[Cite as *State v. Vore*, 2012-Ohio-2431.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-08-093
	:	O P I N I O N
- vs -		6/4/2012
	:	
WILLIAM BERNARD VORE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10CR27091

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Stephan D. Madden, 810 Sycamore Street, 5th Floor, Cincinnati, Ohio 45202, for defendant-appellant

POWELL, P.J.

{¶ 1} A defendant seeks to overturn his bank robbery conviction by claiming he never threatened to use force or forced the teller to turn over cash from the bank drawer. We reject this argument and his additional claims that other-act evidence admitted at trial was prejudicial, he was entitled to an identification expert witness at the state's expense, and the trial court erred in overruling his suppression motion on eyewitness identification issues. We

sua sponte notice postrelease control notification errors and remand this case to the trial court to follow the procedures outlined in R.C. 2929.191.

{¶ 2} William Bernard Vore was indicted for robbery and grand theft after police allege he entered a Fifth Third Bank branch in Warren County, handed a demand note to the teller, took the $9200 in bills she gave him, and left the bank. Vore's case was tried to a jury in Warren County Common Pleas Court. The jury returned guilty findings on both counts. The grand theft count was merged into the robbery count, a felony of the third degree, and Vore was sentenced to prison.

{¶ 3} Before we discuss Vore's four assignments of error in this appeal, we will summarize the evidence pertinent to the errors raised and elaborate on the evidence when necessary to address each specific assignment of error.

{¶ 4} According to the record, within an hour or so of the crime, law enforcement officers took a photo or photos from the bank surveillance video of the robbery and visited businesses around the bank to see if anyone recognized the man in the photo.

{¶ 5} Motel 6 employee Freddy Woolwine recognized the man as someone he believed was staying at the motel before the robbery. Woolwine said he saw the man the previous night exiting a dark blue or black car, "like a Nissan or …I couldn't tell," with Iowa or Nebraska license tags. He also talked with the man briefly in the parking lot the morning of the robbery. The employee remembered the man was wearing a hat like the one the robber was wearing in the bank photo. When asked if he saw the man in the courtroom, Woolwine said, "No. He had a hat on so … ."

{¶ 6} Motel 6 desk clerk Alexey Bogatyrev told police he recognized the man in the bank photo as a customer who had checked out of the motel that morning. Bogatyrev said he saw the man a few times during the last few days and when the man checked out, he was wearing some of the same clothing as the man in the robbery photo.

{¶ 7} Bogatyrev gave police the registration information Vore provided when he checked into the motel, including his name and an Iowa address. Bogatyrev said he remembered the name of the patron because it is a word in his native language. Vore paid cash for his three or four-day stay at the motel. Both Motel 6 employees recall the man was seeking repairs for his vehicle.

{¶ 8} Police showed the bank teller a photo array of six photos a few days after the robbery. The array included a photo that was taken from Vore's Iowa driver's license and forwarded to Warren County. The teller was unable to pick out a suspect.

{¶ 9} Even though the bank teller was unable to identify Vore as the man who gave her the demand note, a bank manager testified that he believed Vore was the man who robbed the bank based on his review of the surveillance video of the robbery.

{¶ 10} A second bank employee testified she was working next to the teller's station on the morning of the robbery and she remembered a man with a day planner walking up to the teller. She said the entire encounter with the teller probably lasted about a minute or so. She agreed that she told police she might not be able to identify the robber and wrote in her statement to police that she did not see anything. After describing for the jury what was depicted in the various photographs taken from the bank video, the bank employee testified she believed Vore was the individual she saw in the bank that day.

{¶ 11} Warren County authorities learned months after the robbery that Vore was in a Kentucky jail. He had reportedly been arrested less than two weeks after the robbery for unrelated charges that involved a police pursuit. A black pellet gun and $558 in cash were found on Vore or in the black Nissan car he was driving.

{¶ 12} Two experts testified they obtained handwriting samples from Vore and compared them to the "questioned writing," which was the demand note given to the teller. A forensic scientist with the Ohio Bureau of Criminal Investigation opined that Vore wrote the

robbery demand note. A handwriting expert originally hired by Vore at state's expense also concluded that Vore wrote the demand note.

