

NO. 08-2170

IN THE SUPREME COURT OF OHIO

APPEAL FROM

THE COURT OF APPEALS OF THE THIRD
APPELLATE JUDICIAL DISTRICT OF OHIO
UNION COUNTY - NO. 14-07-20

STATE OF OHIO

Plaintiff-Appellant

vs.

RAYNELL ROBINSON

Defendant-Appellee

NOTICE OF CERTIFIED CONFLICT

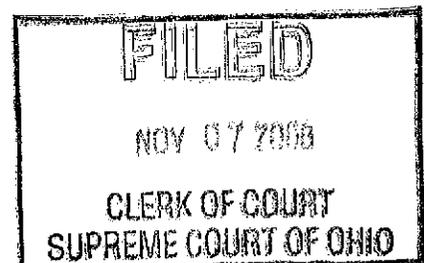
Counsel for Plaintiff-Appellant

DAVID W. PHILLIPS (0019966)
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240 West Fifth Street, Suite A
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Notice of Certified Conflict

Appellant, State of Ohio, gives notice of a certified conflict to the Ohio Supreme Court from the Union County Court of Common Pleas, Third Appellate District, Case Number 14-07-20 decided on August 18, 2008. The Third District has certified the following question to this Court:

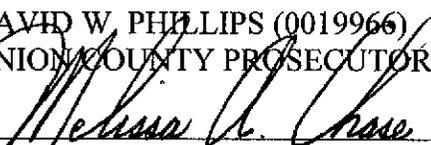
Does the damaging of a single, private telephone or cellular telephone disrupt "public services" sufficiently to constitute a violation of R.C. 2909.04(A)(3)?

The Third Appellate District has declared that its decision in *State v. Robinson* is in conflict with the judgments rendered in *State v. Yoakum*, 5th Dist. No. 01CA0005, 2002-Ohio-249; *State v. Thomas*, 2nd Dist. No. 19435, 2003-Ohio-5746; *State v. Johnson*, 8th Dist. Nos. 81692 and 81693, 2003-Ohio-3241; and *State v. Brown* (1994), 97 Ohio App. 3d 293.

Under Sup.Ct.R. IV Section 1, a copy of the Third District's order certifying the conflict and copies of all decisions determined to be in conflict are attached in the accompanying appendix.

Respectfully Submitted,

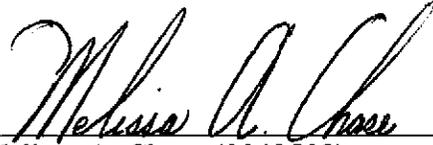
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Certified Conflict was served upon Alison Boggs, Legal Counsel for the Defendant-Appellee at her business address of 240 West Fifth Street, Suite A, Marysville, Ohio 43040 by ordinary U.S. Mail, postage prepaid, this 7th day of November, 2008.

A handwritten signature in cursive script, appearing to read "Melissa A. Chase", is written over a horizontal line.

Melissa A. Chase (0042508)
Assistant Prosecuting Attorney

Appendix

Order of the Third District Court of Appeals certifying a conflict in *State v. Robinson*, Court of Appeals of the Third Appellate Judicial District of Ohio Union County, Case Number 14-07-20 issued on October 10, 2008.

Decision of the Third District Court of Appeals in *State v. Robinson*, Court of Appeals of the Third Appellate Judicial District of Ohio Union County, Case Number 14-07-20 issued on August 18, 2008.

Conflicting Cases:

State v. Yoakum, 5th Dist. No. 01CA0005, 2002-Ohio-249.

State v. Thomas, 2nd Dist. No. 19435, 2003-Ohio-5746.

State v. Johnson, 8th Dist. Nos. 81692 and 81693, 2003-Ohio-3241.;

State v. Brown (1994), 97 Ohio App. 3d 293.

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

STATE OF OHIO,

CASE NUMBER 14-07-20

PLAINTIFF-APPELLEE,

J U D G M E N T

v.

E N T R Y

RAYNELL ROBINSON,

DEFENDANT-APPELLANT.

Sharon S. Edwards
CLERK

2018 OCT 10 PM 1:32

COURT OF APPEALS
UNION COUNTY

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

Upon consideration the court finds that the judgment in the instant case is in conflict with the judgments rendered in *State v. Yoakum*, 5th Dist. No. 01CA0005, 2002-Ohio-249; *State v. Thomas*, 2nd Dist. No. 19435, 2003-Ohio-5746; *State v. Johnson*, 8th Dist. Nos. 81692 and 81693, 2003-Ohio-3241; and *State v. Brown* (1994), 97 Ohio App.3d 293.

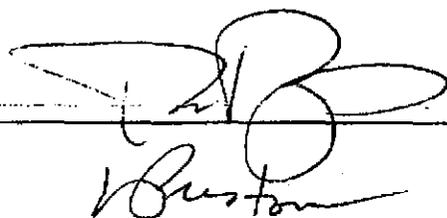
Accordingly, the motion to certify is well taken and the following issue should be certified pursuant to App.R. 25:

Does the damaging of a single, private telephone or cellular telephone disrupt "public services" sufficiently to constitute a violation of R.C. 2909.04(A)(3)?

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



Boston



JUDGES

DATED: October 9, 2008

JAN 2008

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

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 14-07-20

v.

RAYNELL ROBINSON,

O P I N I O N

DEFENDANT-APPELLANT.

CHARACTER OF PROCEEDINGS: An Appeal from Common Pleas Court

JUDGMENT: Judgment Affirmed in Part, Reversed in Part, and Cause Remanded

DATE OF JUDGMENT ENTRY: August 18, 2008

ATTORNEYS:

**ALISON BOGGS
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**MELISSA A. CHASE
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For Appellee**

ROGERS, J.

{¶1} Defendant-Appellant, Raynell Robinson, appeals the judgment of the Union County Court of Common Pleas convicting him of one count of disrupting public services and one count of intimidation of a victim. On appeal, Robinson argues that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. Based upon the following, we affirm Robinson's intimidation of a victim conviction, reverse his disruption of public services conviction, and remand for further proceedings consistent with this opinion.

{¶2} In December 2006, the Union County Grand Jury indicted Robinson for one count of felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree; one count of disrupting public services in violation of R.C. 2909.04(A)(3), a felony of the fourth degree; and, one count of intimidation of a victim in violation of R.C. 2921.04(B), a felony of the third degree.

{¶3} Subsequently, Robinson entered a plea of not guilty to all counts in the indictment.

{¶4} In February 2007, the State moved to dismiss the felonious assault count due to insufficient evidence, which the trial court granted. The case then proceeded to jury trial on the remaining counts, during which the following testimony was heard.

{¶5} Heather Hoge testified that, on September 2, 2006, she and Robinson's nephew, Antonio Robinson¹, attended a party at Robinson's Marysville Meadows apartment; that, after they arrived, Robinson asked her to leave; that, as she and Antonio departed, Robinson and Antonio began arguing and Robinson hit Antonio; that "[Robinson] hit him again and he like hit the side of the truck. And then they took and got into a scuffle * * *" (trial tr., p. 68); that Robinson hit Antonio in the face and "[Antonio's] lip was gashed open and hanging down. And his teeth were like broke [sic] loose from the gums." (Trial Tr., p. 69).

{¶6} Further, Hoge testified that "after [Robinson] got off of him, Antonio got his cell phone and tried – and dialed 911" (trial tr., p. 69); that she heard Antonio make contact with the 9-1-1 dispatcher as "[h]e was standing beside the truck trying to talk on the phone. And then [Robinson] had come up and grabbed the cell phone and smashed it on the ground" (trial tr., pp. 70-71); that she then picked up her own phone to call 9-1-1 and Robinson "[s]tarted yelling at [her] that he wanted to see [her] hands and that [she had] better not be calling the police" (trial tr., p. 71); that Robinson stated several times that "[i]f any of [them] called the police on him, that he would shoot [them]" (trial tr., p. 74); that, after making this statement, Robinson began to "scuffle" with Antonio again; that she

¹ We note that the victim's first name is spelled two different ways in the record before this Court. We elect to use the spelling provided in the appellant's and the appellee's briefs.

then called 9-1-1 again when Robinson was not looking and left the line open so the dispatcher could hear the altercation; and, that Antonio was transported to a hospital where he received stitches.

{¶7} Katie Holdren, dispatcher for the Union County Sheriff's office, testified that she dispatches police and fire departments and answers 9-1-1 calls; that, on September 2, 2006, she answered a 9-1-1 call from an individual who stated that he had been assaulted at the Meadows Apartments; that the phone call abruptly ended before she ascertained a specific apartment number; that she then dispatched the police and fire departments and an ambulance to the general area of the Meadows Apartments; and, that she received a second 9-1-1 call about the incident and "just let the police officers know on the radio that she had an open line and it was still continuing." (Trial Tr., p. 50).

{¶8} Barbara Sharp-Patrick, dispatcher for the Union County Sheriff's office, testified that she answered a third 9-1-1 call concerning the incident on September 2, 2006, and that, "at the time of the call, [she] was also talking with [Holdren] who had already started a medic because of the fact that there was a possible assault." (Trial Tr., p. 53).

{¶9} Officer Robert Bartholomew of the Marysville Police Department testified that, on September 2, 2006, he received a dispatch at approximately 3:30 a.m. requesting an ambulance in the area of the Meadows Apartments; that he and

another officer arrived at the apartment complex at 3:30 a.m. and drove through looking for injured victims; that he arrived at the scene of the assault and spoke with Hoge “no later than 3:45 a.m.” (trial tr., p. 102); and, that “Antonio had a lot of blood around his mouth and it just looked like his lip was [sic] exploded.” (Trial Tr., p. 100).

{¶10} Officer Erik Collier of the Marysville Police Department testified that, on September 2, 2006, he was dispatched to an assault at the Meadows Apartments; that the dispatcher was not able to identify an exact location, such as an apartment number; that he encountered Antonio who had a “severely cut lip. He had blood all over him * * *” (trial tr., p. 108); and, that he called for an ambulance which arrived within a few minutes.

{¶11} Robinson testified that he arrived at his apartment on September 2, 2006, and discovered that his live-in girlfriend was hosting a party; that he asked everyone in the apartment to leave; that he and Antonio began to argue; that he did not recall Antonio having a cell phone during the altercation or taking or throwing a cell phone; that he did not prevent Antonio from making a 9-1-1 call; that he did not threaten to shoot or kill anyone; and, that only one altercation took place between him and Antonio.

{¶12} Antonio did not testify.

{¶13} Subsequently, the jury convicted Robinson of disrupting public services and intimidation of a victim.

{¶14} In April 2007, the trial court sentenced Robinson to a fifteen-month prison term on the conviction of disrupting public services and to a two-year prison term on the conviction of intimidation of a victim, to be served concurrently.

{¶15} It is from this judgment that Robinson appeals, presenting the following assignment of error for our review.

THE JURY LOST ITS WAY WHEN REVIEWING THE EVIDENCE RESULTING IN VERDICTS THAT ARE BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND SUPPORTED BY INSUFFICIENT EVIDENCE AND MUST BE REVERSED.

{¶16} In his sole assignment of error, Robinson asserts that the verdicts are against the manifest weight of the evidence and are not supported by sufficient evidence. Specifically, Robinson contends that he did not substantially interfere with law enforcement's ability to respond to any situation and that the State failed to prove that he inflicted any serious physical injury. Additionally, Robinson contends that he did not intimidate or threaten Hoge, and that, even if he intimidated or threatened Hoge, she was not a witness as there was no pending criminal case or proceeding at that time. We agree that the verdict for disruption of public services is not supported by sufficient evidence, but disagree that the

verdict for intimidation of a victim is not supported by sufficient evidence or is against the manifest weight of the evidence.

{¶17} Initially, we wish to clarify that Robinson was indicted for intimidation of the victim, Antonio, and not intimidation of the witness, Hoge. This is clear from the indictment, although the bill of particulars, parts of the case-in-chief, and Robinson's closing argument at trial all referred to intimidation of Hoge. Further, both appellate attorneys heavily briefed the issue of Robinson's intimidation of Hoge. However, the indictment refers only to intimidation of a victim and the jury was only instructed on intimidation of a victim.

{¶18} Additionally, we note that Robinson failed to move for a Crim.R. 29(A) judgment of acquittal. Failing to move for a judgment of acquittal pursuant to Crim.R. 29(A), Robinson waived all but plain error regarding the sufficiency of the evidence. See *State v. Cooper*, 3d Dist. No. 9-06-49, 2007-Ohio-4937, ¶23, citing Crim.R. 29(A); *State v. Roe* (1989), 41 Ohio St.3d 18, 25; *State v. Moreland* (1990), 50 Ohio St.3d 58, 62; *Cleveland v. Ellsworth*, 8th Dist. No. 83040, 2004-Ohio-4092, ¶7. To have plain error under Crim.R. 52(B), there must be an error, the error must be an obvious defect in the trial proceedings, and the error must have affected substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Plain error must be used "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.*

{¶19} The following standards of review apply throughout.

Standards of Review

{¶20} When an appellate court reviews a 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. *State v. Monroe* (2005), 105 Ohio St.3d 384, 392, citing *State v. Jenks* (1981), 61 Ohio St.3d 259, superseded by state constitutional amendment on other grounds as stated in *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355. Sufficiency is a test of adequacy, *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, and the question of whether evidence is sufficient to sustain a verdict is one of law. *State v. Robinson* (1955), 162 Ohio St. 486, superseded by state constitutional amendment on other grounds as stated in *Smith*, supra.

{¶21} When an appellate court analyzes a conviction under the manifest weight standard, it must review the entire record, weigh all of the evidence and all of the reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Only in exceptional

cases, where the evidence “weighs heavily against the conviction,” should an appellate court overturn the trial court’s judgment. *Id.*

Disrupting Public Services

{¶22} Robinson was convicted of disrupting public services under R.C. 2909.04(A), which provides that:

No person, purposely by any means or knowingly by damaging or tampering with any property, shall do any of the following:

- (1) Interrupt or impair television, radio, telephone, telegraph, or other mass communications service; police, fire, or other public service communications; radar, loran, radio, or other electronic aids to air or marine navigation or communications; or amateur or citizens band radio communications being used for public service or emergency communications;**
- (2) Interrupt or impair public transportation, including without limitation school bus transportation, or water supply, gas, power, or other utility service to the public;**
- (3) Substantially impair the ability of law enforcement officers, firefighters, rescue personnel, emergency medical services personnel, or emergency facility personnel to respond to an emergency or to protect and preserve any person or property from serious physical harm.**

{¶23} Robinson argues that his conviction of disrupting public services was not supported by sufficient evidence because he did not cause serious physical harm to the victim and because he inflicted the injury to the victim prior to any call for emergency services. However, before addressing the merits of Robinson’s argument, we must first examine whether destruction of a private cell phone constitutes disruption of public services within the meaning of R.C. 2909.04.

{¶24} When interpreting a statute, it is axiomatic that, when the language of a statute is plain and unambiguous, and conveys a clear and definite meaning, there is no need for an appellate court to apply the rules of statutory interpretation. *State v. Siferd*, 151 Ohio App.3d 103, 117, 2002-Ohio-6801, citing *State ex rel. Jones v. Conrad* (2001), 92 Ohio St.3d 389, 392 (citations omitted).

{¶25} Here, we find that R.C. 2909.04(A) clearly and unambiguously prohibits substantial interference with public emergency systems and utilities, and not destruction of a single, private telephone or cell phone. Nevertheless, as we believe that several other districts have misinterpreted the statute, we will continue our discussion as though the statute was ambiguous.

{¶26} Where the meaning of a statute is ambiguous, a court may examine legislative history or examine the statute in pari materia in order to ascertain its meaning. *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, ¶34; *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, paragraph two of the syllabus. “In determining legislative intent when faced with an ambiguous statute, the court may consider several factors such as circumstances under which the statute was enacted, the objective of the statute, and the consequences of a particular construction.” *Lima v. State*, 3d Dist. No. 1-07-21, 2007-Ohio-6419, ¶37, citing *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 40, 2001-Ohio-236 (citations omitted). Additionally, “a court cannot pick out one sentence and

disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body.” *Jackson*, 102 Ohio St.3d 380, at ¶34 (citations omitted). Further, a court is permitted to consider laws concerning the same or similar subjects in order to discern legislative intent. R.C. 1.49(D). “Statutes relating to the same matter or subject * * * are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent.” *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶20, quoting *Weygandt*, 164 Ohio St. 463, at paragraph two of the syllabus.

{¶27} The 1973 Legislative Service Commission comment to 1972 Am. Sub. H.B. No. 511, which enacted R.C. 2909.04, discloses that the General Assembly intended the offense of disrupting public services to include:

[A]ny substantial interference with utility or emergency services, including mass communications, public service communications, navigational aids, transportation, water supply, gas, power, and other utility services.

The section also includes serious interference with police, firemen, or rescue personnel in answering an emergency call or protecting life, limb, or liberty. Examples of violations include cutting fire hoses, pouring water into fire hydrants in freezing weather, deflating the tires of emergency vehicles, or forming a human cordon around a fire for the purpose of keeping firemen out.

Summary of Am. Sub. H.B. 511: The New Ohio Criminal Code (1973) p. 20.

{¶28} Additionally, the 1971 final report of the Technical Committee to Study Ohio Criminal Laws and Procedures reveals that:

The Technical Committee intends that the term ‘public’ include not only utility services provided to the public as a whole but any sizable segment of the public. Thus, in addition to including property belonging to telephone, telegraph, gas, electric, public transit, water, or sewage companies which provide utility service to the public as a whole, other utility services such as school bus transportation are included.

Proposed Ohio Criminal Code by the Ohio Legislative Service Commission, Final Report of the Technical Committee (March 1971) p. 130.

{¶29} Thus, it is clear that private telephones and cell phones were not intended to be covered by R.C. 2909.04, although several appellate districts have upheld convictions for disrupting public services under R.C. 2909.04(A)(1) and 2909.04(A)(3) where the defendant destroyed a private telephone. See *State v. Yoakum*, 5th Dist. No. 01CA005, 2002-Ohio-249; *State v. Thomas*, 2d Dist. No. 19435, 2003-Ohio-5746; *State v. Johnson*, 8th Dist. Nos. 81692 & 81693, 2003-Ohio-3241; *State v. Brown* (1994), 97 Ohio App.3d 293.

