[Cite as *State v. Theisen*, 2023-Ohio-2412.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 22CA8
v.	:	
WILLIAM F. THEISEN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Kimberly E. Burroughs, Assistant State Public Defender, Columbus, Ohio, for appellant.[1]

Keller J. Blackburn, Athens County Prosecuting Attorney, and Ashley M. Johnson, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:6-28-23
ABELE, J.

{¶1} This is an appeal from an Athens County Common Pleas Court judgment that found William F. Theisen, defendant below and appellant herein, violated a community-control sanction that the court previously imposed for convictions for witness intimidation and telecommunications harassment. As a result of

[1] Different counsel represented appellant during the trial court proceedings.

appellant's violation, the trial court sentenced him to serve 36 months in prison.

{¶2} Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT VIOLATED MR. THEISEN'S RIGHT TO MINIMUM PROCEDURAL DUE PROCESS BY RELYING PREDOMINANTLY ON HEARSAY EVIDENCE TO FIND MR. THEISEN VIOLATED THE TERMS OF HIS COMMUNITY CONTROL. IN DOING SO WITHOUT GOOD CAUSE, THE TRIAL COURT DEPRIVED MR. THEISEN OF HIS OPPORTUNITY TO CONFRONT HIS ACCUSERS."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT APPLIED THE PROBABLE CAUSE STANDARD, NOT THE PREPONDERANCE OF THE EVIDENCE STANDARD, TO FIND MR. THEISEN VIOLATED THE NO-CONTACT TERM OF HIS COMMUNITY CONTROL SANCTIONS."
>
> THIRD ASSIGNMENT OF ERROR:
>
> "COUNSEL FOR MR. THEISEN PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE TRIAL COURT'S USE OF THE WRONG BURDEN OF PROOF DURING THE JUNE 13, 2022 VIOLATION HEARING."

{¶3} On June 21, 2021, an Athens County Grand Jury returned an indictment that charged appellant with (1) intimidation of an attorney, victim, or witness in a criminal case, in violation of R.C. 2921.04(B)(2), and (2) telecommunications harassment, in violation of R.C. 2917.21(A)(6). At his arraignment, appellant entered not guilty pleas. The trial court set bond and included

as a bond condition that appellant have no direct or indirect contact with Billie Hill.

{¶4} Subsequently, the state filed two bond-condition notice violations. The first alleged that appellant "drove by and/or entered" Billie's "home zone" nine times between July 27 and August 9, 2021. The second alleged that appellant had flowers and alcohol delivered to Billie's address. After the second violation, the trial court revoked appellant's previous bond and increased the bond amount.

{¶5} On October 27, 2021, appellant entered guilty pleas to the charged offenses. The trial court sentenced appellant to serve five years of community control for each offense, to be served concurrently. One condition of community control states that appellant "shall have no contact with Billie Hill, directly or indirectly."

{¶6} On May 11, 2022, the state filed a notice of community-control violation and alleged that appellant's contact with Billie on multiple occasions between February 25, 2022 and April 30, 2022 violated community control.

{¶7} At the June 13, 2022 hearing, the state called appellant's probation officer, Anna White, to testify. White

confirmed that appellant's community-control sanctions prohibited him from contacting Billie.

{¶8} Chelsea Macciomei testified that she works for the prosecutor's office as a diversion officer and stated she also handles probation violations. Macciomei related that a victim advocate informed her "about potential violations that were occurring with [appellant]." Macciomei contacted the treatment facility where appellant resided to determine "how his probation violation could potentially be occurring." She explained that she needed to investigate "how, if these violations were occurring, how that was possible while he was in treatment." Macciomei informed the facility that appellant potentially had contacted the victim, but did not tell the facility the method of contact. Macciomei later discovered that the facility allowed individuals to have personal cell phones for certain periods of time.

