[Cite as *State v. Harris*, 2020-Ohio-5306.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2020-L-067**
- vs -	:	
QUINTON HARRIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 2018 CR 000957.

Judgment: Affirmed and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert,* Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, Ohio, 44077 (For Plaintiff-Appellee).

Vanessa R. Clapp, Lake County Public Defender, and *Melissa A. Blake*, Assistant Public Defender, 125 East Erie Street, Painesville, Ohio 44077 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Quinton Harris ("Ms. Harris"), appeals from the judgment of the Lake County Court of Common Pleas, in which she was convicted of involuntary manslaughter in violation of R.C. 2903.04(B), sale of beer or intoxicating liquor to underage persons in violation of R.C. 4301.69(A), and sale of beer or intoxicating liquor to underage persons in violation of R.C. 4301.69(C).

{¶2} Ms. Harris assigns six errors for our review, arguing in her first three assignments of error that the trial court committed plain error when it: (1) told the jury that Ms. Harris engaged in conduct that constituted the elements of the crimes charged, (2) failed to give an accurate jury instruction on involuntary manslaughter, and (3) allowed a police detective to testify to the meaning of the social media communications and text messages between the victim, Trevon R. Mcdowell Howard ("Mr. Howard") and Ms. Harris. She further argues that her counsel was ineffective for failing to object for the same reasons. Lastly, Ms. Harris' final two assignments challenge the sufficiency and manifest weight of the evidence, arguing that the state failed to produce sufficient evidence to establish all elements of the charged offenses beyond a reasonable doubt and that the guilty verdict for involuntary manslaughter is not supported by the manifest weight of the evidence.

{¶3} After careful review of the record and pertinent law, we find Ms. Harris' assignments of error to be without merit. Ms. Harris failed to demonstrate error or prejudice from the trial court's preliminary instructions to the jury pool prior to the selection of the jury, inasmuch as the trial court's recitation of the basic facts of the case was designed to ascertain the potential jurors' familiarity with the case due to the pretrial publicity.

{¶4} We find that while the trial court did err in its involuntary manslaughter instruction, the error was harmless and not structural. The state introduced sufficient evidence on the elements of involuntary manslaughter, i.e., that the victim's death was a result of furnishing alcohol to an underage person in a hotel room, and the manifest weight of the evidence heavily supports the conviction.

{¶5} We also find the detective's lay opinion testimony regarding the meaning of the "slang" used by Ms. Harris and the victim in their digital messaging communications was admissible because the slang was within the detective's experience, and he had an opportunity to speak with Ms. Harris at length about the events leading up to and during the pair's time together in the hotel room. Further, the slang translations were designed to be helpful to the jury. Even if we were to find the detective's testimony inadmissible, the error was harmless since it was not the basis for her conviction.

{¶6} Since we found the above assignments of error to be without merit, Ms. Harris' argument that her counsel was ineffective for failing to object to the claimed errors must necessarily fail.

{¶7} The judgment of the Lake County Court of Common Pleas is affirmed. In addition, we remand for the trial court to correct a clerical error in the sentencing entry.

Substantive and Procedural History

{¶8} In the early morning of December 21, 2017, Ms. Harris called 911 and reported that Mr. Howard was dead in a hotel room in Mentor, Ohio. The 911 operator kept Ms. Harris on the line while dispatching emergency personnel to the scene and directed Ms. Harris to perform CPR on Mr. Howard. Emergency personnel transported Mr. Howard to the hospital where he was pronounced dead on arrival. The autopsy revealed the cause of Mr. Howard's death was asphyxia as a result of aspiration of gastric contents and that his blood alcohol concentration was .310, nearly four times the legal limit of .08.

{¶9} Following the police investigation, Ms. Harris was indicted by the Lake County Grand Jury on six counts: (1) involuntary manslaughter, a third-degree felony, in

violation of R.C. 2903.04(B); (2) offenses involving underage persons, an unclassified misdemeanor, in violation of R.C. 4301.69(A); (3) offenses involving underage persons, a first-degree misdemeanor, in violation of R.C. 4301.69(C); (4) rape, a first-degree felony, in violation of R.C. 2907.02(A)(1)(a); (5) rape, a first-degree felony, in violation of R.C. 2907.02(A)(1)(c); and (6) sexual battery, a third-degree felony, in violation of R.C. 2907.03(A)(2). The matter was subsequently tried to a jury.

Voir Dire

{¶10} At the start of trial, the judge explained to the jury pool the voir dire process, identified the parties, and then stated, "Now I am going to give you just a brief introduction as to what this case is about, because that's going to be the stepping off point for questions that follow, and so that you can understand why certain questions are asked in the way they are asked. On December 21st, 2017 Mentor Police and Fire responded to the Wood Springs Motel for an unresponsive nineteen year old named Tre'Von Howard. He was with the Defendant, Quinton Harris, who rented the room and provided the alcohol which was 151 proof rum. * * * [T]he Defendant goes also by the name as Chanel, who's a trans gender female, biologically a male. She told police she had engaged in sexual acts with the victim. The victim died as a result of ethanol intoxication. His blood alcohol content was .310 at the time of death. They had been in the room a short amount of time together. They had arrived at the motel together at approximately midnight on December 20th going into December 21, 2017."

{¶11} The court then explained the state's charges against Ms. Harris and that the court's instructions as to the law given after all the evidence is presented is what "controls the deliberations." The court also informed the jury pool that Ms. Harris was pleading not

guilty to the charges. The court further stated it was "providing this information to find out whether any of you has any previous knowledge of this case" since a lot of publicity surrounded the incident.

