IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	**Supreme Court #: 2007-2426** **2007-2030**
	:	
PLAINTIFF-APPELLANT,		**On Appeal from the Crawford County Court of Appeals, Third Appellate District**
vs.	:	
KIRK SESSLER,	:	**Court of Appeals Case No. 3-06-0023**
DEFENDANT-APPELLEE.	:	

****

APPELLANT'S MERIT BRIEF

****

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE.....1

Procedural Posture.....1

Statement of the Facts.....2

ARGUMENT 5

Issue Presented for Review.....5

PROPOSITION OF LAW NO. 1.

PROPOSITION OF LAW NO. 1: A CONVICTION UNDER A SPECIFIC SUB-PART OF A CHARGING STATUTE MAY NOT BE ALTERED TO AN UNCHARGED SECTION OF THE SAME STATUTE. STATE v. PELFREY IS LIMITED TO GENERAL CHARGING STATUTES 5

CONCLUSION 10

CERTIFICATE OF SERVICE..... 11

APPENDIX

Appx. Page

CONSTITUTIONAL PROVISIONS AND STATUTES

JOURNAL ENTRY OF THE THIRD DISTRICT COURT OF APPEALS.....App.1
OPINION OF THE THIRD DISTRICT COURT OF APPEALS.....App.13
OPINION CERTIFYING CONFLICT BY THE THIRD DISTRICT.....App.14
NOTICE OF APPEAL TO THE OHIO SUPREME COURT.....App.16
ORDER CERTIFYING CONFLICT BY THE OHIO SUPREME COURT.....App.18
ORDER GRANTING DISCRETIONARY APPEAL
AND CONSOLIDATING APPEAL.....App. 19
NOTICE OF CERTIFICATION OF CONFLICT.....App.20

R.C. 2905.01.....App. 52
R.C. 2907.05.....App. 54
R.C. 2913.42.....App. 57
R.C. 2919.22.....App.59
R.C. 2921.04.....App.66
R.C. 2945.75.....App.68

TABLE OF AUTHORITIES

State v. Crosky 2008 Ohio 145 ..... **9**

State v. Dudley 2008 Ohio 390 ..... **8**

State v. Kepiro, 2007 Ohio 4593 ..... **2,6,7,8,9**

State v. Pelfrey, 112 Ohio St.3d 422, 2007 Ohio 256, 860 N.E.2d 735 ..... **2,5,6,7,8,9,10**

CONSTITUTIONAL PROVISIONS AND STATUTES

2905.01 ..... **9**
2907.05 ..... **7,8,9**
2913.42 ..... **6**
2919.22 ..... **9,10**
2921.04 ..... **1**
2945.75 ..... **5,6,8,9**

STATEMENT OF THE CASE

Procedural Posture

The defendant-appellee, Kirk B. Sessler was indicted on June 12, 2006 for two Counts of Intimidation under Ohio Revised Code Section 2921.04(B). The offenses are statutorily defined as third degree felonies. The appellant was arraigned on June 19, 2006 and subsequently appointed counsel. The State provided appellant "Open Discovery" by letter dated June 29, 2006 to appellee's counsel. A copy of the Open Discovery letter is part of the record and attached to the State's Motion for reciprocal discovery file stamped August 31, 2006. The Crawford County Prosecutors Office Open Discovery Policy, as defined within this letter, provides counsel for the defendant the entire prosecution file (including witness statements and police reports). Moreover, the policy allows the defendant access to review the entire police file.

The appellee filed numerous frivolous pro-se motions in this case, despite representation by Counsel. The case was tried to a Jury on September 21, 2006. The appellee was convicted of both counts of Intimidation at Trial and sentenced to serve five years in prison on each offense consecutive to each other at the Sentencing Hearing held November 3, 2006. The appellee appealed his convictions and sentence. The Third District Court of Appeals modified the appellee's convictions for two counts of Felony three Intimidation of a witness pursuant to Ohio Revised Code Section 2921.04(B) to two counts of Misdemeanor one violations of Ohio Revised Code Section 2921.04(A). In essence, the finding by the Third District modified the specific elements of the charge before the Jury by deleting the specific finding by the Jury that the appellee committed the offense by the use of Force and/or by the use of an unlawful threat of

harm. The Third District opined that this Court's decision in **State v. Pelfrey**, 112 Ohio St.3d 422 required a modification of the elements of the offense to the lowest degree of offense classified within the charging statute. The State requested that the Court of Appeals reconsider their decision in light of decision and follow the Tenth Appellate District reasoning in **State v. Kepiro**, 2007 Ohio 4593 or alternatively to certify a conflict. By Judgment Entry dated November 30, 2007 the Court granted certification of a conflict, but denied the State's Motion for Reconsideration. The Ohio Supreme Court certified a conflict and granted the State's motion for discretionary Appeal. The cases were consolidated by Judgment Entry dated February 6, 2008.

Statement of the Facts

The evidence established that on May 22, 2006 the appellee and his live in girlfriend, Linda Chatman (hereinafter referred to primarily as the "victim"), spent the day arrowhead hunting. T.R. page 69 lines 4-11. The pair returned home at approximately 8:45 p.m and during various conversations the appellee remarked how happy he was that the victim enjoyed arrowhead hunting with him as his prior girlfriend did not enjoy such activities. T.R. page 69 lines 14-19. The victim inquired of the appellee if that was the girl that lived in Bucyrus; this inquiry by the victim launched the appellee into a tirade about the victim being jealous and trying to "dig" information from him. T.R. page 70 lines 4-10. The victim believing that the appellee was not being serious stood back and laughed it off. T.R. page 70 lines 11-23.

Realizing that the appellee did not share her perception of this comment, the victim decided to leave the room and went into the bathroom closing the door as she was concerned that the appellee could escalate the circumstances further. T.R. page 71 lines 9-14. After a while, the

victim returned to the living room to eat dinner with the appellee. T.R. page 71 lines 19-24. The appellee continued the prior conversation that the victim was just jealous and trying to find out about his personal business. T.R. page 71 lines 22-24. The appellee finished eating and left the residence at approximately 10:00 to 10:30 p.m.. The victim went to bed and was awakened at approximately 2:00 a.m. on May 23, 2006 by the appellee. T.R. page 73 lines 12-16. The appellee entered the bedroom, turned on the lights, plugged in his police scanner and asked the victim if she was ready to apologize to him yet. T.R. page 73 lines 14-24. The victim was also advised by the appellee that he was at Joe's Bar drinking during his absence from the home. T.R. page 74 lines 5-16.

The victim sat up in bed and told the appellee "... that if he (appellee) felt that I needed to apologize, I was sorry, that he (the appellee) misunderstood whatever it is that he thought I was trying to do or so (sic)". T.R. page 74 lines 20-23. The appellee thereupon took his hand and smacked the victim in the face. T.R. page 75 lines 1-2. The victim inquired of the appellee "why do you want to beat on me? And he took and he hit the other side of my face". T.R. page 75 lines 4-8. The appellee sarcastically responded by telling the victim that "I'm not beating you" and then hit her again. T.R. page 75 lines 9-12.

The appellee thereafter jumped on top of the victim (as the victim tried to reach for the cordless telephone) and the appellee placed his hands on the victim's throat telling her that if she tried to call the police or anybody else he was going to kill her. T.R. page 75 lines 13-21. The victim testified that she was screaming for the appellee to let her up. T.R. page 75 lines 22-24. The appellee thereafter got off the victim and left the room. The victim then started dialing the telephone to call her son which led to the appellee returning to the room, taking the telephone

from her and his screaming at the victim. T.R page 76 lines 8-13. The appellee specifically told the victim to go ahead and call your son as he wanted to beat somebody up or kill somebody. T.R. page 76 lines 21-23.

The appellee left the room again, this time with the telephone and started disconnecting the rest of the telephones in the home. T.R. page 76 lines 23-24 continuing onto Page 77 lines 1-6. The victim ran toward the front door, only to be grabbed by her hair and pulled backwards by the appellee from that room into another room. T.R. page 77 lines 7-12. The appellee then slammed the victim's head into the floor and commenced kicking the victim in her legs and on her back taunting her simultaneously that there was nothing wrong with her and for her to get up off the floor. T.R. page 77 lines 11-18. The victim testified that she was hyperventilating at that time and was having a panic attack. T.R. page 77 lines 19-21. The victim testified that the appellee then took a rock found the prior day arrowhead hunting and smashed a glass coffee table by throwing the rock through the coffee table. T.R. page 77 lines 23-24 continuing onto page 78 lines 1-2.

The victim again tried to get too the door, whereupon the appellee pushed her down, retrieved a splintered piece of glass from the broken coffee table and while holding the piece of glass to the victim's face began suffocating her with a pillow telling the victim he that he was going to kill her and that she was not going to call her son or the police. T.R. page 78 lines 13-24 continuing onto page 79 lines 1-12. The victim testified that she did take these threats seriously and thought that it was all over for her. T.R. page 79 lines 13-18. The victim specifically testified that on those two separate occasions that she thought that the appellee was going to kill her and that she took such threats very seriously. T.R. page 102 lines 10-18. The victim eventually did

make it out the door and over to a neighbors home.

The State introduced several Exhibits documenting the injuries suffered by the victim Exhibit 1 shows the injuries received by the victim to her head. (The victim testified that the appellee hit her very hard resulting in her head subsequently banging into the headboard of the bed. T.R. page 85 lines 1-12). Exhibit 2 shows the injuries that the victim received to her chest and legs. T.R. page 86 lines 1-10. Exhibit 3 shows the bruises on the victim's legs resulting from his kicking her with his boots. T.R. page 86 lines 12-24. Exhibit 4 shows the bruises left by the appellee kicking the victim in the "hind end" and her "back side". T.R. page 87 lines 10-20.

ARGUMENT

ISSUE PRESENTED FOR REVIEW

The Ohio Legislature has adopted two separate formats for Criminal Offense Statutes. The first format is a General Charging Statute. A General Charging Statute has the characteristics of outlining a prohibited form of conduct (i.e. theft) and then enhancing the penalty for such conduct based on extent of the conduct (i.e. if the theft offense is less than five hundred dollars a misdemeanor of the first degree; if the offense is greater than five hundred dollars a felony of the fifth degree etc.). The second format is a Specific Charging Statute. A Specific Charging Statute has the characteristics of focusing on specific acts that constitute the offense irrespective of the extent of the conduct (i.e. Gross Sexual Imposition where the crime and penalty is determined by the specific sub-part of the Statute and not by the extent of the conduct). The decision of **State v. Pelfrey** applied Ohio Revised Code Section 2945.75 to a General Charging Statute (i.e. Tampering with Records). The Third District Court of Appeals application of **Pelfrey** to a Specific Charging Statute in the instant case produces untenable results by altering the conviction to that of an uncharged crime or creating a new offense level outside of the Statute drafted by the legislature for committing the charged offense. Limiting the application of **Pelfrey** to General Charging Statutes is therefore appropriate.

PROPOSITION OF LAW NO. I: A CONVICTION UNDER A SPECIFIC SUB-PART OF A CHARGING STATUTE MAY NOT BE ALTERED TO AN UNCHARGED SECTION OF THE SAME STATUTE. STATE v. PELFREY IS LIMITED TO GENERAL CHARGING STATUTES.

The decision issued by the Third District Court of Appeals has modified the application of **State v. Pelfrey**, 112 Ohio St.3d 422 from General Charging Statutes (i.e. statutes that

uniformly prohibit the same conduct with different degrees of punishment depending on the severity of the conduct) to Specific Charging Statute (i.e. statues containing sub-parts that prohibit different specific conduct and specifying the penalty for such conduct). In essence, the decision of the Third District modifies the crime in order to modify the offense level of the crime. By changing the actual crime charged, the Third District has improperly invaded the province of the Jury in determining if the State has proven the defendant guilty of the offense for which the defendant stands charged within the indictment. The State is therefore requesting that the Court limit the holding and application of **State v. Pelfrey** to General Charging Statutes.

Ohio Revised Code Section 2945.75 requires that "a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense."

In **Pelfrey**, the defendant was convicted of one count of tampering with records in violation of R.C. 2913.42. This Court reasoned that a conviction for tampering with records is a misdemeanor, with the severity of the crime being increased if the records are governmental records. Since the jury's guilty verdict form did not indicate the degree of the offense or the additional elevating factor that governmental records were involved, compliance with R.C. 2945.75 mandates that the defendant be convicted of the least degree of the tampering offense containing the elements of the offense necessarily found by the Jury.

State v. Kepiro, 2007 Ohio 4593 presented a different type of charging statute. In **Kepiro**, counsel for the appellant argued to the Tenth Appellate District Court of Appeals that

because the statute under which Kepiro was convicted can be either a third or fourth degree felony, under **State v. Pelfrey**, 112 Ohio St.3d 422, 2007 Ohio 256, 860 N.E.2d 735, he cannot be guilty of the more severe level of the offense unless the jury makes a specific finding to that effect. Stated differently, counsel argued that **Pelfrey** required the Tenth Appellate District Court of Appeals to modify not only the offense level of his conviction from a third degree felony to a fourth degree felony, but also the elements of the offense for which he was convicted upon. Counsel reasoned that a broad interpretation of **Pelfrey** required the Court to reduce his client's conviction to the lowest level (i.e. from a third degree felony to a fourth degree felony) contained within the statute irrespective of the facts or elements continued in the indictment and proven at Trial. In **Kepiro,** the Tenth District Court of Appeals rejected this reasoning. Instead, the Court held that **Pelfrey** was distinguishable, because the statute at issue in **Pelfrey** was mechanically different from the specific charging statute at issue.

