26 (N.D. Ohio 2006) (*Brady* violated when State failed to disclose investigators' exculpatory opinions). The unconstitutional irony in this case is that the *defense* had to discover exculpatory evidence from the State's own witness – only to be denied its use on the basis of a (wrongfully applied) procedural rule. Third, even if there were a discovery violation, choosing a sanction that prevents a defendant from presenting critical evidence violates this Court's requirement that a trial court must choose the "least severe sanction[.]" *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 3.

2 This case was tried under the former Crim. R. 16 which did not require the preparation of a report – only that if a report is prepared, then it had to be produced in discovery. Moreover, the Cuyahoga County local rules did not require preparation of an expert opinion in a criminal case.

In sum, this Court has stated that "[t]he purpose of discovery rules is to prevent surprise and the secreting of evidence favorable to one party. The overall purpose is to produce a fair trial." *Lakewood, supra* at 3. However, the trial court's sanction produced the opposite result.

***Proposition of Law II:* For offenses committed between January 1, 2004 and September 10, 2010, the enhanced penalties attendant to violations of R.C. 4549.02 for leaving the scene of an accident apply only when serious physical harm or death are the result of the offender's having left the scene, not the result of the accident, itself.**

The question presented in this proposition of law, as it applies to Mr. Biro can be stated as follows: Does R.C. 4549.02 become a felony of the third degree when the *accident* that the defendant leaves results in death, or must the *act of leaving the scene* result in death. The Eighth District has held in this case that the former is the correct interpretation of the law in effect at the time, while Mr. Biro maintains the latter. The recent amendment to this statute, which was ignored by the Eighth District, confirms that Mr. Biro is correct.

A. The unambiguous language of the statute supports Mr. Biro's interpretation.

In determining the meaning of the statute, "words used by the General Assembly are to be construed according to their common usage." *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 103. The version of R.C. 4549.02 in effect on September 28, 2008, stated in pertinent part that:

> (B) Whoever **violates** division (A) of this section is guilty of failure to stop after an accident, a misdemeanor of the first degree. . . . If the **violation** results in the death of a person, failure to stop after an accident is a felony of the third degree.

The term "violation" refers to the first clause of division (B): "whoever *violates* division (A). The "violation" is thus the act of violating division (A), which is the act of leaving the accident, and not the accident itself. The term "violation" in division (B) is distinct from the term "accident" in division (A) and division (B). When two words appear in the same statute, courts should presume that the inclusion of one word as opposed to the other at particular places

in the statute is intentional and purposely done so as to convey a specific meaning to the statute. *See, NACCO Industries v. Tracy* (1997), 79 Ohio St.3d 314, 316

Moreover, as a criminal statute, R.C. 4549.02, must be "strictly construed against the state, and liberally construed in favor of the accused." R.C. 2901.04. This "rule of lenity" is both statutorily required, *id.*, and constitutionally based on principles of due process: "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States* (1985), 471 U.S. 419, 428

B. The Legislative History, Including the Most Recent Amendment, Confirms Mr. Biro's Interpretation of R.C. 4549.02.

In its pre-2004 form of R.C. 4549.02, the penalty for a violation of R.C. 4549.02 was found in R.C. 4549.99(B), which elevated the offense to a *fifth* degree felony if the "accident or collision that is the basis of the violation results in serious physical harm or death." Thus, the legislature knew how to say "accident or collision that is the basis of the violation." However, they chose not to use those words when R.C. 4549.02 was amended in 2004.

In 2004, the General Assembly amended the statute in two respects. First, it elevated the "enhancement" of R.C. 4549.02 to a *third*-degree felony when death results. Second, it restricted the more severe, third degree felonies to those situations where the "violation" – i.e., the act of leaving the scene of the accident – caused the death. This was the version in place at the time of Mr. Biro's conduct.

In 2010, after the oral argument in the Eighth District in this case, R.C. 4549.02 was again amended. The term "violation" was replaced with "accident or collision." Thus, under the newly amended law, enhancement applies when the "accident or collision," not the "violation," results in serious physical harm or death. While the Opinion below noted this change, it

accorded it no significance. The defense alerted the Court to the significance of this development via a timely motion for reconsideration, which was summarily denied without opinion. See Appendix at A-1.

