IN THE SUPREME COURT OF OHIO
2025

State of Ohio,

Plaintiff-Appellant,

-vs-

Leander Bissell,

Defendant-Appellee.

Case No. 24-1770

On Appeal from
the Cuyahoga County
Court of Appeals, Eighth
Appellate District

Court of Appeals
No. 113158

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

Steven L. Taylor 0043876
Legal Research and Staff Counsel
Ohio Prosecuting Attorneys Association
196 East State Street, Ste. 200
Columbus, Ohio 43215
Phone: 614-221-1266
Fax: 614-221-0753
E-mail: taylor@ohiopa.org
Counsel for Amicus Curiae Ohio
Prosecuting Attorneys Assn.

Timothy F. Sweeney 0040027
Law Office of Timothy F. Sweeney
The 820 Building, Suite 430
820 West Superior Ave.
Cleveland, Ohio 44113-1800
Phone: 216-241-5003
Email: tim@timsweeneylaw.com
Counsel for Defendant

Michael C. O'Malley 0059592
Cuyahoga County Prosecuting Attorney
Michael R. Wajda 0100356
(Counsel of Record)
Assistant Prosecuting Attorney
Sarah E. Hutnik 0095900
Assistant Prosecuting Attorney
Daniel T. Van 0084614
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
Phone: 216-443-7800
Email:
mwajda@prosecutor.cuyahogacounty.us
Counsel for State of Ohio

Other Counsel on
Certificate of Service

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

Appellant's Proposition of Law I: A person acts knowingly under R.C. 2901.22(B) when the person is aware that the conduct will probably cause a certain result. As a heightened form of recklessness, it does not require that person to purposefully intend to cause the resulting harm.

Appellant's Proposition of Law II: Something is "probable" when there is more reason for expectation or belief than not, whereas something is "likely" when there is merely good reason for expectation or belief. When a driver ignores police vehicles with flashing lights closing down highway lanes and speeds through a closed-off accident area, serious and even fatal injury to emergency personnel, other drivers, or pedestrians, is probable, not just likely.

OPAA stands by its original briefing and adds the following reply.

While the Eighth District majority opinion understated the evidence and committed legal errors in the process, the defense brief here engages in forms of diversion and misstatement in attempting to construct bizarre defenses for the defendant's actions. None of this works, although, as the defense concedes, the video evidence does speak for itself, and, in OPAA's view, the video evidence is damning.

The defense never acknowledges that the highway crash scene was well lighted, with the usual light poles operating in this urban-highway area, and with the headlights of numerous vehicles illuminating the area as drivers awaited their turn to go through in Lanes 3 and 4. The defendant's own headlights were operating as well. In his reflective vest, firefighter Tetrick could not have been missed, and with the defendant having just maneuvered around a police car in Lane 1 to enter Lane 2 in the crash area, (Tr. 76, 261), the defendant was plainly paying attention to the road as he accelerated in Lane 2. (Tr. 129) All of this makes it a rather-easy inference to conclude that the defendant was aware of Tetrick and simply chose to run him down, with the defendant's lack of braking

and stopping and his fleeing the scene also helping to confirm the inference. The State did not need direct evidence of knowingly and could prove that element entirely through circumstantial evidence and common-sense inferences.

In terms of what it means to act "knowingly," the United States Supreme Court has discussed the fact pattern of a driver running down a pedestrian in his path:

> Purposeful conduct is obvious. Suppose a person drives his car straight at a reviled neighbor, desiring to hit him. The driver has, in the statute's words, "use[d] . . . physical force against the person of another." The same holds true for knowing behavior. Say a getaway driver sees a pedestrian in his path but plows ahead anyway, knowing the car will run him over. That driver, too, fits within the statute: Although he would prefer a clear road, he too drives his car straight at a known victim. . . .

Borden v. United States, 593 U.S. 420, 432 (2021) (plurality). The defense cites *Borden*, but, notably, does not refer to this passage.

