[Cite as *State v. Miller*, 2025-Ohio-1920.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 23CA15
	:	
v.	:	
	:	DECISION AND
Daniel Allen Miller,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Angela Miller, Jupiter, Florida, for Appellant.

Anneka P. Collins, Highland County Prosecutor, and Adam J. King, Highland County Assistant Prosecutor, Hillsboro, Ohio, for Appellee.

Smith, P.J.

{¶1} Appellant, Daniel Miller, appeals the judgment of the Highland County Court of Common Pleas convicting him of one count of felonious assault, a second-degree felony in violation of R.C. 2903.11(A)(2). On appeal, Appellant contends 1) that he was denied the effective assistance of trial counsel; 2) that he was deprived of his right to a fair trial by the admission of the details of his prior conviction for vehicular assault; 3) that the trial court violated his right to due process and a fair trial when it entered a judgment of conviction based upon insufficient evidence; and 4) that the sentencing entry erroneously states that he

was convicted of felonious assault in violation of R.C. 2903.11(A)(2) instead of R.C. 2903.11(A)(1), the charge which he was indicted on and which the jury found him guilty. Appellant has also filed a supplemental brief setting forth an additional assignment error contending that the trial court failed to provide mandatory Reagan Tokes Law notifications set forth in R.C. 2929.19(B)(2)(c) at the sentencing hearing, and also failed to include the notifications in the written sentencing entry.

{¶2} Because we find no merit to Appellant's first, second and third assignments of error, they are overruled. Thus, the jury's finding that Appellant was guilty as charged of committing felonious assault in violation of R.C. 2903.11(A)(1) is affirmed. However, because we find merit to Appellant's fourth assignment of error as well as his supplemental assignment of error, the assignments of error are sustained and this matter must be reversed and remanded to the trial court for resentencing.

FACTS

{¶3} Appellant was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(1) on February 7, 2023. The charge stemmed from an incident that occurred on December 21, 2022 at the Eagles located in Greenfield, Ohio, which involved Lonni Clouser, the victim herein. Video footage from the security camera of the Eagles indicates that Appellant and the victim were both patrons at the Eagles that night, prior to an altercation taking place. When the bartender

refused to keep serving the victim due to his level of intoxication, the victim became belligerent, causing Appellant to become involved in an attempt to get him to be quiet and/or leave. When the victim stood up from his barstool, Appellant shoved him to the ground.

{¶4} Several people became involved at that point, including another patron, Willy Highley, who was shoved by Appellant, causing him to fall into a row of barstools. Another patron, Ronald Anderson, believing his girlfriend to be in the vicinity of the scuffle, abruptly entered the action, throwing several punches at the victim and landing at least one. With the victim's back towards him while he was engaged in a struggle with Anderson, Appellant abruptly re-entered the picture, and can be seen running up to the victim, hitting him in the head from behind, and then grabbing him by the arms with both hands and throwing him down onto the concrete floor. The victim was immediately rendered unconscious and can be seen lying flat on his back on the floor with his pants halfway down. The record indicates that the victim was also bleeding from his ears.

{¶5} As a result, law enforcement was notified and responded to the scene. The victim was transported to the local emergency room, after which he was flown to Grant Medical Center in Columbus, Ohio. He was ultimately diagnosed with severe head injuries, including a skull fracture and multiple brain bleeds.

{¶6} Upon being indicted for his role in these events, Appellant pled not guilty, hired counsel to represent him, and the matter proceeded towards trial. Leading up to trial, the State filed notice of its intent to introduce evidence of Appellant's prior conviction for vehicular assault, to which Appellant later objected. Appellant, in turn, filed notice of his intent to claim he was acting in defense of another and naming five individuals he was acting to defend. Those individuals were Dorothy Leeth, the bartender, Willy Highley, a bar patron, Ronald Anderson, also a bar patron, Lora Darbyshire, presumably another bar patron, and Deborah Lyons, Anderson's girlfriend. The matter proceeded to a jury trial on June 12, 2023, however, the trial court declared a mistrial.

{¶7} The matter proceeded to trial for a second time on July 31, 2023. The State introduced nine witnesses as follows: 1) Scott Bentley, president of the Eagles; 2) Dorothy Leeth, bartender at the Eagles; 3) Dr. Sean Stiltner, emergency room treating physician; 4) Willy Highley, bar patron; 5) Amanda Bainter, bar patron; 6) Ronald Anderson, bar patron; 7) Deborah Lyons, another bar patron and Anderson's girlfriend; 8) Lonni Clouser, the victim herein; and 9) Patrolman Mark Hamilton. The testimony of these witnesses is summarized, in some cases out of order for ease of understanding.

{¶8} Dorothy Leeth testified that she was the bartender at the Eagles on the night in question and that she made the decision to stop serving the victim and

Willy Highley because they had both had enough to drink. She testified that the victim called her a bitch as a result, and told her she was not a good bartender. She left the bar area and went to call the president, Scott Bentley. When she returned, the altercation had already begun. She testified that after Appellant shoved the victim and he fell on the concrete floor, "[it] was the worst sound" she had ever heard. She described it as sounding like a baseball bat hitting something ten to twenty times over and that "it was an awful noise." She testified that the victim was lying on the ground snoring and bleeding from his ears. As a result, she called 911. She further testified that although the victim was being loud and calling her expletives, at no point did the victim lunge at her, attempt to hit her, or threaten to physically harm her.

{¶9} Scott Bentley, president of the Eagles, testified that he received a call from Leeth and arrived at the Eagles to find the victim on the floor in a puddle of blood surrounding his head. He testified that he reviewed security camera footage with Patrolman Mark Hamilton. The video footage was played for the jury. Of note, the security camera footage had no sound.

{¶10} Patrolman Mark Hamilton testified that he arrived at the scene in response to the 911 call. He arrived to find the squad already there. He testified that he spoke with several people at the scene and then went to the emergency room but was unable to speak to the victim. He found out the next day that the

victim had been flown to Grant Medical Center. He also testified that he spoke to Appellant upon responding to the Eagles that night and that Appellant told him that he had seen a scuffle going on but was not part of it. After reviewing the security footage, he discovered that Appellant was, in fact, part of the incident that occurred.

{¶11} Willy Highley also testified. He explained that he put his hands on the victim trying to calm him down and point him toward the door. He also testified that he didn't know of the victim threatening anyone and that he did not need Appellant to protect him from the victim. Amanda Bainter testified that when Appellant pushed the victim, he was the first person to put his hands on anyone that evening. She testified that she got in front of the victim to try to diffuse the situation and that she was not threatened with any physical harm. She further testified that when the victim hit the concrete floor, it made a very loud cracking sound. Deborah Lyons, bar patron and girlfriend of Ronald Anderson, also testified. She testified that she walked over after the fighting started and approached the victim to try to get him to leave. She testified that the victim never touched her or threatened her.

{¶12} Ronald Anderson also testified. He explained that he initially became involved because he thought he saw the victim push his girlfriend, Deborah Lyons. After viewing the video, he realized the victim had not touched her. He testified

that he pushed the victim first, primarily because he saw the victim push Highley into some chairs, and that he did not need Appellant's assistance that night. He testified that he and the victim were "facing off" and that the victim was never "getting the best of him" during the exchange.

