

UNDER SEAL

ORIGINAL

ON COMPUTER-DWC

IN THE SUPREME COURT OF OHIO

Safeco Insurance Company of America,	:	CASE NO. 08-0403
	:	
Plaintiff-Appellant,	:	
	:	On appeal from the Hamilton County
v.	:	Court of Appeals, First Appellate District
	:	
Federal Insurance Company, et al.,	:	Court of Appeals
	:	Case No. C-070074
	:	
Defendants-Appellees.	:	
	:	
	:	FILED UNDER SEAL PURSUANT
	:	TO COURT ORDER
	:	

**APPELLANT SAFECO INSURANCE COMPANY OF AMERICA'S MEMORANDUM
IN OPPOSITION TO MOTION TO DISMISS CERTIFIED CONFLICT**

P. Christian Nordstrom (0065439)
(Counsel of Record)
Scott G. Oxley (0039285)
JENKS, PYPYR & OXLEY
901 Courthouse Plaza SW
10 North Ludlow St.
Dayton, OH 45402
Telephone (937) 223-3001
Facsimile (937) 223-3103

pcnordstrom@jpolawyers.com
soxley@jpolawyers.com
Attorneys for Appellant Safeco
Insurance Company of America

Jay Clinton Rice (0000349)
(Counsel of Record)
Richard C.O. Rezie (0071321)
GALLAGHER SHARP
Bulkley Building, 6th Floor
1501 Euclid Ave.
Cleveland, OH 44115-2108
Telephone (216) 241-5310
Facsimile (216) 241-1606

jrice@gallaghersharp.com
rrezie@gallaghersharp.com
Attorneys for Appellees Federal Insurance
Company and Pacific Indemnity Company

FILED
MAR 06 2008
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM IN OPPOSITION
TO MOTION TO DISMISS

I. Procedural Background.

On February 21, 2008 Appellant Safeco Insurance Company of America (“Safeco”) filed with this Court a Notice of Certified Conflict of Decision of the First Appellate District with Decisions from the Third and Fifth Appellate Districts.¹ Attached to Safeco’s Notice of Certified Conflict were four documents: (1) the February 13, 2008 Order of the First District Court of Appeals certifying the conflict, (2) the December 28, 2007 Opinion and Judgment Entry of the First Appellate District, (3) the Fifth District Court of Appeals decision in Torres v. Gentry (Ohio App. 5 Dist.), 2007-Ohio-4781, and (4) the Third District Court of Appeals decision in United Ohio Ins. Co. v. Metzger (Feb. 8, 1999), Putnam App. No. 12-98-1, 1999 Ohio App. LEXIS 920. On February 25, 2008 Appellees Federal Insurance Company and Pacific Indemnity Company (hereinafter “Chubb”) served² a Motion to Dismiss Certified Conflict for Want of Jurisdiction. Chubb’s Motion to Dismiss should be denied because Safeco timely perfected this appeal from the properly issued and legally sufficient February 13, 2008 Order of the First District Court of Appeals certifying a conflict.

Although Chubb’s Motion contains a purported timeline of the events leading up to the filing of this appeal, that timeline contains several significant inaccuracies and omissions. A procedural history will thus be helpful to frame the issues. On December 28, 2007 a panel³ of

¹ On that same date Appellant also filed with this Court a Motion to Seal Record and Pleadings on Appeal. This Court granted Appellant’s Motion by Entry filed February 27, 2008. Consequently this Memorandum is being filed under seal consistent with this Court’s Entry.

² The Motion to Dismiss was not filed until March 3, 2008.

³ The appellate panel consisted of Presiding Judge Mark Painter and Judges Sylvia Hendon and Patrick Dinkelacker.

the First District issued a unanimous Opinion⁴ which affirmed the decision of the trial court and in an atypical manner *sua sponte* recognized two conflicts with decisions of other courts of appeal. The Opinion included specific language outlining the two issues for this Court's review. On January 7, 2008 Safeco filed a timely Motion to Certify Conflict pursuant to Appellate Rule 25(A) with respect to the two conflicting cases and one of the issues identified, but requested that the First District modify its language regarding one of the issues previously identified.

