[Cite as *State v. Urbanek*, 2023-Ohio-2249.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-22-017

Appellee — Trial Court No. 21 CR 013

v.

Edward Urbanek — **DECISION AND JUDGMENT**

Appellant — Decided: June 30, 2023

* * * * *

James J. VanEerten, Ottawa Count Prosecuting Attorney, Thomas A. Matuszak and Alec W. Vogelpohl, Assistant Prosecuting Attorneys, for appellee.

John F. McCaffrey, Hanna M. Smith, and Melissa Z. Kelly, for appellant.

David J. Carey and Freda J. Levenson, for amicus curiae.

* * * * *

DUHART, J.

{¶ 1} This is an appeal from a judgment entered by the Ottawa County Court of Common Pleas, which sentenced appellant, Edward Urbanek, after he was convicted by a jury of violating R.C. 3599.12(A)(2), illegal voting. For the reasons that follow, we affirm the judgment of the trial court.

Statement of the Case

{¶ 2} On January 7, 2021, the state issued a single-count indictment charging appellant with illegal voting, in violation of R.C. 3599.12(A)(2), which is a felony of the fourth degree.[1]

{¶ 3} On January 27, 2021, appellant was arraigned, at which time he entered a plea of not guilty, and the trial court established a personal recognizance bond.

{¶ 4} On August 20, 2021, the state filed a motion in limine seeking to exclude three matters from trial: (1) why appellant voted twice on November 3, 2020; (2) who and/or what appellant voted for or against on November 3, 2020; and (3) whether or not appellant's votes on November 3, 2020 were actually counted and/or tallied in Summit County and/or Ottawa County. On September 3, 2021, appellant filed a written response, opposing the state's motion.

{¶ 5} Also on August 20, 2021, the state filed a written request for jury instructions asking that the following be provided at trial in this case: (1) instructions regarding venue as set forth in R.C. 2901.12; (2) an instruction that R.C. 3599.12(A)(2) is a strict liability offense; (3) an instruction for attempt as set forth in R.C. 2923.02, but without any instruction regarding specific intent; (4) an instruction that motive and intent are irrelevant; (5) an instruction that it is irrelevant whether or not appellant's

[1] The indictment stated that this offense was a felony of the fifth degree, but – without objection from appellant – the state subsequently amended the indictment to accurately reflect that the charge is a felony of the fourth degree.

votes/ballots were actually counted in either Summit County and/or Ottawa County; and (6) an instruction that the testimony of a single witness is sufficient to sustain a conviction.

{¶ 6} On September 3, 2021, appellant filed a written response to the state's motion, opposing the state's requested jury instructions and tendering his own proposed jury instructions, including: (1) a definition of "vote more than once" pursuant to 52 U.S.C. 10307 (Prohibitive Acts); (2) a definition of "provisional ballot;" and (3) a specific-intent instruction for the word "attempt" as used in R.C. 3599.12(A)(2). On September 17, 2021, the state filed a written response, opposing appellant's requested jury instructions.

{¶ 7} On September 3, 2021, appellant filed a motion in limine and memorandum seeking to preclude the use and admission of Facebook screenshots. Specifically, appellant sought to exclude screenshots that the state had obtained from appellant's Facebook account that dealt with the national election held on November 3, 2020. The state did not file a written response to this motion.

{¶ 8} On November 10, 2021, appellant filed a motion in limine seeking to prevent the state from using police reports, body-camera video, and other documents related to appellant's prior contact with law enforcement in Ottawa County in 2019 involving a Marblehead police officer, and, subsequently, the Ottawa County Sheriff's Office. The state did not file a written response to this motion.

{¶ 9} On December 6, 2021, the trial court held a hearing on all outstanding motions.

{¶ 10} On January 7, 2022, the trial court issued a decision and judgment entry setting forth the following rulings: (1) the trial court would instruct the jury that R.C. 3599.12(A)(2) was a strict liability offense; (2) the trial court would hold in abeyance any ruling as to whether it would instruct the jury on the meaning of the word "attempt" as used in R.C. 3599.12(A)(2); (3) the trial court would instruct the jury that motive and intent were irrelevant; (4) the trial court would instruct the jury that it was irrelevant whether or not appellant's ballots were actually counted in either Summit County and/or Ottawa County; (5) the trial court would instruct the jury that the testimony of a single witness could be sufficient to support a conviction; (6) the terms "vote" and "vote more than once" would be accorded meaning pursuant to the rules of grammar and common usage; (7) the trial court would not provide the jury a legal definition of "provisional ballot," because that word appeared nowhere in R.C. 3599.12(A)(2); (8) the trial court granted the state's motion in limine, thereby precluding appellant from introducing any and all comments of counsel, questions of counsel, and/or evidence at trial concerning (i) why appellant voted twice on November 3, 2020, (ii) who and/or what appellant voted for or against on November 3, 2020, and (iii) whether or not appellant's votes on November 3, 2020 were actually counted and/or tallied in Summit County and/or Ottawa County; (9) the trial court granted appellant's motion in limine regarding the use of appellant's

Facebook screenshots; and (10) the trial court denied appellant's motion in limine regarding the use of police reports, body-camera videos, and other documents relating to appellant's prior contact with law enforcement in 2019.

{¶ 11} Beginning on February 8, 2022, a two-day jury trial was held. At the end of the trial, the jury unanimously found appellant guilty of illegal voting, in violation of R.C. 3599.12(A)(2) and (B), a felony of the fourth degree.

{¶ 12} The trial court ordered the preparation of a presentence investigation report. And on March 28, 2022, the trial court held a sentencing hearing, wherein appellant was sentenced to: (1) a three-year term of community control, with the possibility of a thirty-day jail term; (2) a thirty-day term of house arrest; and (3) 50 hours of community service. Appellant timely filed an appeal.

Statement of the Facts

Trial Day 1

The State's Opening Statement

{¶ 13} During the state's opening statement, the prosecutor informed the jury that it did not have to prove that appellant acted "with some sort of evil intent." Defense counsel objected, and at side-bar complained that the state was presenting R.C. 3599.12(A)(2) to the jury as a strict-liability offense, despite the fact that the statute includes the word "attempt." In addition, defense counsel sought to force the state to

elect between whether appellant "voted" or "attempted to vote." The trial court declined to force this election, but stated as follows:

> If it's an attempt, then we need to go into the fact that there is [sic] some requirements to show purpose.
>
> * * *
>
> I don't' care if he [the state] makes the election, but if he elects to, to speak about that it is a strict liability case, he'll be held to vote, not attempt to vote. How's that?

One of appellant's trial attorneys then inquired of the state, "Okay. Are you going on the strict liability or no?" The state responded, "No."

{¶ 14} The state resumed its opening statement, and asked the jury a question: "For those of you who have gone to a polling place and cast a vote, on your way out, did they offer you a little round sticker? What did the sticker say?" A juror verbally replied, "I voted."

Defense Counsel's Opening Statement

{¶ 15} Defense counsel began its opening statement as follows:

> Ladies and gentlemen of the jury, the evidence in this case will show that on November 3, 2020, the only vote that Mr. Urbanek cast – and I stress the word vote, that's going to be very important – was the only, was

only one vote, and that was the poll ballot or regular ballot that he cast and was counted.