{¶ 13} Assignment of Error No. 1:

{¶ 14} THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF THEFT THUS DENYING APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL. [sic]

{¶ 15} Vore argues that he never used or threatened the immediate use of force against the bank teller, and therefore, the trial court should have instructed the jury on the lesser-included offense of theft and erred in failing to do so.

{¶ 16} Vore's indictment contained both a robbery count and a separate grand theft count. According to the record, the grand theft count was based on depriving the owner of his or her property without the owner's consent. *See* R.C. 2913.02.

{¶ 17} The trial transcript reveals that during trial, the trial court and counsel discussed the jury instructions for the two counts of the indictment. Vore's counsel inquired about an instruction on a lesser-included charge of theft for the robbery offense, if the jury did not find the element of force or threat of force. The trial court said that it would explain to the jury the elements of the robbery count and if the jury did not "find any force or threat of force[,] they're going to be instructed to find him not guilty on robbery. They then move on to determine whether or not there is a theft." [sic]. Vore's trial attorney said: "Got you, all right."

{¶ 18} The record reflects no further discussion or objection to this portion of the jury instructions. Therefore, we review Vore's first assignment of error for plain error. Crim.R. 30; *see* Crim.R. 52(B).

{¶ 19} In order to prevail under a plain error analysis, Vore bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *State v. Long*, 53 Ohio St.2d 91, 96-97 (1978), paragraph three of the syllabus (notice of

plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice).

{¶ 20} A party is not entitled to an instruction on a lesser included offense unless the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser included offense. *State v. Trimble*, 122 Ohio St. 3d 297, 2009-Ohio-2961, ¶ 192; *State v. Anderson*, 12th Dist. No. CA2005-06-156, 2006-Ohio-2714, ¶ 10. In making this determination, the court must view the evidence in the light most favorable to the defendant. *Trimble*.

{¶ 21} An instruction on a lesser included offense is not warranted every time some evidence is presented to support the inferior offense. *Id*. Rather, there must be sufficient evidence to allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included (or inferior degree) offense. *Id.*

{¶ 22} Robbery, under the applicable version of R.C. 2911.02(A)(3), states that "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: Use or threaten the immediate use of force against another." "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing. R.C. 2901.01(A)(1).

{¶ 23} According to the record, the bank teller testified she was taking business receipts the morning of the robbery and was looking down at her computer when she noticed someone was "right up at the counter." When she asked how she could help him, the man handed her a piece of paper and said he needed to cash this check. The teller said the check was actually a handwritten note, which said: "This is A Robbery Give me All your 100s, 50s, 20s, Fast, no dye packs or alarms." [sic].

{¶ 24} The teller said she "froze" at first, "in shock just, you know, is this really happening?" The man asked her, "do you got it?" She said she "snapped out of it and then

the fear set in." The teller said, "Yeah I got it." She grabbed bills from her drawer and put them on the counter. The teller said the man put the money in a black "day planner" and walked out of the bank.

{¶ 25} After the man left, the teller said she "froze" until a bank manager walked by and asked her if something was wrong. The teller described the suspect as a white male in his 50s to 60s with a mustache. He was wearing a ball cap, jeans, and a shirt. She also indicated she told police the man had gray hair.

{¶ 26} The teller said she was trained to respond to a robbery by "do[ing] what they ask, get them out." She did not see a weapon, but when asked if she believed she would be harmed if she did not comply, she answered affirmatively. The teller said, "Because you never know. If they're unhappy, maybe he had a weapon and I just didn't see it. I was just scared." * * * "I was scared. This is robbery. Most times robbers they have guns, they have weapons. And I was scared" [sic].

{¶ 27} The Ohio Supreme Court previously stated the "use or threat of immediate use of force against another" component of a robbery offense is satisfied "if the fear of the alleged victim was of such a nature as in reason and common experience is likely to induce a person to part with property against his will and temporarily suspend his power to exercise his will by virtue of the influence of the terror impressed." *State v. Davis*, 6 Ohio St.3d 91, 94 (1983).