The Eighth District erred by assuming that the General Assembly did not intend to change the operation of the enhancement provision in R.C. 4549.02 when it first amended the statute to require the "violation" to result in serious physical harm or death in 2004 or when it again amended the statute in 2010 to require the "accident" to result in serious physical ham or death. It is presumed that the General Assembly, in changing the words of the statute, intended to change the meaning of the statute. *Dennison v. Dennison* (1956), 165 Ohio St.146; State *ex rel. Clampitt v. Brown* (1956), 165 Ohio St. 139.

A review of the legislative history reveals that the General Assembly, in fact, did believe that, prior to the 2010 amendment, it was the "failure to stop" (*i.e.* the "violation") that had to have caused serious injury or death in order for a defendant to be convicted of a felony. See, Synopsis of Committee Amendments, Sub. H.B. 338, 128th General Assembly, (Senate Judiciary Civil Justice), item (9):

> Modify the condition for increased penalties for the offenses of failure to stop after an accident and failure to stop after a nonpublic road accident so that the increased penalties apply when the accident or collision (rather than the failure to stop) results in serious physical harm or death.

This legislative history statement was made even more explicit in the Legislative Services Commission's Final Bill Analysis, at p. 17:

> The act modifies the former penalty provisions by stating that if the *accident or collision* (rather than the "violation," which is the failure to stop) results in serious physical harm to a person, failure to stop after an accident is a felony of the fifth degree and if the *accident or collision* (rather than the "violation", which is the failure to stop) results in death to the person, failure to stop after an accident is a felony of the third degree. (R.C. 4549.02(B).).

(italicized emphasis in original).

C. Mr. Biro's Indictment Only Alleges a Misdemeanor, the Jury Verdict Only Reflects a Misdemeanor Conviction, and the Evidence Was Insufficient to Sustain a Felony Conviction.

In this case, the indictment simply alleged that the "accident" resulted in death – a misdemeanor under R.C. 4549.02(B). It did not allege that the "violation" resulted in death – the predicate for a felony conviction. A defendant can only be found guilty of the crime alleged in the indictment. Ohio Const. Art. I, Sec. 10 (right to indictment); U.S. Const. Amend. XIV (due process clause). Moreover, the jury verdict form, by only stating that the "accident" resulted in death, only reflects a verdict of guilty of the misdemeanor version of the statute – the verdict form would have had to reflect that the "violation" resulted in death. *State v. Pelfry,* 112 Ohio St.3d 422, 2007-Ohio-256. In the court of appeals, the State claimed that Mr. Biro waived these issues by not objecting to a defective indictment. However, there was no reason to object. The indictment has never been defective – it is a perfectly good allegation of a misdemeanor.

Even if the third-degree felony had been properly alleged, it could not have been proven. There is no evidence that Mr. Biro's leaving the scene resulted in the death of the victim. The only evidence was that the victim died at the scene and the State failed to prove that he would have lived had Mr. Biro remained at the scene. Accordingly, Mr. Biro's felony conviction violated his due process rights under the Ohio Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution. *Jackson v. Virginia* (1979), 443 U.S. 307.

CONCLUSION

The trial court's exclusion of critical exculpatory evidence elicited during the cross-examination of a witness for the State deprived Mr. Biro of a fair trial. The Court of Appeals' affirmance, based on a non-exist requirement that defense alert the prosecution about their own witness's opinions, demonstrate the need for guidance from this Court on the allowable scope of cross-examination. Further, the proper construction of R.C. 4549.02 presents an important issue of

first impression for this Court. Twice the General Assembly has amended the statute to change the operation of its enhancement provision The Eighth District's presumption that the amendments are immaterial is both erroneous and contrary to the fundamental obligation of courts to discern and implement legislative intent. Appellant Timothy Biro therefore respectfully requests that this Court accept jurisdiction, review, and reverse the decisions below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 24th day of January, 2011, by U.S. Mail, postage prepaid, upon the following:

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County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO. 93737

LOWER COURT NO. CP CR-516895

COMMON PLEAS COURT

-vs-

TIMOTHY BIRO

Appellant

MOTION NO. 439849

Date 12/10/2010

Journal Entry

MOTION BY APPELLANT FOR RECONSIDERATION IS DENIED.

