[Cite as *State v. Wilburn*, 2023-Ohio-4865.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 22CA16
v.	:	
WILLIAM WILBURN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Natasha L. Kinnan, Catlettsburg, Kentucky, for appellant.[1]

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and Andrea M. Kratzenberg, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:12-21-23
ABELE, J.

{¶1} This is an appeal from a Lawrence County Common Pleas Court judgment of conviction and sentence. A jury found William Wilburn, defendant below and appellant herein, guilty of the following offenses: (1) illegal conveyance of prohibited items onto the grounds of a detention facility or institution, in

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[1] Different counsel represented appellant during the trial court proceedings.

violation of R.C. 2921.36(A)(2)(c); (2) drug possession, in violation of R.C. 2925.11(A); (3) possession of criminal tools, in violation of R.C. 2923.24(A); and (4) possession of a controlled substance, in violation of R.C. 2925.11(A). The trial court sentenced appellant to serve a total of 60 months in prison.

{¶2} Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT-APPELLANT'S MOTION FOR SUPPRESSION."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED IN ALLOWING FRUITS OF THE POISONOUS TREE TO BE INTRODUCED."
>
> THIRD ASSIGNMENT OF ERROR:
>
> "THE STATE OF OHIO WITHHELD EVIDENCE FAVORABLE TO THE APPELLANT."
>
> FOURTH ASSIGNMENT OF ERROR:
>
> "DEFENDANT'S COURT APPOINTED TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE THROUGH THE PRE-TRIAL PROCEEDINGS, TRIAL, AND SENTENCING PHASES."
>
> FIFTH ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT INCORRECTLY APPLIED CONSECUTIVE SENTENCES."[2]

[2] We note that appellant's fourth assignment of error reads, "Ineffective assistance of counsel," and his fifth assignment of error reads, "Improper sentencing." However, "Ineffective

> Around midnight on March 6, 2021, Lawrence County 9-1-1 dispatcher Christopher Wilson noticed appellant near a jail window. Wilson yelled over to his co-worker to call the sheriff's department and request a deputy to respond to the scene. At the same time, appellant started to run from the jail. Wilson followed appellant's movements until the deputy arrived. When the deputy arrived, Wilson pointed to appellant's location. The deputy, along with the Ironton Police Department, pursued appellant.

{¶4} Shortly thereafter, Ironton Police Patrolman Joe Akers caught up with appellant. Akers approached appellant and asked for his name. Appellant responded, "Harry Gullett." Akers questioned appellant if he had drugs or weapons on his person, and appellant stated he did not. Akers also asked appellant for consent to search his person, and appellant consented. After

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assistance of counsel" and "Improper sentencing" are not properly framed assignments of error. We therefore construe appellant's "issues for review" presented under the two headings as his fourth and fifth assignments of error.

the search, Akers found a translucent, green-tinted tube under appellant's left arm. Akers removed the tube and observed what he believed to be tobacco and a yellow wrapper that appeared to be a suboxone wrapper. Based upon this discovery, Akers arrested appellant.

{¶5} On March 24, 2021, a Lawrence County Grand Jury returned an indictment that charged appellant with the following offenses: (1) illegal conveyance of prohibited items onto the grounds of a detention facility or institution, in violation of R.C. 2921.36(A)(2)(c); (2) drug possession, in violation of R.C. 2925.11(A); (3) drug possession, in violation of R.C. 2925.11(A); (4) possession of criminal tools, in violation of R.C. 2923.24(A); (5) possession of a controlled substance, in violation of R.C. 2925.11(A); (6) identity fraud, in violation of R.C. 2913.49(B)(1); and (7) criminal trespassing, in violation of R.C. 2911.21(A)(1).

{¶6} On March 30, 2022, appellant filed a motion to suppress the evidence discovered after the search. He argued that the officers violated his Fourth Amendment right to be free from unreasonable searches and seizures because the officers lacked reasonable suspicion or probable cause to stop him and did not have probable cause to search or arrest him.

{¶7} On April 12, 2022, the trial court held a hearing to consider appellant's motion to suppress evidence. At the start, the state indicated that the disputed issues were whether law enforcement officers had reasonable suspicion to temporarily detain appellant and whether that reasonable suspicion ripened into probable cause to arrest him.

{¶8} At the hearing, former Lawrence County Sheriff's Deputy Jonathan Spoljaric testified that, during the evening hours of March 6, 2021, he heard that a person was "behind the jail, um, messing with one of the windows." The deputy looked around the jail and met the 9-1-1 dispatcher who had reported that a person had been "messing with one of the windows." The dispatcher pointed to a man across the street, and the deputy started to walk toward this man, later identified as appellant. The deputy yelled to appellant and told him to stop, but he "took off." Spoljaric eventually caught up with appellant once Ironton police officers had located him.

{¶9} Patrolman Akers stated that he heard Deputy Spoljaric report over the radio that a person was running between the 9-1-1 center and the rear of the Lawrence County jail and the deputy was chasing the individual. Shortly thereafter, Akers observed an individual who matched the deputy's description and asked the person if he could speak with him. The person, appellant,

stated that his name is Harry Gullett. The patrolman asked if appellant had been near the jail, and he stated he had not. The patrolman noted that appellant appeared nervous and kept turning away. The patrolman thus decided to ask appellant if he "had anything on his person," and appellant stated he did not. The patrolman asked appellant if he would consent to a search of his person, and appellant consented. After the search, Akers found "a green tube that was underneath his right arm." Inside the tube was some tobacco and a yellow wrapper that Akers believed to be suboxone. Akers thus arrested appellant. Spoljarik soon arrived on the scene and confirmed that appellant was the individual he had been chasing. The trial court subsequently overruled appellant's motion to suppress evidence.

{¶10} On August 26, 2022, the trial court held a jury trial. Deputy Spoljaric and Patrolman Akers largely repeated the testimony that they had given during the suppression hearing. During Spoljaric's cross-examination, defense counsel asked why he no longer worked for the Sheriff's Department and Spoljaric stated that being a deputy is "a very stressful job and after ten years it tends to get to you." Spoljaric also agreed that he did not observe criminal activity before he decided to pursue appellant, but he believed he had reasonable suspicion to pursue and stop appellant.

