IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Supreme Court Case No. SC-23-0839
Plaintiff-Appellee,	*	On Appeal from the Lucas County Court of Appeals,
-vs-		Sixth Appellate District
	*	
MARIO D. MAYS		Court of Appeals
	*	Case No. CL-21-1228
Defendant-Appellant.		
	*	

BRIEF OF PLAINTIFF-APPELLEE

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INTRODUCTION

Ohio law provides that if "one or more additional elements makes an offense one of more serious degree *** [a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present." R.C. 2945.75(A)(2). The statute does not specify exactly how the verdict form must convey the information required.

Before the General Assembly enacted R.C. 2945.75, verdict forms were considered adequate under Ohio law if they included language referring to charges in the indictment. *See State v. Park*, 174 Ohio St. 81, 186 N.E.2d 735 (1962). And even after the statute's adoption, phrases similar to "as charged in the indictment" were viewed as satisfying the verdict requirements. *See State v. McMannis*, 5th Dist. Stark No. 2002 CA 00258, 2003-Ohio-1901, ¶13.

Over the past 15 years, the Court has issued several decisions applying the verdict form provision, but those decisions have proven difficult for the lower appellate courts to reconcile. First, the Court suggested that failure to comply with the verdict form provision will automatically result in a reduction of the charge to the lowest possible degree, even when the defendant did not object to the verdict form. *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-2224, 970 N.E.2d 891. *Pelfrey* held that "additional circumstances" could not be used to fulfill the statutory requirements, and the decision offered as examples of such impermissible additional circumstances: the indictment's language, the evidence presented at trial, or the defendant's failure to raise the issue of the inadequacy of the verdict form at trial. *Id.,* ¶14.

Five years after the *Pelfrey*, the Court again reviewed a jury verdict form for compliance with R.C. 2945.75(A)(2). *See State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, 970 N.E.2d 891. The verdict form stated that the jury found Eafford "guilty of Possession of Drugs in violation of §2925.11(A) of the Ohio Revised Code, as charged in Count Two of the Indictment." The Eighth District held that the verdict included neither the degree of the offense nor the applicable aggravating circumstance, and the defect could not be cured by reference to the jury instructions. As a result, Eafford could only be convicted of a third degree misdemeanor. *State v. Eafford*, 8th Dist. Cuyahoga No. 94718, 2011-Ohio-927, ¶46. On appeal, this Court reversed, applying a plain-error standard of review, and holding that "[t]he finding in the verdict cannot be described as error, let alone an obvious defect in the trial proceeding, and it did not affect Eafford's substantial rights." Without overruling or distinguishing *Pelfrey*, the Court pointed out that Eafford "knew from the outset that the state intended to prove his guilt of possession of cocaine" and the verdict form did not affect the outcome of trial. *Id*., ¶18.

In the third case, issued the year after *Eafford,* the Court held that "the verdict form itself is the only relevant thing to consider in determining whether the dictates of R.C. 2945.75 have been followed." The Court concluded that the verdict form in that case supported only a conviction of the lowest possible offense level under the statute. *State v. McDonald*, 137 Ohio St.3d 517, 2013-Ohio-5042, 1 N.E.3d 374. *McDonald* did not overrule or distinguish *Eafford*.

Ohio's lower appellate courts have recognized the difficulty in applying these cases consistently. *See, e.g., State v. Henry*, 9th Dist. Summit No. 27758, 2016-Ohio-

680, ¶47 ("The application of [R.C. 2945.75(A)(2)] has engendered much controversy since the Supreme Court of Ohio issued [*Pelfrey, Eafford*, and *McDonald*]."); *State v. Sanders,* 8th Dist. Cuyahoga No. 107253, 2019-Ohio-1524, ¶47 (*Pelfrey, Eafford*, and *McDonald* "have led to some confusion regarding what is required to comply with R.C. 2945.75(A)(2) and to what extent a failure to strictly comply with R.C. 2945.75(A)(2) is subject to a plain-error analysis").

