IN THE SUPREME COURT OF OHIO
CASE NO. 2024-1608

STATE OF OHIO,	**On Appeal from Cuyahoga County Court of Appeals**
Plaintiff-Appellant	**Eighth Appellate District**
v.	**C.A. Case Nos. 114315 and 114317**
DIAMOND KING,	
Defendant-Appellee	

MERIT BRIEF OF AMICUS CURIAE LOGAN COUNTY PROSECUTOR'S OFFICE IN SUPPORT OF APPELLANT STATE OF OHIO

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STATEMENT OF AMICUS INTEREST

The Logan County Prosecuting Attorney's duties include prosecuting felonies committed in Logan County, Ohio. The Appellant State of Ohio's appeal implicates the reviewability of a trial court's decision to overturn a jury verdict of guilty pursuant to Crim. R. 29(B). Court judgments of acquittal under Crim. R. 29(B) and (C) touch upon all prosecutions in Ohio, ranging from misdemeanors to felony sexual assaults and homicides. The instant appeal directly impacts the appealability of the Logan County Common Pleas Court's judgment in *State v. Marcus Cobb*, Logan C.P. No. CR24-01-0018, Third District Court of Appeals No. 8-24-51. In that case, the Logan County Prosecutor's Office submitted a Motion in Support of Jurisdiction to this Court under case no. 2025-0375 after its appeal of an erroneous application of Crim. R. 29(C) was dismissed by the appellate court pursuant to *State ex rel. Yates v. Court of Appeals,* 32 Ohio St. 3d 30 (1987).

Logan County has a single General Division judge on the Court of Common Pleas who presides over all adult felony cases. Recently, the Logan County Prosecutor's Office prosecuted Marcus Cobb on two counts each of Assault on a Police Officer and Obstructing Official Business. Mr. Cobb had an active warrant for his arrest, and when the police pulled his vehicle over, he refused a lawful order to exit the vehicle. Officers pulled the uncooperative Mr. Cobb from the vehicle to effect the lawful arrest on his warrant. Mr. Cobb continued to resist and escalate his use of force against the officers, ultimately punching an officer twice in the face and biting another on the hand. Per department policy and in response to Mr. Cobb's escalating violent conduct, an officer struck Mr. Cobb once in the face and, when that failed to gain his compliance, deployed

a taser. Mr. Cobb submitted to officers only after a second taser issuance, and officers then immediately ceased any use of force.

The trial court demonstrated a pattern of outcome-oriented decision making in favor of Mr. Cobb. First, the trial court, *sua sponte*, insisted on instructing the jury on self-defense though the defense did not request the instruction. In fact, Mr. Cobb denied assaulting the officers in his testimony,[1] and, more importantly, this Court had explicitly held that a private citizen may not—in the absence of excessive or unnecessary force by an arresting officer—use force to resist arrest. *Columbus v. Fraley*, 41 Ohio St. 2d 173, 180 (1975). Though the trial court initially agreed that *Fraley* and its progeny was "good law," it then attempted to circumvent *Fraley* by proposing a jury instruction containing the court's own factual finding of excessive force. The proposed instruction cited only cherry-picked evidence that supported the court's conclusion and failed to acknowledge material evidence of Mr. Cobb's own conduct and the officers' compliance with use of force policy. The State explicitly objected that the trial court's proposed instruction amounted to advocacy on the defendant's behalf. The trial court then abandoned the excessive force requirement altogether, holding that *Fraley* and its progeny had been overruled by the shift to the State of the burden of proof on self-defense—thus formulating a different mean to the same end.

The jury rejected the trial court's self-defense instruction and found Mr. Cobb guilty of all charges. Immediately after the verdict, the trial court invited the parties to submit briefs on Mr. Cobb's general Crim. R. 29(C) motion. The defense never filed a brief. The State filed a memorandum that addressed only the single issue that the trial court had

[1] Self-defense does not seek to negate any element of the offense and is a justification for admitted conduct. *State v. Martin*, 21 Ohio St. 3d 91, 94 (1986).

identified as concerning during the Crim. R. 29(A) hearing: causation of the bite injury in one of the Assault charges. Finally, approximately two months after the trial, but before sentencing, the trial court dismissed all charges on November 6, 2024[2] under the guise of granting the Crim. R. 29(C) motion. Having secretly abandoned the sole issue discussed during the Crim. R. 29(A) hearing and briefed by the State, the trial court instead ruled that the State had failed to produce sufficient evidence of *mens rea* on all counts. This determinative issue and its contrived rationales were entirely novel and, thus, not subject to fair debate by the parties. Moreover, the trial court dedicated nearly seven pages of its fifty-nine-page entry to a separate, superfluous, and—for the purpose of deciding a Crim. R. 29(C) motion—legally irrelevant finding that the victim officers had exceeded constitutional use of force and may be subject to civil liability—a fallacious claim that the trial court repeated in its immediately accompanying press release on the ruling.

The trial court's ruling and press release has eroded the community's confidence in the judicial system. The chiefs of every Logan County law enforcement agency issued a joint public response in tandem with a statement from the Bellefontaine Mayor and Service-Safety Director condemning not only the ruling, but condemning the judge for professional error and personal bias.

The State filed two appeals on December 4, 2024: an appeal by leave with respect to the self-defense instruction and an appeal of right of the Crim. R. 29(C) judgment as the functional equivalent of a dismissal. The trial court deviated from proper sufficiency-of-the-evidence analysis by weighing the evidence; repeatedly, demonstrably, and materially misrepresenting the evidence and the law; and gratuitously and disdainfully

[2] This initial entry was replaced by a nearly identical Nunc Pro Tunc entry on November 19, 2024 (Exhibit A-2).

criticizing the conduct of the victim officers. The State argued that the substance and the rationales of the ruling were outside the scope of Crim. R. 29(C), the functional equivalent of a Crim. R. 48(B) dismissal, and—considered alongside the trial court's illegal *sua sponte* self-defense instruction—products of bias and demonstrations of outcome-oriented decision-making.

The Third District Court of Appeals dismissed the appeal of the Crim. R. 29(C) ruling on the sole ground that it was required to do so by *Yates,* 32 Ohio St. 3d 30. Signaling that the appeal, if permitted, had a reasonable chance of success on the merits, the dismissal entry noted that the trial court's judgment entry was "extraordinary in tone and troubling in merit." (Exhibit A-1).

The erroneous removal of appellate guardrails by *Yates* invites judicial unaccountability, public controversy, and injustice. The Logan County community needs—and all Ohioans deserve—an avenue of review for rulings that overturn the true final verdict: the verdict of a jury of citizens. Appellate review of post-verdict judgments of acquittal under Crim.R. 29(B) and (C) vindicates the policy purpose of R.C. 2945.67 and restores, promotes, and preserves public confidence in the judicial system without violating constitutional protections against double jeopardy under U.S. Const., amend. V and Ohio Const., art. I, §10.

STATEMENT OF THE CASE AND FACTS

The Amicus adopts by reference the statement of facts provided in Appellant State of Ohio's Merit Brief.

ARGUMENT

<u>Amicus Proposition of Law</u>: A trial court's judgment of acquittal under Crim. R. 29(B) or (C) that overturns a jury's guilty verdict is not a "final

verdict." The State can appeal such a judgment as of right or by leave of court under R.C. 2945.67(A). *State ex rel. Yates v. Court of Appeals*, 32 Ohio St.3d 30 (1987), should be overruled.

The Amicus endorses and adopts by reference all arguments separately submitted by Appellant, the Ohio Attorney General, and the Ohio Prosecuting Attorney's Association. The Amicus submits the following to be considered in tandem with those arguments.

I. R.C. 2945.67 is a broad grant of appellate rights to the State with a narrow exception for "final verdicts."

R.C. 2945.67 broadly expanded the State's appellate rights, permitting appeal of "any" trial court ruling with the exception of the "final verdict." "The rule is well and wisely settled that exceptions to a general law must be strictly construed. They are not favored in law, and the presumption is that what is not clearly excluded from the operation of the law is clearly included in the operation of the law." *State ex rel. Keller v. Forney*, 108 Ohio St. 463, 467 (1923). Moreover, in interpreting statutes, words without statutory definition should be given their usual, ordinary, or customary meaning. *Ayers v. Ayers*, *Slip Op.* No. 2024-Ohio-1833, ¶11 citing *Coventry Towers, Inc. v. Strongsville*, 18 Ohio St.3d 120, 122 (1985); see also R.C. 1.42. Courts may deviate from the plain-meaning rule of construction to avoid an absurd result. *State ex rel. Clay v. Cuyahoga Cty. Med. Exam'rs Office*, 2017-Ohio-8714, ¶26.

As demonstrated below, it is the deviation from these principles in *State ex rel. Yates v. Court of Appeals*, 32 Ohio St.3d 30 (1987), among other deficiencies in logic, that produces an absurd result. In failing to construe the "final verdict" exception strictly and by failing to give those terms their plain meaning, *Yates* confuses a statute that expands *prosecutor* appellate rights with one that expands *defendant* appellate protections. "The effect of *Yates* was to afford greater protection to criminal defendants than the Double

Jeopardy Clauses provide." *State v. Ramirez*, 2020-Ohio-602, ¶19. This perversely reads R.C. 2945.67 to grant prosecutors all constitutionally permissible appeals of trial court decisions except of those that inherently are most prejudicial to prosecutors and most controversial: judgments that overturn jury verdicts.

II. *Yates* was poorly reasoned.

Yates holds that a trial court judgment overturning a jury verdict of guilty pursuant to Crim. R. 29(C) is a "final verdict" within the meaning of R.C. 2945.67(A), thus protected from appellate review. When *Yates* was heard, precedent had held (and the respondent had conceded) that a pre-verdict Crim. R. 29(A) judgment of acquittal is such a "final verdict." In rationalizing its refusal to distinguish post-verdict Crim. R. 29(C) judgments from pre-verdict Crim. R. 29(A) judgments, the *Yates* majority relies upon the following claims: (1) R.C. 2945.67(A) is not tied to the Double Jeopardy Clause, (2) both Crim. R. 29(A) and (C) judgments are determinations of the sufficiency of the evidence, and (3) such judgments are factual determinations of innocence. *Id.* at 32-33.

A. "Final verdict" is tied to double jeopardy prohibitions.

1. *Yates* unwittingly ties "final verdict" to double jeopardy.

Yates acknowledges federal jurisprudence holding that double jeopardy prohibitions do not bar prosecutor appeals that, if successful, would not require a new trial. *Id.* at 32 citing *United States v. Scott*, 437 U.S. 82 (1978) and *United States v. Wilson*, 420 U.S. 332 (1975). However, in dismissing this material distinction, the majority makes the conclusory statement that, "R.C. 2945.67(A) prevents an appeal of *any* final verdict[3]

[3] The *Yates* majority's emphatic reliance on the "any" modifier poignantly demonstrates its confusion. R.C. 2945.67 authorizes appeal by the State of *any* court decision except *the* final verdict. It is the authorization of appeal that was written broadly and the exception written narrowly.

and is not tied to the Double Jeopardy Clause." *Id.* (Emphasis in original). Rather, as Justice Holmes points out in his dissent, the *Yates* majority departs from precedent that had tied the "final verdict" limitation to double jeopardy: *State ex rel. Leis v. Kraft*, 10 Ohio St. 3d 34, 36 (1984) noted that the "final verdict" limitation owed to double jeopardy considerations, and *State v. Keeton,* 18 Ohio St. 3d 379, 380-381 (1985) acknowledged that its holding that a Crim. R. 29(A) acquittal is a "final verdict" comports with double jeopardy protections. *Yates* at 348 (Holmes, J, dissenting).

Indeed, the *Yates,* 32 Ohio St.3d 30, ruling that Crim. R. 29(C) judgments are final verdicts exclusive of double jeopardy context is self-defeating. In holding that a Crim. R. 29(C) judgment of acquittal is a "final verdict," *Yates* depends upon *Keeton*'s prior holding that such a judgment under Crim. R. 29(A) is a "final verdict." *Yates* at 32. However, the only context *Keeton* provided for so holding is that double jeopardy precluded retrial of the defendants. *Id.* at 380-381. If Crim. R. 29(C) judgments are "final verdicts" only because Crim. R. 29(A) judgments are "final verdicts," and Crim. R. 29(A) judgments are "final verdicts" only because reversal is jeopardy-barred, then Crim. R. 29(C) judgments would be "final verdicts" only if reversal is jeopardy-barred. But even *Yates* recognizes that they are not. *Id.* at 32.

2. The plain meaning of "final" comports with its meaning in double jeopardy jurisprudence.

The *Yates* Court fails to examine or consider the plain meaning of "final" or "verdict," instead settling on painting all Crim. R. 29 judgments with the same brush. But comparing the plain meaning of "final" with its usage in double jeopardy jurisprudence confirms the nexus. *Merriam-Webster*'s first definition of "final" is "not to be altered or undone." *Merriam-Webster Online*, https://www.merriam-webster.com/dictionary/final

(accessed Feb. 18, 2025). This plain meaning of "final" is in lock step with its meaning in double jeopardy jurisprudence. The United States Supreme Court said that a "verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final." *Bullington v. Missouri*, 451 U.S. 430, 445 (1981). Courts "accord absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision." *Id*., quoting *Burks v. United States*, 437 U.S. 1, 15–16 (1978). Thus, "final" in R.C. 2945.67 both colloquially and legally means not subject to reversal.

3. The plain meaning of "verdict" comports with its meaning in double jeopardy jurisprudence.

The meaning of "verdict" when the legislature enacted RC 2945.67 in 1978 may be found in Black's Law Dictionary. The fourth edition, released in 1968, defines a "verdict" as a "declaration of the truth as to matters of fact submitted to the jury." *Verdict*, Black's Law Dictionary (4th ed. 1968). It also calls a verdict the "definitive answer given by the jury to the court concerning the matters of fact committed to the jury for their deliberation and determination." *Id*. Finally, it describes a verdict as the "formal and unanimous decision or finding made by a jury, impaneled and sworn for the trial of a cause, and reported to the court (and accepted by it), upon the matters of questions duly submitted to them upon the trial." *Id*. These definitions align with common understanding at that time and today.

The verdict answers *factual* questions submitted to the *trier of fact*—typically a jury. A Crim. R. 29 judgment, however, is a *legal* determination by the *court*. That a Crim. R. 29 legal judgment may be labeled an "acquittal" does not transform it into a factual verdict. The very language of Crim. R. 29(C) authorizes courts to "set aside the *verdict* and enter *judgment* of acquittal." (Emphasis added). Moreover, this Court has looked beyond labels

to examine judgments on their substance. See, e.g. *State v. Davidson*, 17 Ohio St.3d 132 (1985) and *In re A.J.S.*, 2008-Ohio-5307. In *State v. Elqatto*, 2012-Ohio-4303 (10th Dist.), the Tenth District Court of Appeals put this principle into operation to review, pursuant to R.C. 2945.67, a Crim. R. 48 dismissal, though the trial court had styled it a "full judgment of acquittal." See also *McElrath v. Georgia,* 601 U.S. 87, 96 (2024), holding that, for double jeopardy purposes, labels of "acquittal" under state law do not control. Rather, "an acquittal has occurred if the factfinder acted on its view that the prosecution had failed to prove its case." *Id.* (Internal quotations and citations omitted).

