[Cite as *Cleveland v. Dancy*, 2019-Ohio-2433.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CITY OF CLEVELAND,	:	
Plaintiff-Appellee,	:	No. 107241
v.	:	
DAMIONNE DANCY,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 20, 2019

Criminal Appeal from the Cleveland Municipal Court
Case No. 2017 TRC 021373

Appearances:

Barbara A. Langhenry, Cleveland Director of Law, and Bridget E. Hopp, Assistant City Prosecutor, *for appellee*.

Milton A. Kramer Law Clinic Center, Carmen P. Naso, *for appellant*.

ANITA LASTER MAYS, J.:

{¶ 1} Defendant-appellant Damionne Dancy ("Dancy") appeals his conviction and asks this court to vacate his sentence. After our review, we affirm.

{¶ 2} Dancy was found guilty of operating a vehicle under the influence, a first-degree misdemeanor, in violation of R.C. 4511.19; driving under suspension, an unclassified misdemeanor, in violation of C.C.O. 435.07; and failure to control, a minor misdemeanor, in violation of C.C.O. 431.34(A). Dancy was sentenced to 180 days in jail and a $1,000 fine for operating a vehicle under influence. The trial court suspended $500 of the fine and 177 of the days. Dancy was ordered to complete the driver's intervention program in lieu of the three days in jail. His driver's license was suspended for nine months and Dancy was placed on probation. Dancy also received a $100 and $50 fine for driving under suspension and failure to control, respectively.

I. Facts

{¶ 3} On July 3, 2017, Officer Anthony Neubert ("Officer Neubert"), of the Cleveland Police Department received a radio broadcast to respond to the area of I-77 northbound at I-490 for a vehicle on fire. When Officer Neubert arrived, he observed a person laying on the ground about 100 feet from the single-car crash. The person identified himself to Officer Neubert as Dancy. Dancy had trouble moving because his hip was dislocated. Officer Neubert stated that he smelled a "pretty strong odor" of alcohol on Dancy, that Dancy's speech was slurred and that his eyes were glossy. Officer Neubert was unable to perform field sobriety tests due to Dancy's hip injury. After running Dancy's driver's license information in the law enforcement database, Officer Neubert learned that Dancy's driver's license was suspended. Dancy was subsequently arrested.

{¶ 4} According to the Cleveland Municipal Court docket, Dancy was arrested on July 3, 2017, and he entered a not guilty plea at arraignment on July 17, 2017. At arraignment, a pretrial hearing was scheduled for August 3, 2017. At the pretrial hearing, Dancy did not have an attorney, and the trial court continued the case until August 24, 2017, for Dancy to procure an attorney. On August 24, 2017, Dancy was represented by a public defender, and his counsel requested a continuance until September 21, 2017. Dancy filed a motion to suppress and the case was continued at Dancy's request until October 19, 2017.

{¶ 5} The city filed their response to Dancy's motion to suppress on October 12, 2017. The October 19, 2017 hearing was continued at the defendant's request until November 6, 2017, for a suppression hearing. On November 6, 2017, the city was without its witness and requested a continuance. The trial court granted the city's request and continued the suppression hearing until December 11, 2017. On December 11 2017, Dancy's motion to suppress was granted, and a bench trial was scheduled for December 28, 2017.

{¶ 6} On December 28, 2017, the trial was continued at Dancy's request until February 6, 2018. In the interim, on January 24, 2018, Dancy filed a motion to withdraw and appoint new counsel. Therefore, on February 6, 2018, the trial was converted to a pretrial and was continued to February 27, 2018. At the pretrial hearing, the trial was scheduled for March 19, 2018, at Dancy's request. Then on March 19, 2018, Dancy requested another continuance and the trial court scheduled an April 13, 2018 trial date.