{¶30} We respectfully disagree with the decisions of the Second, Fifth, and Eighth appellate districts, which found that destruction of a private telephone constitutes disruption of public services. The comments of the Technical Committee explain that public services include services provided to “the public as a whole” and “any sizeable segment of the public.” Additionally, the examples

provided in the comments include cutting fire hoses, pouring water into fire hydrants in freezing weather, deflating emergency vehicle tires, or forming a human cordon around a fire to keep firefighters out. Further, subsections (A)(1) and (A)(2) of R.C. 2909.04 refer to “mass communications,” “public service communications,” “utility service to the public,” and “public transportation.” Based on the legislative history of R.C. 2909.04 and the reading of its subsections in pari materia, we find that the General Assembly intended the offense of disrupting public services to prohibit serious interference with public emergency systems and utilities, not destruction of a single, private telephone or cell phone.

{¶31} Moreover, even if destruction of a cell phone constituted disruption of public services, the State failed to prove the element of substantial impairment.

{¶32} Robinson contends that the State failed to prove beyond a reasonable doubt the element of “substantial impairment.” R.C. 2909.04(A)(3) requires that the offender “substantially impair” the ability of the emergency or law enforcement personnel to respond to an emergency or protect an individual from serious physical harm.

{¶33} Here, both 9-1-1 dispatchers testified that they dispatched emergency services after they received Antonio’s first 9-1-1 phone call. Additionally, although the dispatcher did not receive a specific apartment number, testimony was heard that the officers arrived at the scene of the assault within

minutes of being dispatched. Thus, destruction of the cell phone did not substantially impair the ability of emergency service providers to respond to the incident. Therefore, even if destruction of a cell phone was a violation of R.C. 2909.04(A)(3), the State failed to prove substantial impairment beyond a reasonable doubt.

{¶34} Because R.C. 2909.04(A)(3) does not prohibit destruction of a private telephone or cell phone and because the State failed to prove substantial impairment beyond a reasonable doubt, we find that Robinson's conviction for disrupting public services was not supported by sufficient evidence. Accordingly, we need not address Robinson's manifest weight argument on this count of the conviction.

Intimidation of a Victim

{¶35} Robinson was convicted of intimidation of a victim under R.C. 2921.04(B), which provides that:

No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness.

Accordingly, the issue here is whether Robinson attempted to influence, intimidated, or hindered Antonio in the filing or prosecution of criminal charges.

{¶36} Here, Robinson first contends that there is insufficient evidence supporting his conviction for intimidation of a victim. However, testimony was heard that Robinson told Antonio after their initial altercation and after Antonio called 9-1-1 that if any of those present called the police, he would shoot them. This Court and other courts have previously found that such conduct may constitute intimidation of a victim.² See *State v. Sessler*, 3d Dist. No. 3-06-23, 2007-Ohio-4931; *State v. Malone*, 3d Dist. No. 9-06-43, 2007-Ohio-5484; *State v. Ball*, 6th Dist. No. E-02-024, 2004-Ohio-2586; *State v. Hunt*, 9th Dist. No. 21515, 2003-Ohio-6120. We are bound by precedent and therefore find that Robinson's intimidation conviction is supported by sufficient evidence.

{¶37} Next, Robinson contends that his intimidation conviction is against the manifest weight of the evidence. As stated above, Hoge testified that Robinson told Antonio after their initial altercation and after Antonio called 9-1-1 that if any of those present called the police, he would shoot them. Although Robinson testified that he did not threaten or prevent Antonio from calling 9-1-1, it is clear that the jury found Hoge's testimony to be more credible. Based on our review of the record, we cannot say that the jury clearly lost its way. Thus, we

² We note that R.C. 2921.04 does not define "filing or prosecution." This author questions whether conduct intended to deter a victim from *reporting* criminal conduct meets this requirement. See R.C. 2901.04(A). A *filing* usually denotes some type of formal or official action, and as used in this statute, *prosecution* would appear to mean proceedings subsequent to the filing of formal charges.

find that Robinson's intimidation conviction was not against the weight of the evidence.

{¶38} Accordingly, we sustain Robinson's assignment of error as it pertains to his disruption of public services argument and overrule his assignment of error as it pertains to his intimidation of a victim argument.

{¶39} Having found error prejudicial to the appellant herein, in the particulars assigned and argued as to his disruption of public services conviction, but having found no error prejudicial to the appellant herein, in the particulars assigned and argued as to his intimidation of a victim conviction, we affirm in part, reverse in part, and remand this cause for further proceedings consistent with this opinion.

*Judgment Affirmed in Part,
Reversed in Part, and
Cause Remanded.*

PRESTON, J., concurs.
WILLAMOWSKI, J., concurs separately.

{¶40} **WILLAMOWSKI, J., concurring separately.** In considering whether the state presented sufficient evidence to convict Robinson of disrupting public services in violation of R.C. 2909.04(A)(3), I agree with the majority's analysis insofar as it concludes that the state failed to prove the element of

Case Number 14-07-20

substantial impairment.³ In my opinion, such conclusion renders moot the issue of whether the destruction of a private cell phone constitutes disruption of a public service. I concur in the remainder of the opinion.

r

³ Had Appellant been indicted under R.C. 2909.04(A)(1), the element of substantial impairment would not apply.

2002 Ohio 249; 2002 Ohio App. LEXIS 133, *

STATE OF OHIO, Plaintiff-Appellee -vs- CARL YOAKUM, Defendant-Appellant

Case No. 01CA005

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, HOLMES COUNTY

2002 Ohio 249; 2002 Ohio App. LEXIS 133

January 17, 2002, Date of Judgment Entry

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDING: Criminal Appeal from Holmes County Court of Common Pleas. Case 2000CR036.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant was convicted, in a bench trial, of one count of disrupting public services, in violation of Ohio Rev. Code Ann. § 2909.04(A)(1). Following the entry of judgment by the Holmes County Court of Common Pleas, defendant appealed.

OVERVIEW: Defendant got into a verbal altercation, and his son indicated he was going to call 9-1-1. Defendant threatened to beat his son, and defendant ended up taking the cordless phone and throwing it against the house, breaking it. Defendant argued the evidence was insufficient to sustain his conviction for interrupting or impairing telephone or other public communications, and was insufficient to show the cordless phone was being used for public service or emergency communications at the time it was disabled. He asserted a private phone was not a part of a "public service" or "telephone service." In rejecting this argument, the appellate court found that while the phone itself may have been private property, the phone was connected to outside public telephone lines, and was part of a public service or telephone service. The appellate court found that any rational trier of fact could have found beyond a reasonable doubt that defendant disrupted public services, in violation of Ohio Rev. Code Ann. § 2904.04(A)(1).

OUTCOME: The judgment was affirmed.

CORE TERMS: telephone, public services, cordless, telephone service, disrupting, emergency, judgment of acquittal, headset, inside, phone, telephone lines, telephone calls, assignment of error, indictment, disabling, disabled, cradle, felony, radio, domestic violence, failed to prove, essential elements, standard of review, rational trier of fact, reasonable doubt, sub judice, disconnected, proceeded, purposely, knowingly

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HN1 See Ohio R. Crim. P. 29(A).

[Criminal Law & Procedure > Trials > Motions for Acquittal](#)

[Criminal Law & Procedure > Appeals > Standards of Review > General Overview](#)

HN2 The standard of review under Ohio R. Crim. P. 29(A) is sufficiency of the evidence. The relevant inquiry on appellate review on the issue of sufficiency is whether, after reviewing 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. [More Like This Headnote](#)

[Criminal Law & Procedure > Criminal Offenses > Property Crimes > Destruction of Property > General Overview](#)

HN3 See Ohio Rev. Code Ann. § 2909.04(A)(1).

COUNSEL: For Plaintiff-Appellee: JEFFREY MULLEN, Asst. County Prosecutor, Millersburg, OH.

For Defendant-Appellant: JEFFREY G. KELLOGG, Millersburg, OH.

JUDGES: Hon. Julie Edwards, P.J., Hon. W. Scott Gwin, J., Hon. John Boggins, J. Edwards, P.J. Gwin, J. and Boggins, J. concur.

OPINION BY: Julie Edwards

OPINION

Edwards, P. J.

Defendant-appellant Carl Yoakum appeals his conviction and sentence from the Holmes County Court of Common Pleas on one count of disrupting public services in violation of R.C. 2909.04(A)(1). Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

The facts, as stipulated to by the parties, are as follows: On October 16, 2000, appellant went to the home of Lou Ann Ash to discuss their relationship. Appellant and Lou Ann Ash have been exclusive paramours for nearly seven years and have two children, Kyle Yoakum, age 7, and Nicholas Yoakum, age 2. Appellant arrived at the house on 10361 CR 320, Millersburg, Ohio, at approximately 4:30 P.M. to find Lou Ann in the car with the couple's children. After appellant pulled [*2] his truck behind Lou Ann's, Lou Ann got out of the vehicle and took her children in the house. Appellant followed them into the house. Once inside, a verbal altercation ensued. After several minutes, the couple's son indicated that he was going to call 9-1-1. Appellant, after telling his son that he would "beat his butt", then took the cordless phone headset from its cradle. The argument again moved outdoors where Lou Ann proceeded to load the kids into the car again. At this point, appellant grabbed Lou Ann's purse and emptied its contents, throwing the purse in a nearby field. After appellant threw the cordless phone at the house, the headset struck the house, dislodging the battery and disabling the phone. Lou Ann proceeded to her mother's house a short distance down the road and 9-1-1 was called by her mother. Subsequently, appellant was arrested and charged with domestic violence, a felony of the fifth degree due to a prior domestic violence conviction, and disrupting public services, a felony of the fourth degree. Thereafter, on November 9, 2000, the Holmes County Grand Jury indicted appellant on one count of disrupting public services in violation of R.C. 2909.04(A)(1), [*3] a felony of the fourth degree. The indictment specifically alleged that appellant "did purposely by any means or knowingly by damaging or tampering with any property, interrupt or impair telephone service being used for public service or emergency communications,..." At his arraignment on November 15, 2000, appellant entered a plea of not guilty to the charge contained in the indictment. After a written "Waiver of Right to Trial by Jury" signed by appellant was filed on February 16, 2001, a bench trial was held on February 27, 2001. At the close of the State's case, appellant made a motion for a Crim.R. 29 acquittal on the basis that appellee failed to prove that the telephone and headset were "public services" as defined in R.C. 2909.04(A)(1) and that the telephone was being used for public service or emergency communications at the time that it was broken. The trial court, after denying appellant's motion, found appellant guilty of one count of disrupting public services in violation of R.C. 2909.04(A)(1). As memorialized in a Judgment Entry filed on March 27, 2001, appellant was sentenced to eight months in prison and ordered [*4] to pay a fine in the amount of \$ 1,500.00. It is from the trial court's March 27, 2001, Judgment Entry that appellant now prosecutes his appeal, raising the following assignment of error:

THE TRIAL COURT ERRED AND THE APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT DENIED APPELLANT'S RULE 29 MOTION FOR ACQUITTAL AS THE STATE FAILED TO PROVE TWO ESSENTIAL ELEMENTS OF A VIOLATION OF 2909.04(A)(1).

I

Appellant, in his sole assignment of error, contends that the trial court erred in denying his Crim.R. 29 motion for judgment of acquittal. We disagree. Crim.R. 29(A) states as follows: ^{HN1} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

^{HN2} "The standard of review under Crim. R. 29(A) is sufficiency of the evidence. Our standard of review on the issue of sufficiency is established in State v. Jenks (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492, [*5] to which the court held as follows: "The relevant inquiry is whether, after reviewing 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. at paragraph 2 of the syllabus. Appellant in the case sub judice was convicted of disrupting public services in violation of R.C. 2909.04(A)(1). Such section states as follows: ^{HN3} "(A) No person, purposely by any means or knowingly by damaging or tampering with any property, shall do any of the following:

(1) Interrupt or impair television, radio, telephone, telegraph, or other mass communications service; police, fire, or other public service communications; radar, loran, radio, or other electronic aids to air or marine navigation or communications; or amateur or citizens band radio communications being used for public service or emergency communications;

Appellant specifically argues that his motion for judgment of acquittal should have been granted since appellee failed to present sufficient evidence (1) that disabling the cordless telephone headset disrupted a public service and (2) that the [*6] cordless telephone was being used for public service or emergency communications at the time it was disabled. Appellant does not dispute that the telephone in this matter was damaged. With respect to (1) above, appellant asserts that "a private phone connected to a telephone network is not part of a 'public service' or 'telephone service.'" We, however, do not concur. As is set forth in the statement of facts above, the telephone in question was a cordless telephone that rests in a cradle. While the cordless telephone and the wiring inside of the house may have been appellant's private property, the fact remains that the telephone, via a telephone jack, is connected to outside public telephone lines. Thus, without the inside telephone lines, there would be no access to public telephone service, which is defined as including "both the initiation and receipt of telephone calls". State v. Brown (1994), 97 Ohio App. 3d 293, 301, 646 N.E.2d 838. By disabling the telephone, not only could Lou Ann and her children no longer initiate or receive telephone calls at the house, but appellant also made it "impossible for any member of the public to initiate telephone contact" with them. [*7] Brown, supra., 97 Ohio App. 3d at 301. Applying appellant's argument, if a intruder were to cut inside telephone lines, the intruder would not be disrupting public services, since there would be no access to public telephone service. We find, therefore, that the cordless telephone in the case sub judice was part of a 'public service' or 'telephone service.' Appellant further maintains that the trial court erred in denying his motion for judgment of acquittal since there was insufficient evidence that the cordless telephone was being used for public service or emergency communications at the time that it was disabled. As is stated above, appellant grabbed the telephone from its cradle after his son indicated that he was going to call 9-1-1. We agree with the trial court, however, that appellee was not required to prove that an actual 9-1-1 emergency was in progress when the telephone was disabled after appellant threw it against the house. In Brown, 97 Ohio App. 3d 293, 646 N.E.2d 838, supra., for example, the defendant disconnected access to telephone service at the victim's apartment and prevented the making of a 9-1-1 telephone call to the police. The court in Brown upheld the defendant's conviction for violating [*8] R.C. 2909.04, finding that the trial court could properly conclude that the defendant disconnected the telephone service to prevent the making of a 911 call. Thus, in Brown, the 9-1-1 call was never initiated. See also State v. Norton, 1998 Ohio App. LEXIS 5872 (Dec. 11, 1998) Greene App. No. 97CA112, unreported in which the court upheld a defendant's conviction for disrupting public services in violation of R.C. 2909.04(A)(1). The defendant, in Norton, had told his victim that it would do no good to call the police since he had cut outside telephone wires. Based on the foregoing, we find that, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that appellant disrupted public services in violation of R.C. 2904.04 R. C. 2904.04(A)(1)(A)(1).

Appellant's sole assignment of error is, therefore, overruled. Accordingly, the judgment of the Holmes County Court of Common Pleas is affirmed.

By Edwards, P.J. Gwin, J. and Boggins, J. concur

2003 Ohio 5746, *; 2003 Ohio App. LEXIS 5109, **

STATE OF OHIO, Plaintiff-Appellee v. RENO S. THOMAS, Defendant-Appellant

C.A. Case No. 19435

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY

2003 Ohio 5746; 2003 Ohio App. LEXIS 5109

October 24, 2003, Decided

SUBSEQUENT HISTORY: Motion denied by State v. Thomas, 2004 Ohio LEXIS 924 (Ohio, Apr. 28, 2004)

PRIOR HISTORY: [**1] (Criminal Appeal from Common Pleas Court). T.C. Case No. 01-CR-1418.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Following a jury trial, the Court of Common Pleas (Ohio) convicted defendant of aggravated burglary, in violation of Ohio Rev. Code Ann. § 2911.11(A)(1), three counts of domestic violence, in violation of Ohio Rev. Code Ann. § 2919.25(A), abduction, in violation of Ohio Rev. Code Ann. § 2905.02(A)(1), and disrupting public services, in violation of Ohio Rev. Code Ann. § 2909.04(A)(1). Defendant appealed.

OVERVIEW: Defendant was charged with two counts of aggravated burglary, three counts of domestic violence, abduction, and disrupting public services after his girlfriend told police that he entered her apartment without permission, beat her, pointed a gun at her, told her he would kill her if she broke up with him, and disconnected a phone when she tried to call police. Defendant's girlfriend testified as a hostile witness and the State called a police officer who had extensive experience working on domestic violence cases to testify as an expert witness. A jury acquitted defendant of one of the aggravated burglary charges, but found him guilty of all other charges. The appellate court held that (1) the trial court did not abuse its discretion by allowing the officer to testify as an expert witness; (2) although a question the prosecutor asked the officer about the number of domestic violence cases in the United States was objectionable, defendant waived any error when he failed to object to the question; (3) the evidence was sufficient to sustain defendant's convictions; and (4) defendant was not denied effective assistance of counsel.

OUTCOME: The trial court's judgment was affirmed.

CORE TERMS: domestic violence, firearm, prosecutor's, specification, prejudicial, closing argument, public service, operable, phone, rape, gun, ineffective, credibility, apartment, probative, telephone, training, offender, abuser, impeachment, guilt, kill, expert witness, expert testimony, evidence to support, citation omitted, admissibility, convicted, manifest, recant

LEXISNEXIS® HEADNOTES

Hide

[Evidence > Relevance > Confusion, Prejudice & Waste of Time](#)

[Evidence > Testimony > Experts > Admissibility](#)

[Evidence > Testimony > Experts > Helpfulness](#)

HN1 In determining the admissibility of an expert witness's testimony, a court must consider whether that witness will aid the trier of fact in search of the truth. Relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The admissibility of evidence is a matter committed to the sound discretion of the trial court. Thus, the judgment of the trial court will not be disturbed absent an abuse of discretion. [More Like This Headnote](#)

[Evidence > Testimony > Experts > General Overview](#)

HN2 See Ohio R. Evid. 702.

[Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Domestic Offenses > General Overview](#)

HN3 Although the average person may be aware of the existence of domestic violence, it does not follow that the average person would have a detailed understanding of the inner-workings of an abusive relationship, notwithstanding some awareness of domestic violence in our society. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Crimes Against Persons](#) > [Domestic Offenses](#) > [General Overview](#)

[Evidence](#) > [Testimony](#) > [Experts](#) > [Criminal Trials](#)

HN4 The fact that a person has not previously testified as an expert does not disqualify him or her as an expert witness. All expert witnesses presumably have a first time testifying as an expert. If a witness cannot qualify as an expert without prior experience testifying as an expert, there can never be expert witnesses. As with any expert witness, that witness must at some point in time be qualified for the first time as an expert in a certain field. The fact that the witness may have limited opportunities to testify before a court of law does not limit his knowledge of the subject in any manner. Also, the fact that the witness neither met a victim nor read the case file has no bearing on his or her ability to testify regarding the dynamics of domestic abuse. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Crimes Against Persons](#) > [Domestic Offenses](#) > [General Overview](#)

[Evidence](#) > [Testimony](#) > [Experts](#) > [Criminal Trials](#)

HN5 Testimony regarding the behavioral characteristics of victims of abuse is permissible. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Trials](#) > [Burdens of Proof](#) > [Prosecution](#)

[Criminal Law & Procedure](#) > [Scienter](#) > [Purpose](#)

HN6 A person is not guilty of a criminal offense unless: (1) the person's liability is based on his own conduct; and (2) the person had the required degree of culpability for each element of the offense for which one is required by statute. [Ohio Rev. Code Ann. § 2901.22\(A\)](#). When a defendant acts alone, the jury's considerations are limited to the defendant's own alleged acts or omissions. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Trials](#) > [Examination of Witnesses](#) > [Child Witnesses](#)

[Evidence](#) > [Testimony](#) > [Experts](#) > [Criminal Trials](#)

[Family Law](#) > [Family Protection & Welfare](#) > [Children](#) > [Abuse, Endangerment & Neglect](#)

HN7 In its Dyson decision, the Court of Appeals of Ohio approved the use of expert testimony about the behavioral characteristics of victims of domestic violence to explain why they sometimes recant their prior accusations against their abusers. Use of that evidence is proper for impeachment. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Evidence](#) > [Testimony](#) > [Credibility](#) > [One's Own Witnesses](#) > [Application](#) > [Surprise](#)

[Evidence](#) > [Testimony](#) > [Credibility](#) > [Rehabilitation](#)

[Evidence](#) > [Testimony](#) > [Experts](#) > [Credibility](#) > [Impeachment](#)

HN8 [Ohio R. Evid. 607\(A\)](#) limits a party's impeachment of its own witnesses to cases of surprise and affirmative damage. That qualification does not apply where a victim is called to testify as the court's witness. When a victim is called to testify as the court's witness in a domestic violence case, the State is free to impeach her testimony, and to bolster its impeachment with an expert's opinion relating to the reasons why domestic violence victims sometimes recant their prior truthful statements. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Substantial Evidence](#) > [General Overview](#)

[Evidence](#) > [Procedural Considerations](#) > [Exclusion & Preservation by Prosecutor](#)

[Evidence](#) > [Procedural Considerations](#) > [Weight & Sufficiency](#)

HN9 A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Weapons](#) > [Definitions](#)

[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Weapons](#) > [Possession](#) > [Elements](#)

[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Weapons](#) > [Use](#) > [Commission of Another Crime](#) > [Elements](#)

HN10 A firearm specification is proven when it is established that an offender had a firearm on or about his person or under his control while committing the offense and displayed the firearm, brandished the firearm, indicated that he possessed the firearm, or used it to facilitate the offense. [Ohio Rev. Code Ann. § 2941.145\(A\)](#). "Firearm" is defined as any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. [Ohio Rev. Code Ann. § 2923.11\(B\)](#). "Firearm" includes an unloaded firearm, and any firearm which is inoperable but which can readily be rendered operable. [More Like This Headnote](#)

[Commercial Law \(UCC\)](#) > [Negotiable Instruments \(Article 3\)](#) > [General Overview](#)

[Criminal Law & Procedure > Trials > Examination of Witnesses > General Overview](#)

[Criminal Law & Procedure > Sentencing > Guidelines > Adjustments & Enhancements > General Overview](#)

HN11 To enhance a sentence pursuant to a firearm specification statute, the State must present evidence that a firearm existed and was operable at the time of the offense. However, such proof can be established beyond a reasonable doubt by the testimony of lay witnesses who were in a position to observe the instrument and the circumstances surrounding the crime. This evidentiary standard was broadened by the Ohio Supreme Court's holding that, in determining whether an individual was in possession of a firearm and whether the firearm was operable or capable of being readily rendered operable at the time of the offense, the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm. Therefore, the existence and operability of a firearm may be proved by threats, explicit or implicit, made by the person in control of the firearm. [More Like This Headnote](#)

[Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview](#)

[Criminal Law & Procedure > Witnesses > Credibility](#)

[Evidence > Hearsay > Exceptions > Spontaneous Statements > General Overview](#)

HN12 It is within the province of the jury to decide issues of credibility of testimony, including the proper weight to assign to conflicting evidence. [More Like This Headnote](#)

[Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview](#)

[Evidence > Procedural Considerations > Weight & Sufficiency](#)

HN13 In reviewing a judgment to determine whether it is against the manifest weight of the evidence, an appellate court sits as a 13th juror, reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. [More Like This Headnote](#)

[Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > General Overview](#)

HN14 See [Ohio Rev. Code Ann. § 2911.11\(A\)](#).

[Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview](#)

HN15 See [Ohio Rev. Code Ann. § 2909.04](#).

[Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview](#)

[Criminal Law & Procedure > Criminal Offenses > Property Crimes > Destruction of Property > Elements](#)

HN16 [Ohio Rev. Code Ann. § 2909.04](#) prohibits purposefully or knowingly damaging or tampering with property that interrupts or impairs telephone service. Telephone service includes the initiation of telephone calls. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure > Counsel > Effective Assistance > Tests](#)

HN17 The Court of Appeals of Ohio evaluates ineffective assistance of counsel arguments in light of the two-prong analysis set forth by the United States Supreme Court in its Strickland decision. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors created a reasonable probability that, but for the errors, the result of the trial would have been different. Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. [More Like This Headnote](#)

[Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements](#)

[Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Tests](#)

[Legal Ethics > Prosecutorial Conduct](#)

HN18 In analyzing claims of prosecutorial misconduct, the test is whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. The touchstone of analysis is the fairness of the trial, not the culpability of the prosecutor. The Court of Appeals of Ohio views the State's closing argument in its entirety to determine whether allegedly improper remarks were prejudicial. [More Like This Headnote](#)

[Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Domestic Offenses > General Overview](#)

[Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > General Overview](#)

HN19 Both rape and domestic violence involve the exertion of power and control over another person, and just as no one is obligated to submit to unwanted sexual conduct, no one has an obligation to submit to the unwanted controlling behavior of an abuser. [More Like This Headnote](#)

COUNSEL: MATHIAS H. HECK, JR., Prosecuting Attorney, By: R. LYNN NOTHSTINE, Assistant Prosecuting Attorney, Dayton, Ohio, Attorneys for Plaintiff-Appellee.

J. ALLEN WILMES, Dayton, Ohio, Attorney for Defendant-Appellant.

JUDGES: FAIN, P.J. WOLFF and GRADY, JJ., concurs.

OPINION BY: FAIN

OPINION

FAIN, P.J.

[*P1] Defendant-appellant Reno S. Thomas appeals from his conviction and sentence for Aggravated Burglary, Domestic Violence, Abduction and Disrupting Public Services. He contends that the trial court erred by admitting expert testimony on the subject of domestic violence. Thomas also contends that the trial court's finding that he was in possession of an operable firearm, a specification to the offense of Aggravated Burglary of which he was convicted, is not supported by sufficient, credible evidence. He further contends that the record demonstrates that his convictions for Aggravated Burglary and Disruption of Public Services are against the manifest weight of the evidence. Finally, Thomas claims that his trial counsel was ineffective.

[*P2] We conclude that the trial court did not abuse its discretion **[**2]** in admitting expert testimony or in concluding that any unfair prejudicial impact of this testimony outweighed its probative value. We further conclude that there is sufficient evidence in the record to support the trial court's finding that Thomas was in possession of an operable firearm. The convictions are supported by the evidence, and we find no merit to the claim of ineffective assistance of counsel. Accordingly, the judgment of the trial court is affirmed.

I

[*P3] The State presented evidence that Tiffany Peterson and Thomas were involved in a romantic relationship from the time Peterson was fifteen years old. In April, 2001, Peterson decided to end her relationship with Thomas. As a result of Peterson's attempt to sever her ties with Thomas, Thomas became violent. On April 28, 2001 and June 15, 2001, he went to Peterson's apartment and assaulted her. During the incident on June 15, Thomas pointed a gun at Tiffany and threatened to kill her if she broke up with him. On June 3, 2001, Thomas observed Tiffany at a gas station talking to another man. Thomas forced Peterson into his car, drove her to his sister's residence, and assaulted her.

[*P4] Thomas was indicted **[**3]** by the Montgomery County Grand Jury on two counts of Aggravated Burglary, in violation of R.C. 2911.11(A)(1), three counts of Domestic Violence, in violation of R.C. 2919.25(A), one count of Abduction, in violation of R.C. 2905.02(A)(1), and one count of Disrupting Public Services, in violation of R.C. 2909.04(A)(1). One count of Aggravated Burglary, as charged in Count Five of the indictment, was accompanied by a firearm specification.

[*P5] At trial, the State called Peterson as a hostile witness. During the course of her testimony, Peterson repeatedly indicated that she did not want to testify. She also characterized the three incidents as mere disagreements between her and Thomas, which caused her to "try to get him in trouble" by getting the police involved. She testified that she had exaggerated or made up the facts contained in each of her written police statements. However, she did admit to writing the statements, and she did admit that she and Thomas were involved in altercations on the dates in question.

[*P6] The State called Margene Robinson as an expert witness **[**4]** on the topic of domestic violence. Robinson is retired from the Dayton Police Department, where she served as an officer for twenty-five years. She first became involved with the issue of domestic violence in the 1970's, before domestic violence was recognized as a distinct type of crime. Since 1983, she has been involved in training officers in domestic violence issues and writing department policies for handling domestic violence cases. She also has attended state, national and international programs on the subject.

[*P7] During the last three years of her employment, Robinson was promoted to Lieutenant, in charge of the Dayton Police Department's Domestic Violence Unit, during which time the unit handled approximately ten thousand cases involving domestic violence. Robinson was personally involved with about one-half of those cases.

[*P8] Robinson is a certified instructor with the Ohio Police Officers Training Academy in London, Ohio, and has a permanent teaching certificate for domestic violence training. She teaches police officers, judges and prosecutors throughout the State of Ohio. She had, at the time of Thomas's trial, just recently trained thirty police agencies **[**5]** in Montgomery County.

[*P9] Robinson served on the Montgomery County Domestic Violence Task Force, as well as on a State committee

writing grants for domestic violence programs. She was "the driving force" behind the writing of the City of Dayton Domestic Violence Protocol regarding the proper procedure for police officer responses to domestic violence. Robinson also served on the Board of Directors, as well as a volunteer, for the Artemis Center, which is a local agency that assists domestic violence victims.

[*P10] During trial, Robinson testified that many people do not tend to believe women who claim to be battered, because they do not understand the phenomenon of domestic violence. She also testified to the vast number of domestic violence incidents: 3,500 in Dayton alone. She testified to the factors leading to abuse, and showed how abusers control their victims through intimidation, economic abuse, isolation, and the use of children as pawns.

[*P11] Robinson also testified that in her experience, many victims recant. She also testified that many victims tend to minimize the abuse. She testified that in as many as eighty-five percent of the cases she handled, **[**6]** the victims recanted. She testified that this is due to a number of factors, including the relationship getting back on track, the fact that it is dangerous for women to testify regarding their abusers, and that many abusers tend to "behave" between the time of the abuse and the time of trial.

[*P12] Robinson testified that a battered woman is seventy-five percent more likely to die trying to leave an abusive relationship than by staying. She testified that many victims blame themselves for the abuse and tend to hope that the situation will improve. She testified that many victims stay in the relationship because the abuser subjects them to fear, isolation, economic abuse, and threats of homicide or suicide.

[*P13] Robinson also testified that she did not meet or interview Peterson, and that she had not read the police reports on this case. Finally, she testified that she had never testified in court as an expert before testifying in this case.

[*P14] Thomas was convicted on all charges except for the Aggravated Burglary charge set forth in Count I of the indictment, which did not carry a firearm specification. He was sentenced accordingly. From his conviction and **[**7]** sentence, Thomas appeals.

II

[*P15] Thomas's First Assignment of Error states as follows:

[*P16] "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR PERMITTING 'EXPERT WITNESS' TESTIMONY ON THE CREDIBILITY OF COMPLAINANT'S TESTIMONY."

[*P17] Thomas contends that the trial court should not have permitted the State to present Margene Robinson as an expert on the subject of domestic violence. He claims that if she had not testified, he would not have been convicted of Aggravated Burglary. In support, he argues that Robinson's testimony did not meet the requirements of Evid.R. 702, and was more prejudicial than probative. Though not specifically argued, the wording of the Assignment of Error indicates that Thomas also believes that Robinson's testimony improperly commented upon the credibility of Peterson as the complainant.

[*P18] ^{HN1}"In determining the admissibility of an expert witness's testimony, a court must consider whether that witness will aid the trier of fact in search of the truth." *State v. Dyson* (Oct. 27, 2000), *Champaign App. No. 2000CA2*, 2000 Ohio App. LEXIS 4968, citation omitted. "Relevant evidence is not admissible if its probative value is substantially outweighed by the **[**8]** danger of unfair prejudice, confusion of the issues, or of misleading the jury." *Id.*, citation omitted. We are mindful that when reviewing rulings concerning the admissibility of expert testimony, the admissibility of the evidence is a matter committed to the sound discretion of the trial court. *State v. Samuels*, 2003 WL 21291047, 2003 Ohio 2865, P23. Thus, the judgment of the trial court will not be disturbed absent an abuse of discretion. *Id.*

[*P19] Evid.R. 702, which governs the admissibility of expert testimony, states that:

[*P20] ^{HN2}"A witness may testify as an expert if all of the following apply:

[*P21] "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

[*P22] "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

[*P23] "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information ***."

[*P24] Thomas first raises the argument that he would not have been convicted **[**9]** of Aggravated Burglary, with a gun specification, if Robinson had not testified. He bases this upon his claim that he was willing to concede his guilt on the domestic violence charge, thereby rendering Robinson's testimony unnecessary, and that Peterson's testimony alone would have been insufficient to support the Aggravated Burglary conviction.

[*P25] We disagree. As noted later in this opinion, we conclude that even without Robinson's testimony, the State presented sufficient evidence to support the conviction. Furthermore, the State was not required to accept Thomas's concession that he was guilty of domestic violence charges; to the contrary, the State had both the right and the duty to present evidence on every element of each charge, upon which it bore the burden of proof. Robinson did not comment on the Aggravated Burglary charge, and did not even intimate that offenses like Aggravated Burglary are a natural consequence of, or evolution from, domestic violence.

[*P26] Thomas next contends that Robinson's testimony does not meet the requirement that her testimony relate to matters beyond the knowledge or experience of lay persons, because most adults are familiar **[**10]** with domestic violence. We have addressed this issue, and stated that ^{HN3} "although the average person may be aware of the existence of domestic violence, it does not follow that the average person would "have a detailed understanding of the inner-workings of an abusive relationship, notwithstanding some awareness of domestic violence in our society." *Dyson*, supra.

[*P27] Thomas next contends that Robinson was not qualified as an expert, because her experience is "questionable," and because she had never testified as an expert in any previous cases, had never met Peterson, and was not familiar with the circumstances of this case. We find nothing "questionable" about Robinson's qualifications; we conclude that the trial court did not err in designating her as expert. The record indicates that she has vast experience from both working and training in the field. ^{HN4} "The fact that Robinson had not previously testified as an expert does not disqualify her as an expert witness. All expert witnesses presumably have a first time testifying as an expert. If a witness cannot qualify as an expert without prior experience testifying as an expert, there can never be expert witnesses. "As with **[**11]** any expert witness, that witness must at some point in time be qualified for the first time as an expert in a certain field. The fact that the witness may have limited opportunities to testify before a court of law does not limit his knowledge of the subject in any manner." *State v. Moulder*, Cuyahoga App. No. 80266, 2002 Ohio 5327, P65. Also, the fact that Robinson neither met Peterson nor read the case file has no bearing on her ability to testify regarding the dynamics of abuse. Pursuant to our discussion in *Dyson*, supra, and our review of Robinson's experience and training, as set forth in the record, we find this argument to be without merit.

[*P28] Thomas also argues that Robinson's testimony was not based upon reliable scientific, technical or other specialized information. Based upon our review of Robinson's qualifications and her work history, we find that the trial court did not abuse its discretion in determining that her testimony was based upon specialized information.

[*P29] We next turn to the claim that Robinson's testimony was more prejudicial than probative. We conclude that Robinson's testimony was relevant to show the dynamics **[**12]** of abusive relationships, and to explain why a victim might recant her accusation, or be uncooperative with the authorities. We have held that ^{HN5} "testimony regarding the behavioral characteristics of victims of abuse is permissible. *Dyson*, supra 2000 Ohio App. LEXIS 4968, at *5.

[*P30] Thomas argues that Robinson's testimony was more prejudicial than probative, to the extent that Robinson cited certain statistics concerning domestic violence. Robinson testified that "four women die every day ... by the hands of a spouse or a mate," that "just in the City of Dayton, alone ... there's anywhere between ... thirty-two hundred and thirty-five hundred cases" each year, and that "nationwide ... six million women are battered every year," at least "the ones that we know about." (T. 390).

[*P31] ^{HN6} "A person is not guilty of a criminal offense unless: (1) the person's liability is based on his own conduct; and (2) the person had the required degree of culpability for each element of the offense for which one is required by statute. R.C. 2901.22(A). When a defendant acts alone, as happened here, the jury's considerations are limited to the defendant's own alleged acts or omissions.

[13]** **[*P32]** The statistics to which Robinson testified are irrelevant to whether Thomas could be found guilty of Domestic Violence, Burglary, or both. Nevertheless, they have the capacity to persuade a jury to convict him on the view that a conviction is appropriate to address the larger problem of domestic violence. This evidence was, as Thomas argues, more prejudicial than it was probative of his guilt or innocence.

[*P33] Robinson's testimony concerning these statistics was in direct response to the following question the prosecutor posed: "Can you provide us with any information or numbers of incidents that occur with respect to domestic violence a year in the United States?" (T. 390). It seems clear from the question that the witness came prepared to provide the information, and that the prosecutor knew it.

[*P34] The question, like Robinson's response, was objectionable because the statistical facts it sought to elicit are irrelevant to Thomas's guilt or innocence. There was no objection to either, however. Therefore, any error in the court's admission of that evidence is waived. Plain error is not shown.

[*P35] We make these observations out of a concern that **[**14]** our holding in *State v. Dyson* (October 27, 2000), Champaign App. No. 2000CA2, 2000 Ohio App. LEXIS 4968, may be read too broadly as permitting statistical evidence of this kind. ^{HN7} "In *Dyson*, we approved the use of expert testimony about the "behavioral characteristics" of victims of domestic violence to explain why they sometimes recant their prior accusations against their abusers.

