

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO :

PLAINTIFF-APPELLANT :

-v- :

DONALD K. MALONE, III, :

DEFENDANT-APPELLEE :

Case No. 07-2186

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NOTICE OF CERTIFIED CONFLICT

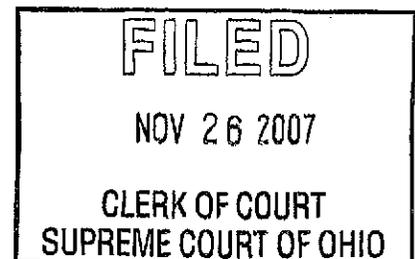
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## NOTICE OF CERTIFIED CONFLICT

Pursuant to Sup.Ct.Prac.R. IV, Section 1, the State of Ohio, Plaintiff-Appellant, hereby gives notice that the Court of Appeals for the Third Appellate District, by journal entry filed November 15, 2007, a copy of which is attached, has certified that the judgment rendered on October 15, 2007 by the Third District Court of Appeals in the instant case is in conflict with judgments pronounced on the same question by the Court of Appeals for the Fifth and Eighth Appellate Districts in *State v. Hummell* (June 1, 1998), 5<sup>th</sup> Dist. No. CA-851 and *State v. Gooden*, 8<sup>th</sup> Dist. No. 82621, 2004-Ohio-2699. The issue for certification is:

Is a conviction for intimidation of a witness under R.C. 2921.04(B), which requires the witness to be involved in a criminal action or proceeding, sustainable where the intimidation occurred after the criminal act but prior to any police investigation of the criminal act, and thus, also prior to any proceedings flowing from the criminal act in a court of justice?

In the instant case, by a 2 to 1 vote, the Third District Court of Appeals reversed the Defendant-Appellee's conviction for intimidation in violation of R.C. 2921.04(B) in Count 6 of the indictment, finding that the conviction was not supported by sufficient evidence because the intimidation of the witness took place prior to the police being called to investigate the underlying crime. See Opinion at ¶¶34-45. R.C. 2921.04(B), which sets forth the offense of intimidation of a witness, states in pertinent part:

No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder \*\*\*\* [a] witness involved in a criminal action or proceeding in the discharge of the duties of the \*\*\*\* witness.

In the instant case, the witness in question, was a witness to a forcible rape which the Defendant-Appellee committed. Immediately after the rape, the Defendant-Appellee told the

victim that if she reported the rape, he would kill both her and her mother. The Defendant-Appellee then told the witness that if she reported the rape, his “dudes” would find her and that if the police or any attorneys asked her about the rape, she was to say she had been asleep. The Defendant-Appellee advised the witness that her life would be in danger if she did otherwise. See Opinion at ¶31. As a result of these threats, the rape was not reported by the victim for two days. When the police initially contacted the witness, as instructed, she initially claimed she had been asleep, before eventually telling the police what had happened.

A majority of the Third District Court of Appeals ruled that since the Defendant-Appellee threatened the witness prior to any police investigation or prosecution in this case, at the time of the threat the witness was merely a witness to a criminal act and not a witness involved in a criminal action or proceeding. Thus the Defendant-Appellee could not be prosecuted for intimidation of a witness. Opinion at ¶39. The Third District Court of Appeals acknowledged that other appellate districts “have upheld convictions for intimidating a witness when the threats were made prior to any investigation by the police.” Opinion at ¶36. The dissenting judge agreed that the decision was in conflict with other Appellate districts and pointed out:

As such, the intimidating affect of a threat upon a witness is just as effective a deterrent to the witness’ later cooperation with police or participation in a criminal prosecution – and hence, just as violative of the statute – whether the threat occurred before police involvement or after.

Opinion at ¶44.

Both the Fifth and Eighth District Court of Appeals previously held that a conviction for intimidation of a witness in violation of R.C. 2921.04(B) is appropriate, even though the intimidation took place prior to criminal prosecution having been commenced or the police having

been called. In *State v. Hummell* (June 1, 1998), 5<sup>th</sup> Dist. No. CA-851, a sexual assault was committed with two witnesses in the room. The defendant told the witnesses that if either one of them told anyone what happened, he would kill them. The defense argued that since the intimidation occurred before the criminal prosecution had been instituted, he could not be guilty because they were not witnesses involved in a criminal action or proceeding. The appellate court disagreed. In *State v. Gooden*, 8<sup>th</sup> Dist. No. 82621, 2004-Ohio-2699, the morning after committing a homicide, the defendant told a witness that he better not tell anyone what he had seen going on the preceding night, or he would also be killed. The court rejected the defense argument that he could not be convicted of intimidation just because the threats took place before any criminal prosecution had been instituted.

Criminals intimidate witnesses to avoid being convicted and punished. This intimidation can take place both in the context of preventing a witness from testifying and preventing a witness from even calling the police. In either case, justice is denied.

Attached hereto are the following documents:

1. Journal Entry of November 15, 2007 in the instant case certifying that the decision in the instant case is in conflict with decisions issued by the Courts of Appeals for the Fifth and Eighth Appellate Districts;
2. Opinion issued in the instant case by the Third District Court of Appeals on October 15, 2007 in which the Appellant seeks to appeal;
3. The opinions issued by the Fifth and Eighth Appellate Districts in *State v. Hummell* (June 1, 1998), 5<sup>th</sup> Dist. No. CA-851 and *State v. Gooden*, 8<sup>th</sup> Dist. No. 82621, 2004-Ohio-2699.

The State of Ohio respectfully requests that this Court issue an order finding conflict on the issues set forth herein so that it can be determined whether or not the criminal offense of intimidation of a witness in violation of R.C. 2921.04(B) has been committed when an individual intimidates a witness prior to law enforcement being called to investigate the original criminal act.

Respectfully submitted,



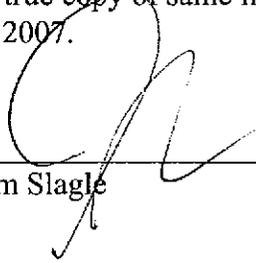
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Attorney for State of Ohio, Plaintiff-Appellant

#### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing pleading was delivered to Kevin Collins, Attorney for Defendant-Appellee, by placing a true copy of same in his mail depository box at the Marion County Court House on November 21, 2007.



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Jim Slagle

RECEIVED NOV 16 2007

FILED  
COURT OF APPEALS

NOV 15 2007

MARION COUNTY OHIO  
JULIE M. KAGEL, CLERK

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

MARION COUNTY

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STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 9-06-43

v.

DONALD K. MALONE, III,

JOURNAL  
ENTRY

DEFENDANT-APPELLANT.

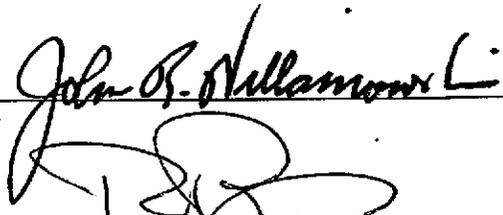
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Upon consideration and consistent with the Court's opinion of October 15, 2007, the Court finds *sua sponte* that the judgment in the instant appeal should be certified pursuant to App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution.

Accordingly, the Court finds that the judgment in the instant case is in conflict with judgments rendered by the Eighth District Court of Appeals in *State v. Gooden*, 8<sup>th</sup> Dist.No. 82621, 2004-Ohio-2699, and the Fifth District Court of Appeals in *State v. Hummell* (June 1, 1998), 5<sup>th</sup> Dist.No. CA-851, unreported, on the following issue:

Is a conviction for intimidation of a witness under R.C. 2921.04(B), which requires the witness to be involved in a criminal action or proceeding, sustainable where the intimidation occurred after the criminal act but prior to any police investigation of the criminal act, and thus, also prior to any proceedings flowing from the criminal act in a court of justice?

It is therefore **ORDERED** that the October 15, 2007 judgment in this appeal be, and hereby is certified as in conflict on the issue set forth hereinabove.

  
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JUDGES

DATED: November 14 2007

/jlr

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
MARION COUNTY**

**FILED  
COURT OF APPEALS**

**OCT 15 2007**

**MARION COUNTY OHIO  
JULIE M. KAGEL, CLERK**

**STATE OF OHIO,**

**CASE NUMBER 9-06-43**

**PLAINTIFF-APPELLEE,**

**v.**

**OPINION**

**DONALD K. MALONE, III,**

**DEFENDANT-APPELLANT.**

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**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.**

**JUDGMENT: Judgment affirmed in part and reversed in part and cause remanded.**

**DATE OF JUDGMENT ENTRY: October 15, 2007**

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**ATTORNEYS:**

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For Appellee.**

**WILLAMOWSKI, J.**

{¶1} The defendant-appellant, Donald Malone, III, appeals the judgment of conviction and sentence filed by the Marion County Common Pleas Court.

{¶2} On April 19, 2006, the Marion County Grand Jury filed a nine-count indictment against Malone, charging the following offenses: Counts One and Three, rape, violations of R.C. 2907.02(A)(2), first-degree felonies; Count Two, kidnapping, a violation of R.C. 2905.01(A)(4), a first-degree felony;<sup>1</sup> Count Four, abduction, a violation of R.C. 2905.05(A)(2), a third-degree felony; Counts Five, Six, and Seven, intimidation of an attorney, victim, or witness in a criminal case, violations of R.C. 2921.04(B), third-degree felonies; Count Eight, tampering with evidence, a violation of R.C. 2921.12(A)(1), a third-degree felony; and Count Nine, possessing criminal tools, a violation of R.C. 2923.24(A), a fifth-degree felony. These charges resulted from an incident that occurred during the night and into the morning on April 8-9, 2006.

{¶3} On April 8, 2006, Brittany Brown invited the victim, L.K., and her friend, Hugh Pfarr, to the apartment shared by Brittany and her husband, Brad Brown. L.K., Hugh, and Brad are clients of the Marion Area Counseling Center West (“MACC West”). L.K. was a client because she is bi-polar, suffers from borderline personality, and engages in impulsive behaviors. L.K. and Hugh lived

at MACC West, but Brad and Brittany's apartment was located in the city of Marion. When Brittany, L.K., and Hugh arrived at the apartment, they met Brad and Malone, who was introduced as "Demon." Malone had his own bedroom in the apartment because he resided there when he fought with his mother and did not want to stay in her home. Malone was nicknamed "Demon" because he was a founder of and a priest in a satanic "covenant" located in Orange County, California.