The Trial

{¶12} The state introduced the testimony of eleven witnesses, pictures of some of the objects taken from the motel room, a recording of Ms. Harris' 911 call, photos of the victim and his cell phone, medical records, photos of the contents of Ms. Harris' purse, Instagram (a messaging application) and text conversations between Ms. Harris and the victim, as well as stipulations as to the authenticity and admissibility of the autopsy report and death certificate.

{¶13} Mentor Police Detective Michael Malainy ("Det. Malainy") described his investigation, including an interview with Ms. Harris that he conducted with Officer Jonathan Miller ("Officer Miller") and a handwritten, signed statement by Ms. Harris witnessed by both officers. The interview was played for the jury. Det. Malainy also identified Ms. Harris' Instagram page and the text and Instagram messages between Ms. Harris and the victim, translating for the jury commonly used emojis and messaging "slang" terminology such as "scoop," which means to pick someone up with a "whip," or vehicle.

{¶14} Ms. Harris and Mr. Howard began messaging on Instagram in November of 2017. Mr. Howard "liked" the picture on Ms. Harris's Instagram page, and they started communicating and asking each other for pictures. Ms. Harris sent Mr. Howard her phone number almost a month later, and they began messaging by text instead of Instagram. The Saturday before the December 21 incident, Mr. Howard sent a text with his address

to Ms. Harris, and they discussed what they were going to do when they got together. Mr. Howard was 19 years old, and Ms. Harris was 30 years old.

{¶15} Mr. Howard asked Ms. Harris what she liked to drink. She responded with a picture of a Cruzan 151 rum bottle. Mr. Howard asked Ms. Harris what Cruzan 151 rum was. He also asked if she had "some bang," which Det. Malainy told the jury means marijuana. Ms. Harris responded "no" but that they could get some. Mr. Howard told Ms. Harris he liked to drink Hennessy and that his next favorite alcoholic beverage was Remy. They texted several more times over the next few days in an attempt to get together until the day of the incident, when the two arranged to get together that night.

{¶16} Officer Miller also reviewed for the jury Ms. Harris' statement and the interview that she had given on the day of Mr. Howard's death. Ms. Harris told the officer that their relationship began when Mr. Howard "liked" one of her pictures on Instagram.

{¶17} Det. Malainy and Officer Miller also described Ms. Harris' recounting of the order of events on the night of the incident. Earlier in the day, Ms. Harris rented the hotel room on Priceline from her home in Garfield Heights. She went to the hotel and then picked up Mr. Howard. The two went to the mall and Wal-Mart before stopping at Tri-Point Hospital because Ms. Harris had a scratched cornea. Deciding the wait was too long, they went to the hotel, arriving around midnight. Ms. Harris admitted to the officers that she brought the alcohol into the hotel. The two drank the Cruzan 151 rum and engaged in sexual activities.

{¶18} Ms. Harris estimated that she consumed two cups of rum and that Mr. Howard had two or maybe three cups (approximately 9 to 10 shots) but did not finish the third. Approximately two hours later, Ms. Harris returned to the hospital to get her eye

checked. Mr. Howard declined to go with her, remarking that he was "too tipsy." Ms. Harris arrived back at the hotel around 5:00 a.m. and, finding Mr. Howard unresponsive, called 911.

{¶19} Dr. David Dolinak from the Cuyahoga County Medical Examiner's Office, who supervised the autopsy, testified that Mr. Howard's blood alcohol concentration was .310, a concentration of alcohol that can "prove deadly." Mr. Howard weighed 109 pounds and his health was "good." The cause of death "was determined to be asphyxia, or lack of oxygen due to aspiration of gastric contents. Or the inhalation of gastric contents. Due to acute ethanol intoxication. Ethanol is another name for alcohol." He further explained that while a person is deeply unconscious, they can vomit or bring some gastric contents into their mouth area, and if they are not awake or alert enough, they can end up inhaling it, an "aspiration event" which can cause breathing problems.

{¶20} Tahja Howard ("Tahja"), one of the victim's sisters, testified that on the day before Mr. Howard went to the hotel with Ms. Harris, she had returned from work to find Mr. Howard on the phone. She testified that "he said he was on the phone with a girl. And he then muted the phone and basically told me that this woman was supposed to buy him things, and that he was using her to get him clothes and shoes, and things like that." She gave him $20 to get a haircut and that was the last time she saw him. Tahja also stated that she had never observed Mr. Howard consuming alcohol and that someone put a Hennessy bottle on his grave because that is her mother's alcoholic drink of choice.

{¶21} Mr. Howard's mother, Tamikia McCants ("Mrs. McCants"), testified that the day before Mr. Howard's death, he informed her he was going to a hotel with "Chanel," a

name used by Ms. Harris, and that they were going to go shopping. He had previously told his mother that Chanel was a 30-year old female and showed her "provocative" pictures of her from his phone and Instagram messages. Ms. McCants testified that Mr. Howard would occasionally "sip" her alcohol but that he did not "drink." She told the jury she had placed the Hennessey bottle on Mr. Howard's grave so he would know "his mother was here" and did that only the one time on the first anniversary of Mr. Howard's death.

{¶22} Andre Benford ("Mr. Benford") also testified for the state about his previous encounter with Ms. Harris in 2010, which resulted in a conviction for Ms. Harris. The fact of the conviction was not presented to the jury. Mr. Benford testified that he was fifteen years old at the time and had been drinking at his grandmother's house when he received a message from Ms. Harris that she would pick him up. She told him to start walking because she could not locate his house. He did so, and a limousine picked him up down the street with two women inside, one of whom was Ms. Harris. They went to a hotel where the three had a sexual encounter in which Mr. Benford was surprised by their aggressive actions and genders. He ran away from the room and went to the lobby, where the security guard called the police.