Double jeopardy jurisprudence provides further evidence that a final verdict does not include a post-verdict Crim. R. 29(B) or (C) judgment. Relying upon the United States Supreme Court's decisions in *Smith v. Massachusetts*, 543 U.S. 462 (2005) and *Evans v. Michigan*, 568 U.S. 313 (2013), this Court held that double jeopardy principles apply to jury verdicts and to "acquittals by a judge that are akin[4] to a jury verdict." *City of Girard v. Giordano*, 2018-Ohio-5024, ¶9. Critically, both *Smith* and *Evans* related to court judgments on the sufficiency of the evidence immediately after the close of the prosecution's case—the equivalent of Ohio's Crim. R. 29(A)—the reversal of which would result in a jeopardy-barred retrial. Unlike the holding in *Yates*, 32 Ohio St.3d 30, that all Crim. R. 29 acquittals are "final verdicts," *Giordano* narrowly, appropriately, and consistently with federal jurisprudence construed that judgments of acquittal are "akin" to verdicts when reversal is jeopardy-barred. *Giordano*'s reasoning would not include post-verdict judgments of acquittal under Crim. R. 29(B) or (C).

"Final verdict," therefore, is inextricably tied to the Double Jeopardy Clause.

[4] "Akin" is defined as "essentially similar, related, or compatible." *Merriam-Webster Online*, https://www.merriam-webster.com/dictionary/akin (accessed Feb. 18, 2025)

B. Crim. R. 29 judgments are not factual determinations.

"Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Dent*, 2020-Ohio-6670, ¶15 (internal citations omitted). Sufficiency-of-the-evidence judgments are decided differently from verdicts. Courts determining legal sufficiency must view the evidence in the light most favorable to the prosecution. *Id*. "[I]t is not the function of [the] court to weigh the evidence developed at trial," *State v. Jenks*, 61 Ohio St. 3d 259, 263 (1991) (superseded by state constitutional amendment on other grounds), while "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Tenace*, 2006-Ohio-2417, ¶37.

On one hand, a legal determination of sufficiency does not require a jury to return a factual verdict of guilty, as every single jury acquittal resulted from a case that survived a Crim. R. 29(A) challenge. On the other hand, as in the cases of Diamond King and Marcus Cobb, post-verdict judgments of acquittal followed both Crim. R. 29(A) legal findings of sufficiency and factual verdicts of guilt. *Yates* not only overlooks this incongruity; it shelters it from examination.

III. This Court has already distanced itself from *Yates*.

The reasoning in *Yates*, 32 Ohio St.3d 30, departed from precedent, and this Court since has distanced itself from that reasoning. The Court's decision in *Ramirez*, 2020-Ohio-602, holding that the State may appeal by leave the granting of a former Crim. R. 33(A)(4) motion based on insufficient evidence undermines the reasoning in *Yates*. To equate a Crim. R. 29(C) judgment to a final verdict, *Yates* relies upon its conclusion that a finding of insufficient evidence "is a factual determination of innocence[.]" *Id.* at 32-33. *Ramirez* necessarily recognizes that this cannot always—if ever—be true. A factual

determination of innocence would be a jeopardy-attached verdict. Rather, *Ramirez* accords more closely with this Court's more contemporary jurisprudence in *Jenks, Tenace,* and *Dent, supra* in treating sufficiency-of-the-evidence review as a legal judgment, not a factual verdict.

Ramirez also reaffirms that a prosecutor appeal of a sufficiency judgment that overturns a jury verdict of guilty does not violate double jeopardy prohibitions because the remedy is to reinstate the verdict, not to retry the defendant. *Id.* at ¶16. This is in harmony with the holding in *Giordano*, 2018-Ohio-5024, that a sufficiency-of-the-evidence "acquittal" by a judge is "akin to a jury verdict" only in that double jeopardy "bars retrial." *Id.* at ¶9.

CONCLUSION

State ex rel. Yates v. Court of Appeals, 32 Ohio St. 3d 30 (1987) stands logically, practically, and jurisprudentially isolated, grounded only upon its own specious reasoning. Prior jurisprudence does not predicate *Yates*, and subsequent jurisprudence avoids or contradicts its rationale. It confuses legal judgments on the sufficiency of evidence with factual determinations of innocence. Its decoupling of "final verdict" from double jeopardy defies both the plain and legally operative meanings of the words. Its departure from bedrock statutory interpretation principles creates the absurd result of a statute that affords prosecutors every constitutionally permissible appeal except of those trial court decisions that inherently are most prejudicial to the State, most detrimental to victims, and most inviting of public controversy.

R.C. 2945.67 is designed to broaden prosecutor appellate rights, not to broaden defendant appellate protections. Crim. R. 29 is designed to protect criminal defendants

from unjust convictions, not to protect trial judges from review of unjust rulings. Current interpretation of R.C. 2945.67 prohibiting review of post-verdict Crim. R. 29(B) and (C) judgments of acquittal not only fails to preserve and honor public trust in the jury's final verdict, it provides impenetrable cover for a trial judge's error or bias in overturning that verdict. This judicially-created blind spot that shelters controversial judicial rulings requires a judicial remedy.

The Logan County Prosecuting Attorney joins the Appellant in asking the Court to overrule *State ex rel. Yates v. Court of Appeals,* 32 Ohio St. 3d 30 (1987). The jury's verdict is the final verdict. The public deserves appellate review when a trial court overturns the final verdict of a jury of citizens. Appellate review of a Crim.R. 29(B) or (C) ruling—regardless the outcome—ensures fairness for both parties and promotes public trust in the judicial system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 25th day of March, 2025, a true copy of the foregoing was served via email to the following counsel of record:

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EXHIBIT A-1

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLANT,

v.

MARCUS R. COBB,

DEFENDANT-APPELLEE.

CASE NO. 8-24-51

JUDGMENT ENTRY

This cause comes before the Court for determination of Appellant's [the State's] "direct appeal" of the trial court's judgment of acquittal and motion for leave to appeal the trial court's *sua sponte*, self-defense instruction; the notice of cross-appeal and motion to dismiss the State's appeal for lack of jurisdiction filed by Appellee/Cross-Appellant, [the Defendant]; and the State's response in opposition to the motion to dismiss.

The Defendant was found guilty by jury verdicts on two counts of assault on a peace officer and two counts of obstructing official business. Thereafter, the Defendant moved for judgment of acquittal under Crim.R. 29(C). Referencing the standard that a court "may not usurp the role of the finder of fact by considering how it would have resolved conflicts, made inferences, or considered the evidence at trial," the trial court proceeded in a 59-page decision to evaluate the evidence

and ultimately grant the Defendant's Crim.R. 29(C) motion, set aside the verdicts, and discharge the Defendant.

It is well settled that the State may appeal a criminal matter under limited circumstances and only when a statute grants express authority to do so. *State v. Thompson*, 2014-Ohio-586, ¶11 (5th Dist.). Most importantly, R.C. 2945.67(A) makes clear that the State has no right to direct appeal of a judgment of acquittal.

Rather, R.C. 2945.67(A) provides that the State may appeal by leave of court "any other decision, except the final verdict." Even if a motion for leave of court is filed, an appeal of a judgment of acquittal or "final verdict" can be granted only to challenge evidentiary rulings or rulings on issues of law, with a bar to retrial due to principles of double jeopardy. As stated in *State v. Hensley*, 2002-Ohio-1887, Pg. 3, (2nd Dist.):

> **A judgment of acquittal by the trial judge in a criminal case is a final verdict within the meaning of R.C. 2945.67(A), which is not appealable by the State either as a matter of right, or by leave to appeal. *State v. Keeton* (1985), 18 Ohio St.3d 379, 481 N.E.2d 629; *State ex rel. Yates v. Court of Appeals of Montgomery County* (1987), 32 Ohio St.3d 30, 512 N.E.2d 343. In cases resulting in a judgment of acquittal, however, the prosecution may nevertheless appeal, by leave of court, evidentiary rulings and rulings on issues of law, because those rulings fall within the language of "any other decision, except the final verdict," in R.C. 2945.67(A). *State v. Arnett* (1986), 22 Ohio St.3d 186; *State v. Bistricky* (1990), 51 Ohio St.3d 157, 555 N.E.2d 644.**

In the instant case, the State concedes that an appeal of a judgment of acquittal under Crim.R. 29(C) is not permitted, but argues that the Court should

"look beyond the label" and treat the judgment as having dismissed the indictment under Crim.R. 48(B), which would be subject to direct appeal. Although the judgment is extraordinary in tone and troubling in merit, it would not be proper for this Court to simply re-label the judgment to acquire appellate jurisdiction. Whether erroneous or not, under no reasonable interpretation can a trial court's judgment of acquittal, which is entirely based on its consideration of the testimony and evidence presented at trial, be treated as having dismissed the indictment pursuant to Crim.R. 48(B). For this reason, the Defendant's motion is well taken and the State's direct appeal of the judgment of acquittal must be dismissed for lack of jurisdiction. See *State ex rel. Yates v. Court of Appeals for Montgomery County*, 32 Ohio St.3d 30 (1987).

The Court further finds that the State's motion for leave to appeal the trial court's *sua sponte*, self-defense instruction is not well taken. There is no pressing legal question regarding the trial court's self-defense instruction requiring an advisory opinion to resolve. In addition, and perhaps most importantly, it was of no consequence in this case whether the self-defense instruction was erroneously given to the jury, because the jury returned guilty verdicts on all charges. There was no prejudice to the State.

Finally, the Court finds that the Defendant's cross-appeal is not properly before the Court. To have appellate standing, a party must be aggrieved by the

final order it seeks to have reviewed on appeal. See *Travelers Property Casualty Corporation v. Chiquita Brands International Inc.*, 2024-Ohio-1775, ¶46 (1st Dist.). A party who is not aggrieved or prejudiced by a final order does not have standing to appeal and, without standing, a party's appeal must be dismissed. *Id.* In this case, the trial court's judgment of acquittal was requested by the Defendant and the judgment dismissed all charges against the Defendant. As such, the Defendant is not aggrieved or prejudiced by the judgment of acquittal. Therefore, the Defendant's cross-appeal must be dismissed for lack of standing.

It is therefore **ORDERED, ADJUDGED and DECREED** that the State's motion for leave to appeal be, and hereby is, **DENIED**; the State's direct appeal be, and hereby is, **DISMISSED**; and the Defendant's direct appeal be, and hereby is, **DISMISSED**. Costs are assessed equally between the State and the Defendant, for which judgment is rendered. This cause be, and hereby is, remanded to the trial court for execution of the judgment for costs.

JUDGES

DATED: FEB 04 2025
/jlm

EXHIBIT A-2

IN THE COMMON PLEAS COURT
OF LOGAN COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO,	:	
Plaintiff,	:	
-vs-	:	**CASE NO: CR 24 01 0018**
MARCUS R COBB, **DOB: 04/13/1982**	:	**NUNC PRO TUNC JUDGMENT ENTRY GRANTING**
Defendant.	:	**DEFENDANT'S CRIM.R. 29 MOTION TO ACQUIT, SETTING ASIDE JURY VERDICTS, DISCHARGING DEFENDANT, RELEASING BOND, AND APPOINTING APPELLATE COUNSEL**

This order corrects typos on page 18 (change "It becomes passive" to "It becomes active" in the question) and page 26 (change "check" to "cheek").

In this case, even after construing the facts in a light most favorable to the State of Ohio (the State), the undisputed evidence the State produced at trial shows that two Bellefontaine Police Department (BPD) officers physically pulled a citizen, Defendant Marcus Cobb (Defendant Cobb), who had committed no crime whatsoever, from a motor vehicle, refused to tell him they had a warrant, and beat him up and tased him.

Defendant Cobb did not know that a civil—not criminal—warrant existed. He asked the officers ***five times*** why they wanted him to get out of the vehicle and ***two times*** if he had a warrant. Each time the officers snubbed him.[1] Instead of responding to Defendant Cobb's reasonable and relevant questions and telling him that they indeed had a warrant, the officers physically grabbed him and in Defendant Cobb's words "rag-dolled" him when he resisted. The State contends that not only is the officers' conduct acceptable police conduct, but also Defendant Cobb is guilty of assaulting the police

officers and obstructing official business when he resisted their physical violation of his person. The Court disagrees.

For the reasons stated herein, the Court finds Defendant Cobb's Crim.R. 29 motion for acquittal well-taken and **GRANTS** the motion. The Court also **SETS ASIDE** the jury's verdicts, **DISCHARGES** Defendant Cobb, **VACATES** the sentencing hearing, **RELEASES** all bond, **ORDERS** the State to pay costs, and **APPOINTS** William Cramer to represent Defendant Cobb in the event of an appeal.

The Court finds no just reason for any delay and **ENTERS FINAL JUDGMENT** in this case in favor of Defendant Cobb.

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On August 21, 2024, this case came on for a jury trial. On August 22, 2024, Defendant Cobb made a motion for acquittal pursuant to Crim. R. 29 at the close of the State's case. The Court informed counsel for both sides and Defendant Cobb "[t]his is a difficult case. I think it's – it's – when I first read that in the bill of particulars I thought it was pretty simple, but I don't think it's simple anymore." (T.p. 184) The Court then denied the motion. (T.p. 179-184 and 188-189)

Defendant Cobb testified, put on evidence, and renewed his Crim.R. 29 motion for acquittal at the end of his case. The Court reserved its decision on the motion. (T.p. 281-282) *See e.g., State v. Ternes,* 92 Ohio Misc. 2d 76 (Elyria Muni. Ct. 1998) (granting defendant's Crim.R. 29 motion for acquittal and setting aside conviction on charge of obstructing official business after reserving decision on the motion at the close of the defendant's case). The Court then sent the case to the jury and instructed the jury on self-defense.[2] In doing so, the Court stated as follows:

> ... The – it is not about what the officers are allowed to do; it is about the defendant's mental state. It is about –the State has to prove knowingly on the assault charges and purposefully on the obstructing business charges.... (T.p. 195-196).

The jury of 12 Logan County residents returned a verdict finding Defendant Cobb guilty of two counts of assault on a police officer, felonies of the fourth degree, and two counts of obstructing official business, misdemeanors of the first degree.

The Court ordered the transcript of the trial and granted the parties until September 19, 2024, to brief the motion and/or file any other post-verdict motions. By and through counsel, the parties consented to the order. On or about September 12, 2024, the State filed its memorandum regarding Rule 29. Defendant Cobb did not file any memorandum or other motion. The Court has reviewed the trial transcript and all the videos and photographic evidence.

STANDARD

"A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 119 Ohio St. 3d 255, 260, 2006-Ohio-2417 ¶ 37, 847 N.E.2d 386. "Sufficiency is a 'term of art meaning the legal standard which is applied to determine whether the case may go to the [finder of fact].'" *State v. Cooper*, 11th Dist. Ashtabula No. 2019-A-0090, 2020-Ohio-3559 *P5 (quoting *State v. Thompkins*, 78 Ohio St. 3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541 (1997)). "A conviction based on legally insufficient evidence constitutes a denial of due process." *State v. Shepherd*, 12th Dist. Butler No. CA2015-11-187, 2017-Ohio-328 *P12, 81 N.E.3d 1011, 1015.