Appellant's Motion was brief, with said brevity necessitated by the fact that although the First District's Opinion was journalized December 28, 2007, counsel never received a copy of the Decision by regular mail or e-mail; only a postcard informing counsel that the Opinion had been journalized. This postcard, mailed January 2, 2008, was received late in the day on Friday, January 4, 2008. A copy of the Opinion was obtained directly from the Clerk on Monday, January 7, 2008, the last day to file a Motion to Certify.⁵ Chubb served an opposition to Safeco's Motion to Certify Conflict on January 16, 2008. The First District issued an Entry January 24, 2008. That Entry was received by Safeco's counsel on Monday, January 28, 2008.

The Entry stated in its entirety:

This case came on to be considered upon the motion of appellant to certify a conflict under App. Rule 25(A) and upon memorandum in opposition.⁶

The Court finds that the motion is not well taken and is overruled as moot. In its judgment entry and opinion, the Court *sua sponte* certified a conflict to the Ohio Supreme Court.

⁴ The Opinion itself did not state it was an order. A Judgment Entry signed only by Mark Painter as Presiding Judge issued the same date noted "The judgment of the trial court is affirmed and conflict certified for the reasons set forth in the Decision filed this date."

⁵ The Courts of Appeals are not permitted to enlarge the time for filing a Motion to Certify Conflict pursuant to Appellate Rule 14(B).

⁶ Safeco also filed a Reply Memorandum in Support of Motion to Certify Conflict on January 25, 2008. The First District's docket in this case is sealed by Court Order and no information about the case is available on the Clerk's website.

On January 31, 2008, Safeco's counsel attempted to file with this Court a Notice of Certified Conflict with respect to the January 24, 2008 Entry pursuant to Supreme Court Practice Rule IV. The Clerk refused to accept the Notice for Filing on the basis that the Notice was required to be filed January 28, 2008, the day the Entry overruling the Motion to Certify was received. The Clerk indicated that because the January 24, 2008 Entry overruled Safeco's Motion to Certify as moot instead of granting it but refusing to change the language of the issue presented, that the Entry cannot serve as an order⁷ certifying a conflict upon which to file a Notice of Certified Conflict.

Consequently, on February 1, 2008 Safeco filed with the First District a timely Application for Reconsideration of its decision on the Motion to Certify pursuant to Appellate Rule 26(A) setting forth the foregoing procedural background and requesting that the First District issue an order granting in part and denying in part its Motion to Certify. Chubb served opposition to this Application for Reconsideration on February 7, 2008. On February 13, 2008 the First District Court of Appeals issued an Order granting the Application for Reconsideration, granting in part and denying in part Appellant's Motion to Certify and certifying a conflict pursuant to Article IV, Sec. 3(B)(4) of the Ohio Constitution. The Order was signed on behalf of the Court by Presiding Judge Painter and identified the two certified conflict cases and two issues presented for this Court's review. Eight days later Safeco filed its Notice of Certified Conflict pursuant to Supreme Court Practice Rule IV Section 1 which states:

When a court of appeals issues an order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, any interested party to the proceeding may institute an appeal by filing a notice of certified conflict in the Supreme Court. The notice shall have attached a copy of the court of appeals order certifying a conflict and copies of the conflicting court of appeals

⁷ Black's Law Dictionary defines Order as the "Direction of a court or judge made or entered in writing, and not included in a judgment, which determines some point or directs some step in the proceedings. An application for an order is a motion." Abridged 6th Ed. 1991, 756.

opinions. The party who files the order certifying a conflict shall be considered the appellant. Failure to file the court of appeals order certifying a conflict within 30 days after the date of such order shall divest the Supreme Court of jurisdiction to consider the order certifying a conflict.

