[Cite as *State v. Williams*, 2023-Ohio-3246.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 112194
v.	:	
SIARA WILLIAMS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART; MODIFIED IN PART AND REMANDED
RELEASED AND JOURNALIZED: September 14, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-22-671642-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Lisa J. Turoso, Assistant Prosecuting Attorney, *for appellee*.

Eric M. Levy, *for appellant*.

KATHLEEN ANN KEOUGH, P.J.:

{¶ 1} Defendant-appellant, Siara Williams ("Williams"), appeals her convictions. We affirm in part and modify in part. We reduce Williams's assault conviction in Count 1 to a first-degree misdemeanor and remand this matter to the

trial court for the limited purpose of resentencing Williams on that offense as a first-degree misdemeanor. We affirm the trial court's judgment in all other respects.

I. Background

{¶ 2} A Cuyahoga County Grand Jury indicted Williams in a five-count indictment as follows: Count 1, felonious assault in violation of R.C. 2903.11(A)(1), with a furthermore specification that the victim was a peace officer (Tatiana Bartell); Count 2, assault in violation of R.C. 2903.13(A), with a furthermore specification that the victim was a peace officer acting in the performance of their official duties (Megan Hollenbeck); Counts 3 and 4, resisting arrest in violation of R.C. 2921.33(B), and Count 5, driving while under the influence in violation of R.C. 4511.19(A)(1)(a).

{¶ 3} Williams pleaded not guilty, and the case proceeded to a jury trial. After the close of the state's evidence, the court granted Williams's Crim.R. 29 motion regarding Counts 3 and 4. The jury found Williams guilty of the lesser-included offense of assault on Count 1, with a further finding that Bartell was a peace officer, and guilty of Counts 2 and 3 (formerly Count 5). The trial court sentenced Williams to two years of community-control sanctions on Counts 1 and 2; six months' jail time on Count 3, suspended; a three-day driver's intervention program; and the payment of a $375 fine. This appeal followed.

II. Trial Testimony

{¶ 4} Two witnesses testified for the state at trial. Cleveland police officer Tatiana Bartell ("Bartell") testified that during the late evening of January 21, 2022, she and her partner, officer Megan Hollenbeck ("Hollenbeck"), were dispatched to

Rockefeller Park in Cleveland regarding a motor vehicle accident. Rockefeller Park is situated partially in the Third District of the Cleveland Police Department and partially in its Fifth District.

{¶ 5} Bartell testified that when she and Hollenbeck arrived on the scene, they observed a black car, with one of its wheels completely off and the car totaled, pulled up on the curb. They saw two cars on the other side of the street. Williams, who was on her phone and pacing near the black car, was "very loud and appeared to be irate." Bartell first conferred with an EMS paramedic on the scene, who advised her that "he believed Williams was either drunk or high on drugs" and that Williams kept trying to get into her car and drive it away, even though one wheel was off and the car was totaled.

{¶ 6} Bartell and Hollenbeck then spoke with Williams. Bartell asked her if she was the driver of the black car, and Williams responded affirmatively. Bartell said that she asked Williams if she needed medical attention, which Williams declined. She then asked questions of Williams to find out what had happened, but according to Bartell, Williams "was acting so erratically it was impossible to have any kind of conversation."

{¶ 7} Bartell said that when she first approached Williams after speaking to the EMS paramedic, Williams got so close to her face that she had to push her away. Bartell said that Williams was angry, her eyes were glossy, her hair was "all over the place," and she was sweating, even though it was a cold night. Bartell also smelled an odor of alcohol on Williams. Bartell said that she had often encountered

intoxicated individuals during her ten years as a police officer and that Williams's glossy eyes, the smell of alcohol, and her belligerent attitude were common signs of intoxication.

{¶ 8} Bartell testified that after determining that the offense happened in the Fifth District, the police tried to handcuff Williams in order to detain her until officers from the Fifth District arrived but, as they tried to place her arms behind her back, Williams yelled "get off me" and started "flailing her arms all around." Bartell said that they managed to get Williams's right hand in cuffs but Williams continued swinging her left arm. Bartell testified that as she reached under Williams to grab her left arm, Williams "bent down and that's when she bit me." State's exhibit Nos. 2 and 3, pictures taken at the hospital later that night of the bite mark on Bartell's hand, were admitted into evidence. Bartell testified that Williams's bite went through the gloves she was wearing and that at the time of trial, some eight months after the incident, she still had a mark on her hand from the bite.