{¶4} Throughout the early evening, the group laughed and joked, talking about various topics, including sex. Malone talked about his former fiancé, who was deceased, and also talked about several girls he had had relationships with. Malone showed pictures of the girls to the group and talked about wanting to kill them. Eventually, Brad and Hugh left the apartment, and Hugh returned to his residence at MACC West. While Brad was gone, Brittany, L.K., and Malone continued to joke about various topics, some of which were of a sexual nature. At approximately 11:00 p.m., L.K. decided to spend the night at the apartment, intending to sleep on the couch in the living room. L.K. laid down on the couch, draping her legs across Malone's lap. Malone asked her if he could lie with her, and she apparently consented, so he rested on the couch behind her, placing his head on her hip and holding her legs. After a short time, L.K. indicated she was

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<sup>1</sup> Count Two contained a sexual motivation specification, and Counts One, Two, and Three contained Sexually Violent Predator specifications.

uncomfortable, and she changed her position on the couch. Malone rested his head on her inner thigh and continued rubbing her legs. During this time, Brittany was cleaning up the apartment and moving between rooms. L.K. again indicated that she was uncomfortable, and she went into Brad and Brittany's bedroom. Brittany joined her in the bedroom, and the two women played with several kittens on the bed.

{¶5} Malone went to his bedroom, and eventually called Brittany to him. In his room, Malone told Brittany that he wanted to have sex with L.K., and he told Brittany he would kill her and/or L.K. if they resisted. During this time, Malone was holding an unsheathed knife, which he always kept on his person. Brittany began to cry and went back to her bedroom, where she told L.K. that Malone wanted to have sex with her. L.K. also began to cry and said she did not want to have sex with Malone, but Brittany told her there would be consequences if she did not comply. Malone walked into the bedroom and sat on a chair, holding his unsheathed knife. Malone told Brittany to leave the room and prevented L.K. from leaving. He told L.K. to give him what he wanted, and then she could leave. Holding his knife in front of her, Malone told L.K. he would kill her if she failed to cooperate. L.K. decided to "go ahead and get it over with," so she followed Malone to his bedroom.

{¶6} In the bedroom, Malone told her to undress, and then he took off his clothes. Malone told L.K. to lie on the bed, and he attempted to insert his penis into her vagina. Failing to do so, he licked her vagina and noted that she had a “fat pussy.” Malone then used Vaseline as a lubricant and had vaginal intercourse with L.K.. After Malone ejaculated in L.K.’s vagina, she got dressed, and Malone made her go into the bathroom. In the bathroom, Malone told L.K. to take a shower to get rid of any evidence. He filled a mustard bottle with warm water, and made her insert the tip of the bottle into her vagina to douche. After she douched with the mustard bottle, Malone took the bottle, inserted it into her vagina and squeezed the bottle one more time. During this time, Malone had his knife with him. Malone then threatened L.K. that he or his “dudes” would kill her and/or her mother if she told anybody about the rape. While L.K. was in the shower, Brad returned to the apartment. Malone went out to see who was in the apartment and told Brad, “I raped the bitch.”

{¶7} When they got out of the bathroom, L.K. went into Brad and Brittany’s bedroom. Malone followed her into the bedroom and again threatened to kill her if she told the police. He also threatened Brad and Brittany and told them that if any police or attorneys asked about the rape, they were to say they had been asleep and had no knowledge. Malone then went into the kitchen and made fried chicken. Brad and Brittany ate some of the chicken while L.K. remained in

the bedroom. Brad and Brittany returned to the bedroom, and Malone entered a short time later, carrying the sheets from his bed, the mustard bottle, and Vaseline in a plastic bag, which he put in his backpack. Malone stated he was going to LaRue to burn the evidence. After Malone left the apartment, L.K. fell asleep in Brad and Brittany's bed. When she awoke, she left the apartment and returned to her apartment at MACC West.

{¶8} After Malone left the apartment, he was stopped by a city police officer for jaywalking. Malone identified himself to the officer and consented to a search of his bag. Malone told the officer that he carried the bedsheet so he could lie down if he got tired, he had the mustard bottle for drinking water, and he had the Vaseline in case his thighs got chafed from walking. The officer found his story strange, but having no reason for an arrest, he let Malone go on his way.

{¶9} On April 10, 2006, L.K. reported the incident to the police and was examined by a sexual assault nurse at a local hospital. Officers investigated at Brad and Brittany's apartment, where they placed Malone under arrest. As part of their investigation, officers seized a calendar on which Malone had written "demon night" on April 8.

{¶10} The court conducted a four day jury trial in July 2006. For its case in chief, the state presented testimony from Rob Musser, the officer who stopped Malone and searched his backpack; L.K.; Brittany; Hugh; Amy Stander, a friend

of L.K.'s; Judy Fatzinger-Spengler, L.K.'s mother; Linda Henson, L.K.'s case manager at MACC West; Betsy Abbott, a victim's advocate; Darlene Schoonard, the nurse who completed the sexual assault examination; James Fitsko, the detective who conducted a photo line-up with L.K.; and Electa Foster, the officer who investigated the offenses. The court admitted the following exhibits into evidence: Malone's knife, Malone's backpack, L.K.'s sweatpants, L.K.'s t-shirt, Malone's calendar, six photographs of Brad and Brittany's apartment, three photographs of the girls Malone had talked about killing, the nurse's report from the sexual assault exam, and the photos from the line-up. Malone testified on his own behalf and presented Brad's testimony. Finally, in rebuttal, the state presented testimony from Jeffrey Brown, Brad's father, and additional testimony from Electa Foster.

{¶11} The jury convicted Malone on both counts of rape, two counts of intimidation, one count of kidnapping with a sexual motivation specification, one count of tampering with evidence, and one count of possessing criminal tools. Malone withdrew his request for a jury trial and pled guilty on the sexually violent predator specifications on counts one, two, and three. The state dismissed the kidnapping charge since it was an allied offense of similar import, opting to retain the rape conviction in count one.

{¶12} Malone waived his right to a pre-sentence investigation report and requested that the court impose an agreed sentencing recommendation of 25 years to life in prison. The court sentenced Malone to a mandatory term of ten years to life on count one with the sexually violent predator specification; a mandatory term of ten years to life on count three with the sexually violent predator specification; five years on count five; five years on count six; five years on count eight; and twelve months on count nine. The court ordered that the sentences imposed on counts one and three be served consecutively; that the sentences on counts five, six, eight, and nine be served concurrently to each other; and the concurrent sentences imposed on counts five, six, eight, and nine be served consecutively to the consecutive sentences imposed on counts one and three. The court's order resulted in an aggregate sentence of 25 years to life. Malone appeals the judgment of the trial court, asserting two assignments of error for our review.

*First Assignment of Error*

**Defendant-Appellant's convictions for rape, kidnapping, intimidation, and possession of criminal tools are contrary to the manifest weight of the evidence.**

*Second Assignment of Error*

**Defendant-Appellant's conviction for tampering with evidence is contrary to the manifest weight of the evidence.**

{¶13} When a court of appeals reviews a conviction based on the manifest weight of the evidence, the "court sits as a "thirteenth juror." *State v.*

*Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, quoting *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

**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. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.” (Emphasis added.)**

*Thompkins*, at 377, quoting Black’s Law Dictionary (6<sup>th</sup> Ed.1990), at 1594. When an appellant challenges a conviction under the weight of the evidence, the court must review the entire record, weigh the evidence and “all reasonable inferences,” consider witness credibility, and determine whether “the jury 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 377, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. To reverse a conviction based on the manifest weight of the evidence, a unanimous panel of three appellate judges must concur. *State v. Michaels*, 3d Dist. No. 13-99-41, 1999-Ohio-958, citing *Thompkins*, at 389. Under this standard, we must determine whether each conviction is against the manifest weight of the evidence. Although Malone has asserted two assignments of error, they may be considered together.

{¶14} The grand jury indicted, and the jury convicted, Malone on two counts of rape. R.C. 2907.02(A)(2) states: “No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.” Sexual conduct is defined as:

**vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.**

R.C. 2907.01(A). In count one, Malone was charged with engaging in vaginal intercourse with L.K. after compelling her to submit by force or the threat of force. In count three, Malone was charged for inserting an object (the mustard bottle) into L.K.’s vaginal opening and for using force or the threat of force to make L.K. insert an object (the mustard bottle) into her vaginal opening three times.

{¶15} Despite all the testimony at trial, the issue of whether sexual conduct occurred boiled down to a question of credibility between L.K. and Malone. As to count one, L.K. and Malone both testified that they engaged in vaginal intercourse. Their testimony was substantially similar in that both testified that Malone was unable to penetrate her vagina on the first attempt and that he used some type of lubrication to enable penetration on his successful attempt. As to count three, L.K. testified that while she was in the shower, Malone filled an empty mustard bottle

with warm water and required her to douche. She stated that she inserted the bottle into her vagina three times. She also testified that Malone inserted the bottle into her vagina and flushed it with warm water to clean out any “evidence” of his semen.

{¶16} Malone testified that he and L.K. showered together to bathe and “wash up.” On cross-examination, Malone admitted he was in possession of a mustard bottle on the night of April 8 – April 9. However, Malone explained that he had had sex with a different woman on April 7, and during that encounter, Malone had rinsed out the mustard bottle, asked the woman to urinate in it, and then drank her urine.

{¶17} There was also circumstantial evidence about the mustard bottle. Brittany testified that she saw Malone put a “mayonnaise” bottle in his backpack before he left the apartment. Brittany also testified that Malone told them he was walking to LaRue to burn the evidence. Officer Musser testified that he found a mustard bottle in Malone’s backpack when he searched it. Against L.K.’s testimony and the circumstantial evidence, the jury apparently disbelieved Malone’s explanation about the mustard bottle, and we must defer to the fact-finder. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. Therefore, a *finding* that sexual conduct occurred is supported by the evidence.