Specifically, the appellant in **Kepiro** was charged with a violation of R.C. 2907.05(A) (Gross Sexual Imposition a third degree felony) which is not a basic statute with enhancements like the one in **Pelfrey**. The GSI statute, rather, has multiple parts, each paragraph setting forth a separate crime, and each having a different penalty. R.C. 2907.05(A), essentially prohibits five different kinds of sexual contact with another: (1) by force (a fourth degree felony); (2) by deception (using drugs, alcohol, or other intoxicants — a fourth degree felony); (3) knowing the other person's judgment is impaired (a fourth degree felony); (4) when the victim is less than 13-years old (a third degree felony); or (5) whose judgment is impaired because of a mental defect (a fourth degree felony). Since each sub-part defines a distinct crime there are no additional elements or attendant circumstances that enhance the penalty. As such, there is no

application of R.C. 2945.75. In **Kepiro**, the jury convicted the Defendant in the manner and form in which he stood charged which was having sexual contact with another who was less than 13-years old. See R.C. 2907.05(A)(4).

Applying the Third District's interpretation of **Pelfrey** to the **Kepiro** specific charging statute is therefore untenable. The offense charged in the indictment and conviction for having sexual contact with a victim under the age of thirteen would necessarily be altered. The new elements of the offense (assuming the application of the **Kepiro** fact pattern to the holding of the Third District Court of Appeals) would alter the elements from having sexual contact with another who was less than thirteen years old to: having sexual contact by force; or having sexual contact when the victim's judgment is impaired; or having sexual contact when the victim's judgment is impaired because of a mental defect; or having sexual contact by deception. None of those separate offenses nor their elements were charged within the indictment or for that matter were proven at trial.

Alternatively, this application by the Third District would create a new statutory offense of a having sexual contact with a victim under thirteen by creating a new offense level of a felony four. A result that invades the province of the General Assembly. Limiting the application of **Pelfrey** to general charging statutes avoids this problem.

In **State v. Dudley**, 2008 Ohio 390 the defendant argued that he was improperly convicted and sentenced for a first degree felony kidnaping offense because the verdict form did not include either the degree of the offense of which defendant was convicted or a statement that the additional aggravating element making the offense one of more serious degree was found to be present by the jury. The kidnaping statute is likewise a specific charging statute that delineates

different offenses and their corresponding felony offense level. Unlike most other statutes, however, the kidnaping statute mandates that all sub-parts of the statute are first degree felonies, unless the defendant releases the victim in a safe place, unharmed. R.C. 2905.01.

Thus, unlike **Pelfrey**, the degree of the offense at issue in this case was not made more serious by the presence of an additional aggravating element. Just the opposite. The defendant's offense of kidnaping under any and all circumstances in R.C. 2905.01(A) and (B) constitutes a felony of the first degree and only if defendant releases the victim in a safe place unharmed does the offense then become a second degree felony. R.C. 2905.01(C). Accordingly, by its very terms, R.C. 2945.75(A) and the rule of **Pelfrey** should not apply.

In **State v. Crosky**, 2008 Ohio 145 the appellant raised a challenge in connection with his convictions for GSI, child endangering, and disseminating matters harmful to juveniles. The **Crosky** Court applied the same rational, citing the Court's previous decision in **Kepiro**. For the GSI offense the Court noted as in **Kepiro**, that there are no additional elements or circumstances over and above the elements of the offense set forth in R.C. 2907.05(A) that enhance the penalty for a GSI conviction. With nothing more than the guilty verdict, appellant is convicted of a third-degree felony as specified in this specific charging statute.

The **Crosky** Court reasoned that appellant's guilty verdict form for his endangering children conviction also did not violate R.C. 2945.75. In pertinent part, that verdict form read: "[w]e, the jury in this case, find the Defendant John R. Crosky GUILTY of Endangering Children as he stands charged in * * * the Indictment." Again, the verdict form does not contain the degree of the offense or any statement of an aggravating element. Like the GSI statute, R.C. 2919.22(B)(5) contains all the necessary elements of the offense. A violation of that statute is a

felony of the second degree. There are no additional elements or circumstances over and above the elements of the offense set forth in R.C. 2919.22(B)(5) that enhance the penalty for the conviction. Thus, the verdict form did not need to contain the degree of the offense or a statement that an aggravating element has been found by the jury.

In the case sub-judice, the appellee was convicted of knowingly and by force or by unlawful threat of harm attempt to influence or intimidate or hinder the victim of a crime in the filing or prosecution of criminal charges. The offense is a felony of the Third Degree. There are no additional elements in reporting circumstances over and above the elements of the offense that enhance the penalty for the conviction. Thus, the verdict form should not need to contain the degree of the offense or a statement that an aggravating element has been found by the jury.

CONCLUSION

For these reasons, the State of Ohio respectfully requests that this honorable Court rule that the **Pelfrey** decision is limited to general charging statutes. That the **Pelfrey** decision has no application to specific charging statutes and that Appellee is guilty of the offense charged in the indictment.

Respectfully submitted,

By: _____
Clifford Murphy
(COUNSEL OF RECORD)
COUNSEL FOR APPELLANT,
STATE OF OHIO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of the foregoing Merit Brief of the Appellant has been served via Ordinary U.S. Mail, postage pre-paid, this 13 day of March 2008 upon Appellee's Counsel John Spiegel at his address listed in the cover page of this Merit Brief.

Clifford Murphy
COUNSEL FOR APPELLANT,
STATE OF OHIO

FILED IN THE COURT OF APPEALS

SEP 2 4 2007

SUE SEEVERS
CRAWFORD COUNTY CLERK

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

CRAWFORD COUNTY

STATE OF OHIO,	**CASE NUMBER 3-06-23**
PLAINTIFF-APPELLEE,	**JOURNAL**
v.	**ENTRY**
KIRK SESSLER,	
DEFENDANT-APPELLANT.	

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is affirmed in part and reversed in part with costs to be divided equally between the parties for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

John B. Hellmann

Jim

Kamon

JUDGES

DATED: September 24, 2007

Willamowski, J.

{¶1} Defendant-appellant Kirk B. Sessler ("Sessler") brings this appeal from the judgment of the Court of Common Pleas of Crawford County finding him guilty of two counts of intimidation.

{¶2} On May 22 and 23, 2006, Sessler and his live-in girlfriend, Linda Chatman ("Chatman") had a dispute. Eventually Sessler left the home and Chatman went to bed. Chatman was awoken at approximately 2:00 a.m. by Sessler demanding an apology for her earlier comments. Sessler also indicated that he had been drinking. After Chatman apologized, Sessler struck Chatman on her face twice. Chatman attempted to reach for the telephone and Sessler jumped on top of her, placed his hands on her throat, and threatened to kill her if she called the police. Sessler then left the room. Chatman then attempted to call for help. Sessler returned to the room, took the telephone from her, and threatened to kill her son or anyone else she called for help. Sessler again left the room, but took the telephone with him. Sessler went through the remainder of the house pulling the remaining telephones from the walls. As Chatman attempted to leave the house, Sessler grabbed her by the hair, pulled her back through the house, slammed her head into the floor, and began kicking her in the back and legs. Sessler then smashed the glass coffee table by throwing a rock through it.

{¶3} Chatman again attempted to get to the door. Sessler grabbed her and a piece of glass from the coffee table. Sessler then held the glass to Chatman's throat, placed a pillow over her face and began suffocating her. While doing these acts, Sessler told Chatman that he was going to kill her. Eventually, Chatman was able to escape to the neighbors' home, who took her to the hospital and then the police station.

{¶4} On June 12, 2006, Sessler was indicted for two counts of intimidation in violation of R.C. 2921.04(B), which are classified as third degree felonies. The State provided Sessler with open discovery, meaning that Sessler had access to the entire prosecution file and the entire police file. Throughout the pretrial proceedings, Sessler filed numerous pro-se motions despite the fact that counsel was provided. These motions included one for a Bill of Particulars, which the State provided on August 31, 2006. On September 21, 2006, a jury trial was held. Sessler was convicted on both counts and ordered to serve five years in prison on each charge, with the terms to be served consecutively. Sessler appeals from this judgment and raises the following assignments of error.

> **The trial court erred in overruling [Sessler's] motion for acquittal, pursuant to Rule 29.**
>
> **The trial court erred in convicting [Sessler] of two general felonies, rather than a specific misdemeanor.**

The trial court erred by allowing trial on indictments that were void, lacking elements, and failed to give [Sessler] proper notice of what allegations would be proven.

The trial court erred by failing to order that a proper bill of particulars be given to [Sessler].

The trial court erred in finding [Sessler] guilty of a felony, when the verdict forms supported only a verdict of a misdemeanor.

The trial court erred in sentencing [Sessler] to maximum consecutive sentences.

{¶5} Sessler's first assignment of error claims that the trial court erred in overruling his motion for acquittal pursuant to Criminal Rule 29. Sessler was charged with two counts of intimidation in violation of R.C. 2921.04(B). To prove a charge of intimidation of a victim in a criminal case, the State must show that the defendant knowingly by force attempted to intimidate a victim of a crime from filing criminal charges. R.C. 2921.04(B). An appellate court's function when reviewing a denial of a motion for acquittal pursuant to Criminal Rule 29 is to determine whether, after viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find all of the essential elements of the offense proven beyond a reasonable doubt. *State v. Shoemaker*, 3rd Dist. No. 14-06-12, 2006-Ohio-5159, ¶59. "Under [Criminal Rule 29(A)], a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt." Id. at ¶61.

{¶6} Here, Chatman testified that after Sessler had hit her several times, she returned to the bed where she had placed the cordless phone. Tr. 74-75. She then testified that Sessler "jumped on top of me on the bed and had me by my throat and told me if I had tried to call the police or anybody he was going to kill me." Id. at 75. She also testified that Sessler kept threatening her that he would kill her if she tried to call the police or anyone else. Id. at 76-80. At the time he was threatening to kill her, he put a shard of broken glass to her throat and threatened to cut her and at another time placed a pillow over her face while threatening to kill her. Id. Finally, Chatman testified that she was afraid that Sessler would kill her if she went for help. Id. at 102-104. Viewing this evidence in a light most favorable to the State, a juror could conclude that the elements of the offense were proven beyond a reasonable doubt. The trial court did not err in denying the motion for acquittal and the first assignment of error is overruled.

{¶7} Sessler's second assignment of error alleges that the trial court erred in convicting him of two general felonies rather than a specific misdemeanor. Sessler argues that the trial court should only have been convicted of either domestic violence, assault, or aggravated menacing for his actions. Sessler claims that the facts of this case could potentially support charges for assault or aggravated menacing, which are more specific charges than intimidation. "Where it is clear that a special provision prevails over a general provision or the Criminal

Code is silent or ambiguous as to which provision prevails, under R.C. 1.51, a prosecutor may charge only on the special provision." *State v. Wickard*, 3rd Dist. No. 5-05-30, 2006-Ohio-6088, ¶10. "However, where it is clear that a general provision applies coextensively with a special provision, R.C. 1.51 allows a prosecutor to charge on both." Id. at ¶12. The restriction set forth in R.C. 1.51 only applies if the offenses are allied offenses of similar import. Id.

{¶8} To be an allied offense of similar import, the elements must align in such a way that the commission of one offense automatically results in the commission of the other. *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699. The elements of intimidation do not line up with those of either assault or aggravated menacing. While an assault or aggravated menacing may occur while intimidation is being committed, it is not necessary. Additionally, one can commit assault or aggravated menacing without committing intimidation. The difference is the use of force or threat of force for the purpose of hindering a victim from reporting a crime. Since the offenses are not allied offenses of similar import, the restriction set forth in R.C. 1.51 does not apply, and the trial court did not err in allowing the convictions for intimidation. The second assignment of error is overruled.

{¶9} Next, Sessler claims that the indictment was inadequate because they merely provided a recitation of the statute. "The statement may be in the

words of the applicable section of the statute, provided the words of that section of the statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged." Crim.R. 7(B).

> **Although a flaw in the indictment could result in the dismissal of the case for lack of jurisdiction, the standard for determining the legal sufficiency of an indictment is relatively simple. In *Childs*, the Supreme Court of Ohio stated that the requirements for a proper indictment can generally be met if the prosecutor follows the language of the statute defining the offense. [*State v. Childs*, 88 Ohio St.3d 194, 2000-Ohio-298, 724 N.E.2d 781]. Based upon this general rule, it has been held that, so long as the indictment refers to all statutory elements of a crime, it will be deemed sufficient even when it does not state the particular facts of that case. *State v. Blackwell*, 6th Dist. No. L-01-1031, 2002-Ohio-6352. For example, the failure to state the specific felony offense upon which a kidnapping charge is based, does not render an indictment insufficient because the defendant can obtain a statement of the specific allegations through a bill of particulars. *State v. Smith*, 8th Dist. No. 83007, 2004-Ohio-3619.**

State ex rel. Smith v. Mackey, 11th Dist. No. 2004-A-0080, 2005-Ohio-825, ¶6.

{¶10} The indictment in this case used the exact language of the statute, quoted the statutory section, and specified that Sessler committed the acts on or about May 23, 2006. Although the indictment did not state the particular facts upon which the indictment is based, the statutory elements were all present. Sessler then was able to obtain the factual basis from the bill of particulars and the State's prosecutorial file. Because the indictment contained all of the statutory

elements, the indictment is sufficient to provide Sessler with the required notice. The third assignment of error is overruled.

{¶11} The fourth assignment of error claims that the trial court erred in not ordering a more specific bill of particulars than was provided by the State.

