ORIGINAL

IN THE SUPREME COURT OF OHIO

SCOTTY R. MCDONALD,	:	12-1177
	:	
Appellant,	:	On Appeal from the
	:	Lawrence County Court
	:	of Appeals, Fourth
vs.	:	Appellate District
	:	
	:	
STATE OF OHIO,	:	Court of Appeals
	:	Case No. 11CA1
Appellee.	:	

NOTICE OF CERTIFIED CONFLICT

Todd A. Long (0082296) (COUNSEL OF RECORD)
The Owen Firm, LLC
5354 North High Street
Columbus, Ohio 43214
(614) 454-5010
Fax No. (614) 454-5030
tal@owenlawyers.com

COUNSEL FOR APPELLANT, SCOTTY R. MCDONALD

Brigham M. Anderson (0071874) (COUNSEL OF RECORD)
Assistant Lawrence County Prosecuting Attorney
Lawrence County Court House
Ironton, Ohio 45638
(740) 533-4360

COUNSEL FOR APPELLEE, STATE OF OHIO

FILED
JUL 13 2012
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT

Appellant Scotty R. McDonald hereby gives notice of certified conflict to the Supreme Court of Ohio from the judgment of the Lawrence County Court of Appeals, Fourth Appellate District, entered in Court of Appeals Case No. 11CA1 on June 13, 2012. Pursuant to S.Ct. Prac. R. 4.1, a copy of the court of appeals order certifying a conflict, a copy of the certifying court's opinion, and a copy of the conflicting court of appeals opinion are attached to this notice.

Respectfully submitted,

Todd A. Long

COUNSEL OF RECORD FOR APPELLANT,
SCOTTY R. MCDONALD

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail to counsel for appellee, Brigham M. Anderson, Assistant Lawrence County Prosecuting Attorney, Lawrence County Court House, Ironton, Ohio 45638 on July 13, 2012.

Todd A. Long

COUNSEL OF RECORD FOR APPELLANT,
SCOTTY R. MCDONALD

COURT OF APPEALS
2012 JUN 13 AM 11:05
MIKE PATTERSON
CLERK OF COURTS
LAWRENCE COUNTY

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 11CA1
vs.	:	
SCOTTY R. MCDONALD,	:	ENTRY ON MOTION TO CERTIFY CONFLICT
Defendant-Appellant.	:	

This matter now comes on for consideration of appellant's motion to certify a conflict to the Ohio Supreme Court for final resolution pursuant to App.R. 25 and Ohio Constitution, Article IV, Section 3(B)(4). We previously affirmed his conviction for failure to comply with the order of a police officer and causing a substantial risk of harm to persons/property, in violation of R.C. 2921.331(B)&(C)(5)(A)(ii). See State v. McDonald, Lawrence App. No. 11CA1, 2012-Ohio-1528.

In affirming appellant's conviction, we declined to follow a Third District case which held inclusion of the language set out in subpart (C)(5)(A)(ii) of R.C. 2921.331 was insufficient to sustain a third degree felony conviction under the statute. See State v. Schwable, Henry App. No. 7-09-03, 2009-Ohio-6523, at ¶¶20-22. The Schwable Court held that because the jury verdict failed to set forth the degree of the offense, the verdict failed to comply with R.C. 2945.75(A)(2) as well as State v. Pelfrey, 112 Ohio St.3d 422, 860 N.E.2d 735, 2007-Ohio-256. We found,

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however, that the jury's incorporation of language from subpart (C)(5)(a)(ii) was, in fact, sufficient to comply with R.C. 2945.75(A)(2) and Pelfrey. That said, we acknowledged our conflict with the Schwable case and indicated that we would entertain a motion to certify that conflict to the Ohio Supreme Court. See McDonald, supra at ¶9, fn. 2. Accordingly, appellant's motion is well taken and is hereby sustained.

We thus certify the following question to the Ohio Supreme Court for final resolution: Is the inclusion of the "substantial risk of serious physical harm to persons or property," language from R.C. 2921.331(B)(5)(a)(ii) sufficient to sustain a third degree felony conviction under that statute when the verdict fails to set forth the degree of the offense?

Kline, J. & McFarland, J.: Concur

IT IS SO ORDERED

BY: Peter B. Abele
Presiding Judge

COURT OF APPEALS

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MIKE PATTERSON
CLERK OF COURTS
LAWRENCE COUNTY

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 11CA1
vs.	:	
SCOTTY R. MCDONALD,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: James D. Owen and Todd A. Long, 5354 North High Street, Columbus, Ohio 43214

COUNSEL FOR APPELLEE: J.B. Collier, Jr., Lawrence County Prosecuting Attorney, and Brigham M. Anderson, Lawrence County Assistant Prosecuting Attorney, Lawrence County Courthouse, 111 South Fourth Street, Ironton, Ohio 45638-1521

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, P.J.

This is an appeal from a Lawrence County Common Pleas Court judgment of conviction and sentence. A jury found Scotty R. McDonald, defendant below and appellant herein, guilty of failure to comply with the order of a police officer and, in doing so, causing a substantial risk of harm to persons or property, in violation of R.C. 2921.331(B)&(C)(5)(A)(ii).