{¶11} Lawrence County Prosecutor's Office Investigator Brian Chaffins testified that he participated in the investigation once appellant had been detained. Chaffins described the tube that Patrolman Akers recovered as a translucent "two-foot-long pixie stick" that "had electrical tape that had both ends that were sealed." About two-thirds of the tube contained tobacco, with other items inside that included suboxone strips, fentanyl, a blue powder, and matches. Chaffins also inspected the window where officers first observed appellant and found a hole in the window and "a homemade stick made out of rolled up magazine papers that was from the inside of the jail poking out."

{¶12} Investigator Chaffins spoke with appellant after he advised him of his *Miranda*[3] rights. Appellant stated that his girlfriend was in jail and he had intended to smuggle contraband into the jail. Appellant indicated that the 9-1-1 dispatcher yelled to him before he could actually smuggle the contraband.

{¶13} During Investigator Chaffins's testimony, the state played a video recording from the night of the incident that had depicted appellant near the jail. Chaffins narrated the video and stated that it showed a person stabbing the window with a stick. During a break, the court discussed jury instructions

[3] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

with the parties and appellant's counsel stated that he did not object to the instructions that the state submitted. After the state presented its evidence, the defense rested.

{¶14} After hearing the evidence, the jury found appellant guilty of the illegal conveyance of prohibited items onto the grounds of a detention facility or institution (count one), drug possession with a prior drug conviction (count three), possession of criminal tools (count four), and possession of a controlled substance (count five). The trial court dismissed counts two, six, and seven.

{¶15} On September 15, 2022, the trial court sentenced appellant to serve 36 months in prison for the illegal-conveyance offense, and 12 months for each of the remaining offenses. The court ordered the sentences for counts one, three, and five to be served consecutively to one another and the sentence for count four to be served concurrently, for a total term of 60 months. The court determined that "consecutive sentences are necessary to punish the offender, consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the defendant poses to the public and the defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect

the public from future crimes of the defendant." This appeal followed.

I

{¶16} In his first assignment of error, appellant asserts that the trial court erred by overruling his motion to suppress evidence. In particular, appellant asserts that law enforcement officers lacked probable cause to search or to arrest him. In doing so, appellant challenges the trial court's decision to credit the officers' testimony. He charges that the testimony presented at the suppression hearing fails to demonstrate that the officers had probable cause to believe that appellant was engaged in criminal activity. Appellant contends that because both Deputy Spoljaric and Patrolman Akers admitted at the suppression hearing that they did not personally observe appellant engage in any criminal activity, the officers lacked probable cause to arrest him.

{¶17} Conversely, the state argues that the officers had reasonable suspicion to conduct an investigative stop and their reasonable suspicion ripened into probable cause to arrest once they discovered contraband on appellant's person.

A

{¶18} Initially, we point out that appellate review of a trial court's ruling on a motion to suppress evidence involves a

mixed question of law and fact. *E.g.*, *State v. Tidwell*, 165 Ohio St.3d 57, 2021-Ohio-2072, 175 N.E.3d 527, ¶ 18; *State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶ 32; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Moore*, 2013-Ohio-5506, 5 N.E.3d 41, ¶ 7 (4th Dist.). Appellate courts thus "'must accept the trial court's findings of fact if they are supported by competent, credible evidence.'" *State v. Leak*, 145 Ohio St.3d 165, 2016-Ohio-154, 47 N.E.3d 821, ¶ 12, quoting *Burnside* at ¶ 8. Accepting those facts as true, reviewing courts "'independently determine as a matter of law, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.'" *Id.*, quoting *Burnside* at ¶ 8.

B

{¶19} The Fourth and Fourteenth Amendments to the United States Constitution, as well as Section 14, Article I of the Ohio Constitution, protect individuals against unreasonable governmental searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 662, 99 S.Ct. 1391, 1400, 59 L.Ed.2d 660 (1979); *State v. Banks-Harvey*, 152 Ohio St.3d 368, 2018-Ohio-201, 96 N.E.3d 262, ¶ 16. "[S]earches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject

only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); *accord State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 98. Once the defendant demonstrates that law enforcement officers subjected the defendant to a warrantless search or seizure, the burden shifts to the state to establish that the warrantless search or seizure was constitutionally permissible. *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 720 N.E.2d 507 (1999); *Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988), paragraph two of the syllabus.

1

{¶20} The investigative stop exception to the Fourth Amendment warrant requirement allows a police officer to stop and briefly detain an individual if the officer possesses a reasonable suspicion, based upon specific and articulable facts, that criminal activity "may be afoot." *Terry* v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *accord United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct 573, 145 L.Ed.2d 570 (2000); *State v. Andrews*, 57 Ohio St.3d 86, 565 N.E.2d 1271 (1991); *State v. Venham*, 96 Ohio App.3d 649, 654, 645 N.E.2d 831, 833 (1994). To justify an investigative

stop, the officer must be able to articulate specific facts that would warrant a person of reasonable caution in the belief that the person stopped has committed or is committing a crime. *See Terry*, 392 U.S. at 27; *Navarette v. California*, 572 U.S. 393, 396, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014), quoting *United States v. Cortez*, 449 U.S. 411, 417-418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) (investigative stop allowed "when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity'").

{¶21} A valid investigative stop must be based upon more than a mere "hunch" that criminal activity is afoot. *E.g.*, *Arvizu*, 534 U.S. at 274; *Wardlow*, 528 U.S. at 124; *Terry*, 392 U.S. at 27. Reviewing courts should not, however, "demand scientific certainty" from law enforcement officers. *Wardlow*, 528 U.S. at 125; *accord Kansas v. Glover*, 589 U.S. ___, 140 S.Ct. 1183, 1188, 206 L.Ed.2d 412 (2020). Rather, a reasonable suspicion determination "must be based on commonsense judgments and inferences about human behavior." *Wardlow*, 528 U.S. at 125. Thus, "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Arvizu*, 534 U.S. at 274; *Wardlow*, 528 U.S. at 123.