II. Safeco's February 21, 2008 Notice of Certified Conflict specifically satisfies all the requirements of Practice Rule IV.

Chubb's Motion makes three arguments seeking to invalidate the First District Court of Appeals February 13, 2008 Order.⁸ In asserting this challenge Chubb fails to acknowledge that there is a presumption of regularity which is accorded to all judicial proceedings and that the First District issued the February 13, 2008 Order with full knowledge of the circumstances of this case. See State v. Hawkins, 74 Ohio St.3d 530, 531, 1996-Ohio-24.

First, Chubb argues that the February 13, 2008 Order is insufficient because it was only signed by Judge Painter, the presiding judge of the three judge panel which issued the Opinion. However, the fact that only Judge Painter signed the Order does not mean that the Order does not represent the conclusion of the "judges" of a court of appeals as mentioned in the Ohio Constitution. Attached as Exhibit 1 are the certification orders for all First District Court of Appeals cases certified as conflicts to this Court during the last two years for which records are available.⁹ All six of these certification orders are signed only by the presiding judge, but they all reference the conclusions of "the Court" or "this Court," just like the Order in the present case. The presiding judge designation is significant because the presiding judge unquestionably speaks for the panel. See State v. Bays (Jan. 30., 1998), Montgomery App. No. 96-CA-118,

⁸ Chubb does not point to any other claimed deficiencies in the Notice of Certified Conflict or its attachments.

⁹ Safeco notes that in five of the First District cases for which orders are attached this Court accepted the certified conflict. Hyle v. Porter, Supreme Court Case No. 2006-2187; State v. Cabrales, S.C. Case No. 2007-0595; State v. Meyers, S.C. Case No. 2007-0844; State v. Foster, S.C. Case No. 2007-1585; State v. Harris, S.C. Case No. 2007-2003. The only exception to this is State v. Taylor, S.C. Case No. 2008-0184 in which no decision from this Court has yet been issued on certification.

1998 Ohio App. LEXIS 226 at *11. Further, the First District is not the only Court of Appeals to issue certification orders signed by only one judge. State v. Ralph, S.C. Case No. 2007-1047, Eleventh District Certification Order attached as Exhibit 2. In Hawkins, *supra*, this Court refused to entertain the assumption¹⁰ that fewer than three judges of the Court of Appeals decided to issue an entry denying an application for reopening merely because only the presiding judge signed the entry. *Id.* at 531. Chubb's first argument is no different and should be rejected since, as the panel's presiding judge, Judge Painter's signature in combination with the language used in the Order demonstrates the panel in this case certified a conflict.

Chubb next argues that because the Court of Appeals indicated in its December 28, 2007 Opinion and Judgment Entry that a conflict existed that the February 13, 2008 Order is invalid. However, Safeco did not file its Notice of Certified Conflict based upon the date of the Opinion and Judgment Entry, but rather in response to the February 13, 2008 Order certifying the conflict. Practice Rule IV Section 1 specifically references the order certifying a conflict in contrast to the conflicting court of appeals "opinions." Even assuming that the Judgment Entry was an Order it does not state the rule of law with which the conflict exists or the conflicting cases and therefore is deficient. See State v. Davis (Ohio App. 10 Dist.), 2006-Ohio-4457, ¶2. Moreover, this Court's recently accepted case of State v. Malone, S.C. Case No 2007-2186 also indicates that the February 13, 2008 Order was sufficient. See Exhibits 3, 4, and 5. In Malone, the Third District Court of Appeals certified a conflict and identified an issue for resolution by this Court in an Opinion and Judgment Entry dated October 15, 2007. See Exhibit 5 at pp. 24-25. Then on November 15, 2007 the Third District issued a Journal Entry¹¹ reiterating the conflict and the issue presented. See Exhibit 4. On November 26, 2007 this Court accepted the

¹⁰ And the assumption in this case is clearly wrong because the First District panel which heard the case all also indicated agreement that a conflict existed in Judge Dinkelacker's Opinion.