{¶ 28} The question is whether the actions of the defendant, when objectively viewed, could reasonably be expected to create a fear in the victim sufficient to cause the victim to part with property against his or her will. *State v. Adkins*, 2nd Dist. No. 2895, 1992 WL 180142 (July 20, 1992). In *Adkins*, a man placed a note on the bank teller's counter that said, "Hi. This is a robbery. Put $5,000 in a bag and don't push no buttons." *Id.* The man said it was not a joke and repeated that no buttons should be pushed. *Id*. When the teller

said she did not know what to do, the man repeated, "Give me $5,000." The teller said the man stared at her, told her he was sorry about this, said he would not hurt her, and knew he was going to get caught. *Id*.

{¶ 29} In addressing whether the accused threatened the immediate use of force against the teller, the *Adkins* court stated that the use of the word "robbery" in the note must be considered in its entirety along with all of the evidence. *Id*. Using the word "robbery" objectively gave the impression of force, particularly for a bank teller. *Id*. The court noted the announcement of a "robbery" was accompanied by a demand to put $5,000 in a bag, an instruction not to push any buttons, and was coupled with the teller's training to take a robbery note seriously because the robber might have a weapon. *Adkins.* Although the focus under R.C. 2911.02(A) is on the nature of the threat rather than on the victim's state of mind, the effect of the threat on the victim is a factor to be considered in evaluating the defendant's behavior. *Id.*

{¶ 30} In a case with facts similar to *Adkins*, a defendant handed a bank teller a note that said something to the effect that this was a "holdup" and demanded two stacks of fifties; no weapon was visible. *State v. Willis*, 10th Dist. 94APA04-554, 1994 WL 704388 (Dec. 15, 1994). In ruling on the manifest weight and sufficiency of the evidence, the *Willis* court said a weapon could reasonably be inferred in a hold up and, the evidence was sufficient for the jury to find beyond a reasonable doubt that the teller gave the defendant money because he was afraid that the defendant would harm him if he refused to comply with the note. *Id.* (teller's fear was reasonable and well founded based on common experience).

{¶ 31} Even though the cases cited above were dealing with the sufficiency and manifest weight of the evidence, we find the facts and conclusions in those cases useful for resolving the issue in the instant case. Vore gave a demand note to the teller telling her he was robbing the bank and demanding she act quickly and not activate any alarms or use die

packs. Based on the cases cited above, we find there was ample evidence that Vore used or threatened the immediate use of force.

{¶ 32} Viewing the evidence most favorably to Vore, we do not find the trial court erred in failing to provide a jury instruction on theft as the evidence did not reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense. *See Trimble*, 122 Ohio St. 3d 297, 2009-Ohio-2961, at ¶ 192. In addition, Vore received an instruction for theft separate from the robbery charge. Vore has not demonstrated plain error and his first assignment of error is overruled.

{¶ 33} Assignment of Error No. 2:

{¶ 34} THE TRIAL COURT ERRED WHEN ALLOWED THE STATE TO INTRODUCE EVIDENCE OF OTHER ACTS THAT WERE NOT SUFFICIENTLY RELATED TO DEFENDANT-APPELLANT. [sic]

{¶ 35} Vore contends that trial testimony from a Kentucky law enforcement officer about a police pursuit that led to his arrest and incarceration in Richmond, Kentucky presented improper other-acts evidence introduced for the purpose of showing he was the type of person who could and did commit a crime.

{¶ 36} According to the record, Vore filed a motion in limine to exclude the introduction of evidence about the Kentucky incident, among other issues. The motion was denied before trial. The record does not reflect that Vore renewed the motion at trial or objected before the officer testified.

{¶ 37} A motion in limine is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue. *State v. Grubb*, 28 Ohio St.3d 199, 201-202 (1986). An appellate court need not review the propriety of such an order unless the claimed error is preserved by a timely objection when the issue is actually reached at trial. *Id*. Therefore, the admission of the testimony in the instant case will be reviewed for

plain error. *See State v. Frazier*, 115 Ohio St. 3d 139, 2007-Ohio-5048, ¶ 133.