The state objected on the grounds that these words violated the trial court's liminal order by referring to whether or not appellant's two ballots were actually counted. The trial court sustained the objection and reiterated that it would not be changing its earlier position, stating as follows:

> And I believe my earlier decision was that it wasn't, it didn't matter whether or not [the Summit County Provisional ballot] was counted. It, because that may or may not have been within what [appellant] knew.
>
> * * *
>
> Well, I think what my previous decision said was that this is a strict liability case, which we believe it to be, that casting the ballot would be a vote.

{¶ 16} Defense counsel, continuing to argue against this decision, stated:

> Your Honor, there were eight, over 8,000 provisional ballots cast in Summit County during this election. It, I mean, this happens, Judge. People show up at the wrong polling locations by mistakes. And that's exactly, this is not a case where he, he came to Ottawa County and voted and then drove all the way out to Summit County and voted again.

{¶ 17} The trial court attempted to end the debate:

My ruling on that regard stands that we're not going to talk about whether or not the vote was counted.

* * *

My, my point is that, my logic in my decision was that casting a ballot, filling out a ballot, was the one thing in your client's control. It was not in his control whether or not it was counted. So I don't think that that's, I don't think it's relevant.

* * *

Okay. So my decision of * * * January 7th stands. We're not going to talk about whether or not it was counted. It's, I, I, that's, that was not within Mr. Urbanek's control.

{¶ 18} Appellant's attorneys persisted, however, and the following discussion took place:

[DEFENSE ATTORNEY]: Can I, can I say that, Your Honor? That the poll ballot was the only ballot counted? Because that's the case. It was the only ballot that was counted.

THE COURT: I don't think so. I mean, it doesn't matter if it was counted or not in my view. The matter, the question is what did Mr. Urbanek do, not what did the Board of Elections or poll people do. That's how I'm looking at it.

{¶ 19} Finally, the state made a prophylactic request that defense counsel side-bar with the trial court and the state before raising such issues again in the presence of the jury. Thereafter, during the balance of his opening statement, defense counsel made reference several times to the fact that only one of appellant's two votes was ever processed.

The State's Case in Chief

Jennifer Widmer

{¶ 16} Jennifer Widmer is the Ottawa County Auditor. As part of her duties, she is the official records keeper for documents dealing with the transfer of property.

{¶ 17} Widmer testified that on January 26, 2017, appellant purchased a home on Johnson's Island, in Marblehead, Ottawa County, Ohio. Johnson's Island is a property that houses a number of second residences for individuals.

Carol Ann Hill

{¶ 18} Carol Ann Hill is the director of the Ottawa County Board of Elections. She explained the mission of the Ottawa County Board of Elections as follows: "Our job is to make sure that every Ottawa County voter has the right to cast one ballot."

{¶ 19} Hill explained to the jury the various ways in which a voter can cast a vote:

> A voter may choose to vote absentee in person prior to the election or absentee by mail prior to the election. They can go to their polling place on Election Day and cast their ballot. Or there's a safety net in Ohio called

provisional voting, and that allows a voter to cast a ballot. They might have forgotten to change their name or address with us, but it allows them to cast a ballot, and then our four-member board would determine whether or not that was eligible to be counted.

{¶ 20} Hill first got involved in the case when she received an email from Summit County asking if appellant had voted in Ottawa County in the November [2020] election. As a result, the Ottawa County Board of Elections investigated the matter.

{¶ 21} Hill testified that on September 23, 2019, appellant registered to vote in the Danbury 1 precinct in Ottawa County, which is near Johnson's Island, in Marblehead, Ohio. Hill confirmed that appellant had personally registered to vote in that precinct by inspecting his signature, his date of birth, and the last four digits of his Social Security number.

{¶ 22} She further testified that on November 3, 2020, appellant voted in Ottawa County. Evidence of this vote was set forth in a document, printed from the Ottawa County Board of Elections' electronic poll book, showing that appellant had signed to receive, and had actually cast, a ballot in the Danbury 1 precinct in Ottawa County. It was time-stamped November 3, 3:56 p.m.

{¶ 23} At some point following the election, the Summit County Board of Elections sent an email to the Ottawa County Board of Elections asking whether appellant had voted in Ottawa County. Attached to the email was a provisional envelope

indicating that on November 3, 2020, the same date that appellant cast a ballot in Ottawa County, appellant had also cast a provisional ballot in Summit County.

{¶ 24} In response to the Summit County inquiry, Hill checked a voter database maintained by the Ohio Secretary of State, known as Voter Query. The Voter Query database is designed to detect and identify potential duplicate votes. According to Hill, the Summit County Board of Elections would have used the same database to know that appellant had cast a ballot in Ottawa County during the November 3, 2020 election. The Voter Query database showed that appellant was registered to vote in the November 3, 2020 election and had listed his current address as 4555 East Forest Glen, Marblehead, Ottawa County.

{¶ 25} Hill confirmed that for the November 3, 2020 election, appellant had cast both a poll ballot in Ottawa County and a provisional ballot in Summit County. Hill explained that Summit County gave appellant a provisional ballot based upon appellant's having provided that county a Summit County address, to wit, 4485 Broadview Road, Richfield, Summit County, Ohio.

{¶ 26} Hill further testified that on December 8, 2020, appellant, after having cast ballots in both Summit and Ottawa counties, went online and changed his voter registration back to Summit County. She explained that the re-registration came through with an online designation, which meant that appellant had changed his own voter registration.

{¶ 27} Hill presented her findings to the four-member board that oversees the Ottawa County Board of Elections. The oversight board consisted of two Democrats and two Republicans. In an open board meeting, the oversight board requested that appellant's case be referred to the Ottawa County Prosecutor's Office for further investigation. The referral occurred on November 19, 2020, before appellant changed his voter registration back to Summit County.

{¶ 28} Hill testified that this was the first time during her 14 years of service at the Ottawa County Board of Elections that she and the board had dealt with a case involving a duplicate vote.

{¶ 29} During cross examination, Hill testified that a provisional ballot is a "safety net ballot," which is put into a provisional envelope, and that the provisional ballot is not scanned into a scanner, but, instead, is held until the Board of Elections decides what is to be done with it.

{¶ 30} Appellant's trial counsel again violated the trial court's liminal order by inquiring into whether appellant's Summit County ballot was actually counted. The trial court sustained the state's objection and warned defense counsel that if it happened again there might be sanctions.

{¶ 31} During redirect examination, Hill explained why she believed the referral from the Ottawa County Board of Elections to the Ottawa County Prosecutor's office was appropriate. Prior voter registration records showed that appellant had been registered to

vote in Summit County from March 2004 through September 2019, at which point he changed his voter registration to Ottawa County. In Summit County, appellant had consistently listed his address as 4485 Broadview Road, Richfield, Summit County, Ohio.

Trial Day 2

{¶ 32} The second day of trial began with a meeting between the attorneys and the trial court outside the presence of the jury. The trial court began by discussing the jury instructions, at which time the state brought to the trial court's attention the case of *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016, which the state had discovered while attempting to reconcile the trial court's draft jury instructions with the attempt language that was contained in the illegal voting statute. In *Nolan*, the Supreme Court of Ohio ruled that a defendant could not be convicted of attempted felony murder, because felony murder was a strict-liability offense and an "attempt" was a specific-intent offense.