Appellant assigns the following errors for review:

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FIRST ASSIGNMENT OF ERROR:

"THE VERDICT FORM AND THE RESULTING JUDGMENT ENTRY WERE INSUFFICIENT UNDER OHIO REVISED CODE SECTION 2945.75 TO SUPPORT MCDONALD'S CONVICTION AND SENTENCE FOR FAILURE TO COMPLY WITH AN ORDER OR SIGNAL OF A POLICE OFFICER, AS A FELONY OF THE THIRD DEGREE."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT INSTRUCTED THE JURY ON RECKLESSNESS, WHICH RESULTED IN A SUBSTANTIAL AND INJURIOUS AFFECT ON MCDONALD'S RIGHTS."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PLAIN ERROR IN PERMITTING THE STATE TO ELICIT TESTIMONY ABOUT MCDONALD'S POST-ARREST SILENCE IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AND BY ALLOWING THE STATE TO COMMENT ON THE SILENCE IN CLOSING."

FOURTH ASSIGNMENT OF ERROR:

"THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE APPEALED TO THE JURY TO ACT AS THE COMMUNITY CONSCIENCE IN VIOLATION OF MCDONALD'S RIGHT TO A FAIR TRIAL."

FIFTH ASSIGNMENT OF ERROR:

"MCDONALD WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL BY INEFFECTIVE ASSISTANCE OF COUNSEL."

SIXTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE ELEMENTS OF THE OFFENSE HAD NOT BEEN PROVEN."

In the early morning hours of September 30, 2010, Coal Grove Police Sergeant Gleo Runyon was pointing a radar gun at traffic

on Route 52. Sgt. Runyon soon clocked a vehicle driving west, toward Ironton, at 112 miles per hour. Sgt. Runyon thereupon activated his lights and siren and began to pursue the vehicle.

Eventually, Sgt. Runyon caught up to the vehicle at the Coal Grove off-ramp, but the vehicle did not stop. Instead, the driver ran a stop sign, as well as several red lights. Sgt. Runyon continued pursuit, at approximately 85 miles per hour, into Ironton. At some point, the vehicle blew a tire and came to a stop. Sgt. Runyon arrested appellant and transported him to the Ironton Police Department. A breath test revealed a 0.163 alcohol content.

On October 25, 2010, the Lawrence County Grand Jury returned an indictment that charged appellant with the aforementioned offense. At the jury trial, Sgt. Runyon testified to chasing appellant through Ironton at a speed of 85 miles per hour. He told the jury that the chase gave him reason for "alarm" as appellant was approaching an establishment named "Shenanigans," where there "appeared to be five or six people standing out on the sidewalk." Sgt. Runyon stated that he activated another siren on his cruiser to warn those people.

At the conclusion of the trial, the jury returned a guilty verdict and the trial court sentenced appellant to serve four years in prison. This appeal followed.

I

In his first assignment of error, appellant asserts that the verdict against him is deficient. In particular, he cites R.C. 2945.75[1] and State v. Pelfrey, 112 Ohio St.3d 422, 860 N.E.2d 735, 2007-Ohio-256, wherein the Ohio Supreme Court vacated a conviction on a greater degree of an offense because the verdict form did not set out the degree of the offense, nor did it list the aggravating factors that elevated the offense. Appellant argues that the verdict form in this case is equally deficient.

Although appellant correctly points out that the verdict form in the case sub judice does not set forth the degree of the offense, it does state that appellant's failure to comply with the police officer's order "Caused A Substantial Risk of Serious Physical Serious Harm to Persons or Property." Under the statute, the least degree of the offense for failing to comply with the direction of police is a first degree misdemeanor. R.C. 2921.331(C)(2)&(3). However, the offense becomes a third degree felony when, inter alia, a trier of fact determines that a defendant's actions caused a "substantial risk of serious physical harm to persons or property." Id. at (B)(5)(a)(ii). Here, the jury verdict incorporated the foregoing language from

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[1] R.C. 2945.75(A)(2) states "[a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

the statute and, thus, satisfied R.C. 2945.75 and Pelfrey. Although technically obiter dicta, we further note that this is the same conclusion our Fifth District colleagues reached in State v. Garver, Holmes App. No. 10-CA-11, 2011-Ohio-2349, at ¶20.

Appellant cites State v. Schwable, 2009-Ohio-6523, Henry App. No. 7-09-03, 2009-Ohio-6523, at ¶¶20-22, wherein the Third District held that a verdict that contained the "substantial risk" language of R.C. 2921.331(C)(5)(a)(ii) was "meaningless" if the verdict form did not also set out that the defendant "willfully" fled or eluded police. We, however, decline to follow Schwable. Admittedly, the "willfully" mens rea, which must be found for a violation of R.C. 2921.331(B), does not exist for a violation of R.C. 2921.331(A). Nevertheless, a violation of subsection (B) of the statute is every bit as much a first degree misdemeanor as is a violation of subsection (A), but with two exceptions. Id. at (C)(3). Those exceptions include circumstances set out in "divisions" (C)(4)&(C)(5) of the statute. Id. at (C)(3). Thus, the type of aggravating elements to which the Ohio Supreme Court referred to in Pelfrey would be contained in those sub-divisions, rather than subsection (B) which includes the "willfully" fleeing or eluding elements.

In short, it is not the element of "willfully" fleeing or eluding that elevates the crime from a first degree misdemeanor

to a third degree felony but, rather, the fact that the defendant is causing a substantial risk of physical harm to person/property. Because that language from the statute was included in the jury verdict, we conclude that verdict complied with R.C. 2945.75 and Pelfrey.[2]

Accordingly, we hereby overrule appellant's first assignment of error.