{¶ 9} Hollenbeck testified that state's exhibit No. 1, which was admitted into evidence, was video footage from her body camera of the events that occurred after she and Bartell arrived on the scene. The video, which was played for the jury and narrated by Hollenbeck, demonstrated that after Bartell asked Williams if she was the driver of the totaled car, Williams responded "uh-huh." Hollenbeck testified that as she and Bartell were trying to assess the situation and determine what had happened, Williams kept asking to drive her vehicle home. Hollenbeck said they did

not allow her to do so because "it appeared that she was highly intoxicated and the vehicle was completely totaled."

{¶ 10} Hollenbeck testified that based on her experience as a law enforcement officer, she believed Williams to be intoxicated "because of the way she was acting." She said that Williams came very close to her face when she was talking to her and "wouldn't give you personal space," she could smell alcohol on Williams "at arm's length away," and Williams did not understand that she could not drive her car even though one wheel was completely off and the vehicle was totaled.

{¶ 11} Hollenbeck testified about video footage from her body camera that showed Williams biting Bartell's hand while the officers were trying to handcuff her. Hollenbeck also testified about video footage that showed Williams resisting as three police officers and two EMS workers tried to get her into an ambulance. Hollenbeck said that because Williams kept resisting, the officers placed her in restraints on a cot; they also put a spit sock over her head because she had started to spit. Hollenbeck also testified that as the officers were trying to get Williams into the ambulance, Williams said she was going to kick Hollenbeck and then, in fact, kicked her twice in the groin area. Hollenbeck said that she did not require medical attention as a result of the kick but the muscles in her leg were still "really sore" the next day. An officer from the Fifth District accompanied Williams in the ambulance to the hospital, and Hollenbeck accompanied Bartell to the hospital for treatment to her hand.

{¶ 12} Williams did not offer any testimony in her defense at trial.

III. Law and Analysis

A. Lesser-Included Offense Instruction

{¶ 13} Williams was charged in Count 1 with felonious assault in violation of R.C. 2903.11(A)(1), with a furthermore clause that the victim was a peace officer. During trial, the state requested that the trial court also instruct the jury on Count 1 on the lesser-included offense of assault on a peace officer in violation of R.C. 2903.13(A). Defense counsel objected to the instruction, asserting that assault of a peace officer under R.C. 2903.13(A) is not a lesser-included offense of felonious assault of a peace officer under R.C. 2903.11(A)(1). The trial court deferred its ruling until the close of trial. The record reflects that after the state and defense rested, the court gave the proposed written jury charge to counsel with instructions to "make sure it's okay," and Williams did not renew her objection to the lesser-included instruction on Count 1, which was included in the proposed instructions. In her first assignment of error, Williams contends that the trial court erred in giving the lesser-included instruction.

{¶ 14} The parties dispute the proper standard of review for this assignment of error. Generally, we review the court's decision to give or exclude a particular jury instruction for an abuse of discretion under the facts and circumstances of the case. *State v. Howard*, 8th Dist. Cuyahoga No. 100094, 2014-Ohio-2176, ¶ 35. Thus, Williams contends that because she objected to the state's proposed instruction when the prosecutor requested the instruction during trial, we should review for abuse of discretion. "'Abuse of discretion' is a term of art, describing a judgment

neither comporting with the record, nor reason." *Klayman v. Luck*, 8th Dist. Cuyahoga Nos. 97074 and 97075, 2012-Ohio-3354, ¶ 12, citing *State v. Ferranto*, 112 Ohio St. 667, 676-677, 148 N.E. 362 (1925). "'A decision is unreasonable if there is no sound reasoning process that would support that decision.'" *Klayman* at *id.*, quoting *AAAA Ent. Inc. v. River Place Comm. Urban Redevelopment*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶ 15} The state, on the other hand, maintains that Williams did not object to the lesser-included instruction when the trial court gave the parties a written copy of the proposed jury charge with its instruction to "make sure it's okay," and thus has waived all but plain error on appeal. An improper or erroneous jury instruction does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Cooperrider*, 4 Ohio St.3d 226, 227, 448 N.E.2d 452 (1983).

{¶ 16} We recognize that the Ninth District has held that a party's failure to renew his objection to the jury charge when specifically offered the opportunity to do so by the trial court effectively withdrew any earlier objection to the charge and waived all but plain error on appeal. *See Akron v. Foos*, 9th Dist. Summit No. 28086, 2016-Ohio-8441, ¶ 21 (where the trial court specifically asked counsel if the instructions were acceptable and counsel responded affirmatively, despite his earlier objection to the instruction, the objection was effectively withdrawn and all but plain error forfeited on appeal). Nevertheless, in this case, we need not decide whether Williams's failure to renew her objection waived her earlier objection to the

lesser-included instruction because under either standard of review, we find no error.