COSTS WAIVED TO COUNSEL FOR ALL PARTIES PURSUANT TO APP.R.

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RECEIVED FOR FILING
DEC 10 2010
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____ DEP.

Presiding Judge MARY EILEEN KILBANE, Concurs

Judge PATRICIA A. BLACKMON, Concurs

Judge MARY J. BOYLE

0719 00033

CC 97 / 2783

The State of Ohio, Cuyahoga County. } ss.

I, GERALD E. FUERST, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal Vol 719 Pge 33 in CA 93737 DATE Dec 10 2010 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal Vol 719 Page 33 in C/A 93737 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 21 day of January A.D. 20 11

GERALD E. FUERST, Clerk of Courts

By _____ Deputy Clerk

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93737

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY BIRO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516895

BEFORE: Boyle, J., Kilbane, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: November 24, 2010

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FILED AND JOURNALIZED
PER APP.R. 22(C)

NOV 24 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

MARY J. BOYLE, J.:

Defendant-appellant, Timothy Biro, appeals his conviction of leaving the scene of an accident, in violation of R.C. 4549.02(A), which carried a furthermore clause elevating the offense to a third degree felony as a result of the victim dying. He raises the following six assignment of errors:

"[I.] The trial court erred when it refused to allow the defense to qualify officer Gilbert as an accident [expert] and ask him about his conclusion that the front of Mr. Biro's vehicle struck the bicycle while it was on the ground and did not strike a person.

"[II.] Mr. Biro is only guilty of a misdemeanor violation of R.C. 4549.02 because the indictment does not allege a felony violation.

"[III.] The jury verdict form only supports a misdemeanor conviction.

"[IV.] The jury was incorrectly instructed regarding the elements of the furthermore clause in Count Two.

"[V.] The combination of errors discussed in assignments II through IV constitute a structural error that requires reversal.

"[VI.] The evidence is insufficient to sustain a felony conviction of R.C. 4549.02."

After a thorough review of the facts and applicable law, we affirm.

Procedural History and Facts

The grand jury indicted Biro on two charges: (1) aggravated vehicular homicide, in violation of R.C. 2903.06(A)(2)(a); and (2) failure to stop after an accident, in violation of R.C. 4549.02(A). The second count also carried a furthermore clause, stating that the accident in question resulted in the death of the victim. The charges arose out of Biro's vehicle allegedly colliding with the victim, who was on a bicycle, and died as a result of the collision. Biro pleaded not guilty to the charges, and the matter proceeded to a jury trial.

The state presented the testimony of two eyewitnesses, Loshanda Mollica and Jujuan Mays. Mollica testified that the victim was riding his bicycle across East 55th Street toward Woodland when Biro's vehicle collided with him, causing the victim to bounce off Biro's car, hit the ground, and go partially underneath Biro's vehicle, where she believed that he was run over by the rear of the car. Mays testified that she saw that the victim and Biro were about to collide, so she looked away, but that she heard the collision. Mays further observed Biro's vehicle clear the intersection in front of her, slow down for a few seconds, and then proceed to accelerate and continue on East 55th Street. Mays, along with her husband who was driving, followed Biro's vehicle and called 911, providing the police with Biro's license plate number. She further testified that her husband flashed the lights of their vehicle in an attempt to stop Biro.

The state also produced forensic evidence that supported the eyewitnesses' testimony that Biro's vehicle had contact with the victim's bike and the victim. Specifically, the state established that the paint smear found on Biro's vehicle was consistent with the paint damage on the bike, that the "black transfer material" found on the surface of the vehicle was consistent with the composition of the bike's brake lever, and that there was a consistency of patterns between the sidewall and pedal of the bike with the undercarriage of Biro's vehicle. The state further introduced evidence that the victim's sweatshirt bore a tire pattern that had class characteristics consistent with Biro's vehicle tire. The coroner's testimony also revealed that the victim died from blunt trauma that caused extensive internal bleeding and that the victim's injuries were consistent with having been run over by a car.