> **The purpose of a bill of particulars "is to inform a defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial, to prevent surprise, or to plead his acquittal or conviction in bar of another prosecution for the same offense."** * * *
>
> * * *
>
> **While the bill of particulars must enable the defendant to prepare for trial, it is not designed to provide the accused with specifications of evidence or to serve as a substitute for discovery. * * * A bill of particulars need not include information that is within the knowledge of the defendant or information that the defendant could discover herself with due diligence. * * * Additionally, a bill of particulars need not be precise, but rather "need only be directed toward the conduct of the accused as it is understood by the state to have occurred."** * * *

State v. Miniard, 4th Dist. No. 04CA1, 2004-Ohio-5352, ¶21-23 (citations omitted). In this case, Sessler was told that the charges stemmed from his actions on May 23 where he threatened the life of the victim and "brutally beat the victim." Bill of Particulars. Under its policy of open discovery, the State had previously provided Sessler with copies of the indictment and the entire police report in the State's possession. The State also notified Sessler of his right to completely review any evidence possessed by the Galion Police Department.

Given the facts that Sessler had access to all of the evidence that the State had and was allegedly present for the offense. the bill of particulars did not need to include any additional information. The trial court did not abuse its discretion in denying Sessler's motion for a more detailed bill of particulars and the fourth assignment of error is overruled.

{¶12} The fifth assignment of error alleges that the verdict forms did not support convictions for intimidation. Sessler cites the Ohio Supreme Court's recent opinion in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, as requiring the verdict form to specify the degree of the offense. In *Pelfrey,* the Supreme Court addressed the question "[w]hether the trial court is required as a matter of law to include in the jury verdict form either the degree of the offense of which the defendant is convicted or to state that the aggravating element has been found by the jury when the verdict incorporates the language of the indictment, the evidence overwhelmingly shows the presence of the aggravating element, the jury verdict form incorporates the indictment and the defendant never raised the inadequacy of the jury verdict form at trial." Id. at ¶1. The Ohio Supreme Court answered the question in the affirmative and held as follows.

> **The statutory requirement certainly imposes no unreasonable burden on lawyers or trial judges. R.C. 2945.75(A) plainly requires that in order to find a defendant guilty of "an offense * * * of more serious degree," the guilty verdict must either state**

> **"the degree of the offense of which the offender is found guilty" or state that "additional element or elements are present." R.C. 2945.75(A)(2) also provides, in the very next sentence, what must occur if this requirement is not met: "Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged." When the General Assembly has written a clear and complete statute, this court will not use additional tools to produce an alternative meaning.**

Id. at ¶12. "The express requirements of the statue cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form, or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form." Id. at ¶14. The Supreme Court held that if the verdict form does not state the degree of the offense or the additional elements necessary to reach the higher degree, then the defendant must be presumed to have been convicted on the least degree of the offense charged. Id.

{¶13} The verdict forms in this case specify that the jury is finding Sessler either guilty or not guilty of intimidation "in manner and form as he stands charged in the indictment." Form. The forms did not specify the degree of the offense charged or set forth any aggravating factors. The only difference between divisions A and B of R.C. 2921.04 as it applies to this case is the question whether the defendant "knowingly and by force or by unlawful threat of harm to any person or property" attempted to intimidate the victim. If there is no force or

threat of harm, the defendant may be found guilty under R.C. 2921.04(A), which is a first degree misdemeanor. R.C. 2921.04(D). If there is force or the threat of harm, the defendant may be found guilty of a third degree felony. R.C. 2929.04(D). This court notes that Sessler was properly charged, the jury instructions specified the correct offense and degree, and the verdict form incorporated by reference the indictment. However, the verdict form does not specify the degree of the offense or even statutory section upon which the offense is based and does not contain any reference to the use of force or threat of harm. The form, therefore, does not permit a determination as to which degree of offense Sessler is guilty of committing. Being obligated to follow the rulings of the Ohio Supreme Court, we must, pursuant to R.C. 2945.75(A)(2) and the holding of the Ohio Supreme Court in *Pelfrey*[1], hold that as to each count of intimidation, the jury found Sessler guilty of the least offense, which is intimidation under R.C. 2921.04(A), a first degree misdemeanor. The fifth assignment of error is sustained.

{¶14} Finally, Sessler claims that the trial court erred in sentencing him to maximum, consecutive sentences. Having found an error with the verdict forms and determined that Sessler can only be sentenced for misdemeanors rather than

[1] While we note that the trial in this case occurred prior to the decision in *Peifrey*, we must nonetheless apply the holding of *Pelfrey* to this appeal.

felonies, Sessler must be resentenced. Thus, this assignment of error is moot and need not be addressed.

{¶15} The judgment of the Court of Common Pleas of Crawford County is affirmed in part and reversed in part. The matter is remanded for further proceedings in accordance with this opinion.

Judgment affirmed in part, reversed in part and cause remanded.

ROGERS, P.J., and PRESTON, J., concur.
r

[Cite as *State v. Sessler*, 2007-Ohio-4931.]

COURT OF APPEALS
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

KIRK SESSLER,

DEFENDANT-APPELLANT.

CASE NUMBER 3-06-23

OPINION

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

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

DATE OF JUDGMENT ENTRY: September 24, 2007

ATTORNEYS:

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For Appellee.

FILED IN THE COURT OF APPEALS

NOV 30 2007

SUE SEEVERS
CRAWFORD COUNTY CLERK

VOL 0440 PG 3558

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

CRAWFORD COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

KIRK SESSLER,

DEFENDANT-APPELLANT.

CASE NO. 3-06-23

JOURNAL ENTRY

This cause comes on for determination of appellee's application to reconsider and motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution, and appellant's response in opposition.

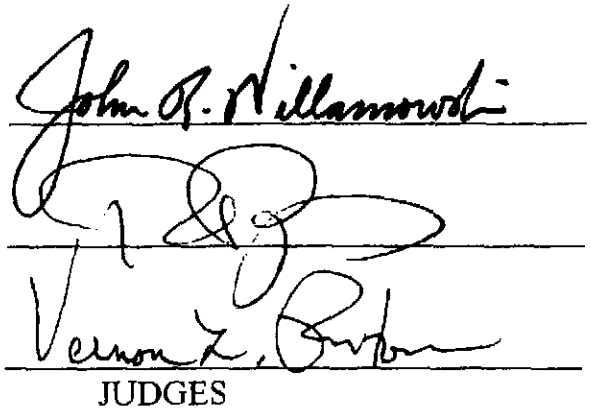
Upon consideration the court finds that the application fails to set forth any error in the decision or issue not properly considered in the first instance. See *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1992), 85 Ohio App.3d 117; *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. As such, the court finds no good cause shown to reconsider the opinion and judgment pursuant to App.R. 26(A).

The court further finds that the judgment in the instant case is in conflict with the judgment rendered by the Tenth District Court of Appeals in *State v. Kepiro*, 10th App.No. 06AP-1302, 2007-Ohio-4593. Accordingly, the motion to certify a conflict is well taken and the following issue should be certified pursuant to App.R. 25:

Is the holding in *State v. Pelfrey*, 112 Ohio St.3d 422, applicable to charging statutes that contain separate sub-parts with distinct offense levels.

It is therefore **ORDERED** that appellee's application to reconsider be, and hereby is, denied.

It is further **ORDERED** that appellee's motion to certify a conflict be, and hereby is, granted on the certified issue set forth hereinabove.



JUDGES

DATED: November 29, 2007

/jlr

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Supreme Court #: 07-2030
PLAINTIFF-APPELLANT,	:	On Appeal from the Crawford County Court of Appeals, Third Appellate District
vs.	:	
KIRK SESSLER,	:	Court of Appeals Case #: 3-06-0023
DEFENDANT-APPELLANT.	:	

****

NOTICE OF APPEAL OF THE STATE OF OHIO

****

STANLEY FLEGM 0006846
CRAWFORD COUNTY PROSECUTOR
Clifford J. Murphy #0063519 (COUNSEL OF RECORD)
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COUNSEL FOR APPELLEE, KIRK SESSLER

FILED
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF THE STATE OF OHIO

Appellant, the State of Ohio, hereby gives notice of Appeal to the Supreme Court of Ohio from the Judgement of the Third District Court of Appeals rendered September 24, 2007 which over-ruled Appellee's Trial Conviction for Two Counts of Intimidation of a Witness, both Felonies of the Third Degree pursuant to Ohio Revised Code Section 2921.04(B) and instead changed the convictions and Offenses to first degree Misdemeanor Offenses under different offense elements contained in R.C. 2921.04(A). The Third District Court of Appeals ruled that **State v. Pelfrey**, 112 Ohio St.3d 422, decided after Appellee's Jury Trial Conviction, allows a defendant to be convicted of the least offense level within a Statute, irrespective of whether such a change alters the very nature of the conduct alleged to have occurred. The State has requested that the Third District Court of Appeals certify their decision as conflicting with the Tenth District Court of Appeals decision of **State v. Kepiro** 2007 Ohio 4593 in which the Tenth District limited **Pelfrey's** application to General Charging Statutes. This issue raises a substantial Constitutional question and is of public or great general concern as the application by the Third District Court of Appeals of **Pelfrey** changes the actual Felony charge indicted upon as opposed to the actual level of the Offense. The State has also filed a motion to certify a conflict with decisions rendered from the Tenth District. No decision has yet been rendered on this application to certify a conflict.

Respectfully submitted,

Clifford J. Murphy 0063519
Asst. Crawford County Prosecutor
(COUNSEL OF RECORD)
COUNSEL FOR APPELLANT, STATE OF OHIO

CERTIFICATE OF SERVICE

The undersigned certifies that true copies of the foregoing Notice of Appeal to the Supreme Court of Ohio has been served via Ordinary U.S. Mail, postage pre-paid, this 29th day of October 2007 upon Appellee's Counsel John Spiegel at the address listed in the cover page.

Clifford J. Murphy

FILED
FEB 06 2008
CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

State of Ohio

v.

Kirk Sessler

Case No. 2007-2426

ENTRY

This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Crawford County. On review of the order certifying a conflict,

It is determined that a conflict exists. The parties are to brief the issue stated at page 2 of the court of appeals' Journal Entry filed November 30, 2007, as follows:

"Is the holding in *State v. Pelfrey*, 112 Ohio St.3d 422, applicable to charging statutes that contain separate sub-parts with distinct offense levels?"

It is ordered by the Court, sua sponte, that this cause is consolidated with Supreme Court Case No. 2007-2030, *State v. Sessler*.

It is further ordered by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Crawford County.

It is further ordered by the Court that the briefing in Case Nos. 2007-2426 and 2007-2030 shall be consolidated. The parties shall file two originals of each of the briefs permitted under S.Ct.Prac.R. VI and include both case numbers on the cover page of the briefs. The parties shall otherwise comply with the requirements of S.Ct.Prac.R. VI.

(Crawford County Court of Appeals; No. 30623)

THOMAS J. MOYER
Chief Justice

FILED
FEB 06 2008
CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

State of Ohio

v.

Kirk Sessler

Case No. 2007-2030

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal.

It is ordered by the Court, sua sponte, that this cause is consolidated with Supreme Court Case No. 2007-2426, *State v. Sessler*.

It is further ordered that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Crawford County.

It is further ordered by the Court that the briefing in Case Nos. 2007-2030 and 2007-2426 shall be consolidated. The parties shall file two originals of each of the briefs permitted under S.Ct.Prac.R. VI and include both case numbers on the cover page of the briefs. The parties shall otherwise comply with the requirements of S.Ct.Prac.R. VI.

(Crawford County Court of Appeals; No. 30623)

THOMAS J. MOYER
Chief Justice

IN THE SUPREME COURT OF OHIO

STATE OF OHIO		
	:	Supreme Court #: 07-2426
PLAINTIFF-APPELLANT,		
	:	On Appeal from the Crawford County Court of Appeals, Third Appellate District
v.		
	:	
KIRK SESSLER		
	:	Court of Appeals Case #:3-06-0023
DEFENDANT-APPELLEE.		

****

NOTICE OF CERTIFICATION OF CONFLICT

****

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Bucyrus, Ohio 44820
(419) 562-6624

COUNSEL FOR APPELLEE, KIRK SESSLER

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	Supreme Court No. _____
Plaintiff-Appellant	:	On Appeal from the Crawford County Court of Appeals, Third
v.	:	Appellate District
KIRK SESSLER	:	Court of Appeals Case #3-06-0023
Defendant-Appellee		Notice of Certification By Appellate Court

Now comes the State of Ohio and gives Notice pursuant to Rule 4, Section 1 of the Rules of Practice of the Supreme Court of Ohio that the Court of Appeals for the Third District has certified a conflict on the 30th day of November, 2007 on the following issue :

> Is the holding in *State v. Pelfrey*, 112 Ohio St. 3d 422, applicable to charging statutes that contain separate sub-parts with distinct offense levels. (See the attached Journal Entry, Case #3-06-23)

Attached is a copy of the conflicting Court of Appeals decision of *State v. Kepiro* (10th Appellate Dist. 2007) 2007 Ohio 4593 which is in conflict with *State v. Sessler* also attached hereto.

Respectfully submitted,

Clifford J. Murphy, #0063519
Asst. Crawford County Prosecutor
Counsel of Record
Counsel for Appellant, State of Ohio
By: Michael J. Wiener, #0074220
Asst. Crawford County Prosecutor

CERTIFICATE OF SERVICE

The undersigned certifies that true copies of the foregoing Notice of Certification has been served via ordinary U.S. Mail postage pre-paid this 27th day of December, 2007 upon Appellee's counsel, John Spiegel, Esq., P. O. Box 1024, Bucyrus, OH 44820.

Clifford J. Murphy, #0063519

FILED IN THE COURT OF APPEALS

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SUE SEEVERS
CRAWFORD COUNTY CLERK

VOL 0440 PG 3558

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

CRAWFORD COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 3-06-23**

v.