{¶18} As to whether Malone caused L.K. to submit by force or threat of force, the issue again boils down to a question of credibility. L.K. testified that Brittany was crying when she came back to her bedroom and told L.K. that Malone wanted to have sex with her. L.K. testified that Brittany told her there would “be consequences” if L.K. did not do what Malone wanted. L.K. stated that Malone prevented her from leaving Brad and Brittany’s bedroom and that he had his knife unsheathed. L.K. stated that Malone told her to give him what he wanted and then she could leave. She also testified that he threatened to kill her if she did not cooperate. L.K. testified that Malone held the knife in front of her and “brought it up” like he was going to stab her. After they had intercourse, Malone told L.K. to take a shower and douche so the police would be unable to find any evidence. L.K. stated that Malone had his knife with him in the bathroom.

{¶19} Brittany testified that when Malone came into her bedroom, he told her to leave, but she could still hear most of the conversation between Malone and L.K.. Brittany testified that her bedroom was next to the living room, separated by French doors, which had several missing panes of glass. Brittany stated that Malone had his knife in his hand when he told L.K. to do what he wanted so she could leave. She also heard Malone state that he did not want to kill L.K., but he would do it if he had to. Brittany testified that earlier in the evening Malone had shown them a notebook, which contained photographs of three girls, and he had

made comments about killing the girls because they had African-American friends. Brittany also stated that Malone sometimes gets depressed, and when he does, he talks about going to California to become a serial killer with his "dudes."

{¶20} Malone admitted that the knife, which was identified as State's Exhibit 1, was his knife. He stated that he always carries his knife because he lives in a bad area of the city. Malone testified that the knife is for his protection and the protection of others; however, he later testified that he fears nothing in life or death and that he does not care if he gets attacked because a fight between men amounts to the assertion of dominance. Malone stated he believed L.K. was interested in having sex with him because she had been making sexual jokes earlier in the evening. He testified that when they laid on the couch together for a total of approximately one and one-half minutes, L.K. twice told him she was "uncomfortable." Malone testified that he understood her discomfort to be caused by a physical problem, such as a pinched nerve, and not discomfort caused by him or his actions. Malone admitted that he had his knife out of the sheath at some point, but he stated that he had just sharpened the blade, which had been dulled when he used it to open a can of sardines at approximately 7:30 that evening.

{¶21} Malone testified that L.K. agreed to have sex with him if he wore a condom. He refused to wear one, guaranteeing her that she would not get pregnant and that he had no diseases. Malone stated that when he and L.K. were

in his bedroom, he said, “Now, you know my name is Demon and you know I’m carrying a knife. I don’t want you to think I’m intimidating you or nothing or whatever. This is your own free choice[,]” and L.K. agreed to have sex with him. Malone then testified about how L.K. undressed first so he could watch her. Malone explained to the jury that he likes to let women undress first:

**that way if I see any twitching, any type of personality or any – anything of uncomfortable ness [sic], because a lot of women will agree with you on something, but then again their actions are so wholly different, I will be like ‘Okay, I’m cool. I can’t do that.’ And if they will ask me why I just told you I would, I will make some kind of excuse I want to be with ‘em, because they agree with one way, but their motions show another.**

(Trial Tr., Nov. 6, 2006, at 486). Malone stated that while he had sex with L.K., his knife was in its sheath on his dresser. Malone also admitted that he had the knife in the bathroom because he takes it everywhere for safety reasons.

{¶22} On cross-examination, Malone was asked whether he made L.K. use the mustard bottle to douche. Malone’s non-responsive answer was, “When you have consensual sex of two adults agreeing among each other, what’s the sense of using a bottle? That’s like me saying I put a condom on when I don’t wear condoms.” (Id., at 492). Malone denied that he ever threatens anybody, especially women, because he is not “into” dominating women, and he stated that he would not force a woman to have sex because in his belief, “women are considered

goddess of man.” Malone testified that to violate a woman “would be like condemning my own soul \* \* \* .”

{¶23} Malone testified that L.K. offered no resistance and that he knows of no woman who would fail to fight if she did not want to have sex. R.C. 2907.02(C) states that a rape victim is not required to resist; furthermore, we are aware of no requirement that the victim verbally resist. *State v. Miller* (Jan. 11, 1995), 3d Dist. No. 4-93-24, unreported. Therefore, L.K.’s seeming lack of resistance is not determinative, and the jury apparently disbelieved Malone’s wealth of knowledge about women’s tendencies and his compassion toward them. On this record, the jury’s verdicts on counts one and three are not against the weight of the evidence.

{¶24} As to count two, kidnapping, the trial court determined that kidnapping was an allied offense of similar import to count one, rape. The trial court dismissed count two, as the state elected to retain the conviction on count one. Accordingly, the first assignment of error is moot as to the kidnapping charge. See generally, *State v. Kessler* (Jan. 31, 1979), 3d Dist. No. 16-78-5, unreported.

{¶25} As to count eight, tampering with evidence, R.C. 2921.12(A)(1) provides: “No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall \* \* \* [a]lter, destroy,

conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]” The bill of particulars alleged that Malone knowingly destroyed evidence, specifically by making L.K. douche to remove evidence of semen, and by burning the sheet, mustard bottle, and Vaseline jar.

{¶26} As indicated above, L.K. testified that Malone used the mustard bottle when he made her douche. L.K. also testified that Malone used the Vaseline for lubrication when he raped her. L.K. testified that Malone put the bed sheet in a plastic bag in his backpack and that he stated he was going to burn the items in the bag. She stated she did not know if he had other items in the bag or not. Brittany testified that Malone told her he was going to walk to LaRue and burn the evidence. She said he specifically mentioned a bed sheet, a mayonnaise bottle, and black riding shorts, and a washcloth L.K. had used in the shower. Brittany testified that Malone told her he had used the mayonnaise bottle to make L.K. douche. However, Brittany testified she did not see the bottle herself. As mentioned above, Officer Musser searched Malone’s backpack and found a bed sheet, a mustard bottle, and a jar of Vaseline.

{¶27} Malone himself admitted that he had these materials in his backpack and that he burned them in LaRue, which is approximately 13-14 miles away from Brad and Brittany’s apartment. However, Malone explained to the jury that he

had used these materials when he had sex with a different woman on April 7. Malone stated that the other woman had asked him to destroy everything they had used when they had sex, so he was simply upholding his end of the bargain. Malone stated that they had had sex on his sheets, that he had drank her urine from the mustard bottle, and that he had used the Vaseline as a conductor for electrical shocks during intercourse. Malone denied using Vaseline as a lubricant, telling the jury "Vaseline inside of a human being in a womb like that will set you on fire." (Trial Tr., at 487).

{¶28} The weight of the evidence supports that Malone made L.K. douche in order to destroy evidence of semen. The evidence also shows that Malone burned bed sheets, a mustard bottle, and Vaseline, which had been used as part of the rape. The record is also replete with instances of Malone threatening L.K. not to tell the police about the rape, which is discussed more fully below. This evidence indicates Malone's knowledge that an investigation was likely to be initiated in this case. On this record, the jury's verdict of guilty for count eight is supported by the evidence.

{¶29} As to count nine, Malone was charged with and convicted of possessing criminal tools. R.C. 2923.24(A) provides: "No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." Specifically, the state alleged that Malone possessed

a "buck knife," a bed sheet, a mustard bottle, and Vaseline with the purpose to commit one or more offenses. The evidence above indicates that Malone did use the knife, bed sheet, mustard bottle, and Vaseline during the commission of offenses for which he was convicted. At least in regard to the mustard bottle, the jury could, and did, believe that Malone possessed it for the purpose of making L.K. douche. As set forth above, that action constituted rape and tampering with evidence. Although Malone carried his knife for protection, the jury could find that he had intent to use it criminally based on the facts of this case. While bed sheets and Vaseline are normal household items, on this record, the jury could have found that Malone intended to use them for a criminal purpose. Accordingly, the evidence supports the jury's verdict of guilty on count nine.

{¶30} Counts five and six charged Malone with intimidation of an attorney, victim, or witness in a criminal case. Specifically, count five pertained to intimidation of a victim, L.K., and count six pertained to intimidation of a witness, Brittany. R.C. 2921.04(B) states: "No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness."

{¶31} The evidence in this case supports the jury's verdict on count five. L.K. testified that while she was in the bathroom, Malone threatened that he or his "dudes" would kill her mom so that she would have to identify her mother's body if she reported the rape. L.K. testified that Malone also threatened to kill her if she told anybody about the rape. L.K. stated that when she went into Brad and Brittany's bedroom with them, Malone told her she could leave, but warned her not to report the offense or he or his "dudes" would find her. Brittany corroborated L.K.'s testimony. Brittany testified that Malone told her not to tell anybody about the offense and that if the police or any attorneys asked her about it, she was supposed to say she had been asleep. Brittany testified that Malone told her her life would be in danger if she did otherwise. Brittany also testified that she is familiar with Malone, and he was serious when he made the threats.

{¶32} As mentioned above, Malone denied making any threats. Brad testified that Malone did not threaten anybody and that Malone would not threaten him. He stated that he had not been threatened during the proceedings. Brad also testified that he had told the grand jury he knew nothing about the rape, and then he said what the prosecutor wanted to hear so he could leave. However, Brad's credibility had been called into question on numerous occasions. L.K., Brittany, and Malone all testified that Brad makes strange comments. There was testimony that Brad was not on his medications, and Brad's father testified that there was a

very marked difference in Brad's personality depending on whether he was taking his medications. During trial, some of Brad's answers were unresponsive, argumentative, or strange. For example, as soon as he was sworn in, the following exchange occurred between him and Malone's attorney:

**Q: Brad, could you please state your name and address for the record?**

**A: I don't have a current address.**

**Q: Okay. What's your name?**

**A: According to the commercial I seen you're not supposed to go by any true name.**

**Q: What was your name given to you on your birth certificate?**

**A: I guess it was Bradley Brown.**

(Trial Tr., at 538). On this record, the jury could have easily discredited, and apparently did discredit, Brad's testimony. The jury apparently found Brittany and L.K.'s testimony more credible than Malone's, thereby finding that Malone had threatened L.K. in an attempt to intimidate her and prohibit her from reporting the rape to the police. The evidence in this record supports the jury's verdict.