{¶22} A court that is determining whether a law enforcement officer possessed reasonable suspicion to stop an individual must examine the "totality of the circumstances." *See, e.g.*, *Arvizu*, 534 U.S. at 273. The totality-of-the-circumstances approach "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Id.*, quoting *Cortez*, 449 U.S. at 418. When evaluating the totality of the circumstances, courts consider the facts "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Cortez*, 449 U.S. at 418. Thus, when a court reviews an officer's reasonable suspicion determination, a court "must give 'due weight' to factual inferences drawn by resident judges and local law enforcement officers." *Arvizu*, 534 U.S. at 273, citing *Ornelas*, 517 U.S. at 699 ("trial judge views the facts of a particular case in light of the distinctive features and events of the community" and "a police officer views the facts through the lens of his police experience and expertise").

{¶23} Moreover, a particular factor under the totality-of-the-circumstances test need not be criminal in and of itself. *See United States v. Sokolow*, 490 U.S. 1, 9, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (factors that are "consistent with innocent"

activity may collectively amount to reasonable suspicion); *Terry*, 392 U.S. at 22 (a series of act "perhaps innocent in itself" may together add up to reasonable suspicion). Additionally, "[a] determination that reasonable suspicion exists * * * need not rule out the possibility of innocent conduct." *Arvizu*, 534 U.S. at 277. Indeed, "[t]o be reasonable is not to be perfect." *Heinen v. North Carolina*, 574 U.S. 54, 60, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014). Thus, the reasonable-suspicion standard "accepts the risk that officers may stop innocent people." *Wardlow*, 528 U.S. at 126. Accordingly, the totality of the circumstances, whether innocent or not, must indicate that criminal activity is afoot. *See e.g., Terry, supra*.

{¶24} In the case sub judice, we believe that the officers had reasonable suspicion to stop appellant. A 9-1-1 dispatcher informed Deputy Spoljaric that appellant had been "messing with" one of the jail windows. An officer may form reasonable suspicion to conduct an investigative stop based upon information that another person provides. *Navarette*, 572 U.S. at 397, quoting *Adams v. Williams*, 407 U.S. 143, 147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 720 N.E.2d 507 (1999), quoting *United States v. Hensley*, 469 U.S. 221, 231, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985)

("'effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information'").

{¶25} Furthermore, when the dispatcher pointed to appellant, appellant ran. "Headlong flight — wherever it occurs — is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Wardlow*, 528 U.S. at 124–25. Thus, the totality of the circumstances (suspicious behavior near the jail window coupled with flight) gave the officers reasonable suspicion to stop appellant.

2

{¶26} We believe that the officers also had probable cause to arrest appellant. A warrantless arrest is valid if the arresting officer possessed probable cause to believe that the suspect committed an offense. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964); *State v. Otte*, 74 Ohio St.3d 555, 559, 660 N.E.2d 711 (1996). Probable cause to arrest exists if all the facts and circumstances within the officer's knowledge were sufficient to cause a prudent person to believe that the individual had committed or was committing an offense.

Ornelas v. United States, 517 U.S. 690, 696, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996); *State v. Heston*, 29 Ohio St.2d 152, 155-56, 280 N.E.2d 376 (1972); *see also Otte*, 74 Ohio St.3d at 559 ("Probable cause exists when the arresting officer has sufficient information from a reasonably trustworthy source to warrant a prudent person in believing that the suspect has committed or was committing the offense."). We note that probable cause deals "with probabilities - the factual and practical nontechnical considerations of everyday life on which reasonable and prudent men act - and is a fluid concept, to be based on the totality of the circumstances, and not reduced to a neat set of legal rules." *State v. Ingram*, 20 Ohio App.3d 55, 61, 484 N.E.2d 227 (12th Dist.1984), citing *Illinois v. Gates*, 462 U.S. 213, 232-33, 103 S.Ct. 2317, 2329, 76 L.Ed.2d 527 (1983); *see also Ornelas*, 517 U.S. at 696. Probable cause to arrest is less than the amount of evidence needed to prove guilt beyond a reasonable doubt in a criminal trial. *Adams v. Williams*, 407 U.S. 143, 149, 92 S.Ct. 1921, 1924, 32 L.Ed.2d 612 (1972). Rather, "[p]robable cause is a flexible, common sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' * * * that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand

any showing that such belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 746, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983).

{¶27} In determining whether probable cause to arrest exists, a reviewing court should examine the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 230-31, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983). The relevant inquiry when examining the totality of the circumstances supporting probable cause "is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncrimnal acts." *Id.* at 243-44, n. 13.

{¶28} In the case at bar, officers had probable cause to arrest appellant. Shortly after Patrolman Akers stopped appellant, he asked appellant for consent to search. Appellant consented.[4] No Fourth Amendment violation occurs when an individual voluntarily consents to a search. *United States v.*

[4] We observe that, although appellant asserts that he had been handcuffed before Patrolman Akers asked for consent to search, he did not argue that being handcuffed negated his consent. We, therefore, do not address the issue. We simply point out that "[e]ven suspects who are handcuffed may voluntarily consent to a search." *State v. Riggins*, 1st Dist. Hamilton No. C-030626, 2004-Ohio-4247, ¶ 18, citing *United States v. Crowder*, 62 F.3d 782, 788 (C.A.6, 1995); *accord United States v. Watson*, 423 U.S. 411, 424, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) ("the fact of custody alone has never been enough in itself to demonstrate a coerced * * * consent to search.").

Drayton, 536 U.S. 194, 207, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002) (stating that "[p]olice officers act in full accord with the law when they ask citizens for consent"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) ("[A] search conducted pursuant to a valid consent is constitutionally permissible"). Upon searching appellant, Akers found contraband that gave the officers probable cause to believe that appellant was engaged in criminal activity. Therefore, the officers possessed probable cause to arrest appellant. Consequently, we do not agree with appellant that the trial court erred by overruling his motion to suppress the evidence discovered as a result of the stop and search.

