IN THE SUPREME COURT OF OHIO
2023

STATE OF OHIO, Plaintiff-Appellant, -vs- JOSHUA E. FORK, Defendant-Appellee.	Case No. 23-356 On Appeal from the Sandusky County Court of Appeals, Sixth Appellate District Court of Appeals No. S-21-022

BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLANT

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STATEMENT OF AMICUS INTEREST

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission is to assist county prosecuting attorneys to pursue truth and justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and serve as legal counsel to county and township authorities. Further, OPAA sponsors continuing legal education programs and facilitates access to best practices in law enforcement and community safety.

In light of these considerations, OPAA offers this briefing on the reach of the aggravated vehicular assault (AVA) statute, and, in particular, on the question of whether the concept of operating a "motor vehicle" under that statute includes the operation of a motor-driven vehicle that can reach speeds up to 60 miles per hour and that can carry multiple passengers. In terms of the public-safety policies underlying the AVA law, the answer would be yes. The defendant endangered the lives of himself, his passengers, and any others traveling in the area that night by driving his Polaris Ranger XP vehicle at speeds up to 60 miles per hour on county roads, running the stop sign he encountered, and then driving at 35 miles per hour on a dirt trail. The speeds frightened the passengers, but when they voiced their concerns, the defendant laughed at the danger. It was almost destined that he would take a turn too fast and flip the Polaris, and he did so, even despite his claims that he knew the trails well. The defendant's decision to allow one more passenger than the Polaris' three-person design represents another indicator of the defendant's alcohol-addled poor judgment, and it makes his decision to drive at these

speeds on roads and trails and through a turn even worse. It was fortunate that no one died, but, as it was, the open fracture of the forearm of one of the victims, leaving the forearm "flapping" around, (Tr. 212), spoke volumes to the dangers that the defendant had created and that the AVA statute seeks to deter and punish.

While the defendant's alcohol-fueled actions fit comfortably within the public-safety logic underlying the AVA statute and the motor-vehicle safety laws generally, the defense raises the legal contention that the Polaris was not really a "motor vehicle" under statutory definitions. The Sixth District sustained that argument and reversed the AVA conviction on that basis alone. It not only reversed the conviction; it ordered that the defendant should be deemed acquitted of the AVA offense based on the theory that the Polaris fits within the "utility vehicle" exception to the "motor vehicle" definition as a matter of law. See R.C. 4501.01(B) (defining "motor vehicle" and referencing "utility vehicle" exception); R.C. 4501.01(VV) (defining "utility vehicle").

The State takes the position that the applicable statutory definition of "motor vehicle" is contained in R.C. 4511.01(B), which everyone concedes is the "motor vehicle" definition applicable to the OVI predicate under R.C. 4511.19 for the AVA offense. Under the definition in R.C. 4511.01(B), there is no "utility vehicle" exception.

The State amply lays out the reasons for why the definition in R.C. 4511.01(B) would be the applicable definition of "motor vehicle" for purposes of the defendant's AVA conviction. OPAA defers to the State's briefing in that regard and focuses here on other significant flaws in the Sixth District's analysis.

Even if the "utility vehicle" exception in R.C. 4501.01(VV) might apply, the Sixth District mishandled the issue in a number of respects. First, it misapplied the

sufficiency-of-evidence standard in arriving at its conclusion that the defendant should be acquitted. It did not construe the evidence in the State's favor, but, instead, credited the defendant's self-serving uncorroborated testimony about some of his prior uses of the Polaris. Under sufficiency review, construing the evidence in the State's favor would mean that the defendant's testimony need not be credited at all, as the jury could disbelieve that self-serving testimony.

At best, the remedy for the "utility vehicle" issue would have been the awarding of a new trial based on the trial court's failure to instruct the jury on that exception. But the defendant's assignment of error below pressed only the sufficiency-of-evidence challenge, which, as a matter of law, would not credit the defendant's self-serving testimony as to prior uses. And, having failed to assign error below in regard to the correctness of the jury instructions, the defendant cannot obtain relief on that basis now.

In a second flaw, the Sixth District was remarkably inconsistent in refusing to consider the evidence of the defendant's specific use of the Polaris at the time of the operation and crash in question. While absolutely ruling out the consideration of this evidence because "the actual use at the time of the incident is irrelevant", see Opinion, ¶ 43, the Sixth District went out of its way to *credit* the defendant's testimony as to how he had used the Polaris on *other* occasions. The Sixth District's logic of picking and choosing what it would consider is puzzling: if the defendant's use of the Polaris on *other* occasions was relevant, then, equally so, and even more so, his use of the Polaris at the time underlying the charge would be relevant too. Under basic standards of relevancy, the defendant's specific use would be relevant evidence in the consideration of whether the Polaris is a "utility vehicle". The inquiry into the principal purpose of the vehicle

would entertain evidence of its multiple purpose(s) in the consideration of what the principal purpose of the vehicle is.

Beyond the Sixth District's misapplication of the sufficiency standard, and beyond the Sixth District's improper refusal to consider the nature of the defendant's use of the Polaris at the time of the crash, the Sixth District fundamentally reached the wrong conclusion under the "utility vehicle" issue. The evidence was sufficient that the Polaris qualified as a "motor vehicle" and was *not* a "utility vehicle."