KIRK SESSLER, **JOURNAL ENTRY**

DEFENDANT-APPELLANT.

This cause comes on for determination of appellee's application to reconsider and motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution, and appellant's response in opposition.

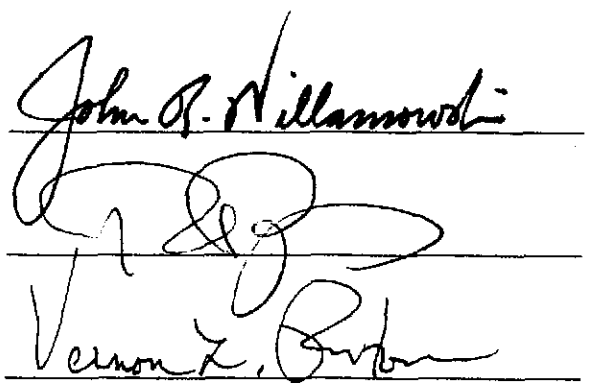
Upon consideration the court finds that the application fails to set forth any error in the decision or issue not properly considered in the first instance. See *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1992), 85 Ohio App.3d 117; *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. As such, the court finds no good cause shown to reconsider the opinion and judgment pursuant to App.R. 26(A).

The court further finds that the judgment in the instant case is in conflict with the judgment rendered by the Tenth District Court of Appeals in *State v. Kepiro*, 10th App.No. 06AP-1302, 2007-Ohio-4593. Accordingly, the motion to certify a conflict is well taken and the following issue should be certified pursuant to App.R. 25:

Is the holding in *State v. Pelfrey*, 112 Ohio St.3d 422, applicable to charging statutes that contain separate sub-parts with distinct offense levels.

It is therefore **ORDERED** that appellee's application to reconsider be, and hereby is, denied.

It is further **ORDERED** that appellee's motion to certify a conflict be, and hereby is, granted on the certified issue set forth hereinabove.



JUDGES

DATED: November 29, 2007

/jlr

FILED IN THE COURT OF APPEALS

SEP 2 4 2007

SUE SEEVERS
CRAWFORD COUNTY CLERK

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

CRAWFORD COUNTY

STATE OF OHIO,	CASE NUMBER 3-06-23
PLAINTIFF-APPELLEE,	JOURNAL
v.	ENTRY
KIRK SESSLER,	
DEFENDANT-APPELLANT.	

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is affirmed in part and reversed in part with costs to be divided equally between the parties for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

John B. Hellmann

Thomas F. Bryant

Lemon

JUDGES

DATED: September 24, 2007

Willamowski, J.

{¶1} Defendant-appellant Kirk B. Sessler ("Sessler") brings this appeal from the judgment of the Court of Common Pleas of Crawford County finding him guilty of two counts of intimidation.

{¶2} On May 22 and 23, 2006, Sessler and his live-in girlfriend, Linda Chatman ("Chatman") had a dispute. Eventually Sessler left the home and Chatman went to bed. Chatman was awoken at approximately 2:00 a.m. by Sessler demanding an apology for her earlier comments. Sessler also indicated that he had been drinking. After Chatman apologized, Sessler struck Chatman on her face twice. Chatman attempted to reach for the telephone and Sessler jumped on top of her, placed his hands on her throat, and threatened to kill her if she called the police. Sessler then left the room. Chatman then attempted to call for help. Sessler returned to the room, took the telephone from her, and threatened to kill her son or anyone else she called for help. Sessler again left the room, but took the telephone with him. Sessler went through the remainder of the house pulling the remaining telephones from the walls. As Chatman attempted to leave the house, Sessler grabbed her by the hair, pulled her back through the house, slammed her head into the floor, and began kicking her in the back and legs. Sessler then smashed the glass coffee table by throwing a rock through it.

{¶3} Chatman again attempted to get to the door. Sessler grabbed her and a piece of glass from the coffee table. Sessler then held the glass to Chatman's throat, placed a pillow over her face and began suffocating her. While doing these acts, Sessler told Chatman that he was going to kill her. Eventually, Chatman was able to escape to the neighbors' home, who took her to the hospital and then the police station.

{¶4} On June 12, 2006, Sessler was indicted for two counts of intimidation in violation of R.C. 2921.04(B), which are classified as third degree felonies. The State provided Sessler with open discovery, meaning that Sessler had access to the entire prosecution file and the entire police file. Throughout the pretrial proceedings, Sessler filed numerous pro-se motions despite the fact that counsel was provided. These motions included one for a Bill of Particulars, which the State provided on August 31, 2006. On September 21, 2006, a jury trial was held. Sessler was convicted on both counts and ordered to serve five years in prison on each charge, with the terms to be served consecutively. Sessler appeals from this judgment and raises the following assignments of error.

> **The trial court erred in overruling [Sessler's] motion for acquittal, pursuant to Rule 29.**
>
> **The trial court erred in convicting [Sessler] of two general felonies, rather than a specific misdemeanor.**

The trial court erred by allowing trial on indictments that were void, lacking elements, and failed to give [Sessler] proper notice of what allegations would be proven.

The trial court erred by failing to order that a proper bill of particulars be given to [Sessler].

The trial court erred in finding [Sessler] guilty of a felony, when the verdict forms supported only a verdict of a misdemeanor.

The trial court erred in sentencing [Sessler] to maximum consecutive sentences.

{¶5} Sessler's first assignment of error claims that the trial court erred in overruling his motion for acquittal pursuant to Criminal Rule 29. Sessler was charged with two counts of intimidation in violation of R.C. 2921.04(B). To prove a charge of intimidation of a victim in a criminal case, the State must show that the defendant knowingly by force attempted to intimidate a victim of a crime from filing criminal charges. R.C. 2921.04(B). An appellate court's function when reviewing a denial of a motion for acquittal pursuant to Criminal Rule 29 is to determine whether, after viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find all of the essential elements of the offense proven beyond a reasonable doubt. *State v. Shoemaker*, 3rd Dist. No. 14-06-12, 2006-Ohio-5159, ¶59. "Under [Criminal Rule 29(A)], a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt." Id. at ¶61.

{¶6} Here, Chatman testified that after Sessler had hit her several times, she returned to the bed where she had placed the cordless phone. Tr. 74-75. She then testified that Sessler "jumped on top of me on the bed and had me by my throat and told me if I had tried to call the police or anybody he was going to kill me." Id. at 75. She also testified that Sessler kept threatening her that he would kill her if she tried to call the police or anyone else. Id. at 76-80. At the time he was threatening to kill her, he put a shard of broken glass to her throat and threatened to cut her and at another time placed a pillow over her face while threatening to kill her. Id. Finally, Chatman testified that she was afraid that Sessler would kill her if she went for help. Id. at 102-104. Viewing this evidence in a light most favorable to the State, a juror could conclude that the elements of the offense were proven beyond a reasonable doubt. The trial court did not err in denying the motion for acquittal and the first assignment of error is overruled.

{¶7} Sessler's second assignment of error alleges that the trial court erred in convicting him of two general felonies rather than a specific misdemeanor. Sessler argues that the trial court should only have been convicted of either domestic violence, assault, or aggravated menacing for his actions. Sessler claims that the facts of this case could potentially support charges for assault or aggravated menacing, which are more specific charges than intimidation. "Where it is clear that a special provision prevails over a general provision or the Criminal

Code is silent or ambiguous as to which provision prevails, under R.C. 1.51, a prosecutor may charge only on the special provision." *State v. Wickard*, 3rd Dist. No. 5-05-30, 2006-Ohio-6088, ¶10. "However, where it is clear that a general provision applies coextensively with a special provision, R.C. 1.51 allows a prosecutor to charge on both." Id. at ¶12. The restriction set forth in R.C. 1.51 only applies if the offenses are allied offenses of similar import. Id.

{¶8} To be an allied offense of similar import, the elements must align in such a way that the commission of one offense automatically results in the commission of the other. *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699. The elements of intimidation do not line up with those of either assault or aggravated menacing. While an assault or aggravated menacing may occur while intimidation is being committed, it is not necessary. Additionally, one can commit assault or aggravated menacing without committing intimidation. The difference is the use of force or threat of force for the purpose of hindering a victim from reporting a crime. Since the offenses are not allied offenses of similar import, the restriction set forth in R.C. 1.51 does not apply, and the trial court did not err in allowing the convictions for intimidation. The second assignment of error is overruled.

{¶9} Next, Sessler claims that the indictment was inadequate because they merely provided a recitation of the statute. "The statement may be in the

words of the applicable section of the statute, provided the words of that section of the statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged." Crim.R. 7(B).

> **Although a flaw in the indictment could result in the dismissal of the case for lack of jurisdiction, the standard for determining the legal sufficiency of an indictment is relatively simple. In *Childs*, the Supreme Court of Ohio stated that the requirements for a proper indictment can generally be met if the prosecutor follows the language of the statute defining the offense. [*State v. Childs*, 88 Ohio St.3d 194, 2000-Ohio-298, 724 N.E.2d 781]. Based upon this general rule, it has been held that, so long as the indictment refers to all statutory elements of a crime, it will be deemed sufficient even when it does not state the particular facts of that case. *State v. Blackwell*, 6th Dist. No. L-01-1031, 2002-Ohio-6352. For example, the failure to state the specific felony offense upon which a kidnapping charge is based, does not render an indictment insufficient because the defendant can obtain a statement of the specific allegations through a bill of particulars. *State v. Smith*, 8th Dist. No. 83007, 2004-Ohio-3619.**

State ex rel. Smith v. Mackey, 11th Dist. No. 2004-A-0080, 2005-Ohio-825, ¶6.

{¶10} The indictment in this case used the exact language of the statute, quoted the statutory section, and specified that Sessler committed the acts on or about May 23, 2006. Although the indictment did not state the particular facts upon which the indictment is based, the statutory elements were all present. Sessler then was able to obtain the factual basis from the bill of particulars and the State's prosecutorial file. Because the indictment contained all of the statutory

elements, the indictment is sufficient to provide Sessler with the required notice. The third assignment of error is overruled.

{¶11} The fourth assignment of error claims that the trial court erred in not ordering a more specific bill of particulars than was provided by the State.

> **The purpose of a bill of particulars "is to inform a defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial, to prevent surprise, or to plead his acquittal or conviction in bar of another prosecution for the same offense."** * * *
>
> * * *
>
> **While the bill of particulars must enable the defendant to prepare for trial, it is not designed to provide the accused with specifications of evidence or to serve as a substitute for discovery.** * * * **A bill of particulars need not include information that is within the knowledge of the defendant or information that the defendant could discover herself with due diligence.** * * * **Additionally, a bill of particulars need not be precise, but rather "need only be directed toward the conduct of the accused as it is understood by the state to have occurred."** * * *

State v. Miniard, 4th Dist. No. 04CA1, 2004-Ohio-5352, ¶21-23 (citations omitted). In this case, Sessler was told that the charges stemmed from his actions on May 23 where he threatened the life of the victim and "brutally beat the victim." Bill of Particulars. Under its policy of open discovery, the State had previously provided Sessler with copies of the indictment and the entire police report in the State's possession. The State also notified Sessler of his right to completely review any evidence possessed by the Galion Police Department.

Given the facts that Sessler had access to all of the evidence that the State had and was allegedly present for the offense, the bill of particulars did not need to include any additional information. The trial court did not abuse its discretion in denying Sessler's motion for a more detailed bill of particulars and the fourth assignment of error is overruled.

{¶12} The fifth assignment of error alleges that the verdict forms did not support convictions for intimidation. Sessler cites the Ohio Supreme Court's recent opinion in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, as requiring the verdict form to specify the degree of the offense. In *Pelfrey*, the Supreme Court addressed the question "[w]hether the trial court is required as a matter of law to include in the jury verdict form either the degree of the offense of which the defendant is convicted or to state that the aggravating element has been found by the jury when the verdict incorporates the language of the indictment, the evidence overwhelmingly shows the presence of the aggravating element, the jury verdict form incorporates the indictment and the defendant never raised the inadequacy of the jury verdict form at trial." *Id.* at ¶1. The Ohio Supreme Court answered the question in the affirmative and held as follows.

> **The statutory requirement certainly imposes no unreasonable burden on lawyers or trial judges. R.C. 2945.75(A) plainly requires that in order to find a defendant guilty of "an offense * * * of more serious degree," the guilty verdict must either state**

> **"the degree of the offense of which the offender is found guilty" or state that "additional element or elements are present." R.C. 2945.75(A)(2) also provides, in the very next sentence, what must occur if this requirement is not met: "Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged." When the General Assembly has written a clear and complete statute, this court will not use additional tools to produce an alternative meaning.**

Id. at ¶12. "The express requirements of the statue cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form, or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form." Id. at ¶14. The Supreme Court held that if the verdict form does not state the degree of the offense or the additional elements necessary to reach the higher degree, then the defendant must be presumed to have been convicted on the least degree of the offense charged. Id.

{¶13} The verdict forms in this case specify that the jury is finding Sessler either guilty or not guilty of intimidation "in manner and form as he stands charged in the indictment." Form. The forms did not specify the degree of the offense charged or set forth any aggravating factors. The only difference between divisions A and B of R.C. 2921.04 as it applies to this case is the question whether the defendant "knowingly and by force or by unlawful threat of harm to any person or property" attempted to intimidate the victim. If there is no force or

threat of harm, the defendant may be found guilty under R.C. 2921.04(A), which is a first degree misdemeanor. R.C. 2921.04(D). If there is force or the threat of harm, the defendant may be found guilty of a third degree felony. R.C. 2929.04(D). This court notes that Sessler was properly charged, the jury instructions specified the correct offense and degree, and the verdict form incorporated by reference the indictment. However, the verdict form does not specify the degree of the offense or even statutory section upon which the offense is based and does not contain any reference to the use of force or threat of harm. The form, therefore, does not permit a determination as to which degree of offense Sessler is guilty of committing. Being obligated to follow the rulings of the Ohio Supreme Court, we must, pursuant to R.C. 2945.75(A)(2) and the holding of the Ohio Supreme Court in *Pelfrey*[1], hold that as to each count of intimidation, the jury found Sessler guilty of the least offense, which is intimidation under R.C. 2921.04(A), a first degree misdemeanor. The fifth assignment of error is sustained.