{¶33} Although Malone's assignment of error as to count six challenges the weight of the evidence, and he has not assigned as error the sufficiency of the evidence, we may recognize plain error sua sponte to prevent a miscarriage of justice. *State v. Conklin*, 2<sup>nd</sup> Dist. No. 1556, 2002-Ohio-2156; citing Crim.R. 52(B). For the reasons expressed below, there was insufficient evidence to convict Malone of intimidating a witness. "[S]ufficiency of the evidence is a test of

adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law \* \* \* .” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, at ¶ 25, citing *Thompkins*, at 386-387.

{¶34} In count six, Malone was charged with and convicted of intimidation of a witness. R.C. 2921.04(B) states in pertinent part: “No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder \* \* \* [a] witness involved in a criminal action or proceeding in the discharge of the duties of the \* \* \* witness.” R.C. 2921.22 imposes a duty on people who witness a felony offense to report the offense. Therefore, in the general sense, a witness who reports an offense to law enforcement is discharging their statutory duty as a witness. However, the intimidation statute requires that the witness *be involved in a criminal action or proceeding*.

{¶35} R. C. 2901.04(A) states that criminal statutes “shall be strictly construed against the state, and liberally construed in favor of the accused.”

**It is well accepted that the cornerstone of statutory construction and interpretation is legislative intention. \* \* \* In order to determine legislative intent it is a cardinal rule of statutory construction that a court must first look to the language of the statute itself. \* \* \* “If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.” \* \* \* Moreover, it is well settled that to determine the intent of the General Assembly “it is the duty of this court to give effect to the *words used* [in a statute], not to delete words used *or to insert words not used.*” \* \* \* A**

**court may interpret a statute only where the words of the statute are ambiguous.**

(Emphasis sic.). *State v. Jordan*, 89 Ohio St.3d 488, 491-492, 2000-Ohio-225, 733 N.E.2d 601, internal citations omitted.

{¶36} The Revised Code does not define the term “criminal action” nor does it define the term “criminal proceeding.” Several appellate districts have upheld convictions for intimidating a witness when the threats were made prior to any investigation by the police. In those cases, the courts equated a witness to a criminal *act* to a witness involved in a criminal *action or proceeding*. *State v. Gooden*, 8<sup>th</sup> Dist. No. 82621, 2004-Ohio-2699; *State v. Hummell* (Jun. 1, 1998), 5<sup>th</sup> Dist. No. CA-851, unreported. We do not believe the terms “criminal action” and “criminal proceeding” are synonymous with the term “criminal act.”

{¶37} The Tenth District Court of Appeals has analyzed the distinction between “actions” and “proceedings.” *State ex rel. Towler v. O’Brien*, 10<sup>th</sup> Dist. No. 04-AP-752, 2005-Ohio-363. Although the court was faced with interpreting R.C. 149.43, its reasoning is instructive.

**For “action” the definition “includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court.” \* \* \* “Proceeding” is the “[r]egular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment.”**

*O'Brien*, at ¶ 16, quoting Black's Law Dictionary (6 Ed.Rev. 1990) 28, 1204. See also *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 432, 639 N.E.2d 83. A "criminal act," as evidenced by the decisions in *Hummel* and *Gooden*, is the illegal behavior engaged in by the defendant. Clearly, for a "criminal action" or "criminal proceeding" to exist, there must be some type of government involvement.

{¶38} If the legislature had intended to make the intimidation statute applicable to witnesses prior to the initiation of a criminal "action" or "proceeding" the appropriate language could have been easily included. We note that the state apparently charged intimidation of a witness much like it charged tampering with evidence; that is, assuming that the defendant had knowledge that an investigation would ensue. R.C. 2921.12(A)(1). Tampering with evidence requires knowledge by the defendant that an "official" investigation or proceeding will follow. A similar mens rea requirement is not expressed in the intimidation statute, at least as it pertains to a witness. R.C. 2921.04(B) specifically prohibits a person from intimidating a *victim* before charges are filed, but requires a *witness* to *be involved* in a criminal action or proceeding.

{¶39} Other courts have upheld convictions for intimidation of a witness after the police have begun an investigation. See *State v. Block*, 8<sup>th</sup> Dist. No. 87488, 2006-Ohio-5593. While we do not establish a bright-line test for when a

criminal action or proceeding begins, at the least, threats made prior to any involvement by law enforcement are insufficient to constitute intimidation of a witness pursuant to the clear and unambiguous language of the statute. Since Malone threatened Brittany prior to any police investigation or prosecution in this case, at the time of threat, Brittany was merely a witness to a criminal act and not a witness involved in a criminal action or proceeding under R.C. 2924.04(B). As such, there is insufficient evidence to support the jury's conviction on count six. Since the result of trial would have been otherwise had the error not occurred, plain error has resulted. *Conklin*. See *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, at ¶ 32, quoting *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894, citing *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus (“[p]lain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise.”).

{¶40} Consistent with this opinion, the first assignment of error is sustained, and the second assignment of error is overruled. The judgment of the Marion County Common Pleas Court is affirmed as to counts one, three, five, eight, and nine and reversed as to count six only.

{¶41} Because this decision is in conflict with *State v. Gooden*, 8<sup>th</sup> Dist. No. 82621, 2004-Ohio-2699, and *State v. Hummell* (Jun. 1, 1998), 5<sup>th</sup> Dist. No.

CA-851, unreported, we certify the record of this case to the Ohio Supreme Court for review and final determination on the following question: Is a conviction for intimidation of a witness under R.C. 2921.04(B), which requires the witness to be involved in a criminal action or proceeding, sustainable where the intimidation occurred after the criminal act but prior to any police investigation of the criminal act, and thus, also prior to any proceedings flowing from the criminal act in a court of justice?

*Judgment affirmed in part  
and reversed in part.*

**ROGERS, P.J., concurs.**

**SHAW, J., concurs in part and dissents in part.**

{¶42} **Shaw, J., concurs in part and dissents in part.** I respectfully dissent from the conclusion of the majority that threats by the perpetrator of a criminal act to an eyewitness prior to any involvement by law enforcement are not sufficient *as a matter of law* to constitute intimidation of a witness under R.C. 2921.04(B).

{¶43} First, a criminal act is not merely a private matter between individuals until such time as formal proceedings are instituted. Rather, from its inception, a criminal act also constitutes an offense against the state in violation of a specific statute. In this sense, a “criminal action” exists when the criminal act is

committed, whether or not the police ever get involved or formal proceedings are ever instituted.

{¶44} Second, an eyewitness to a criminal act is potentially a witness, subject to the unique compulsion of state authority, from that point forward. As such, the intimidating effect of a threat upon a witness is just as effective a deterrent to the witness's later co-operation with police or participation in a criminal prosecution - and hence, just as violative of the statute - whether the threat occurred before police involvement or after.

{¶45} As a result, I see no legitimate basis in the statute for distinguishing a threat to a person made at or near the time of the crime from the same threat made at or near the time of the trial. On the contrary, such a distinction seems to subvert the language and intent of the statute by arbitrarily decriminalizing threats made to potential witnesses where the threats are made prior to any police involvement. In reality, the chilling effect upon the justice system underlying R.C. 2921.04(B) is exactly the same regardless of when the actual threat occurred.

{¶46} For the foregoing reasons I would side with the decisions of the Fifth and Eighth appellate districts on this issue and overrule the first assignment of error. However, in all other aspects, including the certification of the matter to the Ohio Supreme Court for conflict, I concur with the decision of the majority herein.

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Not Reported in N.E.2d, 1998 WL 355511 (Ohio App. 5 Dist.)  
(Cite as: Not Reported in N.E.2d)

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State v. Hummell  
Ohio App. 5 Dist., 1998.

Only the Westlaw citation is currently available.  
CHECK OHIO SUPREME COURT RULES FOR  
REPORTING OF OPINIONS AND WEIGHT OF  
LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Morrow  
County.

STATE of Ohio, Plaintiff-Appellee,  
v.

Gary HUMMELL, Defendant-Appellant.  
No. CA-851.

June 1, 1998.

Criminal Appeal from Common Pleas Court, Case  
No. 3871.

For Plaintiff-Appellee: CHARLES S. HOWLAND,  
48 East High Street, Mansfield, OH 44901.  
For Defendant-Appellant: DAVID L. REMY, P.O.  
Box 1772, Mt. Gilead, OH 43338.

Hon. W. SCOTT GWIN, P.J., Hon. WILLIAM B.  
HOFFMAN, J., Hon. W. DON READER, J.

*OPINION*

READER, J.

\*1 Appellant Gary Hummell appeals a judgment of  
the Morrow County Common Pleas Court  
convicting him of Rape (R.C. 2907.02(A)) and two  
counts of Intimidation of a Crime Witness (R.C.  
2921.04(B)):

ASSIGNMENTS OF ERROR:

- I. THE TRIAL COURT ERRED WHEN IT, OVER  
OBJECTION, ALLOWED THE STATE TO ASK  
LEADING QUESTIONS OF THE VICTIM  
BRANDY WILLIAMSON.
- II. THE EVIDENCE PRESENTED TO GAIN

CONVICTIONS FOR INTIMIDATION OF  
WITNESSES WAS INSUFFICIENT AND  
THEREFORE THOSE CONVICTIONS ARE  
CONTRARY TO LAW.

III. THE TRIAL COURT ERRED IN DENYING  
SUBMISSION OF CRYSTAL BENNETT'S  
PREVIOUSLY WRITTEN STATEMENT FOR  
CONSIDERATION BY THE JURY.

IV. THE VERDICT AND JUDGMENT AS TO  
THE CHARGE OF RAPE IS AGAINST THE  
MANIFEST WEIGHT OF THE EVIDENCE.

During the summer of 1996, appellant worked in  
the roofing business with James Hall. James Hall's  
cousin was Sherry Swint. Appellant resided with  
Hall and Hall's girlfriend. Sherry Swint had a  
fifteen-year-old daughter named Brandy  
Williamson.

In July 1996, Brandy and her friend, Crystal  
Bennett, were walking down the street in  
Cardington. Appellant and Hall were working on a  
roof. When the girls walked by, appellant yelled at  
Brandy, "Nice ass." Brandy called him a pervert.