In the aftermath of *Pelfrey, Eafford*, and *McDonald*, some of Ohio's appellate courts, including the Sixth District in this case, have held that a verdict form satisfies R.C. 2945.75(A)(2) by reference to a statute's subsection to which a single offense level applies. *See State v. Mays,* 6th Dist. Lucas No. L-21-1228, 2023-Ohio-1908. The Third District has rejected this view. S*ee State v. Gregory,* 3d Dist. Hardin No. 6-12-02, 2013-Ohio-853, ¶24. The Sixth District's rationale is the better approach, and its decision in this case should be affirmed. But even if the Court concludes that the R.C. 2945.75 requires more than a statutory reference in the jury verdict form, the Court should clarify that *Eafford*'s plain-error review applies when a challenge to a verdict form is raised for the first time on appeal. Under the circumstances of this case, nothing in the record suggests that the verdict form affected the outcome of trial, so the Court should affirm the Sixth District's decision.

STATEMENT OF THE CASE AND FACTS

Mays is the ex-husband of C.B. and the father of four of her children. Over the course of their relationship, Mays abused C.B. on multiple occasions. He twisted her arms, bruised her body in places people wouldn't see, pushed her down stairs, and choked her. (Tr. Vol. I at pp. 159-161.) C.B. reported the abuse on several occasions,

but was fearful of Mays and did not pursue charges. (*Id*. at p. 168.) Eventually Children's Services notified her that either Mays or her children would have to be removed from the family home. (*Id*. at p. 178.) C.B. moved with the children to a different location, after which Mays came to their new home, seized a knife, and threatened to kill everyone in the home. (*Id*. at pp. 178-179.)

C.B. obtained protection orders in 2007, 2011, and 2017. The last of those protection orders was in effect until June, 2022, and in September, 2017, Mays was convicted of a misdemeanor charge of violating that protection order. (*Id*. at pp. 166-181; Exhibits 1-5.)

On November 30, 2019, C.B. attended their grandson's first birthday party, which was held at a restaurant. (*Id.* at p. 190.) She believed that Mays did not plan to attend because he knew she would be there, but Mays arrived while she was paying the reservation fee for the party. (*Id*. at p. 191.) After 30 or 45 minutes, Mays noticed C.B. was wearing a ring and grabbed her hand, demanding to know if she had remarried. Despite knowing that she was present at the gathering, he remained there until the party ended. (*Id*. at 191-192, 229, 231.)

Mays was indicted on a fifth degree felony violation of a protection order (R.C. 2919.27(A)(2)[1] and (B)(3)), as well as a fourth degree felony count of menacing by stalking (R.C. 2903.211(A)(1) and (B)(2)(e)).

[1] At trial, the first count was amended without objection from defense counsel from a violation of R.C. 2919.27(A)(2) to (A)(1). The felony level designated in R.C. 2919.27(B)(3) was unchanged. (Tr. Vol. II at p. 266.)

The first count of the indictment clearly designated the charged offense as a violation of R.C. 2919.27(B)(3), "a felony of the fifth degree." At trial, the court's jury instructions included the previous conviction of a protection order as an element of the crime:

> Count 1, violating a protection order. The Defendant is charged with violating a protection order. Before you can find the Defendant guilty you must find beyond a reasonable doubt that on or about the 30th day of November, 2020, through the 7th day of February, 2020, and in Lucas County, Ohio, the Defendant did recklessly violate a protection order, that the Defendant previously had been convicted of or pled guilty to a violation of a protection order pursuant to section 3113.31 of the Ohio Revised Code.
>
> There are four elements that must be proven beyond a reasonable doubt before the Defendant can be found guilty of violating a protection order. They are that the Defendant did:
>
> 1. Recklessly;
> 2. Violate a protection order;
> 3. The Defendant had been previously convicted of or pled guilty to a violation of a protection order pursuant to section 3113.31 of the Ohio Revised Code;
> 4. Venue.

(Tr. Oct. 25, 2021 at 334-335.) Defense counsel did not object to the instruction.

The trial court read the verdict form as part of the instructions to the jury. Defense counsel did not object to the form, which stated in relevant part, "We the jury. . . for verdict find and say that we find the defendant, Mario D. Mays …guilty of Count 1, Violating a Protection Order, in violation of R.C. 2919.27(A)(1) and (B)(3)." (Tr. Vol. II at p. 347.) The jury entered a guilty finding on the form, and the court sentenced Mays to 90 days in jail and three years of community control based on the jury's finding.

Mays appealed, arguing in part that the jury verdict form was insufficient pursuant to R.C. 2945.72(A) to convict him of a felony of the fifth degree. The Sixth Appellate

District rejected the assignment of error and affirmed, with the majority opinion applying a de novo standard of review and holding that the verdict form's reference to R.C. 2919.27(A)(1) and (B)(3) was sufficient to state the degree of offense and additional element under R.C. 2945.95(A)(2). *State v. Mays*, 6th Dist. Lucas No. L-21-1228, 2023-Ohio-1908, ¶62.