In the interest of aiding this Court's review, amicus curiae OPAA offers the present brief in support of the appellant State of Ohio and in opposition to the Sixth District's decision on the AVA count.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history set forth in the State's brief.

ARGUMENT

> **Amicus Proposition of Law**: Sufficiency-of-evidence review takes into account the trier-of-fact's prerogative to disbelieve the uncorroborated testimony of the defendant. In considering the design and purposes of a purported "utility vehicle" under R.C. 4501.01(VV), a court engaging in sufficiency review would construe the evidence in the State's favor demonstrating the non-hauling features of the design, function, and uses of the vehicle.

As indicated, OPAA incorporates and defers to the State's briefing on the question of whether the controlling definition of "motor vehicle" is set forth in R.C. 4511.01(B), as the State contends, or whether the applicable definition is set forth in R.C.

4501.01(B), as the defense and the Sixth District contend. There is no need for OPAA to add to the State's briefing on that issue here.

If this Court accepts the State's argument, then the AVA charge was not subject to a "utility vehicle" exception. On the other hand, if the Court rejects the State's argument, then a "utility vehicle" exception potentially could apply, but, in the end, the State should still prevail, and the Sixth District's flawed logic in that regard should be rejected in multiple respects.

OPAA's briefing here will focus on these latter points. Even assuming the "utility vehicle" exception was in play, it was not a basis for sustaining a sufficiency-of-evidence challenge, and, in the final analysis, the evidence was still sufficient to support the conclusion that the Polaris vehicle was a "motor vehicle" and not a "utility vehicle".

A. "Motor Vehicle" is Broad; "Utility Vehicle" Exception is Circumscribed

In pertinent part, R.C. 4501.01(B) defines "motor vehicle", as follows:

> (B) "Motor vehicle" means any vehicle, including mobile homes and recreational vehicles, that is propelled or drawn by power other than muscular power or power collected from overhead electric trolley wires. "Motor vehicle" does not include utility vehicles as defined in division (VV) of this section * * *.

The statute in turn defines "utility vehicle", as follows:

> (VV) "Utility vehicle" means a self-propelled vehicle designed with a bed, principally for the purpose of transporting material or cargo in connection with construction, agricultural, forestry, grounds maintenance, lawn and garden, materials handling, or similar activities.

R.C. 4501.01(VV).

Two main observations emerge from these provisions. Initially, the "motor vehicle" definition cuts an initial broad swath, applying to "any" vehicle propelled by motor power. "Any" casts the widest possible net.

"Any" means "all", i.e., "without limitation". *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Wachendorf v. Shaver*, 149 Ohio St. 231, 239-40 (1948). "The word *any* excludes selection or distinction." *Citizens' Bank v. Parker*, 192 U.S. 73, 81 (1904).

In *Risner v. Ohio Dept. of Natural Resources*, 144 Ohio St.3d 278, 2015-Ohio-3731, ¶ 18, this Court addressed the statutory phrase "any other section of the Revised Code" and emphasized that the word "'[a]ny' means 'all'" and that such "broad, sweeping language" must be accorded "broad sweeping application."

In *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶ 33, the Court addressed the phrase "any criminal offense" and recognized that, "Given the General Assembly's use of the term 'any' in the phrase 'any criminal offense,' we presume that it intended to encompass 'every' and 'all' criminal offenses recognized by Ohio."

In *Wachendorf*, the Court addressed the phrase "any territory" and held that "'any territory' as used in the statute means any or all territory, and that the Legislature intended to include not only unplatted but platted lands as well * * *. To hold otherwise would be usurping the prerogative of the legislative branch of government. In other words, we would be compelled to delete the word 'any' before the word 'territory' and substitute therefor the word 'unplatted.'" *Wachendorf*, 149 Ohio St. at 240. Placement of such a limitation would be for "the legislative and not the judicial branch of government." Id.

Given the use of the phrase "any vehicle", and given the use of motor power, the Polaris fell within the broad reach of the "motor vehicle" definition at the outset.

Second, when addressing the "utility vehicle" exception, it is apparent that the exception has its own limitations. Being designed with a bed is not enough by itself to qualify the vehicle as a "utility vehicle". The vehicle will only qualify if it has a purpose of transporting "material or cargo" in connection with farming or similar operations, and, even then, only if that transportation-of-materials-or-cargo purpose is the vehicle's *principal* purpose. "Principal" or "principally" in regard to "purpose" would require that the transporting-of-materials-or-cargo purpose be the primary, predominant, chief, or main purpose of the vehicle. "Principal" is commonly understood to mean "[c]hief; primary; most important", and the word "principally" would generally mean "chiefly" or "primarily". See *Doe v. Salvation Army in the United States*, 685 F.3d 564, 571 n. 10 (6th Cir.2012) (relying on Black's Law Dictionary); *Malat v. Riddell*, 383 U.S. 569, 572 (1966) ("'primarily' means 'of first importance' or 'principally.'"); *St. Louis Union Trust Co. v. Tipton Elec. Co.*, 636 S.W.2d 357, 359 (Mo.App.1982) ("principal use": "principal" means "first; chief; most important; consequential or influential", synonymous with "primarily," "chiefly," or "mainly"). The words "principal" and "principally" require that the particular purpose be the "predominate" purpose. *Philman's, Inc. v. City of W. Carrollton*, 1990 U.S. Dist. LEXIS 20953, at *19 (S.D.Ohio, 1990).