On August 7, 1996, appellant came to Swint's house  
at 1:00 to 1:30 A.M. His speech was slurred, and he  
was carrying a beer bottle in a brown paper bag.  
Appellant told Swint that Brandy had a crush on  
him. Appellant asked to speak to Brandy. When  
appellant confronted Brandy about the crush, he  
told her that if she was older, he would take her out  
in a minute. Brandy responded that she would not  
go out with him because he was not good looking.  
Appellant appeared angered by Brandy's comment.

On August 8, 1996, Brandy, Crystal, and Amy Hall  
were sleeping in the den at Swint's residence.  
Appellant knocked on the door. Crystal, who was  
the only girl awake, answered the door. Appellant  
was wearing an orange shirt, which was short and  
did not cover his stomach; red cut-off sweats; and  
work boots. He smelled like bug spray. Appellant

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told Crystal that he left his cigarettes at the house, and needed to use the bathroom.

Appellant went into the room where Brandy and Amy were sleeping. Appellant woke Brandy up by kissing her cheek and neck. When she told him to stop, he responded by removing her clothes. He put his hand over her mouth to prevent her from screaming. When she tried to bite his hand, he bit her nipple. Appellant proceeded to have sexual intercourse with Brandy. He told Crystal and Amy, who were watching, that if either one of them told anyone what happened, he would kill them.

Swint slept through the entire incident, as she was taking a variety of medications for panic attacks, post-traumatic stress disorder, and various phobias. The next morning, Amy hysterically told her that appellant had raped Brandy. Brandy initially denied that anything had happened. After spending several weeks visiting her father in Kentucky, Brandy returned to Morrow County and told Swint about the rape.

\*2 Appellant was charged with one count of Rape and two counts of Intimidation of a Witness. The case proceeded to jury trial in the Morrow County Common Pleas Court.

Appellant testified at trial that he had been going out with Sherry, but broke up with her in July of 1996, when she told him that she was just using him to get back with her "ex-old man." He denied being in the Swint residence on the night of the rape.

James Hall testified as an alibi witness for appellant. He testified that appellant, who was residing with Hall and his girlfriend at the time, was home asleep on the night in question. Hall testified that the house was equipped with various security locks on the windows and doors, because his girlfriend's daughter, Bambi Paulette, has Downs Syndrome and tends to wander.

Appellant was convicted as charged. He was sentenced to six years incarceration for Rape. He was sentenced to one year incarceration for each count of Intimidation, to be served concurrently with each other, but consecutively with the Rape

sentence.

## I.

Appellant argues that the court erred in allowing the prosecutor to ask leading questions during the direct examination of Brandy Williamson.

Evid.R. 611(C) provides that leading questions should not be used on direct examination of a witness, except as may be necessary to develop his testimony. It is within the discretion of the trial court to permit the State to ask leading questions of its own witnesses. *State v. Miller* (1998), 44 Ohio App.3d 42, 45, 541 N.E.2d 105. The trial court made a finding on the record that the witness had difficulty testifying due to her age, the personal nature of the allegations, and the alleged threats that had been made upon her. The court found that as it was obvious that Brandy was not going to come out with a narrative testimony, as the court would prefer, he would allow the prosecutor some latitude to ask leading questions, to the extent necessary to lay a groundwork for her to testify. Tr. (II), 123. The trial judge was in a better position than this court to view the demeanor of the witness. It is apparent from the record that Brandy was not forthcoming with answers concerning the allegations, and appeared to have difficulty testifying. Appellant has not demonstrated that the court abused its discretion in allowing the prosecutor to ask leading questions.

The first Assignment of Error is overruled.

## II.

Appellant argues that the evidence was insufficient as a matter of law to convict him of Intimidation of a Witness. He argues that because the alleged threats were made before a criminal prosecution had been instituted, he cannot be convicted of the crime of intimidation of a witness as a matter of law.

R.C. 2921.04(B) provides in pertinent part:  
 (B) No person, knowingly and by force or by unlawful threat of harm to any person or property,

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shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness.

\*3 When considering a claim that the evidence is insufficient to support a conviction, we must determine whether the evidence is legally sufficient to support a jury verdict as a matter of law, or whether the case should not have gone to the jury due to inadequate evidence. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. Whether evidence is legally sufficient to sustain a verdict is a question of law. *Id.*

At the time appellant threatened Amy and Crystal, a criminal proceeding had not been instituted. However, the threat was clearly aimed at discouraging the girls from having any involvement in a forthcoming criminal action. Appellant told the girls that if they told anyone about the rape, he would kill them. Appellant was attempting to prevent the girls from discharging their duties as a witness to a criminal act. The evidence was legally sufficient to permit the charges to go to the jury.

The third Assignment of Error is overruled.

### III.

Appellant argues that the court erred in excluding the prior written statement of Crystal Bennett.

In her written statement, given to the police several days after the rape, Crystal stated that appellant had spent the night at the Swint residence. She stated that when Sherry Swint went to sleep, at approximately 1:00 A.M., appellant came into the living room. She stated that after raping Brandy, appellant went back into Sherry Swint's bedroom and went to sleep.

At trial, Crystal testified that after she let appellant into the house, he went into the bathroom briefly, then came into the den, and raped Brandy. She testified that following the rape, appellant went

toward the kitchen and left.

Appellant was permitted to cross-examine Crystal concerning her prior statement. However, the court did not admit the statement into evidence. The State objected to the admission of the statement on the basis that it was hearsay; the court's ruling is unclear as to the reason for its exclusion. Tr. (II) 254.

Clearly, the document is not hearsay. It was not offered to prove the truth of the matter asserted therein, but rather was offered to impeach the testimony of Crystal Bennett. Pursuant to Evid.R. 613(B), extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded a prior opportunity to explain or deny the statement, and the opposite party is afforded an opportunity to interrogate him thereon. Although, it would appear from the record that the requirements for admission were met in the instant case, appellant has not demonstrated prejudice from its exclusion. The contradictions do not relate to the elements of the crime. As to her testimony concerning the actual rape, the statement is consistent with Crystal's trial testimony. Therefore, the only alleged inconsistency is on a collateral matter. The decision as to whether to admit a prior inconsistent statement which is collateral to the issue being tried, and pertinent only with respect to the credibility of a witness, is within the discretion of the trial court. *State v. Riggins* (1986), 35 Ohio App.3d 1, 519 N.E.2d 397. As appellant was given latitude to cross examine Crystal concerning the prior statement, and the evidence of the inconsistency was before the jury, the court did not abuse its discretion in excluding the written statement itself.

\*4 The third Assignment of Error is overruled.

### IV.

Appellant argues that the judgment convicting him of Rape is against the manifest weight of the evidence. Appellant argues that the testimony was inconsistent as to collateral matters concerning the rape. He further argues that the State failed to explain why the two girls sat quietly while the rape

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occurred, why Sherry Swint was not shown the bite marks on Brandy or the semen on her shirt, and why Sherry claimed her medicine was not strong enough to knock her out, yet the girls claimed that they could not awaken her. 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. *Thompkins, supra*, at 387. Weight is not a question of mathematics, but depends on the effect of the evidence in inducing belief. *Id.* When reversing a judgment on the basis that the verdict is against the weight of the evidence, the Appellate Court sits as a thirteenth juror, and disagrees with the fact finder's resolution of the conflicting testimony. *Id.*

In the instant case, the State's evidence did not conflict on the basic elements of the crime of Rape. All three girls testified that appellant removed Brandy's clothes, pried open her legs, and penetrated her vagina with his penis. They all three testified that appellant bit her nipple. They all three testified that after raping Brandy, appellant told the witnesses that if they told anyone, he would kill them. All of the alleged inconsistencies relate to collateral matters that have very little relation to the crime itself.

The fourth Assignment of Error is overruled.

The judgment of the Morrow County Common Pleas Court is affirmed.

GWIN, P.J. concurs.

HOFFMAN, J. concurs in part, dissents in part. WILLIAM B. HOFFMAN, J., concurring in part and dissenting in part.

I concur in majority's disposition of appellant's first and third assignments of error. I respectfully dissent as to the majority's disposition of appellant's second assignment of error. My reasons follow.

Though I believe appellant's threats to Amy and Crystal should be punishable criminally, I do not find appellant's conduct falls within the perimeters of the statute under which he was indicted.<sup>FN1</sup> The statute creates a separate offense for making a knowing threat of harm to the victim of a crime in an attempt to intimidate the victim from filing

criminal charges.<sup>FN2</sup> However, the statute distinguishes between the intimidation of a victim of a crime and the intimidation of an attorney or witness involved in a criminal action or proceeding. As to the latter two, the threat must be made to influence, intimidate or hinder the discharge of their duties in a "criminal action or proceeding." There is a fine, but distinct, difference between attempting to prevent a witness from discharging his or her duty as a witness to a criminal "act", and attempting to prevent a witness from discharging his or her duty as a witness in a "criminal action or proceeding." A "criminal action or proceedings" requires something more than just the occurrence of the underlying criminal act. *See, e.g., State v. Crider* (1984), 21 Ohio App.3d 268, 487 N.E.2d 911, and *State v. Hanson* (June 30, 1982), Summit Appeal No. 10491, unreported. The fact a criminal action may be forthcoming is insufficient to satisfy the statute when applied to threats made to an attorney or witness. In as much as there was no criminal action or proceeding pending when appellant made the threats to Amy and Crystal, I find the evidence insufficient to support a conviction under R.C. 2921.04(B).

FN1. Appellant's threats to Amy and Crystal may have been punishable under R.C. 2903.21.

FN2. Had appellant been charged with intimidation of the victim, Brandy, the evidence would have been sufficient to support a conviction. *See*, Transcript at 81, 131, 170.

#### JUDGMENT ENTRY

\*5 For the reasons stated in the Memorandum-Opinion on file, the judgment of the Morrow County Common Pleas Court is affirmed. Costs to appellant.

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State v. Gooden  
Ohio App. 8 Dist.,2004.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.  
Court of Appeals of Ohio,Eighth District, Cuyahoga County.  
STATE of Ohio, Plaintiff-Appellee  
v.  
Christopher GOODEN, Defendant-Appellant.  
No. 82621.