{¶13} Dr. Sean Stiltner, emergency room treating physician, also testified. He explained that the victim arrived confused, belligerent, intoxicated, and bleeding from his ears. He testified that testing revealed that the victim sustained a skull fracture, a subdural hematoma, a hemorrhagic contusion along the frontal lobe, and a subarachnoid hemorrhage anterior to the right frontal lobe. He testified that seizures and memory loss can be side effects of those injuries. The victim, Lonni Clouser, also testified. He testified that he had no memory of the events that occurred that evening, other than waking up in Grant Hospital, where he stayed two or three days. He testified that after being discharged, he had to return to the hospital a week later. He further testified that he has suffered long term effects from his injuries, including seizures, dizziness, and memory loss. He also testified that as a result of his injuries he has attended therapy, sees a neurologist, and takes medication.

{¶14} After the State rested, Appellant made a Crim.R. 29(A) motion for acquittal, which was denied by the trial court. After denying the motion for acquittal, the trial court further informed counsel that it would only provide

Appellant's requested defense of another instruction as to Ronald Anderson, reasoning that there was insufficient evidence to support an instruction related to the other four bar patrons identified in Appellant's pre-trial notice. The trial court's reasoning for this denial is set forth in more detail in our analysis of Appellant's first assignment of error below.

{¶15} Thereafter, Appellant testified on his own behalf. He testified as he was reviewing the security camera video, explaining his version of the events that evening. He testified that after Leeth cut the victim off, the victim and Highley were arguing. He testified that the victim told Highley, who was older and smaller, that he was going to "whip his ass," and as a result, he got between the two men. He further testified that he felt threatened by the victim when the victim was standing with his hands up, stating that "I didn't feel very comfortable, I mean he had both hands up in the air and he had his hands to me, had his hands up in the air like this, he was squeezing the cell phone like that, and at any moment he could come down and hit." When asked why he shoved the victim, he testified that he felt threatened by the victim and "repelled him away." He stated he was surprised the victim fell down because he was a big guy, describing him as being 250 pounds.

{¶16} Appellant further testified that while watching the victim engage with Anderson, he was thinking that the victim needed "to be stopped." He explained

that he had enough and walked over and "shoved [the victim] from the back" and then "pushed him forward." He testified that after Anderson hit him, he "grabbed" the victim with an intention to "put him on the ground." He stated "I mean, everything happened he just needed to be stopped so he wouldn't hurt somebody." He further explained that after he knocked the victim to the ground, he walked over and "smacked" him to try to wake him up, explaining he had been taught to do that in the military. Appellant's prior conviction for vehicular assault was introduced into evidence during cross-examination. Of importance, Appellant conceded on cross-examination to the State's description of the events that Appellant grabbed the victim by the arms and slammed him to the ground. Once Appellant's testimony was concluded, the trial court overruled Appellant's renewed Crim.R. 29(A) motion for acquittal.

{¶17} The jury ultimately rendered its verdict finding Appellant guilty of felonious assault in violation of R.C. 2903.11(A)(1), as charged in the indictment. The trial court proceeded to sentence Appellant immediately thereafter, imposing a minimum prison term of five years and a maximum prison term of seven and one-half years. The judgment entry issued by the trial court stated that Appellant had been convicted of felonious assault in violation of R.C. 2903.11(A)(2). It is from that entry that Appellant now brings his appeal, setting forth four assignments of error, as well as a supplemental assignment of error.

ASSIGNMENTS OF ERROR

I. APPELLANT MILLER WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN HIS ATTORNEY FAILED TO: 1) OBJECT TO THE INCOMPLETE INSTRUCTION GIVEN ON THE DEFENSE OF OTHERS; OR 2) REQUEST A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF ASSAULT.

II. APPELLANT MILLER WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL BY THE ADMISSION OF THE DETAILS OF HIS PRIOR CONVICTION FOR VEHICULAR ASSAULT.

III. THE TRIAL COURT VIOLATED APPELLANT MILLER'S RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED A JUDGMENT OF CONVICTION BASED ON INSUFFICIENT EVIDENCE.

IV. APPELLANT MILLER'S SENTENCING ENTRY ERRONEOUSLY STATES THAT HE WAS CONVICTED OF FELONIOUS ASSAULT IN VIOLATION OF R.C. 2903.11 (A)(2). MILLER'S CASE MUST BE REMANDED TO THE RIAL [SIC] COURT TO CORRECT THIS ERROR.

SUPPLEMENTAL ASSIGNMENT OF ERROR

I. THE TRIAL COURT FAILED TO PROVIDE MANDATORY REAGAN TOKES LAW NOTIFICATIONS SET FORTH IN R.C. 2929.19(B)(2)(c) AT THE SENTENCING HEARING AND FAILED TO INCLUDE THEM IN THE WRITTEN SENTENCING ENTRY.

ASSIGNMENT OF ERROR I

{¶18} In his first assignment of error, Appellant contends that his trial counsel was ineffective by virtue of his failure to object to the incomplete instruction given on his defense of another defense. More specifically, Appellant argues that the trial court's decision to limit the defense of another instruction to Ronnie Anderson and exclude the defense as to the other four bar patrons seriously undermined his defense. He argues there was no strategic basis for his trial counsel to fail to object to the trial court's decision. He also contends that he received ineffective assistance of counsel as a result of his trial counsel's failure to request a jury instruction on the lesser included offense of assault. He argues that the evidence in the case "could reasonably support a conviction for either felonious assault or assault," and therefore that his trial counsel provided ineffective assistance when he failed to request a jury instruction on the lesser included offense of assault.

{¶19} The State responds by arguing that based upon the evidence presented, the trial court properly limited the defense of others instruction to Ronnie Anderson and that trial counsel was not ineffective for failing to object to the instruction provided by the court. The State further argues that the evidence presented at trial did not support an acquittal on the felonious assault charge and

therefore Appellant's trial counsel did not provide ineffective assistance by failing to request an instruction on the lesser included offense of assault.

Standard of Review

{¶20} "To prevail on an ineffective assistance claim, a defendant must show: '(1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different.' " *State v. Dixon*, 2022-Ohio-4454, ¶ 46 (4th Dist.), quoting *State v. Short*, 2011-Ohio-3641, ¶ 113, in turn citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984). Failure to satisfy either part of the test is fatal to the claim. *See Strickland* at 697. The defendant "has the burden of proof because in Ohio, a properly licensed attorney is presumed competent." *State v. Gondor*, 2006-Ohio-6679, ¶ 62. We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955); *State v. Moore*, 2021-Ohio-4414, ¶ 12 (4th Dist.).

{¶21} " 'Upon direct appeal, appellate courts generally review claims of ineffective assistance of counsel on a de novo basis, simply because the issue

originates at the appellate level; no trial court has ruled on the issue.' " *State v. Pleasant*, 2025-Ohio-115, ¶ 88 (4th Dist.), quoting *State v. Gondor, supra*, at ¶ 53. " 'Appellate courts review the trial record and are left to judge from the bare record whether the assistance was effective.' " *Id.*

Defense of Another

{¶22} As set forth above, Appellant first argues that his trial counsel was ineffective for failing to object to the trial court's decision to limit the defense of another instruction to only Ronald Anderson, when Appellant had provided notice that he intended the defense to apply to five bar patrons, not just Anderson. A trial court has a duty to provide the jury with full and complete instructions, and we review a trial court's refusal to give a requested jury instruction under an abuse of discretion standard:

> A trial court generally has broad discretion in deciding how to fashion jury instructions. However, "a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." "Additionally, a trial court may not omit a requested instruction, if such instruction is 'a correct, pertinent statement of the law and [is] appropriate to the facts * * *.' " "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case."

(Citations omitted.) *State v. Kelly*, 2021-Ohio-2007, ¶ 13 (4th Dist.), quoting *State v. Jones*, 2018-Ohio-239, ¶ 10 (4th Dist.).