{¶29} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

{¶30} In his second assignment of error, appellant asserts that the trial court erred by failing to prevent the state from introducing at trial the evidence obtained after the purported unlawful search and seizure. He contends that officers lacked reasonable suspicion to stop him and lacked probable cause to search and arrest him.

{¶31} The state contends that because the officers did not violate appellant's Fourth Amendment rights, the suppression of

any items discovered during or after appellant's detention was not warranted.

{¶32} "The Fourth Amendment protects the right to be free from 'unreasonable searches and seizures,' but it is silent about how this right is to be enforced." *Davis v. United States*, 564 U.S. 229, 231, 180 L.Ed.2d 285, 131 S.Ct. 2419, 2423 (2011). Accordingly, the United States Supreme Court "created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." *Id.* at 231-232. The "exclusionary rule is a 'deterrent sanction' rather than a 'substantive guarantee.'" *Hemphill v. New York*, 142 S.Ct. 681, 692, 211 L.Ed.2d 534 (2022), quoting *Kansas v. Ventris*, 556 U.S. 586, 591, 173 L.Ed.2d 801, 129 S.Ct. 1841, 1845 (2009). "[T]he exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and, relevant here, 'evidence later discovered and found to be derivative of an illegality,' the so-called '"fruit of the poisonous tree."'" *Utah v. Strieff*, 579 U.S. 232, 237-38, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016), quoting *Segura v. United States*, 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984). The rule applies only when "its deterrence benefits outweigh its substantial social costs." *Hudson v. Michigan*, 547

U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) (internal quotation marks omitted).

{¶33} In the case sub judice, as we discussed above, the law enforcement officers did not violate appellant's Fourth Amendment rights. Here, the officers had reasonable suspicion to stop appellant. After the stop, appellant consented to a search of his person. During this search, Patrolman Akers discovered contraband, which gave him probable cause to arrest appellant. Therefore, because a Fourth Amendment violation did not occur the exclusionary rule is inapplicable.

{¶34} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

III

{¶35} In his third assignment of error, appellant asserts that the state failed to produce exculpatory and impeachment evidence. Appellant points out that, at the suppression hearing, Deputy Spoljaric stated that he no longer works in law enforcement. Appellant suggests that the state knew that the deputy had been placed on administrative leave and eventually terminated due to violating others' constitutional rights. Appellant states that in April 2022, a civil suit filed in federal court involved the deputy. Appellant claims that the deputy has also been "named as a party to a federal civil rights

case" on other occasions and faults the state for the failure to bring these matters to his attention. Appellant asserts that the state's failure deprived him of the ability to challenge the deputy's testimony.

{¶36} The state argues that even if a violation occurred, the record contains ample evidence, including appellant's confession, to support his convictions.

{¶37} The prosecution's suppression of evidence favorable to an accused and material to either guilt or punishment violates a criminal defendant's due process right to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87, 10 L.Ed.2d 215, 83 S.Ct. 1194, 1197 (1963); *see also Giglio v. United States*, 405 U.S. 150, 153–154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (the *Brady* rule applies to evidence undermining witness credibility); *accord Wearry v. Cain*, 577 U.S. 385, 136 S.Ct. 1002, 1006, 194 L.Ed.2d 78 (2016); *State v. Johnston*, 39 Ohio St.3d 48, 60, 529 N.E.2d 898 (1988).

> "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469–470, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009) (citing *[United States v.] Bagley*, [473 U.S. 667,] 682, 105 S.Ct. 3375[, 87 L.Ed.2d 481 (1985)]). "A 'reasonable probability' of a different result" is one in which the suppressed evidence "'undermines confidence in the outcome of the trial.'" *Kyles[v. Whitley*, 514 U.S. 419,] 434, 115 S.Ct. 1555[, 131 L.Ed.2d 490 (1995)]

> (quoting *Bagley*, supra, at 678, 105 S.Ct. 3375). In other words, [defendants] are entitled to a new trial only if they "establis[h] the prejudice necessary to satisfy the 'materiality' inquiry." *Strickler*[*v. Greene*, 527 U.S. 263,] 282, 119 S.Ct. 1936[, 144 L.Ed.2d 286 (1999)].

Turner v. United States, 582 U.S. 313, 324, 137 S.Ct. 1885, 198 L.Ed.2d 443 (2017).

{¶38} Courts that are considering whether a reasonable probability exists that the result of the proceeding would have been different if the state had disclosed the withheld evidence "'evaluat[e]' the withheld evidence 'in the context of the entire record.'" *Id.* at 324-325, quoting *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

{¶39} The *Brady* rule exists principally to protect a criminal defendant's right to a fair trial. *Bagley*, 473 U.S. at 675-676, quoting *Agurs*, 427 U.S. at 104 ("For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose"); *United States v. Moussaoui*, 591 F.3d 264, 285 (4th Cir. 2010) ("The *Brady* right, however, is a trial right * * * and exists to preserve the fairness of a trial verdict and to minimize the chance that an innocent person would be found guilty.").

Accordingly, the "'overriding concern'" of the *Brady* rule "'[is] with the justice of the finding of guilt.'" *Bagley*, 473 U.S. at 678, quoting *Agurs*, 427 U.S. at 112; *accord Kyles*, 514 U.S. at 439, quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) (the state's "'interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done'"). The purpose of the *Brady* rule

> is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

Bagley, 473 U.S. at 675 (footnotes omitted).

{¶40} To establish that the prosecution's failure to disclose evidence violated a defendant's due-process right to a fair trial, the defendant must establish each of the following: (1) the evidence at issue is "'favorable to the accused, either because it is exculpatory, or because it is impeaching'"; (2) the [prosecution] suppressed the evidence, "'either willfully or inadvertently'" and (3) "'prejudice * * * ensued.'" *Skinner v. Switzer*, 562 U.S. 521, 536, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011), quoting *Strickler*, 527 U.S. at 281–282.