Decided May 27, 2004.

**Background:** Defendant was convicted in the Court of Common Pleas, Cuyahoga County, No. CR-425741, of intimidation, aggravated robbery with firearm specifications, and kidnapping with firearm specifications, and was classified a sexually oriented offender. Defendant appealed.

**Holdings:** The Court of Appeals, Sean C. Gallagher, J., held that:

- (1) joinder of offenses was warranted;
- (2) evidence was sufficient to support convictions;
- (3) prosecutor's line of questioning to detective about police procedure and a defendant's right to remain silent in the context of a police investigation did not amount to plain error;
- (4) prosecutor's comments during closing argument, referring to defense counsel's strategy as a "smoke screen," were not improper; but
- (5) classification of defendant as a sexually oriented offender violated due process.

Affirmed in part, reversed in part, and remanded.  
West Headnotes  
[1] Criminal Law 110 ⇨620(1)

110 Criminal Law  
110XX Trial  
110XX(A) Preliminary Proceedings  
110k620 Joint or Separate Trial of Separate Charges  
110k620(1) k. In General. Most Cited Cases  
Joinder of offenses of intimidation, aggravated robbery with firearm specifications, and kidnapping with firearm specifications was warranted; while the charged offenses were not the same, they were part of a course of criminal conduct against victims and their family. Rules Crim.Proc., Rule 8(A).

[2] Sentencing and Punishment 350H ⇨323

350H Sentencing and Punishment  
350HII Sentencing Proceedings in General  
350HII(F) Evidence  
350Hk323 k. Sufficiency. Most Cited Cases  
Evidence was sufficient to support convictions for aggravated robbery and kidnapping with firearm specifications, despite defendant's claim that the State failed to prove that a "deadly weapon" or "firearm" was used; juvenile victim clearly testified to defendant's use of a firearm, stating that he felt the gun at his side and saw the black tip of the gun as defendant instructed him to go to back of building, and when victim's friends appeared, defendant displayed the gun and told them to leave. R.C. 2905.01, 2923.11, 2941.145.

[3] Extortion and Threats 165 ⇨32

165 Extortion and Threats  
165II Threats  
165k32 k. Evidence. Most Cited Cases  
Evidence was legally sufficient to sustain conviction for intimidation; after victim witnessed homicide to

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which defendant's first cousin was a suspect, defendant approached victim on the street and stated, "I'm telling you, you better not be out running your mouth" and "if you tell anybody about what you seen going on last night, the same thing that man got last night, you're going to get it too." R.C. 2921.04.

**[4] Criminal Law 110 ⇌ 1037.1(2)**

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)I In General

110k1037 Arguments and Conduct of Counsel

110k1037.1 In General

110k1037.1(2) k. Particular Statements, Arguments, and Comments. Most Cited Cases

Prosecutor's line of questioning to police detective about police procedure and a defendant's right to remain silent in the context of a police investigation did not amount to plain error in prosecution for intimidation, aggravated robbery with firearm specifications, and kidnapping with firearm specifications; comments were isolated remarks, and the remaining evidence presented comprised overwhelming proof of defendant's guilt.

**[5] Criminal Law 110 ⇌ 720(7.1)**

110 Criminal Law

110XX Trial

110XX(E) Arguments and Conduct of Counsel

110k712 Statements as to Facts, Comments, and Arguments

110k720 Comments on Evidence or Witnesses

110k720(7) Inferences from and Effect of Evidence in Particular Prosecutions

110k720(7.1) k. In General. Most Cited Cases

**Criminal Law 110 ⇌ 726**

110 Criminal Law

110XX Trial

110XX(E) Arguments and Conduct of Counsel

110k726 k. Responsive Statements and Remarks. Most Cited Cases

Prosecutor's comments during closing argument, referring to defense counsel's strategy as a "smoke screen," were not improper and did not prejudicially affect defendant's substantial rights; comments related to defense counsel's emphasis on the State's lack of evidence and were no more than a commentary on the evidence.

**[6] Constitutional Law 92 ⇌ 4343**

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)15 Mental Health

92k4341 Sexually Dangerous Persons; Sex Offenders

92k4343 k. Classification and Registration; Restrictions and Obligations. Most Cited Cases

(Formerly 92k255(5))

**Mental Health 257A ⇌ 433(2)**

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak433 Constitutional and Statutory Provisions

257Ak433(2) k. Sex Offenders. Most Cited Cases

Application of statutory requirement that defendant be classified as a sexually oriented offender based on kidnapping conviction involving a minor victim, in case in which there was no evidence that the offense was committed with any sexual motivation or purpose, offended due process clauses of both the Ohio and United States Constitutions. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 16; R.C. § 2950.01(D)(1).

Criminal appeal from Common Pleas Court, Case

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No. CR-425741.

William D. Mason, Esq., Cuyahoga County Prosecutor by Suzie Demosthenes, Esq., Assistant County Prosecutor, Cleveland, OH, for plaintiff-appellee.

Thomas A. Rein, Esq., Cleveland, OH, for defendant-appellant.

SEAN C. GALLAGHER, J.

\*1 ¶ 1 Appellant Christopher Gooden ("Gooden") appeals his convictions and sexually oriented offender classification entered by the Cuyahoga County Court of Common Pleas after a jury found him guilty of intimidation, aggravated robbery with firearm specifications, and kidnapping with firearm specifications. For the reasons adduced below, we affirm in part, and reverse and remand in part.

¶ 2 The following facts adduced at trial relate to the offenses for which Gooden was convicted. The victim of the aggravated robbery and kidnapping charges was a 14-year-old eighth-grader who resided on East 113th Street in Cleveland. The victim lived in a house with his brother, grandmother, aunts and cousins. The family lived next door to Gooden's cousins, the Smileys. There had been a feud between teenaged members of the families for two or three years, in which the victim had not been involved.

¶ 3 On May 5, 2002, the victim was standing at a bus stop on the corner of East 115th Street and Superior Avenue with two of his friends. Gooden walked up and grabbed him. The victim had known Gooden for some years from around the neighborhood.

¶ 4 Gooden told the victim he had to talk with him and instructed the victim to come to the back of a nearby abandoned building with him. The victim felt something hurting his side, looked down, and saw Gooden had put a black gun to the victim's side. Gooden took the victim to the back of the abandoned building. The victim testified he was scared, did not feel he could run away, and thought Gooden would shoot him or beat him if he tried to run.

¶ 5 Gooden asked the victim why he stole

Gooden's car and took a leather jacket from the trunk, but the victim did not know what Gooden was talking about. When the victim's two friends appeared, Gooden lifted his shirt displaying the gun and told them to leave.

¶ 6 Gooden then told the victim "I should hit you in your head like I did your friends." Again, the victim did not know what Gooden was talking about. Gooden pulled the gun out and instructed the victim to take off his clothes. The victim took off all his clothes, except for his underwear and socks. The victim observed Gooden take a dollar and some change from a pocket in the victim's clothing. Gooden threw the victim's clothes aside and told the victim to leave.

¶ 7 The victim ran towards home crying and saw his sister's friend to whom he told what happened. The victim then called home and spoke to his cousin, who told him to hurry home. The victim's aunt called the police. When the police arrived, they took the victim back to the scene of the incident where his clothes were found.

¶ 8 On a separate occasion, about a month earlier, Priscilla Reeves ("Reeves"), one of the victim's aunts, was a witness to a homicide. Reeves lived with the victim next door to the Smileys. On April 9, 2002, Reeves witnessed a homicide to which Jimmy Smiley, Gooden's first cousin, was a suspect.

\*2 ¶ 9 Later that day, Reeves saw Gooden, who approached her on the street. Gooden told Reeves, "I'm telling you, you better not be out running your mouth. Because if you tell anybody about what you seen going on last night, the same thing that man got last night, you're going to get it too." Reeves believed Gooden and proceeded walking as Gooden followed her. Reeves then heard a friend yell to her. Reeves turned around and saw Gooden had pulled out a black revolver and was pointing it at her. Reeves' friend yelled, "Chris, don't shoot her." Reeves then hurried across the street where there were other people she knew. Reeves gave a police statement and became a witness for the prosecution in the homicide investigation.

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{¶ 10} Gooden was separately indicted in two cases for the above incidents, CR-425741 and CR-426768. In CR-425741, Gooden was charged with aggravated robbery in violation of R.C. 2911.01 with firearm specifications, and kidnapping in violation of R.C. 2905.01 with firearm specifications. In CR-426768, Gooden was charged with five counts of intimidation in violation of R.C. 2921.04 and one count of felonious assault in violation of R.C. 2903.11 with firearm specifications. Appellee state of Ohio filed a motion for joinder of the two cases, which was granted by the trial court.

{¶ 11} The case proceeded to a jury trial. After the state rested its case, Gooden made a motion for acquittal. The trial court granted the motion in part, and dismissed two of the intimidation counts and the felonious assault count. The trial proceeded on the remaining counts.

{¶ 12} The jury returned a verdict finding Gooden guilty of one count of intimidation, guilty of aggravated robbery with a firearm specification, and guilty of kidnapping with a firearm specification. The jury found Gooden not guilty of two counts of intimidation.

{¶ 13} Prior to sentencing, Gooden filed a motion for judgment of acquittal, or in the alternative for a new trial that was denied by the trial court. The trial court proceeded to sentence Gooden to a total of six years' incarceration. The trial court also classified Gooden as a sexually oriented offender pursuant to R.C. 2950.04.

{¶ 14} Gooden has appealed his convictions raising six assignments of error. His first assignment of error provides:

[1]{¶ 15}“The trial court erred in granting the state's motion for joinder.”

