

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Case No. 07-2186

Appellant,

vs.

On Appeal from the Court of
Appeals for Marion County,
Third Appellate District

DONALD K. MALONE III,

Appellee.

MERIT BRIEF OF APPELLEE, DONALD K. MALONE III

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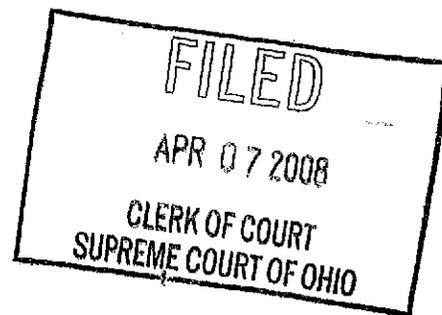


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STATEMENT OF THE CASE AND FACTS

On April 24, 2006, Defendant-Appellant, Donald K. Malone, III, (Donald) entered pleas of Not Guilty to the following charges:

I.	Rape	R.C. §2907.02(A)(2)	[F1]
II.	Kidnapping	R.C. §2905.01(A)(4)	[F1]
III.	Rape	R.C. §2907.02(A)(2)	[F1]
IV.	Abduction	R.C. §2905.02	[F3]
V.	Intimidation	R.C. §2921.04(B)	[F3]
VI.	Intimidation	R.C. §2921.04(B)	[F3]
VII.	Intimidation	R.C. §2921.04(B)	[F3]
VIII.	Tampering with Evidence	R.C. §2921.12(A)(1)	[F3]
IX.	Possessing Criminal Tools	R.C. §2923.24(A)	[F5]

These charges arose from incidents that occurred in the early morning hours of April 9, 2006.

The incidents revolved around Donald engaging in sexual activity with L. K.. They also involved alleged threats by Donald toward Brad Brown (Brad) and Brittany Brown (Brittany).

Brad and Brittany lived in an apartment on West Columbia Street in Marion. At the time of this incident, Donald lived with Brad and Brittany. (Tr., p. 167, 254) Donald periodically resided with them because he and his mother would have disagreements. (Tr., p.465-466) Donald was called Demon because he is a satanic priest. (Tr., p.484) L. K. knew Brad and Brittany through their mutual association with Marion Area Counseling Center. (Tr., p.163)

On Saturday, April 8, 2006, L. K. ran into Brittany and Hugh, another friend. (Tr., p.162) They decided to go to Brittany's apartment to hang out. (Tr., p.163, 211) When L.K. got there she met Donald, who was introduced to her as Demon. (Tr., p.166) In the early morning hours of Sunday, April 9, Donald and L. K. engaged in sexual activity together.

At trial, the material facts in dispute concerned whether the sexual activity between Donald and L. K. was consensual and whether Donald threatened L. K., Brad, and Brittany. Donald, L. K., Brad and Brittany each testified about these issues. Donald testified that the sexual activity was consensual and that he didn't threaten anybody.

Brittany testified that she had returned to the apartment on Columbia with L. K. and Hugh. (Tr., p.259) Brad and Donald were at the apartment. (Tr., p.259) She testified: "We were all just sitting there having a good time, joking around, laughing, having fun* * *." (Tr., p.260) She testified that Hugh left for home and Brad left to go to the bar. (Tr., p.261, 298) The three of them stayed and continued to joke and talk about sex.(Tr., p.299) At some point, she asked L. K. if she wanted to stay overnight. (Tr., p.261, 300) L. K. said yes. Donald was sitting on the couch, L. K. laid down on the couch with her legs over his lap. (Tr., p.262, 263, 300, 302) L. K. and Donald talked. (Tr., p.263) After a while, L. K. and Brittany went into Brittany's bedroom. (Tr., p.263-264)

Donald called Brittany to his room. (Tr., p.265-266) His knife was laying on the table. He told Brittany to tell L. K. that he wanted to have sex with her and if she didn't do exactly as he said, he would kill her. (Tr., p.266, 306) Brittany testified she started crying and went back to her room and told L. K. what Donald said. They both sat on the bed and cried. (Tr., p.268) Then Donald came in with the knife in his hand. (Tr., p.268) Brittany testified he told L. K. to "do everything the way he told her to do it and that everything would be over and that they could go their separate ways." (Tr., p.269) He told L.K. he would kill her and chop up her body if she

didn't do as he said. (Tr., p.269, 307, 321) Donald asked Brittany to leave the room. (Tr., p.269)

Brittany testified she went to the living room and sat on the couch. (Tr., p.270) She could hear everything that was said in the bedroom. (Tr., p.307) Brittany testified she was too scared to do anything. (Tr., p.271) After about ten minutes, she watched L. K. follow Donald into his bedroom. Donald had the knife in his hand, holding it down to his side. (Tr., p.271) She could not hear anything after they went into his room. (Tr., p.272, 309)