"A challenge to the sufficiency of the evidence supporting a conviction 'is a question of law and a 'test of adequacy rather than credibility or weight of the

evidence.'" *State v. Lambert*, 3d Dist. Putnam No. 12-18-10, 2019-Ohio-3543 *P8 (Citations omitted). "The applicable standard 'is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trial of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.'" *Id.* (Citations omitted). This means that the Court "may not usurp the role of the finder of fact by considering how it would have resolved conflicts, made inferences, or considered evidence at trial." *State v. Clay*, 5th Dist. Stark No. 2009-CA-00249, 187 Ohio App. 3d 633, 648, 2010-Ohio-2720 *P69-70, 933 N.E.2d 296, 307-08.

However, "the light most favorable" does *not* mean the Court must or even may treat the State's theory and argument as "fact." *See McDonald v. Ford Motor Co.*,41 Ohio St. 2d 8, 12-13, 326 N.E.2d 252, 255 (1975). The testimony of a witness which is positively contradicted by physical facts captured on video or in photographs cannot be given probative value by the Court and a jury is not permitted to rest its verdict on testimony positively contradicted by physical facts. *Id.*

In other words, the Court may not act as a "rubber stamp" of the State's theory and argument and permit the jury to render a verdict on the evidence when, as here, the evidence is insufficient to support a guilty verdict beyond a reasonable doubt. *See State v. Owens*, 3d Dist. Marion No. 9-16-40, 2017-Ohio-2590 *P15, 90 N.E.3d 189, 194 ("[T]he judge or magistrate is not to serve merely as a rubber stamp for law enforcement.").

The State's Evidence Viewed in the Light Most Favorable

The Court must unpack a lot of evidentiary facts to decide this motion. To do so, the Court ordered the transcript of the trial and methodically reviewed all the evidence in detail to maximize the probability of making a correct decision. Where the Court quotes

in this decision from audio captured by the State's video exhibits, the Court uses ***bold italic*** to distinguish the evidence from testimony about the events that were provided on the witness stand months after the conclusion of the relevant events.

On December 30, 2023, at approximately 2:47 AM Bellefontaine Police Department Officer Andrew Purk (Officer Purk) was on patrol. (T.p. 62-63). He observed a maroon SUV exiting a Speedway gas station in a manner that triggered his suspicion. (T.p. 65) He drove his cruiser through an alley to South Mad River Street. *Id.* When the SUV passed him, he observed a male in the passenger seat who he "believed had a warrant." (T.p. 65-67). He believed the male to be Defendant Cobb. Officer Purk identified Defendant Cobb at trial as the male passenger in the SUV. (T.p. 68) Due to this recognition, Officer Purk sent out a radio call for backup. (T.p. 69)

The State introduced and the Court admitted the warrant as Exhibit A. The warrant was a civil warrant, not a criminal warrant, issued by the Family Division of the Logan County Court of Common Pleas "upon the Summons, Motion to Show Cause and Order and Notice of Support Hearing." *See* Exhibit A. Officer Purk agreed in his testimony that the warrant was "just a failure to appear in the family court." (T.p. 70) With regard to the warrant, Defendant Cobb testified, "... I missed the court case. Not that I was really behind or like anything – I did anything wrong, it was the simple fact I believe that I just missed that date to present myself there, so initially gave me a warrant.... I recently had moved, and I believe they sent it to my old address, and it got mailed back to them. I never currently got it." (T.p. 234-35)

Officer Purk began to follow the SUV and observed the driver fail to use a turn signal when turning from northbound Mad River Street onto Rush Street. (T.p. 70-71). Officer Purk initiated a traffic stop and the driver, Teaira Stine (Ms. Stine) pulled over

immediately and did not attempt to flee. (T.p. 70-71). Officer Purk's testimony and the physical facts captured by the video from Officer Purk's cruiser camera confirms that Officer Purk approached the SUV with his flashlight, that he could clearly see into the SUV, and that he advised Ms. Stine that he was Officer Purk of the Bellefontaine Police Department and the reason for the stop was because she failed to use her turn signal at the stop sign. (T.p. 89 and Exhibit B-1)

Officer Purk testified as follows:

A. I made my initial approach to the vehicle asking the operator for their driver's license and proof of insurance, and during that time I observed Marcus Cobb seated in the passenger seat. He was shaking and trying to light a cigarette.

Q. At this point what's your confidence level that the individual you were looking at in the passenger seat was Marcus Cobb?

A. I was 100 percent.

Q. Okay. So you engaged the driver of the vehicle at this time. Who was the driver of the vehicle at this time?

A. It was Ms. Teaira Stine.

Q. Okay. And she was cooperative with you?

A. Yes, she was.

Q. You say you got her license and information. When she gave that to you, what did you do? Did you at that point tell Marcus Cobb he was under arrest?

A. No, at that time I returned to my cruiser while waiting for an additional officer to respond.
(T.p. 73-74)

Ms. Stine testified as follows:

Q. Do you remember getting pulled over that night?

A. Yes, I do.

Q. December 30th, I believe, right?

A. Yes.

Q. Of last year.

A. Yes.

Q. Do you remember the officer who pulled you over?

A. Yes, I do.

Q. What's his name?

A. Officer Purk.

Q. Okay. The initial traffic stop was pretty normal, yes or no.

A. Yes, sir.

Q. What happened that made you feel normal?

A. He had walked to my car. He had stated his name and what he pulled me over for, and then asked for me my license and insurance.

Q. Okay. Seem normal?

A. Yeah.

Q. And did he say anything else that was abnormal?

A. He had just –

Q. To you.

A. No. He had just said he would be right back with my – after he took my license and stuff, he said he would be right back.

Q. What did he pull you over for again for according to his statement.

A. He said I failed to use my turn signal onto Rush Avenue.

Q. Failed to use your turn signal.

A. Yes.

Q. How did that end up? Did you ever get a ticket for that?

A. I did not. He said he was just going to give me a warning for it.

Q. Did you get a warning slip.

A. I did not.

*****

Q. What did you and Marcus do while you were in the car when Officer Purk – after he had first seen you and taking your license and went back to his car to do whatever officers do, what did you guys do in the car?

A. We didn't do anything really. We sat still, didn't make too many movements.

Q. No movements?

A. No.
(T.p. 209-211)

The physical facts captured on video by Officer Purk's body camera (Exhibit C-1) corroborate Officer Purk's testimony and Ms. Stine's testimony. On the video beginning at the 1:20 to 3:00 minute mark, Officer Purk approached the passenger side of Ms. Stine's SUV, shined his flashlight into the eyes of Defendant Cobb and kept the light-beam on Defendant Cobb and said:

"I'm Officer Purk. The reason I stopped you is you failed to use your turn signal back there. Do you have your license and proof of insurance on you?" Ms. Stine mentioned a problem with her turn signal and located and provided her license to Officer Purk who kept his flashlight beam on Defendant Cobb. Officer Purk did not say anything to Defendant Cobb and likewise Defendant Cobb did not say anything to Officer Purk. Defendant Cobb lit a cigarette and Officer Purk did not say anything objecting to him doing so.

"Are there any weapons in the vehicle or anything like that?" Officer Purk asked. Both Ms. Stine and Defendant Cobb shook their heads "no." Ms. Stine opened

the passenger-side glove compartment and looked for her proof of insurance but could not find it. **"Any drugs or anything else illegal?"** Officer Purk asked. Ms. Stine said "no" and Defendant Cobb slightly shook his head to indicate "no."

"Do you have insurance for the vehicle?" Officer Purk asked. Ms. Stine responded that she did, but the proof might be at her house. Ms. Stine told Officer Purk she was pretty sure her insurer was Progressive, that it was her grandma's insurance, and she was on it. Officer Purk shined his flashlight beam into the backseat of the SUV and asked, ***"Do you think the papers are at your house?"*** Ms. Stine responded. Defendant Cobb sat almost motionless, smoking and staring straight ahead. ***"Give me a second and I'll be right back with you guys,"*** Officer Purk said. Officer Purk then returned to his cruiser. (*See* State's Exhibit C-1)

Defendant Cobb testified that he was familiar with Officer Purk from a previous incident and that he feared Officer Purk. (T.p. 231) Defendant Cobb testified he believed Officer Purk was making a routine traffic stop of Ms. Stine and that he "had no idea of any warrants or anything or having any trouble." (T.p. 232) Officer Purk did not ask Defendant Cobb for his identification (T.p. 233)

Officer Purk described his previous incidents with Defendant Cobb on cross examination as follows:

> Q. Is this the first time you've run into Mr. Cobb?
>
> A. It is not.
>
> Q. So you've handled him before?
>
> A. I've had interactions with him before, yes.
>
> Q. Okay. In those interactions, did those interactions play into how you handled the situation with Mr. Cobb in this case?

A. No, it is not. I've had good and not so good interactions with Mr. Cobb before.

Q. Okay. Did you recognize Mr. Cobb in the dark at nighttime from, you know, while they're – a car's passing by you for only two seconds or so? You can recognize him?

A. Yes.

Q. So you've had enough interaction with him to know what he looks like?

A. That is correct. There are street lights as well.

Q. There were street lights there? Okay. You didn't even check an ID with Mr. Cobb to confirm it was him. You didn't need to do that?

A. I have – I am familiar enough with him that I was confident that that's who he was.

Q. Okay. Has he ever attempted to flee from you before?

A. I feel like that would need an explanation.

Q. I'm sorry.

A. I feel like that's not necessarily an easy yes-or-no question; that would require some explanation, if I may.

Q. Please.

A. So, earlier on in the year I was training another officer. We saw a vehicle that had no lights on. We stopped the vehicle, we approached the vehicle. Mr. Cobb was the driver at the time. When I directed Mr. Cobb out of the vehicle due to basically to further our investigation of impairment, he refused to exit the vehicle, he locked the door and rolled the windows up, which was actually the reason I said ["]Don't do this again["] when he rolled the windows up in his vehicle.

Q. So you were familiar with Mr. Cobb in regards to pulling him over in the situation like this.

A. That's not the only interaction I have had, but that is one example, yes.

Q. Okay. Now, there is another example, if you would like. Please.

A. Another officer believed he was his brother Aaron. After I stopped and talked with Mr. Cobb, Marcus, you know, I was familiar enough with him I

knew that he was not Aaron. I told him, hey, this is – this is the issue, he thought you were Aaron, who is suspended. He saw you driving, however, obviously you are not Aaron so you are free to go.

Q. Which was a normal good interaction with somebody, right?

A. I believe so, yes.
(T.p. 135-137)

******

Q. You mentioned other incidents where you had pulled him over. In any of those scenarios could – in your head would that have caused him to react this way?

A. So in the other incidents where he was pulled over I was actually in the passenger seat of the cruiser. I was training the officer who was driving. He was the one who initiated the traffic stop. If anything, during that incident I think Marcus would have been more likely to be compliant because, again, he locked the door, rolled the windows up. During that incident and after he was eventually removed from the vehicle he continued resisting but not to this extent during this incident. He was arrested for OVI, resisting, and I believe obstructing official business.

Q. Do you know the end result of that case?

A. Due to – the court dismissed it due to I think time – an issue of time. He had gone past the speedy trial.
(T.p. 144)

As the physical facts in Exhibit C-1 video show, after the December 30 stop, Officer Purk returned to his cruiser and waited for backup law enforcement to arrive. As he did so, he put on black work gloves. (T.p. 94-95) Officer Purk testified that he put on the gloves for protection. (T.p. 95) The State did not introduce the protective gloves as evidence, but it did introduce pictures of the protective gloves. (State's Exhibit F-11). The photograph identified as State's Exhibit F-11 depicts black gloves made of tough, durable suede-material labeled 5.11. *Id.*

Bellefontaine Police Department Officer Blake Kenner II (Officer Kenner II) arrived on the scene in response to Officer Purk's radio call for backup. (T.p. 74 and 148-149) Officer Purk testified as follows about Officer Kenner II's arrival:

> Q. ... Who are you talking to in the left hand of the frame?
>
> A. That is Officer Kenner [II].
>
> Q. Okay. And you explained that you acknowledged somebody. Can you describe to the jury what you're telling Officer Kenner [II]?
>
> A. I was letting him know that I had not really acknowledged Marcus or the warrant that he had at that point.
> (T.p. 95-96)

At approximately 3:50 of the State's Exhibit C-1 Officer Purk told Officer Kenner II, ***"I didn't even acknowledge him yet."*** *See* Exhibit C-1. At no time while Officer Purk was back at his cruiser and away from the SUV did Ms. Stine or Defendant Cobb attempt to flee or do anything except comply with Officer Purk's orders.

Officer Kenner II did not question Officer Purk's decision to withhold the existence of the warrant from Defendant Cobb's knowledge. But Officer Kenner II testified on cross examination that under these circumstances it is his "normal practice" to inform and advise persons subject to arrest of the reason for the arrest. (T.p. 164-165). Officer Kenner II testified as follows:

> Q. How long have you been a police officer?.
>
> A. Five years.
>
> Q. Five years. Do you in your normal practice, what's your – what's your policy? Do you normally inform people why they're being arrested or not?
>
> A. Yes.
>
> Q. You inform people they are being arrested?

A. Uh-huh.

Q. Why?

A. Just to give them a heads up of what's going on.
(T.p. 164-165)

Officer Kenner II testified that upon arriving at the scene, the officers' plan was "to make contact with Marcus and place him under arrest for his warrant." (T.p. 149) However, neither Officer Purk nor Officer Kenner informed Defendant Cobb of his warrant or that they intended to arrest him. (T.p. 151)

According to Officer Kenner II, they both approached the passenger side of the SUV. (T.p. 149) As during the initial stop, Defendant Cobb was seated in the passenger seat, calmly smoking, making no attempt to flee even though the passenger door was unguarded, not making any furtive movements, and not making any attempt whatsoever to interfere with Officer Purk's traffic stop and investigation of Ms. Stine's alleged traffic infraction. (*See* Exhibit C-1)

"I approached first," Officer Purk testified. "He [i.e., Officer Kenner II] was behind me. The passenger side window was still down from my initial approach. I directed Marcus to exit the vehicle as I was standing at the A-pillar about where the side window mirror is, and then officer Kenner [II] was standing at the B-pillar, which is where the two doors of the vehicle connect." (T.p. 74)

Defendant Cobb testified as follows regarding Officer Purk's order:

Q. What did he [i.e., Officer Purk] say to you?

A. He pretty much was like get out the car, right? And it's the way he said it. It didn't give a reasoning of the law – it wasn't like a law enforcement ask for tone. It – it sort of made me fearful. The – the actions of how he did – the way he changed. We went from everything's fine, routine, to where he turned around and I didn't know what was in his mind because of the way he looked at me, get out of the car.