¹¹ The Journal Entry also contains language indicating it is an Order.

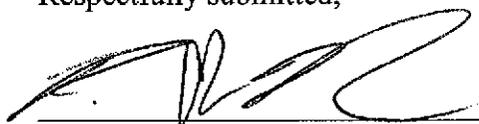
Notice of Certified Conflict and on January 23, 2008 accepted the certified conflict. See Exhibit 3. Malone illustrates that an Opinion and Judgment Entry certifying a conflict does not provide the exclusive basis for this Court's jurisdiction under Practice Rule IV. Chubb's second argument should be rejected.

Chubb's final argument is that since the Order was issued upon Application for Reconsideration that it is really the result of an untimely Motion to Certify. This makes no sense. In applying for reconsideration Safeco asked for a recharacterization of the original Entry issued in response to a timely and proper Motion to Certify. Both the Motion to Certify and the Application were filed within the time periods provided in the Appellate Rules.¹² The First District's decision to grant reconsideration and to grant in part and deny in part the timely Motion to Certify is reflected in the language of the Order. Chubb's disagreement with the First District's decision to issue the February 13, 2008 Order does not make the Order improper.

III. Conclusion.

For the foregoing reasons, Safeco respectfully requests that Chubb's Motion to Dismiss be denied.

Respectfully submitted,



P. Christian Nordstrom (0065439)
Scott G. Oxley (0039285)
JENKS, PYPER & OXLEY CO., L.P.A.
901 Courthouse Plaza SW
10 N. Ludlow St.
Dayton, OH 45402
Telephone: (937) 223-3001
Facsimile: (937) 223-3103
pcnordstrom@jpolawyers.com
soxley@jpolawyers.com

¹² Nor is Chubb's suggestion of endless Applications for Reconsideration correct. An Application for Reconsideration cannot be filed as to a previous decision on Reconsideration, only as to a cause or motion. See App. Rule 26(A).

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Memorandum was sent via ordinary mail to the following on this 6th day of March, 2008:

Jay Clinton Rice (0000349)
Richard C.O. Rezie (0071321)
Gallagher Sharp
1501 Euclid Avenue
7th Floor, Bulkley Bldg.
Cleveland, OH 44115
Phone (216) 241-5310
Fax (216) 241-1608
jrice@gallaghersharp.com

Attorney for Defendants/Appellees Federal Insurance Company and Pacific Indemnity Company

Robert A. Pitcairn (0010293)
Laura A. Hinegardner (0067576)
255 East Fifth Street, Ste. 2400
Cincinnati, OH 45202
Phone (513) 977-3477
Fax (513) 762-0077
rpitcairn@katzteller.com
lhinegardner@katzteller.com

Attorney for Defendants Lance and Diane White

Stanley Chesley (0000852)
Paul DeMarco, (0041153)
1513 Fourth and Vine Street
Cincinnati, OH 45202
Phone (513) 621-0267
Fax (513) 381-2375
stanchesley@wsbclaw.com

Attorney for Defendants Casey, Steven and Megen Hilmer

James E. Burke (0032731)
James Matthews (0043979)
Keating, Muething & Klekamp
1400 Provident Tower
One East Fourth St.
Cincinnati, OH 45202
Phone (513) 579-6429
Fax (513) 579-6457
jburke@kmklaw.com
jmatthews@kmklaw.com
Attorneys for Defendant Benjamin White

Stephen A. Bailey (0009456)
Martin & Bailey
120 E. Fourth St., Ste. 420
Cincinnati, OH 45202
Phone (513) 333-0990
Fax (513) 333-0066
mblaw@one.net
Attorney for Defendants Lance and Diane White

Michael D. Eagen (0018659)
Dinsmore & Shohl, LLP
1900 Chemed Center
255 E. Fifth Street
Cincinnati, OH 45202
Phone (513) 977-8578
Fax (513) 977-8141
michael.eagen@dinslaw.com
Attorney for Defendants Lance and Diane White



P. Christian Nordstrom (0065439)
Scott G. Oxley (0039285)



IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO



D70848383

FRANCIS HYLE, GREEN
TOWNSHIP LAW DIRECTOR, et al.