{¶ 33} The trial court then turned to defense counsel's misconduct on the first day of trial for repeatedly violating the trial court's liminal order. In lieu of holding defense counsel in contempt, the trial court decided to impose the less severe sanction of turning some of the trial court's liminal orders into jury instructions. Specifically, the trial court stated that the jury would be instructed not to consider: (1) why appellant may or may not

have voted twice; (2) who appellant voted for or against; and (3) whether or not appellant's votes were actually counted or tallied in Summit County or Ottawa County.

Agent Bill Marshall

{¶ 34} Agent Bill Marshall is an investigator at the Ottawa County Prosecutor's Office. Marshall first called appellant on January 4, 2021. During the conversation, appellant acknowledged having cast ballots for the November 2020 election in both Ottawa County and Summit County, although he consistently denied having voted twice.

{¶ 35} Marshall conducted a MapQuest search to determine how long it would take to drive from the polling location in Summit County to the Danbury 1 precinct in Ottawa County. According to MapQuest, the drive time was one hour and 23 minutes via Ohio State Route 2 and I-80. Records showed that appellant had cast his ballot in Summit County at 2:20:40 p.m., and that he cast his ballot in Ottawa County at 3:59:06 p.m. The elapsed time between the two cast ballots was one hour and 36 minutes. Appellant told Marshall that in between casting ballots, he had stopped by his office, at Ed's Equipment.

{¶ 36} Marshall obtained the articles of incorporation for Ed's Equipment and compared appellant's signature on that document to appellant's signature on appellant's personal recognizance bond in this case, on which appellant had listed his residence as 4555 East Forest Glen, Marblehead, Ohio -- approximately 23 days after Marshall had spoken with appellant, approximately a month and a half after appellant had changed his

voter registration from Ottawa County back to Summit County on December 8, 2020, and approximately two and a half months after the November 3, 2020 election.

{¶ 37} Appellant's counsel concluded re-cross examination of Marshall by again violating the trial court's liminal order and repeated admonitions. The state objected, and the trial court responded, "Hopefully, my jury instructions will cure these ills."

{¶ 38} The state then moved for admission of its exhibits, and the defense made a motion for a directed verdict pursuant to Crim.R. 29. During argument, the trial court stated:

> I haven't heard any evidence regarding attempt to vote * * *.
>
> * * *
>
> It has not been presented in the case in chief. I don't know if it could be in rebuttal, but I am not going to foreclose anything at this point."

The trial court then denied appellant's motion for directed verdict.

{¶ 39} Appellant called two witnesses during his case in chief: Lance Reed, who is the director of the Summit County Board of Elections, and John Wysmierski, who is an employee of the Summit County Board of Elections.

Lance Reed

{¶ 40} Early on during his direct examination, appellant's counsel again violated the trial court's liminal order and repeated admonitions by asking Reed to explain what happens with a provisional ballot after it is cast. The state objected, and, again, the trial

court sustained the objection and limited Reed's response. Eventually, the trial court notified the jury that it would provide them with instructions of law, and stated, "they will tell you what information you should or should not consider."

{¶ 41} During direct examination, Summit County Board of Elections Director Reed confirmed that appellant had cast a provisional ballot in Summit County. He also confirmed that a "duplicate voter" is flagged by the system. And he confirmed that Summit County cannot re-register a voter on its own; instead, re-registration "require[s] some sort of voter-initiated activity."

{¶ 42} In describing a provisional ballot, Reed said it is "no different, in all honesty from other ballots." He went on to state, "the only reason it is different is just the way it is handled, so it doesn't go through a tabulation machine at the polling place on election day." Instead, the provisional ballot is placed in an envelope and taken to the office of the relevant board of elections for evaluation as to whether it is valid and, therefore, should be counted.

{¶ 43} At defense counsel's request, Reed gave his opinion that appellant's provisional ballot did not constitute a vote, because the four-member board in Summit County never determined that the provisional ballot had "become[] a vote." During cross examination, Reed was more specific about why appellant's provisional ballot was not counted:

PROSECUTOR: * * * So I just want to make sure that I understand your testimony. What you are saying is the defendant's vote in Summit County wasn't counted because you had learned after the fact that he had voted in Ottawa County?

REED: Well, we would have learned that he voted in Ottawa County prior to our board voting on all the provisional ballots.

PROSECUTOR: Correct. So that is why the provisional vote wasn't counted in Summit County?

REED: Correct.

{¶ 44} During re-cross examination, Reed confirmed that during elections Summit County provides stickers that say "I voted," and that someone casting a provisional ballot would likely be offered a sticker.

John Wysmierski

{¶ 45} Summit County Board of Elections employee Wysmierski confirmed that a provisional ballot is a "fail[-] safe for voters." Wysmierski personally put the sticker on the envelope containing the provisional ballot that appellant had cast in Summit County. The sticker identifies cross-county voters. He then sent a copy of that sticker to the Ottawa County Board of Elections and asked them to fill it out. In Wysmierski's opinion, appellant's provisional ballot was not a vote, because it was not counted.

{¶ 46} The following discussion took place between Wysmierski and the prosecutor, on cross examination:

> PROSECUTOR: I just want to make sure that I understand your testimony. What you are saying is that the vote in Summit County wasn't counted because Summit County had learned that he had also voted a regular ballot in Ottawa County?
>
> WYSMIERSKI: That is correct.
>
> PROSECUTOR: So basically, the system is designed to prevent, hopefully catch and cure fraud, correct?
>
> WYSMIERSKI: That is correct, yes.
>
> PROSECUTOR: In this instance, the system in place worked?
>
> WYSMIERSKI: Yes.

{¶ 47} Regarding the topic of "I voted" stickers, the prosecutor asked, "If I voted a provisional ballot, would I be offered one of those stickers?" Wysmierski responded, "Yes."

{¶ 48} After Wysmierski's testimony, appellant renewed his motion for a directed verdict. The trial court again denied that motion.

"Attempt" Language

{¶ 49} Defense counsel then asked the trial court for its ruling with respect to incorporating an "attempt" instruction in the jury instructions. The trial court responded,

"Well, there is no evidence of an attempt[,] [s]o no instruction will be given." The state then suggested that the trial court excise the word "attempt" from the elements of the offense of illegal voting. When appellant objected to this recommendation, the state offered the following:

> Judge, perhaps this would solve it. Give them what they want, give them an attempt instruction with specific intent. It is not going to change the jury's verdict in this case. It will protect the record for appeal. They are inviting this error under the *Nolan* standard.
>
> * * *
>
> If they are insisting upon attempt language in the jury instructions, they are inviting potential appellate error on the *Nolan* standard. So my suggestion is to take that issue off of the table for the Court of Appeals and give them the attempt instruction that they ask for.

The state then invited defense counsel to make a choice: "I am suggesting right now that the defense has an opportunity to pick their appellate strategy. Do they want the attempt language in the instructions or not?" Both of appellant's attorneys indicated that they did. Thereafter, the trial court acknowledged that, given appellant's election to include an "attempt" instruction, the jury instructions should include two different standards: (1) a strict-liability standard for voting more than once; and (2) a specific-intent standard for attempting to vote more than once.