{¶23} Lastly, Doug Rohde, supervisor of chemistry and toxicology at the Lake County Crime Lab, testified as to the samples he had received and tested from the investigation, which included fluids and items found on the scene and fluids from Mr. Howard.

{¶24} At that point, the state rested and the defense made a Crim.R. 29 motion for acquittal, arguing there was no evidence to indicate Mr. Howard did not voluntarily go

to the hotel with Ms. Harris with the full expectation that sexual activity would take place and further that Mr. Howard had vomited when Ms. Harris was not present; thus, the charge of involuntary manslaughter could not stand. The court overruled the motion, finding that the state had submitted sufficient evidence on each and every element of the six charges as set forth in the indictment. The defense rested without presenting evidence. The court denied Ms. Harris' renewed Crim.R. 29 motion.

{¶25} The judge read the agreed-upon jury instructions to the jury, which included an instruction for involuntary manslaughter. When describing the jury verdict form, the court instructed the jury that counts 2 and 3 (the unclassified and first degree misdemeanor offenses involving underage persons, respectively) needed to be completed before count 1 (involuntary manslaughter), since they were prerequisites to the jury's consideration of count 1.

{¶26} The jury returned guilty verdicts on count 1 (involuntary manslaughter), count 2 (offenses involving underage persons in violation of R.C. 4301.69(A)), and count 3 (offenses involving underage persons in violation of R.C. 4301.69(C)) and not guilty verdicts on the two counts of rape and the count of sexual battery.

{¶27} Ms. Harris was sentenced to 36 months in prison and fined $1,000 on count 1 and $500 on count 2.

{¶28} Ms. Harris filed an appeal, which we remanded because the trial court's sentence was silent as to count 3. Accordingly, the trial court held a "continuation of sentencing" hearing, where the court reviewed Ms. Harris' prior sentencing and then sentenced Ms. Harris on count 3 to a 180-day jail sentence concurrent to the 36-month prison sentence on count 1 and imposed a $500 fine.

{¶29} Ms. Harris raises six assignments of error for our review:

{¶30} "[1.] The trial court committed plain error and denied the defendant-appellant her constitutional rights to due process and fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution when it told the jury panel that the defendant-appellant engaged in conduct that constituted elements of the crimes charged.

{¶31} "[2.] The defendant-appellant was deprived of her constitutional rights to due process and fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution when the trial court failed to give an accurate jury instruction with respect to the elements of involuntary manslaughter.

{¶32} "[3.] The trial court committed plain error and denied the defendant-appellant her constitutional rights to due process, fair trial and confrontation of witnesses under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 10 and 16 of the Ohio Constitution when it allowed a Mentor police detective to testify to the meaning of the social media communications and text messages between the decedent and defendant-appellant.

{¶33} "[4.] The defendant-appellant's constitutional rights to due process and fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution were prejudiced by the ineffective assistance of trial counsel.

{¶34} "[5.] The trial court erred to the prejudice of the defendant-appellant when it denied her motion for acquittal under Crim.R. 29(A).

{¶35} "[6.] The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty on counts one, two and three, against the manifest weight of the evidence."

Plain Error Standard of Review

{¶36} In her first three assignments of error, Ms. Harris contends that despite her failure to object at trial, the trial court committed reversible plain error.

{¶37} Thus, we review these three assignments of error for plain error, which "'does not exist unless it can be said that, but for the error, the outcome of the trial would clearly have been otherwise.'" (Citations omitted.) *State v. Crytzer*, 11th Dist. Ashtabula No. 2018-A-0077, 2019-Ohio-2285, ¶37, *motion for leave to file delayed appeal granted*, 157 Ohio St.3d 1427, 2019-Ohio-4003, *appeal not accepted*, 157 Ohio St.3d 1511, 2019-Ohio-5193; Crim.R. 52(B).

Jury Instructions Prior to Voir Dire

{¶38} Ms. Harris asserts in her first assignment of error that she was denied a fair trial when the court told the jury pool that she engaged in conduct that constituted elements of the crime charged. She further submits that the court's standard cautionary instruction that it read to the jury at the conclusion of trial was insufficient to remedy the prejudice resulting from the error.

{¶39} Pursuant to R.C. 2945.03, "[t]he judge of the trial court shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding matters in issue." *State v. Smith*, 11th Dist. Portage Nos. 2006-P-0101 & 2006-P-0102, 2008-Ohio-3251, ¶40; *see also State v.*

Miller, 11th Dist. Trumbull No. 2004-T-0092, 2005-Ohio-5283, ¶20. Further, in presiding over a trial, a judge must be cognizant of the effect of his or her remarks upon the jury. *Smith* at ¶40, citing *State v. Wade*, 53 Ohio St.2d 182, 187 (1978). However, this does not imply a judge is precluded from making remarks during the course of a trial. (Citation omitted.) *Id.* An appellate court reviewing the propriety of a judge's remarks before a jury must determine whether the comments were prejudicial to a defendant's right to a fair trial. *Id.*, citing *Wade* at 188; *see also Miller* at ¶21.

{¶40} To aid in this determination, the Supreme Court of Ohio has stated that courts shall adhere to the following rules: "(1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel." *Id.* at ¶41, quoting *Wade* at 188.