{¶ 17} The question of whether a particular offense should be submitted to the finder of fact as a lesser-included offense involves a two-tiered analysis. *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶ 13. "The first tier, also called the 'statutory-elements step,' is a purely legal question, wherein we determine whether one offense is generally a lesser-included offense of the charged offense." *State v. Deanda*, 136 Ohio St.3d 18, 2013-Ohio-1722, 989 N.E.2d 986, ¶ 6, citing *State v. Kidder*, 32 Ohio St.3d 279, 281, 513 N.E.2d 311 (1987).

{¶ 18} The second tier requires the court to review the evidence and determine whether "'a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser-included offenses.'" *Evans* at ¶ 13, quoting *Shaker Hts. v. Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072, 865 N.E.2d 859, ¶ 11. "Only in the second tier of the analysis do the facts of a particular case become relevant." *Deanda* at ¶ 6.

{¶ 19} Williams argues that the trial court erred in giving the lesser-included instruction because under the first tier of the test, assault of a peace officer under R.C. 2903.13(A) is not a lesser-included offense of felonious assault of a police officer under R.C. 2903.11(A)(1). In determining whether an offense is a lesser-included offense of another, a court shall consider whether (1) one offense carries a greater penalty than the other, (2) some element of the greater offense is not required to prove commission of the lesser offense, and (3) the greater offense as statutorily

defined cannot be committed without the lesser offense as statutorily defined also being committed. *Evans* at paragraph two of the syllabus, clarifying *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988).

{¶ 20} Count 1 charged Williams with felonious assault under R.C. 2903.11(A)(1), which prohibits any person from knowingly causing serious physical harm to another. A violation of this section is a second-degree felony. R.C. 2903.11(D)(1)(a). However, if the victim of the felonious assault is a peace officer, felonious assault is a felony of the first degree. *Id.*

{¶ 21} The trial court also instructed the jury on Count 1 on the offense of assault under R.C. 2903.13(A), which prohibits any person from knowingly causing or attempting to cause physical harm to another. A violation of this section is a misdemeanor of the first degree. R.C. 2903.13(C)(1). However, if the victim is a peace officer "while in the performance of the officer's official duties," the offense is a fourth-degree felony. R.C. 2903.13(C)(5).

{¶ 22} Williams concedes that assault is a lesser-included offense of felonious assault but contends that assault of a peace officer under R.C. 2903.13(A) is not a lesser-included offense of felonious assault of a peace officer under R.C. 2903.11(A)(1) because the element of "while in the performance of the officer's official duties" for assault on a peace officer is not contained in the statutory definition of felonious assault on a peace officer. She contends that it is therefore possible to commit felonious assault of a peace officer (the greater offense) without necessarily committing the offense of assault of a peace officer (the lesser offense)

and, thus, the third element of the *Evans* test for determining whether an offense is a lesser-included offense of a greater offense is not met. *Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889.

{¶ 23} Williams's argument fails because the "while in the performance of the officer's official duties" factor is not an *element* of the offense of assault as statutorily defined under R.C. 2903.13(A); it is simply a *finding* that enhances the degree of the offense. *See, e.g., State v. Wilcox*, 160 Ohio App.3d 468, 2005-Ohio-1745, 827 N.E.2d 832 (8th Dist.) ("A finding by the jury that the victim was a peace officer simply enhances the degree of the offense and potential penalty."), citing *State v. Gimenez*, 8th Dist. Cuyahoga No. 71190, 1997 Ohio App. LEXIS 4013 (Sept. 4, 1997). *See also State v. McPherson*, 8th Dist. Cuyahoga No. 92481, 2010-Ohio-64, ¶ 11 ("special finding" that the assault occurred on the grounds of a correctional institution "was not part of the crime of assault" and "only affected the punishment available upon conviction"; "therefore the finding is not an essential element of the offense"). Thus, this court has previously recognized that a defendant charged with felonious assault with a peace officer specification may be convicted of the lesser-included offense of assault with a peace officer specification. *See State v. Jackim*, 8th Dist. Cuyahoga Nos. 87012 and 87400, 2006-Ohio-4756, ¶ 7 (defendant found not guilty of felonious assault of a peace officer but guilty of "the lesser-included offense of assault, with a peace officer specification" and resisting arrest).

{¶ 24} Williams makes no argument regarding the second tier of the *Evans* test, and thus, we need not consider it. Accordingly, because assault of a peace

officer in violation of R.C. 2903.13(A) is a lesser-included offense of felonious assault of a peace officer in violation of R.C. 2903.11(A)(1), the trial court properly instructed the jury on Count 1 that if it found Williams not guilty of felonious assault, it could consider the lesser-included offense of assault. The first assignment of error is therefore overruled.