Jury Instructions

{¶ 50} Prior to closing arguments, the trial court read the instructions to the jury. As a sanction for the misconduct of appellant's trial counsel, the trial court instructed the jury on the law that was consistent with the trial court's liminal rulings. Specifically, with regard to "voting more than once," the trial court instructed the jury that:

> [t]he State is not required to prove the Defendant acted with a particular motive or intent. You must not consider whether the Defendant acted with a particular motive or intent.

The trial court also instructed the jury that they "shall not consider for any purpose why the Defendant may have cast a ballot in Summit County and Ottawa County." And finally, per the agreement of the parties, the trial court instructed the jury:

> The jury shall not consider for any purpose who or what the Defendant voted for or against. The jury shall not consider for any purpose whether the [D]efendant's ballots were actually counted or tallied in Summit County or Ottawa County.

{¶ 51} At appellant's request, the trial court also instructed the jury as on the issue of "attempt," beginning the instruction as follows:

> The statute says voting or attempting to vote. If you are considering the question of whether or not the Defendant voted more than once, you needn't consider his intent. This is a strict liability offense.

> If you are considering whether he attempted to vote, you then must follow the instructions that I am about to give you starting with attempt.

After reading all of the instructions related to attempt, the trial court asked counsel whether the trial court had sufficiently explained the difference between voting and attempting to vote and the mental status of each. The state responded, "Subject to our prior discussion outside the presence of the jury, the State is satisfied." Appellant's counsel responded, "Yes, Your Honor, same sentiment."

Closing Arguments

{¶ 52} The parties then presented closing arguments. The state's closing arguments centered on the idea that appellant had committed voter fraud by voting twice. Appellant's closing arguments were centered on the notion that appellant only voted once, it being "understood [by appellant] that the only vote that would count is the one in Ottawa [County]."

Deliberations, Jury Question, and Conviction

{¶ 53} Jury deliberations began at 2:03 p.m. on the second day of trial. At approximately 3:15 p.m., the jury returned a question: "On page eight, it delineates the different means of voting, i.e., poll, absentee, military, et cetera, but does not mention a provisional ballot. Does the same apply to a provisional ballot since that is what applies in this case?" The trial court informed counsel:

> My intention would be to say that the instructions are what the instructions are. That is all I am going to add, I am not adding anything, is that acceptable?

Both the state and appellant's counsel responded, "Yes, Your Honor." The trial court then called the jury into the courtroom and provided that answer. The jury then resumed deliberations at 3:35 p.m.

{¶ 54} At 3:40 p.m., the jury returned a unanimous verdict, finding appellant guilty of illegal voting, in violation of R.C. 3599.12(A)(2) and (B), a felony of the fourth degree.

Assignments of Error

{¶ 55} Appellant asserts the following assignments of error on appeal:

> I. The trial court erred and violated Defendant-Appellant Edward Urbanek's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Sections 1 and 16, Article I of the Ohio Constitution, and his right to a fair trial, as guaranteed by the Sixth amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution, when it rejected Mr. Urbanek's request that it instruct the jury about: (1) what it means to "vote more than once" for purposes of Ohio's Illegal Voting Statute, R.C. 3599.12; and (2) the definition of the term "provisional ballot," and instead instructed the jury

that it should not consider whether any of Mr. Urbanek's ballots were or would have been counted.

II. The trial court erred and deprived Mr. Urbanek of the opportunity to present a complete defense, in violation of his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Sections 1 and 16, Article I of the Ohio Constitution, and his right to a fair trial, as guaranteed by the Sixth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution, when it prohibited Mr. Urbanek from offering evidence or testimony about his intent.

Analysis

Ohio's Illegal Voting Statute

{¶ 56} Ohio's illegal voting statute is set forth at R.C. 3599.12, and provides in pertinent part:

(A) No person shall do any of the following:

(1) Vote or attempt to vote in any primary, special, or general election in a precinct in which that person is not a legally qualified elector;

(2) Vote or attempt to vote more than once at the same election by any means, including voting or attempting to vote both by absent voter's ballots under division (G) of section 3503.16 of the Revised Code and by

regular ballot at the polls at the same election, or voting or attempting to vote both by absent voter's ballots under division (G) of section 3503.16 of the Revised Code and by absent voter's ballots under Chapter 3509. or armed service absent voter's ballots under Chapter 3511. of the Revised Code at the same election;

* * *

(B) Whoever violates division (A) of this section is guilty of a felony of the fourth degree.

Standard of Review

{¶ 57} A trial court's decision to provide, or refusal to provide, a particular jury instruction is reviewed on appeal for abuse of discretion. *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 240, citing *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989).

{¶ 58} As with jury instructions, "[d]ecisions involving the admissibility of evidence are reviewed under an abuse-of-discretion standard of review." *Estate of Johnson* at ¶ 22, citing *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032. "Similarly, decisions granting or denying a motion in limine are reviewed under an abuse-of-discretion standard of review." *Id.*, citing *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 526, 639 N.E.2d 771 (1994).

{¶ 59} "For an abuse of discretion to have occurred, the trial court must have taken action that is unreasonable, arbitrary, or unconscionable." *Estate of Johnson*, 135 Ohio St.3d 440, 2013-Ohio-1507, at ¶ 22, citing *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶ 59. An abuse of discretion is more than an error of law. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983); *see also State v. Wampler*, 6th Dist. Lucas No. L-15-1025, 2016-Ohio-4756, ¶ 30.

First Assignment of Error

{¶ 60} Appellant raises three issues in his first assignment of error: (1) whether it was reversible error for the trial court not to have provided the jury a federal statutory definition for the phrase "vote more than once;" (2) whether it was reversible error for the trial court not to have provided the jury a definition for the term "provisional ballot;" and (3) whether it was reversible error for the trial court to have instructed the jury that they were not to consider whether appellant's ballots were or would be counted.

{¶ 61} "[T]he purpose of the jury instruction is to clarify the issues and the jury's position in the case." *Bahm v. Pittsburgh & Lake Erie RR.Co.*, 6 Ohio St.2d 192, 194, 217 N.E.2d 217 (1966). "After arguments are completed, 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." *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. In a criminal case,

requested jury instructions must be given when they are correct, pertinent, and timely presented. *State v. Joy*, 74 Ohio St.3d 178, 181, 657 N.E.2d 503 (1995).

Federal definition of "vote more than once"

{¶ 62} We first consider whether the trial court abused its discretion when it decided not to provide the jury a federal statutory definition for the phrase "vote more than once." Here, the issue presented to the trial court was a legal one, involving the question of whether the trial court should look to federal law to provide the definition of "voting more than once" or, instead, should rely exclusively upon Ohio rules of statutory construction in determining the appropriate jury instructions for the essential elements of the offense charged.

{¶ 63} Ohio's illegal voting statute does not define what it means to "vote more than once." *See* R.C. 3599.12; R.C. 3501.01. Indeed, Ohio's illegal voting statute also does not define the word "vote." *See id.* Ohio does, however, have well-settled rules of statutory construction. Among these rules is that a court must apply a statute as written. *See, e.g., State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 15. In addition, a court "must 'read words and phrases in context according to the rules of grammar and common usage.'" *State ex rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 2006-Ohio-3459, 852 N.E.2d 145, ¶ 37 (internal citations omitted); *see* R.C. 1.42. Finally, it is the duty of a court "to give effect to the words used, not to delete words used

or to insert words not used." *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969).