We relied upon *State v. Stowers* (1998), 81 Ohio St.3d 260, 1998 Ohio 632, 690 N.E.2d 881, which made the same point about the testimony of victims of violence against children. We approve the use of that evidence here, for the same purpose, because it is proper for impeachment.

[*P36] The State was able to use Robinson's testimony to bolster its impeachment of the victim's trial testimony, and it was able to impeach the victim's testimony without running afoul of Evid.R. 607(A). ^{HN8} That rule limits a party's impeachment of its own witness to cases of surprise and affirmative damage. That qualification doesn't apply here, because the victim was called to testify as the court's own witness, not the State's. The State was therefore free to impeach her testimony, and to bolster its impeachment with Robinson's expert opinion **[**15]** evidence relating to the reasons why domestic violence victims sometimes recant their prior truthful statements.

[*P37] The inquiry we approved in *Dyson* relates to the victim's credibility, or lack of it, when proper for that purpose. The expert's opinion or the basis for it will necessarily involve categorical references. However, the broad and general statistical information the State elicited from its expert in this case is not proper impeachment, and it is objectionable as irrelevant and prejudicial. *Dyson* does not authorize its use. The State would do well to avoid that line of inquiry in future cases.

[*P38] Finally, although not specifically argued, Thomas implies that Robinson commented on the credibility of Peterson's testimony. Robinson indicated to the jury that she had never met Peterson, nor reviewed her case file, and that she was simply providing information about domestic violence in general. She did not offer an opinion on Peterson's personal credibility, or as to Thomas's guilt or innocence.

[*P39] We conclude that the trial court did not abuse its discretion by designating Robinson as an expert or by permitting her to testify. Therefore, **[**16]** the First Assignment of Error is overruled.

III

[*P40] The Second Assignment of Error is as follows:

[*P41] "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ENTERING A FINDING THAT APPELLANT WAS IN POSSESSION OF AN OPERABLE FIREARM IN COMMITTING AN AGGRAVATED BURGLARY WHICH FINDING IS CONTRARY TO LAW."

[*P42] Thomas contends that the State did not present sufficient evidence to support a conviction for Aggravated Burglary with a firearm specification because there was insufficient evidence to support a finding that he possessed an operable firearm. Specifically, he argues that Peterson was the only witness to the incident, and that her testimony indicated she was "sure it didn't work." He also notes that Peterson indicated that she was not scared because he was "really tryin' to kill hisself [sic]." In fact, at one point Peterson even testified that she did not recall whether Thomas even had a gun.

[*P43] ^{HN9} A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 1997 Ohio 52 **[**17]** . The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492:

[*P44] "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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.*, at paragraph two of the syllabus.

[*P45] ^{HN10} A firearm specification is proven when it is established that the " * * * offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense * * * ." R.C. 2941.145(A). "Firearm" is defined as " * * * any deadly weapon capable of expelling **[**18]** or propelling one or more projectiles by the action of an explosive or combustible propellant. R.C. 2923.11(B). 'Firearm' includes an unloaded firearm, and any firearm which is inoperable but which can readily be rendered operable." *Id.*

[*P46] ^{HN11} To enhance a sentence pursuant to a firearm specification statute, the state must present evidence that a firearm existed and was operable at the time of the offense. *State v. Murphy* (1990), 49 Ohio St.3d 206, 551 N.E.2d 932, syllabus. "However, such proof can be established beyond a reasonable doubt by the testimony of lay witnesses who were in a position to observe the instrument and the circumstances surrounding the crime." *Id.* This evidentiary standard was broadened by the Ohio Supreme Court's holding that, "in determining whether an individual was in possession of a firearm and whether the firearm was operable or capable of being readily rendered operable at the time of the offense, the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm." *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541, 1997 Ohio 52 **[**19]** , at paragraph one of the syllabus. Therefore, the existence and operability of a firearm may be proved by threats, explicit or implicit, made by the person in control of the

firearm.

[*P47] The State presented the testimony of Deputy Kenneth Miller of the Montgomery County Sheriff's Office, who was dispatched to Peterson's apartment on the morning of June 15, 2001. Miller testified that when he arrived, Peterson was "very upset," "crying" and "almost hysterical." He further testified that while she was upset, Peterson informed him that she had been asleep, when she was awakened by Thomas. He testified that Peterson stated that she did not know how Thomas got into her apartment. He testified that Peterson stated that she told Thomas to leave and that when she tried to telephone the police, he pulled the phone from the wall. Peterson also told Miller that Thomas put a pillow over her face and beat her. She stated that she attempted to leave, but that Thomas pulled her back, threw her to the floor, put the pillow back over her face and proceeded to beat her again. Miller testified that Peterson told him that Thomas then removed the pillow, pointed a gun at her face and stated **[**20]** that he was going to kill her. Miller stated that Peterson appeared very upset over the gun. Miller testified that Peterson had injuries to her body, and that the phone had been ripped from the wall.

[*P48] Peterson admitted to calling the police from a phone booth, and to writing a police statement in which she stated that Thomas had pulled the phone from the wall, put a pillow on her face, beat her and pointed a gun at her while stating that if she tried to "leave him he would kill [her]." However, Peterson was emphatic in her claims that she did not want to testify against Thomas, that she had called the police and written the statement because she was mad and wanted to get Thomas into trouble and that the gun did not work.

[*P49] From our review of the record, we find that Deputy Miller's testimony provides sufficient evidence upon which a reasonable jury could find Thomas guilty of a firearm specification, even though this evidence conflicted, in significant part, with Peterson's testimony at trial. ^{HN12} It is within the province of the jury to decide issues of credibility of testimony, including the proper weight to assign to conflicting evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. **[**21]** paragraph one of the syllabus. Peterson's testimony, even when read on appeal, appears less than credible. Thus, we cannot say that the jury lost its way in crediting the testimony of Deputy Miller, and the excited utterances established by his testimony, over Peterson's trial testimony.

[*P50] While the sufficiency of the evidence offered to prove the operability of the firearm presents a close question, we conclude that the evidence is legally sufficient to sustain the verdict on the specification.

[*P51] The Second Assignment of Error is overruled.

IV

[*P52] For his Third Assignment of Error, Thomas states:

[*P53] "THE CONVICTIONS ON THE FOLLOWING OFFENSES MUST BE REVERSED AS THEY ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE: AGGRAVATED BURGLARY AND THE FIREARM SPECIFICATION; DISRUPTING PUBLIC SERVICE."

[*P54] Thomas claims that his convictions for Aggravated Burglary, with a Firearm Specification, and for Disrupting Public Service are not supported by the evidence.

[*P55] ^{HN13} In reviewing a judgment to determine whether it is against the manifest weight of the evidence, an appellate court sits as a "thirteenth juror," reviews the entire **[**22]** record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins, supra*.

[*P56] With regard to the Aggravated Burglary charge, R.C. 2911.11(A) states: ^{HN14} "No person, by force, stealth, or deception, shall trespass in an occupied structure *** when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense, if any of the following apply: (1) The offender inflicts, or attempts or threatens to inflict physical harm on another."

[*P57] In this case, the record contains evidence that Thomas was not listed on the lease agreement for Peterson's apartment, and that the only authorized tenants were Peterson and her two children. Furthermore, the record shows that prior to the June 15, 2001 incident, Thomas had been issued notice by the sheriff's department that he was not permitted on the property. The record contains **[**23]** evidence that on that date, Thomas entered Peterson's apartment through a window, without her permission, and Peterson told him to leave. There is also evidence that Thomas beat Peterson, tore the phone cords from the wall, pointed a gun at Peterson and threatened to kill her. We conclude that there is credible evidence in the record upon which a reasonable juror could find that Thomas committed the offense of Aggravated Burglary, with a Firearm Specification.

[*P58] We next turn to Thomas's conviction for Disruption of Public Service. R.C. 2909.04, which governs Disruption of Public Service, provides in relevant part as follows:

[*P59] ^{HN15} "(A) No person, purposely by any means or knowingly by damaging or tampering with any property, shall do any of the following:

[*P60] "(1) Interrupt or impair television, radio, telephone, telegraph, or other mass communications service; police, fire, or other public service communications; ***."

[*P61] Thomas contends that the evidence, consisting of Peterson's testimony, demonstrates that the phone he removed from the wall belonged to him, and that he had a right to take it, so that he cannot be found **[**24]** guilty of Disruption of Public Service. We disagree.

[*P62] ^{HN16} The statute prohibits purposeful or knowing damaging or tampering with property that interrupts or impairs telephone service. Telephone service includes the initiation of telephone calls. *State v. Brown* (1994), 97 Ohio App.3d 293, 301, 646 N.E.2d 838. As previously noted, the evidence indicates that after Thomas entered the apartment on June 15, he was told to leave. When he did not leave, Peterson attempted to call the police. At that point, Thomas ripped the phone from the wall. After assaulting Peterson, Thomas left the apartment with the telephone in his possession. At that point, Peterson was forced to contact the police from a pay phone. This is sufficient to sustain the conviction.

[*P63] We have reviewed the record, and we are satisfied that in resolving any conflicts in the evidence, the jury did not lose its way. We conclude that the evidence in the record before us supports the convictions. Accordingly, the Third Assignment of Error is overruled.

V

[*P64] The Fourth Assignment of Error is as follows:

[*P65] "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL **[**25]** COUNSEL FAILED TO OBJECT TO AND SEEK A MISTRIAL DUE TO SEVERELY PREJUDICIAL COMMENTS MADE BOTH BY THE PROSECUTOR AND THE TRIAL COURT DURING CLOSING ARGUMENT."

[*P66] In this Assignment of Error, Thomas contends that he was denied the effective assistance of counsel because his attorney failed to object to comments made by the prosecutor and the trial court. Specifically, he claims that counsel should have objected during the State's closing argument when the prosecutor made a reference to rape, and when the trial court stated that closing argument should be disregarded.

[*P67] ^{HN17} We evaluate ineffective assistance of counsel arguments in light of the two-prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors created a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* at 2064. Hindsight is not permitted to distort the assessment of what was reasonable in light of **[**26]** counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. *Id.* at 2065.

[*P68] We first address the prosecutor's reference to rape during closing argument. ^{HN18} In analyzing claims of prosecutorial misconduct, the test is "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones*, 90 Ohio St.3d 403, 420, 739 N.E.2d 300, 2000 Ohio 187, citation omitted. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *Id.*, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S. Ct. 940, 947, 71 L. Ed. 2d 78. We view the state's closing argument in its entirety to determine whether the allegedly improper remarks were prejudicial. *State v. Moritz* (1980), 63 Ohio St.2d 150, 157, 407 N.E.2d 1268, citation omitted.

[*P69] The alleged misconduct complained of by Thomas occurred during the closing argument of the State when the prosecutor stated as follows: "I don't - in rape cases, no means no. A victim can say no in **[**27]** that kind of case. And this isn't a rape case. But Tiffany Peterson still has the right to say no. She's entitled to say no to the Defendant. She spent the summer of 2001 trying to break up with him, but he would not allow her."

[*P70] Thomas contends that this "reference, allusion and analogy to rape, had no basis in fact," and that the "baseless and sensational analogy [only served to] stigmatize and bias a jury contra Thomas."

[*P71] We conclude, from reading the closing argument, that the prosecutor's rape analogy was valid. As noted by the State, ^{HN19} both rape and domestic violence involve the exertion of power and control over another person, and "just as no one is obligated to submit to unwanted sexual conduct," no one has an obligation to submit to the unwanted controlling behavior of an abuser. In this case, Peterson attempted to end her relationship with Thomas, which resulted in Thomas assaulting her on three occasions. Furthermore, the case involved trespass by Thomas, which Peterson attempted to prevent by telling him to get out. The prosecutor's analogy aptly made the point that Peterson was permitted to tell Thomas that she did not want to be involved in a **[**28]** relationship and that she did not want him in her home, and that she should not have been subjected to assault because of that. Furthermore, the prosecutor reminded the jury that this case did not involve a rape. Therefore, we cannot say that the prosecutor's statement was improper, that it unfairly prejudiced Thomas, or that counsel was ineffective for failing to object. Indeed, had counsel objected, the matter might have been accentuated in the minds of the jurors, an overruled objection tending to communicate the unspoken message, "ouch, that hurt."

[*P72] The comments made by the trial court of which Thomas complains occurred just before closing arguments. The trial court stated as follows:

[*P73] "The Court would just remind the Jury that what the attorneys say during Closing Argument, both the State and the Defendants, is - is not -you're to - to basically to disregard it. It's not the facts that you're to consider." A review of the transcript reveals that the trial court continued as follows: "The facts that you're to consider in this case are only those facts that have come from this Witness Stand and from the items that have been entered into evidence."

[*P74] **[**29]** While the trial court may have made a poor choice of words by telling the jury to disregard the closing arguments, it is clear that the trial court was merely informing the jury that the arguments do not constitute evidence. Furthermore, the trial court told the jurors to disregard both the prosecution and defense arguments. We find no prejudicial error in this, nor do we find counsel ineffective for having failed to object.

[*P75] The Fourth Assignment of Error is overruled.

VI

[*P76] All of Thomas's Assignments of Error having been overruled, the judgment of the trial court is affirmed.

WOLFF and GRADY, JJ., concurs.

2003 Ohio 3241, *, 2003 Ohio App. LEXIS 2903, **

STATE OF OHIO, Plaintiff-Appellee vs. BERNARD JOHNSON, Defendant-Appellant

NO. 81692 & 81693

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2003 Ohio 3241; 2003 Ohio App. LEXIS 2903

June 19, 2003, Date of Announcement of Decision

SUBSEQUENT HISTORY: Appeal denied by State v. Johnson, 100 Ohio St. 3d 1433, 2003 Ohio 5396, 797 N.E.2d 513, 2003 Ohio LEXIS 2745 (Ohio, Oct. 15, 2003)

PRIOR HISTORY: [1]** CHARACTER OF PROCEEDING: Criminal appeal from Court of Common Pleas. Case Nos. CR-402659 and CR-410155.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant was convicted in the Ohio common pleas court of two counts of burglary, two counts of kidnapping, one count of theft, one count of impersonating a police officer, and one count of disrupting public service. He appealed.

OVERVIEW: Posing as police officers, defendant and another man ransacked an 82-year-old woman's home, stole money and property, and ripped her phone from the wall. Later, defendant and two others robbed a 90-year-old woman in a similar fashion. The appellate court held that as a witness's reference to defendant's prior arrests was fleeting and was promptly followed by a curative instruction, defendant had not been entitled to a mistrial. Though the victims could not identify defendant from photos, his fingerprints were found at the crime scenes; the evidence was sufficient to convict defendant of all offenses. Under Ohio Rev. Code Ann. § 2923.03 (C), the State was not required to prove that defendant was the principal offender, or to prove the identity of the principal; it had only to prove that a principal committed the offenses. As burglary and kidnapping and burglary and theft were not "allied offenses of similar import" under Ohio Rev. Code § 2941.25, defendant was properly convicted of all of these offenses. Consecutive sentences were proper under Ohio Rev. Code Ann. § 2929.14, based on, inter alia, defendant's victimizing elderly women, his prior record, and his lack of remorse.

OUTCOME: The judgment was affirmed.

CORE TERMS: fingerprint, burglary, assignments of error, indictment, complicity, offender, kidnapping, door, theft, sentence, public service, disrupting, police officer, consecutive, reasonable doubt, permission, examiner, latent, impersonating, declarant's, trespass, felony, arrest, commit, bedroom, sentenced, mistrial, allied, perpetrator, searched

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 Hide

[Criminal Law & Procedure](#) > [Bail](#) > [General Overview](#)

[Criminal Law & Procedure](#) > [Pretrial Motions & Procedures](#) > [Speedy Trial](#) > [Statutory Right](#)

[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#)

HN1 [Ohio Rev. Code Ann. § 2945.71\(C\)\(2\)](#) provides that a person against whom a felony charge is pending shall be brought to trial within 270 days after his arrest. For purposes of computing the time, [§ 2945.71 \(E\)](#) states that each day during which the accused is held in jail in lieu of bail on the pending charge is counted as three days. In other words, a felony defendant in Ohio must be tried within 90 days if incarcerated on the pending charge or within 270 days if on bail. However, the triple-count provision in [§ 2945.71\(E\)](#) applies only to defendants held in jail in lieu of bail solely on the pending charge. If the defendant is in jail on a separate unrelated case, the three-for-one provision does not apply. [Ohio Rev. Code Ann. § 2945.72 \(A\)](#). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Accusatory Instruments](#) > [Indictments](#) > [Amendment & Variances](#) > [Authorized Amendments](#)

[Criminal Law & Procedure](#) > [Pretrial Motions & Procedures](#) > [Continuances](#)

[Criminal Law & Procedure](#) > [Trials](#) > [Continuances](#)

HN2 Pursuant to [Ohio R. Crim. P. 7\(D\)](#), the trial court has the discretion to amend the indictment at any time before, during, or after a trial provided no change is made in the name or identity of the crime charged.