{¶ 7} At trial, Officer Neubert testified from the information in the medical record without objection. When the city attempted to enter Dancy's medical reports into evidence, Dancy's trial attorney objected. The trial court sustained the objection and did not admit the medical reports. Officer Neubert then testified regarding Dancy's driver's license status. Officer Neubert's testimony was a follows:

Prosecutor:	Okay. And when you ran Mr. Dancy's driver's license information in your Omni Force System on July 3rd, were you able to see whether, in fact, Mr. Dancy was still either in failure to reinstate status or under an active suspension?
Officer:	Correct.
Prosecutor:	Okay. And is that what's reflected on the LEADS printout you have in front of you on Plaintiff's C?
Officer:	Yes.
Prosecutor:	And you showed that his driver's license is under a failure to reinstate suspension?
Officer:	Correct.
Prosecutor:	Okay. Are there any other failure to reinstate suspensions on Mr. Dancy's driving history here that were active at the time?
Officer:	Yes, I'm showing 10 suspensions total.
Prosecutor:	Okay.
Officer:	So, yeah, he hasn't been reinstated for a while it seems like.

(Tr. 18.)

{¶ 8} Dancy was found guilty and sentenced accordingly. Dancy filed this timely appeal assigning two errors for our review:

I. Appellant was denied a speedy trial under R.C. 2945.71; and

II. Appellant was denied effective assistance of counsel because counsel failed to file a motion to dismiss for a speedy trial violation; and counsel failed to object to inadmissible hearsay and unduly prejudicial evidence.

II. Speedy Trial Rights

{¶ 9} In Dancy's first assignment of error, he argues that he was denied a speedy trial under R.C. 2945.71. Under Ohio's speedy trial statutes, a trial court shall discharge a defendant if the trial court and prosecution fail to bring the defendant to trial within the time required by R.C. 2945.71 and 2945.72. *See* R.C. 2945.73(B). The Ohio Supreme Court has "imposed upon the prosecution and the trial courts the mandatory duty of complying with" the speedy trial statutes. *State v. Singer*, 50 Ohio St.2d 103, 105, 362 N.E.2d 1216 (1977). Thus, courts must strictly construe the speedy trial statutes against the state. *Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 661 N.E.2d 706 (1996), citing *State v. Madden*, 10th Dist. Franklin No. 04AP-1228, 2005-Ohio-4281, ¶ 25.

{¶ 10} Once the statutory time limit has expired, the defendant has established a prima facie case for dismissal. *State v. Howard*, 79 Ohio App.3d 705, 707, 607 N.E.2d 1121 (1992). At that point, the burden shifts to the state to demonstrate that sufficient time was tolled pursuant to R.C. 2945.72. *State v.*

Geraldo, 13 Ohio App.3d 27, 28, 468 N.E.2d 328 (1983). *State v. Greene*, 8th Dist. Cuyahoga No. 91104, 2009-Ohio-850, ¶ 24.

> Our review of a challenge of a constitutional speedy trial violation often raises a mixed question of law and fact. *State v. Barnes*, 8th Dist. Cuyahoga No. 90847, 2008-Ohio-5472, ¶ 19. We apply a de novo review to the legal issues, but afford great deference to any factual findings made by the trial court. *Id*.

State v. Cochern, 8th Dist. Cuyahoga No. 104960, 2018-Ohio-265, ¶ 47.

{¶ 11} The appellant did not file a motion to dismiss in the trial court based upon speedy trial violations pursuant to R.C. 2945.73.