Q. Okay.

A. I didn't – played fear in my brain. I didn't understand how to take it at that moment.

Q. Okay. So, did you say anything to him at that point? He said get out of the car. What happened next?

A. I – I asked him for what, am I being detained, or do I have a warrant.

Q. Okay. Did you know if you had a warrant?

A. No, I was not aware of having a warrant at all.

******

Q. Did Officer Purk answer this question for you that you had about why you were being asked to get out of the car?

A. No, he did not. He actually became more aggressive....

******

Q. Okay. So you never got an answer.

A. Never got an answer. Not until after I was beat up and going to the hospital and pretty much traumatized. He told me, well, you have a warrant. After I'm laying on the ground bleeding.
(T.p. 233-236)

Officer Purk's body camera video, State's Exhibit C-1, clearly and unequivocally captured the 15 seconds of the encounter beginning from 4:10 of the video to 4:25:

Officer Purk: ***Hey, Marcus step out of the vehicle for me.***

Defendant Cobb: (calmly) ***For what?***

Officer Purk: ***Because I ordered you out of the vehicle man, c'mon.***

Defendant Cobb: ***Nnnnn no, I'm not.***

Officer Purk: (voice starting to rise as Defendant Cobb turned away, rolled up window, and locked the door) ***Don't do it. Don't do this again.***

Defendant Cobb: ***I want to know why.***

Defendant Cobb testified that if Officer Purk had said why he was ordering him out of the SUV, he "probably would have got out of the car." (T.p. 269) But Officer Purk did not answer the question "for what?" Officer Purk testified that his reason for not answering Defendant Cobb's relevant and respectful question was his "concern that if I advised Marcus he had an active warrant he would attempt to flee in the vehicle." (T.p. 76) However the physical facts in the video contradict Officer Purk's concern. The physical facts indisputably show Ms. Stine was in the driver's seat, in total control of the SUV, and complying with Officer Purk's orders. The physical facts show Defendant Cobb was in the passenger seat and had no control of the SUV and thus could not flee in the SUV. Ms. Stine testified as follows on this matter:

> Q. ... When Marcus Cobb refused to get out of the vehicle, why didn't you try to drive away?
>
> A. Because I knew that was a very dumb idea.
>
> Q. Well, why? Explain why that's a bad idea.
>
> A. Because I knew we both would have got in trouble for it.
>
> Q. So, I mean, you were scared for his safety, right?
>
> A. Uh-huh.
>
> Q. But you didn't drive away.
>
> A. I knew that would have resulted in something bigger, more bigger problems.
>
> Q. Because you would have been in more trouble if you would have resisted the lawful orders of a police officer, right?
>
> A. Yeah.
> (T.p. 221)

As Defendant Cobb informed Officer Purk that he would not get out of the SUV, Defendant Cobb locked his door and raised the passenger window. (T.p. 149-150)

Officer Purk grabbed the window at the top of the glass as it rose and then let go. (T.p. 212 and State's Exhibit C-1)

Then Officer Purk yelled, ***"Open it now!"*** (*See* Exhibit C-1 at 4:27)

In response to Officer Purk's order to open the door, Ms. Stine unlocked the passenger-side door by pressing the unlock button on the driver's side. (T.p. 212-213) In the video, Defendant Cobb then turned his head toward Ms. Stine and shouted at Ms. Stine, ***"Stop! What are you doing?! Fuck no!"*** He did not say anything to the officers or take any aggressive action toward either officer. (*See* State's Exhibit C-1 at 4:29; *Accord* T.p. 116 and 226-227)

As the video shows, Officer Kenner II opened the door, reached into the SUV, and grabbed Defendant Cobb's right arm. (See State's Exhibit C-1 at 4:30 to 4:40; T.p. 77-78, 165-166, 213). As the passenger door opened, Officer Purk again ordered Defendant to get out of the car, but did not tell him about the warrant or that he was putting Defendant Cobb under arrest. (T.p. 76)

The physical facts recorded on Officer Purk's body camera video from 4:30 to 4:44 (14 seconds) contain the following dialogue:

Officer Purk: (sharply) ***Get out of the vehicle now!***

Defendant Cobb: (voice rising) ***Why?***

Officer Purk: (sharply) ***Get out of the vehicle now!***

Defendant Cobb: (sitting passively, but not using force, voice rising) ***For what?! For what?!***

Defendant Cobb: (yelling) ***Do I have a warrant?***

Defendant Cobb: (yelling) ***Do I have a warrant?***
(State's Exhibit 4:30 to 4:44)

Officer Purk did not respond to Defendant Cobb's question, "Do I have a warrant?" Officer Kenner testified he and Officer Purk pulled Defendant Cobb from the SUV. (T.p. 166). Officer Purk's body camera fell to the ground as they did so. As a result the perspective of the video changed. From its position on the ground, Officer Purk's body camera video, State's Exhibit C-1, shows that as the officers pulled him out of the car, Defendant Cobb was not using any force and was shouting, ***"What the fuck I do?! What the fuck I do?!"*** (*See* State's Exhibit C-1 at 4:38 to 4:45).

Officer Purk described these events as follows:

> Q. What happens next?
>
> A. Officer Kenner [II], like I said, as soon as the door unlocked, Officer Kenner [II] opens the door, so we were both in the doorway for the vehicle at that time.
>
> Q. Is Marcus Cobb getting out of the vehicle?
>
> A. He is not.
>
> Q. What happens?
>
> A. We have to give him – we gave him additional commands to exit the vehicle. Officer Kenner secured Marcus' right hand, and I reached in and secured his left hand. As we were removing him from the vehicle, he began shaking and pulling his arms away from us and attempting to run away from us.
> (T.p. 78)

The physical facts captured in Officer Purk's body camera video (Exhibit C-1) showed that the officers never took their hands off Defendant Cobb after they began to physically pull him out of the car. (T.p. 79) Officer Kenner II's testimony corroborated the physical facts captured in the body camera video. Officer Kenner II testified that Defendant Cobb's resistance did not change from passive to active until after the officers grabbed Defendant Cobb and pulled him out of the SUV:

Q. Was Mr. Cobb's rolling up the window passive resistance or active resistance?

A. I would say that's passive resistance at that point.

Q. Passive. It becomes active when he doesn't get out of the car?

A. **It becomes active when we grab him** and he does not come out, yes.
(T.p. 169) (Emphasis added)

"If the guy [i.e., Officer Purk] would have said, hey, you got a warrant, it – I believe things would have went smoother. If he wouldn't have been so aggressive – I didn't have no idea what was going on. I got yanked out of the car so fast," Defendant Cobb testified on cross-examination. (T.p. 272) The physical facts as recorded and admitted in State's Exhibit C-1 show that from the time Officer Purk ordered Defendant Cobb out of the vehicle (4:10) until the officers physically pulled him from the SUV (4:44) was approximately 34 seconds. *See* State's Exhibit C-1.

After the officers opened the door and physically pulled him from the SUV, Defendant Cobb freed his left wrist from Officer Purk's grasp. In response Officer Purk grabbed Defendant Cobb around his midsection, tripped him, and slammed him to the ground. (T.p. 99) Defendant Cobb continued to struggle against the officers and struck Officer Kenner II twice in the face, once with a closed fist and once with an open hand. (T.p. 153) In response, Officer Kenner II blasted Defendant Cobb with a straight-right, gravity-aided punch to the face. (*See* Exhibit D-1 at 2:15 to 2:25)

The State's Exhibit D-1, video from Officer Kennier II"s cruiser camera, is the only video of the short, one-sided affray after the officers physically pulled Defendant out of the SUV. (T.p. 96) The video is from a distance, in the dark, and the events

unfolded very fast. (T.p. 96 and 99) The exchange of blows is captured on State's Exhibit D-1. (T.p. 100-101; Exhibit D-1 2:11 – 2:24)

At approximately 2:10 of Exhibit D-1, Defendant Cobb emerges in the physical control of the police officers, and he can be heard saying, ***"What the fuck I do?! What the fuck I do?!"*** Defendant Cobb resists, but the officers maintain physical contact and control of him. In less than 10 seconds, together they overpower Defendant Cobb and slam him into the ground on his back. (*See* State's Exhibit D-1 at 2:10 to 2:15) At 2:14 to 2:17 of the video, despite being pinned on the ground, Defendant manages to get in the two strikes to Officer Kenner II's face as he resisted their physical assault. *Id.*

Defendant Cobb testified on direct examination about the affray as follows:

> Q. What actions do you recall caused you to feel like you were in physical danger by Purk? What actions that you saw Purk – Officer Purk or Officer Kenner [II] do caused you to feel like you were in physical danger?
>
> A. What actions did they do?
>
> Q. Yeah.
>
> A. I mean, I pretty much was rag dolled. I was never trying to assault anyone or harm anyone. I never bit anyone. I was literally yanked out of the car, slammed instantly, and as I was slammed my body went loose, my arms went up to try and catch something because I was – just a natural reaction of falling. And I was hit more, tased. I mean, I pretty much didn't have a chance to think. I was yelling all the time, stop, why, what did I do, why. Like, there was no understanding of what was going on.
>
> Q. You touched on it just there, but I want to ask a question about it. After the officers took your legs out and dropped you to the ground on your back, you saw the video yesterday, your arms coming up. Can you give the jury any explanation for why that occurred?
>
> A. At that point I actually – I think might have been when I ran out of the room. Myself had a little issue because it was really hard to live again. You know, I had the feeling of not knowing what's going to happen at that very moment, you know. I'm yanked out the car. I don't know what I've done or what. All I know he's been aggressive with me, this officer before in the

past case so I was very nervous, and I was taken by surprise because I got slammed.

I mean, I didn't know what to do. I tried to reach up and grab for something to not fall because I didn't know where I was falling. It was dark. Everything happened so fast. All I could feel was the aggression of the officer, so my hands and everything went for just mental natural tasing reactions. I never intended to hurt or hit at anyone.

Q. Did you intend to punch Officer Kenner?

A. No, sir.

Q. Let's go to Officer Purk said his hand was across your face doing a move – I still can't remember what he said – to make your face go in one direction, the body – or where the face goes the body will go. Do you remember him putting his hand around your face?

A. Yes. I believe it is called a cross face. He kept rubbing his – I was very irritated, but that was the least of my feelings because I was getting tased and I had pressure on my arms and my side of my body. So I remember him doing so, which was very – I didn't understand what was going on and never had a chance to even move or do anything with both of them on me. But I do remember him rubbing his hand all across here (indicating) trying to – I didn't understand, like, is he grabbing anything or just doing that. (Indicating)

Q. At that time did you bite him?

A. No. No, sir.
(T.p. 237-239)[3]

Neither officer ever ordered Ms. Stine to exit or remain in the vehicle. Instead, they simply left her unattended and double-teamed Defendant Cobb. As the affray escalated, Ms.Stine lawfully exited the SUV. While staying back from the affray, she can be heard on the video captured by Officer Kenner II's cruiser camera saying, ***"Guys, guys, stop. Did you just punch him in the face?"*** (State's Exhibit D-1 2:20 to 2:25; T.p. 102-103; State's Exhibit E-1 1:48 to 2:20; T.p. 116) Officer Kenner II testified that he responded that he punched Defendant Cobb in the face, that Defendant Cobb punched him in the face first, and to "get back, bitch." (T.p. 159). The physical facts

captured by Officer Kenner II's cruiser camera confirm Ms. Stine's testimony that she complied with the order. (T.p. 222)

On cross-examination, Officer Kenner II admitted he is a large and powerful man and admitted how he punched Defendant Cobb was a "head turner" as follows:

> Q. When you say you placed Mr. Cobb on the ground, that's a really politically good way to say it, right? You took him down.
>
> A. Yeah.
>
> Q. Yeah. And when you say the word compliance strike, I mean, you'll admit your positioning when you were hitting him was with – was coming from the top to the bottom, right?
>
> A. Yeah.
>
> Q. You were higher up than he was.
>
> A. Yeah.
>
> Q. So you had all of Newton's force of gravity coming down to make the compliance strike effective, right.
>
> Q. And it was.
>
> A. Uh-huh.
> (T.p. 162)
>
> ******
>
> Q. He's looking at you when you hit him, right?
>
> A. Yes.
>
> Q. So, if it's on the left side of his face and he's looking at you like this, right (indicating)? You come down and strike him like that, that would – that's a head turner, right? That's a head turner punch, right?
>
> A. Sure.
> (T.p. 171)

Officer Kenner II agreed that his one head-turner punch was more effective than Defendant Cobb's two strikes. (T.p. 167) Officer Purk agreed that Defendant Cobb's head snapped back like he received a punch from a heavyweight prize fighter:

> Q. ... Did you see in that video when Officer Kenner [II] hit Marcus Cobb? Did you see that?
>
> A. Yes.
>
> Q. Did you see Marcus Cobb's head react backward like a Mike Tyson punch, you know, when they hit they lose – they fall back a little? Did you see that?
>
> A. Yes.
> (T.p. 132)

Defendant Cobb described Officer Kenner II's punch on cross examination:

> Q. So, correct me if I'm wrong. You were punched – we saw that you were punched by Officer Kenner [II].
>
> A. Yes. I was punched by Officer Kenner [II] and tased.
>
> Q. You remember just the punch now. Do you remember the force of the punch?
>
> A. Yeah. But, I mean –
>
> Q. Tell the jury about it.
>
> A. The force of the punch was very excessive. I mean, I was – I wouldn't even hit somebody that hard first trying to fight them thinking that could have killed – I mean, I'm on the ground. There's no way I could hit him. I don't understand why someone would hit me like that when I couldn't even defend myself or cover my face. So I – the punch hurt. It scared me even more. I never ran from them. They're saying stuff that didn't make sense to me, and everything was happening fast. After that punch I was dazed, very confused, mad, hurt, frustrated, but I wasn't trying to be uncooperative or – I still mentally stayed with them and tried to communicate and talk and stayed within the situation. And I lose my temper because I sort of lost my mental state and was mad. I mean, I feel like I was assaulted. I don't know what was going on and was getting assaulted.
> (T.p. 242-243)

To get Defendant Cobb to roll over on his stomach so he could handcuff him, Officer Purk executed a "cross-face maneuver." (T.p. 104) Officer Purk testified he put his hand and his forearm across Defendant Cobb's jawline and cheek to try to turn his head. (T.p. 104) Officer Kenner II removed his taser device and placed it against Defendant Cobb's body. (T.p. 106) When Defendant Cobb continued to struggle against the officers, Officer Kenner II initiated two drive stuns. (T.p. 107) After the second drive stun, Defendant Cobb rolled over onto his stomach and ceased to struggle, and the officer handcuffed him. (T.p. 107-108) Officer Kenner II kept the taser applied between Defendant Cobb's shoulder blades in case he started to struggle again. (T.p. 108-109)

Officer Purk rolled Defendant Cobb onto his side, searched him for weapons (he had none), and sat him upright. (T.p. 109) There is no dispute that Defendant Cobb ceased to resist and became compliant with the officers orders after the officers physically subdued him and tased him. (T.p. 110-111)

Defendant Kenner II testified that he suffered no injury from the blows he received from Defendant Cobb during the affray. (T.p. 161) He testified paramedics who responded to the scene checked him out and said he was "OK." (T.p. 167)

Defendant Cobb was injured. Officer Kenner II's head-turner punch bloodied Defendant Cobb's face above his eye. (*See* State's Exhibit 12) Paramedics were called. They took him to the hospital. He spent over an hour there and got stitched up. (T.p. 119, 161, 216, and 244).

