[Cite as *State v. McGrew*, 2025-Ohio-333.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

STEVEN P. MCGREW,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 24 CO 0022

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2024 CR 177

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Vito J. Abruzzino, Columbiana County Prosecutor and *Atty. Christopher R. W. Weeda,* Assistant Prosecutor, for Plaintiff-Appellee

Atty. Michael P. Dunham, for Defendant-Appellant

Dated: January 29, 2025

WAITE, J.

{¶1} Appellant Steven P. McGrew appeals a June 5, 2024 judgment entry of the Columbiana County Court of Common Pleas convicting him on failure to comply with an order or signal of a police officer. Appellant raises a series of arguments contesting the makeup of the jury, the admission of certain trial evidence, the sufficiency and manifest weight of the evidence, the jury verdict form, and the effectiveness of his trial counsel. For the following reasons, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual And Procedural History

{¶2} Police were involved in an investigation of Appellant when Patrolman Michael Garber of the Salem Police Department heard a dispatch call regarding Appellant. Dispatch advised officers that Appellant had been located near a Salem Walmart parking lot. (Trial Tr., p. 116.) Patrolman Garber drove to the scene, but chose a different route than the one he knew several officers had already traversed. The route taken by Patrolman Garber led him near a Circle K and "Berkshire" building.

{¶3} Once in the Circle K area, Patrolman Garber testified that a vehicle with a loud exhaust caught his attention. Patrolman Garber saw Appellant, with whom he was familiar, operating the vehicle. (Trial Tr., p. 117.) Patrolman Garber testified that the Circle K and Berkshire building area was clearly lighted, and he was certain the driver was Appellant. Patrolman Garber noticed that Appellant had a short beard at that time, more akin to "scruffiness," which he noted was much longer by the time of trial.

{¶4} Patrolman Garber called dispatch and gave Appellant's location. Dispatch relayed back to Patrolman Garber that the vehicle was owned by Appellant's mother, who

earlier reported the vehicle had been stolen by Appellant. (Trial Tr., p. 128.) Dispatch also informed Patrolman Garber that Appellant had two outstanding arrest warrants from another jurisdiction in the state and was the subject of twenty-one driver's license suspensions stemming from DUI convictions. He also learned that Appellant had fled from Sebring police officers three times within the past few weeks.

{¶5} Following this dispatch call, two other patrol cars reached the area. At this point, Appellant accelerated his vehicle and led police on a chase through Columbiana County and into Mahoning County. (Trial Tr., p. 121.) During the chase, Appellant drove in excess of ninety miles per hour at times, on the wrong side of the road. He barely averted a head-on collision with a police cruiser by ten yards, and forced another vehicle traveling on the road to drive over a curb to avoid a collision. Sometime after entering Mahoning County, officers determined the chase had become too dangerous to continue. As they had obtained a positive identification of the driver, officers terminated the pursuit.

{¶6} Appellant was later apprehended, and on April 10, 2024, was indicted on one count of failure to comply with an order or signal of a police officer, a felony of the third degree in violation of R.C. 2921.331(B). Plea negotiations were unsuccessful, and following a one-day jury trial, Appellant was convicted on the sole count in the indictment and the enhancement, which elevated the offense to a felony.

{¶7} On June 5, 2024, the trial court held a sentencing hearing. Defense counsel requested community control or, in the event the court ordered incarceration, a sentence in line with the nine months-to-one-year sentence offered by the state in its final plea offer. The state, however, sought a thirty month prison sentence. Over Appellant's objection,

the court sentenced him to thirty months of incarceration with a twenty-year driver's license suspension. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

> The trial court committed plain and structural errors by accepting a jury verdict that was deficient because the verdict form said that the State "Dtd" proved [sic] their case beyond any reasonable doubt. Docket Entry (D.E.) 36-37.

{¶8} Appellant attacks the jury verdict form pertaining to the crime's enhancement, which elevates the offense from a misdemeanor to a felony based on finding certain aggravating factors. On the form, the jurors handwrote what Appellant believes is "Dtd" in the blank where they were to indicate whether the jurors determined whether the state did, or did not, meet its burden beyond a reasonable doubt. The state responds that the jury clearly wrote the word "did" on this blank. Further, our review of the record reveals that the jurors initially wrote the word "guilty" on this blank, before crossing it out and entering "did."

{¶9} We note that trial counsel never objected to the verdict form, thus, Appellant is limited to a plain error analysis. A three-part test is employed to determine whether plain error exists. *State v. Billman*, 2013-Ohio-5774, ¶ 25 (7th Dist.), citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002).

> First, there must be an error, i.e. a deviation from a legal rule. Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. Third,

> the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

Billman at ¶ 25.

{¶10} The verdict form containing the enhancement to the failure to comply charge reads:

> "We, the jury, find the state *_____ prove beyond a reasonable doubt the Defendant's operation of the motor vehicle caused a substantial risk of serious physical harm to persons or property." (6/5/24 Verdict form.)

{¶11} The jurors originally mistakenly wrote "Guilty," but crossed it out and wrote "Did." While Appellant claims the "i" is a "t," and the handwriting on the form is somewhat messy, it is clear that it is intended to be an "i" and the jurors wrote "Did."

{¶12} In support of his contention that there was error on the verdict form, Appellant relies on *Black v. U.S.,* 130 S. Ct. 2963 (2010). In *Black,* the offense at issue involved honest-services fraud. A discussion arose during the proceedings as to the contents of the verdict form. *Id.* at 469. The state requested a special verdict form where, if the jury found the appellant guilty of mail fraud, the jurors could indicate whether their conviction was based on money fraud, property fraud, or both. The defense proposed jurors be given a general verdict form, and if the defendant was found guilty, the jurors could be asked on what basis. At issue on appeal was whether the defendant waived his right to object to the jury instructions because of his objection to the state's request for a special verdict form. This is a completely different issue than in the instant matter, which

involves neither a special verdict form nor a request for certain jury instructions regarding the form.

{¶13} Similarly, the facts and law in the instant matter are distinguishable from another case on which Appellant relies, *State v. Davis,* 2003-Ohio-4839 (2d Dist.). In *Davis,* the original verdict form contained a typographical error which was noticed after the jury had been discharged. Several hours later, the judge recalled the jury, provided a new verdict form and the jury again found the defendant guilty. *Id.* at ¶ 47. The Second District reversed the verdict, and found the form was not merely defective, as it was inconsistent with the jury instruction provided. The trial court also erred because a court cannot recall a jury after it has been discharged. *Id.* at ¶ 52. Again, none of these facts are present in the instant matter and *Davis* is inapplicable.

{¶14} The same is true for *State v. Schwable,* 2009-Ohio-6523 (3d Dist.). In *Schwable,* the verdict form failed to include the degree of the offense and contained incorrect statutory language. *Id.* at ¶ 12. Again, neither of these errors appear in the instant matter. This same factual situation was present in *State v. McDonald,* 2013-Ohio-5042. That case also involved an omission of the degree of the offense and failed to list the circumstances which led to the enhancement. *Id.* at ¶ 9.

{¶15} In the matter before us, Appellant hinges his argument solely on his contention that the jurors did not write an intelligible word on the verdict form. In his view, they wrote “Dtd.” However, it is apparent that, while the handwriting may not be pristine, the word written on the blank is “did.” If there were any doubt, this is buttressed by the obvious act of the jury initially writing the word “guilty” on the line, before realizing the appropriate response was either “did” or “did not.” At that point, jurors struck through

"guilty" and substituted "did" above it in the appropriate space. Appellant would like to conflate bad handwriting into plain error, but he is mistaken in this attempt. The jury clearly evinced that they found Appellant's operation of the vehicle caused a substantial risk of serious harm, and that he was guilty of the charged crime and enhancement.

{¶16} As there was no error in the verdict form, and certainly not plain error, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> Mr. McGrew's conviction was made with insufficient evidence and against the manifest weight of the evidence.

{¶17} There is only one charged offense at issue, failure to comply with the order of a police officer. This charge stemmed from Appellant's actions in failing to comply with Patrolman Garber's attempt to initiate a traffic stop and leading the subsequent police chase that ensued. Appellant bases his argument on his belief that Patrolman Garber did not adequately identify Appellant, thus contests only the element of identity.

{¶18} While Appellant objects to Patrolman Garber's testimony under both the theories of sufficiency of the evidence and manifest weight of the evidence, this Court has recently acknowledged identity is an issue involving manifest weight. "While identity is an element that must be proven by the state beyond a reasonable doubt, the credibility of witnesses and their degree of certainty in identification are matters affecting the weight of the evidence." *State v. Hill,* 2024-Ohio-2744, ¶ 31 (7th Dist.), citing *State v. Reed*, 2008-Ohio-6082, ¶ 48 (10th Dist.); *State v. Bias*, 2022-Ohio-4643 (10th Dist.).

{¶19} "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 2010-Ohio-617, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 2009-Ohio-1023, ¶ 14 (7th Dist.), citing *State v. Robinson*, 162 Ohio St. 486 (1955). When reviewing a conviction for sufficiency of the evidence, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 2015-Ohio-1882, ¶ 14 (7th Dist.), citing *State v. Merritt*, 2011-Ohio-1468, ¶ 34 (7th Dist.).

{¶20} In reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138 (1998). A conviction cannot be reversed on the grounds of sufficiency unless the reviewing court determines no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id*.

{¶21} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 2011-Ohio-6524, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 2010-Ohio-3282, ¶ 42 (7th Dist.), citing *State v.*

Mastel, 26 Ohio St.2d 170, 176 (1971). When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201 (7th Dist. 1999).

{¶22} Even though Appellant's specific argument actually operates to involve only manifest weight, we note that once Patrolman Garber testified that he positively identified Appellant as the driver of the vehicle, the evidence was legally sufficient as to the identification of Appellant. In addition, Patrolman Garber learned through dispatch that the vehicle belonged to Appellant's mother, further supporting the officer's identification. Thus, the state offered sufficient evidence on identity.

{¶23} Turning to the manifest weight of the evidence, Patrolman Garber testified as follows:

> A. . . . I looked over, and the lights from Circle K lit up the whole front of the vehicle, and I see [Appellant] driving the vehicle.
>
> Q. So you were able to see inside that vehicle?
>
> A. Yes.
>
> Q. Even though it was dark out, the Circle K lights lit it up enough where you could identify [Appellant]?
>
> A. Yes.
>
> Q. Did he have a beard that day?

A. Yes, it was shorter than what it is now, though. It was more like a scruffiness.

Q. Okay. Is is [sic] there any possible way that you could have been confused that it was someone else or are you pretty sure it's [Appellant]?

A. I'm positive that it was [Appellant].

(Trial Tr., pp. 117-118.)

{¶24} When asked about the darkness and whether activation of the police lights may have caused a glare, Patrolman Garber testified:

There wasn't much glare. The Circle K lights are extremely bright, along with -- Berkshire has lights. And the way they are, you know, both sides of the road -- it lights that up very well there. As you can see in the video, when I turn around, it's very well lit. And once I get away from those two businesses its very dark.

(Trial Tr., p. 148.) The video was given to the jury, who were able to observe the lighting in the area. Patrolman Garber also testified that no emergency lights had been activated at the time he first observed Appellant. Instead, the only lighting was from the two building lights and the headlights on both the police cruiser and Appellant's vehicle. (Trial Tr., p. 147.)

{¶25} While Appellant contends Patrolman Garber could not positively have identified him in the dark, Patrolman Garber stated that lighting from the Circle K and Berkshire buildings was adequate to light the front of Appellant's vehicle, and he clearly

and without hesitation was able to identify Appellant, with whom he was familiar, as the driver.

{¶26} Appellant also now attacks Patrolman Garber's testimony that Appellant had a short beard at the time, contending that he wears a long beard. In this argument, Appellant misrepresents the testimony. Patrolman Garber testified that at the time of the incident, Appellant had a shorter beard, more akin to a "scruffiness." He acknowledged that Appellant's beard had grown since the incident. The incident occurred on February 24, 2024 and trial occurred on June 4, 2024, almost four months later. While Appellant did not attack Officer's Garber's description of his beard at trial, and so has waived this portion of his argument, it is apparent that any change in the length of Appellant's beard is explained by growth due to the passage of time.

{¶27} Appellant also questions why only one of three officers could identify him. Again, this is a misrepresentation of the facts. While Patrolman Garber testified that three police cruisers were involved in the chase, he clearly testified that at the time he identified Appellant, he was the only officer in the area and had to radio for backup. The other officers did not have the opportunity to view Appellant in the well-lighted parking lot prior to their chase.

{¶28} Appellant takes issue with the fact that Patrolman Garber admitted he had only ten seconds to identify Appellant. Patrolman Garber testified he was in an area with sufficient lighting and was very familiar with Appellant. His clear view of Appellant for ten seconds appears reasonable in making a positive identification. Even so, this was a question for the jury, who clearly believed Patrolman Garber's testimony.

{¶29} Patrolman Garber also testified that he ran the license plate on the vehicle Appellant was driving and it came back as registered to his mother. Dispatch had advised Patrolman Garber that Appellant's mother reported the vehicle was stolen by Appellant. Hence, not only did Patrolman Garber personally identify Appellant, he also traced the vehicle as one likely being operated by Appellant at the time.

{¶30} This record contains a plethora of evidence that, if believed, demonstrates Patrolman Garber positively identified Appellant as the driver of the vehicle. His second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

> The trial court committed plain error and violated Mr. McGrew's right to a fair and impartial trial. Tr. Passim.

{¶31} Appellant challenges two different issues within this assignment of error: jury bias and improper statements by the prosecutor during voir dire. There was no objection to either of the alleged errors at trial. Thus, Appellant's arguments can only be reviewed for plain error. Because these issues involve different facts and law, they will be divided into two subsections.

Jury Bias

{¶32} Appellant challenges the makeup of the jurors. Six jurors had some sort of relationship with members of law enforcement, one was acquainted with Patrolman Garber, and one knew the prosecutor's father. We will address these separately.

{¶33} In a general sense, the Second District has acknowledged that "[s]imply knowing a witness does not make a potential juror ineligible to serve, nor does having

police officers in the family make one incapable of fairness." *State v. Huber*, 2009-Ohio-1636, ¶ 27 (2d Dist.). In fact, this Court has held "the mere fact a juror is a former police officer does not rise to the level of a challenge for cause." *State v. Kinney*, 2019-Ohio-2704 (7th Dist.), (rev'd and remanded on other grounds), citing *State v. Murphy*, 91 Ohio St.3d 516, 527 (2001).

{¶34} Juror Kinemond's brother was a police officer. According to Appellant, Juror Kinemond possessed an inherent bias and was not rehabilitated in further voir dire. However, when it became known that Juror Kinemond had a brother in law enforcement, the following colloquy occurred:

> Mr. Weeda: Okay. Is there any way of him being your brother that would impact, I guess, how you would, say, judge credibility of witnesses, say, a police officer or anything like that? Or do you think you could sit here, put all of that aside, the fact that your brother is an officer, and make a decision based off what you see here today?
>
> Mr. Kinemond: No, I don't see anything that would hinder that.

(Trial Tr., pp. 56-57.)

{¶35} Juror Smith's husband was a police officer. The state had the following dialogue with Juror Smith about her husband and any possible bias:

> Mr. Weeda: Is there any way of being married to an officer --
>
> Ms. Smith: You must know him.

Mr. Weeda: Huh?

Ms. Smith: You must know him then.

Mr. Weeda: Yeah. I knew him for a short stint. But is there any way of, you know, being married to an officer that would impact your decision on today's case and hearing the evidence, and, again judging the credibility?

Ms. Smith: No.

(Trial Tr., pp. 57-58.)

{¶36} Juror Sloan indicated that she had "close family members" involved in law enforcement, but did not specify their roles or relationships. Defense counsel questioned her on the impact of these relationships:

Ms. Hall Dailey: The fact that you are friends or relatives with these people. Would that sway you in giving more weight to a police officer's testimony than the standard issues credibility?

Juror Sloan: Not at all.

(Trial Tr., p. 73.)

{¶37} Juror Reynolds had a nephew who works in law enforcement. When asked if her relationship with her nephew would affect her ability to make a decision, she responded "no." (Trial Tr., p. 58.)

{¶38} Juror Bourne had a cousin in law enforcement. The state asked him if his relationship with his cousin would affect his decision, to which he responded, "no." (Trial Tr., p. 59.)

{¶39} Juror Bowers indicated that he knew "many" officers from the Salem Police Department. He specified that he was "not really considered close with any of them." (Trial Tr., p. 59.) The state informed him that this case is centered in Salem. He responded that he knew nothing of the case and had not read anything about the matter. The state conducted the following colloquy:

> Mr. Weeda: Is there any way of you knowing the Salem officers are [sic] going to impact your decision to sit here today?
>
> Juror Bowers: No.

(Trial Tr., pp. 59-60.)

{¶40} As to Juror Bower's specific "friendship" with Patrolman Garber, he classified it as more akin to a casual acquaintanceship. A discussion was held regarding their relationship:

> Mr. Weeda: Mr. Bowers, I believe. How do you know Patrolman Garber?
>
> Mr. Bowers: He lives one street behind me.
>
> Mr. Weeda: Okay. Are you friendly with him, close with him?

Mr. Bowers: We are friends, yeah sure, if he stops by -- we'll chat a little bit --

Mr. Weeda: Okay.

Mr. Bowers: -- and say hi. But outside of that, we don't have any close relationship.

Mr. Weeda: Okay. Are you able to put your acquaintance with him and your knowing him and those occasional chats aside and be able to listen to the evidence and kind of make a decision based off what is presented here today?

Mr. Bowers: Of course, absolutely.

(Trial Tr., pp. 24-25.)

{¶41} In *Huber,* there were two issues with jurors during voir dire. One juror informed the court that a witness for the state was a family friend and that his entire family worked in law enforcement. *Id.* at ¶ 25. Another juror stated his belief that a person trained in a specific field, such as police officers, should be given a higher degree of credibility, but he acknowledged that sometimes police make mistakes. Despite the fact that these jurors had relatively close relationships with witnesses and/or police, the Second District affirmed the trial court's decision to allow both jurors to serve on the jury. *Id.* at ¶ 27.

{¶42} While Appellant may not wish to have jurors who are connected in some way to law enforcement on the jury, there is no prohibition to such jurors in the law. Only

two of the jurors in this matter had relationships with law enforcement that could be considered close (Juror Smith, husband, and Juror Kinemond, brother). Juror Reynolds' connection is a nephew and Juror Bourne's connection is a cousin. Juror Bowers had a casual friendship with a neighbor and a few members of the police department. Significantly, each of these jurors stated that they could put those relationships aside and judge the matter and witness credibility based on only the facts and law presented.

{¶43} Appellant also claims that Juror Bowers possessed outside information about the case. Appellant has no evidence to support his belief, and apparently simply assumes this is true due to his acquaintance with Patrolman Garber. However, Juror Bowers specifically stated he had no information or knowledge of the case, as he told the court: "I don't get the newspaper, so I don't even know what – I didn't read about it or anything." (Trial Tr., p. 60.) There is nothing in this record to suggest that Juror Bowers had some prior knowledge of this case.

{¶44} Although he did not have a personal relationship of any kind with a police officer, Juror Porter revealed that the prosecutor's father was his track and field coach in high school. The record does not indicate how long before trial Juror Porter had attended high school. The state engaged in the following colloquy with Juror Porter:

> Mr. Weeda: . . . Is there any way of knowing my dad going to impact your decisions today or anything like that?
>
> Mr. Porter: No.

(Trial Tr., p. 75.)

{¶45} Appellant points out that Juror Albaugh, who worked for a municipality in Minerva, was dismissed from the jury. She was not dismissed for cause, and there is no indication why Juror Albaugh was dismissed pursuant to a peremptory challenge. It appears that Appellant merely seeks to highlight this dismissal, and the limited amount of peremptory challenges he was allowed, particularly as one was used to excuse Juror Albaugh.

{¶46} The record reflects, however, that defense counsel used only this one challenge. Counsel apparently was not concerned about the impartiality of the jurors Appellant now challenges. There is no evidence that defense counsel had reason to challenge any of these jurors for cause, as each told the lawyers and the court they could be impartial. If, in hindsight, Appellant regrets the decision to allow these jurors to serve, this is immaterial. We must again state that this assignment can only be reviewed for plain error. Appellant must demonstrate that any error, if it exists, affected the outcome of the proceedings. Appellant has not argued, and the record does not support, that any juror acted with bias, failed to follow the court's instruction, or that their inclusion on the jury affected the fairness or the outcome of the proceedings.

{¶47} As such, Appellant's argument, here, has no merit and is overruled.

Improper Statements

{¶48} Appellant contends that the prosecutor made several improper statements during jury voir dire. Appellant complains of the prosecutor's comment that the state holds the same rights as a criminal defendant, and contends there was error in the state's attempt to define reasonable doubt, instructions on circumstantial and direct evidence, and discussion of the cumulative evidence rule, all of which he characterizes as an

impromptu opening statement during voir dire. Again, no objections were raised at trial, and Appellant's contentions are reviewed only for plain error. To constitute plain error, the record must demonstrate that any error, if found, affected the outcome of the proceedings.

{¶49} The state responds that the statement regarding the state's rights in a criminal trial was designed to inform the potential jurors that the people also have a right to a fair and impartial trial, and that the jurors must consider all of the evidence presented and weigh it fairly for both sides. The state contends that its discussion of the burden of proof was accurate, and its touching on circumstantial and direct evidence was limited to a brief introduction of the concepts, which the trial court explained much more in depth after the jury was seated. Each of these statements were made in an effort to ensure the jurors could be fair and impartial, and understand their role in the process.

{¶50} Our review of these statements reveals no error. While the statements were somewhat inartful, they contained no actual misstatement of the law. Further, Appellant has not shown that he was prejudiced by the state's comments, particularly as the trial court fully and formally instructed the jury on the relevant law.

{¶51} As to reasonable doubt, the prosecutor stated:

> Reasonable doubt is beyond doubt based upon reason and common sense. Based on reason and common sense. It's not 100 percent certainty. Everything relating to human affairs is open to some possible or imaginary doubt. It's not beyond all reasonable doubt or a shadow of doubt. And they have a definition of 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.

(Trial Tr., pp. 28-29.)

{¶52} As discussed by the Eighth District, the definition of reasonable doubt is found within 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.

State v. Wilson, 2023-Ohio-1046, ¶ 15 (8th Dist.).

{¶53} While not exact, the prosecutor in this case tracked the language closely in his statements. The only additional commentary made by the prosecutor was that jurors did not have to decide by "100 percent certainty" and "it's not beyond all reasonable doubt or a shadow of a doubt." While this language is not in the statute, the prosecutor appeared to be attempting to make the language more relatable. In *Wilson,* the trial court stated:

> Now, again, I think it would be unreasonable if I followed the doctor around, hired a private investigator and had the doctor followed for a month, so that I could be 100 percent sure, because there is no 100 percent sure, right, ladies and gentlemen? Even if I did that, would it work? Would I know everything about that person? I would not. So this is a burden of reasonable doubt, doubt based on reason and common sense, and that's what you need to remember.

Id. at ¶ 16. The Eighth District found that the court's statement was "unnecessary," but not erroneous or prejudicial. *Id.* at ¶ 19.

{¶54} Hence, while the best practice would be to track the language of the statute without deviation, the trial court properly instructed the jury on reasonable doubt and Appellant can show no prejudice as a result of the prosecutor's statement.

{¶55} Appellant also contends, without support with any real argument, that the state improperly commented on the different types of evidence and the prosecutor's whole discussion was akin to an opening statement in voir dire, to which it was not entitled. There is nothing in this record that could be considered to be an opening statement in the jury voir dire proceedings. While the prosecutor did make some attempt at distinguishing between direct and circumstantial evidence, Appellant does not explain his objection to this discussion. Regardless, there is nothing in the prosecutor's description that is unlawful, and the trial court later provided its own definitions in the jury instructions. While again somewhat inartful, nothing in these statements is in any way erroneous.

{¶56} Accordingly, Appellant's third assignment of error is without merit and is also overruled.

ASSIGNMENT OF ERROR NO. 4

The Trial Court abused its discretion in its evidentiary rulings. Tr. Passim.

{¶57} Appellant first objects, again, to Patrolman Garber's identification. Appellant contends the identification should have been inadmissible, based on his claim it was unreliable due to the short amount of time the officer had to view the driver and the poor lighting in the area. Second, Appellant takes issue with statements made by Patrolman Garber which he claims were hearsay: that the vehicle Appellant was driving was reported stolen, Appellant had twenty-one prior convictions for driving under the influence, had a suspended license, was subject to arrest warrants from other Ohio jurisdictions, and that Appellant fled from law enforcement three times within the preceding two weeks before the incident.

{¶58} The state responds that Patrolman Garber testified he had a clear view of the driver and recognized him to be Appellant, with whom he was familiar, and the information pertaining the stolen vehicle was relevant to the issue of identity. The evidence of Appellant's suspended license and arrest warrant were offered to explain the purpose of the attempted traffic stop. The state also posits that the defense opened the door to the statement about Appellant's prior attempts to flee, but does not respond to Appellant's argument about his twenty-one charges of driving under the influence.

Patrolman Garber Identification

{¶59} Appellant claims that the court should not have permitted Patrolman Garber's testimony regarding his identification. As previously discussed, Patrolman Garber testified that he had a clear view of the driver and quickly recognized Appellant. Patrolman Garber testified that he was familiar with Appellant and easily made the identification. While Appellant argues this is an admissibility issue, it actually goes to the weight of the evidence. There is no legal reason to prohibit this testimony. Appellant merely urges Patrolman Garber's testimony, in his view, was not credible. As we earlier stated, however, credibility is for the jury to determine. *See Hill,* 2024-Ohio-2744. The jury heard Patrolman Garber's testimony and defense counsel's attempt to attack that testimony. It is apparent the jury believed Patrolman Garber. There is nothing unreasonable about the jury's decision, as it is supported by competent and credible evidence on the record.

Hearsay/Prior Bad Acts Evidence

{¶60} While the issue of the stolen nature of the vehicle driven by Appellant is framed as hearsay, it actually appears to involve prior bad acts evidence. Patrolman Garber testified that he learned from the Goshen Police Department during his call to dispatch that the vehicle was reported as stolen. We will address a hearsay analysis, but we note that the state does not address the issue as one involving hearsay. We also note that defense counsel did object to Patrolman Garber's testimony on a hearsay basis.

{¶61} According to Evid.R. 801(C), hearsay is, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted." Hearsay is not admissible, unless the evidence falls within one of the many exceptions to the hearsay rule.

{¶62} This record shows that Appellant was not charged with the theft of the vehicle. The testimony at issue was offered to demonstrate one of the reasons Patrolman Garber attempted to initiate the traffic stop. The purpose for the testimony was not to prove the truth of the statement gleaned from dispatch, but to show what Patrolman Garber learned during the course of his investigation and why he initiated a traffic stop of the vehicle. The officer was informed Appellant's mother reported Appellant had stolen the vehicle, so it also may have helped confirm Appellant's identification, which Garber was able to corroborate when viewing the driver of the vehicle. Regardless, this testimony was intended to show that Patrolman Garber had a valid reason to stop the driver of that vehicle.

{¶63} In a Ninth District case, an officer testified about a dispatch call where he learned that the vehicle at issue had been reported stolen. *State v. Tate,* 2005-Ohio-2156 (9th Dist.). Unlike the instant matter, Tate's charges on appeal did include theft of that vehicle. The *Tate* court held that if there was error, any error in admitting that testimony was harmless because the state presented other evidence to prove that the vehicle had been stolen. *Id.* at ¶ 24.

{¶64} The instant case is a step removed from *Tate.* Appellant was not charged with auto theft. Thus, the testimony relating to the stolen nature of the car does not make a fact of consequence in the case any more or less probable. Thus, this testimony did not constitute hearsay. Even so, there is substantial evidence of Appellant's identification

and ample reason, then, to have initiated a stop even without that testimony. Hence, even if we could find error, any such error would be harmless.

{¶65} It appears Appellant's arguments are actually aimed at an issue of the admission of prior bad acts.

{¶66} Pursuant to Evid.R. 404(B):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

{¶67} "The admission of such [other-acts] evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice." *State v. Morris*, 2012-Ohio-2407, ¶ 14.

{¶68} The Ohio Supreme Court created a three-step analysis when reviewing the admissibility of a prior bad act:

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

> Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. See Evid.R 403.

State v. Williams, 2012-Ohio-5695, ¶ 20.

{¶69} While Appellant's counsel objected to Patrolman Garber's evidence as hearsay, no objection was raised relative to the evidence as constituting a prior bad act. However, the argument is addressed by the state under this umbrella, and it appears Appellant's actual argument is based on the character of the evidence, as it raises previous bad conduct on Appellant's part.

{¶70} Turning to this review, the evidence is unquestionably relevant. It is commonplace for police officers to contact dispatch and run a check of a license plate to obtain information about the driver and the vehicle. When the information causes the officer to suspect criminal activity, it becomes part of the investigation. This is the exact occurrence in this case. The testimony also appears relevant to the identification of Appellant, as the vehicle was owned by a close relative, presumably giving him access to the vehicle. In addition, the report of stolen property formed part of the basis (in addition to the bench warrant and suspended license) of the attempted traffic stop. There is no evidence that the testimony was offered to show that Appellant acted in conformity with the "bad act" of car theft. Further, the relevance of the evidence outweighs any prejudice

Appellant may have suffered, particularly as he did not face any charges related to theft of the car.

{¶71} Regarding Patrolman Garber's testimony that Appellant had an outstanding arrest warrant from Kent, this also formed part of the rationale behind Patrolman Garber's attempt to initiate a traffic stop. Thus, the evidence was relevant and was not introduced to show conformity with any specific character trait.

{¶72} Patrolman Garber also testified that Appellant was under a license suspension. This formed part of the reason for the attempted traffic stop. The officer, however, went a step further and testified that Appellant "was under 21 suspensions for driving. He had no driving privileges." (Trial Tr., p. 118.) Information as to Appellant's license is relevant, because it, too, formed the reason for the attempted stop. It is questionable, however, whether the additional testimony that he was under twenty-one suspensions was necessary. Given the facts of this case, however, we cannot say this was prejudicial, as Patrolman Garber identified Appellant, observed the charged offense as it occurred, and the video of the ensuing police chase was admitted into evidence. This record contains an overwhelming amount of evidence of aggravated circumstances regarding the chase, which was at extremely high speeds and involved many instances of Appellant's dangerous driving. To the extent Patrolman Garber may have gone too far with his testimony, Appellant cannot establish, and has not established, prejudice.

{¶73} The final contested testimony was Patrolman Garber's mention that Appellant had fled from police multiple times in recent days. As noted by the state, the passage quoted in Appellant's brief actually was elicited as an extension of the line of questioning that began with defense's counsel examination of Patrolman Garber. The

following questioning from defense counsel initiated testimony of Appellant's prior attempts to flee from police:

When you have dealt with Mr. McGrew in the past, has he been cooperative?

A. Sometimes.

Q. Has he run from the police?

A. Yes.

Q. And when would that have been?

A. Part of the initial call we received -- and we confirmed -- he had ran from the Sebring Police Department three different occasions within the last -- right before this incident occurred. Once was on a motorcycle where they had a positive identification on as well.

Q. Those were not chases you were involved in?

A. Correct.

Q. So you are simply relying on what someone at Sebring Police told you?

A. Yes.

Q. Okay. Has he ever run from Salem Police, to your knowledge?

A. To my knowledge, no.

(Trial Tr., pp. 151-152.)

{¶74} The issue again arose in re-examination of Patrolman Garber by the state:

Q. Counsel just asked if you had any knowledge that this Defendant has ever ran before, and I think you indicated from the Sebring Police. What is your understanding on how many times that was?

A. It was three total times prior to the incident with the Salem Police.

Q. And when you say prior to the incident, about how long prior to the incident?

A. I believe within the previous week to two weeks at the most. It was fresh.

(Trial Tr., p. 152.)

{¶75} In addition to falling within the exception of motive, plan, or absence of mistake, defense counsel opened the door to this "bad acts" testimony by initially raising the issue with Patrolman Garber.

{¶76} Accordingly, Appellant's fourth assignment of error is meritless and is overruled.

ASSIGNMENT OF ERROR NO. 5

Mr. McGrew was denied his right to effective assistance of counsel. Tr. Passim.

{¶77} Appellant also alleges counsel provided ineffective assistance. The test for an ineffective assistance of counsel claim is two-part: whether trial counsel's performance was deficient and, if so, whether the deficiency resulted in prejudice. *State v. White*, 2014-Ohio-4153, ¶ 18 (7th Dist.), citing *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Williams*, 2003-Ohio-4396, ¶ 107. In order to prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Lyons*, 2015-Ohio-3325, ¶ 11 (7th Dist.), citing *Strickland* at 694. The appellant must affirmatively prove the alleged prejudice occurred. *Id.* at 693.