" 'An abuse of discretion connotes more than a mere error of judgment; it implies that the court's attitude is arbitrary, unreasonable, or unconscionable.' " *Id.* at ¶ 14, quoting *State v. Ables*, 2012-Ohio-3377, ¶ 9 (4th Dist.), in turn citing *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶23} R.C. 2901.05(B)(1) states:

> A person is allowed to act in self-defense, defense of another, or defense of that person's residence. If, at the trial of a person who is accused of an offense that involved the person's use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense, defense of another, or defense of that person's residence, the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense, defense of another, or defense of that person's residence, as the case may be.

This statute, as amended in 2019, shifts the burden of proof on the affirmative defense of self-defense from the defendant to the prosecution, provided that "there is evidence presented that tends to support that the accused person used the force in self-defense, defense of another, or defense of that person's residence." R.C. 2901.05(B)(1); *See State v. Tolle*, 2020-Ohio-935, ¶ 18 (4th Dist.).

{¶24} " 'In determining whether to give a requested jury instruction, a trial court may inquire into the sufficiency of the evidence to support the requested instruction.' " *Tolle* at ¶ 20, quoting *State v. Hamilton*, 2011-Ohio-2783, ¶ 70 (4th Dist.). A trial court is therefore vested with discretion "to determine whether the evidence is sufficient to require a jury instruction." *State v. Mitts*, 81 Ohio St.3d

223, 228 (1998); *see also State v. Wolons*, 44 Ohio St.3d 64 (1989), paragraph two of the syllabus. "When determining whether evidence is sufficient, a trial court must consider only the adequacy of the evidence presented—not its persuasiveness * * *." (Citations omitted.) *State v. Palmer*, 2024-Ohio-539, ¶ 21. "The question is not whether the evidence should be believed but whether the evidence, if believed, could convince a trier of fact, beyond a reasonable doubt, that the defendant was acting in self-defense." *Id.* "Evidence is sufficient where a reasonable doubt of guilt has arisen based upon a claim of self-defense." *State v. Melchior*, 56 Ohio St.2d 15, 20 (1978). "If the evidence generates only a mere speculation or possible doubt, such evidence is insufficient to raise the affirmative defense, and submission of the issue to the jury will be unwarranted." *Id.* Thus, "[a]s a matter of law the trial court cannot give a jury instruction on an affirmative defense if a defendant fails to meet this burden." *State v. Schwendeman*, 2018-Ohio-240, ¶ 19 (4th Dist.).

{¶25} As set forth in *Tolle, supra*:

> "To establish self-defense, a defendant must prove the following elements: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger."

Tolle at ¶ 25, quoting *State v. Barnes*, 94 Ohio St.3d 21, 24 (2002), in turn citing *State v. Robbins*, 58 Ohio St.2d 74 (1979), paragraph two of the syllabus. "Furthermore, the degree of force used by a defendant must be 'warranted under the circumstances' and 'proportionate to the perceived threat.' " *State v. Bundy*, 2012-Ohio-3934, ¶ 55 (4th Dist.), quoting *State v. Palmer*, 80 Ohio St.3d 543, 564, (1997). *See also State v. Paskins*, 2022-Ohio-4024, ¶ 50 (5th Dist.).

{¶26} This Court has observed as follows regarding the defense of another defense, which is at issue in the present case:

> "Defense of another is a variation of self-defense. Under certain circumstances, one may employ appropriate force to defend another individual against an assault. However, 'one who intervenes to help a stranger stands in the shoes of the person whom he is aiding, and if the person aided is the one at fault, then the intervenor is not justified in his use of force and is guilty of an assault.' * * * Therefore, one who claims the lawful right to act in defense of another must meet the criteria for the affirmative defense of self-defense."

State v. Dixon, 2022-Ohio-4454, ¶ 35 (4th Dist.), quoting *State v. Belcher*, 2013-Ohio-1234, ¶ 35 (2d Dist.), in turn quoting *State v. Moss*, 2006-Ohio-1647, ¶ 13 (10th Dist.); *State v. Wenger*, 58 Ohio St.2d 336, 340 (1979).

Thus, in order for Appellant to have acted in defense of Dorothy Leeth, Willie Highley, Lora Darbyshire, and Deborah Lyons, the evidence must have shown: (1) that they were not at fault in creating the violent situation that gave rise to the affray, (2) that they had a bona fide belief that they were in imminent danger of

death or great bodily harm and that their only means of escape was the use of force, and (3) that they did not violate any duty to retreat or avoid the danger. *See State v. Blevins*, 2019-Ohio-2744, ¶ 75 (4th Dist.).

Legal Analysis

{¶27} As set forth above, the jury was instructed on defense of another as to Ronald Anderson. Therefore, this analysis is limited to whether Appellant was entitled to an instruction as to the other four bar patrons and in turn, whether trial counsel was ineffective for failing to object to the trial court's decision to limit the instruction to Anderson. Based on our de novo review of the witnesses' testimony, along with our review of the video of the incident, we find insufficient evidence to warrant a defense of another jury instruction as to the other four bar patrons. Thus, based upon the following reasoning, we cannot find that the trial court abused its discretion when it declined the request to give a defense of another instruction as to the other individuals, or that trial counsel provided ineffective assistance by failing to object to the trial court's ruling.

{¶28} Appellant was entitled to a defense of another jury instruction as to the other four patrons if he presented legally sufficient evidence for every element of that claim. *State v. Palmer*, 2024-Ohio-539, at ¶ 19. The trial court was vested with discretion to determine whether the evidence was sufficient to require a jury instruction. Here, we believe that Appellant has failed to establish sufficient

qualitative evidence that the other four bar patrons had a bona fide belief that they were in imminent danger of death or great bodily harm and that their only means of escape was the use of force. *See State v. Underwood*, 2024-Ohio-2273, ¶ 36-44 (4th Dist.). We conclude the evidence, if believed, could not convince a trier of fact, beyond a reasonable doubt, that Appellant was acting in defense of another. *State v. Wilson*, 2024-Ohio-776, ¶ 25.

{¶29} The video of the incident demonstrates that each of the other four bar patrons consistently tried to diffuse the situation by approaching the victim and repeatedly putting their hands on him in an attempt to calm him down and push him backwards either toward the door or away from Appellant. For instance, this is what Willy Highley was doing, which resulted in the victim pushing him back and causing him to fall into a row of barstools. The women in the video did not appear to be threatened by the victim, who was clearly impaired, staggering at times, adjusting his glasses, and trying to keep his pants from falling down. Further, Dorothy Leeth and Deborah Lyons testified at trial and neither of them testified that the victim had threatened them. For example, Deborah Lyons was sitting on the complete opposite end of the bar when the incident began. She testified that she walked over from the other end of the bar to try to get the victim to leave. She further testified that she was never touched or threatened by the victim.

{¶30} In summary, a review of the video demonstrates that the victim, although he may have been mouthy, put his hands up in a non-threatening manner at the very beginning of the incident. Despite this, Appellant shoved him to the ground. From that point on, the victim was apparently verbally arguing with all involved, but he was staggering, unsteady on his feet, trying to adjust his glasses, and trying to hold his pants up. We cannot conclude that these facts were sufficient to require a defense of another instruction as to Leeth, Lyons, Darbyshire, and Highly.[1]

{¶31} Although a de novo review is required because Appellant argues he received ineffective assistance of counsel as a result of his counsel's failure to object to the trial court's decision to limit the defense of another instruction, we believe it is useful to consider the trial court's reasoning in limiting the instruction to begin with, which was a matter within the court's discretion. The trial court stated as follows in deciding to limit the instruction:

> I will note that the initial aggressor in this whole thing was actually Mr. Miller, according to the video, he is the one that did the first pushing. And then set in motion this chain reaction. Now as I indicated before, and I was going to instruct, Mr. Anderson is the only one in the court's view that could possibly have been found to be thought to be defended, although it's a question he was also, appears to be from the video, he was an aggressor and that his girlfriend was out of the situation and he felt that there was still something going on and he said I believe today that he now knows that is not correct. The question

[1] Darbyshire did not testify at trial.