In addition, given the use of the word "the" in the phrase "principally for the purpose of", there would be only one principal purpose. The definite article "the" particularizes the subject which it precedes and is a word of limitation. *Crosby-Edwards v. Ohio Bd of Embalmers & Funeral Directors*, 175 Ohio App.3d 213, 2008-Ohio-762, ¶ 29 (10th Dist).

In this regard, the usefulness of the vehicle on a farm would not be a characteristic of "utility vehicle" by itself. The Polaris could primarily be used in transporting the farmer via trails, routes, and side roads to remote areas of the farm, allowing the farmer to inspect crops or fencing or otherwise to keep an eye on or use farm equipment. But usefulness in moving the farmer or other persons around the farm does *not* qualify as a cognizable "utility vehicle" purpose. What makes a vehicle a "utility vehicle" is a predominant or primary purpose in transporting "material or cargo," *not* the moving of people.

In assessing the broad reach of the threshold part of the "motor vehicle" definition and the limited reach of the "utility vehicle" exception to that definition, it must be kept in mind that, when "a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989). "Exceptions to the operation of laws, whether statutory or constitutional, should receive strict, but reasonable, construction." *State ex rel. Keller v. Forney*, 108 Ohio St. 463 (1923), paragraph one of the syllabus. "[T]he presumption is that what is not clearly excluded from the operation of the law is clearly included in the operation of the law." Id. at 467. "Courts favor a general provision over an exception." *State ex rel. Hyter v. Teater*, 52 Ohio App.2d 150, 160 (6th Dist.1977).

When the design of the Polaris is considered, and the defendant's specific use of the Polaris on this occasion is considered, the evidence was sufficient to show that hauling material and cargo was not the predominant or main purpose of the vehicle. And to the extent the defendant gave his self-serving testimony in this regard, that testimony

was cagey and vague about the issue of predominant purpose.

B. Violating Sufficiency Review by Construing Evidence in Defendant's Favor

Sufficiency review presents a purely legal question for the Court regarding the adequacy of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). This Court has provided the following test for judging the sufficiency of the evidence:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, *after viewing the evidence in a light most favorable to the prosecution*, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed)

State v. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

Under this standard, the evidence *must* be construed in favor of the prosecution.

> {¶164} "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St. 3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

State v. Spaulding, 151 Ohio St.3d 378, 2016-Ohio-8126, ¶ 164.

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307,

319 (1979). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id.

"A jury, as a finder of fact, may believe all, part, or none of a witness's testimony." *State v. Antill*, 176 Ohio St. 61, 67 (1964). A court applying the sufficiency standard must consider the totality of all of the evidence, construing *all* of the evidence in the light most favorable to the prosecution. *Jackson*, 443 U.S. at 319; *Jenks*, 61 Ohio St.3d at 272 (jury weighs "all of the evidence"). "[U]pon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319 (emphasis sic). Sufficiency review "leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors 'draw reasonable inferences from basic facts to ultimate facts.'" *Coleman v. Johnson*, 566 U.S. 650, 655 (2012), quoting *Jackson*, 443 U.S. at 319. Courts reviewing for sufficiency are not permitted to engage in "fine-grained factual parsing". *Coleman*, 566 U.S. at 655. Such review merely inquires into whether the guilty verdict "was so insupportable as to fall below the threshold of bare rationality." Id. at 656.

In the present case, the Sixth District violated the sufficiency standard by construing the evidence in the defendant's favor, rather than in the State's favor. It credited his testimony that he had used the Polaris for farm-related tasks, see Opinion, ¶¶ 41-42, even though, under sufficiency review, the jury would not have been required to accept this self-serving uncorroborated testimony. "The jury [is] under no obligation to accept [the defendant's] testimony as truthful." *State v. Carter*, 72 Ohio St.3d 545, 554 (1995); *State v. Mason*, 82 Ohio St.3d 144, 164 (1998) ("jury had the right to believe the

testimony of the state's witnesses and disbelieve Mason"). "The mere fact that [the defendant's] testimony was uncontroverted does not, *ipso facto*, require the jury to accept his argument if it is found by them to lack credibility." *State v. Caldwell*, 79 Ohio App.3d 667, 680 (4th Dist.1992). Sufficiency review recognizes the prerogative of the trier of fact to accept or reject all or part of a witness' testimony, and this would include the trier of fact's prerogative to reject all or part of a defendant's testimony.

Indeed, when considering a defendant's trial testimony, the trier of fact is allowed to conclude that the testimony is a prevarication and that, to the extent of the prevarication, the truth is the opposite of the defendant's testimony. The evidence of the defendant's demeanor on the witness stand, and other evidence in the case, "may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance, or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *Dyer v. MacDougall*, 201 F.2d 265, 269 (2nd Cir. 1952); see, also, *NLRB v. Walton Mfr. Co.*, 369 U.S. 404, 408 (1962) (quoting *Dyer*); *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality – citing *Dyer*). A testifying defendant runs the risk that, if disbelieved, his testimony denying guilt can boomerang and be used as substantive evidence of guilt. *Silva v. Dos Santos*, 2023 U.S. App. LEXIS 13154, at *18 (11th Cir. 2023) (collecting cases); *United States v. Xiang*, 12 F.4th 1176, 1185 (10th Cir.2021).