{¶14} Finally, Sessler claims that the trial court erred in sentencing him to maximum, consecutive sentences. Having found an error with the verdict forms and determined that Sessler can only be sentenced for misdemeanors rather than

[1] While we note that the trial in this case occurred prior to the decision in *Pelfrey*, we must nonetheless apply the holding of *Pelfrey* to this appeal.

felonies. Sessler must be resentenced. Thus, this assignment of error is moot and need not be addressed.

{¶15} The judgment of the Court of Common Pleas of Crawford County is affirmed in part and reversed in part. The matter is remanded for further proceedings in accordance with this opinion.

Judgment affirmed in part, reversed in part and cause remanded.

ROGERS, P.J., and PRESTON, J., concur.
r

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process
HN9 It is a cornerstone of American jurisprudence that a criminal defendant is entitled to be informed of the nature and cause of the accusation against him. Sixth Amendment to the United States Constitution; Ohio Const. art. I, § 10. Although the United States Supreme Court has yet to hold that a criminal defendant's right to indictment by grand jury relative to the Sixth Amendment to the United States Constitution is binding upon the states, the Ohio Constitution recognizes this right in Article I. The rationale is that a criminal defendant cannot prepare a defense unless he or she knows precisely of the crime charged. Without that knowledge, the defendant cannot know what elements the State is required to prove, and consequently, how to negate the elements of the offense. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
HN10 Due process of law, as guaranteed by the United States and Ohio Constitutions, requires some legal procedure in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
HN11 While the constitutional phrase "due process" eludes exact definition, it would seem to require in a criminal case, where the liberty of a defendant is at stake, accuracy, clearness, and certainty in the charge of the court to the jury. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > General Overview
Constitutional Law > Substantive Due Process > General Overview
Criminal Law & Procedure > Accusatory Instruments > Indictments
HN12 Though, oftentimes, courts neglect to distinguish between the different types of due process, there are two--substantive and procedural due process. Procedural due process requires that individuals be given a meaningful opportunity to be heard before their fundamental rights are encroached. Substantive due process protects an individual's fundamental rights, regardless of the sufficiency of the process afforded. Fundamental rights are those that are enumerated in the Bill of Rights, or those identified as fundamental rights by the United States Supreme Court. Criminal trials are themselves, processes; thus, procedural due process protects how those trials are conducted. In Ohio, a criminal defendant's right to indictment is specifically enumerated in the constitution, which makes the right fundamental. Thus, criminal defendants are also entitled to substantive due process under Ohio law. It is also axiomatic that what the constitution grants, no statute may take away. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > General Overview
HN13 A criminal defendant is denied due process when he is convicted of a crime without the State having proved each element of the crime beyond a reasonable doubt. Similarly, a defendant is denied due process when convicted of a crime other than the crime charged (unless it is a lesser included offense). More Like This Headnote

Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Ex Post Facto Clause > General Overview
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Governments > Legislation > Interpretation
HN14 In a criminal law context, due process is essentially the proposition that a statute must give fair warning of the conduct that it makes a crime. The constitutional requirement of definiteness is violated when a criminal statute fails to give fair notice that the conduct is forbidden, and no one should be held criminally responsible for conduct he or she could not reasonably understand to have been prohibited. This so-called fair warning requirement has even deeper roots, however, in the Ex Post Facto Clause of the United States Constitution. Section 10, Article 1, United States Constitution. Read literally, ex post facto means "after the fact." These laws, of course, are prohibited. The essence of an ex post facto law is retroactivity: No statute may punish conduct that was not criminal at the time it was committed. Thus, the prohibition applies to conduct occurring before the statutory enactment that disadvantages the offender by, either: (1) altering the definition or elements of a crime; (2) increasing the punishment for its commission; or (3) depriving the defendant of any defense that was available when the act was committed. Related to the fair warning requirements are the vagueness doctrine, and the rule of lenity. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
HN15 The vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. More Like This Headnote

Governments > Legislation > Interpretation
HN16 The rule of lenity--also known as the canon of strict construction of criminal statutes--is similar to the vagueness doctrine to the extent that the rule ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. The touchstone of whether there was fair warning is whether the statute, either standing alone or as construed, made it reasonably clear that the defendant's conduct was

criminal. The rule of lenity is most commonly invoked when a statute is ambiguous (as opposed to merely vague). Because the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal, when applying the rule to an ambiguous statute, any ambiguity should be resolved in favor of the criminal defendant, rather than the government. More Like This Headnote

Criminal Law & Procedure > Accusatory Instruments > Indictments
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Criminal Law & Procedure > Trials > Motions for Acquittal
HN17 It is the State's burden to prove each element of each count of an indictment beyond a reasonable doubt. If the State cannot meet its burden as to any element, of any count, that count must be dismissed. More Like This Headnote

COUNSEL: Ron O'Brien , Prosecuting Attorney, and Jennifer L. Maloon, for appellee.

Todd W. Barstow , for appellant.

JUDGES: TYACK, J. BROWN, J., concurs. FRENCH, J., concurs in judgment only.

OPINION BY: TYACK

OPINION

(REGULAR CALENDAR)

TYACK, J.

[*P1] Defendant-appellant, John Kepiro ("appellant"), appeals his sentence and conviction on 25 counts of Gross Sexual Imposition ("GSI"). In 1987, appellant immigrated to the United States from Hungary. Shortly thereafter, he married Anna Payer, also a Hungarian immigrant, who had four children from a previous marriage. The children were still living in Hungary with their biological father. The children's father passed away and, in 1994, appellant rescued two of the children, twins, J.S. and A.S. from foster care. About six months later, their mother died from lung cancer. A.S. alleges that around that time, appellant began sexually molesting her.

[*P2] A.S. claims that the molestation persisted regularly until 1998, although she did not tell anyone about it until 2003. The grand jury indicted appellant on 25 counts [**2] of GSI, all third-degree felonies. The only evidence against appellant was A.S.'s accusations. The jury convicted him on all counts, and the court sentenced him to an aggregate 12 years' incarceration. Appellant now appeals his conviction, arguing that there was insufficient evidence to convict. He also appeals his sentence on grounds that the trial court violated his due process rights by sentencing him under a statute that was not yet in effect when the

majority of the alleged incidents occurred.

[*P3] Ohio law sets the bar very high before an appellate court may reverse a jury verdict because of the weight of the evidence. Within those parameters, we cannot say that the jury got it wrong. Therefore, we affirm appellant's conviction. We do find error, however, in the trial court's sentencing and, accordingly, we vacate the sentence and remand for re-sentencing.

[*P4] Appellant has assigned four errors for our consideration:
I. THE VERDICT FORMS WERE INDADEQUATE [sic] TO SUPPORT APPELLANT'S CONVICTIONS FOR GROSS SEXUAL IMPOSITION AS A THIRD DEGREE FELONY, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

II. THE TRIAL COURT ABUSED ITS DISCRETION [**3] BY IMPOSING AN IMPERMISSIBLE SENTENCE FOR ACTS COMMITTED PRIOR TO JULY 1, 1996, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT A PRISON TERM WAS MANDATORY FOR ACTS COMMITTED AFTER JULY 1, 1996, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

IV. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF GROSS SEXUAL IMPOSITION AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

[*P5] The fourth assignment of error attacks both the sufficiency and weight of the evidence supporting appellant's conviction. Standing alone, either argument is dispositive, therefore, we address the fourth assignment of error first.

[*P6] HN1Sufficiency of the evidence is the legal standard applied to determine whether the evidence is legally sufficient, as a matter of law, to support the jury's verdict. State v. Smith (1997), 80 Ohio St.3d 89, 1997 Ohio 355, 684 N.E.2d 668. [**4] The weight of the evidence, also called "manifest weight," refers to the inclination of the greater amount of credible evidence offered at trial, and whether that greater weight of that evidence tends to support one side of the issue rather than the other. Id. In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime proven beyond a reasonable doubt. Id. (quoting State v. Jenks [1991], 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following Jackson v. Virginia [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560).

[*P7] In considering whether appellant's convictions were supported by sufficient

the trial court. As we have said, the only evidence of appellant's guilt was the alleged victim's testimony. There was no physical evidence of sexual abuse, and the prosecution presented no other witnesses, psychological or otherwise, to corroborate A.S.'s allegations.

[*P8] A.S. testified that the first instance of sexual molestation occurred about a week or two before her mother died on April 20, 1995. (Tr. 49, 55.) She claims that, on that occasion, [**5] she was lying on a futon with her brother and appellant, and that appellant placed her hand "on his private and started to move it up and down and said your daddy has to have a little bit of fun since he brought you out here." (Tr. 54, 60.) (Emphasis added.) A.S. testified that this was the only time she touched appellant's penis, but that on subsequent occasions he touched her genitals. (Tr. 59, 60.) She described the second incident as having occurred several months later, while watching a Disney movie with appellant and her brother. She testified that the three of them were in her bedroom, and that while lying on her bed, appellant fondled her vaginal area from under her clothes. A.S. said she was nine years old at that time. She estimated that during calendar year 1995, appellant touched her vagina six times. (Tr. 64-65.)

[*P9] In late 1995, Franklin County Children Services ("FCCS") came to appellant's home to investigate a report that appellant had been leaving the kids at home unattended for extended periods of time. (Tr. 69.) The complaint is believed to have been related by a neighbor, one of A.S.'s half-siblings. Id. FCCS talked with both of the children, and also with appellant, [**6] and despite the fact that the complaint made no mention of sexual abuse, the caseworker inquired about it (probably as a matter of formality). The investigation did not reveal evidence of any sexual abuse and, in fact, A.S. specifically denied that appellant had touched her inappropriately. (Tr. 70-71.) The defense offered a copy of the FCCS intake referral form into evidence, which contained A.S.'s statement denying that anyone "ever touched her private places."

[*P10] In spite of flatly denying any sexual abuse in late 1995, in August 2006, A.S. testified that appellant continued to molest her in the same manner, and with the same frequency. (Tr. 72-74.) She added that sometime in 1997, appellant began French kissing her, and as she started puberty, he also began touching her breasts. (Tr. 76.) [PROSECUTOR:] During the time period of 1997 looking at that 365-day-time period, January 1<st> through December 31<st>, how many times to your memory did [Mr. Kepiro] place his hand on the skin of your vagina?

[A.S.:] Probably once or twice a month.

Q. I'm sorry?

A. Once or twice a month.

Q. So would it have been at least six times?

A. Yes.

Q. And possibly quite a bit more than that?

A. Yes.
(Tr. 77.)

[*P11] On [**7] September 30, 1997, A.S. turned 12-years old. By that time, she and J.S. attended public school, went to church regularly, and had numerous friends and social acquaintances. Despite what appears to have been a wide social circle, no one close to appellant suspected what A.S. later alleged.

[*P12] A.S. testified that the fondling continued until roughly August 1998, around the time when appellant remarried. (Tr. 84.) A.S. estimated five fondling incidents between January 1, 1998 and July or August of that same year. A.S. described the last incident as having occurred when she was watching television, while reclining on a futon in the living room. She said that appellant came into the living room, laid down on top of her, and "started grinding * * * moving up and down." (Tr. 85.) She said that she looked him in the eye, then turned her head and said nothing, and after that, "he got off of me and never touched me again." Id.

[*P13] Later in 1998, FCCS came back to appellant's house to investigate another complaint, similar to the previous one. (Tr. 83, 84.) Again, no sexual abuse was reported. A.S. testified that she decided not to alert the caseworker to molestations because she thought that the incidents [**8] had stopped. In contrast, she also stated that the reason she never told anyone was because she was scared, and did not know whom she could tell. (Tr. 57.) On cross-examination, appellant's attorney probed A.S. regarding her continued failure, or neglect, to report the abuse. She contended that she declined to report the incidents because she was afraid of being placed in foster care.

[*P14] In early 2002, A.S. ran away from home following an incident when appellant disciplined her by slapping her. This time, she immediately reported the incident to the police. FCCS again got involved. The joint investigation resulted in FCCS issuing a "safety plan" to appellant, which prohibited him from physically disciplining the children. The defense offered a copy of the safety plan into evidence at trial.

[*P15] The scope of A.S.'s cross-examination also touched on a variety of issues not directly related to her accusations against appellant, including the slapping incident and her running away from home. She admitted that the reason appellant had slapped her was because he caught her kissing an older man in a public place, and that appellant disapproved of her relationship with the man because of his age. [**9] This man, Peter

Soos, was about ten years older than A.S. Also on cross-examination, A.S. revealed that one of her uncles (on her mother's side) was jailed for molesting a girl.

[*P16] The prosecution rested its case after the close of A.S.'s testimony. Appellant's attorney moved for judgment of acquittal, arguing that the victim's testimony, standing alone, was insufficient to prove appellant's guilt. (Tr. 196-199.) Although the trial court denied the motion, the court acknowledged the weakness of the case: "It's certainly not the strongest of cases and I think both lawyers would concur with that. But it is a question of fact for the jury." (Tr. 198.)