{¶9} Macciomei testified that she reviewed the voice mail messages that formed the basis for the community-control-violation notice. She indicated that, although she did not directly receive the voice mail messages, she believes they originated from Billie or her sister, Brenda. Appellant's counsel objected to introducing the voice mails "on the basis

that this witness has just testified that these are not her voice mails, they belong to somebody else." The prosecutor responded that (1) she later would call the victim advocate who received the voice mails, (2) the rules of evidence do not apply to community-control-violation hearings, and (3) the statements are not hearsay because "they are [appellant's] own statements."

{¶10} Appellant's counsel pointed out that the voice mails were left on another person's phone, not on Macciomei's phone. He contended that the person who received the voice mails should testify and explain "whether those voice mails were left, what day they were left, [and] what time they were left." The trial court overruled appellant's objection. At that juncture, the state played the voice mail messages from Brenda's phone:

- "This is Frank. Sorry for all the bullshit. I love Billie with all my heart and soul."
- "Billie sucks."
- "I love Billie."
- "Brenda, tell Billie I said to suck my dick."

{¶11} Macciomei also testified that she reviewed a card Billie had received in the mail. Appellant's counsel objected to the card because Macciomei is not the person who received the card. The state, however, pointed out that "the first page specifically shows that someone named Billie Hall e-mailed this [card] directly to our office." Appellant's counsel stated that

he still did not "believe there is appropriate foundation for it." The court overruled appellant's objection.

{¶12} Macciomei stated that the card had been sent to Billie's home address and contained a hand-written statement "Billie you will be mine," and the word "will" underlined three times. She also stated that the return address appeared to have "been changed to not be accurate." Macciomei further recounted that she was present when appellant called the prosecutor's office about the alleged violations. The state played a recording of that call in which appellant stated he had not sent a card to Billie. Macciomei, however, stated that no one from the prosecutor's office had mentioned a card to appellant.

{¶13} Alexis Jones, a victim advocate who works for the prosecutor's office, testified that she spoke with Billie about the card. Billie told Jones that she believed the card came from appellant because the handwriting was "pretty identical to his." Billie explained he had sent her a handwritten note before, and that this card had been signed "Blue's Buddy." Billie told Jones that "Blue was her dog that only [appellant] would have had knowledge of when they were living together." Jones further stated that the card had been sent to the same address that appellant previously had sent Billie a card. With

respect to the voice mail messages, Jones testified that Billie forwarded the voice mails to the prosecutor's office near the date that Brenda received them.

{¶14} On cross-examination, appellant asked Jones whether her knowledge of the voice mail and card details is based upon information that Billie or Brenda relayed to her, and she responded affirmatively.

{¶15} During closing argument, appellant's counsel asserted that the state's hearsay evidence is not adequate to establish a probation violation. He pointed out that neither Billie nor Brenda testified. "The fact that [Billie] and [Brenda] are not here today I believe is enough to say there's not enough evidence that is not hearsay based for purposes of finding my client in violation."

{¶16} After hearing the evidence, the trial court found that appellant violated the terms of his community control. The court stated that the state "has put forth competent, credible evidence establishing probable cause." The trial court then revoked appellant's community control and imposed a 36-month prison sentence. This appeal followed.

I

{¶17} In his first assignment of error, appellant asserts that the trial court's reliance upon hearsay evidence to find that he violated his community-control conditions, without finding good cause for denying him the opportunity to confront the adverse witnesses, violated his due-process rights. Appellant asserts that only hearsay evidence supports findings that (1) he knew that Billie lived with Brenda and (2) he sent messages while the no-contact order was in effect. He contends that the trial court's failure to allow him to confront Billie and Brenda, without a finding of good cause for their absence, deprived him of his due-process right to confront the adverse witnesses.

{¶18} The state responds that appellant failed to preserve this argument. The state asserts that, during the community-control-violation hearing, appellant did not (1) explicitly object to any of the testimony based upon hearsay, and (2) argue that the trial court violated his due-process right to confront adverse witnesses. Thus, according to the state, appellant cannot now raise these issues on appeal.