> Generally, a defendant who fails to file such a motion[1] has waived his statutory right to a speedy trial and is estopped from raising this defense on appeal. *State v. Talley*, 5th Dist. Richland No. 06 CA 93, 2007-Ohio-2902; *State v. Stoutemire* 8th Dist. Cuyahoga No. 49685, 1985 Ohio App. LEXIS 9009 (Oct. 24, 1985). Nevertheless, courts have addressed the merits of such an argument despite the waiver. *See, e.g., State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72; *State v. Starks*, 6th Dist. Lucas Nos. L-05-1417 and L-05-1419, 2007-Ohio-4897.
>
> Some cases, however, have also addressed the failure to file such a motion under a plain error standard. *See State v. Hinson*, 8th Dist. Cuyahoga No. 87132, 2006-Ohio-3831; *State v. Simms*, 10th Dist. Franklin Nos. 05AP-806 and 05AP-807, 2006-Ohio-2960 (appellant waived all but plain error on his statutory speedy trial claims); *State v. Burgess*, 11th Dist. Lake No. 2003-L-069, 2004-Ohio-4395 (trial counsel's failure to object waived review of the speedy trial claim absent plain error); *State v. Griffin*, 9th Dist. Medina No. 2440-M, 1995 Ohio App. LEXIS 5613 (Dec. 20, 1995). Plain error involves both alleged omissions of trial counsel and alleged error on the part of the trial court or in the trial proceedings. *State v. Nelson*, 2d Dist.

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[1] R.C. 2945.73(B) states that "Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code."

> Champaign No. 00CA12, 2001 Ohio App. LEXIS 975 (Mar. 9, 2001), citing *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978).

State v. Conkright, 6th Dist. Lucas No. L-06-1107, 2007-Ohio-5315, ¶ 17-18.

{¶ 12} However,

> As such, a reviewing court's analysis is generally limited to reviewing issues raised on appeal solely for plain error or defects affecting a defendant's substantial rights pursuant to Crim.R. 52(B). *State v. Tisdale*, 8th Dist. Cuyahoga No. 74331, 1998 Ohio App. LEXIS 6143 (Dec. 17, 1988). The plain error doctrine should be invoked by an appellate court only in exceptional circumstances to prevent a miscarriage of justice. *State v. Cooperrider*, 4 Ohio St.3d 226, 227, 448 N.E.2d 452 (1983). Plain error will be recognized only where, but for the error, the outcome of the case would clearly have been different. *Id*.

State v. King, 184 Ohio App.3d 226, 2009-Ohio-4551, 920 N.E.2d 399, ¶ 8 (8th Dist.).

{¶ 13} We will review Dancy's claim under the plain error doctrine. Dancy was charged with misdemeanors, including driving under the influence, a first-degree misdemeanor. R.C. 2945.71(B)(2) states,

> Subject to division (D) of this section, a person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial as follows: Within ninety days after the person's arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days.

{¶ 14} In calculating the days from the time Dancy was arrested until his trial, we find that Dancy's trial occurred within the 90-day requirement pursuant to R.C. 2945.72. Dancy was arrested on July 3, 2017, and arraigned on July 17, 2017, bringing the total days to 14 for speedy trial purposes. A pretrial hearing was

scheduled for August 3, 2017, for a total of 31 days elapsing against speedy trial. At the pretrial hearing, Dancy did not have an attorney, and the trial court continued his case until August 24, 2017, to procure an attorney. R.C. 2945.72(C). On August 24, 2017, Dancy was represented by a public defender, and Dancy requested a continuance until September 21, 2017. R.C. 2945.72(H). From August 3 until September 21, the 49 days tolled pursuant to R.C. 2945.72(C) and 2945.72(H). Therefore, speedy trial days remained at 31 days.

{¶ 15} On September 21, 2017, Dancy filed a motion to suppress. R.C. 2945.72(E). The record reveals that the September 21, 2017 pretrial was continued at Dancy's request until October 19, 2017. The city filed its response to Dancy's motion to suppress in a reasonable time on October 12, 2017. The docket demonstrates that the October 19, 2017 pretrial was continued at Dancy's request until November 6, 2017, for a suppression hearing. R.C. 2945.72(H). Pursuant to R.C. 2945.72(E) and 2945.72(H), from September 21 through November 6, 2017, the 46 days tolled for speedy trial purposes. Speedy trial days remained at 31.

