In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2023-0839
	:	
Appellee,	:	On Appeal from the
	:	Lucas County
v.	:	Court of Appeals,
	:	Sixth Appellate District
MARIO D. MAYS,	:	
	:	Court of Appeals
Appellant.	:	Case No. L-21-1228

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

The General Assembly has required, when an offense has multiple degrees of severity, that a jury verdict-form state "either the degree of the offense of which the offender is found guilty", or that an "additional element or elements" that enhance the degree of the offense "are present." R.C. 2945.75(A)(2). Call this the "verdict provision." If a verdict form does not include the required information, then "a guilty verdict constitutes a finding of guilty of the least degree of the offense charged." R.C. 2945.75(A)(2). What the statute does not say, however, is *how* a verdict form must state the degree of an offense; it is silent about whether a verdict form may state the degree of an offense by incorporating other documents by reference, or through another shorthand that makes the degree clear.

For many years, courts in Ohio had interpreted this provision as allowing a verdict form to reference additional information—like an indictment that itself identified the degree of an offense. *See, e.g.*, *State v. Berger*, No. 71618, 1998 WL 72515 (8th Dist. Feb. 19, 1998). That interpretation made sense. Long before the General Assembly adopted the verdict provision, many courts, including this one, had held that a verdict form may incorporate an indictment by reference. *See State v. Park*, 174 Ohio St. 81, 82–83 (1962) (per curiam); *Craemer v. Washington State*, 168 U.S. 124, 130 (1897). But in 2007, the Court changed direction. It held that under the verdict provision, it was not enough for a verdict form to refer to a valid indictment; the verdict form itself, the Court determined,

must directly state the information that the statute calls for. *State v. Pelfrey*, 112 Ohio St. 3d 422, 2007-Ohio-256, ¶14.

Had *Pelfrey* been the Court's last word on the subject, then the meaning of the verdict provision would be relatively clear. But it was not. Only a few years after the Court decided *Pelfrey*, it appeared to backtrack when it held that it was not plain error for a verdict form to identify the offense for which a defendant was convicted by incorporating the language of his indictment. *State v. Eafford*, 132 Ohio St. 3d 159, 2012-Ohio-2224, ¶¶17–18. But then, just a year later, in a decision that made no mention of *Eafford*, the Court returned to *Pelfrey* and held that a verdict form that failed to directly identify the mens rea necessary for a felony could support only a misdemeanor conviction. *See State v. McDonald*, 137 Ohio St. 3d 517, 2013-Ohio-5042.

This inconsistent application of the verdict provision has created confusion in the lower courts. *See State v. Sanders*, 2016-Ohio-7204, ¶74 (5th Dist.) (collecting cases). Look no further than this case. Here, the confusion takes the form of a dispute over whether a verdict form complies with the verdict provision when it cites a statutory subsection that itself states the degree of an offense. The Sixth District held that it complies. *State v. Mays*, 2023-Ohio-1908, ¶62 (6th Dist.) ("App.Op."). But it also concluded that its decision conflicts with a decision from the Third District, which has held that citing a statutory subsection does not comply. *See id.* at ¶72 (certifying a conflict with *State v. Gregory*, 2013-Ohio-853 (3d Dist.)).

The Sixth District has the better interpretation of the verdict provision. Remember, the statute does not say how a verdict form must state the degree of an offense or that additional enhancing elements are present. *See* R.C. 2945.75(A)(2). A verdict form that cites a statute that indicates the degree of an offense, or identifies additional elements that enhance the degree of an offense, complies with the verdict provision because the cited statute states the degree of the offense for which a defendant was convicted. Many of the courts that have considered the question have held just that; they have held that a statutory citation "saves the verdict form from a claim that it is deficient." *State v. Moore*, 2013-Ohio-4000, ¶¶21–24 (7th Dist.); *State v. Hughley*, 2009-Ohio-3274, ¶16 (8th Dist.); *see also State v. Dillard*, 2014-Ohio-4974, ¶¶31–40 (4th Dist.). Only the Third District Court of Appeals appears to have held otherwise.