{¶41} Evidence favorable to an accused means evidence that "if disclosed and used effectively, * * * may make the

difference between conviction and acquittal." *Bagley*, 473 U.S. at 676. Favorable evidence to an accused includes both exculpatory and impeachment evidence. *Id.* at 676, citing *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

{¶42} Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 682. "The defendant has the burden to prove a *Brady* violation rising to the level of a due-process violation." *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 102.

{¶43} In the case at bar, we first observe that appellant's alleged *Brady* violation apparently relies upon evidence that is not contained in the trial court record. Appellant claims that Deputy Spoljaric "was placed on administrative leave and eventually separated from his employment for allegedly violating [the] constitutional rights of a person." Appellant also

asserts that Spoljaric has been named as a defendant in a federal civil-rights case. However, none of the evidence underlying these allegations appears in the trial court record. Consequently, we cannot consider these allegations as evidence subject to a *Brady* violation analysis. *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319 (on direct appeal, defendant cannot rely upon evidence outside of the record); *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001) (if establishing ineffective assistance of counsel requires proof outside the record, then such claim is not appropriately considered on direct appeal); *State v. Ishmail*, 54 Ohio St.2d 402, 406, 377 N.E.2d 500 (1978) (the appellate court is limited to what transpired as reflected by the record on direct appeal); *see generally State v. Staley*, 1st Dist. Hamilton No. C-200270, 2021-Ohio-3086, ¶ 39-44 (defendant failed to establish grounds for new trial based upon *Brady* violation for failing to disclose evidence regarding citizen complaints filed against testifying officer when defendant did not present any documents to show what statements were contained in citizen complaints).

{¶44} Furthermore, even if we could consider the unsupported allegations to be evidence, we do not believe that appellant established that a reasonable probability exists that the result of the proceeding would have been different if the state had

given appellant evidence regarding Deputy Spoljaric's alleged misconduct. Instead, we believe that the record overwhelmingly supports appellant's conviction. Of note, appellant confessed, and the state played a recording of appellant's confession for the jury. Introducing evidence of Spoljaric's alleged misconduct would not have called appellant's confession into question.

{¶45} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error.

IV

{¶46} In his fourth assignment of error, appellant asserts that trial counsel failed to provide the effective assistance of counsel. Appellant alleges that trial counsel was ineffective for failing (1) to file any motions to force the state to produce evidence regarding Deputy Spoljaric's termination or to submit a public records request, (2) to object to hearsay testimony at the suppression hearing, (3) to file jury instructions, and (4) to request a separation of witnesses.

{¶47} The Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution, provides that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a

criminal defendant is entitled to the "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Hinton v. Alabama*, 571 U.S. 263, 272, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) (the Sixth Amendment right to counsel means "that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence").

{¶48} To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *E.g., Strickland*, 466 U.S. at 687; *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 183; *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 85. "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (a defendant's failure to satisfy one of the ineffective-assistance-of-counsel elements "negates a court's need to consider the other").

{¶49} The deficient performance part of an ineffectiveness claim "is necessarily linked to the practice and expectations of

the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), quoting *Strickland*, 466 U.S. at 688; *accord Hinton*, 571 U.S. at 273. Prevailing professional norms dictate that "a lawyer must have 'full authority to manage the conduct of the trial.'" *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270, ¶ 24, quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

{¶50} Furthermore, "'[i]n any case presenting an ineffectiveness claim, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."'" *Hinton*, 571 U.S. at 273, quoting *Strickland*, 466 U.S. at 688. Accordingly, "[i]n order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95 (citations omitted).

{¶51} Moreover, when considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

Strickland, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Additionally, "[a] properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *e.g., State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin*, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶52} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that "'but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome.'" *Hinton*, 571 U.S. at 275, quoting *Strickland*, 466 U.S. at 694; *e.g., State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus; *accord State v. Spaulding*, 151 Ohio St.3d

378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 91 (prejudice component requires a "but for" analysis). "'[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Hinton*, 571 U.S. at 275, quoting *Strickland*, 466 U.S. at 695. Furthermore, courts ordinarily may not simply presume the existence of prejudice but, instead, must require a defendant to affirmatively establish prejudice. *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 22; *State v. Tucker*, 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002); *see generally Roe v. Flores-Ortega*, 528 U.S. 470, 483, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2008) (prejudice may be presumed in limited contexts, none of which are relevant here).

{¶53} Additionally, we have repeatedly recognized that speculation is insufficient to establish the prejudice component of an ineffective assistance of counsel claim. *E.g., State v. Tabor*, 4th Dist. Jackson No. 16CA9, 2017-Ohio-8656, ¶ 34; *State v. Jenkins*, 4th Dist. Ross No. 13CA3413, 2014-Ohio-3123, ¶ 22; *State v. Simmons*, 4th Dist. Highland No. 13CA4, 2013-Ohio-2890, ¶ 25; *State v. Halley*, 4th Dist. Gallia No. 10CA13, 2012-Ohio-1625, ¶ 25; *State v. Leonard*, 4th Dist. Athens No. 08CA24, 2009-Ohio-6191, ¶ 68; *accord State v. Powell*, 132 Ohio St.3d 233,

2012-Ohio-2577, 971 N.E.2d 865, ¶ 86 (purely speculative argument cannot serve as the basis for ineffectiveness claim).

A

{¶54} In the case sub judice, appellant first faults trial counsel for the failure to file a motion "to force the State to produce or disclose" evidence regarding Deputy Spoljaric's alleged misconduct or by failing to submit a public records request. He contends that this evidence constituted "material facts, known to the general public" and that these facts "would have affected the outcome of the case."

{¶55} However, as we discussed in our disposition of appellant's third assignment of error, the record does not contain any evidence to support appellant's allegations regarding Deputy Spoljaric. Thus, it is difficult to assess whether any deficient performance in failing to request the records affected the outcome of the trial. However, as we noted above, we believe that the record contains overwhelming evidence to support appellant's conviction and introducing evidence of Spoljaric's alleged misconduct would not have negated appellant's confession. Consequently, trial counsel was not

ineffective for failing to request information regarding the deputy's termination or to make a public-records request.