[*P17] After the trial court denied the defense's motion to acquit, they presented two witnesses to rebut A.S.'s testimony: Margie Jarrell--the woman whom appellant married in 1998, but had since divorced--and appellant himself. Ms. Jarrell denied having any knowledge of the alleged fondling, and further testified that she believed A.S. was a liar and a thief. When cross-examined by the prosecution, however, Ms. Jarrell admitted that she did not know A.S. during the bulk of the time the alleged abuse took place. Ms. Jarrell also had difficulty answering [**10] a question relating to an allegation that appellant intended to charge his children to help them get their citizenship. (Tr. 219.)

[*P18] Appellant testified with the assistance of a courtroom interpreter, and wasted no time in flatly denying the allegations against him:
Q. I'll just ask you: You have seen [A.S.] testify?

A. Yes.

Q. You've heard her testify?

A. What do you mean? (Interpreter and defendant conferring.) Oh, yes.

Q. She has said that you had taken her hand and put it on your penis.

A. No, sir.

Q. Do you know what your penis is?

A. Yes.

Q. Did you ever take [A.S.'s] hand and put it on your penis?

A. No, sir.

Q. She has said that she watched movies with you and [J.S.] and that you would put your hand down her pants or on her pants --

A. No, sir.

Q. -- and touch her vagina.

A. No, sir.

Q. Do you know what a vagina is?

A. Yes.

Q. Did you ever, ever, ever touch [A.S.] in her private areas of body?

A. Never I --

Q. I'm sorry?

A. Never touch it.

(Interpreter and defendant conferring.)

INTERPRETER: Never in my life.

Q. Did you ever touch her breasts?

A. Never.

Q. Did you ever touch her down below the waist.

A. Never.

Q. Do you know why she is saying you did?

A. Well, I'll tell you something, money. Money and.

*** [**11] * ***

THE INTERPRETER: Because of money and revenge.

Q. Revenge for what?

A. Well, she's -- I buy for her car. I open for her an account because she's coming back to -- after school she's coming home and she's said everybody have a car, everybody have account and how parents, how you feel. Why not. I don't care. You know, this all money. Never make it money. I do for her because she is happy. She is happy. She is never tell her and never tell her -- never tell her do this different. [J.S.] and [A.S.], I buy one, I buy the both. And go to bank and open for an account. And after buy for her car, buy for her. I tell her, I will give you car, but I don't have any money pay for, you know, insurance. And she

said okay. I go to McDonald's. I working in the paper to get insurance. I say okay. And that's why I buy this car. Go ahead. Everybody do this.

But I open a bank account for her. She's not 16 years old. So she doesn't have a -- a bank not give her an account. I put it under my name. I tell her don't touch. Maybe -- I can tell her maybe just a bit. Every money, I paid the insurance. I paid everything, you know, it's parents after, you know --
(Tr. 231-234.)

[*P19] Although he stumbled frequently during [12] direct and cross-examination, appellant's denial was unequivocal. His testimony, moreover, was consistent with that of Ms. Jarrell--that A.S. fabricated the allegations because of anger and frustration over her inability to get U.S. citizenship.**

[*P20] In early October 2003, just before A.S. reported the molestation to the police, Ms. Jarrell testified that A.S. came to her house for a surprise visit. This was within a few days of A.S.'s 18<th> birthday. Ms. Jarrell had not seen A.S. in almost two years--since she had run away from home. She testified that A.S. demanded that she persuade appellant to help A.S. finalize her U.S. citizenship, and that if he did not, A.S. threatened to go to the police and report the molestation. A.S. said she could get $ 50,000 from the Ohio Victims of Crime Compensation Program if appellant was convicted. Although she admitted going to Ms. Jarrell's house, A.S. denied making any demands or threats. Coincidentally, perhaps, A.S. reported the abuse to the police at about the same time as the visit.

[*P21] At the end of the day, either appellant's broken-English testimony lacked credibility, or A.S. simply appeared more credible, because the jury convicted appellant [13] on all 25 counts. To the legal test of the sufficiency of the evidence supporting appellant's conviction, we must view all the evidence in a light most favorable to the prosecution. Unlike the jury, we did not have the luxury of watching A.S. testify. Because the jury believed A.S.'s testimony, we presume that her testimony was credible. Based on that assumption, we consider whether the evidence is sufficient to support each element of the crimes charged. We hold that it is.**

[*P22] We have already said, HN2at least insofar as rape is at issue, there is no statutory requirement that a victim's testimony be corroborated. State v. Jackson (Feb. 20, 2001), Franklin App. No. 00AP-183, 2001 Ohio App. LEXIS 589 (citing State v. Love [1988], 49 Ohio App.3d 88, 91, 550 N.E.2d 951). Although the issue has not been squarely addressed by the Supreme Court of Ohio, this is the established view among the appellate districts who have decided it. See, e.g., State v. Heilman, Trumbull App. No. 2004-T-0133, 2006 Ohio 1680, at P46; State v. Adams, Lorain App. No. 05CA008685, 2005 Ohio 4360, at P13; State v. Wright, Columbia App. No. 97 CO 35, 2002 Ohio 1548, at P23; State v. Corrothers (Feb. 12, 1998), Cuyahoga App. No. 72064, 1998 Ohio App. LEXIS 491; Love, supra; State v. Shafeek (Dec. 14, 1994), Montgomery App. No. 13666, 1994 Ohio App. LEXIS 5610; [14] State v. Rickard (Sept. 25, 1992), Mercer App. No. 10-91-5, 1992 Ohio App. LEXIS 4908 (each citing State v. Gingell [1982], 7 Ohio App.3d 364, 365, 7 Ohio B. 464, 455 N.E.2d**

1066). Although corroborating testimony, or evidence, gives greater weight to a victim's testimony, it is not a requirement. Shafeek, ibid. The only real difference between the crimes of rape and GSI is that the former requires actual penetration, where the latter does not. See R.C. 2907.01 et seq.; cf. R.C. 2907.05(A). Thus, under the current law, if the victim's testimony in a rape trial does not require corroboration, there is no legitimate reason to require corroboration in a trial for GSI.

[*P23] Although A.S.'s testimony shows obvious weaknesses, sufficiency of the evidence does not take those circumstances into account. All that matters is whether a reasonable jury could have believed A.S.'s testimony. Accordingly, to the extent the fourth assignment of error alleges the evidence was insufficient to support the jury's verdict, we must overrule.

[*P24] HN3When considering the weight of evidence, the test is considerably different. In that regard, we sit as a "thirteenth juror," we weigh the quality of the evidence, and the credibility of [**15] the witnesses. See, e.g., State v. Robinson (Jan. 22, 2002), Franklin App. No. 01AP-748, 2002 Ohio App. LEXIS 169 (quoting Tibbs v. Florida [1982], 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L. Ed. 2d 652; State v. Martin [1983], 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717). All things considered, we determine whether the jury "clearly lost its way," in a manner that created such a "manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id. This discretionary power should only be exercised in the extraordinary case where the evidence weighs heavily against the conviction. Indeed, the Ohio Constitution prevents us from overturning the jury's verdict without a unanimous vote by this panel. See Section 3(B)(3), Article IV, Ohio Constitution. (HN4"No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.") With this standard in mind, we turn to the evidence in this case.

[*P25] The sole issue here is the victim's credibility, because, again, the victim's testimony was the only evidence weighing in favor of conviction. Clearly, A.S. exhibited some credibility issues, based on her testimony, the alleged facts at-large, and the circumstances [**16] and timing of her accusation.

[*P26] As the trial judge acknowledged, this case is not very strong. At first glance, we take notice that the defense presented two witnesses, while the prosecution presented only one. Although Ms. Jarrell testified that she had no knowledge of the alleged molestation, A.S. made her allegations as to a time frame that effectively eliminates Ms. Jarrell's testimony from weighing against her own. Further, defense counsel was afforded wide latitude during A.S.'s cross-examination. (Tr. 134-136.) HN5Even though a victim's character is usually inadmissible in sex offense cases, a witness's reputation for truthfulness is always fair game. See, generally, State v. Williams (1986), 21 Ohio St.3d 33, 34, 21 Ohio B. 320, 487 N.E.2d 560 (quoting R.C. 2907.02[D]); see, also, Evid.R. 608; but, see, Evid.R. 404(A)(2). Counsel for appellant delved into A.S.'s tumultuous past, exposed various inconsistencies in her stories, and attacked her reputation for dishonesty. (Tr. 136, 140, 173, 180.) Had counsel been denied that opportunity, there may have been prejudicial

error (see, e.g., State v. Swann, 171 Ohio App.3d 304, 2007 Ohio 2010, at P12, 870 N.E.2d 754, citing Holmes v. South Carolina [2006], 547 U.S. 319, 126 S.Ct. 1727, 164 L. Ed. 2d 503). [**17] But this did not happen.

[*P27] On the other hand, appellant vehemently denied having any inappropriate or sexual contact with A.S. (Tr. 231-234.) He blamed the accusations on A.S.'s greed and desire to get revenge, citing her threats to Ms. Jarrell. (Tr. 233.) He also admitted slapping A.S., when he found her kissing Peter Soos in a public place. Shortly after this event was when A.S. ran away from home with Mr. Soos.

[*P28] Ultimately, the jury believed A.S. And even though we sit as the proverbial thirteenth juror, there is not enough conflicting testimony or evidence that would warrant a reversal on manifest weight review. This simply means that the record lacks substantive evidence to weigh against it. Applying the legal standards for assessing the sufficiency and weight of the evidence set forth by the Supreme Court of Ohio, we cannot say that the verdicts were against either. Accordingly, the fourth assignment of error is overruled.

[*P29] Turning to the first assignment of error, counsel for appellant argues that, because the statute under which Kepiro was convicted can be either a third or fourth degree felony, under State v. Pelfrey, 112 Ohio St.3d 422, 2007 Ohio 256, 860 N.E.2d 735, he cannot be guilty of the [**18] more severe crime unless the jury made a specific finding to that effect. We hold that Pelfrey does not control, because the statute at issue in Pelfrey was mechanically different from the statute at issue here.

[*P30] The state responds to appellant's argument by noting that HN6R.C. 2907.05(A) is not a basic statute with enhancements like the one in Pelfrey. (Appellee's brief, at 7.) The GSI statute, rather, has multiple parts, each paragraph setting forth a separate crime, and each having a different penalty. See R.C. 2907.05(A). The state is correct.

[*P31] The defendant in Pelfrey was convicted of tampering with records, under R.C. 2913.42(B)(4), a felony of the third degree. Id. at P3. Tampering with records is a first-degree misdemeanor; however, there are a number of elements that can enhance the crime to a felony of the fifth, fourth, or third degree. A conviction on the most severe level of the statute can only occur if the records at issue belonged to the government. See R.C. 2913.42(B)(4). Obviously, under the statute, whether the records belonged to the government is an essential element of the crime which must be proven to the jury beyond a reasonable doubt. See, generally, In re Winship (1970), 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L. Ed. 2d 368 [**19] (holding that the prosecution must prove each element of the crime charged beyond a reasonable doubt).

[*P32] But the jury convicted Pelfrey of tampering with records, "as charged in the indictment." Pelfrey, at P17 (O'Donnell, J., dissenting). That is, they did not expressly find that the records belonged to a governmental entity, nor did they specify that they were convicting him of a third-degree felony. On appeal to the Supreme Court of Ohio, Pelfrey argued that under R.C. 2945.75 he could only be guilty of the least severe crime unless the

jury's verdict form stated otherwise. Justice O'Donnell rejected that argument, noting that the indictment properly put the defendant on notice that he was being tried for the third-degree felony, and that convicting him "as charged in the indictment" was the same thing as convicting him of the third-degree felony. See id. The majority, however, strictly applied R.C. 2945.75, holding that it requires that the guilty verdict state either: (1) the degree of the offense; or (2) that the additional element making it more serious is present. Pelfrey, at P4 (majority opinion). The court remanded the case with instructions to enter a conviction under the [**20] misdemeanor, interpreting R.C. 2945.75(A)(2) to mean that an unspecified guilty verdict can only constitute a finding of guilty as to the least degree of the offense charged. See id.

[*P33] The reason Pelfrey does not control here is that the tampering with records statute only prohibits a single type of conduct. Depending on the attendant circumstances, that conduct can be punished in varying ways. This is similar, for example, to the theft statute, which, more or less prohibits "stealing." See R.C. 2913.02. Obviously, the punishment for stealing $ 13,000,000 in rare coins will be more severe than the punishment for stealing a candy bar from 7-Eleven.

[*P34] The statute appellant was convicted under, HN7R.C. 2907.05(A), essentially prohibits five different kinds of conduct--sexual conduct with another: (1) by force; (2) by deception (using drugs, alcohol, or other intoxicants); (3) knowing the other person's judgment is impaired; (4) when the victim is less than 13-years old; or (5) whose judgment is impaired because of a mental defect. Each of these is a separate offense, having a separate penalty. Under R.C. 2907.05(A), there are no additional elements or attendant circumstances that change the [**21] penalty. Therefore, unlike in Pelfrey, R.C. 2945.75 does not literally apply here. The jury convicted appellant of having sexual contact with another who was less than 13-years old. See R.C. 2907.05(A)(4). The statute defines this conduct as a third-degree felony. We, therefore, overrule the first assignment of error.

[*P35] Turning to the third assignment of error, the state concedes that the trial court erred by finding that the prison term was mandatory for acts committed after July 1, 1996. We, therefore, sustain this assignment of error.

[*P36] The state also concedes that the trial court erred as to Counts 1 through 7 of the indictment. We, therefore, sustain the second assignment of error as to those counts.

[*P37] With regard to Counts 8 through 13 of the indictment, the state argues that because the prohibited conduct could have occurred after the General Assembly's enactment of S.B. No. 2, on July 1, 1996, appellant's conviction under these counts is proper. (Appellee's brief, at 11.) We disagree.