The state also called Richfield Police Officer Robert Gilbert, who testified that he heard the radio call regarding a possible hit-and-run by a vehicle registered to Biro. Gilbert then stopped Biro, who was driving to his home in Hudson. Biro was then escorted to the Richfield Police Department, where a breath-alcohol test was administered, revealing a BAC of .014 milligrams per liter, under the legal limit of .08.

On cross-examination, Gilbert testified that Biro appeared to be going the speed limit, that he seemed surprised to be pulled over, and that once he was

informed of the basis of the stop, i.e., suspected involvement in an accident, he was "noticeably upset." Gilbert further testified that he anticipated that Biro's vehicle would have had a headlight out based on the alleged accident because "when a motor vehicle strikes a person or objects with today's plastic lights they break pretty easily and it would damage one of them." Gilbert testified, however, that the only noticeable damage that he observed was (1) an indentation on the left-hand side in the bumper cover, and (2) a broken driving light in the lower left-hand corner of the motor vehicle.

After the state's presentation of its case in chief, the trial court granted Biro's Crim.R. 29 motion as to the aggravated vehicular homicide count but denied Biro's motion as to the second count.

The trial proceeded on the charge of failure to stop after an accident.

The defense presented a character witness who testified that Biro is one of the "most honest, open, truthful, caring persons."

Biro also testified in his own behalf. According to him, he recalled that, at the intersection of East 55th and Woodland, he "hit a bump that felt similar to what you would expect if you hit a pothole." Immediately following, he slowed down, looked in his left side mirror, observed car lights behind him "but nothing else." He never saw a bicycle or person laying on the ground. He then proceeded

to drive home but was ultimately pulled over in Richfield. He testified that he had no idea that his vehicle was involved in an accident.

The jury returned a guilty verdict on the second count and further found that the victim died as a result of the accident, thereby elevating the offense to a third degree felony. The trial court subsequently sentenced Biro to one year of community control sanctions.

Biro now appeals his conviction. For the ease of discussion, we will address Biro's assignments of error out of order.

Misdemeanor versus Felony Conviction under R.C. 4549.02

Biro's second, third, fourth, fifth, and sixth assignments of error all relate to former R.C. 4549.02[1] and the penalty provision contained in the statute.

The statute provides in relevant part:

"(A) In case of accident to or collision with persons or property upon any of the public roads or highways, due to the driving or operation thereon of any motor vehicle, the person driving or operating the motor vehicle, having knowledge of the accident or collision, immediately shall stop the driver's or operator's motor vehicle at the scene of the accident or collision and shall remain at the scene of the accident or collision until the driver or operator has given the driver's or operator's name and address and, if the driver or operator is not the

[1]The statute was amended, effective September 17, 2010.

owner, the name and address of the owner of that motor vehicle, together with the registered number of that motor vehicle, to any person injured in the accident or collision or to the operator, occupant, owner, or attendant of any motor vehicle damaged in the accident or collision, or to any police officer at the scene of the accident or collision."

Pursuant to former R.C. 4549.02(B), "[w]hoever violates division (A) is guilty of failure to stop after an accident, a misdemeanor of the first degree," but "if the violation results in the death of a person," the violation becomes a third-degree felony offense. The statute, however, does not define the word "results."

In his second assignment of error, Biro argues that the furthermore clause of the indictment lacked the proper language to constitute a felony offense as defined in former R.C. 4549.02(B). It states as follows: "Furthermore, the accident in question resulted in the death of Terrell Jones." Biro argues that the use of the word "accident" was erroneous because the statute requires a showing that the "violation" resulted in death. He further argues in his third and fourth assignments of error that this same deficiency was carried through in the jury verdict form and jury instruction, thereby resulting in the jury convicting him of only a misdemeanor. He also argues that the cumulative effect of these errors constitute structural error that requires a reversal. And finally, he argues in his sixth assignment of error that the state failed to present sufficient evidence to

sustain a felony conviction as defined under former R.C. 4549.02(B). We, however, find Biro's arguments unpersuasive.