{¶41} A trial court's instructions to a jury are addressed in Crim.R. 30(B):

{¶42} "Cautionary Instructions. At the commencement and during the course of the trial, the court may give the jury cautionary and other instructions of law relating to trial procedure, credibility and weight of the evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the case."

{¶43} A review of the court's remarks under the *Wade* factors reveals Ms. Harris failed to establish either error or prejudice from the trial court's challenged introductory comments. The record reveals the court was providing enough facts regarding the

incident to determine whether any of the potential jurors had any previous knowledge of the case given the pretrial publicity. The court preceded its introduction by giving enough detail about the case to give context to some of the questions the judge expected counsel to ask during voir dire.

{¶44} The court then stated: "On December 21st, 2017 Mentor Police and Fire responded to the Wood Springs Motel for an unresponsive nineteen year old named Tre-Von Howard. He was with the Defendant, Quinton Harris, who rented the room and provided the alcohol which was 151 proof rum."

{¶45} The judge went on to explain the state's charges, that Ms. Harris was denying those charges, and that "there may be some discrepancy between what I tell you at the end of the case from what I tell you at the beginning of the case. It's what I tell you at the end of the case after I've heard the evidence that controls your deliberations, and what you would decide as jurors for your verdict[.] * * * I'm providing this information to find out whether any of you has any previous knowledge of this case. It's my understanding that there was a certain amount of publicity that accompanied this case at the time in December, and probably somewhere around the summer of 2018. And so I'd like to know whether any of you saw anything on TV, in the newspaper, on social media, heard about it in the community, or has any previous knowledge of anything about this case prior to the moment that you walked into the courtroom here. And if you can indicate that by a show of hands."

{¶46} As a part of the closing instructions, the court stated that "[i]f during the course of the trial the Court, meaning the Judge, said or did anything that you consider an indication of the Court's view on the facts, you are instructed to disregard it."

{¶47} Ms. Harris relies heavily on our decision in *Smith*, *supra*, where we found the trial court's comments denied the appellant a fair trial. *Id*. at ¶78. The trial judge in *Smith* instructed defense counsel to stop examining the arresting officer on a field sobriety test because the court had previously "determined that these tests were done in accordance with NHTSA standards." *Id*. at ¶39. The court then later interrupted defense counsel during his closing argument to the jury. *Id*. at ¶57.

{¶48} We found that the judge's remarks as to field sobriety test compliance were "tantamount to a legal declaration that the state has met its burden and the jury should therefore find the defendant guilty." *Id.* at ¶54. We observed that even if defense counsel had been permitted to continue cross-examining the officer on the field sobriety test's standards, "the value and impact of any such line of questioning (or any previous cross-examination) likely would have been abrogated by the court's comment." *Id.* at ¶53. Lastly, we noted that the trial court, in the jury's presence, "unnecessarily upbraided defense counsel and caustically criticized his professional reputation during closing arguments." *Id.* at ¶57.

{¶49} We find *Smith* factually distinguishable. This case is more akin to *State v. Oliver*, 11th Dist. Portage No. 2010-P-0017, 2012-Ohio-122, where we found the trial court's characterization of the case was "not giving her own views or opinion with respect to whether an elderly gentleman was 'killed' during a 'home invasion.' Rather the trial judge was merely portraying the pretrial media coverage surrounding th[e] case to determine whether the jurors were exposed to the coverage." *Id.* at ¶41. And, as in this case, the court "instructed the jury that they were to decide this case only upon the evidence presented at trial." *Id.* at ¶43. The trial court had made the specific comment

to each of the 12 empaneled jurors. *Id.* at ¶44. The appellant failed to show error or that he was prejudiced. *Id.*

{¶50} Similarly, here, the trial court described the facts presented in the media and explained the description was given to determine if any of the potential jurors were familiar with the case due to pretrial publicity. Ms. Harris has failed to show error or that she was prejudiced by the court's remarks.

{¶51} Ms. Harris's first assignment of error is without merit.

Involuntary Manslaughter Jury Instruction

{¶52} In her second assignment of error, Ms. Harris contends the trial court committed reversible plain error when it presented the jury with an inaccurate and misleading jury instruction regarding which predicate offenses would support a conviction for involuntary manslaughter.

{¶53} "As a general rule, a defendant is entitled to have the jury instructed on all elements that must be proved to establish the crime with which he is charged, and, where specific intent or culpability is an essential element of the offense, a trial court's failure to instruct on that mental element constitutes error." (Footnote omitted.) *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, ¶17, quoting *State v. Adams*, 62 Ohio St.2d 151, 153 (1980). However, in *Adams*, the Supreme Court of Ohio held that the failure to instruct on each element of an offense is not necessarily reversible as plain error. *Id*. at paragraph two of the syllabus. Rather, an appellate court must review the instructions as a whole and the entire record to determine whether a manifest miscarriage of justice has occurred as a result of the error in the instructions. *Id*. at paragraph three of the syllabus.

{¶54} The Supreme Court of Ohio has rejected the concept that structural error exists in every situation in which even serious error occurred. *Id.* at ¶18; *see State v. Hill,* 92 Ohio St.3d 191, 199 (2001), quoting *Johnson v. United States,* 520 U.S. 461, 466 (1997).

{¶55} To rise to the level of plain error, the jury instructions must render the trial so "fundamentally unfair that it could not be a reliable vehicle for the determination of the defendant's guilt or innocence." *Id.* at ¶24.