If an amendment is made to the substance of the indictment, the accused is entitled to a discharge of the jury on his motion and reasonable continuance if he was misled or prejudiced by the amendment. However, an amendment to an indictment which changes the name of the victim changes neither the name nor the identity of the crime charged. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Trials](#) > [Motions for Mistrial](#)

[Criminal Law & Procedure](#) > [Jury Instructions](#) > [Curative Instructions](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [General Overview](#)

HN3 The grant or denial of a mistrial lies within the sound discretion of the trial court. An appellate court presumes that the jury followed curative instructions given to it by the trial judge. The trial court need not declare a mistrial unless the ends of justice so require and a fair trial is no longer possible. [More Like This Headnote](#)

[Evidence](#) > [Hearsay](#) > [Exceptions](#) > [Spontaneous Statements](#) > [Elements](#)

[Evidence](#) > [Hearsay](#) > [Rule Components](#) > [Declarants](#)

[Evidence](#) > [Hearsay](#) > [Rule Components](#) > [Truth of Matter Asserted](#)

HN4 Ohio R. Evid. 802 generally prohibits the admission of hearsay, which is defined as a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Ohio R. Evid. 801(C). However, under Ohio R. Evid. 803(2), a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is admissible as an exception to the hearsay rule if certain conditions are met. For a statement to be admissible as an excited utterance, (1) there must have been an event startling enough to produce a nervous excitement in the declarant; (2) the statement must have been made while under the stress of excitement caused by the event; (3) the statement must have related to the startling event; and (4) the declarant must have personally observed the startling event. There is no per se amount of time after which a statement can no longer be considered to be an excited utterance. The central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may not be a result of reflective thought. [More Like This Headnote](#)

[Evidence](#) > [Hearsay](#) > [Exceptions](#) > [Spontaneous Statements](#) > [General Overview](#)

HN5 The admission of a declaration as an excited utterance is not precluded by questioning which: (1) is neither coercive nor leading, (2) facilitates the declarant's expression of what is already the natural focus of the declarant's thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant's reflective faculties. [More Like This Headnote](#)

[Evidence](#) > [Testimony](#) > [Experts](#) > [Helpfulness](#)

[Evidence](#) > [Testimony](#) > [Experts](#) > [Qualifications](#)

HN6 A witness may testify as an expert if, among other things, the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony. Ohio R. Evid. 702(B). An expert need not be the best witness on a particular subject, but he or she must be capable of aiding the trier of fact in understanding the evidence or determining a fact in issue. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#) > [Evidence](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#) > [Witnesses](#)

[Evidence](#) > [Procedural Considerations](#) > [Rulings on Evidence](#)

HN7 A trial court's determination to allow a witness to testify as an expert will not be reversed absent an abuse of discretion. [More Like This Headnote](#)

[Evidence](#) > [Scientific Evidence](#) > [Daubert Standard](#)

[Evidence](#) > [Testimony](#) > [Experts](#) > [Daubert Standard](#)

HN8 In determining the admissibility of scientific evidence, the Ohio Supreme Court has adopted the test set forth by the United States Supreme Court in Daubert. Under Daubert, a court must analyze the testimony and determine if the reasoning or methodology used is scientifically valid. In evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subject to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology used has gained general acceptance. [More Like This Headnote](#)

[Evidence](#) > [Scientific Evidence](#) > [Fingerprints & Footprints](#)

HN9 The Ohio Supreme Court has recognized the use of fingerprints for identification purposes in criminal cases. Fingerprints corresponding to those of the accused are sufficient proof of his identity to sustain his conviction, where the circumstances show that such prints, found at the scene of the crime, could only have been impressed at the time of the commission of the crime. [More Like This Headnote](#)

[Constitutional Law](#) > [Bill of Rights](#) > [Fundamental Rights](#) > [Procedural Due Process](#) > [Self-Incrimination Privilege](#)

[Criminal Law & Procedure](#) > [Trials](#) > [Defendant's Rights](#) > [Right to Remain Silent](#) > [Communicative & Testimonial Information](#)
[Evidence](#) > [Privileges](#) > [Self-Incrimination Privilege](#) > [Scope](#)

HN10 The Fifth Amendment privilege against self-incrimination protects an accused only from being compelled to testify against himself, or otherwise provide the State with other evidence of a testimonial or communicative nature. It offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling communications or testimony, but that compulsion which makes a suspect or accused the source of real or physical evidence does not violate it. Moreover, the presence of the jury does not enlarge the scope of the privilege against self-incrimination with respect to the taking of fingerprints. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Pretrial Motions & Procedures](#) > [Joinder & Severance](#) > [Severance of Offenses](#)
[Evidence](#) > [Relevance](#) > [Prior Acts, Crimes & Wrongs](#)

HN11 Many courts have held that joinder is appropriate where the separate offenses evidence a common scheme or plan and thus invite juries to draw conclusions. Joinder is permitted because the jury is believed capable of segregating the proof on multiple charges when the evidence as to each of the charges is uncomplicated. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Jury Instructions](#) > [Particular Instructions](#) > [Use of Particular Evidence](#)
[Evidence](#) > [Procedural Considerations](#) > [Exclusion & Preservation by Prosecutor](#)
[Evidence](#) > [Relevance](#) > [Prior Acts, Crimes & Wrongs](#)

HN12 Evidence concerning a prior crime is admissible in a subsequent trial under Ohio R. Evid. R. 404(B) to show a course of criminal conduct involving a common scheme or plan, as well as the identity of the criminal. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Jury Instructions](#) > [Objections](#)
[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Plain Error](#) > [Jury Instructions](#)
[Evidence](#) > [Procedural Considerations](#) > [Rulings on Evidence](#)

HN13 Where the defense failed to object to the court's jury charge at the time of trial, this issue is subject only to a plain error analysis. To constitute plain error, (1) the instruction must have been erroneous and (2) without the error, the result of the trial would have been different. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Accessories](#) > [Aiding & Abetting](#)

HN14 Pursuant to [Ohio Rev. Code Ann. § 2923.03\(F\)](#), a charge of complicity may be stated in terms of [Ohio Rev. Code Ann. § 2923.03](#) or in terms of the principal offense. Where one is charged in terms of the principal offense, he is on notice, by operation of [Ohio Rev. Code Ann. § 2923.03\(F\)](#), that evidence could be presented that the defendant was either a principal or an aider and abettor for that offense. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Jury Instructions](#) > [General Overview](#)
[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [General Overview](#)

HN15 Jury instructions are reviewed in their entirety to determine if they contain prejudicial error. The court commits error if it states its opinion regarding the facts while instructing the jury. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Harmless & Invited Errors](#) > [Definitions](#)

HN16 To find harmless error, a reviewing court must be able to declare a belief that the error was harmless beyond a reasonable doubt. Thus, it is the job of the reviewing court to assess the impact of the error on the outcome of trial. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Jury Instructions](#) > [Curative Instructions](#)

HN17 Juries are presumed to follow and obey the curative instructions given by a trial court. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Fraud](#) > [False Pretenses](#) > [General Overview](#)

HN18 See [Ohio Rev. Code Ann. § 2921.51\(E\)](#).

[Criminal Law & Procedure](#) > [Scienter](#) > [Recklessness](#)
[Criminal Law & Procedure](#) > [Scienter](#) > [Specific Intent](#)
[Governments](#) > [Legislation](#) > [Interpretation](#)

HN19 When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense. When a statute reads, "No person shall", absent any reference to the requisite culpable mental

state, the statute is clearly indicative of a legislative intent to impose strict liability. [More Like This Headnote](#)

[Criminal Law & Procedure > Accessories > Aiding & Abetting](#)

[Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview](#)

HN20 ↓ Complicity need not be stated in terms of the complicity statute but may be stated in terms of the principal offense. Ohio Rev. Code Ann. § 2923.03(F); Therefore, a defendant suffers no prejudice when the jury is instructed on complicity even though the indictment against him never mentioned the words "complicity," "solicitation," "conspiracy," or "aiding or abetting." [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure > Accessories > Aiding & Abetting](#)

[Criminal Law & Procedure > Jury Instructions > General Overview](#)

HN21 ↓ It is well established that the State may charge and try an aider and abettor as a principal, and if the evidence at trial reasonably indicates that the defendant was an aider and abettor rather than a principal offender, a jury instruction regarding complicity may be given. [More Like This Headnote](#)

[Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > General Overview](#)

HN22 ↓ Ohio Rev. Code Ann. § 2901.01(A) defines "force" as any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing. "Force" may properly be defined as "effort" rather than "violence" in a charge to the jury. A defendant is not prejudiced if there is no substantial difference between the statutory definition of a term and the definition that the trial court provided to the jury. A trial court's definition of "force" as "the amount of force necessary to accomplish entry where the entry would not otherwise have occurred," comports with the statutory definition of "force," which simply requires effort be exerted against a person or thing. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law > Torts > Trespass to Real Property](#)

[Torts > Premises Liability & Property > Trespass > Defenses > Consent](#)

[Torts > Premises Liability & Property > Trespass > Defenses > Privilege](#)

HN23 ↓ Ohio Rev. Code Ann. § 2911.21(A)(1) defines "trespass" as follows: No person, without privilege to do so, shall knowingly enter or remain on the land or premises of another. Where a court instructs the jury that one trespasses when he enters upon property of another without permission of a person authorized to give permission, there is no substantial difference between the statutory definition. [More Like This Headnote](#)

[Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview](#)

[Criminal Law & Procedure > Trials > Motions for Acquittal](#)

HN24 ↓ See Ohio R. Crim. P. 29(A).

[Criminal Law & Procedure > Trials > Motions for Acquittal](#)

[Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > Motions to Acquit & Dismiss](#)

[Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence](#)

HN25 ↓ A motion for acquittal may be granted only where the evidence is insufficient to sustain a conviction. Ohio R. Crim. P. 29(A). In reviewing the sufficiency of the evidence in a criminal case, an appellate court will not reverse a conviction where there is substantial evidence, viewed in a light most favorable to the prosecution, which would convince the average mind of the defendant's guilt beyond a reasonable doubt. [More Like This Headnote](#)

[Criminal Law & Procedure > Appeals > Standards of Review > General Overview](#)

[Evidence > Procedural Considerations > Weight & Sufficiency](#)

[Evidence > Testimony > Credibility > General Overview](#)

HN26 ↓ When presented with a manifest weight argument, a court engages in a limited weighing of the evidence to determine whether the jury's verdict is supported by sufficient competent, credible evidence to permit reasonable minds to find guilt beyond a reasonable doubt. Determinations of credibility and weight of the testimony remain within the province of the trier of fact. [More Like This Headnote](#)

[Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview](#)

HN27 ↓ See Ohio Rev. Code Ann. § 2909.04(A)(3).

[Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview](#)

HN28 ↓ Where one purposely disconnects the victim's telephone service, the crime of disrupting public service has been committed. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview](#)

HN29 ↓ See Ohio Rev. Code Ann. § 2941.25.

[Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview](#)

HN30 In applying Ohio Rev. Code Ann. § 2941.25, a two-step analysis has been developed. First, the court must look to see if the elements of the two crimes correspond to such a degree that the commission of one offense will naturally result in the commission of the other. If the court finds the two crimes to be allied offenses of similar import, then it must determine, under § 2941.25(B), whether the offenses were committed separately or with a separate animus as to each. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > General Overview](#)

HN31 See Ohio Rev. Code Ann. § 2911.11.

[Criminal Law & Procedure > Criminal Offenses > Property Crimes > Larceny & Theft > General Overview](#)

HN32 See Ohio Rev. Code Ann. § 2913.02.

[Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > Burglary > Elements](#)

[Criminal Law & Procedure > Criminal Offenses > Property Crimes > Larceny & Theft > General Overview](#)

[Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview](#)

HN33 The offenses of aggravated burglary and theft have some common elements in that aggravated burglary may involve the purpose to commit a theft offense. However, completion of the theft offense is not a necessary element because the purpose to commit any felony will suffice to supply the requisite intent. Therefore, burglary and theft are not "allied offenses" for purposes of Ohio Rev. Code Ann. § 2941.25. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Kidnapping > General Overview](#)

[Criminal Law & Procedure > Criminal Offenses > Property Crimes > Burglary & Criminal Trespass > Burglary > General Overview](#)

[Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview](#)

HN34 Burglary is not an "allied offense" of kidnapping for purposes of Ohio Rev. Code Ann. § 2941.25. [More Like This Headnote](#)

[Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Kidnapping > General Overview](#)

HN35 See Ohio Rev. Code Ann. § 2905.01.

[Criminal Law & Procedure > Sentencing > Consecutive Sentences](#)

HN36 See Ohio Rev. Code Ann. § 2929.14(E)(4).

COUNSEL: For Plaintiff-Appellee: WILLIAM D. MASON, Cuyahoga County Prosecutor, KRISTEN L. LUSNIA, Assistant, Cleveland, Ohio.

For Defendant-Appellant: PAUL MANCINO, JR., Cleveland, Ohio.

JUDGES: JUDGE COLLEEN CONWAY COONEY. MICHAEL J. CORRIGAN, P.J., and ANNE L. KILBANE, J., CONCUR

OPINION BY: COLLEEN CONWAY COONEY

OPINION

JOURNAL ENTRY and OPINION

COLLEEN CONWAY COONEY, J.:

[*P1] Defendant-appellant Bernard Johnson ("Johnson") appeals his convictions following a jury trial on two counts of burglary, two counts of kidnapping, one count of theft, one count of impersonating a police officer, and one count of disrupting public service in two consolidated cases, Case Nos. 402659 and 410155. Finding no merit to the appeal, we affirm.

[*P2] The charges in this case arose out of two separate incidents implicating Johnson in burglaries of the homes of two elderly women. On August 4, 2000, Mildred Paul ("Paul"), who was eighty-two years old, received a phone call from a man who identified himself as "Detective Sergeant David." The caller told Paul that he had her granddaughter Katie with **[**2]** him. Paul, who did not have a granddaughter named Katie, told the caller she did not have time to talk to him. The caller responded, "There's a lot of robberies around, you better hide your money and your jewelry." Paul hung up the phone and then called the police to request that an officer come to her house.

[*P3] Later that evening, while waiting for the police to arrive, Paul heard someone pounding on her door. When she peered through the peephole, the man outside her door identified himself as "Sergeant David" and showed her a badge. Paul opened the door and discovered that the man had removed her storm door. She also observed a second man in her yard. The two men entered her house without her permission.

[*P4] One of the men guarded Paul while "Sergeant David" searched her bedroom, pulling open drawers, purses, and closets. After ransacking the bedroom, "Sergeant David" proceeded to the dining room and searched the buffet. Meanwhile, the man who was guarding Paul searched through the pockets of her clothes and took some change. He then searched her purse and took her credit card and money.

[*P5] After searching her home and taking various items, "Sergeant David" ripped the **[**3]** telephone from the kitchen wall and took it with him when he left the house. The second man followed shortly thereafter, telling Paul she should count to 100 before she leaves. Paul went to a neighbor's house to call the police.

[*P6] At trial, Officer Jeffrey Ryan testified that he responded to the call within five minutes. He saw that Paul's house had been ransacked, but she was unable to describe her intruders. Officer Ryan stayed with her until Det. Reynolds of the Scientific Investigation Unit arrived. Det. Reynolds "lifted" a latent fingerprint from a dresser in Paul's bedroom as evidence.

[*P7] On August 14, 2000, Margaret Daus, a ninety-year-old woman who lived alone, was visited by three men who came knocking on her door. Two of the men requested permission to look at the outside of her house. While the two men proceeded to the back of the house, the third man, who remained on the porch, entered her house without her permission. The man stood guard over Daus, who sat in a chair, while the other two men entered the house through the back door and proceeded to her bedroom where they searched every purse, box, and drawer. After collecting whatever valuables they could find, **[**4]** the two men came back downstairs and the three men left.

[*P8] Officer Brian Lockwood, who responded to the call to Daus' home, noticed immediately that the home had been burglarized. Daus was unable to give a detailed description of the intruders. Det. Donald Meel found a latent fingerprint on a cedar chest in Daus' bedroom and collected it as evidence.

[*P9] At trial, Felicia Wilson, a latent fingerprint expert with the Cleveland Police Department, testified that she examined the fingerprints lifted from Paul's dresser and Daus' cedar chest and found that they matched Johnson's fingerprints.

[*P10] The jury found Johnson guilty on all counts. The court sentenced him in Case No. 402659 to eight years for burglary, and eight years for kidnapping, to be served concurrently, but consecutive to his sentence in Case No. 410155. In Case No. 410155, the court sentenced Johnson to eight years each for burglary, disrupting public service, and kidnapping. The court also sentenced Johnson to eighteen months for theft, with an elderly specification, and five years for impersonating a police officer. All sentences in Case No. 410155 were to be served concurrently except for impersonating a police **[**5]** officer. Thus, Johnson's total combined sentences in Case Nos. 402659 and 410155 is twenty-one years.

[*P11] Johnson appeals his conviction and sentence, raising seventeen assignments of error.

Speedy Trial

[*P12] In his first assignment of error, Johnson argues he was denied due process of law when the trial court overruled his motion to dismiss, which was based on the alleged denial of his right to a speedy trial.

[*P13] R.C. 2945.71(C)(2) ^{HN1} provides that a person against whom a felony charge is pending shall be brought to trial within 270 days after his arrest. For purposes of computing the time, 2945.71(E) states that each day during which the accused is held in jail in lieu of bail on the pending charge is counted as three days. In other words, "a felony defendant in Ohio must be tried within ninety days if incarcerated on the pending charge or within two hundred seventy days if on bail." *State v. Coleman* (1989), 45 Ohio St.3d 298, 304, 544 N.E.2d 622.

[*P14] However, the triple-count provision in R.C. 2945.71(E) applies only to defendants held in jail in lieu of bail solely on the pending charge. *State v. Brown* (1992), 64 Ohio St.3d 476, 479, 1992 Ohio 96, 597 N.E.2d 97; **[**6]** *State v. MacDonald* (1976), 48 Ohio St.2d 66, 357 N.E.2d 40, paragraph one of the syllabus. If the defendant is in jail on a separate unrelated case, the three-for-one provision does not apply. R.C. 2945.72 (A); *State v. Coleman*, *supra*.

[*P15] In the instant case, Johnson claims he was arrested on September 15, 2000 and was not brought to trial until October 22, 2001. However, when Johnson was arrested in September 2000, he was held in connection with five separate cases. Each of those cases involved different crimes and different victims.

[*P16] Although Johnson argues speedy trial limits cannot be extended by filing separate cases which the prosecutor claims should be tried as one case, only two of the five cases were consolidated and tried together in the instant matter. Johnson was not indicted on the two consolidated cases presented in the instant appeal, Case Nos. 402659 and 410155, until February 23, 2001 and July 19, 2001, respectively. Prior to those dates, Johnson was

being held on three "older" cases. Therefore, because Johnson was being held in connection with multiple cases, the triple-count provision in R.C. 2945.71(E) **[**7]** did not apply.

[*P17] As previously stated, in Case No. 402659, Johnson was indicted on February 23, 2001. In case number 410155, Johnson was not indicted until July 19, 2001. These cases went to trial on October 22, 2001, 241 days after the February 23 indictment. Therefore, because these cases went to trial within 270 days from the date of the first indictment and Johnson was detained pending multiple cases, Johnson's right to speedy trial was not violated. Therefore, the first assignment of error is overruled.

Amended Indictment

[*P18] In his second assignment of error, Johnson argues the trial court violated his constitutional right to due process when the court permitted an amendment of the indictment to substitute the name of a different victim.

HN3* **[*P19]** Pursuant to Crim.R. 7(D), the trial court has the discretion to amend the indictment at any time before, during, or after a trial "provided no change is made in the name or identity of the crime charged." Crim.R. 7(D); State v. Brooks (1996), 75 Ohio St.3d 148, 159, 1996 Ohio 134, 661 N.E.2d 1030. If an amendment is made to the substance of the indictment, the accused is entitled to a discharge of the jury on his motion **[**8]** and reasonable continuance if he was misled or prejudiced by the amendment. State v. O'Brien (1987), 30 Ohio St.3d 122, 125-126, 30 Ohio B. 436, 508 N.E.2d 144.