[*P38] At issue here is which version of R.C. 2907.05 applies when the prosecution cannot prove when the alleged crime(s) occurred. In 1995, the General Assembly overhauled the Ohio Criminal Code by passing [**22] the Omnibus Criminal Sentencing Act. See Publisher's Note to R.C. 2901.01 (1996). HN8These statutory revisions took effect July 1,

as fundamental rights by the United States Supreme Court. See ibid; see, also, Washington v. Glucksberg (1997), 521 U.S. 702, 721, 117 S.Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772.

[*P43] Criminal trials [**25] are themselves, processes; thus, procedural due process protects how those trials are conducted. In Ohio, a criminal defendant's right to indictment is specifically enumerated in the constitution, which makes the right fundamental. Thus, criminal defendants are also entitled to substantive due process under Ohio law. It is also axiomatic that what the constitution grants, no statute may take away. Grieb v. Dept. of Liquor Control (1950), 153 Ohio St. 77, 81, 90 N.E.2d 691.

[*P44] HN13A criminal defendant is denied due process when he is convicted of a crime without the state having proved each element of the crime beyond a reasonable doubt. See, e.g., Winship, supra, at 361. Similarly, a defendant is denied due process when convicted of a crime other than the crime charged (unless it is a lesser included offense). See, e.g., Cokeley v. Lockhart (C.A.8, 1991), 951 F.2d 916, certiorari denied, 506 U.S. 904, 113 S.Ct. 296, 121 L. Ed. 2d 220. In Cokeley, the Eighth Circuit held that the defendant was denied due process when he was charged with rape by sexual intercourse, but the trial judge instructed the jury to return a guilty verdict if it found the state established that the defendant had forced the victim to engage either in [**26] sexual intercourse, or deviate sexual activity--under Arkansas law, rape by sexual intercourse and rape by deviate sexual activity were two separate crimes, and the court's instruction permitted conviction for the uncharged crime of rape by deviate sexual activity. Before coming to the Eighth Circuit on collateral review, on direct appeal the defendant argued that the trial judge should not have instructed the jury on rape by deviate activity, because the State had charged him only with rape by sexual intercourse. Thus, the resulting general verdict constituted a conviction for a crime not charged. The Arkansas Supreme Court rejected that analysis, and upheld Cokeley's conviction. See Cokeley v. State (1986), 288 Ark. 349, 350-352, 705 S.W.2d 425, certiorari denied, 479 U.S. 856, 107 S.Ct. 195, 93 L. Ed. 2d 127. The Arkansas Supreme Court specifically held that the rape statute constituted a single criminal offense with two means of commission, and concluded that the jury instructions properly comported with the language of the statute. See id; see, also, Cokeley, at 917-918.

[*P45] HN14In a criminal law context, due process is essentially the proposition that a statute must give fair warning of the conduct that it makes a crime. [**27] Bouie v. City of Columbia (1964), 378 U.S. 347, 350-351, 84 S.Ct. 1697, 12 L. Ed. 2d 894 (quoting United States v. Harriss [1954], 347 U.S. 612, 617, 74 S.Ct. 808, 98 L. Ed. 989). The constitutional requirement of definiteness is violated when a criminal statute fails to give fair notice that the conduct is forbidden, and no one should be held criminally responsible for conduct he or she could not reasonably understand to have been prohibited. Harriss, ibid.

[*P46] This so-called fair warning requirement has even deeper roots, however, in the Ex Post Facto Clause of the United States Constitution. Section 10, Article 1, United States Constitution. Read literally, ex post facto means "after the fact." Black's Law Dictionary (8 Ed.2004) 620. These laws, of course, are prohibited. The essence of an ex post facto law is retroactivity: No statute may punish conduct that was not criminal at the time it was

committed. Thus, the prohibition applies to conduct occurring before the statutory enactment that disadvantages the offender by, either: (1) altering the definition or elements of a crime; (2) increasing the punishment for its commission; or (3) depriving the defendant of any defense that was available when the act was committed. [**28] See Lynce v. Mathis (1997), 519 U.S. 433, 440-441, 117 S.Ct. 891, 137 L. Ed. 2d 63; see, also, Collins v. Youngblood (1990), 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L. Ed. 2d 30.

[*P47] Related to the fair warning requirements are the vagueness doctrine, and the rule of lenity. United States v. Laton (C.A.6, 2003), 352 F.3d 286, 313-314 (Sutton, C.J., dissenting). Though the precise issue in Laton is inapposite to the issue here, the dissenting opinion provides a good backdrop of the relevant doctrines. HN15The vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Id. (quoting United States v. Lanier [1997], 520 U.S. 259, 266-267, 117 S.Ct. 1219, 137 L. Ed. 2d 432). HN16The rule of lenity--also known as the canon of strict construction of criminal statutes--is similar to the vagueness doctrine to the extent that the rule "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." Liparota v. United States (1985), 471 U.S. 419, 427, 105 S.Ct. 2084, 85 L. Ed. 2d 434; United States v. Bass (1971), 404 U.S. 336, 347-348, 92 S.Ct. 515, 30 L. Ed. 2d 488. Lanzetta v. State of New Jersey (1939), 306 U.S. 451, 453, 59 S.Ct. 618, 83 L. Ed. 888. [**29] The touchstone of whether there was fair warning is whether the statute, either standing alone or as construed, made it reasonably clear that the defendant's conduct was criminal. Swann, at P33.

[*P48] The rule of lenity is most commonly invoked when a statute is ambiguous (as opposed to merely vague). Id. Because "the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal," when applying the rule to an ambiguous statute, any ambiguity should be resolved in favor of the criminal defendant, rather than the government. Laton, at 314.

[*P49] All this discussion of due process and the rule of lenity is relevant because appellant is arguing that the prosecution failed to prove that he committed the alleged acts after the statute at issue was amended on July 1, 1996. We agree. Furthermore, because the old and amended versions of R.C. 2907.05 are in conflict regarding the presumption of a mandatory prison term, we must apply the rule of lenity. Additionally, the fact that the revised statute provides a harsher punishment than its predecessor, sentencing appellant under the revised statute--without proof the conduct occurred after July 1, 1996--operates [**30] as an ex post facto law. The state's argument that the conduct could have occurred after July 1, 1996 is fundamentally flawed. HN17It is the state's burden to prove each element of each count of the indictment beyond a reasonable doubt. If the state cannot meet its burden as to any element, of any count, that count must be dismissed. Here, the state did not prove that appellant molested A.S. after July 1, 1996. Therefore, a mandatory prison term was inappropriate and, accordingly, we sustain the second assignment of error in its entirety.

[*P50] In sum, we overruled the first and fourth assignments of error. The conviction is therefore affirmed. We sustained the second and third assignments of error. Having found reversible error relating to sentencing, the judgment of the Franklin County Court of Common Pleas is hereby reversed, and the sentence is vacated. The case is remanded to the trial court for a new sentencing hearing consistent with the preceding instructions.

Judgment affirmed in part, reversed in part, and cause remanded for further appropriate proceedings.

BROWN, J., concurs.

FRENCH, J., concurs in judgment only.

§ 2905.01. Kidnapping

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, 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:

(1) To hold for ransom, or as a shield or hostage;

(2) To facilitate the commission of any felony or flight thereafter;

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

(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will;

(5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority.

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

(1) Remove another from the place where the other person is found;

(2) Restrain another of the other person's liberty;

(3) Hold another in a condition of involuntary servitude.

(C) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division, kidnapping is a felony of the first degree. Except as otherwise provided in this division, if the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree. If the victim of the offense is less than thirteen years of age and if the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, kidnapping is a felony of the first degree, and, notwithstanding the definite sentence provided for a felony of the first degree in section 2929.14 of the Revised Code, the offender shall be sentenced pursuant to section 2971.03 of the Revised Code as follows:

(1) Except as otherwise provided in division (C)(2) of this section, the offender shall be sentenced pursuant to that section to an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.

(2) If the offender releases the victim in a safe place unharmed, the offender shall be sentenced pursuant to that section to an indefinite term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(D) As used in this section, "sexual motivation specification" has the same meaning as in section 2971.01 of the Revised Code.

History:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 146 v S 2. Eff 7-1-96; 152 v S 10, § 1, eff. 1-1-08.

§ 2907.05. Gross sexual imposition

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person or of one of the other persons by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(3) The offender knows that the judgment or control of the other person or of one of the other persons is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person's consent for the purpose of any kind of medical or dental examination, treatment, or surgery.

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

(5) The ability of the other person to resist or consent or the ability of one of the other persons to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.

(B) No person shall knowingly touch the genitalia of another, when the touching is not through clothing, the other person is less than twelve years of age, whether or not the offender knows the age of that person, and the touching is done with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(C) Whoever violates this section is guilty of gross sexual imposition.

(1) Except as otherwise provided in this section, gross sexual imposition committed in violation of division (A)(1), (2), (3), or (5) of this section is a felony of the fourth degree. If the offender under division (A)(2) of this section substantially impairs the judgment or control of the other person or one of the other persons by administering any controlled substance described in section 3719.41 of the Revised Code to the person surreptitiously or by force, threat of force, or deception, gross sexual imposition committed in violation of division (A)(2) of this section is a felony of the third degree.

(2) Gross sexual imposition committed in violation of division (A)(4) or (B) of this section is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposition committed in violation of division (A)(4) or (B) of this section there is a presumption that a prison term shall be imposed for the offense. The court shall impose on an offender convicted of gross sexual imposition in violation of division (A)(4) or (B) of this section a mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree if either of the following applies:

(a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation;

(b) The offender previously was convicted of or pleaded guilty to a violation of this section, rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.

(D) A victim need not prove physical resistance to the offender in prosecutions under this section.

(E) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(F) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(G) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.
History:

134 v H 511 (Eff 1-1-74); 136 v S 144 (Eff 8-27-75); 137 v H 134 (Eff 8-8-77); 143 v H 208 (Eff

4-11-90); 145 v S 31 (Eff 9-27-93); 147 v H 32. Eff 3-10-98; 151 v H 95, § 1, eff. 8-3-06; 152 v S 10, § 1, eff. 1-1-08.

§ 2913.42. Tampering with records

(A) No person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall do any of the following:

(1) Falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record;

(2) Utter any writing or record, knowing it to have been tampered with as provided in division (A)(1) of this section.

(B) (1) Whoever violates this section is guilty of tampering with records.

(2) Except as provided in division (B)(4) of this section, if the offense does not involve data or computer software, tampering with records is whichever of the following is applicable:

(a) If division (B)(2)(b) of this section does not apply, a misdemeanor of the first degree;

(b) If the writing or record is a will unrevoked at the time of the offense, a felony of the fifth degree.

(3) Except as provided in division (B)(4) of this section, if the offense involves a violation of division (A) of this section involving data or computer software, tampering with records is whichever of the following is applicable:

(a) Except as otherwise provided in division (B)(3)(b), (c), or (d) of this section, a misdemeanor of the first degree;

(b) If the value of the data or computer software involved in the offense or the loss to the victim is five hundred dollars or more and is less than five thousand dollars, a felony of the fifth degree;

(c) If the value of the data or computer software involved in the offense or the loss to the victim is five thousand dollars or more and is less than one hundred thousand dollars, a felony of the fourth degree;

(d) If the value of the data or computer software involved in the offense or the loss to the victim is one hundred thousand dollars or more or if the offense is committed for the purpose of devising or executing a scheme to defraud or to obtain property or services and the value of the property or services or the loss to the victim is five thousand dollars or more, a felony of the third degree.

(4) If the writing, data, computer software, or record is kept by or belongs to a local, state, or federal governmental entity, a felony of the third degree.

History:

134 v H 511 (Eff 1-1-74); 141 v H 49 (Eff 6-26-86); 141 v H 428 (Eff 12-23-86); 146 v S 2 (Eff 7-1-96); 147 v H 565. Eff 3-30-99.

§ 2919.22. Endangering children

(A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

(B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

(1) Abuse the child;

(2) Torture or cruelly abuse the child;

(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child;

(4) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development;

(5) Entice, coerce, permit, encourage, compel, hire, employ, use, or allow the child to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of any material or performance that the offender knows or reasonably should know is obscene, is sexually oriented matter, or is nudity-oriented matter;

(6) Allow the child to be on the same parcel of real property and within one hundred feet of, or, in the case of more than one housing unit on the same parcel of real property, in the same housing unit and within one hundred feet of, any act in violation of section 2925.04 or 2925.041 [2925.04.1] of the Revised Code when the person knows that the act is occurring, whether or not any person is prosecuted for or convicted of the violation of section 2925.04 or 2925.041 [2925.04.1] of the Revised Code that is the basis of the violation of this division.

(C) (1) No person shall operate a vehicle, streetcar, or trackless trolley within this state in violation of division (A) of section 4511.19 of the Revised Code when one or more children under eighteen years of age are in the vehicle, streetcar, or trackless trolley. Notwithstanding any other provision of law, a person may be convicted at the same trial or proceeding of a violation of this division and a violation of division (A) of section 4511.19 of the Revised Code that

constitutes the basis of the charge of the violation of this division. For purposes of sections 4511.191 [4511.19.1] to 4511.197 [4511.19.7] of the Revised Code and all related provisions of law, a person arrested for a violation of this division shall be considered to be under arrest for operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them or for operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath, or urine.

(2) As used in division (C)(1) of this section:

(a) "Controlled substance" has the same meaning as in section 3719.01 of the Revised Code.

(b) "Vehicle," "streetcar," and "trackless trolley" have the same meanings as in section 4511.01 of the Revised Code.