Regarding the alleged bite, Officer Purk testified on direct examination:

Q. ... [W]as there any point in the night where you were aware of being bitten by anybody?

A. No.
(T.p. 122) (Emphasis added)

Officer Kenner II testified he did not see Defendant Cobb bite Officer Purk. (T.p. 168) Officer Kenner II testified he did not hear Officer Purk cry out in pain during the affray. (T.p. 168-169) Officer Purk testified he did not notice any injury to himself at the scene. (T.p. 119 and 131) Officer Purk testified that nothing that happened during the affray caused him to bleed anywhere on his person. (T.p. 131).

After the paramedics left to take Defendant Cobb to the hospital, Officer Purk followed them. The State captured video of Officer Purk at the hospital. The Court admitted the video as Defendant's Exhibit 1 but excluded the sound. Defendant Cobb testified about the video identified as Defendant's Exhibit 1 as follows:

> Q. You heard Officer Purk's testimony yesterday about gloves and an injury to his hand, right?
>
> A. Yes.
>
> Q. Did you see Officer Purk, anything to do with his hands and his gloves at the hospital?
>
> A. Yes. That's what – that's what I was saying to the – he was taking his gloves off and playing and fondling them staring at me as – in the room with the nurse actually just focusing on my medical attention. He was still sort of acting a little weird, and I don't know. I don't know how to explain it because I really was just hit so wasn't really in my right mind, had a lot of mixed emotions and feelings, but I do remember that I had to ask the security to try and get him off of me.
>
> Q. Do you remember receiving a video from the State in regards to this interaction with Officer Purk and yourself as far as the asking him to – for some privacy?
>
> A. Yes, I do believe that it might have been in the video.
>
> ******
>
> (T.p. 247 Defendant's Exhibit 1 video played)
> Q. Okay. And what was surprising to you about this video?
>
> A. His hands. I mean, for one, when I watched the video he's saying he was bit in the hand but yet he – there was no problem with his hands there

(indicating). There's no marks there. And he said he recalled being bit in jail.
(T.p. 244-248)

On direct examination, Officer Purk testified:

Q. Officer Purk, were you injured in any way during the scuffle with Mr. Cobb?

A. Later on I noticed that I had blood on my hand and my hand was starting to hurt. I removed my glove and saw that I had bite marks on my right hand and on the back side.

Q. So let me back up a little bit. First of all, how later are you talking about? Is this the same day, you still on the same shift?

A. It was the same night. It was at the jail.

Q. At the jail? Okay. Can you just give us a ballpark how long after this incident that we witnessed that you noticed this.

A. It was within the same shift, so within approximately three hours.

Q. Okay. Now at this time, which arm – or which hand are you talking about, right or left?

A. It was my right.

Q. Okay. At any point between the time you noticed the blood on your glove and the pain on your hand – had you at any point between the incident and that point did you remove your gloves?

A. I don't remember.

Q. Okay. Did you encounter blood at any point from anybody you might have handled with that glove during the night?

A. No, I did not.

Q. Now, you indicated Mr. Cobb was bleeding.

A. Correct.

Q. Were you wearing that glove when you were handling, Mr. Cobb?

A. Yes, I was.

Q. And where from Mr. Cobb's body was he bleeding?

A. From his eye.

Q. Okay. So part of his face?

A. Yes.

Q. Again, did your right glove have any contact with his face at any point during this incident?

A. Yes, it did.

Q. Can you explain, when is this?

A. So when he originally was – we were attempting to roll him over onto his stomach. Like I said, I issued the cross face where I initially placed my palm across his jaw and cheek, and then I had to move it down further to my forearm while attempting to get him to move over.

Q. You previously testified that the back of your right hand was to his cheek at some point?

A. That is correct.

Q. And when you used this maneuver, was this before or after Officer Kenner [II] punched Mr. Cobb?

A. I believe it was after.

Q. Okay. So let me ask you this. Had you ever – prior to this incident, have you ever been bitten before?

A. Yes, I have.

Q. So you have – you know what it feels like to be bitten.

A. Yes.

Q. Do you know what bite marks look like from personal experience?

A. Yes, I do.

Q. So, again, at some point later your hand hurts, you notice blood on your glove. And you said the blood, is it yours, or not?

A. It was not.

Q. Okay. At that point did your remove your glove?

A. Yes, I did.

Q. Tell the jury what you observed and what you felt.

A. When I removed my glove I looked at the back side of my right hand. There was a red circle. **It was difficult to really see. Like I said, it was a few hours after the incident.** This was after I had escorted him to the hospital and then out to the jail.

Q. So at this point let me ask you this. When you were dealing – was there any point in the night where you were aware of being bitten by anybody?

A. No.

Q. Okay. Was there any other point during the evening where any other person could have bit the back of your right hand?

A. No, there was not.

Q. I'm sorry, I might have made the assumption there. So please describe for the jury where on your hand you were bit.

A. It was, again, on the back side of my right hand. The way to describe it is between the knuckles and my wrist.

Q. Okay. To the best of your recollection was there any person other than Marcus Cobb that would have had access to bite your right hand.

A. No, there was not.

Q. And, again, we saw you putting your glove on in the vehicle before encountering Marcus Cobb. Did you have any bite marks or pain before that point?

A. No, I did not.
(T.p. 119-123) (Emphsis added)

******

Q. Okay. All right. We are looking now at Exhibit F-12. Officer Purk, what are we looking at here?

A. That is the picture of the back side of my right hand.

Q. And why – what's the purpose of this photograph?

A. That is showing after I removed my glove I saw that I had the red circle there, as you can see, and then, like I said, **it's difficult to see** but there are small indentations which are more prominent at the bottom or towards my thumb in the photograph.

Q. Officer Purk, you've got a touch screen monitor. Can you circle this injury that you're describing so the jury can get a better look at this?

A. Yes. (Indicating).

Q. Okay. Just so the record can be clear, he's circled basically the very center of the photograph near the – between the pinky knuckle and the middle knuckle down closer to the wrist. (T.p. 127-128) (Emphasis added)

The State did not introduce the photograph with Officer Purk's circle into evidence. Thus, Officers Purk's circle was demonstrative, not substantive evidence.[4] The State did not seek to admit the photograph with the circle as an exhibit and the Court admitted as State's Exhibit F-12 the photograph without the circle without objection.

Officer Purk testified on cross-examination as follows:

Q. Start with the hand injury. Did you have that looked by the medics?

A. Yes. Afterwards when they came to check on Officer Kenner [II].

Q. Any medical assistance? Did you have any medical assistance with that?

A. They basically said that it was not puncturing the skin there was not too much to worry about, just basically ice it if I needed to, check for any swelling, bruising. If any of those had occurred then I needed to seek further medical attention.

Q. No report, no medical report or anything like that?

A. I don't know if they did a call for – medical run or not.
(T.p. 130)

At the conclusion of the Defendant's case, the State raised the issue of who was responsible for the affray. On cross-examination, Defendant Cobb denied he was responsible:

> Q. At no point did you accept any responsibility at all for the outcome of this incident, did you?
>
> A. Outcome of this incident?
>
> Q. That's right.
>
> A. Responsibility for it?
>
> Q. Correct. That's what I'm asking you. Did you ever admit to any responsibility for it?
>
> A. Admit to responsibility?
>
> Q. Did you admit to responsibility, yes or no, please.
>
> A. No.
>
> Q. Okay. Thank you. I believe you would have the jury believe that you would have cooperated with the police if they would have just told you you had a warrant; is that right? Did I misunderstand?
>
> A. That is correct. I could use other officers as reference.
>
> Q. All right. So, okay. But what I meant to be clear, you're saying if they would have said you had a warrant, you would have cooperated. That's your testimony.
>
> A. I mean, I don't see why I wouldn't have. I might have asked to see the warrant because that's the type of person I am. I'm pretty high strung at times. So, I mean, that's – that's just me, but, yeah, of course I always – I would cooperate. Why wouldn't I cooperate.
> (T.p. 253-254)

The State took the position that Officer Purk did not need to provide Defendant Cobb with his reason for ordering Defendant Cobb out of the SUV. (T.p. 76). The State took the position that Officer Purk did not need to inform Defendant Cobb that he had a

warrant to arrest Defendant Cobb. (T.p. 140). The State took the position that it was irrelevant to Officer Purk whether Defendant Cobb had knowledge of the warrant:

> **Q. Does it matter whether he received this warrant or has knowledge of this warrant?**
>
> **A. No, it does not.**
>
> **Q. Doesn't matter?**
>
> **A. No.**
>
> **Q. Doesn't matter what the warrant's about?**
>
> **A. It does not.**
> (T.p. 140) (Emphasis added)

On cross-examination, Defendant Cobb addressed the State's position:

> Q. ... You heard the officers' testimony. Do you understand that the officers do not need to give you a reason to order you out of the car? Do you now understand that?
>
> A. I mean, I – I guess because that's inhumane. Why would you – I mean, if you're going to protect and serve and do a job, that's sort of confusing. If it doesn't have to do with a bank being robbed or something, bad description or something, I don't see why you wouldn't honestly tell a person, hey, we have a warrant for your arrest instead of just get out of the car. I mean that doesn't make any sense.
> (T.p. 264)

The Court agrees with Defendant Cobb. Under the unusual circumstances in this case, after applying the law to the facts in the light most favorable, the State's case does not make any sense. Moreover, the State's case does not contain sufficient evidence of the offenses charged to support any conviction of Defendant Cobb even when the evidence is viewed in the light most favorable to the State.

ANALYSIS

Defendant Cobb should take notice and make no mistake: Officer Purk had legal authority to order Defendant Cobb to exit the SUV as a matter of course. *Maryland v.*

Wilson, 519 U.S. 408, 117 S.Ct. 882, 137 L.E.2d 41. The Court recognizes that it is bound by the majority decision[5] and that "[i]t applies equally to traffic stops in which there is not even a scintilla of evidence of any potential risk to the officer." *Id.* at 416 (Stevens, J. dissenting).[6] The Court agrees "unquestionably, a strong public interest in minimizing" assaults on police officers is good policy. *See id.*

However, after viewing the State's evidence in a light most favorable to the State, the Court also agrees with Justice John Paul Stevens who presciently foresaw in his dissent that "countless citizens who cherish individual liberty and are offended, embarrassed, and sometimes provoked by arbitrary official commands may well consider the burden [of complying with such arbitrary commands] to be significant." 519 U.S. at 419 (Stevens, J. dissenting).

Moreover, the unquestionably laudatory policy contained in the majority opinion in *Maryland v. Wilson* does not relieve the State of its burden to produce evidence upon which a rational trier of fact could find beyond a reasonable doubt that an assault on an officer occurred and/or the obstruction of an officer's business occurred.

The State should take notice and make no mistake: As is discussed in detail *infra*, Defendant Cobb's refusal to obey Officer Purk's order to exit the SUV and resistance to the officers physically removing him is insufficient to prove Defendant Cobb assaulted the officers or obstructed official business because the State failed to produce sufficient evidence upon which a rational trier of fact could find beyond a reasonable doubt that Defendant Cobb acted with the *mens rea* required to prove the offenses. *See State v. Curlee-Jones*, 8th Dist. Cuyahoga No. 98233, 2013-Ohio-1175 (reversing denial of Crim.R.. 29 motion to acquit on charge of assaulting a police officer and setting aside conviction); *State v. Morris*, 8th Dist. Cuyahoga No. 103561, 2016-

Ohio-8325; 68 N.E.3d 822, (reversing denial of Crim.R. 29 motion to acquit on charge of obstructing official business and setting aside conviction).

I. ASSAULT ON POLICE OFFICER CHARGES

After viewing the evidence in the light most favorable to the State, the Court concludes that the State failed to produce sufficient evidence upon which any rational trier of fact could find beyond a reasonable doubt that Defendant Cobb ***knowingly*** assaulted Officer Purk and/or Officer Kenner II.

As in *State v. Curlee-Jones*, 8th Dist. Cuyahoga No. 98233, 2013-Ohio-1175, the two counts of assault charged in this case were charged under R.C. 2903.13(A) and required the State to prove Defendant Cobb knowingly caused or attempted to cause physical harm to the police officers on the scene. *Id.* *P12.

In *Curlee-Jones*, a passenger in a car held up a cell phone as though he was shooting a video of police officers' interaction with the son of the defendant/driver, Curlee-Jones, and the son's friends. A detective went up to the open passenger door and ordered that the passenger hand over the phone. The passenger, holding the phone away from the detective, refused the order to do so. The detective leaned into the car to grab the phone. The passenger then handed the phone to Curlee-Jones, who put it down her shirt and started to accelerate away. When she did so, the detective was part of the way in the car and was being dragged as the car moved. The detective screamed at Curlee-Jones to stop the car. He pulled his gun on her to force her to stop. When Curlee-Jones stopped the car, she refused to exit it. The police pulled her from the car amidst her swinging and kicking at the officers who were trying to handcuff her. She was forced to the ground, but struggled, so she was subdued by taser. *Id.* *P6.

The state charged Curlee-Jones, in pertinent part, with both resisting arrest and assault. A jury convicted her of the offenses. On appeal, she admitted she resisted arrest. But she argued the state failed to produce sufficient evidence to support a conviction on the assault charges. The Eighth District Court of Appeals agreed:

> The facts showed that the police forcibly removed Curlee-Jones from her car after she refused to hand over the cell phone. One of the police officers, Barnes, testified that as he pulled her from her car, she began swinging her arms and hit him in the head. A second officer, McKay, testified that when Curlee-Jones had been forced to the ground, he tried to grab hold of her legs in an attempt to subdue her for handcuffing and that she resisted by kicking him about a dozen times. Neither officer testified to suffering any injury, so there was no proof of actual physical harm sufficient to establish an assault.
>
> In addition, there was no proof that Curlee-Jones acted knowingly to cause physical harm to the officers. She was plainly resisting arrest – a charge that she does not contest on appeal. The contact she made with the officers was part and parcel of that resistance. The state offered no evidence, apart from that which it used to establish the resisting arrest count, that her struggle with the officers contained the separate intent to knowingly cause or attempt to cause the officers physical harm. We thus find insufficient evidence to prove either count of assault.
> *Id.* *P13-14.

The Third District Appellate Court considered the issue of the sufficiency of the evidence in a case involving charges of assaulting police officers in *State v. Kreischer*, 3d Dist. Van Wert No. 15-20-09, 2021-Ohio-1235. In *Kreischer*, the defendant attempted to assist her friend McKee in escaping from the Van Wert Municipal Court. *Id.* *P2. As McKee fled the courthouse, the defendant waited in her car in the lane of travel. *Id.* *P3. A police officer, Sergeant Conn got in front of the car and started pounding on the hood. *Id.* *P4. He locked eyes with the defendant/driver and told her "stop, don't do this, stop what you are doing." *Id.* He testified the defendant/driver had to have seen him. *Id.* McKee jumped in the car and the driver/defendant drove the car forward striking Sergeant Conn. *Id.* *P5. A jury found defendant guilty of failure to comply with the order

or signal of a police officer, a felony of the third degree, and assault in violation of R.C. 2903(A), (C)(5), a felony of the fourth degree.