{¶ 16} The record reveals that on November 6, 2017, the city was without its witness and requested a continuance of the suppression hearing. The trial court granted the city's continuance and set the hearing date for December 11, 2017. Since the city requested the continuance, the 35 days from November 6 to December 11 are charged against the city for speedy trial purposes. The total days elapsed against the city is now at 66 days. On December 11, 2017, Dancy's motion to suppress was granted, and the bench trial was scheduled for December 28, 2017, resulting in 17

more days elapsing against the city. The speedy trial days elapsing against the city as of December 28, 2017, totaled 83.

{¶ 17} On December 28, 2017, Dancy's requested a continuance and the trial was rescheduled to February 6, 2018. R.C. 2945.72(H). On January 24, 2018, Dancy filed a motion to withdraw and appoint new counsel. To address the motion, the trial scheduled for February 6, 2018, was continued to February 27, 2018. R.C. 2945.72(E). On February 27, 2018, the trial was continued to March 19, 2018. Dancy argues that the city requested the continuance to March 19, 2018, but the transcript reveals that Dancy was not present for trial, and the docket demonstrates his counsel requested a continuance. R.C. 2945.72(D) and 2945.72(H). The journal entry also reflects that Dancy's counsel was present and requested the continuance. Therefore, the speedy trial days remained at 83 days.

{¶ 18} On March 19, 2018, the record reveals that Dancy's counsel requested a continuance to April 13, 2018. R.C. 2945.72(H). From December 28, 2017, to April, 13, 2018, 106 days elapsed but were tolled pursuant to R.C. 2945.72 (D), 2945.72 (E), and 2945.72 (H). Therefore, we conclude that a total of 83 days were counted against the city for speedy trial purposes. We have also illustrated the days in the chart below.

Date	Docket Text	Continuance Requested by	Statute	Days Tolled
07/03/2017	Dancy arrested			
07/17/2017	Dancy arraigned; pretrial scheduled for 08/03/2017			14
08/03/2017	Dancy doesn't have an attorney; court grants continuance to 08/24/2017	Dancy	R.C. 2945.72(C)	31
08/24/2017	Dancy is represented by counsel who requests a continuance to get familiar with the case; continued until 09/21/2017	Dancy	R.C. 2945.72(H)	31
09/21/2017	Dancy files a motion to suppress evidence and the case was continued at Dancy's request to 10/19/2017; *see* Docket under date 09/25/2017	Dancy	R.C. 2945.72(E)	31
10/12/2017	City responds to Dancy's motion *before* the next scheduled hearing			31
10/19/2017	Case is continued at Dancy's request and schedule for 11/06/2017	Dancy	R.C. 2945.72(H)	31
11/06/2017	City is not prepared to proceed and requests continuance	City		31
12/11/2017	Trial is scheduled for 12/28/2017			69
12/28/2017	Trial is continued at Dancy's request to 2/6/2018	Dancy	R.C. 2945.72(H)	83
02/6/2018	Trial is continued at Dancy's request to 2/27/2018	Dancy	R.C. 2945.72(E)	83
02/27/2018	Dancy failed to appear. Trial is continued at defense counsel's request to 03/19/2018	Dancy	R.C. 2945.72(D), R.C. 2945.72(H)	83
03/19/2018	Trial is continued at Dancy's request to 04/09/2018	Dancy	R.C. 2945.72(H)	83
04/09/2018	Trial			

{¶ 19} Dancy argues that his filing of motions do not cause speedy trial days to toll. We find that Dancy is incorrect in this assertion. The filing of defendant's motions tolls time pursuant to R.C. 2945.72(E). *State v. Deacey*, 2d Dist.

Montgomery No. 27408, 2017-Ohio-8102, ¶ 93 (defense's suppression motion began tolling the speedy trial time.). The record reveals that Dancy requested several continuances for various reasons throughout the pendency of the case. *Cleveland v. Collins*, 2018-Ohio-958, 109 N.E.3d 208, ¶ 53 (8th Dist.). R.C. 2945.72(H) states,

> [t]he time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following: The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion.