After about 20-25 minutes, L. K. and Donald went from the bedroom into the bathroom. (Tr., p.272, 310) L. K. and Donald came out of the bathroom. She testified they all went into Brad and Brittany's bedroom. L. K. and Brittany were crying. (Tr., p.274, 313) Brittany testified that Donald told her to say she had been asleep and didn't know what went on. (Tr., p.275) He told them that their lives would be in danger if they told the police anything. (Tr., p.276) He told L. K. that he would kill her mother, then kill her. (Tr., p.278) Donald then prepared to leave with his backpack. (Tr., p.277)

The jury trial began on July 10, 2006. On July 13, 2006, the Jury reached its verdict.

Donald was acquitted of the following counts:

IV.	Abduction	R.C. §2905.02	[F3]
VII.	Intimidation ¹	R.C. §2921.04(B)	[F3]

He was convicted of the following counts:

I.	Rape	R.C. §2907.02(A)(2)	[F1]
II.	Kidnapping	R.C. §2905.01(A)(4)	[F1]
III.	Rape	R.C. §2907.02(A)(2)	[F1]
V.	Intimidation ²	R.C. §2921.04(B)	[F3]

¹ This count pertained to Brad. Brad testified that he did not remember Donald threatening him.

VI.	Intimidation ³	R.C. §2921.04(B)	[F3]
VIII.	Tampering with Evidence	R.C. §2921.12(A)(1)	[F3]
IX.	Possessing Criminal Tools	R.C. §2923.24(A)	[F5]

After discussions with the Prosecutor, Donald withdrew his request to have the jury determine the Sexually Violent Predator specifications to Counts I, II, and III. Via *Alford* pleas, he pleaded guilty to the specifications.

The Judgment Entry of Sentencing was filed on July 17, 2006. Because Counts I and II were allied offenses of similar import, the State dismissed Count II. Donald was sentenced to mandatory terms of ten years to life on Counts I and III. The terms were to be served consecutively. On Counts V, VI, and VIII Donald was sentenced to five years each. On Count IX, Donald was sentenced to twelve months. Counts V, VI, VIII, and IX were to be served concurrently with each other, but consecutive to Counts I and III. In total, Donald was sentenced to imprisonment for 25 years to life. He was determined to be a sexually violent predator, as defined in R.C. § 2971.01 He also was sentenced to a mandatory period of five years of post release control by the parole board.

Notice of Appeal to the Court of Appeals was filed on August 14, 2006. In an opinion filed October 15, 2007, the Court of Appeals reversed Donald's conviction on count six, intimidation of a witness, i.e., Brittany. The Court of Appeals affirmed the remainder of Donald's convictions.

The Third District Court of Appeals analyzed the elements of the crime of intimidation of a witness. *State v. Malone* (Oct. 15, 2007), Marion App. No. 9-06-43, 2007-Ohio-5484, ¶34. It

² This count pertained to intimidation of the victim, L.K.

focused on the Intimidation statute's requirement that the witness *be involved in a criminal action or proceeding*. The Third District concluded the terms "criminal action" and "criminal proceeding" are not synonymous with the term "criminal act." *State v. Malone*, ¶36. Donald threatened Brittany prior to any police investigation or prosecution in this case. Thus, at the time of threat, Brittany was *a witness to a criminal act*, but was not a *witness involved in a criminal action or proceeding* under R.C. 2921.04(B). As such, there was insufficient evidence to support the jury's conviction on count six. *State v. Malone*, ¶39.

The Third District Court of Appeals acknowledged that other appellate districts had upheld convictions for intimidating a witness when the threats were made *prior* to any investigation by the police. In those cases, the courts equated a witness to a criminal *act* to a witness involved in a criminal *action or proceeding*. *State v. Malone*, ¶36. The Third District noted that other courts have upheld convictions for intimidation of a witness *after* the police have begun an investigation. *State v. Malone*, ¶39, citing *State v. Block*, Cuyahoga App. No. 87488, 2006-Ohio-5593; See also *State v. Trikalis* (August 17, 2005) Medina App. Nos.04CA0096-M & 04CA0097-M, 2005-Ohio-4266 (threats made to a law enforcement officer investigating the Defendant's drug offenses) and *State v. Totarella*, Lake App. No. 2002 L 147, 2004-Ohio-1175 (threats made to a witness reporting a crime in progress) The Third District Court refrained from attempting to articulate, "a bright-line test for when a criminal action or proceeding begins." It concluded, "at the least, threats made prior to any involvement by law enforcement are insufficient to constitute intimidation of a witness pursuant to the clear and unambiguous language of the statute." *State v. Malone*, ¶39.

³ This count pertained to intimidation of Brittany.