The underlying rationale in support of Biro's five assignments of error is that a violation of former R.C. 4549.02(A), failure to stop after an accident, is only a misdemeanor offense under former R.C. 4549.02(B) unless the defendant's act of leaving the scene results in death, as opposed to the accident itself resulting in death. But aside from the fact that Biro failed to raise any argument below related to these issues, this court has previously addressed this exact argument and rejected it. See *State v. Osbourne*, 8th Dist. No. 88453, 2007-Ohio-3267.

Contrary to Biro's assertion, *Osbourne* is right on point and controlling. In *Osbourne*, we recognized that "the statute seeks to hold the offender responsible for his ensuing actions." Id. at ¶23. We expressly rejected the defendant's claim that the language of former R.C. 4549.02(B) required the state to prove that defendant's "failure to stop and report" itself, "resulted" in the victim's death in order to establish his guilt of a third-degree felony. Id. at ¶18-23. Instead, in order to sustain a third degree felony, the state must prove that the accident resulted in the victim's death. Id.[2] Indeed, "[t]he statute does not

[2]Notably, the indictment in *Osbourne* was identical to the one at issue here, utilizing the word "accident" instead of "violation."

require that the failure to stop directly causes the victim's death." *State v. McGraw*, 4th Dist. No. 08CA3009, 2008-Ohio-6134, ¶13.

Accordingly, consistent with our holding in *Osbourne*, Biro's second, third, fourth, fifth, and sixth assignments of error are overruled.

Expert Testimony

In his first assignment of error, Biro argues that the trial court abused its discretion in refusing his efforts on cross-examination to qualify the state's witness, Officer Robert Gilbert, as an expert in accident reconstruction and elicit Gilbert's opinion as to the accident. We disagree.

At trial, the state had identified and called Officer Gilbert as a fact witness in its case in chief. During cross-examination, Biro's counsel attempted to establish that Gilbert was an expert in accident reconstruction. Defense counsel intended to question Gilbert as to his expert conclusions regarding the position of the victim's bicycle when it was hit by Biro's vehicle. The trial court prohibited this line of questioning for two reasons: (1) defense counsel never provided an expert report to the state, and (2) Gilbert "never had a second look at the car after he stopped the car and walked around it." Biro's defense counsel proffered Gilbert's excluded testimony as follows:

"He would have testified that, had he been allowed to testify, he would have testified that the dent in the right front portion of Mr. Biro's car was consistent with striking the pedal of the bike.

"He also would have testified that the evidence was not consistent with the bicycle — with Mr. Biro's car striking a person. And also that the bike was already on the ground when Mr. Biro's car struck it."

"And I think that as I related to the court, we didn't have a report, and it's my understanding if there is a report it must be conveyable. If there is no report then obviously you don't have to produce that report."

After hearing the proffer, the trial court maintained its exclusion of any expert testimony.

Biro argues that the trial court's refusal to allow Gilbert's opinion testimony deprived him of his federal due process rights under the United States Constitution because he was prevented from presenting testimony that was critical to his defense. He specifically argues that Gilbert's expert testimony would have undermined the state's eyewitness testimony establishing that the victim was still on the bike when the collision occurred; and significantly, it would have supported Biro's own testimony that he did not see the victim on a bike. The state counters that Biro's defense counsel failed to comply with Crim.R. 16, and therefore the exclusion of the testimony was proper.

The trial court has broad discretion in regulating discovery. *State v. Scudder* (1994), 71 Ohio St.3d 263, 269, 643 N.E.2d 524. "The purpose of discovery rules is to prevent surprise and the secreting of evidence favorable to one party. The overall purpose is to produce a fair trial." *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 3, 511 N.E.2d 1138. When a discovery violation occurs, the trial court should impose the least severe sanction that is consistent with the purposes of the discovery rules. Id. We will not disturb the trial court's choice of remedy absent an abuse of discretion. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 26, 514 N.E.2d 394.