The Sixth District went on to hold that its decision with respect to the adequacy of the verdict forms conflicted with the Third District's previous holding that R.C. 2945.72(A)(2) cannot be satisfied by a jury verdict form listing the statutory section under which the defendant was charged. *Id.,* ¶70, citing *State v. Gregory*, 3d Dist. Hardin No. 6-12-02, 2013-Ohio-853, ¶24. The Sixth District certified a conflict on the following issue:

> Can the requirement in R.C. 2945.75(A)(2) that a "guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional [aggravating] element or elements are present" be satisfied by a verdict form that cites the statutory sections, permitting the defendant to be convicted of the higher-level offense?

Mays, supra, 2023-Ohio-1908, ¶72.

The certified question should be answered in the affirmative, based on the analysis and the reasoning of the Sixth District's opinion. But regardless of the answer to the certified question, the Sixth District's decision should be affirmed. Pursuant to Crim.R. 52 and R.C. 2945.83(E), reversal is inappropriate because the verdict form did not prejudice Mays in any respect.

ARGUMENT

I. A jury verdict form satisfies R.C. 2945.75(A)(2) when it indicates that a defendant is found guilty of a section of the Revised Code defining an offense, together with a specific subsection permitting a conviction of only one offense level based on an additional fact.

A. Permitting a statutory reference which identifies the specific felony level to satisfy the requirements of R.C. 2945.75 is consistent with *Pelfrey* and *McDonald*.

Mays was convicted of violation of a protection order as defined by R.C. 2919.27(A) and (B)(3). Subsection (A)(1) prohibits a reckless violation of a protection order issued pursuant to R.C. 2919.26 or R.C. 3113.31, while subsection (B)(3) provides that a violation is a felony of the fifth degree when the defendant had previously been convicted of a violation of a particular kind of protection order:

> 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.

R.C. 2919.27(B)(3). The Sixth District described the statute as one that does not "identif[y] separate offenses under separate subsections. Rather, it defines the offense of 'violating a protection order,' in its basic form, as 'recklessly violat[ing] the terms of *** one of three types of protection orders." The violation of a protection order is generally a first-degree misdemeanor, but that level is elevated to a fifth-degree felony for previous violations of certain protection orders under Subdivision (B)(3). *Mays, supra,* 2023-Ohio-1908, ¶51.

The Sixth District acknowledged the Third District's holding that a statutory reference in the verdict form fails to satisfy R.C. 2945.75(A)(2) in light of *Pelfrey*. *Mays, supra,* ¶55, citing *Gregory, supra*, 2013-Ohio-853. The Sixth District rejected *Gregory*'s reasoning, based on a distinction between the problematic "additional circumstances" rejected by *Pelfrey* and the statutory reference in the verdict form:

> …impermissible 'additional circumstances' under Pelfrey refers to any circumstance that is 'additional' because it is outside the verdict form itself—e.g., the language of the indictment, jury instructions, trial testimony, or evidence in the record. The *Pelfrey* court did not explicitly or implicitly hold that references to specific statutory sections within the verdict form cannot "state the degree of the offense" as required by R.C. 2945.75(A)(2).

Mays, supra, 2023-Ohio-1908, ¶57. And as the Sixth District discussed, the concurring opinion in the subsequent *McDonald* case supported that analysis in its description of the case as holding "simply that the jury's verdict must identify specifically the offense of which the defendant is found guilty: *a reference to R.C. 2921.331(B) and (C)(5)(a)(ii) would have been sufficient*, as would a reference to the degree of the offense as a felony of the third degree. This is a simple application of *State v. Pelfrey* * * *." *Id*., quoting *McDonald*, ¶60 (Lanzinger, J., concurring), with emphasis.