The defendant appealed. She argued the state's evidence, at best, proved beyond a reasonable doubt that she acted recklessly. *Id.* *P14. She argued the state's evidence was insufficient to prove she acted knowingly. *Id.*

"The requisite culpable mental state for assault is 'knowingly,'" the Third District instructed. "'A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.' R.C. 2901.22(B). 'Physical harm to persons' means any injury, illness, or other physiological impairment, regardless of its gravity or duration.' R.C. 2901(A)(3)." *Id.* *P13.

"Knowledge is a state of mind that must be proved from the surrounding facts and circumstances.... The mental element of knowledge does not require an inquiry into the purpose for an act, but, involves the question of whether an individual is aware that his or her conduct will probably cause a certain result or will probably be of certain nature." *Id.* *P15.

"The definition of 'knowingly' and 'recklessly' are separated by degrees of awareness.... The perception of the likely result, therefore, controls in distinguishing between knowing and reckless conduct. If the result is probable, the person acts 'knowingly'; if it is not probable but only possible, the person acts 'recklessly' if he chooses to ignore the risk." *Id.* *P17 (Citations omitted).

The Third District held the State's evidence was sufficient to prove beyond a reasonable doubt that the defendant acted knowingly, stating:

> Viewing the evidence in the light most favorable to the prosecution, we conclude that Kreischer's assault conviction was based on sufficient evidence. That is, the State presented sufficient evidence at trial from which the trier of fact could reasonably infer that Kreischer acted knowingly. Specifically, the State presented the testimony of Sergeant Conn who testified that he "pound[ed] on Kreischer's vehicle from the area of the front bumper near the headlamp on the passenger's side.... Sergeant Conn testified that, because McKee [i.e., the fleeing offender] did not heed his order to stop, he 'focused' on Kreischer 'as being in the driver's seat" and "told her to stop." He testified that Kreischer "had to have seen him" because he made eye contact with her and "slapped the top of the car a couple times." Sergeant Conn testified that, once McKee entered the vehicle through the driver's side, "[t]he car went forward,' striking his left arm and thumb and causing his back to twist and his body to spin away from the vehicle. According to Sergeant Conn, Kreischer was "[t]he only person [he] saw in the driver's seat***." Based on that evidence, a rational trier of fact could have found beyond a reasonable doubt that Kreischer acted knowingly—that is the jury could infer from the evidence presented by the State at trial that Kreisher was aware that her conduct—accelerating the vehicle while Sergeant Conn was positioned where he was positioned—would probably cause (or attempt to cause) Sergeant Conn physical harm.
> *Id.* *P21.

Factually, viewing the evidence in a light most favorable to the State, the facts in this case are nothing like *Kreischer.* Defendant Cobb was not assisting an offender in escaping law enforcement. Defendant Cobb was not driving the SUV. Ms. Stine, the driver, did not attempt to assist Defendant Cobb in escape or do anything except fully comply with the orders of the police officers. Kreischer, the defendant/driver, did not resist arrest because Kreischer was not the secret target for arrest and not subject to arrest until she drove her car forward and struck Sergeant Conn. No law enforcement officer pulled Kreischer out of her car until after she struck Sergeant Conn with her car.

In this case, the officers' initiated physical contact and escalated the situation from passive to aggressive, not Cobb.[7] The officers grabbed Defendant Cobb and physically pulled him out of the SUV. Defendant Cobb did not come out swinging. If he had, the State could make a case of assault. *See, e.g., State v. Johnson,*

11th Dist. Ashtabula No. 2001-A-0043, 2002-Ohio-6570 *P2 and *P11-*13 (holding state produced sufficient evidence of assault where uncooperative inmate *first* took a swing at correction's officer and the officer responded with takedown). Instead of coming out of the SUV swinging, Defendant Cobb came asking the officers if they had a warrant for him. They snubbed him and ignored his question. They slammed him onto the ground on his back. Only after the officers attacked Defendant Cobb did Defendant Cobb ignore the risk of using force on the police officers and raise his fists against them. He paid to do so with his own blood. But no rational juror could find beyond a reasonable doubt that he assaulted either one of them by resisting.

The facts of this case more closely resemble the facts in *Curlee-Jones.* As in that case, in this case Defendant Cobb plainly resisted the officers. As the 1973 Legislative Service Commission and the Ninth District Appellate Court have recognized, "resisting arrest 'may be committed through the use of force, or recklessly by any means, such as 'going limp.'" *State v. Jones,* 9th Dist. Summit No. 30036, 2022-Ohio-2122 *P13 (quoting 1973 Legislative Service Commission comment to R.C. 2921.33).

As in *Curlee-Jones*, the forceful contact Defendant made with the officers was "part and parcel" of his resistance and the State offered no evidence, apart from that which established Defendant Cobb's resistance, that his "struggle with the officers contained the separate intent to knowingly cause or attempt to cause the officers physical harm." Defendant Cobb's testimony that he was confused why the officers would physically grab him and pull him out of the passenger seat without stating any reason for doing so and that he did not knowingly intend to cause physical harm or knowingly attempt to cause physical harm to the officers stands unrebutted.

The trial transcript is telling. Not only is there no evidence of Defendant Cobb coming out swinging and not using any force until after the officers slammed him to the ground, but there is also no evidence Defendant Cobb made any verbal threat to harm the officers. While Ms. Stine's unlocking the doors unnerved him, his "What the fuck?! What are you doing?! No!!" outburst was directed at her, not the officers.

Even more telling, the counsel for the State and the officers all referred to Defendant's conduct and contact with the officers using the words "resist," "resisting," and "resistance" approximately 50 times. (T.p. 41, 54-56, 57-59, 62, 73, 103, 105-106, 109, 123, 128, 144, 152, 169).

For example, on page 128, Officer Purk testified as follows:

> Q. What affect did Marcus Cobb's active **resistance** with you have on your ability to perform your lawful duty of arresting Marcus Cobb?
>
> A. It interfered and basically prolonged the effecting arrest.
> (T.p. 128)

On page 152 of the trial transcript, Officer Kenner II testified as follows:

> Q. Why did you feel it necessary or appropriate to remove Marcus Cobb from the vehicle?
>
> A. Because he was not getting out and at that point needed to be placed under arrest.
>
> Q. If he would have gotten out of the car when ordered, would you have pulled him out of the vehicle?
>
> A. No.
>
> Q. Okay. So once you pulled him out of the vehicle, what happens next?
>
> A. **He starts to resist** and to try to pull away. At that point Officer Purk and I gained control of him. He was placed on the ground, and when he was placed on the ground he reached up, ripped off my vest and punched me in the face.
> (T.p. 152) (Emphasis added)

At page 160 of the trial transcript, Officer Kenner II testified:

> Q. ... So throughout the course of this whole interaction with Marcus Cobb, what effect did his actions in refusing to obey orders and **resisting**, what effect did that have on your performance of your lawful duties?
>
> A. I mean, it causes us to kind of be a little bit more aggressive than we normally would be just based on him being combative and not complying.
>
> Q. Were you able to – what effect did it have on your ability to arrest him on the warrant?
>
> A. I mean, it hinders or affects greatly if someone is **resisting**.
> (T.p. 162) (Emphasis added)

At page 172 of the trial transcript, Officer Kenner II testified:

> Q. Why was he on the ground?
>
> A. **Because he was resisting arrest.**
> (T.p. 174) (Emphasis added)

At page 128, Officer Purk clearly and unambiguously testified that the "physical harm" the State alleges the officers suffered occurred **"during the resisting."** (T.p. 128) (Emphasis added):

> Q. And are you aware of any physical harm actually being experienced by anybody?
>
> A. Yes.
>
> Q. Please describe.
>
> A. **During the resisting** he had struck Officer Kenner twice in the face, and then bit me in the right hand.
> (T.p. 128) (Emphasis added)

The State disdained charging Defendant Cobb with resisting arrest. But the State's disdain for the resisting charges does not automatically entitle the State to have the jury decide its assault charges. Resistance is defensive conduct.[8] In contrast, assault is offensive conduct.[9] Assault is an attack. Resistance is defending against an

attack. That is why resisting arrest is not a lesser included offense of assault of a police officer. *See State v. Williard*, 5th Dist. Coshocton No. 04CA010, 2004-Ohio-5880 *P10 ("We acknowledge that resisting arrest is not a lesser included offense of assault on a police officer, and it was error to so charge the jury.") Because the State did not charge Defendant Cobb with resisting arrest, the State must produce evidence upon which a rational juror could distinguish beyond a reasonable doubt intent reflective of offensive assaultive force from intent reflective of defensive resistant force. As in *Curlee-Jones*, the State plainly failed to do so.

Indeed, the State not only did not produce evidence proving that Defendant Cobb's conduct transcended resistant force, but it also showed flagrant disdain for the *mens rea* element. To meet its evidentiary burden of production and reach the jury on its assault charges, the State was required to produce evidence upon which a rational juror could find Defendant Cobb possessed knowing awareness. It had to produce evidence upon which a rational juror could find beyond a reasonable doubt that Defendant Cobb knew his conduct would probably, not merely possibly, cause injury, illness, or other physiological impairment. *See Kreischer*, 2021-Ohio-1235 *P15-17.

In response to direct examination from the State's counsel, Officer Purk testified it did not matter if Defendant Cobb knew why Officer Purk was ordering him out of the car. Officer Purk testified it did not matter whether Defendant Cobb knew a warrant for his arrest existed or not. (T.p. 140) Neither Officer Purk nor Officer Kenner II nor Defendant Cobb ever testified that Defendant Cobb knew his conduct would probably, not merely possibly, cause injury, illness, or other physical impairment to either officer. All the evidence produced by both the State and the defense demonstrates that Officer Purk made a calculated decision at the scene to minimize what Defendant Cobb knew

about what was happening. Officer Purk testified that he is not required to increase Defendant Cobb's level of awareness and that he made no effort to do so. (T.p. 140) But what the State and Officer Purk failed to grasp is that by keeping Defendant Cobb unaware, the State's assault charge is hoist with its own petard.[10]

Officer Purk's approach was unorthodox, at least compared to Officer Kenner II's standard approach of making sure other seized persons received a "heads up of what is going on." The State, which must prove knowing intent, a higher level of awareness than recklessness, must bear the cost of Officer Purk's unorthodoxy. That cost is the State's ability to produce evidence upon which a rational juror could find beyond a reasonable doubt that Defendant Cobb knowingly intended to cause injury, illness, or other physical impairment to either officer.

Further, as in *Curlee-Jones*, the State failed to produce to produce evidence upon which a rational juror could find either officer suffered any injury, illness, or other physical impairment. Officer Kenner II clearly testified that he was not injured by the strikes he received from Defendant Cobb and that he was not physically harmed. (T.p. 161) *See Corlee-Jones*, 2013-Ohio-1175 *P13 (holding evidence defendant punched and kicked police officers but did not cause actual physical harm to them was insufficient to prove injury beyond a reasonable doubt for purpose of assault charge).

A jury question on an assault charge is created when a police officer or any witness directly testifies that he saw a defendant bite an officer, attempt to bite an officer, or an officer testifies that he felt a defendant's teeth on his skin. *See, e.g., State v. Moore,* 2nd Dist. Montgomery No. 18337, 2001 Ohio App. LEXIS 78 *2 ("According to [Officer] Cann, before the restraints were put into place, Moore turned his head to the right and bit Cann on the left hand. Officer Cann testified at trial that he not only felt

Moore's teeth on his hand, he also observed Moore biting him."); *State v. Miller,* 10th Dist. Franklin No. 04AP-285 *P23 ("Officer Orick testified that appellant was being held down by Big Bear employees as he entered the store. As Officer Orick grabbed appellant's arm to place him in handcuffs, appellant attempted to bite him. This testimony, viewed in a light most favorable to the state, is sufficient to prove that appellant knowingly attempted to cause physical harm to Officer Orick."); *State v. Lewis*, 6th Dist. Lucas No. L-21-1248, 2022-Ohio-4421 *P19 ("Here, the state presented testimony that when [Officer] Barth attempted to place Lewis in the back seat of the patrol car, Lewis 'latched onto [his] neck with his mouth' and did not let go until other officers pulled him off of Barth.")

Unlike in *Moore*, *Miller*, and *Lewis*, the State did not provide any direct evidence that Defendant Cobb bit Officer Purk. Indeed, in this case, when viewed in the light most favorable to the State, Officer Purk's direct testimony contradicts the inference that Defendant Cobb bit him. Officer Purk testified that he has been bitten before and he knows what being bitten feels like. (T.p. 121-122). But Officer Purk testified he did not feel Defendant Cobb bite him. Instead, Officer Purk admitted that at no point was he aware of being bitten by anyone. (T.p. 122). Even viewed in a light most favorable to the State, this is powerful evidence that Defendant Cobb did not bite Officer Purk.

Officer Kenner II testified he did not see Defendant Cobb bite Officer Purk during the affray. (T.p. 168) He testified that he did not hear Officer Purk cry out in pain as one would expect him to do if Defendant Cobb bit him. (T.p. 168-169). If Officer Purk had cried out, it would be admissible as direct evidence of the bite pursuant to the hearsay exemption for present sense impressions or for the non-hearsay purpose of direct proof of the act of biting. But Officer Kenner II testified he did not hear Officer Purk cry out.

There is not a scintilla of direct evidence in the record that Defendant Cobb bit Officer Purk. The State contends, however, that it produced sufficient circumstantial evidence for the jury to find beyond a reasonable doubt that Defendant Cobb bit Officer Purk. Specifically, the State contends that Officer Purk's testimony that his hand started to hurt hours after the affray ended and his own non-expert self-examination of his hand and non-expert identification of a bite mark is enough to create a question for the jury.

"In general, an issue that involves a question of scientific inquiry that is not within the knowledge of a layperson is an issue that requires expert testimony to prove."[11] *Jenkins v. Ohio Dep't of Rehab. & Corr.*, Ct. of Cl. No. 2021-00537-JD, 2023-Ohio-1382 *P17. Ohio courts have held that bite mark identification is a question that requires scientific inquiry that is not within the knowledge of a layperson. *See State v. Blamer,* 5th Dist. No. 00CA07, 2001 Ohio App. LEXIS 444 at **13; *State v. Prade*, 9th Dist. Summit, No. 28193, 2018-Ohio-3551 *P53, 107 N.E.3d 1268, 1284 ("[S]ince 1998, additional research had resulted in amended guidelines, recommendations, and opinions about the reliability of bite mark identification evidence and the conclusions that an expert might reliably draw in a given case."); *State v. Smith*, 4th Dist. Ross No. 02CA2687, 2003-Ohio-5524 *P16 (affirming trial court's admission as "medical expert's opinion" the testimony of a forensic dentist that bite marks on the victim indicated that the defendant more likely than not bit the victim); *State v. Howard*, 1st Dist. Hamilton Nos. C-190451, C-190452, 2020-Ohio-5072 *P31 ("Shuck further rendered expert testimony when she ... opined that the manifestation of bite marks on skin very from person to person....").

Obviously, Officer Purk is not a forensic dentist or bite mark identification expert. His testimony did not comply with the requirements of Evid.R. 702. *See Petti v. Perna,* 3d Dist. Hancock No. 5-92-21, 86 Ohio App. 3d 508, 513, 621 N.E.3d 580, 583 ("In

order for Deputy Miller to testify as an expert witness concerning his conclusion or opinion about the cause of the accident, the requirements of Evid.R. 702 must be met."); *Mason v. Pawlowski,* 8th Dist. Cuyahoga No. 95766, 2011-Ohio-3699 *P19 (holding permitting police officer to give his opinion on cause of injury was improper because he was not qualified as an expert).