{¶ 64} Unlike Ohio law, federal law, at 52 U.S.C. 10307(e)(3), provides some guidance as to the meaning of voting more than once, at least within the context of the applicable federal statute:

> As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

Id.

{¶ 65} In this case, the trial court elected to follow binding Ohio law, ruling that the phrase "vote more than once" would be accorded meaning pursuant to the rules of grammar and common usage. In declining to interpose non-binding federal law, the trial court did not abuse its discretion.

"Provisional Ballot" not defined

{¶ 66} Next, we consider whether the trial court abused its discretion when it chose not to define the term "provisional ballot" for the jury. In reviewing this argument, we note that the term "provisional ballot" appears nowhere in R.C. 3599.12(A)(2). Instead, the statute provides that "[n]o person shall * * * [v]ote or attempt to vote more

than once at the same election *by any means, including* * * *." R.C. 3599.12(A)(2) (emphasis added). Applying the well-established rule of statutory construction that "a court must read words and phrases in context according to the rules of grammar and common usage," *State ex rel. Russo*, 110 Ohio St.3d 144, 2006-Ohio-3459, 852 N.E.2d 145, ¶ 37, we conclude that a vote "by any means," certainly includes a vote by provisional ballot. Applying the same rule, we similarly conclude that the list of examples that are enumerated in the statute, following the word "including," is merely illustrative.

{¶ 67} Even if the term "provisional ballot" were considered to be an essential element of the offense, we note that "a trial court's failure to separately and specifically charge the jury on every element of each crime with which a defendant is charged does not * * * necessarily require reversal of a conviction." *State v. Adams*, 62 Ohio St.2d 151, 154, 404 N.E.2d 144 (1980). Instead, "[o]nly by reviewing the record in each case can the probable impact of such a failure be determined, and a decision reached as to whether substantial prejudice may have been visited on the defendant, thereby resulting in a manifest miscarriage of justice." *Id.* In the instant case, the directors for the Ottawa County and Summit County Boards of Election both explained to the jury what a "provisional ballot" is and how they are handled by those boards after such ballots are cast. Thus, the jury was not left without any idea about the nature of the ballot that appellant cast in Summit County.

{¶ 68} Further, even if the trial court had provided a definition of "provisional ballot" in its instructions to the jury, there is nothing to suggest that this could have helped appellant. R.C. 3505.181(B), which governs provisional ballot voting in Ohio, discusses the procedure for "cast[ing] a provisional ballot," as follows:

> (B) An individual who is eligible to cast a provisional ballot under division (A) of this section shall be permitted to cast a provisional ballot as follows:
>
> (1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.
>
> (2) Except as otherwise provided in division (F) of this section, the individual shall complete and execute a written affirmation before an election official at the polling place stating that the individual is both of the following:
>
> (a) A registered voter in the precinct in which the individual desires to vote;
>
> (b) Eligible to vote in that election.

Id. Because R.C. 3505.181(B) treats the casting of a provisional ballot as a "vote," as that term is given meaning pursuant to the rules of grammar and common usage, the provision of a specific definition of the term to the jury in accordance with that statute would not

have bolstered appellant's defense that "the completion of a provisional ballot is not itself a vote."

{¶ 69} Under the circumstances of this case, we cannot say that appellant was substantially prejudiced by the trial court's decision not to define the term "provisional ballot" for the jury. Likewise, we cannot say that the trial court's decision amounted to an abuse of discretion.

Whether votes were counted

{¶ 70} We turn now to the question of whether the trial court abused its discretion when it instructed the jury that they were not to consider whether appellant's votes in Summit County or Ottawa County were actually counted. Arguably, consideration of whether or not a person's votes are counted would seem to be useful in determining whether a person "voted" or merely "attempted to vote," pursuant to the rules of grammar and common usage, with a counted poll vote clearly being a vote and a cast but uncounted provisional ballot being either a vote or merely an attempt. *See State v. Jones*, 12th Dist. Warren No. CA2019-03-020, 2020-Ohio-2884 (defendant's casting of a provisional ballot was a "vote" that supported conviction for illegal voting, even though the vote was never counted); *State v. Schulman*, 2020-Ohio-4146, 157 N.E.3d 848 (10th Dist.) (evidence established that appellant "voted or attempted to vote" where envelope signed by appellant declared a ballot was included inside the envelope, even where testimony that a ballot had been cast was excised); *State v. Workman*, 126 Ohio App.3d

422, 710 N.E.2d 744 (10th Dist.1998) (where ballot was sealed but not counted, evidence was sufficient to establish that appellant "attempted to vote" in a general election by impersonating or by signing the name of another person).

{¶ 71} In either case, however, the evidence was sufficient to support a finding of guilt on the part of appellant, because whether or not appellant's provisional vote counted, appellant's behavior in committing the offense consisted of voting or attempting to vote more than once. In the instant case, the evidence is overwhelming and undisputed that appellant voted in Ottawa County and, by voting provisionally after providing his Summit County address, either voted or attempted to vote in Summit County. Whether both or only one vote actually counted is, ultimately, of no consequence.

{¶ 72} Based on the foregoing, we conclude that even if it was error to instruct the jury that they were not to consider whether appellant's votes in Summit County or Ottawa County were actually counted, such error was harmless. "While an accused has a constitutional right to a trial free from prejudicial error, that does not necessarily mean that a trial will be free from all error." *State v. Sims*, 12th Dist. Butler No. CA2007-11-300, 2009-Ohio-550, ¶ 34, citing *State v. Brown*, 65 Ohio St.3d 483, 605 N.E.2d 46. So long as the error did not contribute to appellant's conviction, the error is harmless, even where a trial court errs by failing to admit otherwise admissible evidence. *Id.* That is, "harmless error is appropriate where there is 'overwhelming evidence of guilt' or 'some other indicia that the error did not contribute to the conviction.'" *Id.*, citing *State v.*

Ferguson, 5 Ohio St.3d 160, 166, 450 N.E.2d 265 (1983), fn.5. Because this case involved overwhelming evidence of guilt, regardless of whether appellant's votes were both counted, any error in the trial court's instruction was clearly harmless and did not constitute an abuse of discretion.

{¶ 73} For all of the foregoing reasons, appellant's first assignment of error is found not well-taken.

Second Assignment of Error

{¶ 74} In his second assignment of error, appellant complains that the trial court committed reversible error because it abused its discretion when it allegedly ruled that appellant was prohibited "from offering into evidence about the reasons for his conduct, and then gave the jury an attempt instruction that required it to consider [appellant's] intent."

{¶ 75} This district, in *State v. Arent*, 6th Dist. Wood No. WD-11-034, 2012-Ohio-5263, has expressly held that R.C. 3599.12(A)(2) is a strict liability offense. *See also State v. Schulman*, 2020-Ohio-4146, 157 N.E.3d 848 (10th Dist.) (holding that illegal voting is a strict liability offense); *State v. Worrell*, 9th Dist. Summit No. 23378, 2007-Ohio-7058, ¶ 13 (holding that no mens rea is required to convict one for illegal voting under R.C. 3599.12(A)(1)); *State v. Hull*, 133 Ohio App.3d 401, 407, 728 N.E.2d 414 (12th Dist.1999) (holding that R.C. 3599.12 is a strict liability offense). Thus, evidence

of why an accused voted twice in an election is properly excluded as irrelevant. *Arent* at ¶ 15.