B. Assault — First-Degree Misdemeanor or Fourth-Degree Felony?

{¶ 25} As set forth above, assault in violation of R.C. 2903.13(C) is a first-degree misdemeanor but if the victim was a peace officer while in the performance of the officer's official duties, the offense is a fourth-degree felony. In her second assignment of error, Williams contends that the trial court erred in convicting her in Count 1 of a fourth-degree felony for assault because the jury verdict supported only a first-degree misdemeanor.

{¶ 26} Specifically, Williams contends that the jury instructions did not include the "while in the performance of the officer's official duties" language but only instructed the jury that "[i]f your verdict is guilty of the lesser-included offense [of] assault, it is your duty to deliberate further and to decide whether the state proved beyond a reasonable doubt that the victim was or was not a peace officer." Likewise, she contends that the verdict form returned by the jury did not contain the "while in the performance of the officer's official duties" language but stated, "We the jury, find the defendant, Siara Williams, guilty of the lesser-included offense [of] assault, and we do further find that the state proved beyond a reasonable doubt that at the time of the offense, the victim, Tatiana Lynette Bartell is a peace officer."

Williams contends that the jury therefore failed to make the requisite finding to elevate her assault offense from a first-degree misdemeanor to a fourth-degree felony.

{¶ 27} R.C. 2945.75(A)(2) provides, in relevant part,

> When the presence of one or more additional elements makes an offense one of more serious degree: * * * A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

{¶ 28} It is undisputed that the verdict form in this case did not state the degree of the assault offense of which Williams was found guilty. Accordingly, we must consider whether the verdict form "state[s]" the "additional element" necessary to elevate the offense to a fourth-degree felony and, if not, whether such error mandates a reduction of the degree of the offense of which she was convicted.

{¶ 29} Williams did not object to the jury instructions as given, the verdict forms submitted to the jury, the guilty verdicts, nor the sentence imposed by the trial court. Where a defendant fails to object to a matter below, the defendant is generally deemed to have forfeited all but plain error. To find plain error, the defect in the trial court proceedings must be obvious and have affected the outcome of the trial. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 16; Crim.R. 52(B).

{¶ 30} Nevertheless, in *State v. Sanders*, 8th Dist. Cuyahoga No. 107253, 2019-Ohio-1524, this court held that even where a defendant does not object to the

verdict form below, a reviewing court does not engage in plain-error analysis but, rather, considers only the verdict form itself to determine whether there was compliance with R.C. 2945.75(A)(2). *Id.* at ¶ 65.

{¶ 31} In reaching this conclusion, the *Sanders* Court analyzed three decisions from the Ohio Supreme Court — *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735; *State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, 970 N.E.2d 891; and *State v. McDonald*, 137 Ohio St.3d 517, 2013-Ohio-5042, 1 N.E.3d 374 — which addressed the appropriate standard of review when a defendant asserts noncompliance with R.C. 2945.75(A)(2) on appeal but failed to object to the verdict form in the trial court. The *Sanders* Court found that in *Pelfrey*, the Ohio Supreme Court did not engage in plain-error analysis, despite the defendant's failure to raise any issue with the verdict form in the trial court, and held that failure to comply with R.C. 2945.75(A)(2) requires a reviewing court to treat the jury's guilty verdict as a finding of guilty of the least degree of the offense charged, regardless of any additional circumstances (e.g., that the verdict incorporates the language of the indictment, evidence presented at trial that shows the presence of the aggravating element,[1] or the defendant's failure to raise the issue of the inadequacy of the verdict form in the trial court). *Sanders* at ¶ 50.

[1] The references in *Sanders* to "elements" that can enhance an offense does not change our earlier analysis that the factors are not actually elements of an offense but rather, special findings that elevate the degree of the offense.

{¶ 32} The *Sanders* Court found *Eafford* — in which the Ohio Supreme Court held that the defendant's failure to object to the verdict form required a plain error analysis of the record as a whole — to be distinguishable from *Pelfrey* because although *Eafford* discussed R.C. 2945.75(A)(2), it did not involve the failure to include an enhancing element in the verdict form. *Sanders* at ¶ 55.

{¶ 33} Regarding *McDonald*, the *Sanders* Court found that in *McDonald,* the Ohio Supreme Court "focused on *Pelfrey*" and "once again made it clear that 'in cases involving offenses for which the addition of an element or elements can elevate the offense to a more serious degree, the verdict form itself is the only relevant thing to consider in determining whether the dictates of R.C. 2945.75 have been followed.'" *Sanders*, 8th Dist. Cuyahoga No. 107253, 2019-Ohio-1524, at ¶ 56, quoting *McDonald* at ¶ 17. The *Sanders* Court found that in *McDonald*, the Ohio Supreme Court reiterated that "we look only to the verdict form signed by the jury" and not "additional circumstances" in determining whether the defendant was properly convicted of an elevated offense. *Sanders* at *id.*