To the extent that the Court's precedent could be interpreted as supporting the Third District's approach, the Court should take this opportunity to clarify that precedent does no such thing. Rather, it should hold that a verdict form that cites the applicable statutory section or subsections complies with the verdict provision. Even if the Court concludes that the verdict form at issue in this case failed to comply with the verdict provision, however, it should hold that any error was harmless. This Court and the U.S. Supreme Court have both held that harmless-error review is appropriate in the context of Sixth Amendment jury-trial claims, *see State v. Willan*, 144 Ohio St. 3d 94, 2015-Ohio-1475, ¶28; *Washington v. Recuenco*, 548 U.S. 212, 215 (2006), and there is nothing in

common sense or the text of the verdict provision that would require courts to be less forgiving of statutory errors than of constitutional ones.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. He is interested in ensuring that defendants are properly sentenced for the crimes for which a jury has convicted them.

STATEMENT OF THE CASE AND FACTS

Mario Mays repeatedly abused his ex-wife C.B. He choked her, twisted her arms, spit on her, pushed her down the stairs, and left bruises on her body. Trial Tr.160–64. C.B. filed police reports about Mays's abuse "quite frequently," but, when she did so, she would "beg" the police not to notify Mays because she was "afraid of what would happen" if they did. Trial Tr.165–66. C.B. eventually sought and obtained protection orders against Mays in 2007, 2011, and 2017. Trial Tr.166, 172, 186. In 2017 a Toledo Municipal Court convicted Mays of a misdemeanor charge of violating the 2017 order. Trial Tr.181.

Despite that conviction, and even though the protection orders remained in place, Mays continued to have contact with C.B. *See, e.g.*, Trial Tr.173–76. As is relevant here, Mays attended a birthday party at Chuck E. Cheese for a grandchild he shared with C.B.

Trial Tr.191. C.B. also attended the party. *Id.* She still had a protection order against Mays, but Mays did not leave the party when he saw that C.B. was present; he stayed until the party ended. Trial Tr. 190, 192. Not only did Mays fail to leave the party, he physically accosted C.B. while he was there. When Mays noticed that C.B. was wearing a ring, he grabbed her hand and asked if she was married. Trial Tr.191, 229–30.

In 2020, a Lucas County grand jury indicted Mays on two charges, both felonies, stemming from his actions at the party. It indicted him for violating a protection order in violation of R.C. 2919.27(A)(2) and (B)(3), a felony in the fifth degree, and for menacing by stalking in violation of R.C. 2903.211(A)(1) and (B)(2)(e), a felony in the fourth degree. *See* March 20, 2020 Indictment, R.1. (The indictment was amended during trial to reflect a violation of R.C. 2919.27(A)(1) instead of (A)(2) for the count alleging a violation of a protection order. See Trial Tr.266–269.)

Mays pleaded not guilty and a jury trial was held. At the close of the case, the judge instructed the jurors that in order to find Mays guilty of violating a protection order in violation of R.C. 2919.27(A)(2) and (B)(3), they were required to find that Mays had previously been convicted of, or pleaded guilty to, a violation of a protection order. Trial Tr.334–35. The instructions reflected the language of R.C. 2919.27(B)(3), which states that:

> (3) Violating a protection order is a felony of the fifth degree if the offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for any of the following:

> (a) A violation of a protection order issued or consent agreement approved pursuant to section 2151.34, 2903.213, 2903.214, 2919.26, or 3113.31 of the Revised Code;
>
> (b) Two or more violations of section 2903.21, 2903.211, 2903.22, or 2911.211 of the Revised Code, or any combination of those offenses, that involved the same person who is the subject of the protection order or consent agreement;
>
> (c) One or more violations of this section.

The jury convicted Mays of violating the protection order but acquitted him of menacing by stalking. *See* Verdict Forms, R.30 and 31. With respect to the protection order violation for which the jury convicted Mays, the verdict form stated that the jury had found Mays guilty of violating a protection order, in violation of R.C. 2919.27(A)(1) and (B)(3), but did not specify which subsection of R.C. 2919.27(B)(3) the jury determined Mays had violated. *See* Verdict Form, R.30. The judge sentenced Mays to three years of community control and 90 days in jail. Sentencing Tr.15; *see also* App.Op.¶28.