> whether or not there is an honest belief, that is up to the jury, it's not up to the Court.
>
> So, the instruction the Court is going to give on self defense will only include Mr. Anderson who is the person who is possible in need of [sic], because that is where the focus was, it's not on anyone else in the bar. So, those other folks are not going to be a part of the instructions. So, the Court feels it is a jury issue as to that part of the evening and will allow it to go to the jury on that basis.

{¶32} Defense counsel filed a notice of Appellant's intent to claim defense of another as to five individuals. His arguments to the court and his trial strategy evidenced an intent to demonstrate that all five individuals required defending and that Appellant was justified in using force to protect them. However, Appellant presented no evidence that a reasonable person, under the same circumstances and with the same subjective beliefs and faculties, would have a bona fide belief that the other bar patrons were in imminent danger of death or great bodily harm and that their only means of escape was the use of force. *See State v. Farmer*, 2024-Ohio-6063, ¶ 55 (4th Dist.). Thus, because the evidence presented at trial did not warrant a defense of another jury instruction as to the other four bar patrons, the trial court properly exercised its discretion to disallow the requested instruction; therefore, trial counsel was not deficient for failing to object to the trial court's decision.

{¶33} Furthermore, the trial court made its reasoning clear and further made clear that its reasoning was final. Therefore, any objection made by defense

counsel likely would have been futile. " 'The law does not require counsel to take a futile act.' " *State v. Ludwick*, 2022-Ohio-2609, ¶ 46 (4th Dist.), quoting *State v. Conant*, 2020-Ohio-4319, ¶ 30 (4th Dist.). Importantly, the failure to perform a futile act does not support a claim of ineffective assistance of counsel. *State v. Black*, 2013-Ohio-2105, ¶ 37 (4th Dist.).

{¶34} In light of the foregoing, we cannot find that trial counsel's performance was deficient. Thus, because we cannot find one of the necessary *Strickland* prongs, we cannot find that trial counsel provided ineffective assistance for failing to object to the trial court's decision limiting the defense of another instruction to Ronald Anderson only.

Lesser Included Offense

{¶35} Appellant next argues that he received ineffective assistance of counsel by virtue of his trial counsel's failure to request a jury instruction on the lesser included offense of assault. The State contends, however, that the evidence presented at trial did not support an acquittal on the charge of felonious assault, arguing that the evidence regarding Appellant's actions demonstrated that he acted knowingly, not merely recklessly. We apply the same standard of review for ineffective assistance of counsel claims as set forth above. We also apply the same principles related to a trial court's duty to provide accurate and complete jury instructions.

Legal Analysis

{¶36} Appellant was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(1), which states that no person shall knowingly cause serious physical harm to another or to another's unborn. R.C. 2901.22(B) defines the mental state of knowingly as follows:

> 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. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

R.C. 2903.13 governs assault and provides in section (B) that "No person shall recklessly cause serious physical harm to another or to another's unborn." R.C. 2901.22(C) states:

> A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

{¶37} Thus, the difference in the two offenses is that a mens rea of knowingly is required for the commission of felonious assault, while a mens rea of recklessly is required for the commission of assault. Appellant argues his trial

counsel provided ineffective assistance by not requesting a lesser included offense instruction based upon an argument that a reasonable jury could have acquitted him of felonious assault. He argues it is not clear that he was aware that shoving the victim down "would certainly or likely result in the type of significant injury which occurred." He further argues that "shoving" the victim after the victim had already been punched and knocked into the juke box by Anderson "appears to be more like a reckless act."

{¶38} "When the indictment * * * charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense." R.C. 2945.74; *see also* Crim.R. 31(C). Various appellate districts, including this district, have held that assault, which is governed by R.C. 2903.13, is a lesser included offense of felonious assault, which is governed by R.C. 2903.11. *See State v. Blanton*, 2018-Ohio-1278 (4th Dist.), ¶ 65; *State v. Rogers*, 1993 WL 58590 (8th Dist. Mar. 4, 1993); *State v. Hunter*, 2005-Ohio-443 (2d Dist.); *State v. Brundage*, 2004-Ohio-6436, ¶ 15 (1st Dist.); *State v. Cartagena*, 2002-Ohio-7355, ¶ 30 (10th Dist.). However, a failure to request an instruction on a lesser included offense is generally a matter of trial strategy. *See State v. Clark*, 2004-Ohio-3843, ¶ 15 (4th Dist.).

{¶39} As was the situation in *Clark*, from the opening statement and through the closing arguments, defense counsel sought to demonstrate that Appellant had acted in defense of others. *Id.* It seems clear that in this case, defense counsel was seeking a full acquittal. This Court has previously observed that while a trial court has a duty to include instructions on a lesser included offense when appropriate, a defendant is "entitled to make the tactical decision not to request an instruction on lesser included offenses in hopes of winning an acquittal * * *." *State v. Murphy*, 2008-Ohio-1744, ¶ 35 (4th Dist.). *See also State v. Delawder*, 2012-Ohio-1923, ¶ 25 (4th Dist.). In *Murphy*, we determined that trial counsel pursued an "all or nothing" defense, "seeking an outright acquittal and denying the jury the opportunity to find him guilty of another crime." *Id.* at ¶ 42. We further observed that appellate courts ordinarily refrain from second-guessing such strategic decisions, " 'even where counsel's trial strategy was questionable.' " *Id.*, quoting *State v. Myers*, 2002-Ohio-6658, ¶ 152.

{¶40} Appellant also argues that the failure to request a lesser included offense instruction was prejudicial considering the difference in punishments between felonious assault, which carries a maximum prison term of eight years, versus assault, which carries a maximum term of six months. Indeed, the punishments for these two offenses are quite different. However, this Court has previously held that a difference in punishments of six months in prison versus five

years in prison "was not so great that it rendered trial counsel's assistance ineffective as a matter of law." *State v. Clark, supra*, at ¶ 16 (drawing a distinction with *State v. Black*, 124 Ohio App.3d 419 (1st. Dist. 1997) where trial counsel was deemed to have provided ineffective assistance when the difference in punishments was a minor misdemeanor requiring payment of a small fine versus a third-degree felony carrying a maximum of ten years' imprisonment and a $5000 fine). We find the facts in the present case to be analogous to the facts in *Clark, supra*, which leads us to the conclusion that the punishments at issue in the present case were not so great that the failure to request a lesser included offense instruction rendered trial counsel ineffective as a matter of law. *Clark* at ¶ 16.

{¶41} As set forth above, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland*, *supra*, at 689, quoting *Michel v. Louisiana*, *supra*, at 101; *see also State v. Moore*, *supra*, at ¶ 12 (4th Dist.). We cannot conclude that Appellant has overcome that presumption here. Accordingly, because we find no merit to the arguments raised under Appellant's first assignment of error, it is overruled.

ASSIGNMENT OF ERROR II

{¶42} In his second assignment of error, Appellant contends that he was deprived of a fair trial by the admission of the details of his prior conviction for vehicular assault. More specifically, he argues that the trial court erred by overruling defense counsel's objection and further erred in failing to instruct the jury to disregard the State's prejudicial line of questioning regarding his prior conviction. The State, however, contends that Appellant's prior conviction was introduced solely for impeachment purposes and that Appellant was not prejudiced by the State's line of questioning.