{¶ 76} Arguing against this conclusion, appellant characterizes the words "attempt to vote" as used in R.C. 3599.12 as an "attempt offense." With this very argument, appellant persuaded the trial court to give an instruction on attempt. As recognized by the Supreme Court of Ohio, however, "an attempt offense almost always involves *not* committing the crime charged," such as robbery or murder *State v. Deanda*, 136 Ohio St.3d 18, 2013-Ohio-1722, 989 N.E.2d 986, ¶ 20 (emphasis in original). Here, the underlying crime was not "voting" or even "attempting to vote," but rather, "voting or attempting to vote *more than once*." R.C. 3599.12 (emphasis added). As discussed above, the fact that appellant voted or attempted to vote more than once was clearly established. His intent or purpose in doing so is irrelevant and evidence about the reasons for his conduct was properly excluded.

{¶ 77} To the extent that the trial court instructed the jury on attempt in error, such was invited error on the part of appellant. Under the doctrine of invited error, a litigant may not take advantage of an error which he himself invited or induced. *State v. Grate*, 164 Ohio St.3d 9, 2020-Ohio-5584, ¶ 197. Thus, appellant may not complain of any error in the court's having instructed the jury on attempt.

{¶ 78} Appellant's second assignment of error is found not well-taken.

Amici Curiae

{¶ 79} The American Civil Liberties Union of Ohio Foundation and the American Civil Liberties Union have presented an amicus curiae brief which addresses issues not raised by the parties and we decline to address them.

{¶ 80} We recognize the appearance of amici curiae for the purpose of assisting the court on matters of the law about which the court is doubtful. "Amici curiae are not parties to an action an may not, therefore, interject issues and claims not raised by parties." *Lakewood v. State Emp. Relations Bd.*, 66 Ohio App.3d 387, 394, 584 N.E.2d 70 (8th Dist.1990).

{¶ 81} For all of the foregoing reasons, appellant's assignments of error are found not well-taken, and the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Myron C. Duhart, P.J.
CONCUR. _____
JUDGE

Gene A. Zmuda, J. _____
CONCURS, WITH AN OPINION. JUDGE

ZMUDA, J.

{¶ 82} Does the casting of a provisional ballot constitute a vote in Ohio for purposes of R.C. 3599.12(A)(2)? Can an individual commit the offense of illegal voting for casting a ballot other than a provisional ballot when they are aware that the provisional ballot will not be counted? These are important legal questions underlying appellant's appeal. They are also issues the amicus party raises in the broader context of voting rights. They are questions that we will undoubtedly be called upon to answer when the appropriate case comes before us. However, because appellant does not

properly frame these legal questions in a manner in which this court can resolve them, this is not that case.

{¶ 83} Instead of these broader legal questions, appellant's errors are framed in the narrow questions of a defendant's rights to certain defenses and jury instructions at trial on an allegation of illegal voting. While these are also important issues, and indeed are issues of first impression for Ohio courts, I believe that appellant's conduct at trial precludes this court from reaching the merits of his assigned errors. Accordingly, I believe that the majority improperly addresses the merits of those errors. Moreover, I believe that the majority, in ruling on the merits, relies on arguably inapplicable prior authority from this court. Therefore, while I concur in the majority's decision and would affirm the trial court's judgment, I would do so for different reasons and write separately to explain my departure from the majority's analysis.

I. *State v. Arent,* 2012-Ohio-5263, 981 N.E.2d 307 (6th Dist.) is no longer controlling authority.

{¶ 84} I begin with the majority's resolution of appellant's second assignment of error, in which he alleges that the trial court erred in excluding any evidence related to his intent in casting a poll ballot in Ottawa County after having already cast a provisional ballot in Summit County. The trial court excluded any such evidence finding that attempting to vote more than once was a strict liability offense, rendering appellant's intent in casting these ballots irrelevant.

{¶ 85} Appellant argued both at trial and in this appeal that R..C. 3599.12(A)(2)'s prohibition against attempting to vote more than once established a separate, specific intent offense. He argues that attempting to vote more than once actually violates R.C. 2923.02 which establishes an "attempt" to commit an offense is a separate offense itself. [2] As a result, he argues that the "purposely or knowingly" *mens rea* element of R.C. 2923.02 should be applicable to his attempt to vote more than once in violation of R.C. 3599.12(A)(2) and that the trial court erred in excluding all evidence as to that *mens rea* element. The majority, relying on this court's prior decision in *State v. Arent*, 2012-Ohio-5263, 981 N.E.2d 307 (6th Dist.), held that R.C. 3599.12(A)(2) established strict liability offenses both in voting more than once and attempting to vote more than once and that the trial court properly excluded that evidence.

{¶ 86} As described below, I would not reach the merits of appellant's second assigned error regarding whether R.C. 3599.12(A)(2) establishes a distinct, specific intent offense for attempting to vote more than once. I am compelled to address the majority's resolution of that error on the merits, however, because I find that the majority's adherence to *Arent's* authority is now in question because of a subsequent amendment to the statute on which it relied.

[2] R.C. 2923.02(A) states "[n]o person, purposely or knowingly, and when purpose of knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶ 87} In *Arent*, the defendant was indicted on one count of voting more than once in the same election in violation of R.C. 3599.12(A)(2). ¶ 2. Prior to trial, the state moved to exclude all evidence related to Arent's mental state at the time of the offense, arguing that violations of R.C. 3599.12(A)(2) were strict liability offenses. *Id.* The trial court agreed and granted the state's motion. *Id.* Arent was convicted at trial and appealed. *Id.*

{¶ 88} In his appeal, Arent argued that the statute does not define a strict liability offense. *Id.* at ¶ 3. R.C. 2901.21(B) provides guidance for determining whether an offense defined in a statute is a strict liability offense. At the time of Arent's appeal, R.C. 2901.21(B) stated that a statute defined a strict liability offense when it fails to set forth a culpable mental state and "plainly indicates a purpose to impose strict criminal liability for the conduct described." *Id.* at ¶ 4. We noted that the Ohio Supreme Court in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, held that the lack of a culpable mental state in the subdivision at issue when another subdivision includes a culpable mental state could be construed as the plain indication that the subdivision at issue was intended to be a strict liability offense. *Id.* at ¶ 10.

{¶ 89} In light of this guidance, we found it relevant that:

> one offense of illegal voting defined under the statute has a culpable mental state, while the one at issue does not. Further, the General Assembly made a distinction between the false registration statute, R.C. 3599.11(A), which

include a "knowingly" mens rea element, and the illegal voting statute, R.C 3599.12(A)(2), which does not contain a culpable mental state.

Arent at ¶ 11. Relying on the Ohio Supreme Court's decisions in *State v. Wac,* 68 Ohio St.2d 84, 428 N.E.2d 428 (1981) and *Horner*, we held that the "the absence of a culpable mental state is a plain indication the General Assembly wanted to make a distinction between the two offenses and intended for R.C. 3599.12(A)(2) to be a strict liability offense." *Arent* at ¶ 11. We also found that since other courts had found R.C. 3599.12(A)(1) to be strict liability offenses, that we could reach the same conclusion as to R.C. 3599.12(A)(2). *Arent* at ¶ 13-14, citing *State v. Hull*, 133 Ohio App.3d 401, 728 N.E.2d 414 (12th Dist.1999); *State v. Worrell*, 9th Dist. Summit Nos. 23378 and 23409, 2007-Ohio-7058. For these reasons, we found that R.C. 3599.12(A)(2) was a strict liability offense and affirmed Arent's conviction.