{¶ 16} Under Crim.R. 8(A), joinder is permitted if offenses are of the same or similar character, are based upon the same act or transaction, or are based upon two or more acts or transactions connected together or part of a common scheme or course of criminal conduct. It is well settled that the law

favours joinder. *State v. Waddy* (1992), 63 Ohio St.3d 424, 429, 588 N.E.2d 819. As we have previously recognized, “[j]oinder is liberally permitted to conserve judicial resources, reduce the chance of incongruous results in successive trials, and diminish inconvenience to the witnesses.” *State v. Taylor*, Cuyahoga App. No. 82572, 2003-Ohio-6861. A decision to join indictments will not be reversed absent a showing that the trial court abused its discretion.*Id.*

\*3 {¶ 17} Here, while the charged offenses were not the same, they were part of a course of criminal conduct against Reeves and her family. The intimidation offenses charged that Gooden committed acts of intimidation upon Reeves. Reeves was a witness to a criminal murder case in which Gooden's cousin was a suspect. The aggravated robbery and kidnapping offenses involving the juvenile victim occurred less than a month after Reeves' encounters with Gooden. Reeves and the juvenile victim were family members who resided in the same household. They lived next to Gooden's cousins, the Smileys, and the two families had a history of feuding. Thus, the charges against Gooden displayed a course of criminal conduct against Reeves and her family and were properly joined in the same indictment under Crim.R. 8(A). See *State v. Taylor*, supra.<sup>FN1</sup>

FN1. A defendant may file a Crim.R. 14 motion to sever if he can establish prejudice to his rights. *State v. Taylor*, supra. Gooden did not file a motion to sever in this case and has not demonstrated his rights were prejudiced by a joinder of these offenses for trial.

{¶ 18} Finding no abuse of discretion, we conclude that joinder was proper, and overrule Gooden's first assignment of error.

{¶ 19} Gooden's second assignment of error provides:

{¶ 20}“The trial court erred in denying appellant's motion for acquittal as to the charges.”

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{¶ 21}Crim.R. 29(A) governs motions for acquittal and provides for a judgment of acquittal “if the evidence is insufficient to sustain a conviction \* \* \*.” 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. A verdict will not be disturbed on appeal unless reasonable minds could not reach the conclusion reached by the trier of fact.*Id.* In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 1997-Ohio-52. A reviewing court is to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.*

{2}{¶ 22} Gooden argues that there was insufficient evidence to sustain his convictions for aggravated robbery and kidnapping with firearm specifications because the state failed to prove that a “deadly weapon” or “firearm” was used.

{¶ 23}R.C. 2911.01, the aggravated robbery statute, provides in relevant part:

“(A) No person, in attempting or committing a theft offense \* \* \* or in fleeing immediately after the attempt or offense, shall do any of the following:

“(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;  
“ \* \* \* ”

{¶ 24}R.C. 2923.11 defines “deadly weapon” and “firearm” as follows:“(A) ‘Deadly weapon’ means any instrument, device, or thing capable of inflicting death, and designed or specifically adapted for use as a weapon, or possessed, carried, or used as a weapon.

\*4 “(B)(1) ‘Firearm’ means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. ‘Firearm’ includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered

operable.

“(2) When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm.”

{¶ 25}R.C. 2905.01, the kidnapping statute, provides in relevant part:“(A) No person, by force, threat, or deception, \* \* \* shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

“ \* \* \* ”

“(3) To terrorize, or to inflict serious physical harm on the victim or another;

“ \* \* \* ”

{¶ 26} With respect to the firearm specification, R.C. 2941.145 provides, in relevant part:“(A) Imposition of a three-year mandatory prison term upon an offender \* \* \* is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.”

{¶ 27} The juvenile victim clearly testified to Gooden's use of a firearm. The victim testified he felt the gun at his side and saw the black tip of the gun. Gooden took the victim to the back of an abandoned building. The victim testified he was scared, did not feel he could run away, and thought Gooden would shoot him or beat him if he tried to run. The victim also testified Gooden displayed the gun to his friends and pulled the gun out when instructing the victim to remove his clothing. Additionally, the victim testified that Gooden took a dollar and some change from a pocket in the victim's clothing. Viewing this evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of aggravated robbery and kidnapping were proven

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beyond a reasonable doubt.

{¶ 28} The crux of Gooden's argument is that the state failed to provide any testimony that the incident of May 5, 2002 with the victim involved a "firearm" or weapon capable of inflicting death. Gooden relies upon the Ohio Supreme Court's decision in *State v. Murphy* (1990), 49 Ohio St.3d 206, 551 N.E.2d 932, in which the court held that "[t]he state must present evidence beyond a reasonable doubt that a firearm was operable at the time of the offense."

{¶ 29} In *Murphy*, the court considered the type of evidence necessary to meet this burden of proof. *Id.* The court found that evidence to meet the burden of proof could include the testimony of lay witnesses who were in a position to observe the instrument and the circumstances surrounding the crime. *Id.* at syllabus. In support of its holding, the court stated:

\*5 "In enacting [the firearm specification] statute the legislature wanted to send a message to the criminal world: 'If you use a firearm you will get an extra three years of incarceration.' That is why it chose the word 'firearm,' instead of simply 'deadly weapon,' which can include all types of lethal instruments. The foregoing definition includes loaded as well as unloaded guns. It also includes operable guns, as well as inoperable guns that can readily be rendered operable. Hence, it is only reasonable that the state can rely upon all the surrounding facts and circumstances in establishing whether a firearm was used in the commission of a felony."

{¶ 30} *Id.* at 208,164 P. 88.<sup>FN2</sup>

FN2. Contrary to defense counsel's position at oral argument, *Murphy* does not require use of the term "firearm" or "deadly weapon" to establish operability for circumstantial evidence. *Id.* In *Murphy*, the circumstances included a gun being wrapped in a shirt and a description of the weapon from eyewitnesses. *Id.* In this case the victim testified Gooden put the gun into his side, displayed the gun to his friends, and pulled the weapon on him.

The victim also gave a description of the weapon.

{¶ 31} The Ohio Supreme Court refined the manner by which the state may prove a firearm specification in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541, where the court stated as follows:

"[A] firearm penalty-enhancement specification can be proven beyond a reasonable doubt by circumstantial evidence. In determining whether an individual was in possession of a firearm and whether the firearm was operable or capable of being readily rendered operable at the time of the offense, the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm."

{¶ 32} *Id.* at 385,182 P. 916. Thus, where an individual brandishes a gun and implicitly, but not expressly, threatens to discharge the firearm at the time of the offense, the threat can be sufficient to satisfy the state's burden of proving that the firearm was operable or capable of being readily rendered operable. *Id.* at 384, 182 P. 916. As the court later recognized, "*Thompkins* clarifies that actions alone, without verbal threats, may be sufficient circumstances to establish the operability of a firearm." *State v. Reynolds* (1997), 79 Ohio St.3d 158, 162 fn. 3, 679 N.E.2d 1131 (noting circumstantial evidence of two masked men waving guns stating that they are committing a robbery was sufficient to sustain a conviction for a firearm specification.)

{¶ 33} In this case, operability of the weapon may be inferred from the facts and circumstances. The victim testified Gooden placed the gun into his side and instructed him to go to the back of the building. When the victim's friends appeared, Gooden displayed the gun and told them to leave. Gooden also pulled out the gun and instructed the victim to remove his clothing and proceeded to take money therefrom. Under these facts and circumstances, it was reasonable for the trier of fact to conclude that Gooden's words and actions were meant to imply that his gun was, in fact, operable. Also, the evidence in this case was clearly sufficient for the

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jury to find Gooden possessed and displayed a deadly weapon for purposes of the charges for which he was convicted.

{¶ 34} Given the evidence, and viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, we conclude any rational trier of fact could have found all the essential elements of the offenses beyond a reasonable doubt. Thus, Gooden's aggravated robbery and kidnapping convictions with firearm specifications are sustained by sufficient evidence.

\*6 [3]{¶ 35} Gooden also claims there was insufficient evidence to sustain his conviction for intimidation. R.C. 2921.04 provides in relevant part: **“(B) No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder \* \* \* [a] witness involved in a criminal action or proceeding in the discharge of the duties of the \* \* \* witness.”**

{¶ 36} Gooden argues there was no criminal case pending, there was a lack of credible evidence, and he had an alibi to the alleged incident on April 9, 2002 with Reeves.

{¶ 37} It has previously been recognized that it is not necessary for a criminal proceeding to be pending in order to sustain a conviction for intimidation under R.C. 2921.04. *State v. Hummell* (Jun. 1, 1998), Morrow App. No. CA-851. It is sufficient that the threat be clearly aimed at discouraging a witness from having any involvement in a forthcoming criminal action. *Id.* In this case, Gooden told Reeves, “I’m telling you, you better not be out running your mouth. Because if you tell anybody about what you seen going on last night, the same thing that man got last night, you’re going to get it too.” Gooden was attempting to prevent Reeves from discharging her duties as a witness to a criminal act. We find the evidence was legally sufficient to permit the charge to go to the jury.

{¶ 38} Insofar as Gooden challenges the credibility of Reeves’ testimony and claims to have

had an alibi, our review is not whether the state’s evidence is to be believed, but whether, if believed, the evidence against Gooden would support a conviction. Here, the testimony of Reeves, if believed, was sufficient to sustain a conviction for intimidation.

{¶ 39} Gooden’s second assignment of error is overruled.

{¶ 40} Gooden’s third assignment of error provides:

{¶ 41} “Appellant’s convictions are against the manifest weight of the evidence.”

{¶ 42} In reviewing a claim challenging the manifest weight of the evidence, we are directed as follows: “[t]he court, reviewing 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. The power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and in only the rare case in which the evidence weighs heavily against the conviction. *State v. Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717.

{¶ 43} Gooden argues that the jury simply lost its way because there was no requisite evidence for the convictions in this case. We do not agree. As discussed above, there was ample evidence presented at trial to support Gooden’s convictions. After reviewing the record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we are not persuaded that the jury clearly lost its way and created such a manifest miscarriage of justice such that Gooden’s conviction must be reversed and a new trial ordered. Gooden’s third assignment of error is overruled.

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\*7 {¶ 44} Gooden's fourth assignment of error provides:

{¶ 45} "Appellant was denied a fair trial due to prosecutorial misconduct."

{¶ 46} In this assignment of error, Gooden cites several comments made by the prosecutor during trial and closing argument that he argues were prosecutorial misconduct unfairly prejudicing his right to a fair trial. The test for prosecutorial misconduct is whether the remarks are improper and, if so, whether they prejudicially affected substantial rights of the defendant. *State v. Lott* (1991), 51 Ohio St.3d 160, 165, 555 N.E.2d 293.