Standard of Review

{¶43} " ' "A trial court has broad discretion in the admission or exclusion of evidence and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice to defendant." ' " *State v. White*, 2019-Ohio-4562, ¶ 35 (4th Dist.), quoting *State v. Blair*, 2016-Ohio-2872, ¶ 67 (4th Dist.), in turn quoting *State v. Richardson*, 2015-Ohio-4708, ¶ 62 (4th Dist.). " 'An abuse of discretion connotes more than a mere error of judgment; it implies that the court's attitude is arbitrary, unreasonable, or unconscionable.' " *State v. Kelly*, *supra*, at ¶ 14, quoting *State v. Ables*, *supra*, ¶ 9 (4th Dist.), in turn citing *State v. Adams*, *supra*, at 157.

Legal Analysis

{¶44} When an accused testifies at trial, Evid.R. 609(A)(2) allows the State to impeach the accused's credibility in certain situations, as follows:

> (A) General Rule. For the purpose of attacking the credibility of a witness:
>
> * * *
>
> (2) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

Additionally, Evid.R. 609(B) further places a time limit on the convictions that may be used for impeachment purposes:

> (B) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, or the termination of community control sanctions, post-release control, or probation, shock probation, parole, or shock parole imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

{¶45} "Consequently, a trial court must consider the prejudicial effect of prior offense impeachment evidence even when such evidence may be properly

presented to the jury. Evid.R. 609(A)(2)." *State v. Stodgel*, 2024-Ohio-5182, ¶ 50 (4th Dist.). As explained in *Stodgel*:

> Furthermore, the risk of unfair prejudice is greater when the prior conviction is for the same crime with which a defendant is presently charged. The natural tendency of prior conviction evidence in this situation is to instill in the jurors' minds the idea that " 'if he did it before, he probably did it this time.' " *State v. Goney*, 87 Ohio App.3d 497, 502, 622 N.E.2d 688 (2nd Dist.1993), quoting *Gordon v. United States*, 383 F.2d 936, 940 (C.A.D.C. 1967). Therefore, " 'those convictions which are for the same crime should be admitted sparingly.' " *Id*.

Id.

{¶46} Here, Appellant's prior conviction clearly falls within the guidelines of Evid.R. 609. The questions asked on the State's cross-examination of Appellant revealed the fact of the conviction, the nature of the conviction, the timeframe of of imprisonment and subsequent probation. The pre-trial notice of intent to introduce evidence of the prior conviction filed by the State as well as the responding motion to exclude evidence by the defense further establishes that Appellant's trial counsel anticipated the conviction would be admissible if Appellant were to testify.

{¶47} Appellant essentially argues that the trial court should have sustained his objection to the State's line of questioning that extended beyond the name of the crime and time and place of conviction. *See State v. Topping*, 2012-Ohio-5617, ¶ 51 (4th Dist.), quoting 1 Giannelli & Snyder, Evidence (2d Ed.2001) 473,

Section 609.15 ("Under Evid.R. 609(A)(2), a prosecutor can cross-examine as to 'the name of the crime, the time and place of conviction, and sometimes the punishment' "). *See also State v. Kessinger*, 2014-Ohio-2496, ¶ 51 (4th Dist.). More specifically, Appellant argues that the State's line of questioning improperly sought to establish that his prior conviction for vehicular assault involved a bar fight, and as a result was not being introduced for purposes of impeachment, but rather to show criminal propensity and action in conformity therewith.

{¶48} A review of the record before us reveals that the State asked four questions in order to establish that 1) Appellant had a prior conviction; 2) that it occurred in 2009; 3) that he was not released from probation until 2014; and 4) that his conviction was for vehicular assault as a result of hitting two people. The State then asked Appellant whether the offense occurred after a bar fight to which Appellant responded "[i]t wasn't a bar fight, it was outside." Defense counsel immediately objected.

{¶49} Although the trial court overruled the objection, it stated "that's as far as this needs to go." No more questions were asked related to the prior conviction and it was never mentioned again by the State. We agree with Appellant that the State's final question was improper and went beyond the parameters of what Evid.R. 609 permits. However, the question was immediately objected to and the trial court shut down any further questioning.

{¶50} Further, although the trial court did not order that the question be stricken or instruct the jury to disregard Appellant's answer, defense counsel did not request an instruction. This likely was a matter of trial strategy and an attempt to limit any further attention to the State's question. Nonetheless, when the trial court provided the instructions to the jury, it did provide the following limiting instruction regarding the admission of Appellant's prior conviction:

> Evidence was received that the defendant was convicted of vehicular assault, that evidence received [sic] only for a limited purpose. It was not received, and you may not consider it to prove the character of the defendant or to show he acted in conformity with that character. If you find the defendant was convicted of vehicular assault you may consider that evidence only for the purpose of testing the defendant's credibility, and the weight given to the defendant' testimony can not be considered for any other purpose.

Importantly, "[c]ourts have long held that juries are presumed to follow limiting, or curative, instructions." *State v. Mockbee*, 2013-Ohio-5504, ¶ 49 (4th Dist.); citing *State v. Martin*, 2005-Ohio-4059, ¶ 17 (4th Dist.); *State v. Wasmer*, 1994 WL 90400 (4th Dist. Mar. 16, 1994).

{¶51} Based upon the record before us, we find no abuse of discretion in the manner in which the trial court handled the introduction of Appellant's prior conviction. Contrary to Appellant's argument that it was improperly introduced in order to show criminal propensity, we find that the fact of the conviction as well as the general nature of the conviction, and the timeframe of the punishment was

properly admitted in accordance with the parameters set forth in Evid.R. 609(A) and (B). Accordingly, because we find no merit to the arguments raised under this assignment of error, it is overruled.

ASSIGNMENT OF ERROR III

{¶52} In his third assignment of error, Appellant contends that the trial court violated his right to due process and a fair trial when it entered a judgment of conviction based on insufficient evidence. Appellant argues that he did not knowingly cause serious harm to the victim, but rather that he was reckless in causing serious harm to the victim. More specifically, he argues that shoving the victim down after he had just been knocked into a jukebox as a result of being punched by Anderson did not constitute knowingly causing serious physical harm. The State contends, however, that any rational trier of fact could find that Appellant knowingly caused serious physical harm based upon the evidence introduced at trial.

Standard of Review

{¶53} "When a court reviews the record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Maxwell*, 2014-Ohio-1019, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the

syllabus; following *Jackson v. Virginia*, 443 U.S. 307 (1979); *State v. Torres*, 2023-Ohio-1406, ¶ 44 (4th Dist.); *State v. Bennington*, 2019-Ohio-4386, ¶ 11 (4th Dist.).