APPEAL NO. C-050768

TRIAL NO. A-0506155

Appellees,

vs.

ENTRY OVERRULING MOTION FOR
RECONSIDERATION AND *SUA*
SPONTE CERTIFYING CONFLICT

GERRY R. PORTER, JR.

Appellant.

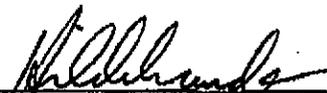
This cause came on to be considered upon the motion of the appellant filed herein for reconsideration, and upon the response thereto.

The Court, upon consideration thereof, finds that the motion is not well taken and is hereby overruled.

The Court, *sua sponte*, hereby certifies this cause to the Ohio Supreme Court as being in conflict *Nasal v. Dover* (2nd Dist. October 20, 2006), 2006-Ohio-5584.

To The Clerk:

Enter upon the Journal of the Court on NOV 15 2006 per order of the Court.

By: 
Presiding Judge

(Copies sent to all counsel)





D72657889

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,

APPEAL NO. C-050682
TRIAL NO. B-0403121D

Appellee,

vs.

ENTRY OVERRULING MOTION FOR
RECONSIDERATION AND GRANTING
MOTION TO CERTIFY CONFLICT

FERNANDO CABRALES,

Appellant.

This cause came on to be considered upon the motion of the appellee for reconsideration and, in the alternative, to certify this appeal to the Ohio Supreme Court as being in conflict with *State v. Greitzer*, 11th Dist. Case No. 2003-P-0110, 2005-Ohio-4037; as well as a series of cases cited in appellee's motion from the 4th, 6th, 8th, 10th, and 12th appellate districts of Ohio. The Court has also considered the appellant's memorandum in opposition.

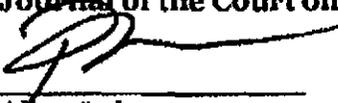
The Court finds that the motion for reconsideration is not well taken and is overruled. The Court finds that the motion to certify a conflict in this appeal is well taken and is granted.

It is the order of this Court that the appeal be certified to the Ohio Supreme Court as being in conflict with the above cases regarding the following issue:

Are the offenses of trafficking in a controlled substance in violation of R. C. 2925.03(A)(2) and possession of a controlled substance in violation of R.C. 2925.11(A) allied offenses of similar import when the same controlled substance is involved in both offenses?

To The Clerk:

Enter upon the Journal of the Court on MAR 29 2007 per order of the Court.

By: 
Presiding Judge

(Copies sent to all counsel)

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,

Appellee,

APPEAL NO. C-060012
TRIAL NO. B-0503606

vs.

ENTRY GRANTING MOTION
TO CERTIFY CONFLICT

JOHN MEYERS,

Appellant.

This cause came on to be considered upon the motion of the appellee to certify this appeal to the Ohio Supreme Court as being in conflict with *State v. Greitzer*, 11th Dist. Case No. 2003-P-0110, 2005-Ohio-4037.

The Court finds that the motion is well taken and is granted.

It is the order of this Court that the within appeal is certified to the Ohio Supreme Court as being in conflict with the above case regarding the following issue:

"Are the offenses of trafficking in a controlled substance in violation of R.C. 2925.03 (A)(2) and possession of a controlled substance in violation of R.C. 2925.11 (A) allied offenses of similar import when the same controlled substance is involved in both offenses?"