[4]{¶ 47} Gooden first argues the prosecutor improperly commented on Gooden's failure to testify. Specifically, after Detective Williams made an isolated remark that Gooden did not want to make a statement after he had been arrested, the following colloquy took place:

"Q: When someone, a defendant refuses to give you a statement, can you still go ahead and talk to him?"

"A: No, I do not.

"Q: Why not?"

"A: Because he has a right not to talk to me."

{¶ 48} We note initially that this line of questioning occurred after defense counsel cross-examined the detective about his failure to follow up with certain witnesses in his investigation and failure to obtain evidence corroborating the victim's statement. Defense counsel had also inquired as to the detectives' efforts to contact Gooden. With respect to the prosecutor's line of questioning, the prosecutor did not directly comment about Gooden's silence or failure to testify, but rather asked about police procedure and a defendant's right to remain silent in the context of a police investigation.

{¶ 49} Since Gooden failed to object to the testimony about which he now complains, he has waived all but plain error. *State v. Slagle* (1992), 65 Ohio St.3d 597, 605 N.E.2d 916. "Plain error does not exist unless it can be said that, but for the error, the outcome of the trial would clearly have

been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58, 552 N.E.2d 894.

{¶ 50} Gooden argues that admission into evidence of a defendant's post-arrest silence constitutes plain error. In support of this argument, Gooden relies upon *Doyle v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91; *State v. Williams* (1979), 64 Ohio App.2d 271, 413 N.E.2d 1212; and *State v. Eiding* (1978), 57 Ohio App.2d 111, 385 N.E.2d 1332.

{¶ 51} In *Doyle*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91, the United States Supreme Court dealt with the issue of the right to cross-examine a defendant who had provided exculpatory testimony at trial about his post-arrest silence for the limited purpose of impeachment. *Id.* Although the state argued that evidence of post-arrest silence was for impeachment purposes, as opposed to evidence of guilt, the Court was concerned that evidence implying an inconsistency with the defendant's exculpatory testimony might be construed by the jury as evidence of guilt. *Id.* As the Court stated, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618. Therefore, the Court held use for impeachment purposes of a defendant's silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 619.

\*8 {¶ 52} In *Eiding*, 57 Ohio App.2d 111, 385 N.E.2d 1332, our court considered a similar issue where, on cross-examination of the defendant, the state inquired why the defendant had not told the police about his alibi at the time of his arrest. The defendant responded that he had never been interviewed by the police. *Id.* In rebuttal, a detective on the case testified the defendant refused to make a statement to the police after his arrest and did not tell the police about his alibi. *Id.* This court found that admitting evidence of the defendant's post-arrest silence at trial and relying on it as a basis of guilt, denied him due process of law. *Id.*

{¶ 53} In *Williams*, 64 Ohio App.2d 276, this court held that "[a]ny comment which infers that the

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defendant is guilty because he remained silent subverts the guarantees afforded him by the Fifth Amendment to the Constitution of the United States. "The prosecutor in *Williams* had elicited testimony that the officer had informed the defendant of his right to remain silent, but that only one of the four persons arrested in connection with the offense provided a statement. *Id.* This court found the testimony was impermissible, stating "[p]rosecutors should avoid any suggestion that the accused is guilty because he refused to give a statement to police." *Id.*

{¶ 54} Our review of the above cases reflects that admitting evidence of post-arrest silence in a manner that implicitly suggests a defendant's guilt is impermissible. As recognized by this court, "the *Miranda* decision precludes the substantive use of a defendant's silence during police interrogation to prove his guilt." *State v. Correa* (May 15, 1997), Cuyahoga App. No. 70744, quoting *State v. Sabbah* (1982), 13 Ohio App.3d 124, 468 N.E.2d 718. However, as the Ohio Supreme Court has recognized, "where evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless 'beyond a reasonable doubt' if the remaining evidence alone comprises 'overwhelming' proof of defendant's guilt." *State v. Williams* (1983), 6 Ohio St.3d 281, 452 N.E.2d 1323, citing *Harrington v. California* (1969), 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284.

{¶ 55} We find that in determining whether the prosecutor's conduct and admission of the post-arrest silence evidence was harmless, this court must consider the extent of the comments, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting Gooden's guilt. *State v. Thomas*, Hamilton App. No. C-010724, 2002-Ohio-7333. A review of the comments in this case reflects that they were isolated remarks. See *State v. Ervin*, Cuyahoga App. No. 80473, 2002-Ohio-4093; *State v. Kelly* (July 12, 2001), Cuyahoga App. No. 78422 (both recognizing isolated reference to post-arrest silence is not reversible error). Further, the context in which the evidence was introduced reveals it was an inquiry only into the course of the police

investigation of the incident and police procedure, rather than an insinuation of Gooden's guilt. Also, the remaining evidence presented, as discussed under earlier assignments of error, comprised overwhelming proof of Gooden's guilt, and we cannot say that, but for the error, the outcome of the trial would clearly have been otherwise.

\*9 [5]{¶ 56} Gooden also argues that the prosecutor in closing argument improperly referred to defense counsel's strategy as a "smoke screen" on three occasions. The first "smoke screen" reference was raised with respect to a line of questioning by defense counsel that questioned the lack of investigation of the clothing, including the sizing, and perhaps suggested the recovered clothing did not belong to the victim. The second and third "smoke screen" references were in relation to defense counsel's references to what the state did not produce.

{¶ 57} We find none of the remarks complained of rise to the level of suggesting defense counsel had fashioned lies and suborned perjury as found in the cases relied upon by Gooden, *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883; and *State v. Braxton* (1995), 102 Ohio St.3d 28. The "smoke screen" remarks related to defense counsel's emphasis on the state's lack of evidence. They were no more than a commentary on the evidence and did not undermine the fairness of the proceedings against Gooden or prejudice his ability to have a fair trial. Under these circumstances, not only do we find that the prosecutor's comments were not improper, but also, we find that the "smoke screen" comments did not prejudicially affect substantial rights of the defendant. Gooden's fourth assignment of error is overruled.

{¶ 58} Gooden's fifth assignment of error provides:

{¶ 59} "Appellant was denied effective assistance of counsel as guaranteed by Section 11, Article VIII, of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution when counsel failed to object to the prosecutor's questioning and remarks regarding appellant's post-arrest silence and when counsel failed to object to the prosecutor's closing

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arguments.”

{¶ 60} To prove “ineffective assistance of counsel,” Gooden must show that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to deprive him of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. To warrant reversal, “the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus, citing *Strickland*, 466 U.S. at 694. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Sallie* (1998), 81 Ohio St.3d 673, 674, 693 N.E.2d 267.

{¶ 61} As noted above, Gooden has failed to show that his counsel's performance was substandard, or that the outcome of the trial would have been different but for his counsel's performance.

{¶ 62} Gooden's fifth assignment of error is overruled.

{¶ 63} Gooden's sixth assignment of error provides:

{6}{¶ 64} “The trial court erred by improperly concluding that appellant should be classified as a sexually oriented offender.”

\*10 {¶ 65} As relevant to this case, the applicable version of R.C. 2950.01(D)(1) defines a “sexually oriented offense” as including a violation of R.C. 2905.01, kidnapping, when the victim is a minor under the age of eighteen. In this case, Gooden was convicted of kidnapping a fourteen-year-old in violation of R.C. 2905.01. However, he argues that there was absolutely no evidence in this case that the kidnapping was committed with the purpose to gratify his sexual needs or desires.

{¶ 66} We recognize that the trial court applied the statute as written, which did not require anything more than the kidnapping of a minor. The

Second District Court of Appeals has held that applying the statutory requirement that an individual be classified as a sexually oriented offender, where the offenses were committed without any sexual motivation or purpose, “is unreasonable and arbitrary, and bears no rational relationship to the purposes of the statute.” *State v. Barksdale*, Montgomery App. 19294, 2003-Ohio-43, appeal allowed, 99 Ohio St.3d 1434, 2003-Ohio-2902, and cause dismissed, 99 Ohio St.3d 1549, 2003-Ohio-4781; and *State v. Reine*, Montgomery App. No. 19157, 2003-Ohio-50, appeal allowed, 99 Ohio St.3d 1434, 2003-Ohio-2902, and cause dismissed, 99 Ohio St.3d 1549, 2003-Ohio-4781. The Second District found that such an application of the statute offends the Due Process Clauses of both the Ohio and United States Constitutions. *Barksdale*, supra; *Reine*, supra.<sup>FN3</sup>

FN3. The Ohio legislature amended R.C. 2950.01, effective January 1, 2004, limiting the definition of a “sexually oriented offense” under R.C. 2950.01(D)(1) to a violation of R.C. 2905.01(A)(4), which is kidnapping with the purpose of engaging in sexual activity.

{¶ 67} We agree with the Second District and find that application of the statutory requirement that Gooden be classified as a sexually oriented offender, in a case in which there was no evidence that the offense was committed with any sexual motivation or purpose, is unreasonable and arbitrary, bears no rational relationship to the purposes of the statute, and, thus, offends the Due Process Clauses of both the Ohio and United States Constitutions.

{¶ 68} Gooden's sixth assignment of error is sustained. The order of the trial court designating Gooden to be a sexually oriented offender, and imposing upon him the registration and reporting requirements appropriate to that designation, is to be vacated by the trial court upon remand.

{¶ 69} Judgment affirmed in part and reversed and remanded in part.

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ANNE L. KILBANE, P.J., and DIANE  
KARPINSKI, J., concur.

This cause is affirmed in part, reversed in part and  
remanded to the lower court for further proceedings  
consistent with this opinion.

It is ordered that appellant and appellee share 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.

N.B. This entry is an announcement of the court's  
decision. See App.R. 22(B), 22(D) and 26(A);  
Loc.App.R. 22. This decision will be journalized  
and will become the judgment and order of the  
court pursuant to App.R. 22(E) unless a motion for  
reconsideration with supporting brief, per App.R.  
26(A), is filed within ten (10) days of the  
announcement of the court's decision. The time  
period for review by the Supreme Court of Ohio  
shall begin to run upon the journalization of this  
court's announcement of decision by the clerk per  
App.R. 22(E). See, also, S.Ct.Prac.R. II, Section  
2(A)(1).

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