{¶54} An appellate court must construe the evidence in a "light most favorable to the prosecution." *State v. Hill*, 75 Ohio St.3d 195, 205 (1996); *State v. Grant*, 67 Ohio St.3d 465, 477 (1993); *Torres* at ¶ 45. Further, "[t]he court must defer to the trier of fact on questions of credibility and the weight assigned to the evidence." *State v. Dillard*, 2014-Ohio-4974, ¶ 22 (4th Dist.), citing *State v. Kirkland*, 2014-Ohio-1966, ¶ 132; *State v. Lodwick*, 2018-Ohio-3710, ¶ 9 (4th Dist.). Thus, "a reviewing court is not to assess 'whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.' " *State v. Davis*, 2013-Ohio-1504, ¶ 12 (4th Dist.), quoting *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997) (Cook, J., concurring). Rather, a reviewing court will not overturn a conviction on a sufficiency of the evidence claim unless reasonable minds could not reach the conclusion that the trier of fact did. *State v. Tibbetts*, 92 Ohio St.3d 146, 162 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

Legal Analysis

{¶55} Appellant was indicted for felonious assault, a violation of R.C. 2903.11(A)(1) and was found guilty by a jury of that charge.[2] R.C. 2903.11(A)(1) states that no person shall knowingly cause serious physical harm to another or to another's unborn. Here, because Appellant claimed his actions were permitted in the defense of others, in addition to the elements set forth in R.C. 2903.11(A)(1), the State also had to prove beyond a reasonable doubt that the Appellant did not use the force in defense of another, in accordance with R.C. 2901.05(B)(1). As explained above, R.C. 2901.05(B)(1), which was amended in 2019, shifts the burden of proof on the affirmative defense of defense of another from the defendant to the prosecution, provided that " 'there is evidence presented that tends to support that the accused person used the force in * * * defense of another * * *.' " *State v. Farmer*, *supra*, at ¶ 48 (4th Dist.), quoting *State v. Tolle*, *supra*, at ¶ 18 (4th Dist.), in turn citing R.C. 2901.05(B)(1).

{¶56} As set forth above, R.C. 2901.22(B) defines the mental state of knowingly as follows:

> 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. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence

[2] The judgment entry issued by the trial court erroneously states that Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(2). We address this error in our disposition of Appellant's fourth assignment of error.

> of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

Appellant contends that he did not act knowingly in causing serious physical harm to the victim, but instead acted recklessly in doing so. As set forth above, R.C. 2901.22(C) defines the mental state of recklessly as follows:

> A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

{¶57} As Appellant's argument only challenges the jury's finding as to the required state of mind for the offense, we limit our review to that question. The State presented the testimony of several witnesses at trial who were eyewitnesses to the events that occurred. For instance, Dorothy Leeth was the bartender who cut the victim off that evening. She testified that after Appellant "shoved" the victim, he fell and cracked his head on the concrete. She testified that "[i]t was the worst sound I ever heard[,]" describing it as sounding like 10 to 20 times the sound of a baseball bat hitting something. Amanda Bainter also testified at trial. She testified that she got in front of the victim to try to diffuse the situation and that when the victim hit the floor, she heard a very loud, cracking sound.

{¶58} Appellant also testified in his own defense at trial. He testified that when the altercation first started and he shoved the victim down, he was surprised the victim fell down considering his size, stating "I didn't think he would go down like that. I mean its hard to move 250 pounds." Appellant further testified regarding his thoughts after the incident had escalated and Ronnie Anderson had entered the picture, stating as follows:

> My intention was to put him on the ground, I mean everything happened he just needed to be stopped so he wouldn't hurt anybody.
>
> * * *
>
> And then once everything broke out I just had enough, I wanted him done, I didn't want to see Ronnie get hurt or any of the females that was trying to intervene and was trying to get him to leave.

On cross examination, Appellant conceded that he, like the victim, was trained in the military and had been trained to cause injury with his hands. Further, when asked by the prosecution if the video demonstrated Appellant grabbing the victim by the arms and slamming him to the ground, Appellant affirmed that it did.

{¶59} On re-direct Appellant reaffirmed his desire that he "wanted Lonni to be done, I wanted him stopped, I didn't want him to hurt anybody else in that vicinity or possibly just hurt them in general." However, none of the other witnesses testified that the victim had threatened them, or that they felt threatened by the victim. Anderson testified that at no point during his face-off with the

victim was the victim getting the better of him. Further, the video of the incident shows all of the other bar patrons essentially inserting themselves into the initial altercation that began between Appellant and the victim by approaching the victim, putting their hands on him and generally trying to guide him backwards toward the exit. All the while, the victim appears to be staggering, trying to adjust his glasses, and trying to hold his pants up.

{¶60} " ' "It is a fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts." ' " *State v. Underwood*, 2024-Ohio-2273, ¶ 84 (4th Dist.), quoting *State v. Johnson*, 2014-Ohio-4443, ¶ 18 (4th Dist.), in turn quoting *State v. Conway*, 2006-Ohio-791, ¶ 143. "[T]he jury, unable to enter the mind of another, is required to consider common sense, causal probabilities in considering whether the defendant acted 'knowingly.' " *State v. Kelly*, 2012-Ohio-523, ¶ 23 (11th Dist.). Here, it is clear from the video evidence that Appellant set the events of that night in motion by initially shoving the victim to the ground while he was standing with his hands up. Chaos ensued, with several people trying to intervene in an effort to get the victim to leave the premises before there was more trouble. Not only did Appellant's action in initially shoving the victim to the ground start the melee, his actions in hitting the victim in the back of the head and then violently throwing him to the ground ended the melee, resulting in the victim lying unconscious on the ground,

with his pants down, bleeding from his ears, and ultimately sustaining a skull fracture and several brain bleeds that resulted in hospitalization and lasting injuries, including seizures and memory loss.

{¶61} Appellant's description that the he merely pushed or shoved the victim to ground while he was engaging in a fist fight with Anderson is not supported by the video evidence, which clearly depicts Appellant grabbing the victim with both hands and throwing him onto the concrete floor, which immediately rendered him unconscious. Based upon the video evidence alone, the jury could have reasonably inferred that Appellant knowingly caused serious physical harm to the victim, not that he did so in a reckless manner. Further, Appellant himself testified that he was surprised that simply pushing or shoving the victim caused the victim to fall to the ground when the altercation first began. This initial encounter with the victim put Appellant on notice of the victim's physical condition on the night of the incident. Thus, Appellant certainly knew that the victim would not be able withstand being grabbed by both hands and violently being thrown to the concrete floor.

{¶62} In light of the foregoing, we conclude that after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime of felonious assault in violation of R.C. 2903.11(A)(1) proven beyond a reasonable doubt. In so concluding, we

specifically find that the evidence adduced at trial constitutes sufficient evidence of Appellant's knowledge in committing the offense of felonious assault. Accordingly, we find no merit to Appellant's third assignment of error and it is overruled.

ASSIGNMENT OF ERROR IV

{¶63} In his fourth assignment of error, Appellant contends that his sentencing entry erroneously states that he was convicted of felonious assault in violation of R.C. 2903.11(A)(2), rather than R.C. 2903.11(A)(1). Appellant argues that the matter must be remanded to the trial court in order for the trial court to issue a nunc pro tunc order correcting this mistake and that Crim.R. 36 permits this action. The State concedes this error and agrees that the matter must be remanded in order to be corrected via issuance of a nunc pro tunc entry.

{¶64} This Court has previously observed that trial courts retain jurisdiction to correct clerical errors through the issuance of nunc pro tunc orders in order to ensure that entries reflect what the court actually decided. *State v. Walker*, 2021-Ohio-4489, ¶ 28; *State ex rel. Cruzado v. Zaleski*, 2006-Ohio-5795, ¶ 19; *see also* Crim.R. 36 ("Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time"). Here, as agreed by the parties, Miller was charged with felonious assault in violation of R.C. 2903.11(A)(1) and was found guilty by the

jury of that charge. The provision in the sentencing entry convicting him of a violation of R.C. 2903.11(A)(2) appears to be a clerical error.

{¶65} While such an error would ordinarily result in this Court remanding the matter for correction of the clerical error, because our disposition of Appellant's supplemental assignment of error requires a reversal and remand for a new sentencing hearing to be held, the trial court can simply correct this error when it issues a new sentencing entry. Accordingly, this assignment of error has merit and is sustained, but will be remedied on remand in accordance with our disposition of Appellant's supplemental assignment of error.