II

Appellant's second assignment of error involves the jury instructions. In particular, appellant cites the trial court's definition for a reckless mental state when, as noted above, willfulness is the mens rea required for commission of this particular offense. Appellant concedes, however, that no objection was lodged to the instruction, but asserts that we should find plain error.

Generally, notice of plain error under Crim.R. 52(B) must be taken with the utmost of caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. State v. Gardner, 118 Ohio St.3d 420, 889 N.E.2d 995, 2008-Ohio-2787, at ¶78; also see State v. Puckett, 191 Ohio App.3d 747, 947 N.E.2d 730, 2010-Ohio-6597 at ¶14; State v. Patterson, Washington App. No. 05CA16, 2006-Ohio-1902, at ¶14. Furthermore, "[a] silent

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[2] We concede that this case conflicts with Schwable. Thus, we will entertain a motion to certify a conflict for final resolution.

defendant has the burden to satisfy the plain-error rule[,] and a reviewing court may consult the whole record when considering the effect of any error on substantial rights." State v. Rizer, Meigs App. No. 10CA3, 2011-Ohio-5702, at ¶26; State v. Davis, Highland App. No. 06CA21, 2007-Ohio-3944, at ¶22.

Although it is unclear why a definition for recklessness was included in the jury instructions, we conclude that it did not affect a substantial right or inflict a miscarriage of justice. The trial court gave the definition for recklessness, but did not instruct the jury that it should apply that definition and determine whether appellant behaved recklessly. The court did, in fact, correctly define "willfully" for the jury and, as the following portion of the transcript reveals, instructed the jury to apply that particular mens rea in reaching its verdict:

> "The defendant is charged in Count One with failing to comply with an order or signal of a police officer. Before you can find the defendant guilty, you must find beyond a reasonable doubt that Scotty R. McDonald . . . did operate a motor vehicle so to willfully elude or flee a police officer after receiving a visible or audible signal from a police officer to bring his motor vehicle to a stop and the operation of said motor vehicle caused a substantial risk of serious physical harm to persons or property." (Emphasis added.)

In sum, although the trial court did define recklessness for the trier of fact, the court actually instructed the jury to determine if appellant had acted willfully. The court did not ask the jury to determine if appellant behaved recklessly. Thus, any negative impact from the extraneous definition in the

instructions is speculative at best and, thus, does not warrant a finding of plain error.

Accordingly we hereby overrule appellant's second assignment of error.

III

Appellant's third assignment of error involves Officer Runyon's testimony, as well as comments from the assistant prosecutor during closing argument, that appellant claims violated his Fifth Amendment rights. The first such instance involves the colloquy between Sgt. Runyon and the prosecution:

> "Q. * * * Did you arrest him right away?
>
> A. Yes I did.
>
> Q. Okay, did you notice anything else about him when you arrested him?
>
> A. Yes, I did. I smelt the odor of what seemed to be an alcoholic beverage coming off his person and asked him if he had been drinking which he just kind of shrugged his shoulders and mumbled, didn't want to comply or answer any questions for me." (Emphasis added.)

Appellant argues that this answer constitutes an impermissible comment on appellant's exercise of the constitutional right to remain silent and this constitutes plain error. The prosecution counters that it is unclear when appellant was arrested and whether Sgt. Runyon actually referred to appellant's post-arrest silence.

We believe that the transcript reveals that appellant was arrested "right away" after he exited his vehicle. Nevertheless, the precise timing of appellant's arrest is largely irrelevant as the Ohio Supreme Court has held that evidence of pre-arrest silence is generally inadmissible. See State v. Leach, 102 Ohio St.3d 135, 807 N.E.2d 335, 2004-Ohio-2147, at the syllabus. Furthermore, it appears that the comment suggests appellant's guilt. That said, we are not persuaded that this constitutes error, let alone plain error. The gist of Leach is that such testimony cannot be introduced as "substantive evidence" of guilt of the crime for which a defendant is being tried. Here, the trial involved an alleged violation of R.C. 2921.331, not R.C. 4511.19. Intoxication or alcohol consumption is not an element of the offense and, thus, Sgt. Runyon's testimony did not supply any substantive evidence of guilt. We also believe it speculative that the testimony caused appellant prejudice.

We also find no merit to appellant's arguments concerning alleged improper comments made during the prosecution's closing argument. During cross-examination, Sgt. Runyon was asked how he could be sure that appellant saw his "signal" to stop. When he was asked if he was one hundred percent sure appellant had seen the signal, Sgt. Runyon demurred. During closing argument, the prosecution alluded to this testimony with the following comment:

> "Now you heard [defense counsel] ask Officer Runyon, were you a hundred percent sure that [appellant] saw

> and heard your siren? The Officers said well, I'm not a hundred percent sure, I can't tell for sure, he never said that he did it, that he heard it." (Emphasis added.)

To begin, we are unsure whether this is a comment on appellant's silence or a mischaracterization of the testimony altogether. Although we located that portion of the cross-examination when Sgt. Runyon admitted to not being one hundred percent sure that appellant heard the siren, we cannot find any testimony where Runyon said appellant never said that he heard it. Indeed, the actual testimony of Sgt. Runyon is that he simply "assume[d] appellant heard the signal." We also believe that common sense does appear to support Runyon's view of the matters.