{¶19} Appellant replies that during closing argument, he "raised the issues addressed in his merit brief." Appellant

further asserts that his foundation objections were, essentially, hearsay objections and that the "underlying challenge is a due process challenge." He contends that his foundation objections, coupled with using the word "hearsay" during his closing argument, were "enough to alert the trial court to the due process, hearsay, and foundation issues raised" on appeal.

{¶20} A defendant charged with violating community control and facing imprisonment is entitled to due process of law under the Fourteenth Amendment to the United States Constitution. *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 36 L.Ed.2d 656, 93 S.Ct. 1756, 1759 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 485, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *State v. Boling*, 4th Dist. Athens No. 01CA30, 2001 WL 1646691, *2 (Dec. 17, 2001); Crim.R. 32.3 (defendant entitled to hearing before court imposes a prison sentence for violating community control). To that end, before a court may send a defendant to prison for violating community control, the court must give the defendant both a preliminary hearing and a final hearing.[2] *E.g.*, *Gagnon*, 411

[2] We observe that these due-process requirements arose out of parole and probation revocation proceedings, which invariably involved a loss of liberty, "a serious deprivation requiring that the parolee be accorded due process." *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Ohio

U.S. at 786. With respect to the preliminary hearing, defendants are entitled to notice of the alleged community-control violation, an opportunity to appear and to present exculpatory evidence, a conditional right to confront adverse witnesses, an independent decision, and a written report of the hearing. *Id.*; *Morrissey*, 408 U.S. at 487. The final hearing is "less summary" and requires similar procedures:

> "(a) written notice of the claimed violations of [community control]; (b) disclosure to the [defendant] of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body * * *; and (f) a written statement by the factfinders as to the evidence relied on and reasons for [finding a community-control violation]."

---

courts routinely have applied these same due-process requirements to hearings involving community-control violations. *E.g., State v. Reese*, 8th Dist. Cuyahoga No. 109055, 2020-Ohio-4747; *State v. Newsome*, 4th Dist. Hocking No. 17CA2, 2017-Ohio-7488; *State v. Ohly*, 166 Ohio App.3d 808, 2006-Ohio-2353, 853 N.E.2d 675, (6th Dist.); *State v. Boling*, 4th Dist. Athens No. 01CA30, 2001 WL 1646691 (Dec. 17, 2001). The Ohio Supreme Court apparently has not directly ruled on this issue, but stated that "in contrast to probation violation and revocation proceedings as described by the court in *Gagnon*, community control violation hearings are formal, adversarial proceedings." *State v. Heinz*, 146 Ohio St.3d 374, 2016-Ohio-2814, 56 N.E.3d 965, ¶ 16; *but see State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 16 (finding "no meaningful distinction between community control and probation for purposes of reviewing the reasonableness of their conditions").

Gagnon, 411 U.S. at 786, quoting *Morrissey*, 408 U.S. at 489.

{¶21} In the case at bar, appellant argues that the trial court permitted the state to introduce hearsay testimony to establish the community-control violations and failed to find good cause to not allow appellant to confront adverse witnesses. Appellant thus contends that the trial court deprived him of his due-process confrontation right.

{¶22} A well-established principle is that appellate courts ordinarily will not consider any error that a complaining party "could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus. "Even constitutional rights 'may be lost as finally as any others by a failure to assert them at the proper time.'" *State v. Murphy*, 91 Ohio St.3d 516, 532, 747 N.E.2d 765 (2001), quoting *Childs*, 14 Ohio St.2d at 62. Courts thus have held that failing to object to an alleged due-process violation during a community-control-violation hearing "waives all but plain error." *State v. Clark*, 3d Dist. Union No. 14-22-01, 2022-Ohio-2539, ¶ 13, citing *State v. Dye*, 4th Dist. Athens No. 16CA17, 2017-Ohio-9389, ¶ 10, and *State v. Allsup*, 3d Dist. Hardin Nos.

6-10-06 and 6-10-07, 2011-Ohio-405, ¶ 30; *accord State v. Hairston*, 2016-Ohio-8495, 79 N.E.3d 1193, ¶ 34 (10th Dist.), quoting *State v. Wallace*, 10th Dist. Franklin No. 08AP-2, 2008-Ohio-5260, ¶ 25 (an "'[o]bjection on one ground does not preserve other, unmentioned grounds'").