SUPPLEMENTAL ASSIGNMENT OF ERROR

{¶66} In his supplemental assignment of error, Appellant contends that the trial court failed to provide the mandatory Reagan Tokes Law notifications set forth in R.C. 2929.19(B)(2)(c) at the sentencing hearing and also failed to include them in the written sentencing entry. Appellant argues that these failures of the trial court resulted in his sentence being contrary to law. He asks this Court to reverse the judgment of the trial court and remand the matter for a new sentencing hearing. The State did not file a responsive brief to Appellant's supplemental brief and thus, the State's position with respect to these arguments is unknown.

Standard of Review

{¶67} Appellate courts review felony sentences under the standard outlined in R.C. 2953.08(G)(2). *State v. Estep*, 2024-Ohio-58, ¶ 56 (4th Dist.), citing *State v. Long*, 2021-Ohio-2672 (4th Dist.). R.C. 2953.08(G)(2) provides as follows:

> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶68} We noted in both *Estep* and *Long* that appellate courts may vacate or modify a felony sentence if the court clearly and convincingly finds that the record does not support the trial court's findings. *Estep* at ¶ 56, citing *Long* at ¶ 26, in turn citing *State v. Layne*, 2021-Ohio-255, ¶ 6 (4th Dist.). " 'This is an extremely deferential standard of review.' " *Layne* at ¶ 8, quoting *State v. Pierce*, 2018-Ohio-4458, ¶ 8 (4th Dist.). Clear and convincing evidence is proof that is more than a "mere preponderance of the evidence" but not of such certainty as "beyond a reasonable doubt," and produces in the mind a "firm belief or conviction" as to the

facts sought to be established. *State v. Conant*, supra, at ¶ 42; *see also State v. Hughes*, 2021-Ohio-3127, ¶ 37-38 (4th Dist.).

Legal Analysis

{¶69} As set forth above, Appellant asserts that the trial court erred when it failed to provide the mandatory Reagan Tokes Law notifications set forth in R.C. 2929.19(B)(2)(c) at the sentencing hearing and also erred in failing to include them in the written sentencing entry. R.C. 2929.19(B)(2)(c) provides as follows:

> (2) Subject to division (B)(3) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:
>
> * * *
>
> (c) If the prison term is a non-life felony indefinite prison term, notify the offender of all of the following:
>
> (i) That it is rebuttably presumed that the offender will be released from service of the sentence on the expiration of the minimum prison term imposed as part of the sentence or on the offender's presumptive earned early release date, as defined in section 2967.271 of the Revised Code, whichever is earlier;
>
> (ii) That the department of rehabilitation and correction may rebut the presumption described in division (B)(2)(c)(i) of this section if, at a hearing held under section 2967.271 of the Revised Code, the department makes specified determinations regarding the offender's conduct while confined, the offender's rehabilitation, the offender's threat to society, the offender's restrictive housing, if any, while confined, and the offender's security classification;
>
> (iii) That if, as described in division (B)(2)(c)(ii) of this section, the department at the hearing makes the specified determinations

> and rebuts the presumption, the department may maintain the offender's incarceration after the expiration of that minimum term or after that presumptive earned early release date for the length of time the department determines to be reasonable, subject to the limitation specified in section 2967.271 of the Revised Code;
>
> (iv) That the department may make the specified determinations and maintain the offender's incarceration under the provisions described in divisions (B)(2)(c)(i) and (ii) of this section more than one time, subject to the limitation specified in section 2967.271 of the Revised Code;
>
> (v) That if the offender has not been released prior to the expiration of the offender's maximum prison term imposed as part of the sentence, the offender must be released upon the expiration of that term.

{¶70} In *State v. Estep*, *supra*, we observed our prior holding that " 'if a trial court fails to provide notice of all R.C. 2929.19(B)(2)(c) notifications at a sentencing hearing, the sentence is contrary to law. ' " *Estep* at ¶ 55, quoting *State v. Bentley*, 2022-Ohio-1914, ¶ 10 (4th Dist.). *See also State v. Jackson*, 2022-Ohio-3449, ¶ 20 (1st Dist.) (trial court must advise defendant of all five notifications outlined in R.C. 2929.19(B)(2)(c)); *State v. Whitehead*, 2021-Ohio-847, ¶ 43-36 (8th Dist.); *State v. Gatewood*, 2022-Ohio-2513, ¶ 1 (2d Dist.); *State v. Hodgkin*, 2021-Ohio-1353, ¶ 24 (12th Dist.).

{¶71} We further explained in *Estep* as follows:

> These notifications also include the pertinent features of the Reagan Tokes Law. Because the Reagan Tokes Law, when applicable, allows the Ohio Department of Rehabilitation and Correction to extend a defendant's sentence beyond the minimum

> term upon satisfaction of statutory criteria, trial courts must abide by R.C. 2929.19(B)(2)(c) and notify the defendant of the five notifications as it relates to their indefinite prison term. *State v. Greene*, 1st Dist. Hamilton No. C-220160, 2022-Ohio-4536, 2022 WL 17727610, ¶ 11.

Estep at ¶ 57. *See also State v. Clark*, 2024-Ohio-4930, ¶ 13 (4th Dist.).

{¶72} At the sentencing hearing in the case sub judice, the trial court imposed a definite, minimum prison term of five years and a maximum term of seven and one-half years pursuant to the Reagan Tokes Law. When imposing the sentence, the trial court simply stated as follows:

> So the Court's order is that you be and are hereby sentenced to the Correction Reception Center at Orient, Ohio for a period of 5 years. That is the minimum sentence you'll serve. And under the law it is possible that the Department of Rehabilitation and Corrections based upon their analysis of the case may extend that by up to an additional 50 percent or two and a half years.

Aside from informing Appellant of his minimum and maximum sentence, the trial court failed to provide any of the R.C. 2929.19(B)(2)(c) notifications to Appellant at the time of sentencing. Thus, we sustain this argument raised under Appellant's supplemental assignment of error. This error alone requires the judgment of the trial court be reversed and the matter be remanded to the trial court to hold a new sentencing hearing at which all of the required R.C. 2929.19(B)(2)(c) notifications be provided to Appellant.

{¶73} Our analysis, however, does not end here. Appellant further argues that in addition to being required to provide all of the foregoing R.C.

2929.19(B)(2)(c) notifications during the sentencing hearing, the trial court was also required to include each and every one of those notifications in the sentencing entry, but that it failed to do so. A review of the record confirms that the sentencing entry failed to incorporate these notifications. Appellant represents to this Court that a split of authority exists within this state regarding whether sentencing entries must contain all five of the R.C. 2929.19(B)(2)(c) notifications. Moreover, this specific question appears to be a matter of first impression in this district.

{¶74} In the portion of the statute preceding section (B)(2)(c), R.C. 2929.19 provides in sections (B)(2)(a) and (b) as follows:

> (2) Subject to division (B)(3) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:
>
> (a) Impose a stated prison term and, if the court imposes a mandatory prison term, notify the offender that the prison term is a mandatory prison term;
>
> (b) In addition to any other information, include in the sentencing entry the name and section reference to the offense or offenses, the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms, if sentences are imposed for multiple counts whether the sentences are to be served concurrently or consecutively, and the name and section reference of any specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications[.]

The statute then sets forth the five R.C. 2929.19(B)(2)(c) notifications discussed above.