Moreover, appellant has not persuaded us that any of this caused appellant prejudice. Sgt. Runyon's admission on cross was actually damaging to the prosecution's case. If appellant did not hear or see any signal to stop, then he could not be said to have willfully evaded police. Thus, we are not persuaded that plain error under Crim.R. 52(B) is present in the case sub judice.

For these reasons, we hereby overrule appellant's third assignment of error.

IV

In his fourth assignment of error, appellant argues that a prosecution comment in its closing argument constitutes

prosecutorial misconduct. Once again because appellant did not object to the comment he has waived all but plain error.

The standard generally applied to evaluate a prosecutorial misconduct claim is whether the remarks were improper, and, if so, whether they prejudicially affected the accused's substantial rights. State v. Lang, 129 Ohio St.3d 512, 954 N.E.2d 596, 2011-Ohio-4215, at ¶155; State v. Smith (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. The touchstone of analysis is the fairness of the trial, not culpability of the prosecutor. Lang, supra at ¶155; State v. Trimble, 122 Ohio St.3d 297, 911 N.E.2d 242, 2009-Ohio-2961, at ¶200.

In the case sub judice, the alleged improper remark is as follows:

> "And we ask when you retire to that Jury Room that you take that jury form and you tell the defendant that you can't do this in our county. You can't drive in excess of eighty miles per hour and run through stop signs and run through red lights in order to get away from a police officer because you're drunk."

Appellant argues that this is the sort of "send a message" argument that this Court has previously looked askance. See e.g. State v. Smith, Highland No. 09CA29, 2010-Ohio-4507, at ¶68; State v. Turner, Scioto App. No. 08CA3234, 2009-Ohio-3114, at ¶47. As we noted in Smith, these sorts of arguments "typically rely on community outrage and invite the jury to render a verdict based on the outrage rather than the facts of the case." 2010-Ohio-4507, at ¶68. Here, however, the uncontroverted evidence

reveals that appellant did drive in excess of eighty miles per hour and did ignore numerous stop signs and red lights. In other words, the prosecutions's argument was tailored to the facts adduced at trial rather than community passions.

Further, claims of prosecutorial misconduct must also be examined in the context of the entire trial. State v. Burns, Stark App. No. 2010CA279, 2011-Ohio-815, at ¶21; State v. Dyer, Scioto App. No. 07CA3163, 2008-Ohio-2711, at ¶34.

Thus, in the case sub judice, appellant has not persuaded us that the prosecution's remarks were impermissible, let alone reach the level of plain error.

For all these reasons, we hereby overrule appellant's fourth assignment of error.

V

Appellant's fifth assignment of error asserts that his conviction must be reversed because he received constitutionally ineffective assistance from trial counsel.

Our analysis begins with the settled premise that a criminal defendant has a constitutional right to counsel, and this right includes the right to effective assistance from counsel. McMann v. Richardson (1970), 397 U.S. 759, 771, 25 L.Ed.2d 763, 90 S.Ct. 1441,; also see State v. Pierce, Meigs App. No. 10CA10, 2011-Ohio-5353, at ¶18. To establish a claim of ineffective assistance of counsel, a defendant must show that (1) his

counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. See e.g. Strickland v. Washington (1984), 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052; also see State v. Perez, 124 Ohio St.3d 122, 920 N.E.2d 104, 2009-Ohio-6179, at ¶200. However, both prongs of the Strickland test need not be analyzed if a claim can be resolved under one. State v. Madrigal (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52; State v. Saultz, Ross App. No. 09CA3133, 2011-Ohio-2018, at ¶19. In other words, if it can be shown that an error, assuming arguendo that such error does exist, did not prejudice a defendant, an ineffective assistance claim can be resolved on that basis alone. Pierce, supra at ¶18. To establish existence of prejudice, a defendant must demonstrate that a reasonable probability exists that, but for counsel's alleged error, the result of the trial would have been different. See State v. White (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus.

Appellant offers two arguments to support his claim that trial counsel's representation was constitutionally ineffective. First, he argues that counsel should have objected to a number of the issues that we previously reviewed under the plain error standard. As we noted in our review of those issues, however, appellant has not persuaded us that any error in fact occurred,

let alone plain error. Appellant also claims that counsel should have objected when the prosecution argued that appellant should have heard the signal to stop. He does not, however, explain why that argument was objectionable and its impropriety is not obvious to this Court.

Appellant's other argument is that trial counsel did not present any evidence in appellant's defense. Appellant, however, offers nothing to prove the existence of any relevant evidence to offer in his defense. Prejudice, for purposes of the second prong of the Strickland test, must be affirmatively shown and will not be presumed. See e.g. Saultz; State v. Clark, Pike App. No. 02CA684, 2003-Ohio-1707, at ¶ 22; State v. Tucker (Apr. 2, 2002), Ross App. No. 01 CA2592. Here, appellant must make some showing that relevant and probative evidence actually did exist and could have been offered in his defense.

For these reasons, we are not persuaded trial counsel erred in his representation, nor are we persuaded that any such error, even if it arguably existed, prejudiced the defense.

Accordingly, for these reasons, we hereby overrule appellant's fifth assignment of error.

VI

Appellant asserts in his sixth assignment of error that the trial court erred by denying a Crim.R. 29(A) motion for judgment of acquittal he made at the end of the prosecution's case in

chief.