{¶ 34} Accordingly, in *Sanders*, this court held that in appeals involving compliance with R.C. 2945.75(A)(2) — even where the defendant has not objected to the verdict form below — "*Pelfrey* and *McDonald* control the result" and thus, a reviewing court considers only the verdict form itself. We do not look beyond the verdict form and consider whether, based on the record as a whole, the deficiency in the verdict form constituted plain error. *Sanders* at ¶ 64-65, 71. We therefore reject the state's contention in this case that *Eafford* is the controlling law and that

Williams is limited to only plain-error analysis. Nor do we consider the jury instructions, which did not instruct the jury regarding the "while in the performance of the officer's official duties" regarding the further finding for the lesser-included offense of assault in Count 1.[2]

{¶ 35} Considering only the verdict form itself, we find that the verdict form for the lesser-included offense of assault in Count 1 supports a conviction for first-degree misdemeanor assault, not fourth-degree-felony assault. The further finding on the verdict form states only that the jury found "that the state proved beyond a reasonable doubt that at time of the offense, the victim, Tatiana Lynette Bartell, is a peace officer." In order to elevate the offense to a fourth-degree felony, however, the jury was required to find that at the time of the offense, Bartell was "a peace officer * * * while in the performance of the officer's * * * official duties." R.C. 2903.13(D)(5). Thus, the verdict form did not comply with the requirements of R.C. 2945.75(A)(2) for an enhanced penalty. Furthermore, in the absence of the language "while in the performance of the officer's official duties," it is apparent that the jury did not make all the findings required to enhance the penalty from a first-degree misdemeanor to a fourth-degree felony.

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[2] The state contends that the jury was correctly instructed that it should determine whether Bartell was acting "while in the performance of the officer's official duties." The record reflects that the instructions for the further finding in Count 2 contained the requisite language but the instructions for the further finding for the lesser-included offense of assault in Count 1 did not.

{¶ 36} We find no merit to the state's argument that *State v. Anderson*, 183 Ohio App.3d 522, 2009-Ohio-3900, 917 N.E.2d 843 (8th Dist.), compels a different result. In *Anderson*, the defendant argued that the verdict forms for his felonious assault on a peace officer convictions were deficient because they did not reflect the enhancing factor that the peace officers were acting in the performance of their duties. *Id.* at ¶ 109. The court rejected that argument, finding that *Pelfrey* and subsequent cases applying *Pelfrey* involved verdict forms that either did not list the degree of the offense nor an enhancing factor, but the verdict forms at issue contained an enhancing factor that stated "the defendant did assault a peace officer as defined in Section 2935.01." *Id.* at ¶ 113. The court found the statement to be "a sufficient statement of the aggravating element to withstand scrutiny under *Pelfrey*." *Id.* at ¶ 114. *Anderson* was decided before *McDonald*, however, which made clear that there must be "strict compliance" with the dictates of R.C. 2945.75. *McDonald*, 137 Ohio St.3d 517, 2013-Ohio-5042, 1 N.E.3d 374, at ¶ 14; *State v. Johnson*, 2016-Ohio-781, 60 N.E.3d 661, ¶ 12 (1st Dist.), citing *McDonald* at ¶ 14 ("The Ohio Supreme Court has held that there must be strict compliance with the mandates of R.C. 2945.75."). We cannot find that a verdict form that does not include all of the language required to find an enhancing factor is strict compliance with the requirements of the statute. *See Sanders*, 8th Dist. Cuyahoga No. 107253, 2019-Ohio-1524 (verdict form was insufficient to support a conviction for third-degree felony domestic violence because although the form contained a finding that the defendant was previously convicted of attempted abduction, it did not include

language that the abduction involved a family or household member, which was necessary to elevate the offense).

{¶ 37} Accordingly, the second assignment of error is sustained. Williams's conviction for fourth-degree felony assault is reduced from a fourth-degree felony to first-degree misdemeanor assault. The sentence for fourth-degree felony assault is vacated, and the matter is remanded for resentencing on the offense as a first-degree misdemeanor.

C. Jury Instructions on Count 3

{¶ 38} Williams was convicted in Count 3 of driving while under the influence in violation of R.C. 4511.19(A)(1)(a), which provides that "[n]o person shall operate any vehicle * * * within this state if at the time of operation * * * the person is under the influence of alcohol, a drug of abuse, or a combination of them." In her third assignment of error, Williams contends that her conviction should be vacated because the trial court failed to instruct the jury on the element of "under the influence." Our review of the record demonstrates that although the court instructed the jury regarding the meanings of "operate," "vehicle," and "alcohol," it did not give any instruction defining "under the influence."