{¶23} Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This rule permits a court to recognize plain error if the party claiming error establishes that (1) "'an error, i.e., a deviation from a legal rule'" occurred, (2) the error is a plain or 'an "obvious" defect in the trial proceedings,'" and (3) this obvious error affected substantial rights, i.e., the error "'must have affected the outcome of the trial.'" *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); *accord United States v. Dominguez Benitez*, 542 U.S. 74, 76, 82, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004) (under plain-error review, defendant typically must establish "'reasonable probability that, but for the error,' the outcome of the proceeding would have been different"). For an error to be "plain" or "obvious," the error must be plain "under current law" "at the time of

appellate consideration." *Johnson v. United States*, 520 U.S. 461, 467, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); *accord Henderson v. United States*, 568 U.S. 266, 279, 133 S.Ct. 1121, 185 L.Ed.2d 85 (2013); *Barnes*, 94 Ohio St.3d at 27, citing *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (for error to be plain, it must be obvious error under current law); *State v. G.C.*, 10th Dist. Franklin No. 15AP-536, 2016-Ohio-717, ¶ 14. However, even when a defendant demonstrates that a plain error or defect affected his substantial rights, the Ohio Supreme Court has "'admonish[ed] courts to notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."'" *Rogers* at ¶ 23, quoting *Barnes*, 94 Ohio St.3d at 27, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶24} In the case sub judice, appellant did not object to any of the evidence based upon his due-process right to confront the adverse witnesses. Instead, during the hearing appellant objected to various evidence due to a lack of foundation. However, his foundation objections are not sufficient to preserve a due-process, right-to-confront-adverse-witnesses issue for purposes of appeal. *United States v. Burrage*, 951

F.3d 913, 916 (8th Cir. 2020) (defendant's failure to "clearly object based on his inability to confront" witness during revocation hearing meant that defendant forfeited all but plain error); *United States v. Gorsline*, 784 F. Appx. 974, 974 (8th Cir. 2019) (defendant waived confrontation issue at revocation hearing when defendant objected to a police report based on foundation and hearsay but did not request to question its author); *United States v. Simms*, 757 F.3d 728, 732–33 (8th Cir. 2014) (due-process confrontation inquiry appropriate during revocation hearing when defendant timely objects and determining that "[a]n objection that a non-author may not read a police report into evidence did not preserve the question whether [defendant] had a due process right to confront his victim"); *accord Morrissey*, 408 U.S. at 487 ("[o]n request of the parolee" adverse witness must be made available for questioning at parole revocation hearing); *see generally State v. Petty*, 10th Dist. Franklin No. 15AP-950, 2017-Ohio-1062, ¶ 49. In the case sub judice, at no point did appellant specifically ask the court to make Billie or Brenda available for questioning. Thus, our review of this issue is limited to plain-error review.

{¶25} After our review, we do not believe that the trial court obviously erred by failing to sua sponte recognize that

appellant's objections (1) meant that he wished to question Billie and Brenda, or (2) required the court to find good cause to deny him the right to confront the witnesses. Although appellant mentioned during closing argument that the state's evidence relied primarily upon hearsay, appellant did not assert that he had the right to confront the adverse witnesses. Instead, appellant argued that Billie's and Brenda's absence "is enough to say there's not enough evidence that is not hearsay." By failing to assert his due-process right to confront adverse witnesses during the hearing, appellant deprived the state of the opportunity to establish, and for the trial court to find, good cause for the witnesses' absence.

{¶26} Furthermore, even if during appellant's closing argument he had implied that his argument is that he had a right to confront his accusers, appellant did not, at an earlier point in the proceedings, apprise the court that he wished to confront his accusers. Neither did appellant raise it in a manner that would have allowed the state to establish good cause for the witnesses' absence. Under these circumstances, we do not believe that the trial court plainly erred by failing to inquire into the witnesses' absence. *See Burrage*, 951 F.3d at 916

(trial court did not plainly err by failing to inquire into "the absence of live testimony").