Generally, the standard used to review a Crim.R. 29(A) argument is the same that would apply to arguments that challenge the sufficiency of evidence. State v. Jackson, 188 Ohio App.3d 803, 937 N.E.2d 120, 2010-Ohio- 1846, at ¶5; also see e.g. State v. Brooker, 170 Ohio App.3d 570, 868 N.E.2d 683, 2007-Ohio-588, at ¶¶8-9. In reviewing for the sufficiency of evidence, our inquiry must focus upon adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. Thus, we must determine whether, after viewing the evidence and all of the inferences reasonably drawn therefrom, in a light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense beyond a reasonable doubt. Jenks, 61 Ohio St.3d at 273; also see Jackson v. Virginia (1979), 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560. In the case sub judice, we conclude that sufficient evidence was adduced at trial to support appellant's conviction.

Appellant argues that only two witnesses exist who witnessed the course of events - himself and Sgt. Runyon. Because appellant pled not guilty to the charges in this case, appellant maintains that he essentially denied the charge against him. To

the extent this argument is characterizing the case as being one of conflicting accounts as to what happened, we note that in determining whether the trial court erred in denying the Crim.R.29 motion, we must assume that the witness testified truthfully. See State v. Samuel, Franklin App. No. 11AP-158, 2011-Ohio-6821.

Appellant also cites Sgt. Runyon's testimony that he could not be one hundred percent certain that appellant heard the signals to stop his vehicle and cites that as proof that he should not have been convicted. However, Sgt. Runyon testified he activated his lights and siren during the entire pursuit. The pursuit also occurred "in the middle of the night" which again, common sense would tell us that it would be exceedingly difficult for appellant not to have seen the lights behind him. This is particularly true in view of the fact that Sgt. Runyon testified that he caught up with appellant at the Coal Grove "on-ramp" on Route 52. In any case, we believe that sufficient evidence did exist to give the case to the jury and that the trial court did not err when it overruled appellant's Crim.R. 29 motion for judgment of acquittal. Accordingly, we hereby overrule appellant's sixth assignment of error.

Having considered all of the errors assigned and argued we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

COURT OF APPEALS

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JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee to recover of appellant the costs herein taxed.

MARY ANN HOGAN
CLERK OF COURTS
LAWRENCE COUNTY

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

[Cite as *State v. Schwable*, 2009-Ohio-6523.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HENRY COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 7-09-03**

v.

LARRY SCHWABLE, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Henry County Common Pleas Court
Trial Court No. 07 CR 031

Judgment Affirmed in Part, Reversed in Part and Cause Remanded

Date of Decision: December 14, 2009

APPEARANCES:

Kenneth J. Rexford **for Appellant**

John H. Hanna **for Appellee**

ROGERS, J.

{¶1} Defendant-Appellant, Larry Schwable, appeals the judgment of the Court of Common Pleas of Henry County convicting him of failure to comply with an order or signal of a police officer, sentencing him to four years of community control, imposing a ninety-day jail term and a three-year driver's license suspension, and ordering him to pay $8,210 in restitution. On appeal, Schwable argues that the jury verdict form was insufficient under R.C. 2945.75 to support a conviction for failure to comply with an order or signal of a police officer as a felony of the third degree under R.C. 2921.331(B),(C)(5)(a)(ii) because the verdict form only contained the statutory language for a violation of R.C. 2921.331(A), a first degree misdemeanor. Schwable also argues that his conviction was not supported by sufficient evidence, as the State did not present evidence demonstrating that the detective in question met the definition of a police officer pursuant to R.C. 4511.01, as was necessary for a conviction under R.C. 2921.331. Based on the following, we affirm in part, and reverse in part, the judgment of the trial court.

{¶2} In August 2007, the Henry County Grand Jury indicted Schwable on count one: failure to comply with an order or signal of a police officer in violation of R.C. 2921.331(B),(C)(5)(a)(ii), a felony of the third degree; count two: assault in violation of R.C. 2903.13(A),(C)(3), a felony of the fourth degree; and, count

three: assault in violation of R.C. 2903.13(A),(C)(3), a felony of the fourth degree. The indictment arose from an incident during which the police confronted Schwable after he left the scene of an alleged domestic violence incident, and during which Schwable fled in his vehicle after being told by an officer to stop, crashed his vehicle into a telephone pole, and was involved in an altercation with officers. Subsequently, Schwable entered a plea of not guilty by reason of insanity to all counts in the indictment.

{¶3} In September 2008, the matter proceeded to a jury trial, at which the following testimony was heard.

{¶4} Detective James Robertson of the Napoleon Police Department testified that he was assigned to road patrol duties on January 20, 2007[1]; that he was assigned to car number twenty-eight, which is a marked patrol car; that he was also in a uniform on that day; that he and Officer Michael Foreman were dispatched to the scene of an alleged domestic violence incident where a woman had been hit by a pickup truck; that, as he headed to the scene, he was told by the dispatcher that the person driving the pickup truck was driving to Dew's Towing, so he activated the lights on the patrol car and proceeded in that direction; that, when he arrived at Dew's Towing, he saw a pickup truck in the parking lot, and he

[1] Although Detective Robertson testified that this incident occurred on January 20, we find this to be an accidental misstatement, as the event occurred on June 20, and Detective Robertson made other references to June 20, including that the schedule he was on at the time lasted from June 18 to July 1, and that he was wearing his summer uniform on this date.

turned his lights and sirens off; that he pulled his patrol car in front of the truck, exited the car, and began to walk around the truck with his weapon drawn, as he was told by the dispatcher that the truck was used as a weapon to run someone over; that he then saw Schwable run to his truck; that he went to the passenger side of the truck with his weapon drawn and told Schwable to get out of the truck; that Schwable stated, "no, * * * shoot me, suicide by cop, that's what I want, kill me" (trial tr., pp. 31-32); that Schwable put the truck in gear and sped away; that he chased Schwable in his patrol car with the lights and sirens on; and, that Schwable ran his truck into a utility pole as he was trying to make a turn.