The Sixth District is not alone in its holding. Several courts have held that a statutory reference in a verdict form will satisfy the requirements of R.C. 2945.75(A)(2). *See Mays, supra*, ¶61, citing *State v. Dillard*, 4th Dist. Meigs No. 13CA9, 2014-Ohio-4974, ¶36-37; *State v. Hughley*, 8th Dist. Cuyahoga No. 90323, 2009-Ohio-3274, ¶ 15-16; and *State v. Moore*, 7th Dist. Mahoning No. 12 MA 197, 2013-Ohio-4000, ¶ 20-24. *See also State v. Cooper*, 5th Dist. Stark No. 2022CA00091, 2023-Ohio-2897; and *State v. Craig*, 5th Dist. Licking No. 17-CA-61, 2018-Ohio-1987, ¶16, appeal not

allowed, 154 Ohio St.3d 1430, 2018-Ohio-4670, 111 N.E.3d 1192 (both holding that a verdict form citing R.C. 2921.331(B) and (C)(5)(1)(ii) was sufficient to convict the defendant of a felony level offense).

B. The recitation of the statute's precise language or the felony level for the offense would have provided no information regarding specific nature of the protection order that was violated.

Mays and the dissent in the Sixth District's decision complain that the statutory reference in this case is "incomplete" because it does not include the specific factual finding pursuant to R.C. 2919.27(B)(3)(a)-(c) which elevates the offense to a felony of the fifth degree. But R.C. 2945.75(A)(2) is worded in the disjunctive, so that a satisfactory verdict form must state "**either** the degree of the offense of which the offender is found guilty, **or** that such additional element or elements are present."

An explicit statement or designation that the offense in question is a felony of the fifth degree would not clarify precisely which aggravating element applied. As the Sixth District noted,

> …there would have been no practical difference if the verdict form had said "we find the defendant, Mario D. Mays (insert guilty/not guilty) __ of Count 1, Violating a Protection Order, **a fifth-degree felony**" rather than what it did say, which was "we find the defendant, Mario D. Mays (insert guilty/not guilty) __ of Count 1, Violating a Protection Order, **in violation of R.C. 2929.27(A)(1) and (B)(3)**." (Emphasis added.) While both versions sufficiently state the degree of the offense—thereby satisfying R.C. 2945.75(A)(2)—neither version is sufficient to identify the specific factual finding that elevated the offense to a fifth-degree felony.

Mays, supra, 2023-Ohio-1908, ¶66 (emphasis in original).

The Sixth District's reasoning is consistent with the majority view of the lower appellate courts and is based on an appropriate distinction between the "additional circumstances" identified in *Pelfrey* and the reference to a statutory provision which

permits a finding of guilt **only** as to a felony of the fifth degree. The reasoning should be affirmed, but the decision may also be affirmed by way of the plain-error review provided in *Eafford.*

II. When the indictment, jury instructions, and arguments of counsel recite the elements of an offense, a defendant is not prejudiced by a jury verdict form which recites the specific subsection and subdivision that contains the felony level as well as the factual basis for the particular felony level.

This Court has recognized only limited circumstances in which a verdict may be set aside in the absence of a showing of prejudice. Only an absence of jurisdiction or a structural error is generally sufficient to override the prejudice requirement, but neither is apparent in this case.

A. The statutory provision at issue in this case does not create a jurisdictional requirement.

There is no dispute that the trial court had subject-matter jurisdiction and personal jurisdiction over Mays, so there is no basis for declaring the judgment entry void. *See State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, ¶4-5. R.C. 2945.75(A)(2) does not define or limit the trial court's subject-matter jurisdiction. In fact, the statute's remedy for non-compliance is a reduction of charges, not a voiding of the judgment itself, indicating that the requirement is a requirement "in the exercise of jurisdiction" and not a prerequisite to that exercise.

B. Appellant has not identified a constitutional right on which to base a claim of structural error.

"Structural errors are **constitutional defects** that defy analysis by harmless-error standards because they 'affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *State v. Bond*, 170 Ohio St.3d 316, 2022-Ohio-4150, 212 N.E.3d 880, ¶26 (emphasis added), quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Such error "may affect substantial rights even if the defendant cannot show that the outcome of trial would have been different had the error not occurred." *Bond*, ¶32.

Here, no constitutional right is involved. At most, the issue amounts to "a statutory rather than constitutional error." *Pelfrey, supra*, 2007-Ohio-256, 860 N.E.2d 735, ¶28-29 (O'Donnell, J., dissenting and citing, among other authorities, *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643). *See also State v. Sessler*, 119 Ohio St.3d 9, 2008-Ohio-3180, 891 N.E.2d 318, ¶8 (O'Donnell, J., dissenting). Neither the Ohio nor the United States Constitution recognizes a right to a special jury verdict form reciting the degree or particular elements of an offense. In fact, general verdicts were accepted "in England before the Declaration of Independence, and in this country long afterwards." *Griffin v. United States*, 502 U.S. 46, 49-51, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). Even when multiple theories of guilt are submitted to a jury under a single count and the general verdict does not specify which of the theories the jury relied upon, a defendant's constitutional rights are not violated. *Id*. at 49-51. *See also Schad v. Arizona*, 501 U.S. 624, 645 (1991); *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787.