{¶27} Moreover, even if the trial court relied upon some hearsay evidence, Evid.R. 101(C)(3) expressly provides that the rules of evidence do not apply to, among others, "proceedings with respect to community control sanctions." *E.g.*, *State v. Ohly*, 166 Ohio App.3d 808, 2006-Ohio-2353, 853 N.E.2d 675, ¶ 21 (6th Dist.) ("Probation-revocation hearings are not subject to the rules of evidence and thus allow for the admission of [otherwise inadmissible] evidence."); *State v. Estep*, 4th Dist. Gallia No. 03CA22, 2004–Ohio–1747, ¶ 6 ("The Rules of Evidence do not apply to community control revocation hearings"). The rules of evidence do not apply to community-control-violation hearings because these hearings are "informal" and "structured to assure that the finding of a * * * violation will be based on verified facts" by a person with "accurate knowledge of the * * * [defendant's] behavior." *Morrissey*, 408 U.S. at 484. Thus, courts "should be able to consider any reliable and relevant evidence indicating whether the [defendant] has violated the terms of [community control]." *State v. Gullet*, 5th Dist. Muskingum No. CT2006–0010, 2006–Ohio–6564, ¶ 27; citing *Columbus v. Bickel*, 77 Ohio App.3d 26, 36, 601 N.E.2d 61 (10th

Dist.1991); *e.g.*, *State v. Newsome*, 4th Dist. Hocking No. 17CA2, 2017-Ohio-7488, ¶ 21.

{¶28} We further note that, even if the trial court relied upon some hearsay evidence to find that appellant violated his community-control conditions, the court did not exclusively rely on hearsay evidence. This court and others have stated that relying on hearsay evidence during a community-control-violation hearing deprives a defendant of his due-process right to confront his accusers when hearsay evidence is the only evidence presented at the hearing. *Newsome* at ¶ 22, citing *State v. Johnson*, 4th Dist. Meigs No. 14CA10, 2015-Ohio-1373, ¶ 25, quoting *Ohly* at ¶ 21 ("'[t]he introduction of hearsay evidence into a probation-revocation hearing is reversible error when that evidence is the only evidence presented and is crucial to a determination of a probation violation'"); *e.g., State v. Sherazee*, 5th Dist. Delaware No. 2014CAA120082, 2015-Ohio-4160, ¶ 25; *State v. Slappey*, 3rd Dist. Marion No. 9-12-58, 2013-Ohio-1939, ¶ 14; *State v. Partin*, 5th Dist. Richland No. 07CA104, 2008-Ohio-3904, ¶ 14. Thus, contrary to appellant's assertion, Ohio appellate courts have not stated that a trial court violates a defendant's due-process right to confront witnesses when it "predominantly" relies on hearsay evidence to find that

a defendant violated community control. *See State ex rel. Mango v. Ohio Dept. of Rehab. & Correction*, 169 Ohio St.3d 32, 2022-Ohio-1559, 201 N.E.3d 846, ¶ 14 (parolee facing revocation does not have same confrontation rights as an accused facing a trial and upholding parole revocation that was based partly upon hearsay evidence and partly upon nonhearsay evidence).

{¶29} In the case sub judice, the trial court's finding is not based exclusively on hearsay. Instead, the state presented both hearsay and nonhearsay evidence to support the trial court's finding that appellant violated the no-contact order imposed as a community-control sanction. Appellant's own statements are nonhearsay. Evid.R. 801(D)(2) (statement not hearsay if it "is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity"). Appellant's voice mail messages establish that he made statements intended for Billie. The state relied on hearsay evidence to show when Brenda and Billie received the voice mail messages and to establish that appellant knew that Billie resided at Brenda's house. Additionally, the state introduced into evidence a copy of the card Billie received. This card contained a made-up return address, is addressed to Billie at Brenda's residence, and is postmarked April 11, 2022,

which is within the time period when appellant was subject to the no-contact order. The state relied upon Billie's hearsay statements to establish that she did, in fact, receive the card and that she believed appellant sent the card. Appellant also indicated, during a conversation with an investigator, that he knew that Billie had received a card in the mail, but denied that he sent it. This statement is not hearsay.