{¶ 38} As we previously noted, in order to prevail under a plain error analysis, Vore bears the burden of demonstrating that the outcome of the trial clearly would have been different, but for the error. *Long*, 53 Ohio St.3d 91 at 96-97.

{¶ 39} Evid.R. 404(B) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, but 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. *State v. Broom*, 40 Ohio St.3d 277, 282-283 (1988). The rule is in accord with R.C. 2945.59. *Id*. However, the issue of identity, although not listed in the statute, has been held to be included within the concept of scheme, plan, or system. *Id*.

{¶ 40} R.C. 2945.59 and Evid.R. 404(B) codify the common law with respect to evidence of other acts of wrongdoing, and are construed against admissibility. *State v. Lowe*, 69 Ohio St. 3d 527, 530, 1994-Ohio-345. The admission of other-acts evidence under Evid.R. 404(B) 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 has created material prejudice. *State v. Perez*, 124 Ohio St. 3d 122, 2009-Ohio-6179, ¶ 96. Relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 403.

{¶ 41} The state argues the evidence was properly admitted to show identity, connecting Vore to the Ohio robbery. At trial, Vore's identity as a perpetrator of the robbery was disputed. His defense was built on the theory that he was not the person depicted in the bank surveillance video.

{¶ 42} Other acts can be evidence of identity (1) where other acts form part of the immediate background of the alleged act that forms the foundation of the crime charged in

the indictment, and are inextricably related to the alleged criminal act, and (2) where the identity of a perpetrator is established by showing he has committed similar crimes and that a distinct, identifiable scheme, plan, or system was used in the commission of the charged offense. *Lowe*, 69 Ohio St. 3d 527 at 531.

{¶ 43} Courts must be careful when considering evidence as proof of identity to recognize the distinction between evidence that shows that a defendant is the type of person who might commit a particular crime and evidence that shows that a defendant is the person who committed a particular crime. *Id.* at 530.

{¶ 44} The record indicates the Kentucky police officer testified that the Richmond, Kentucky incident with Vore occurred on May 1, 2010, which was 11 days after the Warren County robbery. The officer said Vore was the subject of a police pursuit, which was discontinued at one point for safety reasons, but resumed shortly thereafter when Vore was observed entering a neighborhood that "dead ends." Vore was arrested after the black Nissan car he was driving was disabled by stop sticks.

{¶ 45} The officer was asked on cross-examination why Vore was being pursued. The officer indicated another officer was responding to a reported theft at a parking lot when the alleged victim of the theft pointed out Vore, who was driving away from the scene. The Kentucky officer testified Vore appeared intoxicated when he was stopped and the $558 recovered from Vore was eventually released to Vore's sister.

{¶ 46} While the testimony of the Kentucky police officer placed Vore with a car that matched the vehicle description provided by the Motel 6 employee, the connection for the Evid.R. 404(B) purpose of identity is tenuous.

{¶ 47} Nevertheless, nothing suggests the jury used the evidence presented by the state to convict Vore on the theory he was a bad person or had a propensity toward crime. *See State v. Grant*, 67 Ohio St. 3d 465, 472, 1993-Ohio-171. Based on the other evidence

admitted at trial, we find Vore was not prejudiced by the admission of the evidence and the outcome of Vore's trial clearly would not have been different. *State v. Johnson*, 5th Dist. No. 1997 CA 00247, 1998 WL 517852 (Aug. 3, 1998). Vore's second assignment of error is overruled.

{¶ 48} Assignment of Error No. 3:

{¶ 49} THE TRIAL COURT ERRED WHEN IT VIOLATED DEFENDANT-APPELLANT'S U.S. AND OHIO CONSTITUTIONAL RIGHTS BY FAILING TO PROVIDE ADEQUATE FUNDS FOR AN EYE WITNESS IDENTIFICATION EXPERT. [sic]

{¶ 50} Vore asked the trial court before trial to provide funds to hire expert witnesses in eyewitness identification and handwriting analysis. The trial court granted funds for the handwriting expert, but denied funds for an eyewitness identification expert.