C. At a Minimum, the Relevance of the Specific Use on this Occasion

While crediting the defendant's self-serving testimony on prior "farm" uses, the Sixth District was adamant in refusing to consider the evidence of the defendant's actual

use on this occasion, concluding that such use simply did not bear on the question of whether the Polaris was a "utility vehicle". In this regard, though, the Sixth District wrongly refused to consider relevant evidence of the purpose of the vehicle, as shown on this occasion. Even if the evidence of the defendant's use on this occasion was not controlling, it was at least *relevant* and subject to consideration in assessing the predominant purpose of the Polaris.

Evid.R. 401 defines what is "relevant":

> "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. 402 in turn provides that relevancy is the first step in the admissibility analysis, categorically excluding evidence that is not relevant: "Evidence which is not relevant is not admissible." But "[a]ll relevant evidence is admissible", subject to other rules, statutes, and constitutional provisions that might nevertheless exclude the relevant evidence on other grounds.

"As with all evidence, the threshold question for determining admissibility asks: is the evidence relevant?" *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, ¶ 24. "Relevance under Evid.R. 401 is the first hurdle to clear." *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, ¶ 44. "Evidence is relevant and therefore generally admissible under Evid.R. 402 * * *." *State v. Whitaker*, 169 Ohio St.3d 647, 2022-Ohio-2840, ¶ 88.

"*Any* tendency" is sufficient for relevance. "This test is a broad one * * *." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 70. "The Rules' basic standard of

relevance * * * is a liberal one" and sets a "low threshold". *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993); *Tennard v. Dretke*, 542 U.S. 274, 285 (2004). "The threshold of admissibility is a low one, reflecting the policy favoring the admission of relevant evidence for the trier of fact to weigh." *State v. Kehoe*, 133 Ohio App.3d 591, 606 (12th Dist. 1999). "[T]he question of whether evidence is relevant is ordinarily not one of law but rather one which the trial court can resolve based on common experience and logic." *State v. Lyles*, 42 Ohio St.3d 98, 99 (1989).

The advisory committee comment to Fed.Evid.R. 401 states that "[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." The evidence must tend to prove "a fact that is of consequence to the determination of the action * * *." The Staff Note to Evid.R. 401 emphasizes that "[r]elevancy is not an inherent characteristic of any item of evidence. When it exists, it is a relationship between an item of evidence and a matter properly provable in the case."

It is important to note that the item of evidence need not rise to the level of being a "smoking gun" and need not "hit a home run" in proving a point. It can be a mere building block in helping prove a point. Advisory Committee Note to Fed.R.Evid. 401. This is because "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987). "[A] piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence." Id. at 180. "Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum

* * *." *Old Chief v. United States*, 519 U.S. 172, 187 (1997). The evidence need not itself rise to the level of showing a probability that a certain fact exists; evidence of possibility can be relevant. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 77 ("expert witnesses in criminal cases can testify in terms of possibility rather than in terms of a reasonable scientific certainty or probability").

"[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have '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.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985) (quoting Fed.Evid.R. 401). Evidence "need not be conclusive regarding a fact in question" to be relevant. *State v. Wiles*, 59 Ohio St.3d 71, 80 (1991); *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶¶ 37-38 ("state never claimed that the statement directly proved appellant's involvement, and that is not the test of its probative value").

In assessing relevance, the evidence is "viewed in a light most favorable to its proponent". *State v. Mann*, 19 Ohio St.3d 34, 39 (1985).

In this regard, there would be no distinction drawn between direct and circumstantial evidence. A criminal conviction can be based solely on circumstantial evidence. *State v. Nicely*, 39 Ohio St.3d 147 (1988). Circumstantial evidence can be just as persuasive, and indeed more persuasive, than eyewitness testimony. *Jenks*, 61 Ohio St.3d at 272. Proving a point circumstantially is plainly allowed. *State v. McAlpin*, 169 Ohio St.3d 279, 2022-Ohio-1567, ¶ 139 ("Google searches constituted relevant, circumstantial evidence of McAlpin's intent to steal cars and resell them and, more

specifically, of his intent to use a firearm during the robbery."). "[R]elevant evidence is not limited to merely direct evidence proving a claim or defense. Rather, circumstantial evidence bearing upon the probative value of other evidence in the case can also be of consequence to the action." *State v. Moore*, 40 Ohio St.3d 63, 65 (1988).

Given the low threshold for relevance, the defendant's use of the Polaris on this occasion was relevant and admissible as bearing on the "utility vehicle" question. In this regard, a number of significant facts were developed about the operation and characteristics of the Polaris here.

The defendant had admitted that he drove the Polaris to the party that evening. (Tr. 192-93) The Polaris included instrumentation in the form of a speedometer, (Tr. 201), and it also had headlights, (Tr. 80), a rollover cage, (Tr. 228), and three seatbelts. (Tr. 92, 171, 225) The evidence showed that the Polaris at one point had a windshield, which had broken off and had been left at the scene of the crash. (Tr. 265)

On this occasion, it was the defendant's idea to give Travis a ride in the Polaris, (Tr. 194), and the defendant let Leah and Sarah join in on the trip when they said they wanted to go too. (Tr. 194-95) When Sarah asked the defendant whether he was going to try to scare them, the defendant denied it, claiming that "he rides these trails all the time" and knows them like the back of his hand, and there was "nothing to worry about." (Tr. 70-71, 123) The defendant took up a position on the driver's side of the bench seat, and the other three were able to sit on the bench seat without any need for one of them to sit in the lap of another. (Tr. 71, 124, 199) The defendant said it would not be a problem for them to go along. (Tr. 225) Travis testified that there was enough room for four to be seated, (Tr. 198), and Leah testified that the passenger-side door was able to be closed.