Mays appealed, alleging in relevant part that the verdict form was insufficient and that he therefore had not been properly convicted of a fifth-degree felony. According to Mays, the jury's verdict form failed to comply with the verdict provision because it did not specify the basis on which the jury concluded that he had committed a fifth-degree felony. Mays App.Ct.Br.11–12. Mays argued that, under the verdict provision, the verdict form was required to specify which subsection of R.C. 2919.27(B)(3) the jury determined he had violated. Because it did not, he argued that the verdict form could

support a conviction for only the least degree of the offense charged—which was a misdemeanor. Mays App.Ct.Br.12.

A panel majority of the Sixth District Court of Appeals rejected Mays's challenge and affirmed Mays's conviction and sentence. App.Op.¶1. The majority held that the verdict form complied with the verdict provision because it sufficiently stated the degree of the offense for which the jury found Mays guilty. Because a finding of guilty under R.C. 2919.27(B)(3) is always a fifth-degree felony, regardless of which subsection a defendant violated, the majority held that there was no meaningful difference between a verdict form that stated that Mays was guilty of violating R.C. 2919.27(B)(3) and one that more directly stated that Mays was guilty of a fifth-degree felony. App.Op.¶64. The court of appeals further noted that because the verdict provision requires only that a verdict form state the degree of an offense, the form would not have been required to indicate which specific finding elevated the offense to a fifth-degree felony—even if, instead of citing R.C. 2919.27(B)(3), it had explicitly indicated that Mays was guilty of a fifth-degree felony. App.Op.¶¶65–66. Judge Zmuda concurred in part and dissented in part. Unlike the majority, the dissent would have held that the verdict form failed to comply with the verdict provision and that the verdict form was sufficient to convict Mays of only a misdemeanor. *See* App.Op.¶¶81, 93 (Zmuda, J., dissenting in part).

Although it rejected Mays's appeal, the majority determined that its decision conflicted with the Third District's decision in *State v. Gregory*, 2013-Ohio-853 (3d Dist.).

App.Op.¶27. Unlike the Sixth District, the Third District has held that a verdict form fails to comply with the verdict provision when it indicates the degree of an offense by incorporating a statute by reference rather than stating the degree explicitly. *See Gregory*, 2013-Ohio-853 at ¶¶21, 24. Mays filed a notice of the certified conflict with this Court and the Court determined that a conflict exists and accepted the case for review. *09/06/2023 Case Announcements*, 2023-Ohio-3100.

ARGUMENT

Proposition of Law:

> *A verdict form complies with R.C. 2945.75(A)(2) when it cites a statute that identifies the degree or elements of an offense for which a defendant was found guilty.*

The Sixth Amendment to the United States Constitution, which is incorporated against the States through the Fourteenth Amendment, guarantees criminal defendants "the right to a speedy and public trial, by an impartial jury." *Duncan v. Louisiana*, 391 U.S. 145 (1968); U.S. Const. amend. VI. The Ohio Constitution contains similar guarantees: Article I, Section 5 of the Ohio Constitution states that the "right of trial by jury shall be inviolate," and, like the Sixth Amendment, Article I, Section 10 guarantees defendants the right to a "speedy public trial by an impartial jury." Both the U.S. Supreme Court and this Court have interpreted these provisions to require that a jury find "all facts necessary to constitute a statutory offense," as well as all facts that increase the penalty for a crime. *See Apprendi v. New Jersey*, 530 U.S. 466, 483–84, 490 (2000); *State v. Foster*, 109 Ohio St. 3d 1 (2006) *abrogated in part by Oregon v. Ice*, 555 U.S. 160 (2009). But while

defendants are constitutionally entitled to have a jury *find* all facts relevant to guilt or punishment, neither the U.S. Constitution, nor the Ohio Constitution, say anything about how juries must *report* their findings. *See* U.S. Const. amend. VI; Ohio Const. art. I, §§5 and 10; *see also United States v. Davis*, 726 F.3d 357, 370–71 (2d Cir. 2013); *United States v. Grooms*, 194 F. App'x 355, 363 (6th Cir. 2006).