{¶ 51} Vore argues his conviction turned on eyewitness identification and the denial of his request for an expert in this area was error.

{¶ 52} Due process requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing of a reasonable probability that the requested expert would aid in his defense, and that denial of the requested expert assistance would result in an unfair trial. *State v. Mason*, 82 Ohio St.3d 144, 1998-Ohio-370, syllabus.

{¶ 53} In resolving a request for funding for expert fees, courts have reviewed the expert's value to the defendant's proper representation at trial and the availability of alternative devices that fulfill the same functions as the expert assistance sought. *State v. Weeks*, 64 Ohio App.3d 595 (12th Dist.1989); *State v. Bean*, 2nd Dist. No. 16438, 1998 WL 22061 (Jan. 23, 1998); *State v. Hurley*, 3rd Dist. No. 12-11-01, 2012-Ohio-310.

{¶ 54} Where a party seeks to admit expert testimony about the reliability of

eyewitnesses, there are a number of alternative devices through which a defendant can accomplish the same ends, including conducting rigorous cross-examination, pointing out inconsistencies or discrepancies in the testimony, alerting jurors to factors that may affect a witnesses' reliability, as well as ensuring pertinent instructions are given to the jury. *See State v. Buell*, 22 Ohio St.3d 124, 132-133 (1986); *Bean*.

{¶ 55} The record reveals that Vore's counsel rigorously cross examined the witnesses who identified Vore, pointed out inconsistences or discrepancies in the testimony, and alerted jurors to factors affecting witnesses' reliability. The trial court provided an extensive instruction on identification issues to the jury. In other words, Vore accomplished the same ends as an expert witness through alternative devices. He failed to show the denial of the requested expert assistance resulted in an unfair trial. The trial court did not abuse its discretion in denying funds for the eyewitness identification expert. Vore's third assignment of error is overruled.

{¶ 56} Assignment of Error No. 4:

{¶ 57} THE TRIAL COURT ERRED AND VIOLATED DEFENDANT-APPELLANT'S DUE PROCESS RIGHTS WHEN IT OVERRULED THE SUPPRESSION MOTION AS TO IDENTIFICATION.

{¶ 58} Vore contends his suppression motion should have been sustained because the eyewitness identification testimony of a number of individuals was obtained through impermissibly suggestive procedures.

{¶ 59} When a witness is confronted with a suspect before trial, due process requires a court to consider whether the defendant demonstrated the identification procedure was unduly suggestive, and if so, whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. *See State v. Murphy*, 91 Ohio St.3d 516, 534, 2001-Ohio-112; *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375 (1972)

(examine the totality of the circumstances to determine whether the confrontation was so suggestive that there was "a very substantial likelihood of irreparable misidentification").

{¶ 60} The factors to be considered are (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Broom*, 40 Ohio St.3d 277 at 284, citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243 (1977).

{¶ 61} When a trial court rules on a suppression motion, it acts as the trier of fact and is best situated to determine the credibility of witnesses and resolve questions of fact. *State v. Williams*, 12th Dist. No. CA2009-08-014, 2010-Ohio-1523, ¶ 9. In reviewing a trial court's decision on suppression, the appellate court must accept the lower court's findings of fact if they are supported by competent, credible evidence. *Id*. The appellate court must then independently determine as a matter of law whether the facts satisfy the applicable legal standard. *Id*.

{¶ 62} First, we note that Vore now argues the identification testimony from four named witnesses should have been suppressed because they viewed Vore or Vore's photograph numerous times before they were either shown the photo array or identified Vore in court. After reviewing the record, however, we find the four witnesses listed in the appeal were not the witnesses mentioned and considered at the suppression hearing. In this assignment of error, Vore challenges the trial court's decision on the suppression motion and we will limit our review to the decision on the motion.

{¶ 63} Specifically, Vore's motion asked the trial court to suppress all pre-indictment and pretrial identifications based upon an "impermissibly suggestive photo array procedure." The motion did not delineate how the photo array procedure was impermissibly suggestive.