(D) (1) Division (B)(5) of this section does not apply to any material or performance that is produced, presented, or disseminated for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) Mistake of age is not a defense to a charge under division (B)(5) of this section.

(3) In a prosecution under division (B)(5) of this section, the trier of fact may infer that an actor, model, or participant in the material or performance involved is a juvenile if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the actor, model, or participant as a juvenile.

(4) As used in this division and division (B)(5) of this section:

(a) "Material," "performance," "obscene," and "sexual activity" have the same meanings as in section 2907.01 of the Revised Code.

(b) "Nudity-oriented matter" means any material or performance that shows a minor in a state of nudity and that, taken as a whole by the average person applying contemporary community standards, appeals to prurient interest.

(c) "Sexually oriented matter" means any material or performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.

(E) (1) Whoever violates this section is guilty of endangering children.

(2) If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following:

(a) Except as otherwise provided in division (E)(2)(b), (c), or (d) of this section, a misdemeanor of the first degree;

(b) If the offender previously has been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, except as otherwise provided in division (E)(2)(c) or (d) of this section, a felony of the fourth degree;

(c) If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, a felony of the third degree;

(d) If the violation is a violation of division (B)(1) of this section and results in serious physical harm to the child involved, a felony of the second degree.

(3) If the offender violates division (B)(2), (3), (4), or (6) of this section, except as otherwise provided in this division, endangering children is a felony of the third degree. If the violation results in serious physical harm to the child involved, or if the offender previously has been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, endangering children is a felony of the second degree. If the offender violates division (B)(6) of this section and the drug involved is methamphetamine, the court shall impose a mandatory prison term on the offender as follows:

(a) If the violation is a violation of division (B)(6) of this section that is a felony of the third degree under division (E)(3) of this section and the drug involved is methamphetamine, except as otherwise provided in this division, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than two years. If the violation is a violation of division (B)(6) of this section that is a felony of the third degree under division (E)(3) of this section, if the drug involved is methamphetamine, and if the offender previously has been convicted of or pleaded guilty to a violation of division (B) (6) of this section, a violation of division (A) of section 2925.04 of the Revised Code, or a violation of division (A) of section 2925.041 [2925.04.1] of the Revised Code, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than five years.

(b) If the violation is a violation of division (B)(6) of this section that is a felony of the second degree under division (E)(3) of this section and the drug involved is methamphetamine, except as otherwise provided in this division, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree that is not less than three years. If the violation is a violation of division (B)(6) of this section that is a felony of the second degree under division (E)(3) of this section, if the drug involved is methamphetamine, and if the offender previously has been convicted of or pleaded guilty to a violation of division (B)(6) of this section, a violation of division (A) of section 2925.04 of the Revised Code, or a violation of division (A) of section 2925.041 [2925.04.1] of the Revised Code, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree that is not less than five years.

(4) If the offender violates division (B)(5) of this section, endangering children is a felony of the second degree.

(5) If the offender violates division (C) of this section, the offender shall be punished as follows:

(a) Except as otherwise provided in division (E)(5)(b) or (c) of this section. endangering children in violation of division (C) of this section is a misdemeanor of the first degree.

(b) If the violation results in serious physical harm to the child involved or the offender previously has been convicted of an offense under this section or any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, except as otherwise provided in division (E)(5)(c) of this section, endangering children in violation of division (C) of this section is a felony of the fifth degree.

(c) If the violation results in serious physical harm to the child involved and if the offender previously has been convicted of a violation of division (C) of this section, section 2903.06 or 2903.08 of the Revised Code, section 2903.07 of the Revised Code as it existed prior to March 23, 2000, or section 2903.04 of the Revised Code in a case in which the offender was subject to the sanctions described in division (D) of that section, endangering children in violation of division (C) of this section is a felony of the fourth degree.

(d) In addition to any term of imprisonment, fine, or other sentence, penalty, or sanction it imposes upon the offender pursuant to division (E)(5)(a), (b), or (c) of this section or pursuant to any other provision of law and in addition to any suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege under Chapter 4506., 4509., 4510., or 4511. of the Revised Code or under any other provision of law, the court also may impose upon the offender a class seven suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code.

(e) In addition to any term of imprisonment, fine, or other sentence, penalty, or sanction imposed upon the offender pursuant to division (E)(5)(a), (b), (c), or (d) of this section or pursuant to any other provision of law for the violation of division (C) of this section, if as part of the same trial or proceeding the offender also is convicted of or pleads guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, the offender also shall be sentenced in accordance with section 4511.19 of the Revised Code for that violation of division (A) of section 4511.19 of the Revised Code.

(F) (1) (a) A court may require an offender to perform not more than two hundred hours of supervised community service work under the authority of an agency, subdivision. or charitable organization. The requirement shall be part of the community control sanction or sentence of the offender, and the court shall impose the community service in accordance with and subject to divisions (F)(1)(a) and (b) of this section. The court may require an offender whom it requires to

perform supervised community service work as part of the offender's community control sanction or sentence to pay the court a reasonable fee to cover the costs of the offender's participation in the work, including, but not limited to, the costs of procuring a policy or policies of liability insurance to cover the period during which the offender will perform the work. If the court requires the offender to perform supervised community service work as part of the offender's community control sanction or sentence, the court shall do so in accordance with the following limitations and criteria:

(i) The court shall require that the community service work be performed after completion of the term of imprisonment or jail term imposed upon the offender for the violation of division (C) of this section, if applicable.

(ii) The supervised community service work shall be subject to the limitations set forth in divisions (B)(1), (2), and (3) of section 2951.02 of the Revised Code.

(iii) The community service work shall be supervised in the manner described in division (B)(4) of section 2951.02 of the Revised Code by an official or person with the qualifications described in that division. The official or person periodically shall report in writing to the court concerning the conduct of the offender in performing the work.

(iv) The court shall inform the offender in writing that if the offender does not adequately perform, as determined by the court, all of the required community service work, the court may order that the offender be committed to a jail or workhouse for a period of time that does not exceed the term of imprisonment that the court could have imposed upon the offender for the violation of division (C) of this section, reduced by the total amount of time that the offender actually was imprisoned under the sentence or term that was imposed upon the offender for that violation and by the total amount of time that the offender was confined for any reason arising out of the offense for which the offender was convicted and sentenced as described in sections 2949.08 and 2967.191 [2967.19.1] of the Revised Code, and that, if the court orders that the offender be so committed, the court is authorized, but not required, to grant the offender credit upon the period of the commitment for the community service work that the offender adequately performed.

(b) If a court, pursuant to division (F)(1)(a) of this section, orders an offender to perform community service work as part of the offender's community control sanction or sentence and if the offender does not adequately perform all of the required community service work, as determined by the court, the court may order that the offender be committed to a jail or workhouse for a period of time that does not exceed the term of imprisonment that the court could have imposed upon the offender for the violation of division (C) of this section, reduced by the total amount of time that the offender actually was imprisoned under the sentence or term that was imposed upon the offender for that violation and by the total amount of time that the offender was confined for any reason arising out of the offense for which the offender was convicted and sentenced as described in sections 2949.08 and 2967.191 [2967.19.1] of the Revised Code. The court may order that a person committed pursuant to this division shall receive hour-for-hour credit upon the period of the commitment for the community service work

that the offender adequately performed. No commitment pursuant to this division shall exceed the period of the term of imprisonment that the sentencing court could have imposed upon the offender for the violation of division (C) of this section, reduced by the total amount of time that the offender actually was imprisoned under that sentence or term and by the total amount of time that the offender was confined for any reason arising out of the offense for which the offender was convicted and sentenced as described in sections 2949.08 and 2967.191 [2967.19.1] of the Revised Code.

(2) Division (F)(1) of this section does not limit or affect the authority of the court to suspend the sentence imposed upon a misdemeanor offender and place the offender under a community control sanction pursuant to section 2929.25 of the Revised Code, to require a misdemeanor or felony offender to perform supervised community service work in accordance with division (B) of section 2951.02 of the Revised Code, or to place a felony offender under a community control sanction.

(G) (1) If a court suspends an offender's driver's or commercial driver's license or permit or nonresident operating privilege under division (E)(5)(d) of this section, the period of the suspension shall be consecutive to, and commence after, the period of suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege that is imposed under Chapter 4506., 4509., 4510., or 4511. of the Revised Code or under any other provision of law in relation to the violation of division (C) of this section that is the basis of the suspension under division (E)(5)(d) of this section or in relation to the violation of division (A) of section 4511.19 of the Revised Code that is the basis for that violation of division (C) of this section.

(2) An offender is not entitled to request, and the court shall not grant to the offender, limited driving privileges if the offender's license, permit, or privilege has been suspended under division (E)(5)(d) of this section and the offender, within the preceding six years, has been convicted of or pleaded guilty to three or more violations of one or more of the following:

(a) Division (C) of this section;

(b) Any equivalent offense, as defined in section 4511.181 [4511.18.1] of the Revised Code.

(H) (1) If a person violates division (C) of this section and if, at the time of the violation, there were two or more children under eighteen years of age in the motor vehicle involved in the violation, the offender may be convicted of a violation of division (C) of this section for each of the children, but the court may sentence the offender for only one of the violations.

(2) (a) If a person is convicted of or pleads guilty to a violation of division (C) of this section but the person is not also convicted of and does not also plead guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, both of the following apply:

(i) For purposes of the provisions of section 4511.19 of the Revised Code that set forth the

penalties and sanctions for a violation of division (A) of section 4511.19 of the Revised Code, the conviction of or plea of guilty to the violation of division (C) of this section shall not constitute a violation of division (A) of section 4511.19 of the Revised Code;

(ii) For purposes of any provision of law that refers to a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code and that is not described in division (H)(2)(a)(i) of this section, the conviction of or plea of guilty to the violation of division (C) of this section shall constitute a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code.

(b) If a person is convicted of or pleads guilty to a violation of division (C) of this section and the person also is convicted of or pleads guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, the conviction of or plea of guilty to the violation of division (C) of this section shall not constitute, for purposes of any provision of law that refers to a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code, a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code.

(I) As used in this section:

(1) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code;

(2) "Limited driving privileges" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Methamphetamine" has the same meaning as in section 2925.01 of the Revised Code.

History:

134 v H 511 (Eff 1-1-74); 137 v S 243 (Eff 11-17-77); 140 v H 44 (Eff 9-27-84); 140 v S 321 (Eff 4-9-85); 141 v H 349 (Eff 3-6-86); 142 v H 51 (Eff 3-17-89); 145 v H 236 (Eff 9-29-94); 146 v S 2 (Eff 7-1-96); 146 v S 269, § 1 (Eff 7-1-96); 146 v H 353, § 1 (Eff 9-17-96); 146 v H 167 (Eff 5-15-97); 146 v S 269, § 8 (Eff 5-15-97); 146 v H 353, § 4 (Eff 5-15-97); 147 v S 60 (Eff 10-21-97); 148 v H 162 (Eff 8-25-99); 148 v S 107 (Eff 3-23-2000); 148 v S 180. Eff 3-22-2001; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v S 58, § 1, eff. 8-11-04; 151 v S 53, § 1, eff. 5-17-06; 151 v S 8, § 1, eff. 8-17-06.

§ 2921.04. Intimidation of attorney, victim or witness in criminal case

(A) No person shall knowingly attempt to intimidate or hinder the victim of a crime in filing or prosecution of criminal charges or a witness involved in a criminal action or pr in the discharge of the duties of the witness.

(B) No person, knowingly and by force or by unlawful threat of harm to any person or p shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or pro of criminal charges or an attorney or witness involved in a criminal action or proceedin discharge of the duties of the attorney or witness.

(C) Division (A) of this section does not apply to any person who is attempting to resol dispute pertaining to the alleged commission of a criminal offense, either prior to or sub to the filing of a complaint, indictment, or information, by participating in the arbitratio mediation, compromise, settlement, or conciliation of that dispute pursuant to an author for arbitration, mediation, compromise, settlement, or conciliation of a dispute of that n is conferred by any of the following:

(1) A section of the Revised Code;

(2) The Rules of Criminal Procedure, the Rules of Superintendence for Municipal Co County Courts, the Rules of Superintendence for Courts of Common Pleas, or another r adopted by the supreme court in accordance with Section 5 of Article IV, Ohio Constit

(3) A local rule of court, including, but not limited to, a local rule of court that relates alternative dispute resolution or other case management programs and that authorizes t of disputes pertaining to the alleged commission of certain types of criminal offenses to appropriate and available arbitration, mediation, compromise, settlement, or other conc programs;

(4) The order of a judge of a municipal court, county court, or court of common pleas

(D) Whoever violates this section is guilty of intimidation of an attorney, victim, or wit

criminal case. A violation of division (A) of this section is a misdemeanor of the first degree. A violation of division (B) of this section is a felony of the third degree.

History:

140 v S 172 (Eff 9-26-84); 146 v H 88. Eff 9-3-96.

§ 2945.75. Degree of offense; charge and verdict; proof of prior conviction

(A) When the presence of one or more additional elements makes an offense one of more serious degree:

(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

(B) (1) Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

(2) Whenever in any case it is necessary to prove a prior conviction of an offense for which the registrar of motor vehicles maintains a record, a certified copy of the record that shows the name, date of birth, and social security number of the accused is prima-facie evidence of the identity of the accused and prima-facie evidence of all prior convictions shown on the record. The accused may offer evidence to rebut the prima-facie evidence of the accused's identity and the evidence of prior convictions. Proof of a prior conviction of an offense for which the registrar maintains a record may also be proved as provided in division (B)(1) of this section.

History:

134 v H 511. Eff 1-1-74; 151 v H 461, § 1, eff. 4-4-07.