(Tr. 170-71)

When the defendant exited the driveway of the party location, he started going "really fast" right away, (Tr. 74), doing a "burnout" on the road, (Tr. 199-200), and then "floor[ing]" it to go a "scary" fast speed. (Tr. 127-28, 199-200) Sarah saw the speedometer reach up to 55 miles per hour, (Tr. 74), and Travis testified that he saw the speedometer reach 58-60 miles per hour. (Tr. 201) When Sarah complained about the speed, the defendant said "I'm going the speed limit" and told her to "calm down", and he laughed. (Tr. 74-75, 127, 202) "[I]t seemed like it was just funny to him". (Tr. 127) Leah thought he was showing off. (Tr. 128)

When the defendant reached a stop sign at an intersection, he slowed but did not stop. (Tr. 76, 128-29, 202) He drove through the intersection and floored it onto a dirt trail, now going 35 miles per hour according to the speedometer, which was "really fast" for the dirt conditions near a cornfield in the dark of night. (Tr. 80, 90, 129, 204) Some of the cornstalks and tree limbs abutting the trail were hitting the sides of the Polaris. (Tr. 130) When Sarah again complained about going really fast, the defendant said, "I know what I'm doing." (Tr. 77) As the defendant was coming up on a corner that would require turning to the left, everyone was yelling for him to slow down, but he did not brake, and they rolled onto the right side of the Polaris, and Travis was thrown clear of the wreckage, suffering an open forearm fracture and other injuries in the process. (Tr. 132, 205-206) The defendant was "flying up to this corner, and he's not slowing down , and we just flipped." (Tr. 131) The defendant would later apologize to Travis, contending that he had been down that trail a dozen times but that the corner "snuck up" on him. (Tr. 219)

This evidence was certainly relevant to the issue of the purpose(s) of the vehicle. Even though the vehicle had a bed in which materials and cargo might be transported, it was also true that the vehicle was designed to have on-road and off-road people-mover capabilities for recreational purposes and general travel and enjoyment. The defendant himself found it enjoyable to travel at these speeds, having invited the others on the trip, and thinking it was funny and laughing about pushing the higher speeds of the vehicle. These high-speed people-mover capabilities are built into the vehicle, with safety equipment including a windshield, a rollover cage, and seat belts, and a speedometer to monitor speed, all of which would reflect that a significant purpose of the vehicle is to transport multiple people on excursions, both on the road and off the road.

As can be seen, the defendant himself was using the vehicle as pure transportation and pure recreation on this occasion. He admitted using the Polaris to travel from his home to the party. He also admitted using the trails "all" the time. In the context of the ride on trails here, these comments indicated a significant familiarity with the trails in question, which would have been gathered during similar recreational trail excursions – "I know what I'm doing." The defendant's comments did not signal in any way that he had gathered this off-roading experience merely by puttering around on the trails as a part of transporting materials and cargo for a farming purpose. There was no indication he would have been doing any "farming" on these known trails at any other time anyway. The defendant's statements before the ride, and his apology to Travis afterwards, all supported the view that he was experienced with such trails under similar conditions and that his alcohol-induced poor judgment caused him to misjudge the speed of the turn on this occasion.

Rather than completely discarding the evidence of the defendant's specific use of the Polaris on this occasion, the Sixth District at a minimum should have considered this highly-relevant evidence bearing on the capabilities and use of the Polaris. Indeed, for all practical purposes, the Sixth District was conceding the relevance of specific uses on specific occasions because it was *also* considering the defendant's claim to have used the Polaris for farm purposes on other occasions. If the specific use on this occasion was not relevant, it would have followed that those other uses would not have mattered either. At a minimum, the Sixth District's consideration of that testimony shows that the defendant's specific uses on this occasion would have been just as relevant as any other instances in which the defendant had used the Polaris.

Overall, the Sixth District lost its compass in assessing the legal question. In assessing the statutory question of what the principal purpose of the vehicle was, the trier of fact would consider the totality of such possible purposes and would then consider which of those purposes would qualify as the principal purpose. If the principal purpose of the vehicle having a bed is to transport material and cargo for, inter alia, a farming or similar purpose, then it would qualify as a "utility vehicle". But if transporting material or cargo was not its principal purpose, then the vehicle would not fall within the "utility vehicle" exception, and then the vehicle would fall within the otherwise-applicable broad threshold definition of "motor vehicle" in R.C. 4501.01(B).

D. Evidence was Sufficient to Negate "Utility Vehicle" Exception

The evidence was sufficient to negate the defense theory that the Polaris was a "utility vehicle". As just discussed, there was ample evidence showing that the Polaris served recreational and people-mover purposes falling outside a "utility vehicle" purpose,

which is limited to transporting material or cargo. The defendant himself was using the Polaris for recreational and people-mover purposes on this occasion, and other evidence showed he had used it in the same way to go to the party that night and that he would have intended to use it for the same purpose to get home that night. His statements and apology related to prior use of the Polaris on the trails, and using those trails "all the time" served to confirm the recreational purpose of the vehicle as well.