By Judgment Entry filed November 15, 2007, the Third District Court of Appeals certified its judgment in the instant case to be in conflict with the judgments rendered by the Fifth District Court of Appeals in *State v. Hummell* (June 1, 1998), Morrow App. No. CA-851, and the Eighth District Court of Appeals in *State v. Gooden*, Cuyahoga App. No. 82621, 2004-Ohio-2699. This Court determined a conflict existed and directed parties to brief the following issue:

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

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

INTRODUCTION

In relevant part, R.C. § 2921.04(B) states, “No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder * * * an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness.” This case requires this Court to consider what the State must prove to establish the witness was, “involved in criminal action or proceedings.” The essential facts of the case are not disputed. At the time of Donald’s threat, Brittany had witnessed a criminal act, but no police investigation or prosecution had begun.

This case comes before this Court because of a conflict between the appellate courts of the State of Ohio. The Decision of the Third District Court of Appeals was found to conflict with *State v. Hummell* (June 1, 1998), Morrow App. No. CA-851, 1998 WL 355511, and *State v. Gooden* (May 27, 2004), Cuyahoga App. No. 82621, 2004-Ohio-2699.

In *State v. Gooden*, the Appellant argued that he could not be convicted of intimidation under R.C. 2921.04 because no criminal case was pending at the time of his alleged threats. The Eighth District Court of Appeals rejected his argument:

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

The Eighth District did not articulate any analysis of the statute, but simply adopted the reasoning of the Fifth District Court of Appeals in *State v. Hummell*.

In *State v. Hummell*, the Appellant contended that the evidence was insufficient to convict him of intimidation because the threats were alleged to have been made before a criminal prosecution had been instituted. *State v. Hummell*, at p. *2. The Fifth District held that the evidence was sufficient to support the Hummell's conviction:

“At the time appellant threatened Amy and Crystal, a criminal proceeding had not been instituted. However, the threat was clearly aimed at discouraging the girls from having any involvement in a forthcoming criminal action. * * * Appellant was attempting to prevent the girls from discharging their duties as a witness to a criminal act.” *State v. Hummell*, at p. *3.

The Court was satisfied that Hummell's threat was aimed at the discharge of the witness's duty. The Court did not examine the meaning of the statute's requirement that the witness be involved in a criminal action or proceeding. The majority opinion concluded the evidence was sufficient to sustain Hummell's conviction for intimidation of a witness. The dissenting opinion observed:

“There is a fine, but distinct, difference between attempting to prevent a witness from discharging his or her duty as a witness to a criminal ‘act’, and attempting to prevent a witness from discharging his or her duty as a witness in a ‘criminal action or proceeding.’ A ‘criminal action or proceedings’ requires more than just the occurrence of the underlying criminal act.” *State v. Hummell*, at p. *4.

PROPOSITION OF LAW: A CRIMINAL CHARGE OF INTIMIDATION OF A WITNESS IN VIOLATION OF R.C. 2921.04(B) REQUIRES THE STATE TO PROVE THAT THE DEFENDANT MADE A THREAT TO A WITNESS INVOLVED IN A CRIMINAL ACTION OR PROCEEDING. WHERE NO CRIME HAS BEEN REPORTED AND NO INVESTIGATION OR PROSECUTION HAS BEEN INITIATED, A WITNESS HAS NO INVOLVEMENT IN A CRIMINAL ACTION OR PROCEEDING.

The cornerstone of statutory construction and interpretation is legislative intention. *State v. Jordan* (2000), 89 Ohio St.3d 488, 491, citing *State ex rel. Francis v. Sours* (1944), 143 Ohio St. 120, 124. A court must first look to the words of the statute itself. *State v. Jordan*, 89 Ohio

St.3d at 492, citing *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105. Here, the legislature prohibited threats to a witness or attorney “involved in a criminal action or proceeding.” The Revised Code does not define the phrases “criminal action” or “criminal proceeding.” *State v. Malone*, ¶36. Black’s Law Dictionary defines “action” generally as “conduct; behavior; something done; the condition of acting; an act or series of acts.” It goes on to state that the phrase “in its usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law.” Black’s Law Dictionary (5 Ed. Rev. 1979) at 26. Black’s defines “criminal action” as “such as are instituted by the sovereign power (i.e., government), for the purpose of punishing or preventing offenses against the public.” Black’s Law Dictionary (5 Ed. Rev. 1979) at 27. Black’s defines “proceeding” as “the form and manner of conducting juridical business before a court or judicial officer.” It includes an “act which is done by the authority or direction of the court, agency, or tribunal, express or implied.” Black’s Law Dictionary (5 Ed. Rev. 1979) at 1083. Thus, the plain meaning of the words of the statute indicate some formal government complaint or act done by the authority or direction of the court, agency or tribunal is required. The element of government involvement is lacking if no crime has been reported and no police investigation or prosecution has been initiated.