The General Assembly has imposed statutory requirements on how they must do so, however, at least when "the presence of one or more additional elements makes an offense one of more serious degree." *See* R.C. 2945.75(A). When there are multiple degrees of an offense, the General Assembly has required a jury verdict-form to state either "the degree of the offense of which the offender is found guilty, or that such additional element or elements are present." *See* R.C. 2945.75(A)(2). That is the same requirement that the General Assembly has applied to indictments. There too, when one or more additional elements make an offense one of a more serious degree, an "affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements." R.C. 2945.75(A)(1). An indictment or a verdict form that fails to state the degree of an offense, or identify the additional elements, refers to only "the least degree of the offense." R.C. 2945.75(A)(1), (2).

The Court in this case is tasked with resolving a conflict over whether a verdict form sufficiently states the degree of an offense for purposes of the verdict provision

when, instead of directly stating the degree, the verdict form cites a statutory provision that *itself* states the offense's degree. *See* App.Op.¶72 (certifying a conflict with *State v. Gregory*, 2013-Ohio-853 (3d Dist.)). It should hold that it does.

I. The Sixth District correctly held that a verdict form sufficiently states the degree of an offense for purposes of the verdict provision when the form cites the specific statute for which a defendant was convicted.

The Sixth District was right when it held that a verdict form may state the degree of an offense by citing the statute that defines that offense. The verdict form at issue here stated that the jury found Mays guilty of violating a protection order, in violation of R.C. 2919.27(A)(1) and (B)(3). Those statutes state, respectively, that no person shall recklessly violate the terms of a protection order and that violating a protection order is a felony of the fifth degree if the offender had previously been convicted of a variety of other offenses. *See* R.C. 2919.27(A)(1), and (B)(3). By citing R.C. 2919.27(B)(3), the verdict form clearly indicated that the jury found Mays guilty of committing a fifth-degree felony. There is no meaningful difference between a verdict form that directly states that a crime of conviction is a fifth-degree felony and one, like the one here, that cites R.C. 2919.27(B)(3), which itself contains such a statement. In both instances, the verdict form states the degree of the offense. *See* App.Op.¶66. The Sixth District was therefore right to affirm Mays's conviction and sentence. Its decision doing so is supported by three factors: the verdict provision's text, its purpose, and the Court's precedent.

First, start with the text. The verdict provision requires in relevant part that a verdict form "state … the degree of the offense of which [an] offender is found guilty." R.C. 2945.75(A)(2). The statute provides little additional guidance beyond that. Most significantly, the provision's language does not specify *how* a verdict form must state the degree of an offense. Information can be stated in more than one way, however. And the verdict provision is best read as allowing a verdict form to state the degree of an offense in any fashion that makes it possible to "ascertain what findings can be ascribed to the jury." *Cf. United States v. Grooms*, 194 F. App'x 355, 364 (6th Cir. 2006) (quotation omitted).

Consider an example. A witness describing an accident caused by someone who ran a red light could certainly say that the light was red. But that same witness would state the light's color in no less certain terms if he said instead that the light was signaling stop. It both cases, the witness would have stated the color of the light. So too with verdict forms. A verdict form that cites a statutory provision that, in turn, identifies the degree of an offense effectively communicates the jury's findings. In the parlance of the statute it "states" the degree of the offense, even if it does so with more than the minimum number of words.

The surrounding statutory text supports this interpretation. The verdict provision found in R.C. 2945.75(A)(2) mirrors the language of the preceding statutory subsection, R.C. 2945.75(A)(1), which imposes similar requirements on indictments. Subsection

(A)(1) of R.C. 2945.75 governs indictments and, like the verdict provision, states that when "the presence of one or more additional elements makes an offense one of more serious degree," an indictment must "state the degree of the offense." *Compare* R.C. 2945.75(A)(1) *with* (A)(2).