Officer Purk did not review any guidelines, recommendations, or opinions about the reliability of bite mark identification. Officer Purk testified that even he found the alleged marks on his hand "difficult to see." The Court, after independently examining the photograph of Officer Purk's hand, did not see anything that looked like a bite mark. Defendant Cobb did not see any bite mark on Officer Purk's hand in the video at the hospital admitted as Defendant Exhibit 1. The Court did not see any bite marks on Officer Purk's hand in Defendant Exhibit 1 either. The State did not produce any evidence that Officer Purk's durable, protective suede work glove, which covered his hand throughout the affray, showed any laceration or indentation or any sign whatsoever of a bite mark. The Court examined the photograph of the glove and did not see any evidence of a bite mark. The State did not call the medics who examined Officer Purk to testify Officer Purk suffered injury from a bite.

Viewing the evidence in the light most favorable to the State, the Court concludes as a matter of law that no rational juror could find beyond a reasonable doubt that Defendant Cobb bit Officer Purk. A rational juror might find beyond a reasonable doubt that Officer Purk incurred a non-specific, minor superficial hand discomfort because of his struggle with Defendant Cobb after he pulled Defendant Cobb out of the SUV and slammed to the ground. The evidence produced by the State permits an inference that Defendant Cobb possibly bit Officer Purk, but it does not permit an inference that

Defendant Cobb probably bit Officer Purk. It certainly does not permit an inference that Defendant Cobb knowingly bit Officer Purk. It is just as likely that Officer Purk stuck his hand in Defendant Cobb's mouth as he performed the cross-face move.

For all these reasons, viewing the evidence in the light most favorable to the State, the Court concludes as a matter of law that the State failed to produce sufficient evidence upon which a rational juror could find beyond a reasonable doubt that Defendant Cobb assaulted either Officer Purk or Officer Kenner II.

II. OBSTRUCTING OFFICIAL BUSINESS CHARGES

"Obstructing official business" as defined in R.C. 2921.31(A) has five essential elements: (1) an act by the defendant, (2) done with the purpose to prevent, obstruct, or delay a public official, (3) that actually hampers or impedes a public official, (4) while the official is acting in the performance of a lawful duty, and (5) the defendant so acts without privilege."[12] *State v. Morris*, 8th Dist. Cuyahoga No. 103561, 2016-Ohio-8325 *P14; 68 N.E.3d 822, 824-25.

"To violate the obstructing official business statute, a defendant must engage in an affirmative or overt act." *State v. Bohach*, 3d Dist. Crawford Nos. 3-23-28 and 2-23-29, 2024-Ohio-389 *P17. "In other words, a person cannot obstruct official business by doing nothing." *Id.* (Citations omitted). "Importantly, the mere failure to respond to an officer's request does not constitute obstructing official business." *Id.* (Citations omitted). *See also Cleveland Metroparks v. Cauthen*, 8th Dist. Cuyahoga No. 109297, 2020-Ohio-5266 *P15 ("One cannot be guilty of obstructing official business by doing nothing because the text of R.C. 2921.31 specifically requires an offender to act.").

"[A]n individual must commit an overt act with an intent to obstruct a public official, such as a police officer, and must succeed in actually hampering or impeding

that officer." *State v. Hammock*, 1st Dist. Hamilton Nos. C-230548, C-230549, 2024-Ohio-2149 *P17 (Citations omitted). "The proper focus in a prosecution for obstructing official business is on the defendant's conduct, verbal or physical, and its effect on the public official's ability to perform the official's lawful duties." *Id.* (Citations omitted). "The totality of the defendant's conduct should be considered, as opposed to viewing each act in isolation." *Id.* (Citations omitted).

"[T]here must be some stoppage of the officer's progress before one can say [the officer] was hampered or impeded." *Id.* *P19 (Citations omitted). "No finite period of time constitutes a substantial stoppage." *Id.* (Citations omitted). "[T]he question is whether the defendant's act had more effect on the performance of the police than silence or a refusal to answer would have had." *Id.* (Citations omitted).

Even when viewed in the most favorable light, the State failed to produce evidence upon which a rational trier of fact could find beyond a reasonable doubt that the State proved all the elements of obstructing official business.

First, the State presented no evidence that Defendant Cobb obstructed Officer Purk from giving Ms. Stine a ticket for failing to use her turn signal. Officer Purk approached the vehicle. He admitted in his testimony he did not even acknowledge Defendant Cobb at that time. Defendant Cobb did not engage in any physical or verbal interaction with Officer Purk at that time. Officer Purk returned to his cruiser. He could have easily written the ticket and gone back and given it to Ms. Stine. Defendant Cobb did nothing to hamper or impede Officer Purk from writing a ticket and giving it to Ms. Stine. *See Bohach, supra.*

Instead of going forward with writing a ticket and giving it to Ms. Stine, Officer Purk secretly decided to wait for Officer Kenner II and to detour from writing the ticket to

take Defendant Cobb into custody. No rational juror could find beyond a reasonable doubt that Officer Purk was hampered or impeded from giving Ms. Stine a ticket by what happened after he secretly decided to detour from writing the ticket. The only finding a rational juror could make is Officer Purk had a 100 percent unhampered and unimpeded opportunity to write and give Ms. Stine a traffic ticket and he made a unilateral decision not to do so. No rational juror could find beyond a reasonable doubt that Defendant Cobb obstructed his opportunity or ability to do so.

Second, Defendant Cobb's refusal to exit the SUV in response to Officer Purk's order is not an act upon which an obstructing official business conviction can be based. *State v. Morris*, 8th Dist. Cuyahoga No. 103561, 2016-Ohio-8325, 68 N.E.3d 822. The facts in *Morris* were as follows:

> Officer John Jarrell testified that when he and other officers arrived, Douglas Morris approached the officers and reported Wade jumped on him and he subsequently stabbed Wade. The officers immediately detained Morris, handcuffing him and placing him in the back of Officer Jarrell's patrol vehicle, while they investigated the stabbing incident. Morris became agitated and confused as to why the police arrested him when he himself called the police to report the incident. He was uncooperative while getting into the police vehicle. When the police vehicle arrived at the police station, Morris would not get out of the vehicle on his own. Officer Jarrell and his partner had to physically lift him out. Once they got Morris to his feet, however, Morris was cooperative and walked on his own to the booking center.
>
> Officer Jarrell's partner, Brandon Melbar, testified that when he and Officer Jarrell transported Morris to the police station for booking, Morris laid on his side in the back seat and refused to sit up, complaining of discomfort. The officers told him he would breathe better if he sat up. Morris refused and called the officers names. He was also spitting in the backseat. Officer Melbar testified that, when they arrived at the police station, Morris told them he had problems breathing and his back hurt, and "[t]hat's why it took him a little while to get out of the car." It took 20 or 30 minutes for the officers to remove him from the vehicle.
> *Id.* *P16-*P17.

The majority applied the law to the facts as follows:

The state argues Morris's refusal to exit the vehicle on his own, lying down and spitting in the back seat of the police vehicle, and verbal outbursts constituted the offense of obstructing official business. Under the case law authority, however, the officers' testimony, even viewed in a light most favorable to the state, was, as a matter of law, insufficient to support a conviction for the criminal offense of obstructing official business.

Regarding Morriss's refusal to exit the vehicle on his own, the case law has required more than mere failure to obey or respond to a law enforcement officer's request in order to support a conviction of obstructing official business.

Similarly, Morris's verbal outburst while in the backseat of the police car, certainly offensive and ill-advised as it was, is also insufficient to support this conviction. The courts have required evidence reflecting "affirmative acts, not oral statements or inaction, which hamper or impede a public official in the performance of lawful duties."

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[T]here was not testimony here from the officers that Morris engaged in affirmative acts such as struggling with, kicking, or striking the officers, stiffening his body, or otherwise physically resisting the officers' efforts to remove him from the vehicle. Even if there were such an affirmative act, the state still must prove not only the act was committed with an intent to obstruct the officers but also that the defendant succeeded in actually hampering or impeding them.... As this court noted, obstructing official business is established "where there is both an illegal act which quickens the duty of the police officer to enforce the law, and interference with intent to impede that enforcement." ... Even viewing the officers' testimony in a light most favorable to the state, there was no necessary convincing evidence that Morris refused to exit the police vehicle on his own with an intent to impede the officers' duty. The officers acknowledged at trial that Morris eventually explained to them that he requested help to exit the vehicle because of his breathing difficulties and back problems. The officers also acknowledged that once he got on his feet, Morris exhibited cooperative behavior, walking on his own to the booking center.
Id. *P18-*P22.

The majority held and concluded as follows:

Our full and careful examination of the evidence as reflected by the trial testimony does not reflect that Morris, while certainly imprudently disrespectful and unaccommodating toward the officers, engaged in an affirmative act that satisfied the statutorily enumerated elements of the offense of obstructing official business. Morris's exasperation and angry

> state of mind and resultant uncooperative behavior no doubt rendered the police officers' performance of their duty much more arduous and unpleasant than if they were transporting a docile, polite person. The courts, however, have not interpreted the obstructing official business statute to criminalize uncouth, uncooperative conduct such as displayed by Morris.
>
> Our thorough review of the case law indicates rather that the courts have consistently applied the statute narrowly and held that a conviction of obstructing official business required an affirmative act, done with an intent to obstruct the public officials, which then did actually hamper or impede the performance of their duties. The charge of obstructing official business against Morris is unwarranted, and his conviction is unsupported by sufficient evidence. Accordingly, we vacate Morris's conviction of the obstructing offense.
> *Id.* *P2-*P3
>
> Judge Kathleen Ann Keough dissented and wrote:
>
> I would find that the evidence demonstrated that not only did Morris spit at the officers, tell them he hated them, and that he was going to 'kill' them, but that he actively and affirmatively resisted their orders to get out of the patrol car, forcing the officers to physically lift him from the car. Morris's actions were overt acts, committed with an intent to impede the officers' attempt to effectuate his arrest, that caused a significant delay in the officers' performance of their duties and placed their safety at risk.
> *Id.* *P32.

In this case, as in *Morris*, Defendant Cobb refused to exit the SUV. But His locking the door and rolling up the window did not impede the officers because Ms. Stine immediately complied with Officer Purk's order and unlocked Defendant Cobb's door. Defendant Cobb was not verbally abusive of the officers. He did not yell at the officers. His outburst was directed at Ms. Stine, who is not a public official.

When Officer Purk ordered Defendant Cobb out of the SUV, he asked, "For what?". Officer Purk snubbed him. As the officers physically pulled Defendant Cobb from the SUV, he asked them if they had a warrant. The officers again snubbed him. Defendant Cobb testified that if Officer Purk had told him he had a warrant, he probably

would have gotten out of the SUV and not resisted. The State did not put on any evidence to rebut Defendant Cobb's testimony.

Viewed in a light most favorable to the State, no rational trier of fact could find beyond a reasonable doubt that under the totality of the circumstances Defendant Cobb's resistance was undertaken with the intent to obstruct being arrested because: (a) Officer Purk did not tell Defendant Cobb he had a warrant that authorized him to make an arrest; (b) Defendant Cobb testified he probably would not have resisted and would have submitted if he had been told; and (c) Defendant Cobb ceased resisting and submitted to arrest after he was informed of the warrant for his arrest. Further, it is undisputed that the officers consciously decided to not attempt to put Defendant Cobb under arrest until after the affray had concluded. As a result, no rational juror could find beyond doubt that the affray actually hampered or impeded the arrest.

Under the totality of these circumstances, as in *Morris*, the obstructing official business charges against Defendant Cobb are unwarranted. The State has failed to produce sufficient evidence upon which a rational trier of fact could find beyond a reasonable doubt that Defendant Cobb intended to hamper or impede the officers' apprehension of him or did. Once again, the State's case is hoist with its own petard.

For all these reasons, viewing the evidence in the light most favorable to the State, the Court concludes the State failed to produce sufficient evidence upon which a rational trier of fact could find that Defendant Cobb obstructed any official business.

III. Officer Purk's use of force violated Defendant Cobb's constitutional rights under the Fourth Amendment.

"People misunderstand what a police state is. It isn't a country where the police strut around in jackboots; it's a country where the police can do anything they like."[13] It

was a fear of the emergence of such a police state that moved Supreme Court Justice Anthony Kennedy to dissent in *Maryland vs. Wilson* and opine "the [police officer's] command to exit ought not be given unless there are objective circumstances making it reasonable for the officer to issue the order." 519 U.S. at 422. The *Wilson* majority's "matter of course" license "puts tens of millions of passengers at risk of arbitrary control by the police," Justice Kennedy wrote. *Id.* at 422. Since the Supreme Court's decision, other courts have recognized that the decision does not license a police officer to use force on a person, such as Defendant Cobb, who passively resists an officer's order.

Under the Fourth Amendment, it is "well-established ... that a non-violent, non-resisting, or only passively resisting suspect who is not under arrest has a right to be free from an officer's use of force." *Sevenski v. Artfitch*, 2022 U.S. App. LEXIS 20108 *16-17 (6th Cir. July 20, 2022).

In *Sevenski*, the Sixth Circuit Court of Appeals ruled that "[d]etermining whether the force used to effect a particular seizure [of a person] is 'reasonable' under the Fourth Amendment requires a careful balancing of the 'nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake.'" *Id.* at *P8

Three important but non-exhaustive factors guide the analysis: the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at *9 (Citations omitted). "The ultimate question ... is 'whether the totality of the circumstances justifies a particular sort of seizure.'" *Id.* (Citations omitted).

In *Sevenksi*, a police officer stopped Sevenski for allegedly failing to use a turn signal. Sevenski got out of his vehicle and walked toward the officer with his hands

above his head. The officer knew Sevenski from prior encounters. The officer ordered Sevenski to get back in his vehicle. Sevenski did not obey the command. The officer asked Sevenski if he had any weapons. Sevenski answered he did not, but he wished he did. Without any warning or putting Sevenski under arrest, the officer grabbed Sevenski's arm and executed an arm-bar takedown, injuring Sevenski. *Id.* at *P2-3. The Sixth Circuit found the officer's use of force was excessive and forfeited his qualified immunity and the officer would have to stand trial on Sevenski's claim that the officer violated his civil rights. *Id.* at *P16-17 ("A direct refusal to follow an officer's commands did not preclude a finding that a takedown was excessive.").

Unfortunately, as in *Sevenski,* in this case, Justice Kennedy's fears have proved well founded. Even in the most favorable light, Officer Purk's testimony at trial demonstrated a woeful failure to observe the constitutional limitations on a police officer's authority to use force against a passenger who refused his command.

With respect to his use of force policy, Officer Purk testified as follows:

> Q. Can you please describe the use of force – how it works, please.
>
> A. So the use of force spectrum is basically we have to start at the lowest possible force that we are able to in order to effect arrest; however, if we are met with a weapon we are able to escalate, obviously, to the use of deadly force. It we're met with deadly force we can meet with deadly force, and we're not required to start below the level of force that's being used against us.
>
> Q. I'm sorry, can you repeat and explain what you just said about the not being able to use lower force?
>
> A. So law enforcement officers are not required to start at the least amount of force if they are met with a higher level of force. So, for example, if someone is using deadly force against us, we do not have to try and take that weapon from them, you know, with our hands, potentially causing harm to us or someone else If they're using any other weapon that could be deadly force against us, we are allowed to meet with deadly force. So we do not have to start automatically with asking them, please don't shoot,

please put your firearm down, things like that. We are able to start at a step above whatever force they are using.