{¶5} Detective Robertson continued that, when he pulled his patrol car behind Schwable's wrecked pickup truck, Schwable exited the truck and came towards his patrol car, saying, "come on get out, come on get out" (Id. at p. 34); that he commanded Schwable to lay on the ground, and, when he failed to comply, he spayed him with mace; that he and Officer Foreman then approached Schwable with their batons drawn, continuing to tell him to lay on the ground; that Schwable lunged at both him and Officer Foreman, and was swinging wildly; and, that he and Officer Foreman eventually wrestled Schwable to the ground and handcuffed him.

{¶6} Officer Michael Foreman testified that, on June 20, 2007, he received a call from the dispatcher that a man in a red truck had run over his

girlfriend and was headed in his direction; that he pursued the vehicle in his patrol car with the lights and sirens on; that he then heard the dispatcher state that the vehicle crashed, so he drove to the crash scene; that, when he arrived at the scene, he observed Schwable in an altercation with Detective Robertson, with Schwable swinging at him and Detective Robertson deploying mace; and, that, eventually, both he and Detective Robertson were able to wrestle Schwable to the ground and handcuff him.

{¶7} Melissa Peper Firestone testified that she is an attorney and works in an office in Napoleon; that, on June 20, 2007, she was working in her office and heard a screeching sound; that she looked out her window and saw a red truck hit a utility pole; that a man immediately exited the truck after hitting the pole, and two police vehicles stopped near him; that two uniformed police officers exited the vehicles and were attempting to talk to the man, but he was very upset and kept lunging at the officers; and, that the police officers eventually were able to subdue the man to the ground.

{¶8} At the close of the State's presentation of evidence, Schwable made a Crim.R. 29 motion for judgment of acquittal on all counts in the indictment, arguing that the State failed to present sufficient evidence to establish that he failed to comply with an order or signal of a police officer, as evidence was not offered that the police officers approached him with an audible and visible signal

indicating that they were police officers, and that evidence was not presented demonstrating there to be a substantial risk of serious physical harm to persons or property. Additionally, Schwable argued that insufficient evidence was presented to show that he assaulted the police officers, as the uncontroverted testimony was that he did not strike or touch the officers. Subsequently, the trial court overruled Schwable's motion.

{¶9} After Schwable's presentation of evidence, Schwable was convicted of count one: failure to comply with an order or signal of a police officer, with the jury finding, pursuant to R.C. 2921.331(B),(C)(5)(a)(ii), that Schwable caused a substantial risk of serious physical harm to persons or property. However, the jury found Schwable not guilty on counts two and three of the indictment. The jury verdict form A on count one of the indictment provided that:

> **We, the jury, find the Defendant, Larry R. Schwable guilty of failure to comply with an order or signal of a police officer.**

The jury verdict form B on count one of the indictment provided that:

> **We, the jury, find the Defendant, Larry R. Schwable guilty of failure to comply with order or signal of a police officer, and we further find the operation of the motor vehicle by the defendant did cause a substantial risk of serious physical harm to persons or property.**

However, neither verdict form stated the degree of the offense or the section number of the statute under which Schwable was convicted.

{¶10} In March 2009, the trial court sentenced Schwable to a ninety-day jail term, imposed four years of community control and a three-year driver's license suspension, and ordered him to pay $8,210 in restitution. The trial court's judgment entry stated, in pertinent part:

> **This cause came on to be heard on the 10th day of March, 2009, upon the presentence report heretofore ordered herein, * * * the defendant having been found guilty on a prior day of this Court of violation Ohio Revised Code Section 2921.331(B)(C)(5)(a)(ii), Failure to Comply with Order or Signal of Police Officer, a felony of the third degree, as to Count One of the Three Count Indictment.**

(Mar. 2009 Judgment Entry, p. 1).

{¶11} It is from his conviction and sentence that Schwable appeals, presenting the following assignments of error for review.

Assignment of Error No. I

THE VERDICT FORM AND THE RESULTING ENTRY WERE INSUFFICIENT UNDER R.C. 2945.75 TO SUPPORT MR. SCHWABLE'S CONVICTION AND SENTENCE FOR COUNT I, FAILURE TO COMPLY WITH AN ORDER OR SIGNAL OF A POLICE OFFICER, AS A FELONY OF THE THIRD DEGREE AS REFLECTED IN THE ENTRY.

Assignment of Error No. II

THE VERDICT FORM FOR COUNT I WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE THAT MR. SCHWABLE WILLFULLY FLED FROM OR ELUDED OR FAILED TO COMPLY WITH THE ORDER OF A "POLICE OFFICER".