B

{¶56} Appellant also argues that trial counsel rendered ineffective assistance during the suppression hearing for the failure to object to hearsay testimony. We point out, however, that "the Rules of Evidence do not apply to suppression hearings." *State v. Bozcar*, 113 Ohio St.3d 148, 863 N.E.2d 155, 2007–Ohio–1251, ¶ 17, citing Evid.R. 101(C)(1) & 104(A); *see also State v. Norman*, 4th Dist. Ross Nos. 08CA3059 and 66, 2009–Ohio–5458. Therefore, "'[a]t a suppression hearing, the court may rely on * * * evidence, even though that evidence would not be admissible at trial.'" *Maumee v. Weisner*, 87 Ohio St.3d 295, 298, 720 N.E.2d 507 (1999), quoting *United States v. Raddatz* (1980), 447 U.S. 667, 679, 100 S.Ct. 2406, 65 L.Ed.2d 424. Consequently, appellant cannot demonstrate that trial counsel was ineffective for failing to object, during the suppression hearing, to hearsay testimony.

C

{¶57} Appellant further contends that trial counsel rendered ineffective assistance for the failure to submit jury instructions and to object to the state's proposed presumption-of-innocence instruction. Appellant argues that trial counsel

should have requested the court to instruct the jury on the meaning of the phrase "presumption of innocence."

{¶58} Courts typically have held that "[a]n attorney's decision not to request a particular jury instruction is a matter of trial strategy and does not establish ineffective assistance of counsel." *State v. Harrison*, 3d Dist. Logan No. 8-14-16, 2015-Ohio-1419, ¶ 89, quoting *State v. Morris*, 9th Dist. Summit No. 22089, 2005-Ohio-1136, ¶ 100, citing *State v. Fisk*, 9th Dist. Summit No. 21196, 2003-Ohio-3149, ¶ 9, citing *State v. Hill*, 73 Ohio St.3d 433, 443, 653 N.E.2d 271 (1995), and citing *State v. Oates*, 3d Dist. Hardin No. 6-12-19, 2013-Ohio-2609, ¶ 9. Nevertheless, "[a] trial court's instructions to a jury must correctly, clearly, and completely state the law applicable to the case." *State v. Orians*, 179 Ohio App.3d 701, 2008-Ohio-6185, ¶ 10 (3d Dist.). Further, "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." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 37, quoting *State v. Adams*, 62 Ohio St.2d 151, 153, 404 N.E.2d 144 (1980).

{¶59} In the case sub judice, appellant contends that trial counsel was ineffective for failing to request the trial court to give the jury a presumption-of-innocence instruction.

Appellant does not, however, identify the precise definition that he claims trial counsel should have requested. Instead, appellant asserts that R.C. 2938.08 required the court to give the jury a presumption-of-innocence instruction.

R.C. 2938.08 provides as follows:

> A defendant in a criminal action is presumed to be innocent until he is proved guilty of the offense charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be acquitted. The presumption of innocence places upon the state (or the municipality) the burden of proving him guilty beyond a reasonable doubt.
>
> In charging a jury the trial court shall state the meaning of the presumption of innocence and of reasonable doubt in each case.

{¶60} This statute, however, is included in a section of the Revised Code titled, "Magistrate Courts." R.C. 2938.02 specifies that R.C. Chapter 2938 applies to trials "in any court or before any magistrate inferior to the court of common pleas." *See* Katz and Giannelli, Ohio Criminal Law, Section 71:6 (3d ed.) (R.C. 2938.08 applies "in cases tried before a magistrate's court"). In the case before us, however, the trial did not occur in a court inferior to the common pleas court. We therefore do not agree that trial counsel was ineffective for failing to ask the trial court to give the jury this R.C. 2938.08 presumption-of-innocence instruction.

Additionally, the court did advise the jury that appellant

> is presumed innocent until his guilt is established beyond a reasonable doubt. The defendant must be acquitted unless the state produces evidence which convinces you beyond a reasonable doubt of every essential element of the offense charged in the indictment or of any lesser offense included within that charge.

The court's instruction tracks the Ohio Jury Instructions. *See* Ohio Jury Instructions CR 207.11 (Rev. Dec. 10, 2011) ("The defendant is presumed innocent until his/her guilt is established beyond a reasonable doubt. The defendant must be acquitted unless the State produces testimony or evidence that convinces you beyond a reasonable doubt of every essential element charged in the indictment.").

{¶61} Moreover, our review of the record indicates that the trial court gave the jury an appropriate reasonable-doubt instruction. The court gave the jury the following instructions:

> "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say that they are firmly convinced of the truth of the charge. It is a doubt based upon reason and common sense. "Reasonable doubt" is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.

The trial court's reasonable-doubt instruction mirrors R.C. 2901.05(E):

> "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.

{¶62} Furthermore, appellant did not demonstrate how any deficiency in trial counsel's failure to request different jury instructions affected the outcome of the proceedings.

{¶63} Consequently, we do not believe that trial counsel was ineffective for failing to request a more specific presumption-of-innocence instruction.

D

{¶64} Appellant additionally argues that trial counsel was ineffective for failing to request a separation of witnesses. He asserts that the failure to do so resulted in the state's investigator being permitted to remain at the prosecution's table, even though the investigator testified as a fact witness.

{¶65} Evid.R. 615(A) states that "at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order

of its own motion." Evid.R. 615(B)(2) further provides, however, that the court shall not exclude "an officer or employee of a party which is not a natural person designated as its representative by its attorney." Evid.R. 615(B)(2).

{¶66} The state is not a natural person. *State v. Massie*, 6th Dist. Ottawa No. OT-04-007, 2005-Ohio-1678, ¶ 11. And "[t]he prosecuting attorney is the state's legal representative in all criminal matters." *State v. Montgomery*, 169 Ohio St.3d 84, 2022-Ohio-2211, 202 N.E.3d 616, ¶ 17, citing R.C. 309.08(A), and *State v. Heinz*, 146 Ohio St.3d 374, 2016-Ohio-2814, 56 N.E.3d 965, ¶ 21. Under Evid.R. 615(B)(2), the trial court shall not exclude an officer or employee of the state if the prosecuting attorney designated that officer or employee as the state's representative.