Because no constitutional right is involved, structural error is inapplicable, and the Court should examine the record for obvious error which prejudiced Mays' substantial rights.

C. Plain error review should apply when a defendant challenges the adequacy of a verdict form for the first time on appeal. (*State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, 970 N.E.2d 891, applied.)

Crim.R. 52(A) provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Likewise, R.C. 2945.83(E) provides that no verdict shall be set aside for any cause "unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial." Crim.R. 52(B) allows the Court to notice "[p]lain errors or defects affecting substantial rights" even when those errors "were not brought to the attention of the court." Plain-error analysis places the burden on the defendant "to demonstrate the requirements for review whereas under harmless-error review, the state bears the burden to demonstrate that the error did not affect the defendant's substantial rights." *Bond*, supra, 2022-Ohio-4150, ¶7. Prejudice to substantial rights requires a showing that the error "must have affected the outcome of the [trial] court proceedings." *State v. Boaston*, 160 Ohio St.3d 46, 2020-Ohio-1061, 153 N.E.3d 44, ¶62.

Review for plain error is consistent with this Court's historic treatment of other jury verdict form requirements. In 1869, as today, Ohio required the jury's verdict to be in writing and signed by the foreman. *Hardy v. State*, 19 Ohio St. 579, 580 (1869); *see also* current R.C. 2945.171. But when a verdict was announced "in proper form, and inquiry was made of each juror whether the verdict so returned was his verdict; and

each responded that it was, and it was entered upon the record," a defendant was not prejudiced by the absence of a written verdict form signed by the foreman. *Id.*

This Court has previously held that "[v]erdicts are to have a reasonable intendment and to have a reasonable construction." *Norman v. State*, 109 Ohio St. 213 (1924), paragraph one of the syllabus. The reasonableness requirement prohibits voiding the jury verdicts "unless from necessity originating in doubt of their import or irresponsiveness to the issues submitted, or unless they show a manifest tendency to work injustice. A verdict is sufficient in form if it decides the question in issue in such a way as to enable the court intelligently to base a judgment thereon." *Id.* And the requirement of prejudice extends to consideration of other claims of defects in procedures related to jury verdict forms. *See State v. Clark*, 2nd Dist. Montgomery No. CA 9722, 1987 Ohio App. LEXIS 5485 (Jan. 6, 1987) (loss of written jury verdict forms was not a prejudicial violation of procedural statutes and rules requiring that "written and signed verdicts of the jury be filed and recorded in full in the journal of the court"); *State v. Bankston,* 10th Dist. Franklin No. 13AP-250, 2013-Ohio-4346, ¶13 (failure to file verdict forms not considered reversible error).

Mays' failure to object to the jury verdict form in this case requires a review of whether the record reveals an obvious deviation from the legal rule which affected his "substantial rights." *Eafford*, *supra*, 2012-Ohio-2224, ¶11. The Court should clarify that plain-error analysis of the verdict form permits a reviewing court to consider matters outside the jury verdict form, including the indictment, evidence at trial, and instructions to the jury. *State v. Proctor*, 9th Dist. Summit No. 26740, 2013-Ohio-4577, ¶4-7. See also *State v. Smoot*, 6th Dist. Wood No. WD-19-034, 2020-Ohio-838, ¶49-50 (defendant

was not prejudiced in his defense because he received adequate notice of what the State intended to prove at trial, even though the verdict form indicated an incorrect statutory provision).

In this case, the indictment (as amended) stated a fifth degree felony offense. The evidence related to a fifth degree felony offense. The jury was properly instructed as to the elements of a fifth degree felony offense. And the judgment entry sentenced Mays for a fifth degree felony. Review for plain error compels the conclusion that the Sixth District's judgment should be affirmed, because the record in this case does not reveal any prejudice to Mays based on the jury verdict form.

CONCLUSION

The Court should answer the certified question in the affirmative and affirm the Sixth District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent, via email, this _____ day of January, 2024 to Joseph Patituce and Catherine Meehan at attorney@patitucelaw.com.

By /s/ Evy M. Jarrett_____
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