{¶ 20} We find that Dancy's speedy trial rights were not violated and also determine that a manifest injustice has not occurred and therefore, we find that Dancy's claim is without merit.

{¶ 21} Dancy's first assignment of error is overruled.

II. Ineffective Assistance of Counsel

{¶ 22} In Dancy's second assignment of error, he contends that he was denied effective assistance of counsel because counsel failed to file a motion to dismiss for a speedy trial violation, and counsel failed to object to inadmissible hearsay and unduly prejudicial evidence.

> To establish a claim for ineffective assistance of counsel, the appellant must show that his trial counsel's performance was deficient and that the deficient performance prejudiced his defense. *State v. Drummond*, 111 Ohio St. 3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 205, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice is established when the defendant demonstrates "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." *Strickland*, 466 U.S. at 694.

State v. Salti, 8th Dist. Cuyahoga No. 106834, 2019-Ohio-149, ¶ 66.

{¶ 23} We have already determined that Dancy's speedy trial rights were not violated.

> And in order to demonstrate that counsel provided ineffective assistance of counsel by failing to file a motion to dismiss for speedy trial violations, the defendant must show that the motion would have been successful and the case would likely have been dismissed. *Id*. "Counsel cannot be [ineffective] for failing to file a fruitless motion." *State v. Cottrell*, 4th Dist. Ross Nos. 11CA3241 and 11CA3242, 2012-Ohio-4583, ¶ 8.

State v. Mango, 8th Dist. Cuyahoga No. 103146, 2016-Ohio-2935, ¶ 18. We conclude that filing a motion to dismiss would have been fruitless.

{¶ 24} Therefore, Dancy did not receive ineffective assistance of counsel because his counsel failed to file a motion to dismiss for a speedy trial violation.

{¶ 25} Dancy argues that the police officer's testimony constituted inadmissible hearsay where Officer Neubert testified to information contained in the medical report when there were no foundational or authentication requirements fulfilled. More specifically, Officer Neubert testified that the medical report demonstrated that Dancy's blood-alcohol level was in excess of the legal limit. Pursuant to Evid.R. 802 "[h]earsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of

Ohio." 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." Evid.R. 801(C).

{¶ 26} Evidentiary rulings lie within the broad discretion of the trial court and will form the basis for reversal on appeal only upon an abuse of discretion that amounts to prejudicial error. *State v. Graham*, 58 Ohio St.2d 350, 352, 390 N.E.2d 805 (1979). *State v. Toudle*, 8th Dist. Cuyahoga No. 98609, 2013-Ohio-1548, ¶ 12. Dancy contends that he was prejudiced by Officer Neubert's testimony.

> As stated in *Wells v. Miami Valley Hosp.*, 90 Ohio App. 3d 840, 858, 631 N.E.2d 642 (1993):
>
> " * * * facts from medical records are presumed to be accurate and true. Expert opinion testimony based on data in medical records, as opposed to recorded physician opinions in medical records, is valid. Evid.R. 703. Where medical records are not admitted into evidence by an agreement of the parties, the business record exception to the hearsay rule would allow such records in Evid.R. 803(6)."
>
> Evid.R. 803(6) provides that the following is not excluded by the hearsay rule:
>
> "A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness ***."
>
> Under the business records exception to the hearsay rule, "'*** the witness providing the foundation need not have firsthand knowledge of the transaction. Rather, it must be demonstrated that the witness is sufficiently familiar with the operation of the business and with the circumstances of the record's preparation, maintenance and retrieval, that he can reasonably testify on the basis of this knowledge that the

> record is what it purports to be, and that it was made in the ordinary course of business consistent with the elements of Evid.R. 803(6).'" *State v. Verona* (1988), 47 Ohio App. 3d 145, 148, 547 N.E.2d 1189, quoting 1 Weissenberger's Ohio Evidence 75-76, Section 803.79 (1985).