The Ohio Supreme Court has repeatedly recognized that "the trial court has authority to enter pretrial orders regarding discovery." Further, "[d]iscovery beyond what the rules require is at the trial court's discretion." *State v. Landrum* (1990), 53 Ohio St.2d 107, 119, 559 N.E.2d 710.

Biro argues that the trial court erroneously excluded Gilbert's testimony on the basis that he failed to provide an expert report because former Crim.R. 16 or Loc.R. 21.1(B) imposes no such duty in criminal cases.[3] While we agree that former Crim.R. 16 imposes no duty to provide a written expert report and that this court has previously held that Loc.R. 21.1(B) does not apply in criminal

[3] We note that since Biro's trial in this case, the Ohio Supreme Court has adopted "open discovery" in criminal cases, significantly amending former Crim.R. 16. The new rule became effective July 1, 2010. We, however, apply former Crim.R. 16, which was in effect at the time of Biro's underlying case.

cases,[4] Biro ignores a critical fact in the proceedings below: the trial court specifically set a deadline for the defense's expert report to be provided.

Our review of the record reveals that, on April 15, 2009, Biro's defense counsel moved for a continuance of the trial date set for April 22, 2009 because he needed additional time to secure a different expert. The trial court granted the continuance, converting the trial date into a pretrial. Following the pretrial, the trial court reset the trial for June 3, 2009 and issued a discovery order, stating the following: "Defense expert report due 5/20/09." Defense counsel never objected to this order, nor raises any argument on appeal related to the trial court's express requirement.

The state contends that Biro's defense counsel never responded to the state's request for discovery. We find no discovery responses filed by Biro in the record. Thus, aside from failing to comply with the court's express order regarding the submission of an expert report prior to trial, defense counsel never even notified the state that it intended to use Gilbert as an expert without a report. Contrary to Biro's assertion, we do not read the trial court's order as requiring an expert report only if he intended to introduce one at trial. Indeed, former Crim.R. 16 mandates the production of a report under such circumstances. In light of the trial court's explicit order regarding an expert

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[4] See *State v. O'Malley* (Mar. 25, 1993), 8th Dist. No. 62223.

report, it is clear to us why the court refused to allow Gilbert to testify as an expert: Biro had not prepared a report or provided one to the state.

Thus, under the circumstances of this case, we cannot say the trial court abused its discretion in refusing the defense's request to qualify Gilbert as an expert and elicit his expert opinions on cross-examination.

We further note that the record does not convince us that Gilbert would have even been qualified to render the opinion proffered by defense counsel. Even assuming that Gilbert is an expert in accident reconstruction, there is no evidence that he was qualified to opine specifically that the victim's bike was already on the ground when Biro struck it. Indeed, Gilbert did not conduct any type of investigation in this case, and his opinion was based solely on his cursory review of the damage to Biro's vehicle.[5]

But even assuming that Gilbert was qualified to testify as an expert and that the defense was entitled to offer his testimony, we find that the exclusion of his testimony was harmless error beyond a reasonable doubt. "An error in the admission or exclusion of evidence is properly considered harmless error if it does not affect a substantial right of the accused." *State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, 789 N.E.2d 696, ¶80, citing Crim.R. 52(A).

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[5] Notably, the trial court did permit Gilbert to testify that, based on the accident described over the radio, he anticipated that Biro's headlight would have been broken but it was not.

The state produced two eyewitnesses who observed the victim riding his bicycle up until the collision. Indeed, one eyewitness testified in detail as to the collision, including that the victim "smacked" the side of Biro's car, bouncing off of the car, and ultimately was run over by the back of Biro's car. Gilbert did not observe the accident, and any opinion that he would have offered was based solely on his brief examination of the vehicle when he pulled it over. Notably, he even admitted that he did not observe the undercarriage of the vehicle, noting that "it would be something you would do on a post crash examination of a motor vehicle." Thus, even if the defense would have been able to establish that Gilbert was qualified to render an opinion, we fail to see what weight, if any, the opinion would have carried given the overwhelming evidence contradicting such opinion.

The first assignment of error is overruled.

Judgment is affirmed.

It is ordered that appellee recover from 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.

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

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR