[Cite as *Columbus v. Phillips*, 2015-Ohio-5088.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
		No. 15AP-408
v.	:	(M.C. No. 2014 CRB 022515)
Dale K. Phillips, II,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 8, 2015

Richard C. Pfeiffer, Jr., City Attorney, and *Melanie R. Tobias*, for appellee.

Lane Alton, and *Chad K. Hemminger*, for appellant.

APPEAL from the Franklin County Municipal Court

SADLER, J.

{¶ 1} Defendant-appellant, Dale K. Phillips, II, appeals from the judgment of conviction and sentence entered by the Franklin County Municipal Court for obstructing official business in violation of Columbus General Offenses Code 2321.31. For the following reasons, we reverse and remand this matter to the trial court for a new trial.

I. BACKGROUND

{¶ 2} On September 16, 2014, plaintiff-appellee, City of Columbus, filed a criminal complaint charging appellant with Columbus General Offenses Code 2321.31, a misdemeanor of the second degree. Specifically, the complaint stated:

> [Dale K. Phillips, II] on or about the 15th day of September, 2014 did: without privilege to do so and with purpose to prevent or obstruct or delay the performance by a public official, to wit: P.O. Blair, CPD #2543, of an authorized act which was within public official's official capacity, to wit:

> investigating a burglary did hamper and impede the public official in the performance of the public official's lawful duties, to wit refused to comply to requests to exit his vehicle and be pat down for weapons and wrestling with officers.

{¶ 3} On September 18, 2014, appellant entered a plea of not guilty and demand for jury trial. On October 20, 2014, appellant filed a motion for a bill of particulars, and appellee filed a memorandum contra submitting that the language in the complaint was sufficiently specific to state the crime charged. No bill of particulars or further information regarding resolution of this motion is present in the record on appeal. On February 9, 2015, appellant filed a motion in limine asking the court to grant a restriction on any testimony concerning the allegation of prostitution under theories of hearsay, irrelevancy, and prejudice.

{¶ 4} The motion in limine was addressed on March 9, 2015, at the end of the first day of appellant's jury trial. The trial court made a preliminary ruling precluding mention of the information regarding prostitution in opening statements or in voir dire and delaying a final ruling on specific testimony until the issue arose while examining witnesses. The trial resumed, and appellee produced the following relevant evidence in its case-in-chief.

{¶ 5} Karen Blair, an officer with the Columbus Police Department, testified regarding her encounter and eventual arrest of appellant on the evening of September 15, 2014. At approximately 10:45 p.m. that evening, Blair responded to a dispatch indicating a burglary in progress at 2756 Sullivant Avenue. Blair believed the dispatch indicated a male and two females were loading property into an undescribed vehicle and that one of the females wore a brightly colored, orange shirt. The first officer to respond, Blair pulled her marked cruiser, lights and sirens off per protocol, into an alley just north of Sullivant Avenue and approached Harris Avenue, a one-way northern bound road. Blair observed a truck parked on the west side of Harris Avenue facing north, directly next to a door to the Sullivant Avenue building indicated in the burglary dispatch. Blair saw two occupants in the truck, a male driver and a female passenger wearing bright pink or orange.

{¶ 6} Believing the car location and occupants fit the dispatch description for the burglary, Blair pulled her cruiser partially onto Harris Avenue and exited her cruiser. As soon as she got out of the cruiser, the truck started to pull forward, so Blair verbally and

physically indicated for the truck to stop. The truck still pulled forward slowly, so Blair tapped on the hood and again asked the driver, appellant, to stop. Appellant stopped the truck.

{¶ 7} Blair, still alone, started talking to appellant in an attempt to "stall, you know, start the investigation, figure out what was going on while I'm waiting for more officers to respond to assist." (Tr. 37.) Blair wanted to remove appellant from his truck in order to detain him as a possible suspect in the burglary, search him for weapons, separate him from other witnesses, and continue the burglary investigation by interviewing him and searching the truck and building. Blair testified that patting a suspect down is particularly important where the crime at hand is a felony, which both tends to involve persons carrying weapons and tends to carry greater penalties for being caught, and presents a safety risk to officers and citizens.

{¶ 8} While waiting for other officers to arrive, Blair asked appellant for identification. According to Blair, appellant initially refused to provide Blair identification, stating he did not have it, but eventually produced a valid Ohio driver's license. After about one minute, another Columbus Police officer, Jean Byrne, arrived and spoke to the female passenger. For safety reasons, Blair continued to wait for an additional officer to assist her in removing appellant from the vehicle. While waiting, Blair asked appellant general questions regarding where he had come from and where he was going. During this time, appellant repeatedly asked Blair why she stopped him, and Blair told him she was investigating a possible burglary, which appellant immediately denied. Blair continued to detain appellant still believing, at that point, that he was involved in the possible burglary based on the truck's location directly outside of the building named in the dispatch, the timing of the truck being at that location so close in time to the dispatch, and the description of the occupants as male and female, with the female wearing a brightly colored shirt.

{¶ 9} After about another minute, a third Columbus Police officer, Adam Groves, arrived. Blair indicated to Groves that she wanted to remove appellant from the truck. Blair and Groves asked appellant to get out of his vehicle. According to Blair, appellant was hesitant, did not open his door, and continued to look forward. Blair opened appellant's door and again asked him to step out of the truck. He was still hesitant but put

his left leg out the truck and partially stood while leaning against the seat. According to Blair, Groves said "[n]o, come out of the truck, and grabbed his left arm in the escort position to guide him out of the [truck]" in accordance with their training on removing and positioning car occupants for pat downs. (Tr. 47.)

{¶ 10} Blair testified that, as soon as Groves touched appellant's arm, appellant immediately pulled his left arm toward his chest and grabbed the support handle on the truck door frame with his right hand. Blair and Groves told appellant to step out of the vehicle and let go of the handle, but appellant tried to pull himself back into the truck. At that point, Blair tried unsuccessfully to remove appellant's right hand from the handle, while Groves and a fourth officer tried to pull appellant out of the truck. Appellant continued to not comply with the officer's commands and repeatedly stated that he was a state trooper. Blair was then able to remove one of his fingers from the handle, and the two other officers took appellant to the ground by picking up his back legs—a "[d]ouble leg takedown." (Tr. 51.) Once on the ground, appellant and the officers struggled for about one minute, with appellant putting his hands underneath his body to prevent being handcuffed, until Groves deployed mace in appellant's face. Several officers were then able to get appellant's hand behind his back, handcuff him, and place him in the back of a cruiser. According to Blair, appellant's behavior delayed her and the assisting officers' response to the burglary, including delaying securing the building.

{¶ 11} On cross-examination, after appellant played an audio recording of the burglary dispatch, Blair agreed that the dispatch identified two white males and one black female with an orange wrap on her head and that, in actuality, the female passenger was white and wore a pink shirt. Blair did not agree that appellant definitively looked like a black man and testified that she believed appellant was white when she approached and interacted with him in his truck. Later, on redirect, Blair confirmed that she indicated appellant's race as "[w]hite" on the arrest form. (Tr. 111.) Blair also did not recall hearing a portion of the dispatch stating that the suspects were "back inside the building." (Tr. 79.)

{¶ 12} Regarding her decision to remove appellant from his truck, Blair disagreed that it would have been safer to leave him in his truck due to the potential for weapons inside the vehicle. She could not recall if the engine of appellant's truck was running but

agreed the truck was in "park." (Tr. 97.) Blair agreed that appellant eventually began to "[p]artially" exit his vehicle, but then would not come any further. (Tr. 91.) Blair disagreed that Groves reached in the vehicle and pulled appellant out. Instead, Blair described Groves contact as touching or holding appellant's arm, which evolved into pulling his arm only after appellant pulled back from Groves' contact. According to Blair, the officers employed the safest way, with the least amount of force possible, to detain appellant, who was overpowering the officers and not complying with commands.

{¶ 13} Although Blair "absolutely believed" appellant had been involved in the burglary when her confrontation with him occurred, Blair confirmed that she was ultimately unable to obtain any evidence linking him to a burglary. (Tr. 89.) Police eventually discovered the building was vacant, and only a breaking and entering had occurred. A female involved in the breaking and entering eventually exited the building, using the door which was directly next to appellant's truck.

{¶ 14} Byrne testified to responding to a reported burglary in progress on Sullivant Avenue and assisting with appellant's passenger. Byrne, who estimated that she arrived at the scene approximately 30 seconds after the call went out regarding the burglary, pulled her cruiser directly behind appellant's truck, "aired" appellant's tag, and observed Blair on the driver's side of the truck. (Tr. 150.) As Byrne approached the passenger side of the vehicle, the female occupant, wearing a pink or light colored headband, "started sinking down." (Tr. 154.) Over appellant's objection, Byrne said she recognized the passenger as a person who she had often observed behave, both earlier that day and over the course of several months during the prior spring, in a manner consistent with a prostitute. Because she could not see the passenger well in the truck, for safety, Byrne ordered the passenger to exit the truck to be patted down. The passenger complied but started getting a little "antsy" and repeated that "[h]e's just giving me a ride," which Byrne said is a common statement when officers interrupt a "transaction." (Tr. 167, 168.) Byrne told her that she knew she was a "working girl," a term Byrne uses when speaking with prostitutes, but that she was not in trouble related to the prostitution because the officers were here for a burglary. (Tr. 168.) According to Byrne, the passenger replied, "[y]es, but I'm not – he's just giving me a ride" in response to Byrne's statement. (Tr. 171.)

{¶ 15} Byrne learned the passenger's name was "Micah," but while Byrne was in the process of getting additional information from the passenger, Byrne heard a disturbance on the other side of the truck and left the passenger to assist the officers with appellant. (Tr. 176.) The passenger fled. Byrne testified that she was confident the passenger was not involved in the burglary but wanted her information for a possible field interview.

{¶ 16} Groves testified to responding to the reported burglary in progress on Sullivant Avenue. Upon arriving at the scene, Groves first attempted to scan the truck for weapons but, finding it too dark to see, proceeded to assist Blair with appellant who, at that point, was sitting in the driver's seat. With Blair, he asked appellant to step out of the vehicle, which, according to Groves, he was trained to do in situations involving felony suspects in a vehicle in order to separate them from possible weapons in the vehicle and to better interview the subject.

{¶ 17} According to Groves, after one minute or two of the officers' requests, appellant "[p]artially" complied by stepping his left foot out of the truck with his right hand on the handle above the truck door. (Tr. 193.) When Groves grabbed ahold of appellant's arm to escort him out of the vehicle, appellant tensed up, brought his left arm in and pulled both his arms to his chest in a "power triangle," and started twisting and pulling into the vehicle. (Tr. 196.) At that point, Groves tried to pull him out of the truck by his arm, not knowing whether appellant had something on him or in the truck that could hurt him or other officers. Once off the truck, appellant refused to put his arms behind his back and pulled away from the officers. Another officer grabbed his legs to take him to the ground. According to Groves, appellant continued to resist while on the ground by putting his arm underneath him. Groves attempted an "arm bar" to gain control of appellant's arm without success. (Tr. 199.) Not knowing whether appellant had a weapon in his waist band, Groves warned appellant to give him his hand or he would use mace. Appellant did not comply, and Groves sprayed him with mace. The officers were then able to get appellant in custody. Over appellant's objection and after he refreshed his memory with the arrest report, Groves testified that appellant, after being read his rights, stated he was not trying to pick up a prostitute but instead was giving a woman named Micah a ride to a gas station. On cross-examination, Groves agreed that

when he grabbed appellant's arm, he was trying to manipulate it behind appellant's back but was unsuccessful in doing so.

{¶ 18} Appellee admitted into evidence the cruiser video and photographs of appellant, proffered into the record the arrest form used to refresh Blair's memory, and rested its case-in-chief. Appellant moved for a Crim.R. 29 motion to dismiss, which the trial court overruled. Appellant then testified in his own defense.

{¶ 19} Appellant, currently employed as a truck driver, formerly worked as a state trooper for between seven and eight years. In his role as a trooper, he performed thousands of traffic stops. Additionally, appellant testified to his race as being "black" and that all his personal information indicate his race as black. (Tr. 258.)

{¶ 20} Regarding the night he was arrested, appellant testified that he returned to Columbus from a trucking job at 10:15 p.m. and headed to the Marathon gas station at Broad Street and Hague Avenue for fuel before heading home, where his girlfriend was waiting with dinner. Along the way, a person he thought to be his daughter's friend yelled at him from the street, so he went to pick her up. The woman turned out to be someone he did not know. She asked for a ride to the gas station, and appellant agreed. He was driving north on Harris Avenue when a patrol car "popped out" of the alley, causing him to stop suddenly to avoid hitting her. (Tr. 235.) He sat in his truck awhile, expecting the officer to back up, as appellant had the right of way. When the cruiser activated its overhead lights, appellant backed up to his left because his passenger said she thought the officer wanted to get around him. However, the cruiser pulled up, barely out of the alley, and turned its light off, so appellant proceeded slowly forward northbound on Harris Avenue. The officer exited the cruiser and indicated for appellant to stop.

{¶ 21} Appellant rolled down his window and asked the officer why she was stopping him, to which she replied, "I don't know, but we're going [to] find out." (Tr. 236.) Appellant replied that she could not stop him for no reason and to do so would violate his rights. The officer looked "befuddled" and began asking him for his license, to which appellant repeatedly responded by asking why he was being stopped, asking if he was being detained, and stating that she already had his information from running his car tags. (Tr. 236.) The officer finally said, "[y]es, you're being detained," and appellant eventually gave her his name, date of birth, and social security number. (Tr. 238-39.)

After other cruisers began to arrive, the officer told appellant she was stopping him to investigate a burglary. Appellant then gave the officer his driver's license, complied with her order to turn off his truck, and told the officer he had nothing to do with the burglary. The officer stood there until another officer came to his door and then asked him to step out of the vehicle.

{¶ 22} Appellant replied, "[w]ait a minute here. You stopped me illegally," explained that he already turned off his truck and provided his license, and asked why they wanted him out of the vehicle. (Tr. 241.) In light of police brutality and killings, appellant started to be concerned for his safety because of the "big show of force" with multiple cruisers around him. (Tr. 241.) Appellant testified, at that point, "there's no way I really want to get out of the vehicle." (Tr. 242.) He "didn't see how there could be any reason for me to have to exit the vehicle" but "suspected they were wanting – they were wanting to * * * do something." (Tr. 242.) The officers had not informed him that he was under arrest, that he had committed a traffic violation, and had not asked if he had any weapons on him. According to appellant, after he sat there for a little bit, the officer opened his truck door, so appellant reluctantly started to exit the vehicle by grabbing the handle on the frame above his door and stepping out with his left foot. Appellant believed he was complying with the officers' requests, even through he felt the stop to be illegal.

{¶ 23} Appellant testified that immediately after he stepped his left foot out, an officer grabbed him and tried to twist his arm behind his back, which prevented him exiting the truck. Appellant continued to hold the handle on the door frame and asked the officers why they were grabbing and assaulting him. The officers continued pulling and jerking on his arm while repeatedly saying "[s]top resisting." (Tr. 244.) The officers eventually removed appellant from the truck, with one officer on each arm, and continued to ask him to stop resisting but without providing him with other instructions. Another officer pulled his legs, and appellant fell, hitting his left shoulder and head on the ground. According to appellant, he never placed his hands underneath his body but, rather, the officers handcuffed him with his hands behind his back and then applied mace to his eyes at a point blank range, scraping his eye balls. Appellant testified that he suffered multiple injuries as a result of the incident, including injuries to his eyes, head, knees, left shoulder, and right arm and that his right arm required surgery to repair a tendon.

{¶ 24} On cross-examination, appellant confirmed that Blair told him she was investigating a burglary before she asked him to get out of his truck but explained that he did not see the purpose of getting out of the vehicle at the time Blair asked, did not understand that she wanted him out of the vehicle to talk about the burglary, and was worried about getting out of the truck. Appellant agreed that Blair would have considered him a suspect in the burglary. Appellant additionally agreed that he stopped exiting his truck after Groves grabbed his arm but added he "had no choice" because he was under Groves' control at that point. (Tr. 283.)

{¶ 25} Photographs of appellant and the scene, the audiotape of the report of the burglary, the audiotape of the police dispatch, and a video showing the actual burglary suspect were admitted into evidence. Appellant then rested his case.

{¶ 26} The jury found appellant guilty of obstructing official business, and the court imposed a $200 fine plus court costs with a $50 credit for one day served in jail. Appellant has filed a timely appeal.

II. ASSIGNMENTS OF ERROR

{¶ 27} Appellant raises the following three assignments of error for our review:

> [1.] The trial court erred in denying Defendant-Appellant's motion in limine and allowing testimony that was inadmissible.
>
> [2.] The trial court erred in creating a material variance from the complaint when it allowed the prosecution to present evidence that the investigation evolved beyond a burglary investigation and to argue facts that were unrelated to the specific factual allegations set forth in the complaint.
>
> [3.] Defendant-Appellant's conviction was against the manifest weight of the evidence.

III. DISCUSSION

A. First Assignment of Error

{¶ 28} Under his first assignment of error, appellant asserts that the trial court erred in denying his pretrial motion in limine[1] requesting exclusion of testimony

[1] Appellant preserved appellate review of this issue by objecting when the issue raised in his motion in limine was reached during Blair's testimony. *See Columbus v. Zimmerman*, 10th Dist. No. 14AP-963, 2015-Ohio-3488, ¶ 9.

concerning prostitution, pursuant to Evid.R. 401, 402, 403, and 802, and otherwise allowing inadmissible testimony regarding prostitution. Appellant specifically points to two statements as the source of error: Byrne's testimony, from personal experience, that appellant's passenger was a prostitute, and Byrne's statement that the female passenger admitted to being a "working girl." (Tr. 170)

{¶ 29} Conversely, appellee argues that the evidence of the "extrinsic"[2] other act evidence here is relevant to appellant's state of mind—his motive and purpose to obstruct the police in investigating him for soliciting prostitution—and is admissible under Evid.R. 404(B) as proof of motive, purpose, and intent for the obstructing charge. (Appellee's Brief, 10.) Alternatively, appellee argues that any error in allowing the testimony regarding prostitution was harmless considering the overwhelming proof of appellant's guilt. For the following reasons, we disagree with appellee.

{¶ 30} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus; *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, ¶ 22. " 'Abuse of discretion' has been described as including a ruling that lacks a 'sound reasoning process.' " *Id.* at ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990). "A review under the abuse-of-discretion standard is a deferential review. It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments." *Id.*

{¶ 31} Under Evid.R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Still, the trial court has "broad discretion" to admit other acts evidence for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, ¶ 2, 17; Evid.R. 404(B); R.C. 2945.59.

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[2] Appellee does not argue that the evidence was "intrinsic" to the crime charged and, therefore, not governed by Evid.R. 404. *See, e.g., State v. Rocker*, 10th Dist. No. 97APA10-1341 (Sept. 1, 1998) ("Evidence of a separate instance of criminal conduct is admissible where the crime is so connected with the charged crime that the facts of each are logically intertwined.").

{¶ 32} The Supreme Court of Ohio in *Williams* set out a three-step analysis for the trial court to consider in admitting "other acts" evidence: (1) whether the other acts evidence is relevant under Evid.R. 401, (2) whether the other acts evidence is presented to prove a permissible purpose, such as those stated in Evid.R. 404(B), rather than to prove the character of the accused in order to show activity in conformity therewith, and (3) whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice under Evid.R. 403. *Id.* at ¶ 19-20.

{¶ 33} Appellee offered the evidence at issue to prove the element of "purpose" of the obstructing official business charge under Columbus General Offenses Code 2321.31(A), which reads, "[n]o person, without privilege to do so and *with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity*, shall do any act which hampers or impedes a public official in the performance of his lawful duties." (Emphasis added.) The Columbus Code further specifies that "[a] person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." Columbus General Offenses Code 2301.22(A).

{¶ 34} The first step of *Williams* asks whether the evidence is relevant. *Id.* at ¶ 2o. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Irrelevant evidence is inadmissible, while relevant evidence is generally admissible subject to certain exceptions. Evid.R. 402. Under Columbus General Offenses Code 2321.31(A), the evidence at issue must be relevant to appellant's "purpose to prevent, obstruct, or delay the performance by a public official of *any* authorized act within his official capacity." (Emphasis added.)

{¶ 35} Here, the prostitution evidence was relevant because having a possible motive or reason to obstruct the officers does tend to make more probable appellant's specific intention to engage in acts which would hamper or impede the officers and tends to make less probable appellant's contention that he did not act with a purpose to prevent, delay, or obstruct the officers. Evid.R. 401; *Williams* at ¶ 22; Columbus General Offenses Code 2301.22(A). *See also State v. Blankenburg*, 197 Ohio App.3d 201, 220, 2012-Ohio-

1289, ¶ 82 (12th Dist.) ("Motive is generally relevant in criminal trials even though the matter involved is not an element of the offense the state must prove to secure a conviction. * * * Unless readily evident from the accused's conduct, motive is a part of the narrative of the state's theory of its case against the accused seeking to prove his criminal liability.").

{¶ 36} Appellant does not argue that, under the second step of *Williams*, appellee did not present the evidence for a permissible purpose but, rather, focuses on the third step under *Williams*: that, under the Evid.R. 403(A) balancing test, the probative value of any reference to prostitution was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Id*. at ¶ 23-24.

{¶ 37} Regarding the Evid.R. 403(A) balancing test, the trial court repeatedly acknowledged that the prostitution evidence was prejudicial. The court thought that "the damning aspect" of the evidence was that Byrne's personal knowledge would increase the impact of her own testimony relaying the statement from the passenger. (Tr. 159.) Yet, the court also thought Byrne's personal knowledge lessened the prejudicial impact of the passenger's statement. Additionally, the court noted that appellant would be able to testify to explain how the passenger came to be in his car.

{¶ 38} However, the record is silent on several key issues under Evid.R. 403(A) raised on the record of this case. Namely, the prosecution emphasized the prostitution evidence for its theory of the case and, as indicated in the trial court's reasoning above, the case at times correspondingly shifted focus to examine why appellant had the passenger in the car. Moreover, the effect of the prejudice on the jury was unmitigated in this case. No limiting instruction was requested by either party, and the jury instructions are silent on the proper use of the prostitution evidence. *See* Evid.R. 105. Finally, although appellant raised the issue several times, the record does not reflect consideration of whether the evidence of prostitution would confuse the issues for the jury, one of the reasons to prompt mandatory exclusion of evidence under Evid.R. 403(A).

{¶ 39} On the other side of the scale, the trial court found the alleged comment of the passenger combined with Byrne's personal knowledge to be "highly relevant" with respect to "why did [appellant] behave the way he did." (Tr. 159.) However, it did not consider whether, under the definition of purpose stated in Columbus General Offenses

Code 2301.22(A), the motive or reason behind appellant's conduct—no matter whether related to the possibility of a prostitution charge or the possibility of police brutality—may possess minimal probative value in relation to a charge for obstructing official business under Columbus General Offenses Code 2321.31(A).

{¶ 40} Therefore, considering all the above and the circumstances presented in this case, we find that the trial court abused its discretion in admitting the evidence of prostitution. Regarding appellee's argument that any error is nonetheless harmless, "[i]n determining whether to grant a new trial as a result of the erroneous admission of evidence under Evid.R. 404(B), an appellate court must consider both the impact of the offending evidence on the verdict and the strength of the remaining evidence after the tainted evidence is removed from the record." *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, syllabus. "[A]n improper evidentiary admission under Evid.R. 404(B) may be deemed harmless error on review when, after the tainted evidence is removed, the remaining evidence is overwhelming." *Id.* at ¶ 32. *See also* Crim.R. 52(A); R.C. 2945.83. The court summarized the *Morris* analysis in the subsequent decision of *State v. Harris,* 142 Ohio St.3d 211, 2015-Ohio-166, ¶ 37:

> [T]he following analysis was established to guide appellate courts in determining whether an error has affected the substantial rights of a defendant, thereby requiring a new trial. First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. *Id.* at ¶ 25 and 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. *Id.* at ¶ 28. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt. *Id.* at ¶ 29, 33.

{¶ 41} Here, as previously discussed, appellee offered the prostitution evidence to prove appellant's purpose and repeatedly emphasized this evidence. In its closing argument, appellee discussed the prostitution evidence at length, while simultaneously equating the concepts of motive and purpose. For example, appellee stated:

> We have demonstrated the defendant's purpose. * * * He didn't want to leave that truck. He didn't want to get separated, and he had a reason for that. Whatever that reason is, that was his purpose. And that's – that was his intent.

> Now, you can ask yourselves why he had that intent. We don't have to prove that, but it's a natural human question.
>
> Here's what the evidence was, when you sit in a truck at night next to someone that the Columbus police reasonably believe is a prostitute, the natural inclination is not to cooperate with the police when they come upon that truck and they want to remove you from it.
>
> * * *
>
> [T]he defendant admitted that he didn't want to do what police said. He suggested reasons why he didn't want to do this. He had a feeling about what the police were up to. But it's clear that the objective reasonable fact is that he was in the car with somebody, and you heard me question him extensively about that person. And his answers were disingenuous, his answers were evasive. His answers weren't correct and weren't true about his relationship with that person, and that's why he wasn't leaving that truck.

(Tr. 321-22.)

{¶ 42} Under *Morris* and *Harris*, we must also review the strength of the remaining evidence against appellant prior to granting a new trial. Blair testified that she informed appellant that she was detaining him to investigate a burglary just moments prior to asking him to get out of the car. Appellant admitted to this timing of events, admitted that he would be considered a suspect for the burglary at that time, and also admitted that he did not want to get out of the truck. On appellee's end, Blair and Groves admitted that appellant at least partially complied with their instruction to get out of the truck by stepping out with his left foot, and Groves admitted that when he grabbed appellant's arm he was trying to manipulate it behind appellant's back.

{¶ 43} A person must exit a vehicle when lawfully ordered to do so by a police officer. *State v. Foxx*, 2d Dist. No. 2013-CA-14, 2014-Ohio-235, ¶ 13-16 (holding that a police officer may require a passenger to exit a vehicle for an investigative stop where the officer articulates a reasonable suspicion that the occupant of the vehicle was involved in a recent armed robbery); *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) ("[A] police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle."). However, the parties' testimony directly conflicts with regard to whether, in the short time

frame involved, appellant was in the act of complying with the officer's order to exit his vehicle when Groves made contact with appellant, whether the nature and effect of Groves' actions prohibited compliance, and thus whether appellant "refused to comply to requests to exit his vehicle and [to] be pat down for weapons and wrestl[ed] with officers." (Complaint, 1.)

{¶ 44} As such, appellee's case depended, at least in part, on the jury's determination of who was more credible, the officers or appellant. The prostitution evidence, undisputedly prejudicial, could have influenced the jury's determination of appellant's credibility and, therefore, reduced the weight the jury placed on appellant's side of the story on key points in dispute. Considering the facts of this case, once the tainted evidence is excised, we cannot say overwhelming evidence of appellant's guilt supports the conviction and establishes appellant's guilt beyond a reasonable doubt. *See Harris* at ¶ 43.

{¶ 45} Accordingly, appellant's first assignment of error is sustained.

B. Second and Third Assignments of Error

{¶ 46} The disposition of appellant's first assignment of error renders both appellant's second assignment of error, challenging the evidence presented at trial as a material variance from the complaint, and appellant's third assignment of error, challenging the weight of the evidence used to convict him, premature and unnecessary at this time. Accordingly, appellant's second and third assignments of error are rendered moot. App.R. 12(A)(1)(c).

IV. CONCLUSION

{¶ 47} Having sustained appellant's first assignment of error and appellant's second and third assignments of error being rendered moot, we hereby reverse the judgment of the Franklin County Municipal Court and remand this matter to the trial court for further proceedings consistent with this decision.

Judgment reversed;
cause remanded.

LUPER SCHUSTER and HORTON, JJ., concur.

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