On the other hand, there was no evidence that would have compelled a trier of fact to believe that the predominant/primary/principal purpose of the vehicle was a "utility vehicle" purpose so as to justify the conclusion that it was a "utility vehicle". To be sure, the vehicle had a bed, which could serve a function of transporting materials and cargo for a farming purpose. But there was no evidence that would have compelled the conclusion that this transportation-of-material farming purpose was predominant over its other purposes as a recreational device and people-mover transporter. Indeed, the capability to transport multiple persons, and its functions allowing speeds up to 60 miles per hour, demonstrate that the vehicle was meant to go far beyond the limited purpose of transporting material or cargo on a farm.

Of course, the defense would claim that the defendant's testimony established that the principal purpose of the vehicle was for farming. According to the Sixth District, the defendant's testimony demonstrated that the principal purpose of the vehicle was related to farming.

> {¶ 41} A "utility vehicle" is defined by the Statute as "a self-propelled vehicle designed with a bed, *principally for the purpose* of transporting material or cargo in connection with construction, agricultural, forestry, grounds maintenance, lawn and garden, materials handling, or

> similar activities." (Emphasis added) R.C. 4501(VV). [sic] Principal purpose, as included in the statutory definition, implies a utility vehicle could serve another purpose or use without losing its designation of "utility vehicle." When considering the evidence in the record, we find that the Polaris fits the definition of a "utility vehicle."
>
> {¶ 42} The Polaris is a self-propelled vehicle with a bed, and appellant testified without contradiction that its principal purpose was for "[f]arm work, hauling rocks, hauling bags of seed to the planter, removing limbs and such from the farm." He additionally testified that they pull a sprayer with the Polaris and "just about anything you can do on a farm with it."

But these statements in the Sixth District's decision misstate the exact nature of the defendant's testimony. In the answer being quoted, this is how the defendant actually testified:

> Q. And what do you use that Polaris for?
>
> A. Farm work, hauling rocks, hauling bags of seed to the planter, removing limbs and such from the farm.

(Tr. 313-14) As can be seen, the defendant did not use the term "principal purpose" and did not purport to quantify all of the uses to which he or others had put the Polaris. While the defendant claimed to have used it to haul rocks, seed, and limbs, this conclusory testimony would be consistent with the notion that these tasks only represented a sporadic use of the vehicle and not a predominant use. The defendant's claim that he used the vehicle for "farm work" was equally conclusory, as "farm work" could merely reflect that the vehicle was used to transport the farmer around the farm, and, as already indicated, using the vehicle as a people-mover device is *not* a "utility vehicle" use.

Under the defendant's vague testimony, the defendant could have been

consistently using the vehicle as a recreational and people-mover device, with only occasional and sporadic use on a farm in hauling material and cargo. For example, using the vehicle nine times out of ten as a transporter, and only one time out of ten as a hauler, would not demonstrate that hauling was the vehicle's principal purpose, and the defendant's vague testimony was consistent with that kind of ratio.

In regard to the use of a "sprayer", the defendant testified, as follows:

> Q. So why did you buy the Polaris?
>
> A. For farm use.
>
> Q. Were you familiar with that particular vehicle from any other acquaintance with it?
>
> A. My father-in-law has one, and then my dad has a version as well.
>
> Q. And what do they use them for?
>
> A. Farm work.
>
> Q. And what kind of things do you do with it on a farm?
>
> A. We use it for – we pull a sprayer with it; like I said, we pick up rocks, trim trees, haul bags of seed, just about anything you can do on the farm with it.

(Tr. 317) Notably, the father and father-in-law did not testify, and this, again, represented the uncorroborated say-so of the defendant himself. And, while the defendant described some uses as consistent with transporting material or cargo for farm purposes, he also indicated that the Polaris had been used for "just about anything you can do on the farm with it." This phrase is overbroad, since, as already indicated, "anything you can do on the farm" would include a people-mover purpose that would *not* fit within the narrow limitations of what would qualify the vehicle as a "utility vehicle".

Moreover, a full reading of the defendant's testimony showed that there was a basic disconnect between the defendant's purported "farm" use of this Polaris and any actual farming. He had non-farm employment in a commercial roofing business. (Tr. 312) Although he claimed to "cash rent farm" at a farm in Gibsonburg near his parents' house, he admitted that he was *not* farming in the Burgoon area where he lived, (Tr. 312), which is where this Polaris was plainly located. This discrepancy between the Burgoon location of the Polaris and the Gibsonburg location of his "cash rent farm" was not explained. If anything, this discrepancy confirmed the non-hauling purpose for the Polaris as a people-mover vehicle useful in commuting to a distant farm.

Other parts of the defendant's testimony weighed toward a "motor vehicle" conclusion. He conceded the existence of a safety device that would limit the vehicle to 15 miles per hour unless the driver was using the seat belt, (Tr. 314-15, 334-35), a fact which draws a basic demarcation between the puttering-around purposes to which the vehicle might be put on a farm, as opposed to the range of speeds above 15 miles per hour and up to 60 miles per hour when the recreational and people-mover purposes would apply. Just in terms of this safety device, most of the attainable speeds of the vehicle reflected a recreational and people-mover purpose that diverges from use as a farm hauler of material and cargo.