{¶ 90} Two years later, in 2014, the Ohio General Assembly amended R.C. 2901.21(B). The new, current version of R.C. 2901.21(B) maintains the original language but now also states "[t]he fact that one division of a section plainly indicates a purpose to impose strict liability for an offense defined in that division does not by itself plainly indicate a purpose to impose strict criminal liability for an offense defined in other divisions of the section that do not specify a degree of culpability." I believe that this amendment calls into question the authority that we relied on in *Arent* and, in turn, renders our strict adherence to *Arent*, without further analysis, unwarranted.

{¶ 91} Applying the current version of the statute here, our prior reliance on *Hull* and *Worrell* to resolve *Arent* is no longer a valid basis to find that R.C. 3599.12(A)(2) defines a strict liability offense. In both *Hull* and *Worrell*, the Twelfth and Ninth District Courts of Appeals, respectively, held that violations of R.C. 3599.12 were strict liability offense.[3] *Hull* at 408, *Worrell* at ¶ 13. However, each of those cases focused on whether the defendant voted or attempted to vote when they were not a "legally qualified elector" in violation of R.C. 3599.12(A)(1). *Id.* Each of these decisions found that strict liability was applicable to an individual voting when they were not a legally qualified elector because "[i]t is important for the public welfare that only legally qualified voters, who must be United States citizens and residents of the state of Ohio, elect the government officials of our state." *Worrell* at ¶ 13, citing *Hull* at 408. Considering this important principle, both courts held that the General Assembly's lack of a culpable mental state as to R.C. 3599.12(A)(1) was a plain indication that it intended a violation of that subsection to be a strict liability offense. *Id.*

[3] Both *Hull* and *Worrell* describe their analysis as concluding whether R.C. 3955.12(A) defines strict liability offenses as a whole. However, the actual issue before those courts was whether only R.C. 3599.12(A)(1) established a strict liability offense. I limit those courts' findings of strict liability to that subdivision only as the general reference to the entirety of R.C. 3599.12(A) as identifying strict liability offenses in these cases is in clear conflict with the statute itself as there is no dispute that R.C. 3599.12(A)(5) explicitly references a "knowing" *mens rea* element.

{¶ 92} In *Arent*, we expanded those holdings to impose strict liability for a violation of R.C. 3599.12(A)(2).[4] *Arent* at ¶ 14. We held, in part, that because other courts found that a violation of R.C. 3599.12(A)(1) was a strict liability offense, that a violation of R.C. 3599.12(A)(2) must be as well. At that time, this was a permissible interpretation under R.C. 2901.21(B). However, since the 2014 amendment of the statute, I believe that reviewing courts must determine whether each offense identified in a subdivision of a statute contains a plain indication that it defines a strict liability offense on its own and without consideration of whether another subdivision of that same statute defines a strict liability or specific intent offense. Accordingly, while we may have properly determined that *Hull* and *Worrell's* finding that R.C. 3599.12(A)(1) defined a strict liability offense was relevant to our analysis of R.C. 3599.12(A)(2) at the time we decided *Arent*, I do not believe such analysis is correct now.

{¶ 93} This is not to say that our decision in *Arent* would not have reached the same conclusion under the current version of the statute by finding that the statute plainly indicated strict liability offenses for other reasons unrelated to other courts' application of strict liability to R.C. 3599.12(A)(1). My concern is that to date, neither this court nor any other Ohio appellate district has directly addressed the impact of the 2014 amendment to R.C. 2901.21(B) in conjunction with whether the general assembly's plain

[4] Notably, our decision in *Arent* excises the "attempt to vote" language from our analysis. Because I would find reliance on *Arent* is misplaced, the import of that limitation is immaterial to my analysis here.

indication that a statutory subdivision defines a strict liability offense. Until that analysis occurs, I find that *Arent's* authority, including its consideration of *Hull* and *Worrell* as part of its analysis, should not be considered controlling. I note that neither party raises that issue here. Therefore, I find it would be improper to conduct that analysis in this appeal. As a result, I disagree with the majority's reliance on *Arent* and cannot join in the majority's analysis as to the merits of appellant's second assignment of error.

II. Appellant's demand for a jury instruction expanding the basis on which he could be convicted precludes him from showing reversible error.

{¶ 94} Having expressed my disagreement with the majority's reliance on *Arent,* I turn to the primary reason for my separate concurrence—I would find that appellant's demand for a specific intent jury instruction precludes our review of both of appellant's assigned errors as it prevents him from showing prejudice as a result of either alleged error.

a. Overview of appellant's arguments

{¶ 95} Appellant's first assignment of error challenges the trial court's refusal to define "vote more than once" and "provisional ballot" for the jury. He argued that even if voting more than once is a strict liability offense, the state must still prove that he did, in fact, vote more than once. He sought a jury instruction stating that casting a provisional ballot does not constitute a vote if it is not ultimately counted. This would have provided him with a complete defense, he argues, because since his provisional vote was not counted the state could not prove an essential element of the strict liability

offense. To succeed on his first assignment of error, appellant would have to show that the trial court abused its discretion in declining to give the requested instructions. *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127.

{¶ 96} Appellant's second assignment of error argues that the trial court erred when it excluded all evidence related to his intent in casting both a provisional ballot and a poll ballot. In support of this assignment, appellant argues that R.C. 3599.12(A)(2) actually identifies two distinct offenses—voting more than once and attempting to vote more than once. At trial, appellant conceded that voting more than once was a strict liability offense.[5] However, he maintains that the allegation that he attempted to vote more than once constitutes a specific intent offense that required the state to prove that he acted either knowingly or purposely as described in R.C. 2923.02. Therefore, the court's exclusion of this evidence and proceeding as if "attempting" to vote more than once was a strict liability offense constituted error. To succeed on a challenge to the trial court's exclusion of evidence, appellant must show that either (1) the trial court's findings of fact are not supported by competent credible evidence or (2) if the factual findings are supported, whether the facts satisfy the applicable legal standard. *See State v. Morris*, 6th Dist. Lucas No. L-22-1025, 2023-Ohio-168 ¶ 32.

{¶ 97} As described below, I believe that this court is precluded from reaching the merits of appellant's assigned errors because he cannot demonstrate prejudice as a result

[5] As described above, I believe that this is an open question.

of either error. I begin my analysis by describing appellant's conduct at trial that leads directly to this conclusion.

b. Appellant's demand for an attempt jury instruction.

{¶ 98} At all times during the trial court proceedings, appellant maintained that although he was charged with a single count in violation of R.C. 3599.12(A)(2), that R.C. 3599.12(A)(2) actually established two offenses—voting more than once and attempting to vote more than once. Immediately prior to trial, appellant asked the trial court to force the state to elect whether it intended to proceed on a theory that appellant voted more than once or attempted to vote more than once. The trial court did not force the state to make such an election at that time. Then, just prior to the second day of trial, after the state had presented a significant portion of its case-in-chief, the trial court stated "am I correct in assuming you [the state] are not going to pursue the attempt to vote?" The state responded "that is correct, your honor." Appellant objected, arguing that such an election should have been made prior to trial and that because the jury had heard, over the state's sustained objections, some indication as to his intent that he would now suffer prejudice as result of the late election. The trial court took the parties' arguments under advisement and agreed to address them through the parties' proposed jury instructions. The parties then proceeded with the second day of trial.