The discussion of knowing in the *Borden* plurality decision would not be controlling here, since it relies on the Model Penal Code definition that requires an awareness of a "practically certain" result, *see id.* at 426, and Ohio's less-demanding definition only requires awareness of probable result. Even so, the *Borden* discussion of the driver's knowledge in running down the seen pedestrian is relevant here.

The totality of the evidence must be construed in the State's favor in assessing sufficiency. As this Court recently stated:

> {¶ 139} "[P]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence." 1A Wigmore, *Evidence*, § 24 et seq., at 944 (Tillers Rev. 1983). "Circumstantial evidence and direct evidence inherently possess the same probative value . . . ." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph

> one of the syllabus, *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 1997-Ohio-355, ¶ 49, fn. 4.
>
> {¶ 140} "Circumstantial evidence is sometimes defined as proof of facts by direct evidence from which the trier of fact may infer or derive by reasoning other facts in accordance with the common experience of mankind." *State v. Griffin*, 13 Ohio App.3d 376, 377 (1st Dist. 1979), citing 1 *Ohio Jury Instructions*, § 5.10d (1968). When reviewing the evidence presented, it is within the province of the fact-finder to draw reasonable inferences from the evidence. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). And when drawing reasonable inferences, jurors are "free to rely on their common sense and experience." *State v. Allen*, 1995-Ohio 283, ¶ 45. "'[C]ircumstantial evidence is sufficient to sustain a conviction if that evidence would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. McKnight*, 2005-Ohio-6046, ¶ 75, quoting *State v. Heinish*, 50 Ohio St.3d 231, 238 (1990).

State v. Roberts, 2025-Ohio-5120, ¶ 139-40. Circumstantial evidence from the surrounding facts can establish the requisite mens rea. *Id*. ¶ 159.

When the totality of the evidence is construed in the light most favorable to the prosecution here, a reasonable trier of fact could conclude that the defendant was acting in a fit of pique owing to his impatience and that the defendant, akin to the phrasing of *Borden*, "plow[ed] ahead anyway, knowing the car will run him over." A reasonable factfinder could draw that conclusion from all of the evidence based on the common-sense inference that the defendant saw the conspicuously-visible Tetrick in his reflective vest and ran him over anyway. Having just completed the obstacle course of driving around the flashing emergency vehicles to get to that point, the defendant must have been attentive to the road in the seconds before hitting Tetrick and could not have avoided the indications of hazards in the area, including the flashing lights from the emergency

vehicles, the other vehicles proceeding cautiously in Lanes 3 and 4, the overturned car in Lane 1, the numerous pedestrians, etc.

The supposed exculpatory alternative is to think that the defendant was not attentive and did not see Tetrick, but a reasonable factfinder was not required to indulge that view of the fact pattern. The defendant did not testify, and a reasonable factfinder would not have been required to accept a less-than-credible claim to that effect by the defendant anyway. Tetrick was visible, plain as day, and the roar of the defendant's car *accelerating* can plainly be heard in the body-cam video recording.

In any event, the "didn't see him" alternative does not serve to exculpate the defendant from having acted "knowingly." The defendant had ample warning of an accident scene that was still being processed, and, under this "didn't see him" scenario, he chose to speed through the active scene anyway while being *inattentive* to who was in the area. In this "didn't see him" alternative, the defendant's actions were the equivalent of having been warned of an active children's playground ahead and yet choosing to blindly drive through the playground anyway at a high rate of speed.

"A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). In this regard, the defendant did not need to be aware that he would probably cause death; "to prove felony murder, no mens rea element with regard to the death of the victim need be shown." *State v. Owens*, 2020-Ohio-4616, ¶ 10. The mens rea for the underlying predicate offense must be shown, *see id.*, and, vis-à-vis the serious-physical-harm form of felonious assault, the resulting harm could be far less serious than death, and could include just a small cut requiring stitches. *State v.*

Edwards, 83 Ohio App.3d 357, 360 (10th Dist. 1992). Even if the defendant was somehow ignorant of the road ahead as he entered the crash scene, it is still rather easy to conclude that the defendant would be aware that inattentively driving at high speed through an active crash scene at least would probably cause serious physical harm to pedestrians in the area, whether it be from hitting such pedestrians or from the pedestrians being injured in the resulting mad scramble to avoid being hit. Having met the relatively-low level of awareness needed for felonious assault, the defendant's guilt of felony murder would follow as a matter of course, since the mens rea for felonious assault is the only mens rea required for felony murder here. *State v. Miller*, 2002-Ohio-4931, ¶ 32-33.