{¶ 39} Williams did not object to the jury instructions, however, and thus has waived all but plain error. To demonstrate plain error, a defendant must show an error that was an obvious defect in the trial proceedings that affected the outcome of the trial. *Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, at ¶ 16; Crim.R. 52(B). Notice of plain error is to be taken "'with utmost caution, under

exceptional circumstances, and only to prevent a manifest miscarriage of justice.'" *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002), quoting *State v. Long*, 53 Ohio St.2d 91, 976, 372 N.E.2d 804 (1978). Thus, reviewing for plain error, we must examine the evidence admitted at trial and determine whether the jury would have convicted Williams even if the error had not occurred. *State v. Slagle*, 65 Ohio St.3d 597, 605, 605 N.E.2d 916 (1992).

{¶ 40} "In charging the jury, the court must state to it all matters of law necessary for the information of the jury in giving its verdict." R.C. 2945.11. Thus, the trial court should have instructed the jury that "under the influence" for purposes of R.C. 4511.19(A)(1)(a) means

> that the defendant consumed some alcohol, whether mild or potent, in such a quantity, whether small or great, that it adversely affected and noticeably impaired the defendant's actions, reaction, or mental processes under the circumstances then existing and deprived the defendant of that clearness of intellect and control of herself which she would otherwise have possessed. The question is not how much alcohol would affect an ordinary person. The question is what effect did any alcohol, consumed by the defendant, have on her at the time and place involved. If the consumption of alcohol so affected the nervous system, brain, or muscles of the defendant so as to impair, to a noticeable degree, her ability to operate the vehicle, then the defendant was under the influence.

Ohio Jury Instructions, Section 711.19 (2007).

{¶ 41} Nevertheless, although the trial court did not give this instruction, it is apparent that the evidence admitted at trial was more than sufficient to demonstrate that Williams was under the influence of alcohol such that the

intoxication impaired her actions, reactions, and mental processes and, accordingly, that the jury would have convicted her if the correct instruction had been given.

{¶ 42} "In determining whether a defendant was under the influence of alcohol, the jury may properly consider evidence of his appearance and behavior, including his ability to perceive, make judgments, coordinate movements, and safely operate a vehicle." *State v. Baker*, 9th Dist. Summit No. 29167, 2020-Ohio-19, ¶ 13. Further, to prove impaired driving ability, "the state may rely on physiological factors (*e.g.*, odor of alcohol, glossy or bloodshot eyes, slurred speech, confused appearance) to demonstrate that a person's physical and mental ability to drive was impaired." *Id.* Finally, "virtually any lay witness, without special qualifications, may testify as to whether an individual is intoxicated." *Id.*

{¶ 43} Bartell testified that Williams was belligerent and acting so erratically that it was impossible to have a conversation with her. She testified further that she could smell an odor of alcohol on Williams and that Williams's eyes were glossy, her hair was disheveled, and she was sweating, even though it was a cold night. Hollenbeck testified that Williams appeared to be "highly intoxicated" and that she could smell alcohol on her "at arm's length away." She also testified that even though one wheel was off Williams's car and the car was totaled, Williams repeatedly kept asking to drive her vehicle home. Both officers testified that in light of their extensive experience as police officers with intoxicated persons, they believed that Williams was intoxicated.

{¶ 44} In light of this evidence, the jury could have concluded beyond a reasonable doubt that Williams was operating her vehicle while under the influence of alcohol if the "under the influence" instruction had been given. Accordingly, the trial court's failure to instruct on that element was not prejudicial to Williams and this is not the exceptional case where reversal of the conviction is necessary to prevent a manifest miscarriage of justice. The third assignment of error is overruled.

D. Sufficiency and Manifest Weight of the Evidence

{¶ 45} In her fourth assignment of error, Williams contends that her convictions were not supported by sufficient evidence. In her fifth assignment of error, she contends that her convictions were against the manifest weight of the evidence.

{¶ 46} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Cunningham*, 8th Dist. Cuyahoga No. 109100, 2020-Ohio-4220, ¶ 32. An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The 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. *Id.*

{¶ 47} The weight of the evidence concerns "'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. * * * Weight is not a question of mathematics, but depends on its effect in inducing belief.'" *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12, quoting *Thompkins* at 387. In a manifest weight analysis, the reviewing court sits as a "thirteenth juror" and reviews "'the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at *id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). The discretionary power to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. *Thompkins* at 386.

{¶ 48} Although sufficiency and manifest weight are different legal concepts, manifest weight subsumes sufficiency; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence also disposes of the issue of sufficiency. *State v. Jackson*, 8th Dist. Cuyahoga No. 100125, 2015-Ohio-1946, ¶ 11, citing *Thompkins*; *see also State v. Nunez*, 8th Dist. Cuyahoga No. 104623, 2018-Ohio-83, ¶ 6.