Bishop v. Munson Transp., 109 Ohio App.3d 573, 579, 672 N.E.2d 749 (7th Dist.1996).

{¶ 27} Under the requirements of Evid.R. 803(6), we find that Officer Neubert did not provide the foundation or authentication required where he was not familiar with the operation of the business and with the circumstances of the medical record's preparation, maintenance, and retrieval. However, we also find that Officer's Neubert's lack of satisfying foundational and authentication requirements were not controlling to this particular issue and therefore Dancy was not prejudiced by the testimony for the following reasons.

{¶ 28} The record reveals that defense counsel did not object to the testimony regarding the information contained in the medical records or the admission of the medical records at the close of the state's case. (Tr. 24.) However, after Dancy testified and defense rested, defense counsel requested that the medical results of the blood draw be excluded because there was no expert testimony. (Tr. 35.) The trial court granted Dancy's counsel's request. The trial court stated, "[s]o your motion to have these records, the medical records, not considered, in terms of the reading, I'll grant the motion, that's fine. We'll just proceed with the observational DUI." (Tr. 37.) Thus, the trial court excluded the medical records testimony. The trial court heard "observational DUI" evidence that Officer Neubert

smelled a strong odor of alcohol from Dancy, that Dancy had glossy eyes, that Dancy had slurred speech, that Dancy was the only person at the scene of the accident that was not emergency personnel.

{¶ 29} We note that this was a bench trial. The Ohio Supreme Court has repeatedly recognized that when a judge hears evidence in a bench trial, the trial court must be presumed to have "'considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.'" (Citations omitted.) *State v. Thomas*, 8th Dist. Cuyahoga No. 90623, 2008-Ohio-6148, ¶ 34. Therefore, we find that Dancy did not receive ineffective assistance of counsel.

{¶ 30} Additionally, Dancy argues that he received ineffective assistance of counsel when his trial counsel failed to object to Officer Neubert's testimony regarding Dancy's prior driving convictions. Dancy argues that the admission of said evidence amounted to unfair prejudice that outweighed its probative value, in violation of Evid.R. 403(A). We observe that this argument is raised for the first time on appeal and it will be reviewed for plain error.

> [A] reviewing court's analysis is generally limited to reviewing issues raised on appeal solely for plain error or defects affecting a defendant's substantial rights pursuant to Crim.R. 52(B). *State v. Tisdale*, 8th Dist. Cuyahoga No. 74331, 1998 Ohio App. LEXIS 6143 (Dec. 17, 1988). The plain error doctrine should be invoked by an appellate court only in exceptional circumstances to prevent a miscarriage of justice. *State v. Cooperrider*, 4 Ohio St.3d 226, 227, 448 N.E.2d 452 (1983). Plain error will be recognized only where, but for the error, the outcome of the case would clearly have been different. *Id*. *State v. King*, 184 Ohio App.3d 226, 2009-Ohio-4551, 920 N.E.2d 399, ¶ 8 (8th Dist.).

State v. Bell, 8th Dist. Cuyahoga No. 106842, 2019-Ohio-340, ¶ 61.

{¶ 31} The testimony in question is as follows:

Prosecutor:	Okay. And when you ran Mr. Dancy's driver's license information in your Omni Force System on July 3rd, were you able to see whether, in fact, Mr. Dancy was still either in failure to reinstate status or under an active suspension?
Officer:	Correct.
Prosecutor:	Okay. And is that what's reflected on the LEADS printout you have in front of you on Plaintiff's C?
Officer:	Yes.
Prosecutor:	And you showed that his driver's license is under a failure to reinstate suspension?
Officer:	Correct.
Prosecutor:	Okay. Are there any other failure to reinstate suspensions on Mr. Dancy's driving history here that were active at the time?
Officer:	Yes, I'm showing 10 suspensions total.
Prosecutor:	Okay.
Officer:	So, yeah, he hasn't been reinstated for a while it seems like.
Prosecutor:	Okay. Did you, also, issue him a citation for driving under suspension then?
Officer:	Yes, ma'am, I did.