The defense attempts to erect bizarre factual defenses to the defendant's guilt for felonious assault and felony murder. While the police and firefighters did not put in place a physical barrier like a firetruck across the lanes that would have made it impossible for the defendant to speed through the crash scene in Lane 2, (*see* Defense Brief, at 12, 16, 17, 18, 21, 30), and while police and firefighters failed to provide *Miranda*-like specific warnings of the nature of the crash scene ahead and the presence of responder-pedestrians, (*see id*. at 8, 10-11), the supposed negligence of police and firefighters would not detract from the defendant's otherwise-proven guilty knowledge and primary conduct in hitting and killing Tetrick. "There is no contributory negligence analog in criminal law." *State v. Smith*, 2017-Ohio-537, ¶ 7 (8th Dist.); *State v. Wells*, 146 Ohio St. 131, 139-40 (1945).

The impractical demand for *Miranda*-like traffic warnings represents an effort to distract from all of the indicators of danger that *were* provided and of which the

defendant would have been aware. The police deployed cruisers with flashing lights to warn travelers and to close lanes, thereby funneling traffic into the right two lanes. The slow pace of the traffic in those lanes naturally provided everyone in line with notice that the situation ahead was perilous and required extra care as traffic moved through the area. And, even without *Miranda*-like warnings earlier in the traffic funnel, by the time the defendant went rogue, went through the obstacle course of flashing cruisers, and then reached the crash scene, the defendant would have been aware of what was happening in the well-lighted scene itself, including the responder-pedestrians present therein.

The weakness of the defense arguments is betrayed by the invocation of the theory that the semitruck in Lane 4 obstructed the defendant's view to his right, including his view of Tetrick. (*See* Defense Brief, at 3, 23) The video evidence of the moments leading up to the crime, (*see* State's Ex. 1 (semitruck), 1-A (dash cam), and 1-B (body cam)), shows that the semitruck in Lane 4 was positioned on the defendant's far right as he began to enter the crash scene itself, approximately at his "3 o'clock" angle. Responder-pedestrians are visible to the left front of the defendant, attending to the rolled-over vehicle, at approximately the defendant's "11 o'clock" angle. Tetrick and another firefighter were wearing their reflective vests and were plainly visible walking across the highway, with Tetrick at approximately the defendant's "12 o'clock" angle and the second firefighter at approximately the defendant's "12:30 o'clock" angle. Other pedestrians in the area can be seen standing beside a pickup truck on the right berm. None of these persons, especially Tetrick, would have been obscured from the defendant's view by the semitruck that was in Lane 4 far to the defendant's right, and, as indicated in OPAA's merit brief, the location where Tetrick was hit was at least 15 paces

in front of the semitruck. The defense semitruck argument earns a "Four Pinocchios" rating.

Overall, the defense seeks to create what amounts to a "car involved" defense to knowingly crimes. To be sure, one can find numerous cases in which reckless driving was prosecuted as such, and, of course, the knowing standard is a higher standard than reckless. But the definition of knowing contains no "car involved" exception, and neither does the crime of felonious assault. In fact, as noted in OPAA's merit brief, a knowing crime will have indicia of recklessness too because knowingly *includes* recklessness. R.C. 2901.22(E). There is no "recklessness" defense to a knowing crime, and the all-things-considered nature of sufficiency review would reject any attempt to stereotype "car involved" crimes as merely being "reckless" crimes.

The defense seems to argue that the "targeting with car" cases set the standard for knowingly prosecutions involving a car. But a driver's targeting of the victim with a car would partake of purposely and prior calculation and design. The State need not meet either of those standards to prove that the defendant's actions with a car satisfied the lower standard of knowingly with regard to causing serious physical harm.