Q. So, you did say you had to use – your're required to use the lowest level of force required to effect the arrest; is that correct?

A. That's correct.

Q. If you decide what if any use of force is required, whose conduct determines the use of force that you are authorized and need to use?

A. That would be the subject that we are attempting to effect the arrest on.

Q. Okay. So, let me run by – run through some things for you. What is – what would you describe as the lowest level of force in law enforcement? What – what kind of actions would that be?

A. The lowest level of force would be things like just officer presence, just making our presence known, such as having two officers there instead of one.

Q. And how is that – I mean, you're not describing putting hands on anybody. How is that force?

A. That is just kind of a show that – just a show of presence is considered an escalated use of force in certain situations.

Q. Is there a purpose in having a show of force with officer presence? What is the purpose of officer presence?

A. If you have a subject that is even just thinking about trying to run away or resist arrest or fight the officer or anything worse than that, he might think again or think twice about it if they see two, three, or four officers on scene.

Q. So let me ask you, when you are arresting somebody, under what conditions do you want to have that officer presence – a second officer or more when you're doing that?

A. Different – for the most part if we are able to identify ahead of time that we are going to arrest someone or where you have a potential to be arresting that person we call for a second officer to provide – in order to assist just in case that subject does not resist or attempt to run.

Q. Okay. So if you know ahead of time it's better to have a backup in advance.

A. Correct. Certain things – a lot of times with impaired drivers is the time we use second officers, as well as arrest warrants.

Q. So, again, this is – this is generally speaking, I'm just trying to get the jury to understand use of force and how it works. If you are trying to arrest somebody and they are not cooperating – not talking about running, not talking about fighting – refusing to do what they're told, what level of force is authorized in that scenario?

A. At that point we are allowed to actually go hands on is what it is called. We are allowed to secure their arms and wrists in order to actually handcuff them to arrest them.

Q. Just talking about physically forcing the hands to the point you can handcuff them.

A. Correct.

Q. Are you allowed to strike them or use your Taser on them at that point?

A. If they are just passively resisting, no.

Q. Okay. Let's move on. If somebody is more actively resisting by trying to pull away or flee, what level of force are you permitted to use at this point?

A. We still try to start at the at the just going hands onto. For example, both officers will attempt to secure a wrist. If they're trying to flee, we might have to basically tackle the subject in order to get them to the ground in order to effect that arrest and stop them from attempting to flee.

Q. Now you had spoken previously about somebody having or using deadly weapons or using deadly force against officers. What about some level of force that is not deadly. So if somebody is resisting in a way that might cause you physical harm, what is the authorized use of force in that situation?

A. For things like that we are authorized to actually use our Tasers or OC Spray.

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Q. Okay. Officer Purk, when use of force is authorized, at what point does the force stop? Under what circumstances when you use force against somebody you're trying to arrest must the force stop?

A. As soon as we're able to gain compliance or actually effect the arrest. So if the subject stops resisting, then we stop any use of force. So as soon as

> they become compliant we would stop use of force. If they continue to resist, up until the time that we have actually placed them in handcuffs and effect the arrest. Once they are in handcuffs, secured, and then we stop any sort of use of force.
> (T.p. 52-56 and 59-60)

Even in the most favorable light, Officer Purk's articulation of his understanding and his use of force upon Defendant Cobb differs significantly from the limitations on the use of force under the Fourth Amendment. *See Sevenski*, *supra*.

First, Defendant Cobb had not committed any crime whatsoever and Ms. Stine had committed at most a minor traffic violation by failing to use her turn signal on a deserted street in the middle of the night with no other motor vehicle in sight. Officer Purk did not care. He testified he did not care what the warrant was about. The evidence is clear and convincing that Officer Purk failed to consider in any form or fashion the first factor of the analysis.

Second, the evidence is also clear and convincing Defendant Cobb and Ms. Stine did not present any threat to Officer Purk or others as they sat in the motor vehicle. Officer Purk shined his light into the SUV. He asked them if they had weapons. They told him they did not. Officer Purk's reliance on authority to use deadly force is disturbing and had no application in this case. The evidence is clear and convincing that Officer Purk failed to properly consider the second factor of the analysis.

Third, Defendant Cobb and Ms. Stine never attempted to flee to avoid arrest. Neither knew anything about the warrant. They complied with Officer Purk's order to pull over. Ms. Stine testified she understood that fleeing would make the situation worse.

Defendant Cobb never actively resisted *arrest*. "Active resistance requires not only a refusal to comply with orders, but also 'some outward manifestation' that suggests intentional disobedience or blatant resistance." *Id.* at *11. The Sixth Circuit

instructed, "if there is a common thread to be found in our caselaw on this issue, it is that noncompliance alone does not indicate active resistance; there must be something more." *Id.*

Consistent with this principle, Defendant Kenner II admitted that Defendant Cobb's resistance was passive when he remained in the SUV and rolled up the window. (T.p. 169) Defendant Cobb's resistance remained passive after the officers physically pulled Defendant Cobb out of the SUV as he did not come out swinging. Rather like Sevenski who approached officers with his hands above his head—a submissive approach[14]—Defendant Cobb came out signaling his interest in submitting by asking, "Do I have a warrant? Do I have a warrant?" The Court cannot snub these physical facts as Officer Purk did and the State did at trial and in its brief of this motion. Viewed in the most favorable light to the State, it is clear from the physical facts captured on video that Defendant Cobb only began actively resisting after the officers snubbed him, grabbed him, and slammed him onto the ground. At that point, Officer Purk still had not told Defendant Cobb about the warrant or told Defendant Cobb that he was under arrest.

For all these reasons, the evidence is clear and convincing Officer Purk failed to properly consider the third factor. *Accord Sevenski,* 2022 U.S. App. LEXIS 20108 at *P16-17 ("A direct refusal to follow an officer's commands did not preclude a finding that a takedown was excessive. 'It was well-established at the time of the incident in this case that a non-violent, non-resisting, or only passively resisting suspect who is not under arrest has a right to be free from an officer's use of force.'") (Citations omitted).

As the Sixth Circuit recognized in *Sevenski*, a police officer interacting with a passenger who refuses to obey a command cannot ***do*** anything he wants to the passenger. An officer's authority under *Wilson* to order a passenger out of the vehicle is

not that broad. To the extent the State's counsel believed the officer's authority was that broad when he indicted Defendant Cobb, he made a critical legal error.

The City of Bellefontaine is not a "police state" or even a "police city."[15] But Officer Purk's conduct at the scene reflected police-state officer conduct. Construed in a light most favorable to the State, the Court concludes, as a matter of law, that Officer Purks' use of force policy and application of his policy to Defendant Cobb violated Defendant Cobb's constitutional rights under the Fourth Amendment.

CONCLUSION

"The distinguishing feature of our criminal justice system is its insistence on principled, accountable decision making in individual cases," Justice Kennedy wrote in dissent in *Wilson v. Maryland*. "If a person is to be seized, a satisfactory explanation for the invasive action ought to be established by an officer who exercises reasoned judgment under all the circumstances of the case. This principle can be accommodated even where officers must make immediate decisions to ensure their own safety." 519 U.S. at 422 (Kennedy, J. dissenting).

In this case, there is no evidence that gives rise to a reason to think that Defendant Cobb would have resisted if Officer Purk had simply told Defendant Cobb of the warrant—what Justice Kennedy called "a satisfactory explanation for the invasive action." Defendant Cobb did all he could to invite Officer Purk to tell him. Officer Purk snubbed him. If Officer Purk had accepted Defendant Cobb's invitation and told Defendant Cobb about the warrant and Defendant Cobb resisted, then the State could prove beyond a reasonable doubt the offense of resisting arrest.

Officer Purk had broad authority to control the scene at the stop. But Officer Purk and the State bear the consequences for how he did so even when the consequences

result in the State's case being hoist with its own petard and put Officer Purk's and Officer Kenner II's qualified immunity in jeopardy.

One of the consequences of Officer Purk's decision making at the scene and the one that is before the Court on this motion is that the State has failed to produce evidence upon which a rational trier of fact could find beyond a reasonable doubt that Defendant Cobb assaulted either officer or obstructed any official business.

For all these reasons, the Court finds Defendant Cobb's Crim.R. 29 motion for acquittal well-taken and **GRANTS** the motion. The Court also **SETS ASIDE** the jury's verdicts, **DISCHARGES** Defendant Cobb, **VACATES** the sentencing hearing, **RELEASES** all bond, **ORDERS** the State to pay costs, and **APPOINTS** William Cramer to represent Defendant Cobb in the event of an appeal.

Judge Kevin P. Braig

ENDORSEMENT REGARDING NOTICE OF JUDGMENT

To the Clerk:

You are hereby directed to serve upon all the parties Notice of Judgment and the date on which it was journalized pursuant to Civil Rule 58(B).

Judge Kevin P. Braig

cc: Prosecutor
JOHN C CUNNINGHAM
WILLIAM CRAMER

[1] *See* Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/snub (defining "snub" as a verb as "to treat someone rudely, esp. by ignoring that person"),

[2] The court is mindful that the Ohio Supreme Court has held that self-defense is an issue subject to review on a manifest weight of the evidence challenge, not a sufficiency of the evidence challenge. *State v. Messenger*, 171 Ohio St. 3d 227, 2020-Ohio-4562. In granting Defendant Cobb's Crim.R. 29 motion for acquittal, the Court disclaims that it has weighed the evidence, second-guessed the jury, or done anything except determine that the State failed to produce evidence upon which a rational juror could find beyond a reasonable doubt that Defendant Cobb committed the allege offenses. Based on the evidence produced by the jury, this case never should have been given to the jury. If the Court had known seen the videos and known the facts before the trial began, it would have never been given to the jury. The Court would have granted the Crim.R. 29 motion immediately at the end of the Defendant's case.

[3] *See also (*T.p. 111-112) ("Well, let the record reflect that during the playing of the video [State's Exhibit E-1] the defendant, Marcus Cobb, became emotional and stood up from his seat and walked out of the courtroom. He was out of the courtroom for maybe five minutes or so. There was no questioning of the witness. The only thing that happened was the video continued to play. Mr. Cobb came back. We're getting to the point where we should take a break anyway just to give the jury a break. So typically I would allow you, Nathan, to finish the testimony but under the circumstances I'm going to take a break right now for 15 minutes to just let everybody kind of cool off for a bit. We'll come back and we'll finish up.")

[4] *State v. Miller,* 7th Dist. Columbiana No. 14 CO 0047, 2016-Ohio-8544 *P89, 79 N.E.3d 1, 20 ("Stated generally, demonstrative evidence is an object, picture, model, or other device intended to clarify or qualify facts for the jury.... Demonstrative evidence is merely an aid in understanding certain facts. This is in contrast to 'substantive evidence,' which has been defined as 'something (as testimony, writings, or objects) presented at a judicial or administrative proceeding for the purpose of establishing the truth or falsity of an alleged matter of fact.").

[5] *See e.g., Doe v. Contemporary Servs. Corp.*, 8th Dist. Cuyahoga No. 107229, 2019-Ohio-635 *P30 ("[T]he dissenting opinion does not carry the full force of law or precedential value. This court is bound to adhere to the majority opinion....").

[6] While the Court is bound to adhere to the holding of the majority opinion in *Maryland v. Wilson* and has done so, this Court is free to find the reasoning in the dissents of Justice Kennedy and Justice Stevens persuasive provided it does not do so in contradiction to the holding of the majority opinion that established the rule of law that Officer Purk had authority to order Defendant Cobb out of the SUV as matter of course. *See e.g, State v. Lusane*, 11th Dist. Portage No. 2014-P-0057, 2016-Ohio-267 *P21, 58 N.E.3d 416, 420 (concluding dissenting opinion "more persuasive than the majority analysis").

[7] *Contra State v. Davis*, 5th Dist. Licking No. 17-CA-55, 2018 Ohio App. LEXIS 5642 (December 20, 2017) (affirming conviction of assault on a police officer and denial of Crim.R. 29 motion to acquit where accomplice of shop-lifter initiated physical contact with police officer by striking officer in the throat and chest when the officer confronted the accomplice and police officer did not put his hands on the accomplice)

[8] *See* Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/resistance (defining "resistance" as "the act of fighting against something that is attacking you").

[9] *See* Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/assault (defining "assault" as "a violent attack").

[10] *See* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/petard#:~:text=Aside%20from%20historical%20references%20to,%3A%20%22For%20%27tis%20the%20sport. ("Aside from historical references to siege warfare, and occasional contemporary references to fireworks, *petard* is almost always encountered in variations of the phrase 'hoist with one's own petard,' meaning 'victimized or hurt by one's own scheme.' The phrase comes from William Shakespeare's *Hamlet*: 'For 'tis the sport to have the enginer / Hoist with his own petar.' *Hoist* in this case is the past participle of the verb *hoise*,

meaning 'to lift or raise,' and *petar(d)* refers to an explosive device used in siege warfare. Hamlet uses the example of the engineer (the person who sets eh explosive device) being blown into the air by his own device as a metaphor for those who schemed against him being undone by their own schemes. The phrase has endured, even if its literal meaning has largely been forgotten."). For a contemporary example of literally being "hoist with one's own petard" refer to the screenplay of the film *The Hunt for Red October* when Soviet Captain Second Rank Victor Tupolev fires a torpedo at the submarine *Red October* and the torpedo misses the intended target and instead blows up Tupolev's own submarine.

[11] *See Darnell v. Eastman,* 23 Ohio St. 2d 13, 17, 261 N.E.2d 114, 116 ("Except as to questions of cause and effect [that] are so apparent as to be matters of common knowledge, the issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry and must be established by the opinion of medical witnesses competent to express such opinion. In the absence of such medical opinion, it is error to refuse to withdraw that issue from the consideration of the jury.")

[12] The element of privilege is not an essential element of obstructing official business which the State must prove beyond a reasonable doubt. *State v. Elkins*, 5th Dist. Richland No. 17 CA 50, 2018-Ohio-1267 *P20. If the State produced sufficient evidence to sustain a conviction, then Defendant's privilege to self-defense contained in the Ohio Revised Code would be subject to review on a manifest weight of the evidence standard.

[13] Lanchester, John, "The Snowden files: why the British public should worry about GCHQ," *The Guardian* (October 3, 2013), https://www.theguardian.com/world/2013/oct/03/edward-snowden-files-john-lanchester.

[14] *See* Merriam-Webster Dictionary (defining "submissive" as "inclined or willing to submit to others"), https://www.merriam-webster.com/dictionary/submissive.

[15] *See* Vidal, Gore, "Comment, August 1961," *Esquire* (May 19, 2008) ("As or civil liberties, any one who is not vigilant may one day find himself living, in not in a police state, at least in a police city."), *available at*: https://www.esquire.com/news-politics/a4592/comment-0861/.