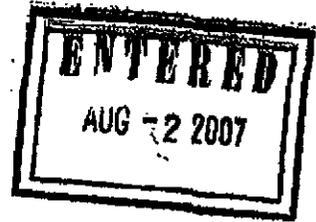
To The Clerk:

Enter upon the Journal of the Court on MAY - 3 2007 per order of the Court.

By: 
Presiding Judge

(Copies sent to all counsel)

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO



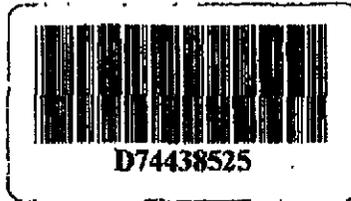
STATE OF OHIO

APPEAL NO. C-060720

Appellee,
vs.

ENTRY OVERULING MOTION TO
RECONSIDER AND GRANTING
MOTION TO CERTIFY CONFLICT

DAVID FOSTER



Appellant,

This cause came to be considered upon the motion of the appellee for reconsideration and, in the alternative, to certify this appeal to the Ohio Supreme Court as being in conflict with State v. Greitzer, 11th Dist. Case No. 2003-P-0110, 2005-Ohio-4037 as well as a series of cases cited in appellee's motion from the 4th, 6th, 8th, 10th, and 12th appellate districts of Ohio.

The court finds that the motion for reconsideration is not well taken and is overruled. The court finds that the motion to certify a conflict in this appeal is well taken and is granted.

It is the Order of this Court that the within appeal is certified to the Ohio Supreme Court as being in conflict with the above cases regarding the following issue:

Are the offenses of trafficking in a controlled substance in violation of R.C. 2925.03(A)(2) and possession of a controlled substance in violation of R.C. 2925.11(A) allied offenses of similar import when the same controlled substance is involved in both offenses?

To The Clerk:

Enter upon the Journal of the Court on AUG - 2 2007 per order of the Court.

By: [Signature] (Copies sent to all counsel)
Presiding Judge



Scott

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,

Appellee,

APPEAL NO. C-060691
TRIAL NO. B-0200149

vs.

ENTRY GRANTING MOTION
TO CERTIFY CONFLICT

JAMES HARRIS,

Appellant.

This cause came on to be considered upon the motion of the appellee to certify this appeal to the Ohio Supreme Court as being in conflict with *State v. Greitzer*.¹

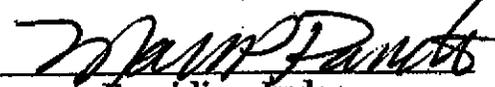
The Court finds that the motion is well taken and is granted.

It is the order of this Court that the within appeal is certified to the Ohio Supreme Court as being in conflict with the above case regarding the following issue:

"Are the offenses of trafficking in a controlled substance in violation of R.C. 2925.03 (A)(2) and possession of a controlled substance in violation of R.C. 2925.11 (A) allied offenses of similar import when the same controlled substance is involved in both offenses?"

To The Clerk:

Enter upon the Journal of the Court on OCT 25 2007 per order of the Court.

By:  (Copies sent to all counsel)
Presiding Judge

¹ *State v. Greitzer*, 11th Dist. Case No. 2003-P-0110, 2005-Ohio-4037.



D76705716

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
JAN 17 2008

STATE OF OHIO,

APPEAL NO. C-070026

Appellee,

TRIAL NO. B- 0601772B

vs.

ENTRY GRANTING MOTION
TO CERTIFY CONFLICT
AND MOTION FOR STAY

PIERRE TAYLOR,

Appellant.

This cause came on to be considered upon the motion of the appellee to certify this appeal to the Ohio Supreme Court as being in conflict with *State v. Greitzer*¹ and to stay judgment in this case pending the outcome of *State v. Cabrales*.²

The Court finds that the motions are well taken and are granted.