While the Court has never addressed whether a verdict form may incorporate the language of a statute by reference, it *has* held that an indictment may do so. It has held that an indictment that "identifies a predicate offense by reference to the statute number need not also include each element of the predicate offense in the indictment." *State v. Buehner*, 110 Ohio St. 3d 403, 2006-Ohio-4707, syl.; *cf. State v. Horner*, 126 Ohio St. 3d 466, 2010-Ohio-3830 (an indictment that tracks the language of a statute is not defective). Statutes must be read as a whole, *State ex rel. Myers v. Board of Education*, 95 Ohio St. 367, 372–73 (1917), and a "word repeatedly used in [a] statute will be presumed to bear the same meaning throughout the statute unless there is something to show that another meaning is intended," *Schuholz v. Walker*, 111 Ohio St. 308, 325 (1924). What it means to "state" the degree of an offense must therefore mean the same thing in subsection (A)(2) of R.C. 2945.75 as it does in subsection (A)(1). And because an indictment may incorporate a statute by reference, the only consistent interpretation of the indictment and verdict provisions found in R.C. 2945.75(A) is one that allows a verdict form to do the same.

Second, the statute's purpose supports the Sixth District's decision. The verdict provision does not dictate what findings a jury must make—the Sixth Amendment does that. *See Apprendi*, 530 U.S. at 483–84. A jury is aided in its fact-finding task by the jury instructions. The jury instructions provide the jury with a "correct, pertinent statement of the law that is appropriate to the facts." *State v. White*, 142 Ohio St. 3d 277, 2015-Ohio-492, ¶46; *State v. Comen*, 50 Ohio St. 3d 206, 210 (1990). The jury receives a copy of the instructions, *see* Crim.R.30(A), and is presumed to follow them in its deliberations, *State v. Garner*, 74 Ohio St. 3d 49, 59 (1995).

A verdict form, by comparison, does not instruct the jury; it serves an entirely different purpose. The purpose of a verdict form is to report the results of the jury's deliberation. It records for the benefit of the defendant, the sentencing court, and reviewing courts, the conclusions that the jury reached after deliberating and after considering the facts of a case in the context of the law set out in the trial court's jury instructions. As long as a verdict form accurately and completely reflects those conclusions, it has served the purpose the verdict provision assigns to it.

Third, and finally, there is precedent. The Court has never directly considered whether a verdict form may comply with the verdict provision by citing the relevant statute or statutes. But its decision in *State v. McDonald*, 137 Ohio St. 3d 517, 2013-Ohio-5042, supports the conclusion that it may. The verdict form in *McDonald* did not cite the statute that the defendant was convicted of violating. *See McDonald*, 137 Ohio St. 3d at

¶6. Instead, it recited the name of the offense that the defendant had committed: failing to comply with an order or signal of a police officer and causing a substantial risk of serious harm as a result. *See id.* The problem was, the relevant portion of the Revised Code identified two separate offenses as a "failure to comply with an order or signal of a police officer," the penalties for the offenses were different, and the verdict form did not specify which portion of the Code the jury found that the defendant had violated. *See id.* at ¶¶5–6, 20.

Relying on *Pelfrey*, the Court held that because the verdict form did not identify the statutory subsections that the defendant violated, it did not sufficiently state the degree of an offense for purposes of the verdict provision. *Id.* at ¶¶13–23. It was the lack of specificity, not the reference to the named offense, that was the problem. Justice Lanzinger, in a concurring opinion, wrote that a more specific reference to the relevant statutes *would* have been sufficient for purposes of the verdict provision. *Id.* at ¶29 (Lanzinger, J., concurring).

The verdict form in this case was specific in a way that the form in *McDonald* was not. It contained the type of specific statutory citations that the concurrence in *McDonald* indicated would have complied with the verdict provision. Unlike in *McDonald*, the statutes that the verdict form in this case cited made clear that the jury found Mays guilty of committing a fifth degree felony. Verdict Form, R.30; see also R.C. 2919.27(A)(1) and (B)(3).

II. The Third District misinterpreted the verdict provision when it held that a verdict form may not incorporate a statute by reference.

Unlike the Sixth District, the Third District has held that a verdict form that cites the statutory subsection under which a defendant was charged and convicted *does not* state the degree of an offense for purposes of the verdict provision—even when the cited statute itself states the degree of the offense. *Gregory*, 2013-Ohio-853 at¶¶23–24. It stands alone in that respect. Other courts to have considered the question have held that "the inclusion of statutory references in a verdict form can satisfy R.C. 2945.75(A)(2)." App.Op.¶61 (collecting cases). It was wrong for two reasons.