[*P20] However, "an amendment to an indictment which changes the name of the victim changes neither the name nor the identity of the crime charged." State v. Owens (1975), 51 Ohio App.2d 132, 149, 366 N.E.2d 1367; State v. Smith, Cuyahoga App. No. 79527, 2002 Ohio 2145. Because the name of the victim is not an essential element of the crime, the name of the victim is not required in the indictment. Owens, supra. Moreover, Johnson was not prejudiced by the amendment because he previously received discovery from the State providing him the correct name of the victim. Therefore, the second assignment of error is overruled.

Prior Arrest Record

[*P21] In his third assignment of error, Johnson argues the trial court violated Johnson's right to due process and a fair trial when it allowed a witness to mention his previous arrest record in the presence of the jury.

[*P22] During the examination of Felicia Wilson, a fingerprint examiner for the City of Cleveland, the witness explained **[**9]** that she obtained a fingerprint card to make a comparison of Johnson's fingerprints from an earlier arrest of Johnson. As soon as Wilson made this statement, the court instructed the jury that the fact that Johnson was previously arrested is totally irrelevant. Notwithstanding the court's curative instruction, defense counsel moved for a mistrial, which the court denied. Johnson claims the court erred in denying his motion for mistrial.

[*P23] **HN3*** The grant or denial of a mistrial lies within the sound discretion of the trial court. State v. Glenn (1986), 28 Ohio St. 3d 451, 28 Ohio B. 501, 504 N.E.2d 701. We presume that the jury followed curative instructions given to it by the trial judge. State v. Loza (1994), 71 Ohio St. 3d 61, 75, 1994 Ohio 409, 1994 Ohio 410, 641 N.E.2d 1082. The trial court need not declare a mistrial unless "the ends of justice so require and a fair trial is no longer possible." State v. Garner (1995), 74 Ohio St. 3d 49, 59, 1995 Ohio 168, 656 N.E.2d 623. Citing, State v. Glenn (1986), 28 Ohio St. 3d 451, 28 Ohio B. 501, 504 N.E.2d 701.

[*P24] In Garner, the defendant objected and moved for a mistrial after an officer testified that he made arrests at the defendant's address **[**10]** in the past. id., 74 Ohio St. 3d 49 The trial court immediately sustained the objection and admonished the jury not to consider the testimony. The Ohio Supreme Court affirmed the trial court's denial of a mistrial, finding that "the reference to the defendant's prior arrests was fleeting and was promptly followed by a curative instruction." Id.

[*P25] In the instant case, as in Garner, the reference to Johnson's arrest record was a brief and isolated remark followed by a curative instruction from the court. The mere mention of Johnson's arrest record, without more, did not unfairly prejudice Johnson so as to warrant a mistrial. Therefore, the third assignment of error is overruled.

Victims' Statements to Police

[*P26] In his fourth assignment of error, Johnson argues the trial court violated his right to due process when it allowed Officers Ryan and Lockwood to relate their interviews with each of the victims. Johnson also claims the court erroneously allowed Det. Karlin to testify about Paul's identification of suspects from photographs.

[*P27] Johnson argues the victims' statements to the officers constituted inadmissible hearsay. The State claims their statements were excited utterances **[**11]** and, therefore, admissible as exceptions to the hearsay rule.

[*P28] Evid.R. 802 **HN4*** generally prohibits the admission of hearsay, which is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). However, under Evid.R. 803(2), "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible as an

exception to the hearsay rule if certain conditions are met. Evid. R. 803(2).

[*P29] For a statement to be admissible as an excited utterance, (1) there must have been an event startling enough to produce a nervous excitement in the declarant; (2) the statement must have been made while under the stress of excitement caused by the event; (3) the statement must have related to the startling event; and (4) the declarant must have personally observed the startling event. State v. Taylor (1993), 66 Ohio St.3d 295, 300-301, 612 N.E.2d 316; State v. Duncan (1978), 53 Ohio St.2d 215, 373 N.E.2d 1234, paragraph one of the syllabus. "There is no **[**12]** per se amount of time after which a statement can no longer be considered to be an excited utterance. The central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may not be a result of reflective thought." Taylor, supra at 303.

[*P30] Further, ^{HN5} "the admission of a declaration as an excited utterance is not precluded by questioning which: (1) is neither coercive nor leading, (2) facilitates the declarant's expression of what is already the natural focus of the declarant's thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant's reflective faculties." State v. Wallace (1988), 37 Ohio St.3d 87, 93, 524 N.E.2d 466.

[*P31] In the instant case, both victims' statements were excited utterances. The officers testified that Paul and Daus were visibly shaken and frightened when the police arrived shortly after the home invasions. When Officer Ryan first arrived at Daus' home, she was too afraid to open her door because the perpetrator of the burglary had impersonated a police officer. Because these women were still under the stress of having **[**13]** their homes invaded and burglarized, their statements to police, which were made within hours of these events, constitute excited utterance exceptions to the hearsay rule and were admissible.

[*P32] With regard to Det. Karlin's testimony regarding Paul's identification of suspects from photos, it is evident from the transcript that defense counsel opened the door to this testimony. Despite the fact that neither Paul nor the prosecutor mentioned the photos on direct examination, defense counsel asked:

"Q: How many picture - on June 30th, is that when you showed her the pictures?"

A: Yes.

Q: Okay. How many pictures did you show her?"

A: Six.

Q: She couldn't identify anybody on there positively; is that right?"

A: Correct.

Q: Was his picture in there, Bernard Johnson's?"

A: Yes, it was."

[*P33] The defense, having brought up the photos in the first instance and then asking whether the defendant's photo was among them, opened the door for the prosecutor to question the witness further. Having opened the door, the defense waived any right to object to the admission of the witness' testimony regarding those photos on redirect. Accordingly, the fourth assignment of error is overruled.

[14]** Fingerprint Comparison

[*P34] In his fifth assignment of error, Johnson argues that Felicia Wilson, a fingerprint examiner for the City of Cleveland, should not have been permitted to testify as an expert because she lacked the training and experience necessary to qualify as an expert.

^{HN6} **[*P35]** A witness may testify as an expert if, among other things, the witness "is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Evid.R. 702(B). An expert need not be the best witness on a particular subject, but he or she must be capable of aiding the trier of fact in understanding the evidence or determining a fact in issue. Lambert v. Shearer (1992), 84 Ohio App.3d 266, 275, 616 N.E.2d 965. ^{HN7} A trial court's determination to allow a witness to testify as an expert will not be reversed absent an abuse of discretion. State v. Mack (1995), 73 Ohio St.3d 502, 511, 1995 Ohio 273, 653 N.E.2d 329.

[*P36] In State v. Lovings, Franklin App. No. 97APA05-656, 1997 Ohio App. LEXIS 6023, the court held that the fingerprint examiner in that case was qualified to testify as an expert **[**15]** because she had been a fingerprint technician with the Columbus police for eight years and "a latent fingerprint examiner for the last three years." She also completed several courses on latent fingerprint comparisons, latent palm print comparisons, latent print photography, and latent print processing. Id. at * 14, 1997 Ohio App. LEXIS 6023. She also completed a six-month basic fingerprint course covering fingerprint pattern recognition and ink fingerprint comparisons in 1983 while she was an employee of the FBI. See also, State v. Johnson, 3rd Dist. No. 1-84-2, 1985 Ohio App. LEXIS 7272 (witness

who worked as fingerprint examiner for police department for over 20 years and attended fingerprint training at FBI was qualified as an expert).

[*P37] In the instant case, Wilson testified that she had worked as a fingerprint examiner with the Cleveland Police Department for five and one-half years. She also testified that she was trained by the FBI to be a fingerprint examiner and had taken an advanced latent training class and received on-the-job training. She testified that she had identified over 1,000 people by comparing fingerprints. Therefore, she qualified as an expert to testify about the fingerprints **[**16]** found at the victims' homes.

[*P38] Johnson also argues that fingerprint identification is not reliable, scientific evidence. ^{HN8} In determining the admissibility of scientific evidence, the Ohio Supreme Court in *Miller v. Bike Athletic Co.*, (1998), 80 Ohio St.3d 607, 1998 Ohio 178, 687 N.E.2d 735, adopted the test set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786. The *Daubert* court stated that a court must analyze the testimony and determine if the reasoning or methodology used is scientifically valid. *Miller*, *supra* at 611, citing *Daubert*, 509 U.S. at 592-593. The court further stated that "in evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subject to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology used has gained general acceptance." *Id.*, citing *Daubert*, 509 U.S. at 593-594.

[*P39] ^{HN9} The Ohio Supreme Court has recognized the use of fingerprints for **[**17]** identification purposes in criminal cases, stating "fingerprints corresponding to those of the accused are sufficient proof of his identity to sustain his conviction, where the circumstances show that such prints, found at the scene of the crime, could only have been impressed at the time of the commission of the crime." *State v. Miller* (1977), 49 Ohio St.2d 198, 361 N.E.2d 419, syllabus. There is no dispute that the fingerprints in the instant case were found at the crime scenes and that the circumstances indicate that such prints could only have been impressed at the time of the commission of the crimes.

[*P40] Therefore, the fifth assignment of error is overruled.

Fingerprint examination

[*P41] In his sixth assignment of error, Johnson argues the trial court violated his constitutional rights when it required him, over objection, to submit to a fingerprint examination during the course of the trial. Although Johnson claims a substantial constitutional right was violated, he does not specify what right or rights he claims were violated.

[*P42] In support of his argument, Johnson relies on *Davis v. Mississippi* (1961), 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394, **[**18]** and *Dunaway v. New York* (1979), 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248, both of which held that fingerprint evidence should have been excluded as improperly obtained during illegal seizures in violation of the Fourth and Fourteenth Amendments. In contrast to these cases, Johnson does not claim he was illegally detained when his fingerprints were taken. Rather, he seems to be arguing that it was improper for the court to allow his fingerprints to be taken during the course of the trial as though it were compelled testimony in violation of the Fifth Amendment.

[*P43] ^{HN10} The Fifth Amendment privilege against self-incrimination protects an accused "only from being compelled to testify against himself, or otherwise provide the State with other evidence of a testimonial or communicative nature ***." *Schmerber v. California* (1966), 384 U.S. 757, 761, 16 L. Ed. 2d 908, 86 S. Ct. 1826. "It offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, **[**19]** often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id.* at 764. See, also, *United States v. Wade* (1967), 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926. Moreover, the presence of the jury does not enlarge the scope of the privilege against self-incrimination with respect to the taking of fingerprints. *United States ex rel. O'Halloran v. Rundle* (E.D. Pa. 1967), 266 F. Supp. 173, affirmed (1967), 384 F.2d 997, certiorari denied (1968), 393 U.S. 860, 21 L. Ed. 2d 128, 89 S. Ct. 138. Therefore, we do not find that the court violated any constitutional right when it required Johnson to submit to a fingerprint examination during the trial. Accordingly, the sixth assignment of error is overruled.

Other Acts Evidence

[*P44] In his seventh assignment of error, Johnson claims he was deprived of a fair trial because the court gave the following jury instruction:

"Now as you consider the events of August 4th and August 14th, you must **[**20]** examine separately the evidence relating to each date.

That is to say you look at the evidence and you say what does it prove as to August 4th, and you look at the evidence against and you say what does it prove as to August 14th?

If the State establishes beyond a reasonable doubt that the defendant committed an offense on that date, it does not necessarily follow that he committed any of the alleged crimes on the other date.

You may consider, however, whether the conduct on one date was so similar to the conduct on the other date, that the conduct on each date was part of a unique common plan or scheme. That is, that the shared unique qualities indicate that the defendant participated in the offenses on each of these dates.

It's kind of like saying that there was a trademark that, you know, that may or may not be true but if you come to that kind of conclusion, then you can draw the appropriate conclusions from it."

[*P45] Pursuant to Crim.R. 8(A), the trial court allowed two of Johnson's pending criminal cases to be consolidated because they involved crimes of the same character. ^{HN11} Many courts have held that joinder is appropriate where the separate offenses evidence a common **[**21]** scheme or plan and thus invite juries to draw conclusions. See, e.g., State v. White-Barnes, Ross App. No. 93 CA 1994, 1995 Ohio App. LEXIS 2001; State v. McKenzie, Cuyahoga App. No. 48959, 1985 Ohio App. LEXIS 6267. Joinder is permitted because the jury is believed capable of segregating the proof on multiple charges when the evidence as to each of the charges is uncomplicated. State v. Roberts (1980), 62 Ohio St.2d 170, 405 N.E.2d 247.

[*P46] Even if the trials were separated, ^{HN12} evidence concerning the first incident would have been admissible in a subsequent trial under Evid.R. 404(B) to show a course of criminal conduct involving a common scheme or plan, as well as the identity of the criminal. See McKenzie, *supra* at *6, 1985 Ohio App. LEXIS 6267, Evid.R. 404(B). Moreover, the court instructed the jury to examine the evidence as it relates to each case separately. Indeed, the court informed the jury that simply because the State proves beyond a reasonable doubt that the defendant committed one of the offenses, does not mean the State necessarily proved the other. Therefore, we find nothing prejudicial about this instruction, and the seventh **[**22]** assignment of error is overruled.

Disrupting Public Service

[*P47] In his eighth assignment of error, Johnson claims the trial court violated his right to due process when it gave erroneous jury instructions on the elements of disrupting public service such that it improperly amended the indictment. Because ^{HN13} the defense failed to object to the court's charge at the time of trial, this issue is subject only to a plain error analysis. State v. Jacobs (1995), 108 Ohio App. 3d 328, 335, 670 N.E.2d 1014, discretionary appeal not allowed (1996), 75 Ohio St. 3d 1497, 664 N.E.2d 1294. To constitute plain error, (1) the instruction must have been erroneous and (2) without the error, the result of the trial would have been different. State v. Campbell (1994), 69 Ohio St.3d 38, 1994 Ohio 492, 630 N.E.2d 339.

[*P48] Johnson claims the court's use of a complicity theory in its charge of disrupting public service constructively amended the indictment. In instructing on the offense of disrupting public service, the court stated:

"Disrupting public service is committed when one knowingly by damaging or tampering with property substantially impairs the ability of law enforcement **[**23]** to respond to an emergency.

The State claims that this crime was committed when someone participated in the activities at Mildred Paul's home, the alleged burglary of Mildred Paul's home, pulled the telephone from the wall.

The State does not say which of the individuals pulled the phone from the wall. It asserts that the defendant is guilty under the concept of complicity."

^{HN14} **[*P49]** Pursuant to R.C. 2923.03(F), a charge of complicity may be stated in terms of R.C. 2923.03 or in terms of the principal offense. State v. Caldwell (1984), 19 Ohio App.3d 104, 19 Ohio B. 191, 483 N.E.2d 187. Where one is charged in terms of the principal offense, he is on notice, by operation of R.C. 2923.03(F), that evidence could be presented that the defendant was either a principal or an aider and abettor for that offense. See State v. Dotson (1987), 35 Ohio App.3d 135, 520 N.E.2d 240. Because a charge of complicity may be stated in terms of either the principal offense or in terms of R.C. 2923.03, the complicity section, the indictment was not amended when the court instructed the **[**24]** jury that they could find Johnson guilty under the complicity theory. Therefore, the eighth assignment of error is overruled.

Identity of the Perpetrator

[*P50] In his ninth assignment of error, Johnson argues the court usurped the fact-finding role of the jury when the judge stated in his charge that the central issue in the case was not whether the crimes occurred but whether Johnson was the perpetrator of the crimes. During the charge, the court stated:

"What do you think about the credibility of the witnesses, because that, I think, is what this case is all about. I don't think - I didn't hear a serious dispute here that a burglary, for example, was not committed. I think the central issue here for the primary charges certainly is did the defendant do it, or did they have the wrong person?"

HN15 ¶ **[*P51]** Jury instructions are reviewed in their entirety to determine if they contain prejudicial error. *State v. Porter* (1968), 14 Ohio St.2d 10, 235 N.E.2d 520. The court commits error if it states its opinion regarding the facts while instructing the jury. *State v. Nutter* (1970), 22 Ohio St.2d 116, 258 N.E.2d 440. Therefore, the court erred when **[**25]** it stated there was no dispute that a burglary had been committed, but we find this error harmless.

[*P52] **HN16** ¶ To find harmless error, a reviewing court must be able to "declare a belief that the error was harmless beyond a reasonable doubt." *State v. Bayless*, 48 Ohio St.2d 73, 357 N.E.2d 1035, at paragraph seven of the syllabus. Thus, it is the job of the reviewing court to assess the impact of the error on the outcome of trial.

[*P53] At the conclusion of the charge, defense counsel voiced his concern about the court's statement of its opinion that a burglary had been committed. In response, the court gave the following curative instruction:

"I've been asked to make clear that all of the elements of proof are disputed here so that when I said there's no dispute about burglary or something like that, the State has to prove a burglary, it has to prove a burglary was committed and that it was committed by the defendant. It has to prove each of these things, so in a legal sense, everything is disputed, okay?"

[*P54] **HN17** ¶ Jurors are presumed to follow and obey the curative instructions given by a trial court. *Loza, supra*.

[*P55] Further, the court's statement **[**26]** about there being no dispute about a burglary being committed is not prejudicial when the charge and the evidence is viewed as a whole. Throughout the charge, the court repeatedly stated that the jury has the sole responsibility of evaluating the evidence and deliberating on each element of each offense. For example, the court instructed: "Your only concern is to decide what facts have been proved and whether or not those facts prove one or more of the offenses that are charged in this case beyond a reasonable doubt." The court also explained: "The defendant has entered a plea of not guilty and since he has entered a plea of not guilty, he denies the existence of all the elements of these offenses as they may relate to him," and "You, ladies and gentlemen, have the exclusive responsibility to decide what the facts are."

[*P56] Moreover, the evidence overwhelmingly proved that two burglaries occurred and there was no evidence or testimony to the contrary. Indeed, even defense counsel admitted in closing argument that "these events" occurred but argued the evidence was insufficient to prove that Johnson was the perpetrator. Therefore, because we find the court's error harmless, the **[**27]** ninth assignment of error is overruled.

Culpable Mental State

[*P57] In his tenth assignment of error, Johnson argues the trial court erred when it did not identify in its jury instructions a specific culpable mental state for the crime of impersonating a police officer. Because Johnson failed to object to the instruction at the time of trial, this issue is reviewed only for plain error. *Jacobs, supra*; *Campbell, supra*.