{¶67} Indeed, in criminal trials prosecuting attorneys commonly "designate an individual to be a personal representative of the state and sit at counsel table during a criminal trial." *State v. Montgomery*, 169 Ohio St.3d 84, 2022-Ohio-2211, 202 N.E.3d 616, ¶ 17, citing *State v. Lewis*, 70 Ohio App.3d 624, 640, 591 N.E.2d 854 (4th Dist.1990). Courts have long held that "[i]n a criminal prosecution, a representative of the law enforcement agency handling the prosecution — even if the representative is a witness — may assist the prosecutor

during trial and may remain in the courtroom although a separation of witnesses has been ordered." *State v. Fuller*, 1st Dist. Hamilton No. C–960753 (Sept. 26, 1997); *e.g.*, *State v. Anderson*, 8th Dist. Cuyahoga No. 87836, 2007-Ohio-5326, ¶ 11; *State v. Remy*, 4th Dist. Ross No. 03CA2731, 2004-Ohio-3630, ¶ 74.

{¶68} In the case before us, we do not believe that trial counsel was ineffective for failing to ask the court to exclude the state's representative from the courtroom during other witnesses' testimony. As Evid.R. 615(B)(2) and case law clearly indicates, the state may designate a law enforcement officer as its personal representative who is not subject to exclusion under Evid.R. 615(A). Trial counsel, therefore, reasonably could have determined that asking the court to exclude the investigator would be a vain act. Trial counsel is not ineffective for failing to perform a vain act. *E.g., State v. Whitehead*, 4th Dist. Scioto No.20CA3931, 2022-Ohio-479, at ¶ 27. Consequently, we do not believe that trial counsel was ineffective for failing to ask the court to exclude the investigator.

{¶69} Accordingly, based upon the foregoing reasons, we overrule appellant's fourth assignment of error.

IV

{¶70} In his fifth assignment of error, appellant argues that the trial court "incorrectly applied consecutive sentences."[5] More specifically, appellant seeks "a review and appeal" of his consecutive sentences under R.C. 2953.08(C)(1).[6]

{¶71} When reviewing felony sentences, we apply the standard set forth in R.C. 2953.08(G)(2). *E.g., State v. Nelson*, 4th Dist. Meigs No. 22CA10, 2023-Ohio-3566, ¶ 63. R.C. 2953.08(G)(2)(a) provides that "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." Instead, the statute authorizes appellate courts

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[5] During the pendency of this appeal, the Ohio Supreme Court issued *State v. Gwynne*, ___ Ohio St.3d ___, 2022-Ohio-4607, ___ N.E.3d ___ (*Gwynne I*), opinion vacated and superseded on reconsideration, ___ Ohio St.3d ___, 2023-Ohio-3851, ___ N.E.3d ___. We invited the parties to submit supplemental briefs to address *Gwynne*. Appellant's counsel responded: "Counsel finds [the fifth assignment of error] to be without merit at this time as no reasonable contention can be made that offers a basis for reversal. However, Appellant requests that [the fifth assignment of error] remain and be reviewed by the Court pursuant to *State v. Gwynne*."

Also, during the pendency of this appeal, the State of Ohio filed a motion for reconsideration in *Gwynne I*. The Ohio Supreme Court recently issued its decision regarding the motion for reconsideration, and a plurality of the court essentially returned felony-sentencing appellate review to pre-*Gwynne I* review. *State v. Gwynne*, ___ Ohio St.3d ___, 2023-Ohio-3851, ___ N.E.3d ___ (*Gwynne II*).

[6] We observe that appellant's brief cites R.C. 2929.14(C)(3), but the substance of the sentence attached to that citation recites the language contained in R.C. 2953.08(C)(1).

to "increase, reduce, or otherwise modify a sentence" "if it clearly and convincingly finds either of the following":

> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
> (b) That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2).

{¶72} Practically speaking, R.C. 2953.08(G)(2) means that appellate courts ordinarily "'defer to trial courts' broad discretion in making sentencing decisions.'" *State v. Gwynne*, ___ Ohio St.3d ___, 2023-Ohio-3851, ___ N.E.3d ___, ¶ 11 (*Gwynne II*), quoting *State v. Rahab*, 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431, ¶ 10 (lead opinion), and citing *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23 (describing the appellate court's review of whether a sentence is clearly and convincingly contrary to law under R.C. 2953.08(G) as being deferential to the sentencing court); *accord State v. Creech*, 4th Dist. Scioto No. 16CA3730, 2017-Ohio-6951, ¶ 11, quoting *State v. Venes*, 8th Dist. Cuyahoga No. 98682, 2013–Ohio–1891, ¶ 21 ("[t]he language in R.C. 2953.08(G)(2) establishes an 'extremely deferential standard of review' for 'the restriction is on the appellate court, not the trial

judge'").[7] In other words, appellate courts "may increase, reduce, or otherwise modify consecutive sentences only if the record does not 'clearly and convincingly' support the trial court's R.C. 2929.14(C)(4) consecutive-sentence findings." *Gwynne II* at ¶ 13.

> "[C]lear and convincing evidence" means "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established."

Gwynne II at ¶ 14, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

> Therefore, an appellate court is directed that it must have a firm belief or conviction that the record does not support the trial court's findings before it may increase, reduce, or otherwise modify consecutive sentences. The statutory language does not require that the appellate court have a firm belief or conviction that the record supports the findings. This language is plain and unambiguous and expresses the General Assembly's intent that appellate courts employ a deferential standard to the trial court's consecutive-sentence findings. R.C. 2953.08(G)(2) also ensures that an appellate court does not simply substitute its judgment for that of a trial court.

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[7] Interestingly, Justice Stewart, then a judge for the Eighth District Court of Appeals, authored the decision in *State v. Venes*. Justice Stewart took the opposite position when writing the majority decision in *Gwynne I*.

And the concurring opinion in *Venes* could not have been more prescient: "The doctrine of stare decisis now appears to be a mythical beast when it comes to criminal law." *Venes* at ¶ 31 (Rocco, J., concurring).