The defense amici professors argue against treating knowingly like an enhanced form of recklessness. However, as discussed in the Attorney General's merit brief, that is exactly how Ohio's graduated system of escalating mens rea definitions works. As stated by the Attorney General, "for the knowing standard, the accused *knows that he is likely to cause harm*, and for recklessness, he *knows there is a risk that he is likely to cause harm*. The more certain the harm, the higher the *mens rea*." (Emphasis sic) Under this gradated system, knowingly is a heightened form of recklessness as the defendant's

disregard of the substantial risk(s) increases and transitions into an awareness that the conduct will probably cause a certain result. Again, knowingly includes recklessly, and acting knowingly will have indicia of "reckless," thereby confirming that the question of knowingly versus reckless is a matter of degree, with knowingly amounting to an enhanced form of recklessness in which the indicia of recklessness have coalesced to such a degree to reach a level of awareness of probable result so as to qualify as knowingly. "It is therefore a person's perception of the likelihood of the result that is the key in differentiating between 'knowingly' and 'recklessly.' 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." *State v. Edwards*, 83 Ohio App.3d 357, 361 (10th Dist. 1992).

The existence of an element of chance in how the resulting harm actually occurred would not negate knowingly, since the definition of knowingly expressly includes an element of chance. The defendant's awareness of probable serious physical harm need only rise to the level of a *probability* to satisfy the knowingly standard. There can be a significant possibility that serious physical harm might *not* result from the defendant's conduct, and yet the defendant will still be guilty of felonious assault for having acted "knowingly." The definition of knowingly expressly takes this element of chance into account, and the existence of chance will not negate knowingly and will not relegate the offense to being a "reckless" crime alone.

The amici professors err in citing *State v. Creech*, 5 Ohio App.2d 179 (3rd Dist. 1964). They tout *Creech* as being relevant to how Ohio treated knowingly at that time. But, in fact, *Creech* reversed the defendant's second-degree murder conviction because it

required proof of *purpose* to kill, and so it is not a bellwether case as to knowingly. Moreover, the court applied a now-discarded analysis in contending that the evidence of purpose was "insufficient." The court contended that purpose to kill was only shown through circumstantial evidence and that there was a reasonable hypothesis of innocence as to whether the defendant acted purposely. This Court rejected the reasonable-hypothesis-of-innocence line of cases over thirty years ago, *see State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph one of the syllabus, and it is not part of any sufficiency-of-evidence review. Given the defendant's inconsistencies and dissembling in *Creech*, sufficiency review today would require that the evidence be construed in the light most favorable to the State and would lead to the conclusion that the defendant's varying accounts would not negate the sufficiency of the evidence otherwise supporting the view that she purposely shot the victim in the back with a sawed-off rifle.

The professors' citation to *State v. Saylor*, 6 Ohio St.2d 139 (1966), is unavailing for other reasons, being a remnant of a "guilty purpose" requirement imported into the obscenity statute by 1960's case law. It has no relevance to how knowingly is applied today, which is expressly defined as *not* requiring proof of purpose.

Finally, there is no "high probability" requirement in proving that the defendant was aware that his conduct would probably cause a certain result. The high-probability language in the third sentence of the R.C. 2901.22(B) definition addresses a subcategory of "knowingly" cases involving willful blindness, i.e., cases like drug-mule situations in which the element of knowledge relates to the existence of a fact, e.g., the presence of a drug in a vehicle, and the "mule" subjectively believes that there is a high probability of the existence of the fact and fails to make inquiry with a conscious purpose of avoiding

learning the fact. *See* discussions in *State v. McNeal*, 2009-Ohio-3888, ¶ 22-26 (8th Dist.) and *State v. Byrd*, 2018-Ohio-1069, ¶ 39 (10th Dist.).