First, the Third District overread this Court's precedent. It pointed to this Court's decision in *Pelfrey* as requiring a verdict form to do more than just cite a relevant statutory provision. *Pelfrey*, the Third District held, mandates that the form itself recite the degree of the offense for which a jury convicted a defendant. *See Gregory*, 2013-Ohio-853 at ¶¶18, 24. The Third District was wrong. Neither the text of the verdict provision nor this Court's decision in *Pelfrey* require a verdict form to specifically recite the degree of an offense rather than cite the relevant statutory provision. As one Ohio appellate court has noted, this Court "*did not* specifically hold in *Pelfrey* or *McDonald* that inclusion of the statutory section of the offense charged in the verdict form would fail to satisfy the requirements of R.C. 2945.75(A)(2)." *State v. Dillard*, 2014-Ohio-4974, ¶36 (4th Dist.) (emphasis added).

Pelfrey involved a different question than the one presented here. It asked whether a verdict form that incorporates an indictment by reference adequately states the degree of an offense for purposes of the verdict provision. *See* 112 Ohio St. 3d 422 at ¶14. The Court held that it does not; the verdict provision cannot be satisfied, it held, "by demonstrating additional circumstances." *Id.* But the statute defining an offense for which a defendant was convicted is not an "additional" circumstance. The offense of conviction—including the degree of the offense—is the core question (or in the language of *Pelfrey*, the core circumstance) with which a verdict form is concerned.

Second, even if the Third District's reading of *Pelfrey* was a plausible one, the Court should reject it. *Pelfrey* was wrongly decided and, even if this case does not provide an opportunity to overrule that decision, the Court should at least decline to compound its earlier error. It should, at a minimum, refuse to extend *Pelfrey* any further.

Long before the Court decided *Pelfrey*, it was well established that a jury verdict that referenced an indictment properly stated the degree of an offense. Over a century earlier, the U.S. Supreme Court had held that a verdict sufficiently stated the degree of an offense when it indicated that the jury found that the defendant was "guilty as charged." *Craemer v. Washington State*, 168 U.S. 124, 130 (1897). It rejected the defendant's argument that such a verdict could support only a lesser conviction. *See id.* at 128. Other courts did the same—including this Court. *See State v. Park*, 174 Ohio St. 81, 82–83 (1962) (*per curiam*); *People v. Pleit*, 308 Ill. 323, 327 (1923); *cf. United States v. Tosh*, 330 F.3d 836,

842 (6th Cir. 2003) ("A jury's verdict represents a finding that a crime was committed as alleged in the indictment." (quotation omitted)).

Courts were similarly forgiving even when a verdict form failed to mention an indictment at all. The U.S. Supreme Court, for example, held that a jury verdict did not need to reference an indictment; a jury verdict that simply stated "guilty," indicated a conviction of the maximum degree of the charged offense. *St. Clair v. United States*, 154 U.S. 134, 154 (1894); *see also Statler v. United States*, 157 U.S. 277, 278–79 (1895). Under the rule discussed in *St. Clair*, if a jury wanted to find a "defendant guilty of an offence of an inferior degree to that charged," then "the verdict must specify" that a conviction was for a lesser offense. *See Craemer*, 168 U.S. at 130 (citing *Timmerman v. Washington Territory*, 3 Wash. Ter. 445 (1888); *see also Williams v. United States*, 238 F.2d 215, 220 (5th Cir. 1956); *Commonwealth v. Di Stasio*, 298 Mass. 562, 567–69 (1937). While not all courts agreed that a general jury verdict reflected a conviction of the greatest degree of a charged offense, even courts that rejected that rule acknowledged that a verdict was valid so long as it referenced the charges set forth in an indictment. *See Glenn v. United States*, 420 F.2d 1323, 1325 (D.C. Cir. 1969) (stating that a "general verdict of guilty … may be an acceptable course where the jury returns a verdict of 'guilty as charged'").