The defendant also conceded that he had told the sergeant investigating the crash that he had intended to drive the Polaris home after the party, (Tr. 315, 329), which, again, would have been a non-hauling purpose. He also conceded that his wife and toddler would sometimes ride with him in the Polaris, (Tr. 326), which, again, reflects a people-mover and recreational purpose.

As to the time of the crash, the defendant conceded that he was driving the Polaris at speeds of 50-60 miles per hour. (Tr. 335) The defendant conceded that it was dangerous to take four people around the turn because "it throws off the weight distribution of the vehicle, so, yes." (Tr. 340)

On sufficiency review, the appellate court would consider *all* of the evidence in the case, including the evidence provided in the defense case-in-chief. *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, ¶ 18. But all of that evidence would be construed in favor of the prosecution, and sufficiency review would recognize the trier of fact's prerogative to reject the self-serving uncorroborated aspects of the defendant's testimony. Even if the defendant's testimony would serve to establish a farm-hauling purpose as the principal purpose of the vehicle, the trier of fact was not required to accept that testimony as truthful. The Sixth District erred in accepting that testimony as truthful and further erred in using the defendant's uncorroborated testimony as a reason to find the evidence insufficient to support conviction.

The Sixth District's error even goes one step further. While a trier of fact could reject the defendant's self-serving uncorroborated testimony, it could *also* conclude that the testimony was false and that, as false testimony, the truth was the opposite of the defendant's testimony. As already indicated, a testifying defendant runs the risk that, if disbelieved, his testimony denying guilt can boomerang and be used as substantive evidence of guilt. Accordingly, even if the defendant's testimony purported to claim that farm hauling was the "principal purpose" of the vehicle, the jury could reject that testimony as false as a matter of fact and could use the false testimony as positive evidence of consciousness of guilt and as proof that a farm-hauling purpose was *not* the

principal purpose of the vehicle.

It bears emphasis that there were substantial reasons to reject that testimony as false. It was self-serving and vague in failing to provide sufficient specifics as to the entirety of all of the purposes served by the vehicle. The defendant's testimony was also uncorroborated, even though there would be persons (his wife, father, and father-in-law) who might have provided corroborating testimony as to any actual farm-hauling uses. The defendant's testimony also strained credulity in a number of respects, including his claim that he was *not* hiding from police after the crash when he went to a nearby barn instead of going home.

In light of all of the foregoing, when the defendant's testimony on farm-hauling uses is construed in the State's favor, the end result is that it would not positively support acquittal under sufficiency review. Instead, under sufficiency review, the defendant's testimony could only positively support the sufficiency of the evidence because the trier of fact could construe the uncorroborated testimony on farm use to be false and could use such falsity to support the conclusion that the truth was the opposite of the defendant's testimony.

E. Objective vs. Subjective Purposes

The question arises as to whether a specific use by the operator on *any* occasion would matter for purposes of the "utility vehicle" definition. The Sixth District tried to have it both ways, saying that the specific use on this occasion would not be considered, while claiming – at the same time – that the defendant's testimony about specific uses on prior occasions was controlling. This logic made no sense and was inconsistent in its consideration of specific uses on various occasions. If the specific uses on other

occasions would be relevant, then, necessarily, the specific use on this occasion would be relevant too in assessing the functions and purposes of the vehicle.

Even so, some might argue that specific uses should not matter at all and that the analysis should be controlled by an objective assessment of the vehicle's design, function, and capabilities. But even if that were true, the assessment would *still* consider evidence of specific uses, since the evidence of specific uses remains relevant to showing what, objectively, the design, function, and capabilities of the vehicle are, and therefore what the purpose(s) of the vehicle are.

In terms of whether the ultimate test would be objective, it is notable that, while the definition of "utility vehicle" refers to the "purpose" of the vehicle, and then requires that the farm-hauling or similar purpose be the "principal" purpose of the vehicle, the definition does not limit the issue to a pure objective test based on design and function alone. The language would allow room for consideration of the operator's purpose as well and would allow the principal purpose of the vehicle to be determined by a consideration of all purposes demonstrated by the design of the vehicle and by the consideration of pertinent subjective purposes as shown by the operator's use, including on the occasion in question. In the end, however, it is plain that a vehicle will qualify as a "utility vehicle" *only if*: (1) it is designed with a bed; and (2) the principal purpose of the vehicle is to transport material or cargo for a farming or similar purpose.

Under an objective standard based on design and function alone, and under a combined objective-subjective test that takes into account the purposes demonstrated by the operator's specific uses, the evidence was sufficient here to allow a trier of fact to conclude that the Polaris was not a "utility vehicle". Objectively, the vehicle's

capabilities revealed a significant non-farm-hauling purpose for the vehicle, and there was significant evidence that, subjectively, the defendant had used the vehicle for such recreational and people-mover purposes, including on this occasion. On the other hand, there was no evidence that would have compelled the conclusion that a farm-hauling purpose was the predominant purpose of the vehicle. The mere existence of evidence showing the vehicle's material-hauling capability for farm or similar purposes does not compel the conclusion that such capability was the predominant/principal purpose of the vehicle. No evidence compelled the conclusion that the vehicle was a "utility vehicle" as a matter of law for sufficiency-of-evidence purposes, and the Sixth District's conclusion to the contrary was erroneous.