{¶56} Ms. Harris is correct in her assertion that the trial court erred in instructing the jury on the correct predicate offense that supports a conviction for involuntary manslaughter when it reviewed the verdict form during instructions. More specifically, the trial court instructed the jury as follows: "[n]ow you can probably tell as I work through the instructions that Count 1 [involuntary manslaughter] shouldn't be the one you do first. Counts 2 and 3 need to be done first. Because if you don't find the Defendant guilty on *Counts 2 and 3* [s]he can't possibly be found guilty on Count 1. So *Counts 2 and 3 are prerequisites* to your consideration of Count 1. So you should do Counts 2 and 3 first, then go to Count 1 ." (Emphasis added.)

{¶57} A review of the written jury instructions and the verdict form also reveals the trial court erred in its written charge on involuntary manslaughter. Both state: "[you must/we (respectively)] find beyond a reasonable doubt that on or about the 20th and 21st days of December 2017, and in Lake County, Ohio, the defendant caused the death of Trevon R. Mcdowell Howard, as a proximate result of committing or attempting to commit *either or both of the charged misdemeanors* set forth and defined in Counts 2 and 3 below, namely Offenses Involving Underage Persons, both misdemeanors."

{¶58} Counts 2 and 3, both counts of sale of beer or intoxicating liquor to underage persons, were charged in the indictment under different subsections – R.C. 4301.69(A) and R.C. 4301.69(C).

{¶59} Count 2, alleging a violation of R.C. 4301.69(A), is an unclassified misdemeanor. Pursuant to R.C. 4301.99(I), "[w]hoever violates division (A) of section 4301.69 * * * of the Revised Code is guilty of a misdemeanor, shall be fined not less than five hundred and not more than one thousand dollars, and, in addition to the fine, may be imprisoned for a definite term of not more than six months."

{¶60} Count 3, alleging a violation of R.C. 4301.69(C) is a first-degree misdemeanor. Pursuant to R.C. 4301.99(C), "whoever violates * * * division * * * (C) * * * of section 4301.69 * * * of the Revised Code is guilty of a misdemeanor of the first degree."

{¶61} Pursuant to R.C. 2903.04(B), "involuntary manslaughter," "[n]o person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit *a misdemeanor of any degree, a regulatory offense, or a minor misdemeanor* other than a violation of any section contained in Title XLV of the Revised Code that is a minor misdemeanor and other than a violation of an ordinance of a municipal corporation that, regardless of the penalty set by ordinance for the violation, is substantially equivalent to any section contained in Title XLV of the Revised Code that is a minor misdemeanor."

Classifications of Misdemeanors

{¶62} Prior to its amendment in 1994, R.C. 2903.04(B) did not specify the degrees or classifications of misdemeanors; thus the statute read: "[n]o person shall cause the

death of another as a proximate result of the offender's committing or attempting to commit *a misdemeanor*." (Emphasis added.)

{¶63} As one commentator has noted, at one time, the Supreme Court of Ohio had ruled that a minor misdemeanor could not serve as the underlying predicate offense for involuntary manslaughter. Katz, Martin & Macke, *Baldwin's Ohio Practice Criminal Law*, Section 95:12 (3d Ed.), citing *State v. Collins*, 67 Ohio St.3d 115 (1993), and *State v. Kuhajda*, 67 Ohio St.3d 450 (1993). The statute, however, was since amendedafter *Collins was decided.*. *Id*.

{¶64} Notably absent from the amended involuntary manslaughter statute is the term "unclassified misdemeanor" or the unqualified term "misdemeanor." The statute specifies "misdemeanor of any degree" and "minor misdemeanor." R.C. 2903.04(B).

Unclassified Misdemeanors

{¶65} Pursuant to R.C. 2901.02(A), "classification of offenses," offenses include "aggravated murder, murder, felonies of the first, second, third, fourth, and fifth degree, misdemeanors of the first, second, third, and fourth degree, minor misdemeanors, and offenses not specifically classified."

{¶66} An offense that is not specifically classified is a minor misdemeanor if (1) it is an offense committed prior to January 1, 2004, and has a fine up to $100, or (2) it is an offense committed on or after January 1, 2004, that has a fine not exceeding $150, community service under R.C. 2929.27(D), or a financial sanction other than a fine under R.C. 2929.28. *See* R.C. 2901.02(G).

{¶67} In *State v. Talameh*, 11th Dist. Portage No. 2011-P-0074, 2012-Ohio-4205, we discussed how the degree of misdemeanor (or lack thereof) was crucial to determine

the appellant's request to seal his juvenile record – if one is convicted of an unclassified misdemeanor, the offender is eligible for an expungement; however, under the same statute, if an offender is convicted of a first degree misdemeanor, the offender's record cannot be expunged. *Id*. at ¶33.

{¶68} Thus, we explained that:

{¶69} "R.C. 4301.99 specifies the degree and penalty for offenses involving violations of liquor control law. For liquor control offenses involving underage persons proscribed by R.C. 4301.69, the degree of the offenses are expressly set forth in R.C. 4301.99. Notably, division (A) of R.C. 4301.69 * * * has a different degree designation than conduct proscribed by the other divisions in R.C. 4301.69.

{¶70} "Regarding offenses proscribed by divisions (B), (C), (D), (E)(1), and (F) of R.C. 4301.69, R.C. 4301.99(C) states: 'Whoever violates * * * division (B), (C), (D), (E)(1), or (F) of section 4301.69 * * * is *guilty of a misdemeanor of the first degree*.' (Emphasis added.)

{¶71} "Regarding division (A) of R.C. 4301.69, * * * R.C. 4301.99(I) states: 'Whoever violates division (A) of section 4301.69 * * * is (italics) *guilty of a misdemeanor*, shall be fined not less than five hundred and not more than one thousand dollars, and, in addition to the fine, may be imprisoned for a definite term of not more than six months.' (Emphasis added.)