Gwynne II at ¶ 15.

{¶73} In the case at bar, appellant does not contend that the record fails to support the trial court's findings under R.C. 2929.14(C)(4) or that the sentence is contrary to law in accordance with R.C. 2953.08(G)(2)(a) and (b). Instead, appellant seeks review under R.C. 2953.08(C)(1). That provision reads:

> In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (C)(3) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum definite prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted or, with respect to a non-life felony indefinite prison term, exceed the longest minimum prison term allowed by division (A)(1)(a) or (2)(a) of that section for the most serious such offense. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.[8]

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[8] App.R. 5(D)(2) authorizes a defendant to incorporate this leave to appeal in the initial appellate brief. The rule states as follows:

> When a criminal defendant has filed a notice of appeal pursuant to App. R. 4, the defendant may elect to incorporate in defendant's initial appellate brief an assignment of error pursuant to R.C. 2953.08(C), and this assignment of error shall be deemed to constitute a timely motion for leave to appeal pursuant to R.C. 2953.08(C).

{¶74} At least one court has concluded that R.C. 2953.08(C)(1), "by its terms, * * * only applies to consecutive sentences imposed under R.C. 2929.14(C)(3)." *State v. Green*, 7th Dist. Belmont No. 14 BE 0055, 2016-Ohio-4915, ¶ 112.

R.C. 2929.14(C)(3) provides:

> If a prison term is imposed for a violation of division (B) of section 2911.01 of the Revised Code, a violation of division (A) of section 2913.02 of the Revised Code in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of section 2921.331 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

This provision specifies that it

> only applies to sentences for violations of three specific statutory sections: R.C. 2911.01(B), R.C. 2913.02(A), and R.C. 2921.331(B). R.C. 2911.01 is the aggravated robbery statute. R.C. 2913.02(A) is the theft and aggravated theft statue. And R.C. 2921.331(B) is the failure to comply with an order or signal of a police officer statute.

Green at ¶ 112.

{¶75} Other courts, however, seemingly have glossed over[9] R.C. 2953.08(C)(1)'s reference to R.C. 2929.14(C)(3) and

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[9] See *State v. Davis*, 1st Dist. Hamilton No. C-120076, 2012-Ohio-5756, ¶ 12 (inserting ellipsis in place of R.C. 2929.14(C)(3)). At least one court has concluded that R.C. 2953.08(C)(1)'s reference to R.C. 2929.14(C)(3) is a "clerical error." *State v. Chavez*, 8th Dist. Cuyahoga No. 99436, 2013-Ohio-4700, ¶ 47.

concluded that "'[a] defendant may seek a discretionary appeal of consecutive sentences under R.C. 2953.08(C) if the aggregate prison term exceeds the maximum sentence possible for the most serious offense of which the defendant was convicted.'" *State v. Graham*, 2nd Dist. Montgomery No. 25934, 2014-Ohio-4250, ¶ 32, quoting *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 24. These courts have determined that R.C. 2953.08(C)(1)'s "grant of the right to appeal does not mean, however, that consecutive sentences are erroneous merely because they exceed the maximum sentence allowed for the most serious offense." *Graham* at ¶ 32*; State v. Wardlow*, 12th Dist. Butler No. CA2014-01-011, 2014-Ohio-5740, ¶ 22 ("R.C. 2953.08(C)(1) does not limit a sentencing court's discretion to impose consecutive sentences"). "To the contrary, consecutive sentences for multiple convictions certainly may exceed the maximum sentence for the most serious offense." *State v. Myers*, 2nd Dist. Clark No. 2001-CA-40, 2002-Ohio-6196, ¶ 6, citing *State v. Hacker*, 2d Dist. Clark No.2001-CA-12, 2001 WL 958873 (Aug. 24, 2001) (expressly rejecting "any suggestion that consecutive sentences may not exceed the maximum sentence allowable for the most serious offense of which a defendant is convicted"); *State v. Haines*, 10th Dist. Franklin No. 98AP195, 1998 WL 767438 (Oct. 29, 1998), *6-7 ("the right to appeal a

sentence under R.C. 2953.08(C) does not mean that consecutive sentences for multiple convictions may not exceed the maximum sentence allowed for the most serious conviction").

{¶76} In any event, we agree with "the great weight of authority in Ohio * * * that R.C. 2953.08(C)(1) does not limit a sentencing court's discretion to impose consecutive sentences." *State v. Davis*, 1st Dist. Hamilton No. C-120076, 2012-Ohio-5756, ¶ 13, citing *State v. Owens*, 5th Dist. Ashland No. 11–COA–37, 2012–Ohio–2951, ¶ 15; *State v. Nicely*, 6th Dist. Fulton No. F–09–14, 2010–Ohio–2797, ¶ 28–29; *State v. Gonzalez*, 3d Dist. Allen No. 1–98–84, 1999 WL 446441, *3–4 (Jun. 30, 1999); *Haines* at *16. "Instead, the statute merely provides an opportunity to seek leave to appeal." *Davis* at ¶ 13.

{¶77} Moreover, we recognize that R.C. 2929.14(C)(4) governs the imposition of consecutive terms of imprisonment.[10] R.C.

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[10] R.C. 2929.14(C)(4) states:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial

2929.14(C)(4) does not refer to R.C. 2953.08(C)(1) or explicitly bar a sentencing court from imposing an aggregate prison term in excess of the most serious offense for which the defendant was convicted. *See id.* at ¶ 14. Rather, "[i]n order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, paragraph one of the syllabus.

{¶78} Here, appellant has not raised any argument that the trial court failed to comply with R.C. 2929.14(C)(4). Additionally, our review of the record does not reflect that the trial court failed to comply with R.C. 2929.14(C)(4).

> or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

Consequently, we find no merit to appellant's fifth assignment of error.

{¶79} Accordingly, based upon the foregoing reasons, we overrule appellant's fifth assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

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

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the 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 60 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 60-day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the 45-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 60 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.

Smith, P.J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, 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.