When the General Assembly adopted the verdict provision, it inverted the rule that a verdict that is silent as to the degree of an offense represents a conviction of the maximum degree. Now, under the statute, a verdict that does not state the degree of an

offense for which a defendant was convicted represents a conviction for the minimum, rather than maximum, degree. *See* R.C. 2945.75(A)(2). The legislature made no mention of the separate-but-related principle that a verdict form may incorporate an indictment by reference, however. *See* R.C. 2945.75(A)(2); *Craemer*, 168 U.S. at 130. So it should come as no surprise that, until the Court decided *Pelfrey*, most courts in Ohio had held that a verdict form that cited an indictment sufficiently stated the degree of an offense for purposes of the verdict provision. *See State v. Woods*, 8 Ohio App. 3d 56, 63 (8th Dist. 1982); *State v. Napier*, No. 16550, 1998 WL 257871, *3–4 (2d Dist. May 22, 1998); *State v. Rakes*, No. 11-97-9, 1997 WL 791525 *2–3 (3d Dist. Dec. 30, 1997); *State v. Davis*, No. 1746, 1992 WL 21228, *5–8 (4th Dist. Jan. 27, 1992); *State v. Dalton*, No. 1997CA00316, 1998 WL 525575, *1–2 (5th Dist. Apr. 27, 1998); *State v. Poling*, No. 88-T-4112, 1991 WL 84229, *15 (11th Dist. May 17, 1991); *but see State v. Breaston*, 83 Ohio App. 3d 410, 413–14 (10th Dist. 1993).

The Court in *Pelfrey*, it is true, rejected this majority rule. But its opinion in that case was a cursory one that did not discuss the Court's earlier decision in *Park* or explain why the text of the verdict provision required it to abandon that decision. The lack of any substantive analysis renders *Pelfrey* of little precedential or persuasive value. And whatever else can be said about that decision, it certainly does not hold that a verdict form that cites a statute fails to comply with the verdict provision.

At least some of the justices in the *Pelfrey* majority appear to have believed that the Sixth Amendment requires that a verdict form spell out, in detail, the jury's specific findings about the degree of an offense. When the Court in *Eafford* held that a verdict form could incorporate an indictment by reference when identifying the offense for which a defendant was convicted, two justices dissented on the basis that the decision violated the defendant's Sixth Amendment rights to a jury trial. *Compare Eafford*, 132 Ohio St. 3d 159 at ¶17 (majority op.) *with* ¶20 (Lanzinger, J., dissenting). One of those same justices concurred in *McDonald*, writing that *Apprendi* and the Sixth Amendment require a verdict form to specifically identify the offense for which a defendant is found guilty. *McDonald*, 137 Ohio St. 3d 517 at ¶28 (Lanzinger, J., concurring). Any Sixth Amendment concerns were of course misplaced; the Sixth Amendment does not dictate how a jury must report its verdict. *See Grooms*, 194 F. App'x at 363; *see also United States v. Kocis*, 504 F. App'x 865, 867 (11th Cir. 2013) (*per curiam*).

Whether it is because it was little more than a drive-by ruling, or because it was grounded on incorrect constitutional assumptions, *Pelfrey* stands on shaky grounds. Thus, even if the Court does not abandon *Pelfrey* completely, it should construe it narrowly. Many Ohio courts have done so, *see State v. Jones*, 2013-Ohio-5889, ¶8 (4th Dist.); *State v. Reynolds*, 2009-Ohio-3998, ¶¶40, 44 (5th Dist.); *State v. Edwards*, 2013-Ohio-3068, ¶34 (9th Dist.); *State v. Hill*, 2010-Ohio-1687, ¶35 (10th Dist.), and this Court should do the same.

III. If the Court determines that the verdict form in this case failed to comply with the verdict provision, it should hold that any error was harmless.

The Court should affirm Mays's conviction and sentence even if it determines that the verdict form in this case failed to sufficiently state the degree of the offense for purposes of the verdict provision. Because the statutes that the verdict form cites clearly state the degree of the offense for which Mays was convicted, any failure to perfectly comply with the verdict provision was harmless. Constitutional jury trial errors are subject to harmless error review and there is no reason to treat statutory errors any differently.