{¶72} "These two divisions stand in sharp contrast to each other. It appears that the General Assembly singled out division (A) and left it unclassified, while it designated offenses proscribed by the other divisions of R.C. 4301.69 as a misdemeanor of the first degree.

{¶73} "We note that misdemeanors began to be classified by degree in 1974. See (italics) *State v. Ricks*, 194 Ohio App.3d 511, 2011-Ohio-3866, ¶ 19 (2d Dist.). Various offenses remain unclassified, however. *State v. Williams*, 7th Dist. No. CA 221, 2002-Ohio-5022, ¶ 17, citing *State v. Quisenberry*, 69 Ohio St.3d 556, 557 (1994). 'An unclassified misdemeanor is an offense which is not specifically labeled and for which a penalty of incarceration not exceeding one year may be imposed.' *Williams* at ¶ 16, citing R.C. 2901.02(F). The legislature typically leaves an offense unclassified 'when it assigns penalties which vary from those in the general penalty-listing statute.' *Williams* at ¶ 17. While the term of incarceration for [a] misdemeanor of the first degree is 'not more than one hundred eighty days,' R.C. 2929.24(A)(1), the term for a defendant convicted of an unclassified misdemeanor can be one year of incarceration. R.C. 2901.02(F)." *Id*. at ¶28-32. *See also Ricks* at 516 ("Although the potential penalty for an unclassified misdemeanor is more serious than the penalty for a first-degree misdemeanor, nothing in R.C. 2953.36(C) precludes the sealing of a conviction for an unclassified misdemeanor. The failure to prohibit the sealing of unclassified misdemeanors may have been a legislative oversight, but we are not at liberty to rewrite an unambiguous statute such as R.C. 2953.36(C)").

{¶74} Likewise, the General Assembly's failure to specifically include unclassified misdemeanors in the involuntary manslaughter statute may have been an oversight, but as we did in *Talameh*, we will apply the plain language of the pertinent statute without resort to unnecessary statutory interpretation.

Harmless Error

{¶75} As we found in *Talameh*, the two divisions of R.C. 4301.69 stand in sharp contrast to each other. It appears that the General Assembly singled out division (A) and left it unclassified, while it designated offenses proscribed by the other divisions of R.C. 4301.69 as misdemeanors of the first degree.

{¶76} Thus, Count 3 (R.C. 4301.69(C)) is the only qualifying misdemeanor under the involuntary manslaughter statute since it is a first-degree misdemeanor, thus qualifying it as a predicate "*misdemeanor of any degree* or regulatory offense or minor misdemeanor" under R.C. 2903.04(B). (Emphasis added).

{¶77} A review of the jury's verdicts, however, reveals the court's erroneous instruction is harmless. As the Supreme Court of Ohio aptly stated in *Wamsley*, "this case does not present a violation of a fundamental constitutional right that would lead to the kind of basic unfairness amounting to structural error * * *." *Id.* at ¶24. Arguably, one could say the trial court erred in Ms. Harris's favor since in order to find her guilty of involuntary manslaughter, they were required to find her guilty on two counts instead of one. Quite simply, there is nothing in this record demonstrating that but for the court's erroneous jury instruction, the jury's verdict on the involuntary manslaughter count would have been otherwise.

{¶78} Ms. Harris failed to show the trial court's error in the jury verdict form instruction rose to a structural and reversible error.

{¶79} Ms. Harris's second assignment of error is without merit.

"Slang" Definition Testimony

{¶80} In her third assignment of error, Ms. Harris argues no expert foundation was laid for Det. Malainy's opinion testimony and that it was error to allow him to give opinion

testimony as to the meaning of certain words, phrases, and images used in the social media communications and text messages between the victim and Ms. Harris. As a result, she argues she was denied a fair trial and the right to confrontation of witnesses.

Lay Witness

{¶81} A witness may testify as an expert if: "(A) the testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons; (B) the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education on the subject matter; and (C) the testimony is based on reliable scientific, technical, or other specialized information." *State v. Carter*, 7th Dist. Mahoning No. 15 MA 0225, 2017-Ohio-7501, ¶88, citing Evid.R. 702 (with additional rules for test results).

{¶82} A lay witness can also provide an opinion. Evid.R. 701 provides: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *Id.*, quoting Evid.R. 701.

{¶83} "[A] police officer is permitted to testify concerning his own expertise as to the behavioral and language patterns of people commonly observed on the streets, including people associated with criminal activities, in a manner helpful for the jury's clear understanding of the factual issues involved." (Citations omitted.) *Id.* at ¶89.

{¶84} For example in *State v. Barnett*, 10th Dist. Franklin No. 92AP-345, 1992 WL 246000 (Sept. 22, 1992), the Tenth District determined that "the police officer's knowledge of the slang terminology usually accompanying drug transactions is permissible." *Id*. at

*2. Similarly, in *State v. Mason*, 5th Dist. Stark No. 2003CA00438, 2004-Ohio-4896, the Fifth District found that a detective was permitted to testify under Evid.R. 602 and 701 that the term "40" in certain contexts refers to $40 worth of crack cocaine. *Id.* at ¶23-35. And, in *State v. Scott*, 10th Dist. Franklin No. 90AP-255, 1990 WL 140548 (Sept. 27, 1990), the Tenth District found that a police officer could relate his knowledge of the slang terminology, nods, and gestures accompanying drug transactions. *Id*. at *5.