{¶ 99} At the conclusion of appellant's case-in-chief, the parties returned to the trial court's chambers to discuss the jury instructions. As the majority accurately notes,

the trial court had previously excluded, over appellant's objection, all testimony related to appellant's intent in casting both a provisional ballot and a poll ballot—evidence appellant argues would have gone to the *mens rea* element it argued applied to attempting to vote more than once under R.C. 3599.12(A)(2). At this point of the trial, the state had elected to abandon any theory that appellant had violated the statute by attempting to vote more than once and intended to seek only a conviction for voting more than once. Appellant, being fully aware of these facts, nevertheless insisted on the trial court providing the jury with an instruction regarding the specific intent necessary for the now-abandoned "attempt" offense. In doing so, appellant stated:

> Judge, this is why that is important because here is what I see happening. This is a duplicative verdict because you could have six jurors who say "well, I don't believe that the prosecution proved that he actually voted, but maybe he did attempt." And you could have six agreeing that maybe he did attempt, but he didn't vote, and that is going to be a problem.

The state, in an effort to resolve the issue, responded by telling the court it did not object to the full attempt instruction being given. The state argued that giving the instruction at this point would be invited error and would not warrant reversal on appeal. In response, the court asked appellant directly "so do you want the attempt language or don't you?" Appellant stated "yes. Thanks." The trial court then gave the jury a full instruction on attempt, including that it must find that appellant acted purposely in casting both a poll

ballot and a provisional ballot to find that he attempted to vote more than once in violation of R.C. 3599.12(A)(2). After receiving its instructions the jury retired to deliberate, ultimately finding appellant guilty of a violation of R.C. 3599.12(A)(2).

c. Appellant is unable to show prejudice as a result of either assigned error.

{¶ 100} Somewhat presciently, appellant identified the precise reason why I do not believe this court can resolve the important questions both he and the amicus party raise. At the conclusion of the parties' cases-in-chief, the jury had before it evidence that appellant had cast a provisional ballot in Summit County, Ohio and a poll ballot in Ottawa County, Ohio in the same election. The jury had not heard, and as the majority notes was instructed to disregard any reference to, any statements made regarding appellant's intent in casting either of these ballots. Despite this, appellant demanded that the jury be instructed to consider both whether he voted more than once and whether he attempted to vote more than once. In doing so, appellant expanded the theories on which he could be convicted for violating R.C. 3599.12(A)(2). Citing his own example, the demand for this instruction could reasonably result in a scenario in which six members of the jury may have found him guilty for attempting to vote more than once while the other six may have found him guilty of voting more than once. This potential for a split jury verdict undermines appellant's assigned errors.

{¶ 101} "It is an elementary proposition of law that an appellant, in order to secure reversal of a judgment against him, must not only show some error but must also show

that that error was prejudicial to him." *Smith v. Flesher,* 12 Ohio St.2d 107, 233 N.E.2d 137 (1967). An appellant's failure to show that they suffered prejudice as a result of the assigned error warrants the reviewing court to find that error not well-taken. *See State v. Bond,* 2016-Ohio-8383, 78 N.E.3d 291 (6th Dist); *State v. Blevins,* 2019-Ohio-2744, 140 N.E.3d 27 (4th Dist.). I find that appellant's demand that the jury be allowed to consider both whether he voted more than once or attempted to vote more than once as a basis on which to find him guilty of the single count prevents him from ever showing the prejudice required to find reversible error.

{¶ 102} In his first assigned error, appellant argues that the trial court erred in failing to provide the jury with definitions of "provisional ballot" and "voting more than once." Appellant argues that these instructions relate directly to whether he actually voted more than once in violation of R.C. 3599.12(A)(2). Assuming that this decision constituted error, that error would be entirely inconsequential to the ultimate verdict in this case if the jury found him guilty based on his *attempt* to vote more than once. Similarly, in appellant's second assignment of error, he argues that the trial court's exclusion of all evidence related to his intent in attempting to vote more than once was error because, he argues, attempt is a specific intent offense. If the jury found him guilty for *actually* voting more than once in violation of R.C. 3599.12(A)(2), the exclusion of evidence related to the attempt offense is irrelevant to that verdict. Thus, in order to succeed on either assigned error, appellant would have to know the basis for the jury's

verdict. This, of course, is something appellant could never show as jury deliberations are not part of the record. Without that information, appellant can never show that either allegedly erroneous decision resulted in prejudice, a fact directly attributable to his own demand for wider latitude on which the jury could find him guilty. As a result, I find that appellant cannot show that either alleged error was reversible due to his inability to show that they resulted in prejudice. *Smith* at 110.

{¶ 103} I do not reach this conclusion lightly. As noted above, the relationship between Ohio's provisional voting statute and the illegal voting statute presents important policy decisions affecting Ohio citizens' right to vote. For example, R.C. 3599.12(A)(2) does not expressly include provisional ballots as a means by which someone could "vote more than once." Additionally, R.C. 3505.181(A), suggests that an individual who casts a provisional ballot declaring that that they are a "registered voter in the precinct in which the individual desires to vote and that the individual is eligible to vote in an election," would not endure any consequences if that declaration was made in error other than having their ballot rejected. R.C. 3505.181(C)(1) states that in this scenario, the individual must be instructed that if the declaration was incorrect that "the ballot or a portion of the ballot will not be counted[.]" That individual, however, has arguably violated R.C. 3599.12(A)(1) by voting in an election when they are not a qualified elector *if* a provisional ballot is considered a "vote" under R.C. 3599.12.

{¶ 104} It would certainly benefit Ohio voters for a court to reach the merits of the issues raised by appellant's assigned errors to begin the process of resolving the important legal and public policy issues raised here. However, we have no discretion to resolve either the factual or legal issues raised by appellant in light of the muddled record before us. *See State v. Peagler*, 76 Ohio St.3d 496, 668 N.E.2d 48, citing *C. Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298, 301, 360 N.E.2d 400 (1974), *Hungler v. Cincinnati*, 25 Ohio St.3d 338, 342, 496 N.E.2d 912 (1986) (holding that appellate courts must base factual conclusions only on the record before it and must have a sufficient evidentiary basis in the record before it can decide a legal issue). Because appellant's actions at trial preclude him from showing that the trial court's alleged errors were prejudicial and, therefore, reversible, I would find each of his assignments of error not well-taken.

III. Conclusion

{¶ 105} I concur in the majority's judgment finding that appellant's first and second assignments of error not well-taken. However, I reach this conclusion based on appellant's inability to show that either error resulted in prejudice. As a result, I would not resolve the merits of appellant's assigned errors. This conclusion would limit extension of the authority in *State v. Arent* and preserve the important questions raised by appellant and the amicus party for a case in which they are properly before this court.

Therefore, I concur in majority's judgment only in finding appellant's assigned errors not well-taken.