Assignment of Error No. I

{¶12} In his first assignment of error, Schwable argues that the jury verdict form and resulting judgment entry were insufficient to support a conviction for failure to comply with an order or signal of a police officer as a felony of the third degree pursuant to R.C. 2921.331(B),(C)(5)(a)(ii). Specifically, he contends that, because the jury verdict form failed to include the degree of the offense and contained the statutory language for a violation of R.C. 2921.331(A), the jury finding that he created a substantial risk of serious physical harm to persons or property is not sufficient to elevate his offense to a third degree felony because only violations under R.C. 2921.331(B) can be elevated above a first degree misdemeanor. Accordingly, he argues that his conviction can only be for the lowest degree of the offense, a first degree misdemeanor. We agree.

{¶13} R.C. 2945.75(A)(2) provides as follows:

> **A) When the presence of one or more additional elements makes an offense one of more serious degree:**
>
> * * *
>
> **(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.**

{¶14} In *Pelfrey*, 112 Ohio St.3d 422, the Supreme Court of Ohio addressed the issue of the specificity required in a jury verdict form pursuant to

R.C 2945.75(A)(2) to support a conviction for the greater degree of an offense. In *Pelfrey*, the defendant was charged with tampering with records in violation of R.C. 2913.42, with an enhanced charge to a third degree felony for tampering with government records pursuant to R.C. 2913.42(B)(4). The defendant was subsequently convicted and sentenced on the third degree felony conviction. On appeal, he argued that the jury verdict form and resulting judgment entry of conviction were insufficient to support his conviction for a felony of the third degree, as the verdict form and judgment entry did not state the degree of the offense or contain a finding that government records were involved. Accordingly, he argued that, pursuant to R.C. 2945.75(A)(2), his conviction should only be for the lowest degree of the offense, a first degree misdemeanor.

{¶15} In affirming the Second Appellate District's decision to reverse the defendant's conviction for a third degree felony and remand for the entry of a conviction of a first degree misdemeanor, the Supreme Court stated, in pertinent part:

> **Pelfrey's offense of tampering with records would have constituted a misdemeanor under R.C. 2913.42(B)(2)(a) but for the additional element that the records at issue were government records, a circumstance that elevates the crime to a third-degree felony under R.C. 2913.42(B)(4). However, neither the verdict form nor the trial court's verdict entry mentions the degree of Pelfrey's offense; nor do they mention that the records involved were government records. * * ***

> **Because the language of R.C. 2945.75(A)(2) is clear, this court will not excuse the failure to comply with the statute or uphold Pelfrey's conviction based on additional circumstances such as those present in this case. The express requirement of the statute cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form, or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form. We hold that pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.**

Pelfrey, 112 Ohio St.3d 422, at ¶¶13-14.

{¶16} Additionally, this Court found in *State v. Sessler*, 3d Dist. No. 3-06-23, 2007-Ohio-4931 ("*Sessler I*"), that the holding of *Pelfrey* required that a third degree felony conviction for intimidation of a crime victim or witness in violation of R.C. 2921.04(B) must be remanded for a first degree misdemeanor conviction under R.C. 2921.04(A) because the jury verdict form only found the defendant guilty of intimidation "in manner and form as he stands charged in the indictment," and failed to include the degree of the offense, the statutory section of the offense, or any finding of the aggravating factor elevating the offense to a third degree felony. In *Sessler*, we strictly construed *Pelfrey* and found that, even though "Sessler was properly charged, the jury instructions specified the correct offense and degree, and the verdict form incorporated by reference the

indictment," the third degree felony conviction could not stand because the requirements of R.C. 2945.75 were not met, as the jury verdict form did not contain the degree of the offense or a finding of the aggravating factor. *Sessler*, 2007-Ohio-4931, at ¶13.

{¶17} Subsequent to our decision in *Sessler I*, the Supreme Court of Ohio accepted for review our implicit finding that *Pelfrey* was applicable to charging statutes containing separate sub-parts with distinct offense levels, and, in *State v. Sessler*, 119 Ohio St.3d 9, 2008-Ohio-3180 (*Sessler II*), the Supreme Court affirmed our decision.

{¶18} Other courts have also applied a strict interpretation of *Pelfrey*. See *State v. Wells*, 9th Dist. No. 24460, 2009-Ohio-2673 (stating that the jury verdict form finding the defendant guilty of possession of crack cocaine exceeding "ten one hundred (100) grams" was insufficient for a first degree felony conviction, as it was required to state that it was an amount exceeding one hundred grams, thereby making the finding unclear and insufficient under *Pelfrey* and R.C. 2945.75); *State v. Keith*, 12th Dist. No. 2007-07-161, 2008-Ohio-348 (finding that the jury verdict forms reciting a guilty finding for tampering with records as charged in the indictment were insufficient pursuant to *Pelfrey* and R.C. 2945.75 to enhance the convictions to third degree felonies for tampering with government records, as the verdicts did not contain the degree of the offense or a finding of the

aggravating factor, even though the indictment properly charged the aggravating factor.)

{¶19} In the case at bar, Schwable was charged by indictment with failure to comply with an order or signal of a police officer under R.C. 2921.331(B),(C)(5)(a)(ii). The statute provides, in pertinent part:

> **(A) No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic.**
>
> **(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.**
>
> **(C)(1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.**
>
> **(2) A violation of division (A) of this section is a misdemeanor of the first degree.**
>
> **(3) Except as provided in divisions (C)(4) and (5) of this section, a violation of division (B) of this section is a misdemeanor of the first degree.**
>
> * * *
>
> **(5)(a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:**
>
> * * *
>
> **(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.**

R.C. 2921.331.