{¶85} A review of Det. Malainy's testimony is troubling because the line between translation and interpretation of communications in which one party to the communication is unavailable is a slippery slope. Overall, the detective's testimony appears to be "in a manner helpful for the jury's clear understanding of the factual issues involved" under Evid.R. 701. For example, the terms "scoop" and "whip" and the meaning of several emojis are not terms or images necessarily known by the average juror; it is information Det. Malainy gained through his own expertise as a detective who investigated the incident, and it is helpful for the jurors' understanding of what the victim and Ms. Harris were communicating to each other. *See Carter* at ¶89. Even if we were to find these messages inadmissible evidence, any error would be harmless, since that evidence was not the basis for her convictions.

{¶86} Ms. Harris cites to *State v. Rardon*, 5th Dist. Delaware No. 17 CAA 04 0027, 2018-Ohio-1935, in support of her argument, which also upheld as admissible a police detective's lay opinion testimony regarding phone text communications. *Id*. at ¶58. *Rardon*, however, supports the state's view of this opinion testimony since the court found the detective's admissible lay testimony was "rationally based on his perceptions and

helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *Id.*

{¶87} Similarly, here, Det. Malainy's testimony provided definitions of commonly used "slang" terms that are frequently used in text communications but may not be part of common knowledge. Thus, the jury was better able to understand the conversations between the victim and Ms. Harris. Further, just as in *Rardon*, the jury was allowed to view actual photographs of the Instagram and text messages that Det. Malainy took as a part of the state's evidence. *See id*. at ¶58.

Testimonial Statements

{¶88} Ms. Harris submits that while the text messages and social media communications themselves are nontestimonial in nature, and were properly authenticated when offered into evidence, Det. Malainy's translation of those messages was testimonial in nature. Thus, she argues Det. Malainy's testimony translating these messages should have been inadmissible since it violated the Confrontation Clause of the Sixth Amendment to the United States Constitution, and deprived her of the right to a fair trial.

{¶89} The Confrontation Clause affords a criminal defendant the right "to be confronted with the witnesses against him." Sixth Amendment to the U.S. Constitution. According to the Supreme Court of the United States, the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). The prominent issue is "what constitutes a testimonial statement: 'It is the testimonial character of the

statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.'" (Citations omitted.) *State v. Johnson*, 7th Dist. Mahoning No. 17 MA 0050, 2019-Ohio-1089, ¶25.

{¶90} We agree with Ms. Harris that there is a difference between merely defining slang versus interpreting a conversation where one of the witnesses is unavailable – and that the prospect of sliding from translation to interpretation is troubling. In this case, however, any error from allowing Det. Malainy's testimony as to the text messages and social media communications is harmless error since Ms. Harris's convictions did not rest on these communications. Further, the communications between Ms. Harris and Mr. Howard appear to have aided Ms. Harris in that they provided evidence that supports the jury's finding that their sexual encounter was consensual.

{¶91} Ms. Harris's third assignment of error is without merit.

Ineffective Assistance of Counsel

{¶92} In her fourth assignment of error, Ms. Harris argues her trial counsel was ineffective for failing to object to the trial court's errors in her first three assignments of error.

{¶93} Because we have separately addressed the underlying grounds for these three assignments of error and found them to be without merit, Ms. Harris' claims of ineffective assistance of counsel based upon the same grounds are likewise without merit. *Crytzer, supra,* at ¶51; *see State v. Henderson*, 39 Ohio St.3d 24, 33 (1988) ("The grounds which underlie each of these instances have already been separately addressed and found to be without merit. Accordingly, we need not address the counsel-

performance component of these grounds"); *see also State v. Hobbs*, 8th Dist. Cuyahoga No. 81533, 2003-Ohio-4338, ¶64.

{¶94} Ms. Harris's fourth assignment of error is without merit.

Sufficiency of the Evidence

{¶95} In her fifth assignment of error, Ms. Harris contends the state presented insufficient evidence to establish that the victim's death was the proximate result of Ms. Harris's conduct as alleged in counts 2 and 3.

{¶96} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Hope*, 11th Dist. Trumbull No. 2018-T-0053, 2019-Ohio-2174, ¶44, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶97} A sufficiency challenge requires this court to review the record to determine whether the state presented evidence on each of the elements of the offense. *Id.* at ¶45, citing *State v. Muncy*, 11th Dist. Ashtabula No. 2011-A-0066, 2012-Ohio-2830, ¶13. This test involves a question of law and does not permit us to weigh the evidence. *Id.*, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶98} As already noted, pursuant to R.C. 2903.04(B), "involuntary manslaughter," "[n]o person shall cause the death of another * * * as a proximate result of the offender's

committing or attempting to commit a misdemeanor of any degree, a regulatory offense, or a minor misdemeanor[.]

{¶99} Pursuant to R.C. 4301.69(C)(1), "[n]o person shall engage or use accommodations at a hotel * * * when the person knows or has reason to know * * * [t]hat beer or intoxicating liquor will be consumed by an underage person on the premises of the accommodations that the person engages or uses * * *."

{¶100} Thus, the state was required to prove that Ms. Harris caused the death of another as a proximate result of her using accommodations at a hotel when she knew that the underage victim would be consuming intoxicating liquor in that hotel room.

{¶101} There is no question the state carried its burden of production by putting forth evidence by way of witness testimony and physical evidence that Ms. Harris rented a hotel room for herself and Mr. Howard, that he was 19 years old at the time, and that they consumed Cruzan 151 rum, which Ms. Harris purchased. Further, the cause of death was a result of aspirating on gastric contents from acute ethanol intoxication, with a blood alcohol concentration of .310, which is nearly four times the legal limit of .08.