The Ohio Jury Instructions Committee recognizes in a Comment that, in regard to the "high probability" provision, "the trial court should give the last sentence of this instruction only when knowledge of the existence of a particular fact is an element of the offense." *Ohio Jury Instructions*, CR 417.11(1), Comment. But OJI then would mistakenly apply the "high probability" language generally to the first and second sentences of the definition as to awareness of probable result and awareness of probable circumstances. *See Ohio Jury Instructions*, CR 417.11(2).

The "high probability" language of the third sentence in the definition is inapt to the awareness-of-probable-result issue because "[t]he third sentence . . . is only sometimes relevant." *State v. Gilkey*, 2019-Ohio-4417, ¶ 27 (5th Dist.). In *Gilkey*, the trial court instructed on only the first and second sentences of the knowingly definition, and the court found that the instruction was "complete" and provided a "correct statement of law" as to aggravated robbery and felonious assault.

> {¶30} We find that the instruction the trial court gave is complete pursuant to the Committee commentary. The trial court followed the language of the statute and of O.J.I., except for the third sentence which is not always pertinent. "The instructions found in Ohio Jury Instructions are not mandatory. Rather, they are recommended instructions based primarily upon case law and statutes, crafted by eminent jurists to assist trial judges with correctly and efficiently charging the jury as to the law applicable to a particular case." *State v. Martens*, 90 Ohio App.3d 338, 343, 629 N.E.2d 462 (3rd Dist.1993).
>
> {¶31} Appellant did not provide proposed jury instructions upon the element of "knowingly;" nor did he object to the proposed instruction at trial. His summary argument on

> appeal does not explain why the outcome of the trial would have been different if the argued instruction had been given. We have reviewed the questioned instruction in its entirety and in the context of the instructions as a whole, and find the trial court did not commit plain error in providing the stated instruction.
>
> {¶32} Therefore, because the trial court's instruction as to "knowingly" provided a correct statement of law and is taken almost verbatim from the Ohio Jury Instructions, the trial court did not err, let alone commit plain error, when it instructed the jury as such. . . .

Gilkey, at ¶ 30-32. Contrary to the arguments made by the defense and the amici professors, the third sentence of the knowingly definition does not impose a high-probability standard across the board in all cases, and it has no application to the part of "knowingly" pertaining to awareness of probable result as it would pertain to felonious assault.

> **Appellant's Proposition of Law III**: A violation of R.C. 2921.331, failure to comply with order or signal of police officer, does not require a verbal command from a police officer. Police vehicles with flashing blue lights blocking lanes conveys a "lawful order or direction" that drivers must stay out of the lane.

OPAA stands by its earlier arguments in support of the State's third proposition of law.

Respectfully submitted,

/s/ Steven L. Taylor
Counsel for Amicus Curiae OPAA

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on December 1, 2025, to the following counsel of record: Timothy F. Sweeney, Law Office of Timothy F. Sweeney, The 820 Building, Suite 430, 820 West Superior Ave., Cleveland, Ohio 44113, tim@timsweeneylaw.com, counsel for defendant; Michael R. Wajda, Assistant Prosecuting Attorney, The Justice Center, 1200 Ontario Street, 8th Floor, Cleveland, Ohio 44113, mwajda@prosecutor.cuyahogacounty.us, counsel for State of Ohio; Gwen E. Callender, Fraternal Order of Police of Ohio, Inc., 222 East Town Street, Columbus, Ohio 43215, gcallender@fopohio.org, counsel for Amicus Curiae Fraternal Order of Police of Ohio, Inc.; Henry A. Arnett, Livorno and Arnett Co., LPA, 1335 Dublin Road, Suite 108-B, Columbus, Ohio 43215, counsel@oapff.org, counsel for Amicus Curiae Ohio Association of Professional Fire Fighters; Mathura J. Sridharan, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, mathura.sridharan@ohioago.gov, counsel for Amicus Curiae Ohio Attorney General Dave Yost; Robert Barnhart, Capital University Law School, 303 East Broad Street, Office 514, Columbus, Ohio 43215, rbarnhart13@law.capital.edu, counsel for Amicus Curiae Certain Ohio Criminal Law Professors.

/s/ Steven L. Taylor