{¶20} The general name of the offense is failure to comply with an order or signal of a police officer, but Schwable was charged under part (B) which contains the additional elements of willfully fleeing or eluding a police officer, and with the aggravating factor under (C)(5)(a)(ii), causing a substantial risk of serious physical harm to persons or property, elevating the offense to a third degree felony. However, part (A) of the jury verdict form contained a guilty finding for failure to comply with an order or signal of a police officer, which is the language contained in section (A) of the statute, and did not state the additional elements of willfully fleeing or eluding contained in section (B) of the statute. Additionally, neither the (A) nor (B) verdict form contained the degree of the offense, or the statute section number. As in *Sessler*, the verdict form failed to state specific elements necessary for a conviction of Section (B) of the statute. Although there was an additional finding in part (B) of the verdict form that Schwable caused a substantial risk of serious physical harm to persons or property, only section (B) of the statute can be elevated to a third degree felony by a substantial risk of harm finding. A conviction under section (A) is exclusively a first degree misdemeanor.

{¶21} Consequently, because the plain language of the verdict form only supports a conviction for a violation of section (A) of the statute, the jury finding

that Schwable created a substantial risk of harm is rendered meaningless, and only a first degree misdemeanor conviction under section (A) of the statute can stand.

{¶22} Although we note that Schwable was charged under section (B) of the statute; that the jury was instructed under section (B) of the statute; and, that the general name of the offense is also the same language used under section (A) of the statute, and the language found in the jury verdict form, we feel compelled to follow a strict application of *Pelfrey* and look only toward the language of the verdict form and not any additional circumstances. See *Pelfrey*, 112 Ohio St.3d 422, at ¶14. Consequently, without a jury verdict form stating the degree of the offense or a proper finding of an aggravating factor, we find the verdict fails to comply with R.C. 2945.75 to support a conviction for a third degree felony under section (B),(C)(5)(a)(ii) of the statute, and we must remand to the trial court for the entry of a conviction for the least degree of the offense, a first degree misdemeanor under section (A) of the statute.

{¶23} Accordingly, we sustain Schwable's first assignment of error.

Assignment of Error No. II

{¶24} In his second assignment of error, Schwable argues that insufficient evidence was presented at trial to support his conviction. Specifically, Schwable contends that no evidence was presented at trial demonstrating that the detective was authorized to direct or regulate traffic, or to make arrests for violations of

traffic regulations, as was required for a conviction of failure to comply with an order or signal of a police officer. We disagree.

{¶25} When an appellate court reviews a record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶47, citing *State v. Jenks* (1981), 61 Ohio St.3d 259, superseded by state constitutional amendment on other grounds as stated in *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355. Sufficiency is a test of adequacy, *State v. Henry*, 3d Dist. No. 13-08-10, 2009-Ohio-3535, ¶20, and the question of whether evidence is sufficient to sustain a verdict is one of law. *State v. Robinson* (1955), 162 Ohio St. 486, superseded by state constitutional amendment on other grounds as stated in *Smith*, supra.

{¶26} R.C. 2921.331 sets forth the offense of failure to comply with an order or signal of a police officer, and provides that "police officer," as used in the statute, "has the same meaning as in section 4511.01 of the Revised Code." R.C. 2921.331(F)(2). Under R.C. 4511.01(Z), "police officer" is defined as "every officer authorized to direct or regulate traffic, or to make arrests for violations of traffic regulations." When referring to an officer who is "authorized to direct or regulate traffic," the definition is referring to a certified police officer.

{¶27} R.C. 109.77 provides certification requirements for all peace officers. The statute states, in pertinent part:

> **(B)(1) Notwithstanding any general, special, or local law or charter to the contrary, and except as otherwise provided in this section, no person shall receive an original appointment on a permanent basis as any of the following unless the person previously has been awarded a certificate by the executive director of the Ohio peace officer training commission attesting to the person's satisfactory completion of an approved state, county, municipal, or department of natural resources peace officer basic training program:**
>
> **(a) A peace officer of any county, township, municipal corporation, regional transit authority, or metropolitan housing authority;**

R.C. 109.77(B)(1)(a). Furthermore, the definition of "peace officer" includes a "member of the organized police department of a township or municipal corporation." R.C. 109.71(A)(1). Consequently, it follows that, because a municipal police officer is a peace officer, and no peace officer can be hired without being certified by the Ohio Peace Officer Training Commission, all police officers are certified.

{¶28} Here, Detective Robertson testified that he was employed as a detective by the Napoleon Police Department. Although there was no evidence presented that he was a certified police officer, or that he was authorized to regulate or direct traffic, no such evidence was needed, as all police officers are certified, and, therefore, authorized to direct or regulate traffic, pursuant to R.C.

109.77. Consequently, we find that sufficient evidence was presented to establish that Detective Robertson was a "police officer" under R.C. 2921.331 and R.C. 4511.01(Z), and, therefore, sufficient evidence existed to support Schwable's conviction for failure to comply with an order or signal of a police officer.

{¶29} Accordingly, we overrule Schwable's second assignment of error.

{¶30} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued in his second assignment of error, but having found error prejudicial to the appellant herein, in the particulars assigned and argued in his first assignment of error, we affirm in part, and reverse in part, the judgment of the trial court, and remand for a modification of Schwable's conviction to a misdemeanor of the first degree and resentencing accordingly.

Judgment Affirmed in Part,
Reversed in Part and
Cause Remanded

PRESTON, P.J. concurs.
SHAW, J., concurs in Judgment Only.

/jlr