It is the order of this Court that the appeal be certified to the Ohio Supreme Court as being in conflict with the above case regarding the following issue:

Are the offenses of trafficking in a controlled substance in violation of R. C. 2925.03(A)(2) and possession of a controlled substance in violation of R.C. 2925.11(A) allied offenses of similar import when the same controlled substance is involved in both offenses?

To The Clerk:

Enter upon the Journal of the Court on JAN 17 2008 per order of the Court.

By: _____

Presiding Judge

(Copies sent to all counsel)

¹ *State v. Greitzer*, 11th Dist. Case No. 2003-P-0110, 2005-Ohio-4037

² *State v. Cabrales*, 2007-0651.

A-1

COURT OF APPEALS

FILED

STATE OF OHIO

COUNTY OF ASHTABULA

2007 JUN -5 P 11:29
IN THE COURT OF APPEALS
)SS. CAROL A. HEAD
CLERK OF COURTS
ELEVENTH DISTRICT
ASHTABULA COURT
ASHTABULA CO. OH

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

RALPH E. CLARK,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2006-A-0004

2007 JUN 5 P 11:29
CAROL A. HEAD
CLERK OF COURTS
ELEVENTH DISTRICT
ASHTABULA COURT
ASHTABULA CO. OH

FILED

This cause is presently before the court upon motion of appellant, Ralph E. Clark, for certification of a conflict to the Supreme Court of Ohio pursuant to Appellate Rule 25. No brief in opposition has been filed.

On April 13, 2007, this court issued its opinion in *State v. Clark*, 11th Dist. No. 2006-A-0004, 2007-Ohio-1780, affirming Clark's conviction for Aggravated Murder by way of a negotiated plea agreement. Clark argues our decision is in conflict with the Twelfth Appellate District's decision, *State v. Prom*, 12th Dist. No. CA2002-01-007, 2003-Ohio-6543.

Section 3(B)(4), Article IV, of the Ohio Constitution states that in order to certify a conflict, a judgment must be "in conflict" with a judgment of another court. In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 1993-Ohio-223, the Ohio Supreme Court held: "Pursuant to Section 3(B)(4), Article IV of the Ohio Constitution and S.Ct.Prac.R. III, there must be an actual conflict between

EXHIBIT
tabbles
2

appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper."

Both *Clark* and *Prom* involved defendants entering guilty pleas to charges of Murder. In both cases, the defendants were sentenced to life with eligibility for parole. In our case, Clark signed a plea agreement in which he acknowledged that the maximum penalty for aggravated murder was life without parole. At sentencing, the trial court adopted the jointly recommended sentence of life imprisonment, with eligibility for parole after twenty-eight years.

In both *Clark* and *Prom*, the trial judge mistakenly advised the defendants that they would be subject to the conditions of post-release control if they are released from prison, rather than explaining the more stringent conditions of parole. The common issue in *Clark* and *Prom*, then, is whether a sentencing court's erroneous statements to a defendant regarding post-release control invalidates the defendant's guilty plea, rendering it unknowing, involuntary, and unintelligent.

In *Clark*, we recognized, as did the Twelfth Appellate District in *Prom*, that the conditions of parole do not form part of the "maximum penalty" which must be explained to a defendant who enters a guilty plea. See Crim.R. 11(C)(2)(a); *Clark*, 2007-Ohio-1780, at ¶21; *Prom*, 2003-Ohio-6543, at ¶27.

However, the Twelfth Appellate District concluded that, by erroneously advising the defendant that the conditions of post-release control would apply if she were released, the trial court rendered *Prom* "unaware of the maximum

penalty to which she was exposed by her plea," and, thus, the plea invalid. 2003-Ohio-6543, at ¶29.

We disagreed with this holding on the ground that "eligibility for parole as well as the terms and conditions of parole were neither part of [the] sentence nor part of the maximum penalty to which she was exposed." 2007-Ohio-1780, at ¶23. Any misinformation Clark received about the terms and conditions of parole simply has no bearing on his understanding of the maximum penalty involved. Accordingly, our decision in *Clark* is in conflict with the Twelfth Appellate District's decision in *Prom*.