{¶78} As both prongs are necessary, if one is not met, an appellate court need not address the remaining prong. *Id*. at 697. The appellant bears the burden of proof on the issue of counsel's effectiveness, and in Ohio, a licensed attorney is presumed competent. *State v. Carter*, 2001-Ohio-3312 (7th Dist.), citing *State v. Calhoun,* 86 Ohio St.3d 279, 289 (1999).

{¶79} Appellant argues that counsel was ineffective for failure to file a motion to suppress Patrolman Garber's identification of Appellant; request an expert witness to rebut this identification; object to biased jurors; object to improper statements during voir dire; object to prior bad acts evidence; and in failing to request preparation of a Pre-Sentence Investigation report ("PSI") to preserve the possibility of a community control sentence.

{¶80} Most of these complaints have been earlier addressed. Again, counsel is presumed effective, and we will not second-guess any counsel's trial strategy. Counsel

is also not required to perform a futile act. Hence, as we have already ruled Patrolman Garber's identification of Appellant was admissible and could only be attacked on the basis of credibility, it would have been futile for counsel to have tried to suppress this testimony. Even if some expert could be found to attack this testimony, counsel may have believed expert testimony was unnecessary due to counsel's intended attacks on the patrolman's credibility, and this strategy will not be second-guessed. It would likewise have been futile to attack potential jurors by means of a request for recusal for cause, and it may very well have been a valid trial strategy to have them remain on the panel. There were no erroneous statements by the prosecutor during voir dire, although some were inartfully phrased. There was also no "hearsay" evidence offered, and any prior bad act evidence was properly offered as well. Counsel was not ineffective for failing to object.

{¶81} Finally, as to the PSI issue, Appellant argues that his counsel was ineffective for failing to request a PSI be prepared, which is necessary to preserve the possibility of a sentence of community control. This record reflects the trial court did research Appellant's criminal record prior to sentencing, as would be expected. At the hearing, the court stated:

> I looked up your record. You were on probation when this offense occurred. Number one, not amenable. Because if you were, you wouldn't be committing new offenses while on probation. You were on probation in multiple cases in municipal court. You have a felony record here. I didn't even look anywhere else. I'm sure there might be something in Mahoning County. But I have you 2016 CR 2, 2017 CR 195, 2018 [CR] 148. The

> 2018 was a felony of the fifth degree. You were sentenced to prison on that. It was a possession of drugs offense.

(Trial Tr., p. 199.)

{¶82} It is clear from the trial court's statements at sentencing that community control would not be considered. No doubt counsel was aware that, once Appellant's full record was revealed, he was not a candidate for community control. Preparation of a PSI was futile, here, and may have conversely highlighted the full extent of Appellant's previous criminal record.

{¶83} In addition, the court was aware of and addressed the health of Appellant's mother, who apparently has cancer and is taking care of Appellant's son while he is incarcerated:

> No. I heard the testimony. You stole your mom's car. You must really care. You must really be wonderful to her to steal her car. She -- so much so that she reports it stolen to the police. What kind of a son does that to his mother? And one you're telling me here today is sick. It's awful. It's shameful.

(Trial Tr., p. 199.)

{¶84} Appellant attempts to frame his sentencing as a situation where he was summarily lead out of the courtroom pleading for mercy. This record reveals otherwise. Appellant was clearly provided an opportunity to speak, as required. He informed the judge about his mother's illness and that she cares for his child. Appellant was not

prevented from raising any mitigation of which he was aware prior to sentencing, but apparently had little to offer.

{¶85} The record reveals Appellant and the state had entered into negotiations in an attempt to reach a plea deal prior to trial, but were unsuccessful. The court twice indicated that it understood a prior plea negotiation included an offer for Appellant to serve nine months to one year in prison. The court reminded Appellant it was not part of the negotiations and had never approved any part of a plea offer. The court indicated a number of times that Appellant was not amenable to community control. In fact, the court expressly rejected community control as a possibility multiple times: "[y]ou are not amenable to community control. You were on community control when you committed this offense." (Trial Tr., p. 202.) Even if this record revealed counsel erred in failing to obtain a PSI, and it does not, this would have been harmless. As such, Appellant cannot show he was prejudiced in this regard.

{¶86} As Appellant cannot even meet one of the *Strickland* prongs on any of the issues he raises, his fifth assignment of error is without merit and is overruled.

Conclusion

{¶87} Appellant raises a series of arguments contesting the makeup of the jury, evidence offered at trial, the sufficiency and manifest weight of the evidence, the jury verdict form, and the effectiveness of his trial counsel. For the reasons provided, Appellant's arguments have no merit and the judgment of the trial court is affirmed.

Robb, P.J. concurs.

Hanni, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.