(Tr. 17-18.)

{¶ 32} "Evid.R. 403(A) mandates the exclusion of even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." *Hunt v. E. Cleveland*, 8th Dist. Cuyahoga No. 105953, 2019-Ohio-1115, ¶ 46.

In addition,

> [a] judge has "broad discretion" to admit or exclude evidence under Evid.R. 403(A), and we will not reverse the ruling absent a "clear abuse" of that discretion. This standard of review flows from the uniquely factual nature of the Evid.R. 403(A) determination, which must balance probative value against the risk of unfair prejudice in light of all the circumstances. "The issue of whether testimony is relevant or irrelevant, confusing or misleading, is best decided by the trial judge who is in a significantly better position to analyze the impact of the evidence on the jury."

State v. Hruby, 8th Dist. Cuyahoga No. 81303, 2003-Ohio-746, ¶ 8.

{¶ 33} Dancy argues that the testimony regarding his driving suspensions was substantially more prejudicial than probative, needlessly cumulative, and showed inadmissible crimes.

> Evid.R. 404(B) precludes the admission of evidence regarding a defendant's prior criminal acts when such evidence is offered to prove the defendant's character and that his actions were in conformity with that character. *State v. Herring*, 8th Dist. Cuyahoga No. 104441, 2017-Ohio-743, ¶ 12. However, evidence of the defendant's prior criminal acts may be admissible for other purposes, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B).

State v. Nunez, 2017-Ohio-4295, 92 N.E.3d 294, ¶ 17 (8th Dist.).

{¶ 34} The city argues that these were not prior driving suspensions, but rather active suspensions. Dancy was charged with driving under suspension, and

the city had to demonstrate that Dancy was in fact under suspension, as an element of the crime. *Cleveland v. Lowery*, 8th Dist. Cuyahoga No. 103722, 2016-Ohio-5626, ¶ 22, citing *State v. Johnson*, 8th Dist. Cuyahoga No. 83317, 2004-Ohio-2698, ¶ 27 ("where the evidence tends to prove an element of the charged crime or forms the immediate background of the crime, it is admissible outside the parameters of Evid.R. 404(B)"). We agree with the city. The officer's testimony was not unduly prejudicial and was used to demonstrate that Dancy had active suspensions, not prior suspensions, which is an element of driving under suspension. We find that the admittance of the driving record is not an exceptional circumstance to prevent a miscarriage of justice. Therefore, Dancy's trial counsel was not ineffective for failing to object to the admission of Dancy's current driving suspensions.

{¶ 35} Dancy's second assignment of error is overruled.

{¶ 36} In Dancy's reply brief, he adds an additional argument that the trial court cannot convict him of operating a vehicle under the influence because there was not sufficient evidence demonstrating that he was operating the vehicle, or that he was under the influence. Dancy did not assert this argument or error in his original brief.

> Pursuant to App.R. 16(C), reply briefs are to be used to rebut arguments raised in the appellee's brief; an appellant may not use a reply brief to raise new issues or assignments of error not addressed in the appellant's opening brief. *See, e.g., Harris v. Harris*, 5th Dist. Stark No. 2014CA00107, 2015-Ohio-1000, ¶ 39.

Young v. Kaufman, 2017-Ohio-9015, 101 N.E.3d 655, ¶ 44 (8th Dist.).

{¶ 37} Therefore, we are not obliged to consider this argument. *Id.*

{¶ 38} Judgment is affirmed.

It is ordered that the appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

_____
ANITA LASTER MAYS, JUDGE

PATRICIA ANN BLACKMON, P.J., and
RAYMOND C. HEADEN, J., CONCUR