Sixth Amendment precedent provides some guidance about what the Court should do if it determines that the verdict form failed to comply with the verdict provision. This Court and the U.S. Supreme Court have both held that Sixth Amendment jury-trial errors are subject to harmless error review. *Willan*, 144 Ohio St. 3d at ¶28; *Recuenco*, 548 U.S. at 222; *see also Neder v. United States*, 527 U.S. 1, 12–13 (1999) (jury-instruction error subject to harmless-error review). To determine whether a Sixth Amendment error is harmless, courts examine the record as a whole and ask whether the evidence presented at trial "was so strong as to leave no doubt as to what the jury's finding on that subject would have been." *United States v. Mansoori*, 480 F.3d 514, 523 (7th Cir. 2007); *see also United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2003).

Even though Sixth Amendment is unconcerned with how a jury reports its findings, *see Grooms*, 194 F. App'x at 363, the Court should adopt a similar harmless error

test here. Criminal Rule 52(A) states that any error "which does not affect substantial rights shall be disregarded." The Court's review of a verdict-provision error would therefore "be incomplete" if the Court "failed to perform" a harmless error review. *State v. LaRosa*, 165 Ohio St. 3d 346, 2021-Ohio-4060, ¶37. Neither the Court's decision in *Pelfrey* nor its decision in *McDonald* ever considered whether verdict-provision errors are subject to harmless error review. The Court should resolve that question now, and it should hold that harmless error applies.

Doing so would bring the Court's verdict-form jurisprudence in line with its other decisions. Capital sentencing opinions, for example, must specify "the aggravating circumstances the offender was found guilty of committing." R.C. 2929.03(F). Some courts have complied with that requirement by incorporating the language of an indictment by reference. *See State v. Dickerson*, 45 Ohio St. 3d 206, 212–13 (1989). The Court has held that, while it "does not condone" that practice, any error in failing to provide a more specific sentencing opinion is "harmless beyond a reasonable doubt." *Id.*

The Court should likewise hold that a verdict-provision error is harmless when a verdict form leaves no doubt about the degree of the offense for which the jury found the defendant guilty. Applied here, that test makes clear that any error in Mays's verdict form was harmless. The verdict form in this case stated that the jury convicted Mays of "Violating a Protection Order, in violation of R.C. 2919.27(A)(1) and (B)(3)." Verdict Form, R.30. And R.C. 2919.27(B)(3) in turn states that violating a protection order is a

fifth-degree felony if the defendant, like Mays, had previously pleaded guilty to, or been convicted of, certain other offenses. So even if the verdict form did not explicitly state the degree of the offense for which a jury found Mays guilty, the statutory provisions that the verdict form cited made the degree clear.

Two additional factors confirm that the jury found the facts necessary to convict Mays of a fifth-degree felony. *First*, the court's instructions to the jury informed the jurors that they could find Mays guilty of the first count of the indictment only if they concluded that he had previously been convicted of violating a protection order. Trial Tr.334–35. *Second*, Mays's counsel acknowledged that he had; counsel noted in closing argument that Mays had been convicted of violating a previous restraining order. Trial Tr.316. Taken together, these factors, combined with the plain language of the verdict form, leave no doubt that the jury found Mays guilty of committing a fifth-degree felony. Any verdict-provision error, assuming that one occurred, is therefore harmless.

IV. None of Mays's contrary arguments are persuasive.

Mays argues that the verdict form in this case failed to comply with the verdict provision because, even though R.C. 2919.27(B)(3) identifies three different circumstances under which the violation of a protection order is a fifth-degree felony, the verdict form did not specify which of the three the jury determined applied to him. But as the Sixth District correctly pointed out, the verdict provision does not require the verdict form to be any more specific than it was. *See* App.Op.¶¶65–66. All that the statute requires a

verdict form to do is state "either the degree of the offense of which the offender is found guilty" or state that "additional element or elements are present" that make the offense "one of more serious degree." R.C. 2945.75(A), (A)(2). No one could dispute that the verdict form would have complied with the verdict provision if it had stated that the jury found Mays guilty of committing a fifth-degree felony. But if it had, the form *still* would not have identified the specific factual finding that elevated Mays's conviction to a fifth-degree felony. Mays's complaint is therefore not that his verdict form failed to comply with the verdict provision, but rather that the statute does not require juries to make more specific findings. That complaint is best directed to the General Assembly, not the Court.

CONCLUSION

For the above reasons, the Court should affirm the Sixth District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served this 8th day of January, 2024, by e-mail on the following:

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