Vore told the trial court at the motion hearing that the bank teller's identification was tainted because the detective pointed out Vore's photo after the teller was unable to choose the robbery suspect from the photo array. Vore also challenged the identification procedures utilized when the same detective indicated in his investigative report that he showed Vore's driver's license photo to employees of businesses near the bank.

{¶ 64} The record indicates Warren County Sheriff's Detective Roger Barnes testified at the suppression hearing that he gave the bank teller six separate folders that each contained a single photograph of a potential suspect. According to Barnes, the teller was unable to select from any of the six, but was debating between five and six. Det. Barnes told her photograph number six was the suspect.

{¶ 65} While the photo array itself appeared to be appropriate, the bank teller should not have been told which photograph was Vore's when she could not pick out the robbery suspect. This procedure was unduly suggestive. However, the bank teller never identified Vore as the robbery suspect. The trial court was told at the suppression hearing the bank teller was unable to identify Vore as the suspect. At trial, the bank teller did not identify a suspect. Therefore, the failure to suppress the identification procedure was harmless error. Crim.R. 52(A) (any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded).

{¶ 66} Det. Barnes also testified at the motion hearing that he showed a driver's license photo to some of the employees from businesses near the bank and acknowledged that one of those employees was Motel 6 employee Woolwine. According to the detective, after he took the bank surveillance photo to nearby businesses and Vore was recognized and identified as the Motel 6 patron, he obtained a copy of the picture used for Vore's Iowa driver's license and returned to the businesses to show some of the employees that picture.

{¶ 67} When asked why he did not show a photo array, the detective responded that,

"[w]ell, I think it's pretty much the same issue as before, showed a single picture and say, 'was this person in your store?' The person didn't know you, wouldn't be able to pick you out of a lineup. It's a technique that I have used."

{¶ 68} While showing one photograph – in this case the driver's license photo – can, in some situations, be an impermissibly suggestive procedure, the testimony indicated that this photograph was obtained and used only after Vore was recognized from images taken during the crime. We find that Vore failed to demonstrate that the identification procedure was unduly suggestive of his guilt and any identification made was unreliable under the totality of the circumstances.

{¶ 69} Vore's arguments are not well taken and his fourth assignment of error is overruled.

{¶ 70} After reviewing the record to consider Vore's four assignments of error, we notice and raise, sua sponte, errors in the imposition of postrelease control (PRC) for the third-degree felony.

{¶ 71} R.C. 2967.28(B) calls for a mandatory term of postrelease control for first and second-degree felonies, for felony sex offenses, and for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person.

{¶ 72} A period of postrelease control required by this division for an offender shall be of one of the following periods:

> (1) For a felony of the first degree or for a felony sex offense, five years;
>
> (2) For a felony of the second degree that is not a felony sex offense, three years;
>
> (3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

R.C. 2967.28(B).

{¶ 73} Under R.C. 2967.28(C), a term of postrelease control for felonies of the third, fourth and fifth degree that are not subject to (B)(1) or (B)(3) above shall be up to three years if the parole board determines that a period of postrelease control is necessary for that offender.

{¶ 74} In the case at bar, Vore was told at his sentencing hearing that his term of postrelease control was "five years of post-release control, it's optional. That means the adult parole authority will supervise you or could supervise you for a period up to five years." The sentencing entry states that Vore's supervision is "mandatory," and the control period "will be a maximum term of up to 3 years."

{¶ 75} There are errors in both the oral notification at the sentencing hearing and the sentencing entry. R.C. 2967.28(B)(C); *see also State v. Addis*, 12th Dist. No. CA2009-05-019, 2010-Ohio-1008 (entry stating "up to" when dealing with mandatory PRC term is error).

{¶ 76} We reverse and remand this case only for the limited purpose of permitting the trial court to employ the PRC correction procedures of R.C. 2929.191. In all other respects, the judgment of the trial court is affirmed.

HENDRICKSON and PIPER, JJ., concur.