{¶30} Consequently, the combination of both nonhearsay and hearsay evidence shows that the trial court did not exclusively rely upon hearsay evidence to find that appellant violated community control. Therefore, in accordance with established Ohio case law, the trial court did not deprive appellant of his due-process right to confront the adverse witnesses against him.

{¶31} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

{¶32} In his second assignment of error, appellant asserts that the trial court plainly erred by using a probable-cause standard to decide whether the state met its burden to prove that he violated community-control conditions. Instead, appellant contends that the correct standard is the preponderance-of-the-evidence standard. Appellant further

argues that a reasonable probability exists that the outcome of the community-control-violation hearing would have been different if the court had applied the correct burden of proof.

{¶33} As we stated earlier, before a trial court may impose a prison sentence on a defendant for violating community control, the court must hold "two hearings, one a preliminary hearing at the time of [the defendant's] arrest and detention to determine whether there is probable cause to believe that" the defendant violated community control. *Gagnon*, 411 U.S. at 781–82; *Morrissey*, 408 U.S. at 485. The purposes of this probable-cause hearing are "to prevent the incarceration of a [community-control violator] without probable cause and to allow independent review of the charges against him 'while information is fresh and sources are available.'" *State v. Delaney*, 11 Ohio St.3d 231, 233, 465 N.E.2d 72 (1984). Probable cause generally equates to a "fair probability" that the defendant violated community control. *See generally Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

{¶34} The second "hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." *Morrissey*, 408 U.S. at

488. The second hearing is not a criminal trial, however. *State v. Wolfson*, 4th Dist. Lawrence No. 03CA25, 2004-Ohio-2750, ¶ 7, citing *State v. Payne*, 12th Dist. Warren No. CA2001-09-081, 2002-Ohio-1916, citing *State v. Hylton*, 75 Ohio App.3d 778, 782, 600 N.E.2d 821 (4th Dist.1991). Thus, the state need not establish, beyond a reasonable doubt, that the defendant violated a community-control condition. *Id.* Instead, after the probable-cause determination, the state need only present "substantial" proof that a defendant violated the community-control conditions. *Hylton*, 75 Ohio App.3d at 782. Accordingly, this court has applied the "some competent, credible evidence" standard to determine whether the evidence supports a court's finding that a defendant violated community-control sanctions. *Wolfson* at ¶ 7 (citations omitted). We have stated that this standard of review is "highly deferential" and similar to a preponderance-of-the-evidence burden of proof. *In re C.M.C.*, 4th Dist. Washington No. 09CA15, 2009-Ohio-4223, ¶ 17. "'"[A] preponderance of evidence means the greater weight of evidence. * * * The greater weight may be infinitesimal, and it is only necessary that it be sufficient to destroy the equilibrium."'" *State v. Nicholas*, ___ Ohio St.3d ___, 2022-Ohio-4276, ___ N.E.3d ___, ¶ 29, quoting *State v. Stumpf*, 32

Ohio St.3d 95, 102, 512 N.E.2d 598 (1987), quoting *Travelers' Ins. Co. of Hartford, Connecticut v. Gath*, 118 Ohio St. 257, 261, 160 N.E. 710 (1928) (Ellipsis sic.).

{¶35} In the case at bar, even if the trial court improperly applied a probable-cause standard when it decided whether appellant violated his community-control sanctions, we nonetheless believe that the record contains competent and credible evidence to demonstrate, by a preponderance of the evidence, that appellant violated the no-contact order. As we discuss in greater detail in appellant's third assignment of error, the witnesses' testimony is sufficient to find that appellant violated the no-contact order under the preponderance-of-the-evidence standard. Thus, any error is, at most, harmless error that we must disregard. Crim.R. 52(A); *State v. Baker*, 4th Dist. Scioto No. 09CA3331, 2010-Ohio-5564, ¶¶ 5-9 (trial court's mistake in applying probable-cause standard to community-control-violation determination is harmless error).