For the foregoing reasons, we certify the following issue for review by the Ohio Supreme Court:

Is a guilty plea knowing, intelligent, and voluntary when the trial court misinforms the defendant that he or she will be subject to five years postrelease control if released and up to nine months in prison for any violation when, in fact, the defendant faces a lifetime of parole and re-incarceration for life for any violation?

Clark's motion to certify a conflict is granted.



JUDGE DIANE V. GRENDALL
FOR THE COURT

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO :

PLAINTIFF-APPELLANT :

-v- :

Case No. 07-2186

DONALD K. MALONE, III, :

DEFENDANT-APPELLEE :

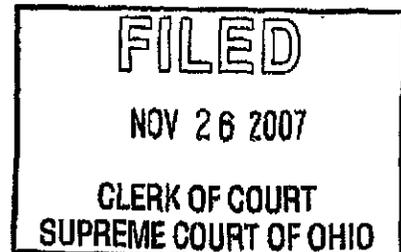
NOTICE OF CERTIFIED CONFLICT

Jim Slagle (#0032360)
Marion County Prosecuting Attorney
134 E. Center Street
Marion, Ohio 43302
(740) 223-4290
Telefax: (740) 223-4299

Attorney for Plaintiff-Appellant

Kevin P. Collins (#0029811)
COLLINS & LOWTHER CO., L.P.A.
125 S. Main Street
Marion, Ohio 43302
(740) 223-1470
Telefax: (740) 223-1467

Attorney for Defendant-Appellee



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), 5th Dist. No. CA-851 and *State v. Gooden*, 8th 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), 5th 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*, 8th 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), 5th Dist. No. CA-851 and *State v. Gooden*, 8th 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,

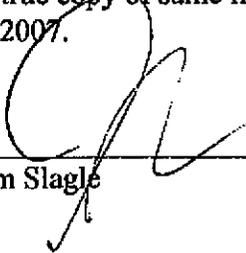


Jim Slagle (#0032360)
Marion County Prosecuting Attorney
134 E. Center Street
Marion, Ohio 43302
(740) 223-4290

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.



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

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 9-06-43

v.

DONALD K. MALONE, III,

JOURNAL
ENTRY

DEFENDANT-APPELLANT.

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*, 8th Dist.No. 82621, 2004-Ohio-2699, and the Fifth District Court of Appeals in *State v. Hummell* (June 1, 1998), 5th Dist.No. CA-851, unreported, on the following issue:

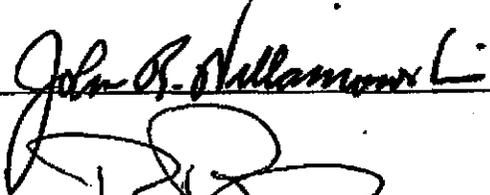
Is a conviction for intimidation of a witness under R.C. 2921.04(B), which requires the witness to be involved in a criminal action or proceeding, sustainable where the intimidation occurred after the criminal act but prior to any police investigation of the criminal act, and thus, also prior to any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

EXHIBIT

tabbles

4

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.







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.

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

ATTORNEYS:

**KEVIN P. COLLINS
Attorney at Law
Reg. #0029811
125 South Main Street
Marion, OH 43302
For Appellant.**

**JIM SLAGLE
Prosecuting Attorney
Reg. #0032360
134 East Center Street
Marion, OH 43302
For Appellee.**

EXHIBIT

5

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;¹ 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

¹ 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 (6th 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*, 2nd 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*, 8th Dist. No. 82621, 2004-Ohio-2699; *State v. Hummell* (Jun. 1, 1998), 5th 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*, 10th 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*, 8th 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*, 8th Dist. No. 82621, 2004-Ohio-2699, and *State v. Hummell* (Jun. 1, 1998), 5th 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.

r