1. Count 1 – Assault of Officer Bartell

{¶ 49} As modified above, Williams was convicted in Count 1 of assault against Bartell in violation of R.C. 2903.13(A), which provides that no one shall "knowingly" cause physical harm against another. Williams contends that this conviction was against the manifest weight of the evidence because her actions against Bartell were not made knowingly. She argues that her bite on Bartell's hand was only incidental to her flailing her arms as she was being restrained and, thus, does not rise to the level of knowledge required to support a conviction for assault.

{¶ 50} Under R.C. 2901.22(B), "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." Accordingly, "assault does not require that a defendant intend to cause physical harm but 'only requires that the defendant acted with awareness that the conduct probably will cause such harm.'" *State v. Lucas*, 11th Dist. Lake No. 2020-L-118, 2021-Ohio-2721, ¶ 21, quoting *State v. Skjold*, 11th Dist. Geauga No. 2003-G-2544, 2004-Ohio-5311, ¶ 24.

{¶ 51} The evidence does not support a finding that Williams's bite on Bartell's hand was accidental. Bartell testified that when she reached under Williams and tried to grab her left arm, Williams "bent down" and then bit her hand. Moreover, the video footage of the incident shows Williams repeating "get off me!" several times before bending down to bite Bartell's hand. It also shows Bartell

asking Williams to stop resisting, but Williams responds "no, I'm not. Get off me." The fact that Williams bent down to bite Bartell's hand after telling her to "get off me" is clear evidence that Williams knowingly bit Bartell; the bite was not an accidental bite incidental to Williams's flailing around.

{¶ 52} Williams's argument that her intoxication negated the "knowingly" mens rea element of assault is likewise without merit. R.C. 2901.21 specifically provides that "voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense." *See also State v. Koballa*, 8th Dist. Cuyahoga No. 100664, 2014-Ohio-3592, ¶ 24 (a lack of capacity to form an intent due to voluntary intoxication is not a defense to a crime where mental state is an element of the crime.) And although Williams suggests that her intoxication may have been involuntary, there is no evidence whatsoever in the record to support this assertion.

{¶ 53} Williams also contends that the assault conviction in Count 1 was against the manifest weight of the evidence because Bartell was outside her jurisdiction at the time of the assault and not acting as a peace officer. We need not consider this argument because, as discussed above, Williams's assault conviction in Count 1 is modified to first-degree-misdemeanor assault without a peace officer specification and, thus, whether Bartell was outside her jurisdiction or acting as a peace officer while in the performance of her official duties is not relevant to Williams's assault conviction.

2. Count 2 – Assault of Officer Hollenbeck

{¶ 54} Williams makes the same arguments regarding her conviction for assault against Hollenbeck as she does regarding Bartell: her action in kicking Hollenbeck twice in the groin was not done "knowingly"; her intoxication is a defense to the crime; and Hollenbeck was outside her jurisdiction and not acting as a peace officer while in the performance of her official duties when Williams kicked her.

{¶ 55} Williams's argument that her kicks to Hollenbeck were not made knowingly is specious. Williams announced that she was going to kick Hollenbeck and then, in fact, kicked her twice. There is simply no plausible argument that the kicks were not done knowingly. And again, voluntary intoxication is not a defense to assault.

{¶ 56} There is likewise no merit to Williams's argument that Hollenbeck was not acting as a peace officer while in the performance of her official duties when Williams kicked her. The evidence at trial demonstrated that Bartell and Hollenbeck, while on patrol for the Cleveland Police Department during their shift on January 21, 2022, were dispatched to Rockefeller Park in response to 911 calls regarding an accident. It thus could not be more clear that both Bartell and Hollenbeck were acting as peace officers at the scene. There is also no evidence that Hollenbeck was outside her jurisdiction and not engaged in the course of her official duties when Williams kicked her. The evidence established that Rockefeller Park is handled by both Third District and Fifth District officers from the Cleveland Police

Department. It also demonstrated that although Bartell and Hollenbeck did not arrest Williams, they talked to EMS and Williams to determine what had happened and, upon determining that the offense occurred in the Fifth District, detained Williams until Fifth District officers arrived. There is no evidence they were outside their jurisdiction or not engaged in their official duties when they did so.

3. Count 3 — Driving While Under the Influence

{¶ 57} Williams next contends that her conviction for driving while under the influence of alcohol was against the manifest weight of the evidence because no Fifth District police officer testified at trial regarding her intoxication, no field sobriety test was administered, no blood test was done to determine her blood alcohol level, and neither Bartell nor Hollenbeck saw her driving her vehicle nor observed her condition while she was driving. Williams's arguments are wholly without merit.