{¶36} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

III

{¶37} In his third assignment of error, appellant asserts that trial counsel did not provide effective assistance of

counsel. In particular, he contends that trial counsel ineffectively failed to object to the probable-cause standard that the trial court applied to find that he violated the no-contact order. Appellant argues that if trial counsel had pointed out the error, a reasonable probability exists that the trial court would have concluded that the state failed to establish, by a preponderance of the evidence, that appellant violated his community control.

{¶38} The Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution, provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to the "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Hinton v. Alabama*, 571 U.S. 263, 272, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) (the Sixth Amendment right to counsel means "that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence").

{¶39} To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) his counsel's

performance was deficient and (2) the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *E.g.*, *Strickland*, 466 U.S. at 687; *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 183; *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 85. "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (a defendant's failure to satisfy one of the ineffective-assistance-of-counsel elements "negates a court's need to consider the other").

{¶40} The deficient performance part of an ineffectiveness claim "is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), quoting *Strickland*, 466 U.S. at 688; *accord Hinton*, 571 U.S. at 273. Prevailing professional norms dictate that "a lawyer must have 'full authority to manage the conduct of the trial.'" *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270, ¶

24, quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

{¶41} Furthermore, "'[i]n any case presenting an ineffectiveness claim, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."'" *Hinton*, 571 U.S. at 273, quoting *Strickland*, 466 U.S. at 688. Accordingly, "[i]n order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95 (citations omitted).

{¶42} Moreover, when considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Additionally, "[a] properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128

(1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *e.g., State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin*, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶43} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that "'but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome.'" *Hinton*, 571 U.S. at 275, quoting *Strickland*, 466 U.S. at 694; *e.g., State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus; *accord State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 91 (prejudice component requires a "but for" analysis). "'[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Hinton*, 571 U.S. at 275, quoting *Strickland*, 466 U.S. at 695. Furthermore, courts ordinarily may not simply presume the

existence of prejudice but, instead, must require a defendant to affirmatively establish prejudice. *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 22; *State v. Tucker*, 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002); *see generally Roe v. Flores-Ortega*, 528 U.S. 470, 483, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2008) (prejudice may be presumed in limited contexts, none of which are relevant here).

{¶44} In the case sub judice, after our review we do not believe that a reasonable probability exists that, absent the probable-cause error, the trial court would have determined that the state failed to meet its burden to prove, by a preponderance of the evidence, that appellant violated the no-contact order. Instead, had trial counsel pointed out the error and had the trial court applied the preponderance-of-the-evidence standard, we believe that the record contains more than adequate evidence to satisfy the preponderance standard. That is, the greater weight of the evidence supports a finding that appellant violated the no-contact order. Here, the state played the audio recordings in which appellant can be heard relaying messages about or for Billie. Appellant's own statements establish that he intended to contact Billie. The state's witnesses testified to the dates that the prosecutor's office received the emails

containing the voice mail messages, and these witnesses stated that Billie informed the prosecutor's office that she sent the emails to the prosecutor's office around the time that she had received the messages. All of these contacts occurred while the no-contact order was in effect.

{¶45} Additionally, the state introduced a copy of a card, dated April 11, 2022, addressed to Billie with a made-up return address. The card contained a message for Billie that stated "you will be mine," with the word "will" underlined three times for emphasis. The card also was signed by "Blues [sic] Buddy." Billie explained to her victim advocate that appellant knew that her now-deceased dog's name had been Blue.

{¶46} After our review, we believe that all of the foregoing evidence supports the conclusion that the state established the violation by a preponderance of the evidence.

{¶47} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee shall recover of appellant 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 Athens County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of 60 days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the 60-day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the 45-day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said 60 days, the stay will terminate as of the date of such dismissal.

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

Hess, J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

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