{¶75} As noted by Appellant, the Second District Court of Appeals, in both *State v. McLean*, 2022-Ohio-2806 (2d Dist.) and *State v. Massie*, 2021-Ohio-3376 (2d Dist.), appears to have determined that trial courts are required to include the R.C. 2929.19(B)(2)(c) Reagan Tokes Law notifications in the sentencing entry itself. For instance, *McLean* argued that the trial court failed to provide the five notifications contained in R.C. 2929.19(B)(2)(c) during the sentencing hearing. *McLean* at ¶ 12. The *McLean* court held that "[t]he trial court failed to make the required indefinite sentencing notifications at the sentencing hearing. They also were not included in the judgment entry of conviction. The court's failure to comply with R.C. 2929.19(B)(2)(c) renders McLean's sentence contrary to law." *Id.* at ¶ 14.

{¶76} Massie also challenged the trial court's failure to provide the R.C. 2929.19(B)(2)(c) notifications during the sentencing hearing, in response to which the court held as follows:

> In this case, when reading the language in R.C. 2929.19(B)(2) as a whole, it becomes clear that the notification requirement at issue in section (B)(2)(c) relates to notice that must be given at the sentencing hearing. We reach this conclusion by looking at the language in the preceding sections of the statute, i.e., (B)(2)(a) and (B)(2)(b). Section (B)(2)(a) provides that the sentencing court shall "notify the offender that the prison term is a mandatory prison term," without specifically

> stating that the notification should be given at the sentencing hearing. Section (B)(2)(b), however, instructs the sentencing court to "include in the sentencing entry * * * whether the sentence or sentences contain mandatory prison terms[.]" *When considering the language in sections (B)(2)(a) and (B)(2)(b) together, it becomes clear that the phrase "notify the offender" in (B)(2)(a) necessarily refers to notice that should be given at the sentencing hearing, since section (B)(2)(b) instructs the trial court to include the same information in the sentencing entry.*
>
> Like section (B)(2)(a), section (B)(2)(c) simply instructs the sentencing court to "notify the offender" of the specific information listed thereunder without specifically mentioning the sentencing hearing. Because the phrase "notify the offender" as used in (B)(2)(a) refers to notification given at the sentencing hearing, we find that the same meaning should apply to the phrase "notify the offender" in section (B)(2)(c). Therefore, we agree with our sister districts and find that the trial court was required to notify the offender of all the information set forth in R.C. 2929.19(B)(2)(c) at the sentencing hearing in order to fulfill the requirements of the statute.

(Emphasis added). *Id.* at ¶ 22.

{¶77} However, a close review of these cases reveals that the specific question of whether all five notifications contained in R.C. 2929.19(B)(2)(c) that must be provided during the sentencing hearing must also be explicitly stated in the sentencing entry was not directly before the court in either *McLean* or *Massie*. This Court, too, has made similar statements in ultimately holding that all five notifications contained in R.C. 2929.19(B)(2)(c) must be provided to defendants during sentencing hearings. For instance, in *State v. Cunningham*, 2023-Ohio-

4305, ¶ 40 (4th Dist.), this Court relied on *State v. Massie, supra*, for the proposition that:

> when considering language in sections R.C. 2929.19(B)(2)(a) and (B)(2)(b) together, it becomes clear that the phrase 'notify the offender' in (B)(2)(a) necessarily refers to notice that should be given at the sentencing hearing, since section (B)(2)(b) instructs the trial court to include the same information in the sentencing entry.

See also State v. Woods, 2024-Ohio-2991, ¶ 4 (4th Dist.) ("Appellee points out that court have determined that a defendant should be orally advised of the required notifications at the sentencing hearing in addition to including the notifications in the sentencing entry"); citing *State v. Cunningham, supra*, and *State v. Massie, supra*.

{¶78} As also noted by Appellant, the Twelfth District Court of Appeals has taken a different approach, finding that there is nothing in R.C. 2929.19(B) that requires the notifications contained in subsection (2)(c) to be incorporated into the sentencing entry. *See State v. McIntosh*, 2023-Ohio-4022 (12th Dist.). In *McIntosh*, the court rejected an argument that the R.C. 2929.19(B)(2)(c) notifications were required to be included the sentencing entry, holding as a matter of first impression as follows:

> * * * consistent with the text of the statute, we hold the Reagan Tokes notifications required by R.C. 2929.19(B)(2)(c) must be given at a sentencing hearing, but do not need to be restated in a sentencing entry. No statute requires that the notifications be restated in a sentencing entry, and it is not our role to create a

> new law where there is none. The trial court did not err by not including the Reagan Tokes notifications in the sentencing entry.

Id. at ¶ 67.

{¶79} In reaching its decision, the court further rejected an argument analogizing the issue to the Supreme Court of Ohio's requirement that postrelease control notifications must be included in a sentencing entry. *Id.* at ¶ 60-63. The court reasoned that the Supreme Court of Ohio's requirement that postrelease control notifications be included in sentencing entries is " 'completely judge-made law' divorced from the interpretation of any word or phrase in the statute." *Id.* at ¶ 63, quoting *State v. Bates*, 2022-Ohio-475, ¶ 56 (DeWine, J., dissenting). The *McIntosh* court essentially held that although it was required to follow the reasoning of the Supreme Court of Ohio with respect to postrelease control, such reasoning did not extend to the context of Reagan Tokes notifications. *Id*. at ¶ 61.

{¶80} Most recently, the Second District Court of Appeals has adopted and applied the reasoning of the Twelfth District, holding that "nothing in R.C. 2929.19(B)(2)(c) requires the notifications be included in the sentencing entry." *State v. Rasheed*, 2024-Ohio-3424, ¶ 98 (2d Dist.). In reaching its decision, the *Rasheed* court rejected an argument that because the Supreme Court of Ohio has held that all of the required advisements for post-release control provided at the sentencing hearing be incorporated into the sentencing entry, that the same analysis

leads to a requirement that all of the R.C. 2929.19(B)(2)(c) Reagan Tokes notifications also be incorporated into the sentencing entry. *Id.* at ¶ 99.

{¶81} Thus, at the present time, it does not appear there is actually a split of authority existing between the Second and Twelfth Districts on this issue. Furthermore, we find the reasoning set forth in both *McIntosh* and *Rasheed* to be sound and applicable to the question currently before us, which is a matter of first impression within this district. Applying the reasoning of those cases, as well as the plain language of R.C. 2929.19(B)(2)(a)-(c), we hold that although trial courts are required to provide all five R.C. 2929.19(B)(2)(c) Reagan Tokes Law notifications to defendants during the sentencing hearing, there is no statutory requirement that those five notifications also be incorporated into the sentencing entry. Courts must, however, include the minimum and maximum terms in which defendants are being sentenced under the Reagan Tokes Law in the sentencing entry. *See State v. Rasheed* at ¶ 95, citing R.C. 2929.144(C).[3]

{¶82} In summary, we find merit to Appellant's argument that the trial court erred in failing to provide the five Reagan Tokes Law notifications contained in R.C. 2929.19(B)(2)(c) to Appellant during the sentencing hearing. This failure on

[3] R.C. 2929.144(C) provides that "[t]he court imposing a prison term on an offender pursuant to division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree shall sentence the offender, as part of the sentence, to the maximum prison term determined under division (B) of this section. The court shall impose this maximum term at sentencing as part of the sentence it imposes under section 2929.14 of the Revised Code, and shall state the minimum term it imposes under division (A)(1)(a) or (2)(a) of that section, and this maximum term, in the sentencing entry.

the part of the trial court requires that the judgment be reversed and remanded for a new sentencing hearing. We find no merit, however, to Appellant's argument that the trial court erred in failing to incorporate those five statutory notifications in the sentencing entry. Accordingly, Appellant's supplemental assignment of error is sustained in part, and overruled in part.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART, REVERSED IN PART, and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and Hess, J., concur in Judgment and Opinion.

For the Court,

_____

Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.