{¶ 58} Williams admitted that she was the driver of the car, which was totaled and up on the curb with one wheel off when Bartell and Hollenbeck arrived on the scene immediately after the accident. Further, both Bartell and Williams testified about their observations of Williams, from which they concluded that she was "highly intoxicated." There is simply no evidence whatsoever to support Williams's assertion that she could have somehow become intoxicated before Bartell and Hollenbeck arrived on the scene after she totaled her car and that because they were Third District rather than Fifth District officers, their testimony about her glossy eyes, appearance, erratic behavior, and failure to comprehend that she could

not drive her totaled car was somehow insufficient to establish that she had driven (and totaled) her car while intoxicated.

{¶ 59} Williams's argument that the lack of field sobriety and chemical testing demonstrates her conviction was against the manifest weight of the evidence is likewise without merit. Williams was not charged under the sections of the law regarding testing over the legal limit for alcohol. Instead, she was charged with "driving under the influence" in violation of R.C. 4511.19(A)(1)(a), for which "'the amount of alcohol found as a result of the chemical testing of bodily substances in only of secondary interest.'" *State v. Vales*, 5th Dist. Stark No. 2019CA00061, 2020-Ohio-245, ¶ 60, quoting *Newark v. Lucas*, 40 Ohio St.3d 100, 104, 532 N.E.2d 130 (1988). Instead, "'[t]he defendant's ability to perceive, make judgments, coordinate movements, and safely operate a vehicle is at issue in the prosecution of a defendant under such sections. It is the behavior of the defendant which is the crucial issue.'" *Vales* at *id.*, quoting *Lucas* at *id*.

{¶ 60} Here, the jury heard both Bartell's and Hollenbeck's testimony about Williams's inability to make judgments and safely drive her car as a result of the alcohol she had consumed. Not only did she smell of alcohol, she was unable to have a coherent conversation with the officers and was unable to comprehend that her car was not driveable even though it was totaled. Further, the jury viewed the video footage from Hollenbeck's body camera and were able to observe Williams's statements, movements, and interactions with the officers.

{¶ 61} In summary, the jury heard the witnesses, evaluated the evidence, and was convinced of Williams's guilt on all three counts. This is not the exceptional case in which the evidence weighs heavily against Williams's convictions. Williams's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence. The fourth and fifth assignments of error are therefore overruled.

E. Ineffective Assistance of Counsel

{¶ 62} In her sixth assignment of error, Williams contends that she was denied her constitutional right to effective assistance of counsel.

{¶ 63} To establish ineffective assistance of counsel, Williams must demonstrate that counsel's performance fell below an objective standard of reasonable representation and that she was prejudiced by that deficient performance such that, but for counsel's error, the result of the proceedings would have been different. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 205, citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.E.3d 674 (1984). In short, counsel's errors must be so serious as to render the result of the trial unreliable. *State v. Jamie*, 8th Dist. Cuyahoga No. 102103, 2015-Ohio-3583, ¶ 24. In evaluating a claim of ineffective assistance of counsel, a court must be mindful that there are countless ways for an attorney to provide effective assistance of counsel in a given case and it must give great deference to counsel's performance. *Strickland* at 689.

{¶ 64} Williams first contends that counsel was ineffective for not objecting to the jury instruction for Count 3 because it did not include the definition of "under the influence." We find no ineffective assistance of counsel because, as discussed above, the trial court's failure to give this instruction did not prejudice Williams.

{¶ 65} Williams also contends that her counsel was ineffective for not objecting to the hearsay testimony of Bartell, who testified that an EMS paramedic at the scene told her that "he believed that [Williams] was either drunk or high on drugs." Because the record is replete with testimony from Bartell and Hollenbeck about Williams's obvious alcohol intoxication that affected her ability to safely operate her car, it is apparent that the jury would have convicted Williams of driving while under the influence without the admission of the hearsay statement from the EMS paramedic. Accordingly, the error was not prejudicial to Williams and we find no ineffective assistance of counsel.

{¶ 66} Finally, Williams contends that her counsel was ineffective for not objecting to her conviction in Count 1 for assault of a peace officer because the jury verdict form did not contain the requisite language "while in the performance of the officer's official duties." Because we have reduced Williams's conviction on Count 1 to a first-degree misdemeanor, we find no prejudicial error as a result of counsel's failure to object and, thus, no ineffective assistance of counsel. The sixth assignment of error is overruled.

{¶ 67} Judgment affirmed in part; modified in part; and remanded for resentencing on Count 1 as modified.

It is ordered that the parties share equally in the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

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KATHLEEN ANN KEOUGH, PRESIDING JUDGE

MICHELLE J. SHEEHAN, J., and
EILEEN T. GALLAGHER, J., CONCUR