[*P58] Johnson was charged with impersonating a police officer in violation of R.C. 2921.51(E) which provides: **HN18** ¶ "No person shall commit a felony while impersonating a peace officer, a private police officer, or an officer, agent, or employee of the state." This section does not specifically identify a culpable mental state. R.C. 2901.21(B) provides:

HN19 ¶ "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates **[**28]** a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

[*P59] In *State v. Cheraso* (1988), 43 Ohio App.3d 221, 223, 540 N.E.2d 326, the court found that: "*** when a statute reads, 'No person shall ***,' absent any reference to the requisite culpable mental state, the statute is clearly indicative of a legislative intent to impose strict liability." Because R.C. 2921.51 provides that "no person shall commit a felony while impersonating a police officer," it is a strict liability crime which may be proven without regard to culpable mental state. Therefore, the trial court's instruction was proper and the tenth assignment of error is overruled.

Complicity

[*P60] In his eleventh assignment of error, Johnson claims he was denied due process of law and a fair trial because (1) the court's charge on complicity constructively amended the indictment, (2) the court lessened the burden of proof below the beyond-a-reasonable-doubt standard, and (3) the State was not required to prove that Johnson was the principal offender.

[*P61] As previously explained, the court's charge on complicity did not **[**29]** constructively amend the indictment because **HN20** ¶ complicity need not be stated in terms of the complicity statute but may be stated, as it was in this case, in terms of the principal offense. R.C. 2923.03(F); *Dotson, supra*. Therefore, a defendant suffers no prejudice when the jury is instructed on complicity even though the indictment against him never mentioned the

words "complicity," "solicitation," "conspiracy," or "aiding or abetting." *Dotson, supra*. See also, *State v. Grimsley* (1998), 131 Ohio App. 3d 44, 721 N.E.2d 488.

[*P62] Further, the court did not lessen the State's burden in this case. The court explained the proof-beyond-a-reasonable-doubt standard to the jury and properly instructed them that the State must prove Johnson's guilt beyond a reasonable doubt.

[*P63] Finally, the State was not required to prove that Johnson was the principal offender to obtain a conviction. ^{HN21}It is well established that the State may charge and try an aider and abettor as a principal, and if the evidence at trial reasonably indicates that the defendant was an aider and abettor rather than a principal offender, a jury **[**30]** instruction regarding complicity may be given. *State v. Kajoshaj*, Cuyahoga App. No. 76857, 2000 Ohio App. LEXIS 3642, citing *Hill v. Perini* (C.A. 6, 1986), 788 F.2d 406, cert. denied, 479 U.S. 934, 93 L. Ed. 2d 361, 107 S. Ct. 409, and *Anderson v. Coyle* (C.A. 6, 1999), 173 F.3d 854.

[*P64] Further, in order to convict an offender of complicity, the State need not establish the principal's identity; pursuant to R.C. 2923.03(C), the State need only prove that a principal committed the offense. *State v. Smith*, Cuyahoga App. No. 43414, 1982 Ohio App. LEXIS 11957. Therefore, Johnson's eleventh assignment of error is overruled.

Definitions of "Force" and "Trespass"

[*P65] In his twelfth assignment of error, Johnson claims the trial court failed to define the terms "force" and "trespass" as they relate to the burglary charge and that this failure violated his right to due process. Because the defendant did not object to these instructions at the time of trial, this issue is reviewed only for plain error. *Campbell, supra*.

[*P66] At trial, the court instructed the jury as follows:

"But let us **[**31]** now look at each of the particular kinds of crimes that are alleged. What kind of crime is burglary? What do we mean by burglary . . .

A burglary occurs when a person by force or stealth - excuse me, by force or deception trespasses in an occupied structure when another person who is not the accomplice of the offender is present, and when he does so for the purpose of committing in the structure a criminal offense.

Theft, for example, is a criminal offense. The force that is used need not be of any particular amount.

It need only be sufficient to accomplish entry where entry would not have otherwise occurred, so when you say that the person trespassed by force, it's only the amount that's sufficient to accomplish the entry where the entry would not otherwise have occurred.

One trespasses when he enters upon property of another without permission of a person authorized to give permission. And I'm assuming you know what the word deception means. Now I'm going to try to define just that, just the same way, what it means to you in your everyday life. There's no tricky definition of that. Okay. So that's the crime of burglary."

[*P67] R. C. 2901.01(A) ^{HN22} defines **[**32]** "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." In *State v. Lane* (1976), 50 Ohio App.2d 41, 45, 361 N.E.2d 535, the court held that force may properly be defined as "effort" rather than "violence" in a charge to the jury. A defendant is not prejudiced if there is no substantial difference between the statutory definition of a term and the definition that the trial court provided to the jury. *Lane, supra*.

[*P68] The court's definition of "force" as "the amount of force necessary to accomplish entry where the entry would not otherwise have occurred," comports with the statutory definition of "force" which simply requires effort be exerted against a person or thing. Accordingly, we find no substantial difference between the statutory definition of "force" and that given by the trial court.

[*P69] R.C. 2911.21(A)(1) ^{HN23} defines "trespass" as follows: "No person, without privilege to do so, shall . . . knowingly enter or remain on the land or premises of another." Here, the court instructed the jury, "One trespasses when he enters upon property of another without **[**33]** permission of a person authorized to give permission." Again, we find no substantial difference between the statutory definition and that given by the court. Therefore, the twelfth assignment of error is overruled.

Motion for Judgment of Acquittal as to Indictment Involving Mildred Paul

[*P70] In his thirteenth assignment of error, Johnson argues the trial court erred in denying his motion for judgment of acquittal. Specifically, Johnson argues the verdict was against the manifest weight of the evidence and there was insufficient evidence to support the convictions because Paul was unable to identify Johnson as the perpetrator.

[*P71] Crim.R. 29(A) provides in part:

HN24 "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

[*P72] **HN25** "A motion for acquittal may be granted only where the evidence is insufficient to sustain a conviction. Crim.R. 29(A); State v. Apanovitch (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394. **[**34]** In reviewing the sufficiency of the evidence in a criminal case, an appellate court will not reverse a conviction where there is substantial evidence, viewed in a light most favorable to the prosecution, which would convince the average mind of the defendant's guilt beyond a reasonable doubt. State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492, State v. Bridgeman (1978), 55 Ohio St.2d 261, 263, 381 N.E.2d 184.

[*P73] **HN26** "When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether the jury's verdict is supported by sufficient competent, credible evidence to permit reasonable minds to find guilt beyond a reasonable doubt. State v. Thompkins (1997), 78 Ohio St.3d 380, 387, 1997 Ohio 52, 678 N.E.2d 541, reconsideration denied (1997), 79 Ohio St. 3d 1451, 680 N.E.2d 1023 ("When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting evidence"). Determinations of credibility and weight of the testimony remain within **[**35]** the province of the trier of fact. State v. DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

[*P74] After careful review of the record, we find that the State presented substantial credible evidence which would allow reasonable minds to conclude that all of the material elements of the offenses at issue in this case were proven beyond a reasonable doubt. Paul testified that a man knocked on her door and claimed to be "Sergeant David." She testified that when she peered through the door, he showed her a badge and thus represented himself as a police officer. Further, Paul testified that when she opened the door, "Sergeant David" and another man entered her home without her permission.

[*P75] Paul also stated that the men forced her into her bedroom where one of them guarded her while the other searched her drawers, purses, and closets, taking any valuables he could find. They took change from her pockets, and money and a credit card from her purse. Finally, she stated that as they were leaving, "Sergeant David" ripped the telephone out of the wall.

[*P76] A fingerprint examiner testified that the fingerprint evidence collected from Paul's **[**36]** home from an item touched by "Sergeant David" was positively identified as matching Johnson's fingerprint. According to Paul's testimony, there was no reason for Johnson's fingerprint to be inside her home other than as a result of the burglary. Based on this evidence, reasonable jurors could conclude that Johnson committed the burglary, theft, impersonating a police officer, disrupting public service, and kidnapping of Paul. Therefore, the court's decision to deny the motion for acquittal was proper, and the thirteenth assignment of error is overruled.

Motion for Judgment of Acquittal as to Indictment Involving Margaret Daus

[*P77] In his fourteenth assignment of error, Johnson argues the trial court erred in denying his motion for judgment of acquittal as to the indictment involving Margaret Daus. Specifically, Johnson argues the verdict was against the manifest weight of the evidence and there was insufficient evidence to support the convictions because Daus could not remember seeing Johnson in her house.

[*P78] As previously stated, a motion for acquittal may be granted only where the evidence is insufficient to sustain a conviction. Crim.R. 29(A); Apanovitch, supra. **[**37]** With regard to the manifest weight of the evidence, the conviction may only be reversed if it is not supported by sufficient competent, credible evidence keeping in mind that determinations of credibility remain within the province of the jury.

[*P79] Our review the record reveals that the State presented substantial credible evidence which would allow reasonable minds to conclude that all of the material elements of the offenses charged in the indictment involving Margaret Daus have been proven beyond a reasonable doubt. Daus testified that three men entered her house without her permission. While one of the men guarded her in the kitchen, the other two men proceeded to her bedroom, where they searched every purse, box, drawer, and closet, taking any valuable items they could find. After ransacking her bedroom, the three men left her house without saying a word to her.

[*P80] Although Daus testified that she could not identify the perpetrators, a fingerprint examiner testified that the fingerprint evidence collected from her home was positively identified as being Johnson's fingerprint. According to Daus, there was no reason Johnson's fingerprint would be found inside her house **[**38]** other than as a result of the burglary. Based on this evidence, reasonable jurors could conclude that Johnson committed the burglary and participated in the kidnapping of Daus. Therefore, the court did not err in overruling Johnson's motion for judgment of acquittal and the fourteenth assignment of error is overruled.

Motion to Dismiss

[*P81] In his fifteenth assignment of error, Johnson argues the trial court erred in denying his motion to dismiss the count of disrupting public service when there was no evidence to support all the elements of that offense.

[*P82] R.C. 2909.04(A)(3) provides:

HN27 "No person purposely by any means, or knowingly by damaging or tampering with any property, shall substantially impair the ability of law enforcement officers, firefighters, rescue personnel, emergency medical services personnel, or emergency facility personnel to respond to an emergency, or to protect and preserve any person or property from serious physical harm."

[*P83] This court has held that *HN28* where one purposely disconnects the victim's telephone service, the crime of disrupting public service has been committed. *State v. Coker*, Cuyahoga App. No. 74785, 1999 Ohio App. LEXIS 4291, **[**39]** citing *State v. Brown* (1994), 97 Ohio App. 3d 293, 646 N.E.2d 838.

[*P84] In this case, Paul testified that the perpetrator ripped the telephone from the wall and took it with him when he left the house and that she had no means of calling the police. Thus, Johnson made it impossible for Paul to initiate or receive telephone calls at her home. Therefore, there was sufficient evidence to support a conviction of disrupting public service and the fifteenth assignment of error is overruled.

Allied Offenses

[*P85] In his sixteenth assignment of error, Johnson argues the trial court violated his right to due process when it failed to merge various offenses. Specifically, Johnson claims that pursuant to R.C. 2941.25, burglary and kidnapping and burglary and theft are "allied offenses of similar import" and, therefore, the trial court should not have convicted and sentenced him for all of these offenses.

[*P86] R.C. 2941.25 provides:

"(A) *HN29* Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such **[**40]** offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

[*P87] *HN30* In applying this statute, a two-step analysis has been developed. See *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, and *State v. Mitchell* (1983), 6 Ohio St.3d 416, 6 Ohio B. 463, 453 N.E.2d 593. First, we must look to see if the elements of the two crimes correspond to such a degree that the commission of one offense will naturally result in the commission of the other. *Mitchell, supra*, at 418. If we find the two crimes to be allied offenses of similar import, then we must determine, under R.C. 2941.25(B), whether the offenses were committed separately or with a separate animus as to each.

[*P88] When comparing the elements of kidnapping, burglary, and theft, it is obvious that any of these offenses **[**41]** could be committed without also committing the others. "Aggravated burglary" is defined in R.C. 2911.11, which provides in relevant part:

"(A) *HN31* No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense as defined in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

- (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
- (2) The offender has a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;
- (3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present."

[*P89] "Theft" is defined in R.C. 2913.02 as follows:

"(A) *HN32* No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert **[**42]** control over either:

- (1) Without the consent of **[**7]** the owner or person authorized to give consent;

- (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
- (3) By deception;
- (4) By threat."

[*P90] ^{HN33} These two offenses do have some common elements in that aggravated burglary may, as in this case, involve the purpose to commit a theft offense. However, completion of the theft offense is not a necessary element because the purpose to commit any felony will suffice to supply the requisite intent. Therefore, burglary and theft are not allied offenses. See *Mitchell, supra*.

[*P91] Similarly, ^{HN34} burglary is not an allied offense of kidnapping. *State v. Watkins, Montgomery App. No. 10252, 1987 Ohio App. LEXIS 9278*. Kidnapping is defined by R.C. 2905.01, which states in pertinent part:

"(A) ^{HN35} 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 he is found or restrain him of his liberty, for any of the following purposes:

* * *

(2) To facilitate the commission **[**43]** of any felony or flight thereafter."

[*P92] We find that the commission of kidnapping will not necessarily result in the commission of aggravated burglary and vice versa. Aggravated burglary requires the commission of a felony in connection with a trespass. These elements are not required to commit kidnapping. Therefore, kidnapping and burglary are not allied offenses of similar import and Johnson could be convicted and sentenced for burglary, kidnapping, and theft under both indictments in this case. Accordingly, the sixteenth assignment of error is overruled.

Consecutive Sentences

[*P93] In his seventeenth assignment of error, Johnson argues the trial court improperly sentenced him to consecutive prison terms. Specifically, Johnson argues the trial court inappropriately imposed consecutive prison terms because Johnson refused to assist law enforcement in apprehending the other participants involved in these crimes. He also claims that the burglaries in these cases do not constitute the worst forms of the offense and that the court failed to state its reasons for imposing consecutive sentences.

[*P94] The court's decision to impose consecutive sentences was not based solely **[**44]** on the fact that Johnson refused to assist in apprehending the other participants involved in these crimes. The court sentenced Johnson according to the applicable terms of the sentencing statute.

[*P95] R.C. 2929.14(E)(4) provides, in pertinent part:

"(4) ^{HN36} If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

* * *

(c) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

[*P96] At sentencing, the court stated:

"These were both elderly persons. The most pathetic situations. Women living alone. One woman, as was pointed out, who lived at this location for 90 years. And I think the only reason that the trauma to the 90-year-old **[**45]** was manifest more severely is that she's just - she's not a mentally very able person. I mean, she obviously was suffering a lot of deficiencies, although incidentally she was articulate and she knows what's going on at the moment, but her, you know, her memory about what happened is not - was not good.

But the other woman's memory was very good, the 82-year-old, and she's clearly traumatized in a very serious way by this. She can't live the independent life that she was physically able to lead, taking care of herself and everything. And now she's so frightened she has to live with her families and are so concerned. And, of course, this was committed while he was on probation.

He's got four prior imprisonments. He shows no remorse. You've done this kind of thing in the past. I agree with Miss Tiburzio, this man will probably be a danger to older people for the rest of his life.

So I can't come to any conclusion except that this is a person who has the greatest likelihood of committing future crime and I think he's committed the worst form of these nonviolent burglaries, burglarizing elderly people when they're there, present in the home, selecting the most vulnerable people one [**46] can find and doing it in an organized fashion with other people, so he's getting other people to do it.

* * *

So I do not think that 21 years is disproportionate to the seriousness, Mr. Johnson, of your conduct or to the danger you pose to the public. And frankly, I think that this sentence is absolutely necessary to protect the public from you."

[*P97] These statements illustrate that the court not only gave its reasons for consecutive sentences, but that the court's reasons were based on factors set forth in the sentencing statute. Accordingly, we overrule the seventeenth assignment of error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. MICHAEL J. [**47] CORRIGAN, P.J. and

ANNE L. KILBANE, J. CONCUR

JUDGE

COLLEEN CONWAY COONEY

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

97 Ohio App. 3d 293, *, 646 N.E.2d 838, **;
1994 Ohio App. LEXIS 3489, ***

The STATE of Ohio, Appellee, v. BROWN, Appellant

No. 65097

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

97 Ohio App. 3d 293; 646 N.E.2d 838; 1994 Ohio App. LEXIS 3489

August 11, 1994, Decided

PRIOR HISTORY: [***1] **CHARACTER OF PROCEEDING:** Criminal appeal from Court of Common Pleas. Case No. CR-283319.

DISPOSITION: *Judgment affirmed.*

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed from the judgment of the Cuyahoga County Court of Common Pleas (Ohio), which convicted him after a bench trial of felonious assault, domestic violence, and disruption of public services with accompanying violence specifications.

OVERVIEW: Defendant was the father of one of the victim's children, and she complained that he beat her, threw her to the floor, threatened her with a knife, and tore her telephone off the wall. Defendant was arrested when police stopped him in the belief that he fit the description of a suspected robber. Immediately prior to trial, defendant waived his right to trial by jury and the matter proceeded to a suppression hearing before a judge. The trial court denied the motion for suppression of his recorded statement and convicted him on the testimony of the victim and the arresting officer. Defendant denied the assaults and threats. On appeal, the court affirmed the judgment. Defendant failed to state any facts that supported his motion to suppress statements, and he abandoned his other suppression motions. Even if his arrest was unlawful, a voluntary statement was admissible after he was given his Miranda warning. Felonious assault was proved by the attempt to cause physical harm pursuant to Ohio Rev. Code Ann. § 2923.11. Defendant failed to preserve any appellate issue at trial concerning disruption of public services.

OUTCOME: The court affirmed the judgment of the trial court.