The State argues that the statute really applies to any witness *to a criminal act*. The State’s position is contrary to the rules of statutory construction and interpretation. The well established duty of this Court is “to give effect to the *words used* [in a statute], not to delete words used *or to insert words not used.*” (Emphasis *sic*) *Id.*, citing *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.* (1979), 58 Ohio.St.2d 1, 4, quoting *Columbus-Suburban Coach*

Lines v. Pub. Util. Comm. (1969), 20 Ohio St.2d 125, 127 The legislature chose to make the statute applicable to witnesses “involved in a criminal action or proceeding.”

The plain meaning of the words used in the statute are unambiguous and definite. They require more than threatening a witness to a criminal act. This Court has held, “If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.” *State v. Jordan*, 89 Ohio St.3d at 492, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545. Ambiguity exists only if the language is susceptible of more than one reasonable interpretation. *Id.*, citing *State ex rel. Toledo Edison Co. v. Clyde* (1996), 76 Ohio St.3d 508, 513. The State’s position is irreconcilable with the unambiguous words of the statute.

The State’s position is inconsistent with the statutory scheme within the Intimidation statute. The statute differentiates between threatening a victim and threatening a witness. R.C. 2921.04(B) specifically prohibits a person from intimidating a *victim* in the *filing or prosecution of criminal charges*, but prohibits a person from intimidating a *witness involved in a criminal action or proceeding*. *State v. Malone*, ¶38. The legislature did not require a witness to be involved in the “filing or prosecution” of criminal charges. The internal logic of the statute indicates that involvement in a “criminal action or proceeding” exists only after the reporting or filing of criminal charges. Furthermore, the Intimidation statute applies to *attorneys and witnesses* involved in criminal actions and proceedings. The interpretation urged by the State has no sensible application to attorneys. If the statute was intended to apply to all witnesses of criminal acts, it would not have been drafted to include attorneys and witnesses the same clause.

Furthermore, the State's position is inconsistent with the statutory context of the Intimidation statute. The Intimidation statute does not exist in a vacuum. It is, in effect, a special form of menacing.⁴ If the legislature had intended to make it applicable to witnesses prior to the initiation of a criminal "action" or "proceeding", the appropriate language easily could have been included. *State v. Malone*, ¶38. The drafters of the Intimidation statute had a well established statute with just such wording, R.C. § 2921.12. The Tampering statute applies if the defendant knows that an "official proceeding or investigation is in progress, or is about to be or likely to be instituted." R.C. § 2921.12. At the time the Intimidation statute was drafted, the Tampering statute had been in effect for over twenty years. The parameters of the Tampering statute were well established; the issue had thoroughly percolated through the courts and the meaning of the phrase in the Tampering statute was clear. If the legislature had intended the intimidation statute to apply to threats directed to the witness of a criminal act prior to any report to the police or investigation or prosecution, it would have been extremely easy and eminently logical to employ the language of the Tampering statute. The legislature chose to do something different.

Finally, the State's position is contrary to the well-established rules of statutory construction. Revised Code § 2901.04(A) directs that, "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused."

CONCLUSION

Where a statute is unambiguous, a court must only read and follow it. *City of Fairborn v.*

⁴ Donald's actions could have constituted violations of R.C. § 2903.21, Aggravated Menacing.

Dedomenico (1996), 114 Ohio App.3d 590, 593, citing *Wachendorf v. Shaver* (1948), 149 Ohio St. 231. The unambiguous words of the statute require proof that a witness be involved in a criminal action or proceeding. This case does not present a question about the outer boundaries of the statute's application. At a minimum, this requires some level of formal, government involvement. Where no crime has been reported and no investigation or prosecution has been initiated, a witness has no involvement in a criminal action or proceeding. The Third District Court of Appeals decision should be affirmed and the certified question be answered in the negative.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Merit Brief was served upon Jim Slagle, Marion County Prosecuting Attorney, at 134 East Center Street, Marion, Ohio 43302, by regular U.S. Mail, postage prepaid, this 7TH day of April, 2008.



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APPENDIX

Ohio Revised Code § 2901.04

Ohio Revised Code § 2903.21

Other Appendices are attached to the Appellant's Merit Brief and are not duplicated herein.

2901.04 Rules of construction for statutes and rules of procedure.

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

Effective Date: 03-23-2000; 09-23-2004

2903.21 Aggravated menacing.

(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family.

(B) Whoever violates this section is guilty of aggravated menacing. Except as otherwise provided in this division, aggravated menacing is a misdemeanor of the first degree. If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, aggravated menacing is a felony of the fifth degree or, if the offender previously has been convicted of or pleaded guilty to an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

Effective Date: 04-10-2001