{¶102} When this evidence is taken together and viewed in a light most favorable to the state, a rational jury could reasonably conclude that Ms. Harris caused the death of another by furnishing alcohol to and consuming it with an underage victim in a hotel room she rented.

{¶103} Ms. Harris's fifth assignment of error is without merit.

Manifest Weight of the Evidence

{¶104} Lastly, Ms. Harris contends her conviction for involuntary manslaughter is against the manifest weight of the evidence because the evidence does not support a

finding that Ms. Harris was the proximate cause of Mr. Howard's death in that she was not present in the hotel room when he passed away from aspiration of gastric contents.

{¶105} "The Supreme Court of Ohio explained the criminal manifest-weight-of-the-evidence standard in *State v. Thompkins*, 78 Ohio St.3d 380 (1997). *See State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶25. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.*, citing *Thompkins* at 386. Sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id.*, citing *Thompkins* at 386-87. In other words, a reviewing court asks whose evidence is more persuasive—the state's or the defendant's? *Id.* Although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.*, citing *Thompkins* at 387. When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. *Id.*

{¶106} "A manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 390 (Cook, J., concurring). The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. A jury is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Fetty*, 11th Dist. Portage No. 2011-P-0091, 2012-Ohio-6127, ¶58. The

discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Fritts*, 11th Dist. Lake No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *Martin* at 175." *Hope* at ¶77-78.

{¶107} A review of the evidence presented at trial reveals the manifest weight of the evidence heavily supports the jury's verdict and does not suggest a miscarriage of justice or that the jury lost its way. Rather, as already noted in our discussion of Ms. Harris' fifth assignment of error, the state carried its burden of production and the jury was free to believe that Ms. Harris furnished and consumed alcohol with an underage person in a hotel room which culminated in his death due to aspiration of gastric contents due to excessive alcohol consumption. Simply because she was not present when he died does not mean the jury could not have found her action in providing the high-powered alcohol for him to drink was the proximate or foreseeable cause of Mr. Howard's death. The culpable mental state requisite for a conviction of involuntary manslaughter is the culpable mental state of the underlying misdemeanor. *State v. Voland*, 99 Ohio Misc.2d 61, 74 (C.P.1999), citing *Stanley v. Turner*, 6 F.3d 399 (6th Cir.1993).

{¶108} Stated differently, there was more than enough evidence from which a jury could find that "but for" Ms. Harris's furnishing of a hotel room and alcohol, the underage victim would not have died. Criminal conduct constitutes the "proximate cause" of a death when the conduct "(1) caused the result, in that but for the conduct, the result would not have occurred, and (2) the result [was] foreseeable." *State v. Jones*, 8th Dist. Cuyahoga Nos. 103290 & 103302, 2018-Ohio-498, ¶100, quoting *State v. Gibson*, 8th Dist. Cuyahoga No. 98725, 2013-Ohio-4372, ¶36, citing *State v. Muntaser*, 8th Dist. Cuyahoga No. 81915, 2003-Ohio-5809, ¶38. "Foreseeability is determined from the perspective of

what the defendant knew or should have known, when viewed in light of ordinary experience." *Id.*, quoting *Muntaser* at ¶38. "Results are foreseeable when the consequences of an action are 'natural and logical,' meaning 'that [they are] within the scope of the risk created by the defendant.' *Id.*, quoting *Muntaser* at ¶38, citing *State v. Losey*, 23 Ohio App.3d 93 (10th Dist.1985).

{¶109} The evidence supports the jury's verdict that Mr. Howard could die as a result of consuming a large amount of 75% alcohol by volume liquor in a hotel room, both of which Ms. Harris provided, was a foreseeable consequence "within the scope of the risk created by" Ms. Harris.

{¶110} Ms. Harris's sixth assignment of error is without merit.

Nunc Pro Tunc Correction Required

{¶111} Upon review of the sentencing judgment entry, we note that in declaring that the jury found Ms. Harris guilty on counts 1, 2, and 3, the court misstated the correct statutory reference number for count 3. Ms. Harris was found guilty of R.C. 4301.69(C) and not 4301.69(A) – as in count 2.

{¶112} In *State v. Bradford*, 4th Dist. Ross No. 16CA3531, 2017-Ohio-3003, the Fourth District found this same error to be merely a clerical error that does not render the conviction void or contrary to law. Thus, the court explained that: "[c]lerical errors, including ones involving a court's incorrect statutory reference in a sentencing entry, can be corrected by a nunc pro tunc entry." *Id.* at ¶23. The court cited to several cases, including *State v. Lattimore*, 1st Dist. Hamilton No. C-010488, 2002 WL 252451 (2002), which found "the trial court's internally inconsistent sentencing entry is a correctable clerical error." *Id.* at *1-2. And in *State v. Taylor*, 3d Dist. Seneca No. 13-10-49, 2011-

Ohio-5080, the Third District found that despite “innumerable errors” in the verdict forms and judgment entries, which included the trial court's citation to an incorrect Ohio Revised Code section, the errors were clerical in nature and correctable via a nunc pro tunc order. *Id.* at ¶52-53; *see also State v. Daley*, 3d Dist. Seneca No. 13-13-26, 2014-Ohio-2128, ¶1 (remanded case for correction of clerical errors included in the sentencing judgment entry). *Bradford* at ¶23.

{¶113} Because we conclude there is a clerical error in the sentencing entry, we remand to the trial court to correct the misstated statutory reference.

{¶114} The judgment of the Lake County Court of Common Pleas is affirmed, and this case is remanded for the court to correct the clerical error in the sentencing entry.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.