CORE TERMS: telephone, suppress, assignments of error, felonious assault, sub judice, apartment, public services, physical harm, knife, domestic violence, victim's apartment, telephone call, specification, disrupting, emergency, audio, telephone service, violence, knowingly, purposely, impair, radio, suppress evidence, tape recording, suppression, damaging, pulled, tape, law enforcement officers, record demonstrates

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[Criminal Law & Procedure > Pretrial Motions & Procedures > Suppression of Evidence](#) 

[Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > General Overview](#) 

[Evidence > Illegal Eavesdropping > General Overview](#) 

HN1  The Ohio Supreme Court has recognized that the failure to raise suppression claims in the trial court prior to the commencement of trial precludes raising the argument for the first time on appeal. [More Like This Headnote](#)

[Criminal Law & Procedure > Interrogation > Miranda Rights > Spontaneous Statements](#) 

HN2  Even if an unlawful arrest occurred in violation of the Fourth Amendment, this does not provide a basis for excluding post-arrest statements voluntarily given by a defendant after being advised of his Miranda, Fifth, Sixth and Fourteenth Amendment rights. [More Like This Headnote](#)

[Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Simple Offenses > Elements](#) 

[Criminal Law & Procedure > Criminal Offenses > Weapons > Definitions](#) 

HN3  Ohio Rev. Code Ann. § 2903.11 defines the crime of felonious assault and provides as follows: (A) No person shall knowingly: (1) Cause serious physical harm to another; (2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance, as defined in Ohio Rev. Code Ann. § 2923.11. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Crimes Against Persons](#) > [Assault & Battery](#) > [Simple Offenses](#) > [Elements](#)

HN4 The prosecution is not required to establish defendant caused any type of "physical harm" to the victim to support a conviction for felonious assault. Rather, an attempt to cause physical harm by means of a deadly weapon or dangerous ordnance is sufficient to constitute felonious assault under [Ohio Rev. Code Ann. § 2903.11\(A\)\(2\)](#). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Substantial Evidence](#) > [General Overview](#)

[Evidence](#) > [Procedural Considerations](#) > [Weight & Sufficiency](#)

HN5 As to the claim of insufficient evidence, the test is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Reviewability](#) > [Preservation for Review](#) > [General Overview](#)

HN6 The general rule is that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

COUNSEL: *Stephanie Tubbs Jones*, Cuyahoga County Prosecuting Attorney, and *Thomas Rein*, Assistant Prosecuting Attorney, for appellee.

Lawrence Rafalski, for appellant.

JUDGES: Krupansky, Judge. Spellacy, P.J., and James D. Sweeney, J., concur.

OPINION BY: KRUPANSKY

OPINION

[*294] [839]** Defendant-appellant Anthony Brown appeals from his bench trial convictions for felonious assault, domestic violence and disruption of public services with accompanying violence specifications.

Defendant was indicted by the Cuyahoga County Grand Jury August 11, 1992 on the following three charges, *viz.*: (1) felonious assault of Stephanie Simpkins with a knife in violation of [R.C. 2923.11](#) with an aggravated felony and three violence specifications; (2) domestic violence against Simpkins in violation of [R.C. 2919.25](#) with two violence specifications and a "furthermore" clause based on a prior domestic violence conviction; and (3) disrupting public services in violation of [R.C. 2909.04](#) with two violence specifications. The charges arose out of two separate incidents on **[***2]** May 30 and May 31, 1992 at the victim's apartment located at 3782 West 22nd Street in the city of Cleveland.

The record demonstrates that defendant filed three general boilerplate motions to suppress evidence two days following his indictment in the case *sub judice*. Defendant's three motions to suppress were captioned as follows, *viz.*: (1) Motion to Suppress Statements; (2) Motion to Suppress Eye Witness Identification **[*295]** Testimony; and (3) Motion to Suppress Illegally Obtained Evidence. The three suppression motions challenged the admissibility of different types of evidence and each raised distinct constitutional claims.

On December 14, 1992 immediately prior to trial, defendant waived in writing his right to trial by jury and the matter proceeded to a suppression hearing before a judge. The transcript of proceedings demonstrates the trial court conducted a hearing on only defendant's Motion to Suppress Statements. Defendant expressly withdrew his two remaining suppression motions, *viz.*, his Motion to Suppress Eye Witness Identification Testimony and his Motion to Suppress Illegally Obtained Evidence. As a result, the sole issue for the trial court was **[***3]** whether the police obtained an oral statement from defendant in violation of his rights to counsel and against self-incrimination.

The prosecution presented testimony from Cleveland Police Patrolman David A. Reuse and an audio tape recording of a statement made by defendant after defendant was taken into custody on May 31, 1992 outside the victim's apartment. Patrolman Reuse testified that he and his partner, Patrolman Edwin Caudra, each read defendant his *Miranda* rights prior to the time when defendant made any statements. Patrolman **[**840]** Reuse stated he read defendant his *Miranda* rights prior to placing defendant in the squad car and Patrolman Caudra read defendant his *Miranda* rights after the tape recorder in the squad car was engaged but before defendant made any statement. Patrolman Reuse specifically testified under cross-examination by defense counsel that defendant volunteered the statement recorded on the audio tape without any questioning by the officers as follows:

"Q. Were there any questions or interrogations made by either you or Officer Cuadra [*sic*] to induce Defendant to

make his statement?

"A. No."

The audio tape recording, State's Exhibit [***4] 1, was played for the trial court. The trial court subsequently denied defendant's Motion to Suppress Statements at the conclusion of the hearing.

The trial court thereafter amended count one of the indictment to delete the aggravated felony specification at the request of the prosecution prior to commencing the bench trial. Defendant also stipulated to his prior domestic violence conviction and two violence specifications accompanying all three charges prior to the presentation of evidence.

The prosecution thereafter presented testimony from the victim, Stephanie Simpkins, and Patrolman Reuse to support the felonious assault, domestic violence and disruption of public service charges. Simpkins testified defendant, who was the father of the youngest of her two children living with her, kicked in [*296] the door of her apartment on May 29, 1992. Simpkins stated she did not report the incident to the police because she was intimidated by defendant. Defendant remained in her apartment throughout the evening and the following weekend.

Simpkins testified that on the following day, May 30, 1992, defendant grabbed her by the collar and threw her down head first onto the floor. [***5] Simpkins stated defendant threatened to kill her "before he'd go back to jail" and pulled the telephone out of the apartment wall. Simpkins stated her head hit the floor "real hard" and she received "a real bad headache" from this incident. Her telephone connection was broken and the telephone did not operate after the incident. Simpkins informed the police that "nothing happened" when they responded to the scene pursuant to the request of an unidentified telephone caller because she was afraid of further violence from defendant.

Finally, Simpkins also testified defendant "held her up" and cornered her with a knife to her neck in the hallway of the apartment building the following day, May 31, 1992. Simpkins stated defendant threatened her, but did not cut her, with the knife. Patrolman Reuse concluded the testimony for the prosecution by describing the circumstances of defendant's arrest.

Defendant testified on his own behalf following the denial of his Crim.R. 29 motion for judgment of acquittal. Defendant denied beating the victim or disconnecting the telephone in her apartment on May 30, 1992. Defendant also denied threatening her with a knife on May 31, 1992.

The trial [***6] court found defendant guilty of felonious assault, domestic violence and disrupting public services with accompanying specifications following its deliberations. The trial court journalized defendant's convictions on December 24, 1992. The trial court thereafter imposed the following concurrent indefinite terms of imprisonment January 15, 1993 after conducting a sentencing hearing, viz.: (1) four to fifteen years for felonious assault in violation of R.C. 2903.11; (2) three to five years for domestic violence in violation of R.C. 2919.25; and (3) three to ten years for disrupting public services in violation of R.C. 2909.04. Defendant, through newly appointed appellate counsel, timely appeals raising three assignments of error.

Defendant's first assignment of error follows:

"The trial court improperly failed to grant the motion to suppress, as the detention of defendant had been improper, once he was found not to be involved in the reported crime for which police say he was stopped, in violation of his Fourth Amendment rights."

Defendant's first assignment of error lacks merit.

[**841] Defendant argues the trial court improperly failed to suppress the audio tape recording [***7] of his oral statement made while he was in police custody since he was [*297] unlawfully taken into custody. However, based on our review of the record, defendant has failed to exemplify any error.

As noted above, defendant originally filed three generalized boilerplate motions to suppress evidence two days following his indictment in the case *sub judice*. The brief accompanying the first of these three motions, viz., defendant's Motion to Suppress Statements, which ultimately proceeded to a pretrial hearing argued in its entirety as follows:

"The statement(s) taken by police in the case at bar are in violation of the defendant's fifth, sixth and fourteenth Amendment rights [sic] under the Ohio and United States Constitutions. The admission into evidence of said statements would violate guarantees in the cases of Miranda v. Arizona, 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (1966) and Burton v. United States, 391 R.S. [sic] 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] (1968)."

Defendant's remaining two motions to suppress evidence were expressly abandoned by defense counsel on the record in open court.

It should be noted in this first assignment [***8] of error defendant now challenges his Fourth Amendment

constitutional rights on appeal which he did not argue in the trial court. The record demonstrates, however, defendant in the trial court challenged only a violation of his Fifth, Sixth and Fourteenth Amendment rights under the United States Constitution and "Article I" of the Ohio Constitution, which he does not raise in this assignment of error on appeal. Defendant's failure to provide a transcript of the audio tape recording precludes this court of appeals from reviewing the merits of the trial court's ruling on the issues presented to the trial court. See *State v. Hammer* (1992), 82 Ohio App.3d 663, 612 N.E.2d 1300; *State v. Lane* (1988), 49 Ohio App.3d 158, 551 N.E.2d 994.

Defendant's newly minted contention that the trial court should have suppressed his audio tape recorded statement because he was improperly "seized" prior to making the statement in violation of his Fourth Amendment rights lacks merit. ^{HN1} The Ohio Supreme Court has recognized that the failure to raise suppression claims in the trial court prior to the commencement of trial precludes raising the argument for the first time on appeal. See *State v. F.O.E. Aerie 2295* (1988), 38 Ohio St.3d 53, 526 N.E.2d 66. Moreover, we note that even if defendant's third motion to suppress evidence, viz., his Motion to Suppress Illegally Obtained Evidence on the grounds he was improperly "searched" in violation of his Fourth Amendment rights, were construed to challenge his "seizure" and raise this issue, defendant specifically abandoned the argument in the trial court.

Even if defendant had not expressly abandoned his Motion to Suppress Illegally Obtained Evidence, the trial court would have been warranted in [*298] summarily denying the boilerplate motion since defendant did not assert any factual basis to support the motion. *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 524 N.E.2d 889; *State v. McLenore* (1992), 82 Ohio App.3d 541, 545-546, 612 N.E.2d 795, 798-799. The record *sub judice*, which contains only the testimony of Patrolman Reuse and no transcript of defendant's audio tape recorded statement, reveals absolutely no factual basis for the Motion to Suppress Illegally Obtained Evidence: Patrolman Reuse testified defendant was belligerent throughout the entire time after he was approached by the police investigating [***10] a robbery triggered by a police radio broadcast. Defendant fit the description of the suspected robber. Since defendant fit the description of the suspected robber, the police had a right to approach and question defendant during the investigation of a felony. After defendant was given his *Miranda* rights and placed in the police car, defendant remained belligerent and without questioning by the police continued to rant and rave. In fact, defendant was so belligerent he was placed in shackles or leg irons in the police station and no interrogation of any kind occurred.

Finally, ^{HN2} even if an unlawful arrest occurred in violation of the Fourth Amendment as defendant contends on appeal, this does not provide a basis for excluding post-arrest statements voluntarily given by a defendant [***842] after being advised of his *Miranda*, Fifth, Sixth and Fourteenth Amendment rights as in the case *sub judice*. See *State v. Hooper* (1966), 10 Ohio App.2d 229, 39 O.O.2d 435, 227 N.E.2d 414, paragraph four of the syllabus.

Accordingly, defendant's first assignment of error is overruled.

Defendant's second assignment of error follows:

"Appellant was denied due process of law [***11] as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States, where his conviction was not supported by sufficient evidence."

Defendant's second assignment of error lacks merit.

Defendant contends the trial court improperly denied his motion for judgment of acquittal on the felonious assault with a knife charge in count one. Defendant specifically argues the prosecution failed to present any evidence defendant caused "serious physical harm" to the victim or caused any "physical harm" to the victim with the knife.

However, ^{HN3} R.C. 2903.11 defines the crime of felonious assault and provides as follows:

"(A) No person shall knowingly:

"(1) Cause serious physical harm to another;

[*299] "(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code." (Emphasis added.)

As a result, contrary to defendant's argument, ^{HN4} the prosecution is not required to establish defendant caused any type of "physical harm" to the victim to support a conviction for felonious assault. Rather, an attempt to cause physical harm by means of a deadly weapon or dangerous ordnance [***12] is sufficient to constitute felonious assault under R.C. 2903.11(A)(2).

The standard governing claims that a conviction is not supported by sufficient evidence has been summarized in *State v. Martin* (1983), 20 Ohio App.3d 172, 20 OBR 215, 485 N.E.2d 717, as follows:

^{HN5} "As to the claim of insufficient evidence, the test is whether after viewing the probative evidence and inferences

reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence." *Id.* at 175, 20 OBR at 218, 485 N.E.2d at 720.

The record *sub judice* contains sufficient evidence, when viewed in the light most favorable to the prosecution, to support defendant's conviction for felonious assault with a knife. The record is replete with evidence demonstrating defendant's violent behavior, including the following, *viz.*: (1) kicking in the door to the victim's apartment; (2) throwing the victim to the apartment floor [***13] with the result of the victim hitting her head; (3) threatening to kill the victim because defendant did not want to return to jail; (4) holding a knife to the victim's throat; and (5) destroying the victim's ability to communicate by telephone. It is well established that the mere act of brandishing a knife, even without such additional violent behavior against the victim during an entire weekend, may be found to constitute an "attempt to cause physical harm" to sustain a conviction for felonious assault as in the case *sub judice*. *State v. Zackery* (1987), 31 Ohio App.3d 264, 31 OBR 549, 511 N.E.2d 135.

Accordingly, defendant's second assignment of error is overruled.

Defendant's third assignment of error follows:

"Appellant was improperly convicted of the offense of disrupting public services, as the purpose of the statute is not intended to apply to the damaging of home appliances such as radio and television receivers, telephones and the like."

Defendant's third assignment of error lacks merit.

[*300] Defendant argues for the first time on appeal that he was improperly convicted of disrupting public services in violation of R.C. [**843] 2909.04. Defendant contends [***14] he merely hung up the victim's telephone while she was talking on the telephone with her father on May 30, 1992 and damaged the telephone unit. However, based on our review of the record, defendant has failed to exemplify any error.

The record of proceedings in the trial court contains absolutely no hint of defendant's arguments concerning the scope or applicability of R.C. 2909.04 under the circumstances of the case *sub judice*. Defendant did not specifically raise any issue concerning the disrupting public services charge when making his Crim.R. 29 motions for judgment of acquittal during trial or in any other manner at any time prior to or following his conviction of this offense. The grounds supporting this argument were clearly apparent and obviously known during trial and should have been raised in the trial court at that time prior to the appeal *sub judice*.

The Ohio Supreme Court has recognized in this context that belated claims of error raised for the first time on appeal are deemed to be waived, stating as follows:

HN6 "The general rule is that 'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could [***15] have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.'" *State v. Awan* (1986), 22 Ohio St.3d 120, 122, 22 OBR 199, 201, 489 N.E.2d 277, 279.

By failing to specifically raise any issue concerning the scope or applicability of R.C. 2909.04 in the trial court, defendant waived any claim of error in the case *sub judice*.

Moreover, even if defendant had timely raised and preserved this issue, his contention lacks merit. R.C. 2909.04 defines the crime of disrupting public services and provides as follows:

"(A) No person, purposely by any means, or knowingly by damaging or tampering with any property, shall do any of the following:

"(1) Interrupt or impair television, radio, telephone, telegraph, or other mass communications service, or police, fire, or other public service communications, or radar, loran, radio or other electronic aids to air or marine navigation or communications, or amateur or citizens band radio communications being used for public service or emergency communications;

"(2) Interrupt or impair public transportation, including without limitation school bus transportation, [***16] or water supply, gas, power, or other utility service to the public;

[*301] "(3) Substantially impair the ability of law enforcement officers, firemen, or rescue personnel to respond to an emergency, or to protect and preserve any person or property from serious physical harm." (Emphasis added.)

Based on our review of the record *sub judice*, the prosecution presented sufficient evidence from which the trial court could reasonably conclude defendant purposely, or knowingly by damaging or tampering with the victim's telephone, either (1) interrupted or impaired utility service to the public, or (2) substantially impaired the ability of law enforcement officers to protect and preserve any person or property from serious physical harm. The evidence

and reasonable inferences drawn therefrom, when viewed in the light most favorable to the prosecution, reveal defendant purposely, with specific intent, disconnected access to telephone service at the victim's apartment and prevented the making of an emergency 911 telephone call to the police or telephone call to anyone else for assistance while defendant was beating her.

By destroying the telephone connection [***17] in the victim's apartment, defendant interrupted or impaired existing telephone service to the public which included the victim, her two children who lived with her in the apartment and her father with whom she was conversing when defendant pulled the telephone out of the wall. Telephone service to the public includes both the initiation and receipt of telephone calls. Not only could the victim and her children no longer initiate or receive telephone calls at the apartment, but defendant also made it impossible for any member of the public to initiate telephone contact with the victim or her children at the apartment.

[**844] Contrary to defendant's argument in his brief on appeal, the record demonstrates defendant did substantially more than merely "hang up" the telephone during the victim's conversation with her father. Rather, the victim testified defendant pulled the telephone out of the wall, disconnected the telephone from the telephone wires and destroyed the telephone. The trial court could properly conclude defendant deliberately prevented the initiation or receipt of telephone communications service at the victim's apartment until the telephone unit could be replaced [***18] and connection with the telephone wires at the apartment restored days thereafter.

Defendant's contention the prosecution is required to establish that he completely deprived each and every member of the entire community at large of telephone service lacks merit. R.C. 2909.04(A)(2) is designed by its own terms to protect public access to existing telephone communications service, including the ability to initiate or receive telephone calls, without diminution of any kind. As a result, the evidence supports a conviction when the defendant, purposely or knowingly by damaging or tampering with any property, interrupts or impairs [*302] telephone service to the public by preventing either the initiation or receipt of telephone calls at a single location as in the case *sub judice*.

The trial court could likewise properly conclude defendant disconnected telephone service at the victim's apartment on May 30, 1992 to prevent the making of an emergency 911 telephone call to the police or anyone else for assistance while defendant was beating her. The victim testified defendant threatened to kill her "before he'd go back to jail" during the incident when he pulled the telephone [***19] out of the wall. Under the circumstances, the trial court could properly conclude that purposely or knowingly destroying a telephone and disconnecting immediate access to emergency telephone service to prevent, obstruct or delay communication with emergency services substantially impairs the ability of law enforcement officers to respond to the emergency in violation of R.C. 2909.04(A)(3).

Accordingly, defendant's third assignment of error is overruled.

Judgment affirmed.

Spellacy, P.J., and James D. Sweeney, J., concur.