F. Limits on Strict Construction

To the extent the defense might deploy "strict construction" arguments in opposition to the foregoing argument, OPAA would emphasize that the rule of lenity, otherwise known as the rule of strict construction, does not require that the defendant prevail in every instance in which a court is addressing a statutory provision. The provision may be clear enough to avoid any need for "construction". Moreover, "strict construction" does not require that the defendant prevail in every instance of statutory ambiguity.

1.

The rule of lenity does not apply when the statute is unambiguous. *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, ¶ 35.

"It is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent." *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105

(1973). "The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it. * * * The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact." *Slingluff v. Weaver*, 66 Ohio St. 621 (1902), paragraphs one and two of the syllabus.

"[I]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Lingle v. State*, 164 Ohio St.3d 340, 2020-Ohio-6788, ¶ 15 (quoting another case). "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *State v. Reed*, 162 Ohio St.3d 554, 2020-Ohio-4255, ¶ 17 (internal quote marks omitted).

"Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation." *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the syllabus. "An unambiguous statute is to be applied, not interpreted." Id. "We apply a statute as it is written when its meaning is unambiguous and definite. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language." *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 9 (citations omitted).

"In determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used." *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127 (1969). "We have long recognized that neither administrative agencies nor this court 'may legislate to add a requirement to a statute enacted by the General Assembly.'" *State ex rel. Moorehead v.*

Indus. Comm., 112 Ohio St.3d 27, 2006-Ohio-6364, ¶ 15. "[C]ourts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of either statutory interpretation or liberal construction; in such situation, the courts must give effect to the words utilized." *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347 (1994).

2.

Even when a potential or actual ambiguity exists, the concept of "strict construction" still does not require that the provision be construed in favor of the criminal defendant.

The mere existence of real or possible "ambiguity" does not mean that the defendant prevails. "[T]his Court has never held that the rule of lenity automatically permits a defendant to win." *Muscarello v. United States*, 524 U.S. 125, 139 (1998). Even when the statutory language is "ambiguous," the statutory text still must be *fully* analyzed in the effort to construe it.

Strict construction is not necessary "merely because it [is] possible to articulate a construction more narrow than that urged by the Government." *Moskal v. United States*, 498 U.S. 103, 108 (1990). "[T]he mere possibility of clearer phrasing cannot defeat the most natural reading of a statute * * *." *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 416 (2012).

Strict construction "is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute. The rule of lenity comes into operation at the end of the process of construing

what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Chapman v. United States*, 500 U.S. 453, 463 (1991) (internal quotation marks and brackets omitted).

"[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what [the legislature] intended." *Marachich v. Spears*, 570 U.S. 48, 76 (2013) (quoting another case). "Only where the language or history of [the statute] is uncertain after looking to the particular statutory language, the design of the statute as a whole and to its object and policy, does the rule of lenity serve to give further guidance." Id. at 76 (quoting in part another case; ellipses omitted).

"We have used the lenity principle to resolve ambiguity in favor of the defendant only 'at the end of the process of construing what [the legislature] has expressed' when the ordinary canons of statutory construction have revealed no satisfactory construction." *Lockhart v. United States*, 577 U.S. 347, 361 (2016). Only a grievous ambiguity or uncertainty that remains at the end of the interpretive process would trigger the application of the rule of lenity. *Salman v. United States*, 137 S.Ct. 420, 429 (2016). The mere "arguable" application of a canon of statutory construction does not create a grievous ambiguity. *Lockhart*, 577 U.S. at 361 ("the arguable availability of multiple, divergent principles of statutory construction cannot automatically trigger the rule of lenity").

As this Court likewise has emphasized, the rule of lenity "comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers". *State v.*

Elmore, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 40 (quoting another case). "The canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose. The canon is satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly." *State v. Sway*, 15 Ohio St.3d 112, 116 (1984). "[A]lthough criminal statutes are strictly construed against the state, they should not be given an artificially narrow interpretation that would defeat the apparent legislative intent." *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, ¶ 20 (citation omitted). "[S]trict construction is subordinate to the rule of reasonable, sensible and fair construction according to the expressed legislative intent, having due regard to the plain, ordinary and natural meaning." *In re Clemons*, 168 Ohio St. 83, 87-88 (1958).

3.

"Strict construction" would not aid the defense here. The broad reach of the threshold part of the "motor vehicle" definition is plain, as is the "principal purpose" limitation on the definition of "utility vehicle." Sufficiency review would not support a reversal as a matter of law on the "principal purpose" issue, and the Sixth District was simply incorrect in thinking that the defendant's vague testimony established such "principal purpose". And, as already indicated, the "utility vehicle" exception would receive a strict, but reasonable, construction, with "the presumption [being] that what is not clearly excluded from the operation of the law is clearly included in the operation of the law." *Keller*, 108 Ohio St. at 467 & paragraph one of the syllabus.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA urges that this Court reverse the judgment of the Sixth District Court of Appeals in regard to the AVA count and thereupon affirm the conviction on that count.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on August 14, 2023, to the following counsel of record: Kathryn Sandretto, Assistant Prosecuting Attorney, 100 North Park Avenue, Suite 220, Fremont, Ohio 43420, ksandretto@sanduskycountyoh.gov, counsel for plaintiff-appellant; Blaise Katter, Huey Defense Firm, 3240 Henderson Road, Ste. B, Columbus, Ohio 43220, hueylawfirm@gmail.com, counsel for defendant-appellee.

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