

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

**CASE NO. 11-**

**11-0685**

Plaintiff-Appellant,

vs.

**ON APPEAL FROM THE  
MONTGOMERY COUNTY  
COURT OF APPEALS, SECOND  
APPELLATE DISTRICT**

**TRACY B. DAVIS, SR.**

**COURT OF APPEALS  
CASE NO. 23858**

Defendant-Appellee.

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**MEMORANDUM IN SUPPORT OF JURISDICITON  
OF APPELLANT, THE STATE OF OHIO  
DISCRETIONARY APPEAL**

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**EXPLANATION OF WHY LEAVE TO APPEAL SHOULD BE GRANTED**  
**AND WHY THIS CASE PRESENTS QUESTIONS OF PUBLIC OR**  
**GREAT GENERAL INTEREST**

This case presents the question of whether a conviction for witness intimidation under R.C. 2921.04(B) is sustainable when threats against a witness are made after law enforcement officers have begun to investigate a reported crime, but before a legal proceeding has commenced in court. Relying upon *State v. Malone*, 121 Ohio St.3d 244, 2009-Ohio-310, 903 N.E.2d 614, the Second District Court of Appeals held that R.C. 2921.04(B) only applies when a witness is threatened after commencement of “proceedings flowing from the criminal act in a court of justice.” *State v. Davis*, 2<sup>nd</sup> Dist. No 23858, 2011-Ohio-1280, at ¶29, citing *Malone*, at ¶9.

Yet, even while relying upon *Malone*, the court of appeals acknowledged ambiguity in the *Malone* decision. For example, this Court stated in *Malone* that a criminal action or proceeding implies that a formal process involving a court is underway. However, the wording of *Malone*’s holding suggested that a witness may be involved in a criminal action or proceeding for purposes of R.C. 2921.04(B) when a crime has been reported and an investigation initiated. See, *Davis*, at ¶27, 28, 30, referring to *Malone*, at ¶1, 9, 30; and *Malone*, at ¶18.

Ambiguity likewise appears between this Court’s language in *Malone*’s first and last paragraphs and its finding that there was insufficient evidence of witness intimidation in *State v. Gooden*, 8<sup>th</sup> District No. 82621, 2004-Ohio-2699. The first and last paragraphs of *Malone* indicate the issue was whether R.C. 2921.04(B) applied to threats made before any police investigation had begun in the particular case. Nevertheless, even though Gooden threatened a witness after a homicide investigation had commenced (but before a court proceeding was

pending), the *Malone* decision implicitly overruled Gooden's conviction for witness intimidation. See, *Davis*, at ¶28, referring to *Malone*, at ¶1, 23-26, 30.

In the end, the court of appeals in *Davis* reached a conclusion that appears to be in stark contrast with the stated holding of *Malone*. The court of appeals held: "However, our reading of *Malone* requires a holding that 'criminal action or proceeding' as used in R.C. 2921.04 requires 'proceedings flowing from the criminal act in a court of justice.' Id. at ¶9 (emphasis added). Thus, since there had only been an offense reported and a police investigation initiated, there was insufficient evidence of a 'criminal action or proceeding' to sustain a conviction for witness intimidation in violation of R.C. 2921.04(B)." *Davis*, at ¶29, citing *Malone*, at ¶9. In contrast, this Court held in *Malone*: "Liberally construing that statute in favor of the accused, as we must, we hold that when no crime has been reported and no investigation or prosecution has been initiated, a witness is not 'involved in a criminal action or proceeding' for purposes of R.C. 2921.94(B)." *Malone*, at ¶30. These disparate holdings are but one indication that clarity on the issue of what constitutes a criminal action or proceeding under R.C. 2921.04 is needed from this Court.

Witness intimidation, as this Court has already recognized, "does real harm to the administration of justice." *Malone*, at ¶27. It is already a problem in criminal prosecutions and will likely become even more prevalent if suspects cannot be charged with a felony offense for threatening a witness before charges are filed in a case. Moreover, many crimes will simply go unsolved if witnesses are too intimidated to even speak to the police during an investigation. Finally, prosecutors across the State need clear guidance about how to decide what crime may be charged when a witness has been threatened after police have begun investigating a reported

crime. Therefore, it is a matter of public and great general interest for the ambiguity in the *Malone* decision to be resolved.

### STATEMENT OF THE CASE AND FACTS

Tracy B. Davis, Sr., was indicted by a Montgomery County Grand Jury on December 4, 2007 for one count of felonious assault against a peace officer, in violation of R.C. 2903.11(A)(2), two counts of tampering with evidence, in violation of R.C. 2921.12(A)(1), and one count of intimidating a witness, in violation of R.C. 2921.04(B). The charges were tried to a jury in February of 2009. The evidence established that, on November 25, 2007, Davis and Deputy Joshua Haas were involved in an incident that resulted in Davis driving a van toward Haas, who then fired multiple rounds from his service weapon at the van. The van belonged to Davis' ex-wife, Sinnie Nelson, and, after he fled from the incident with Haas, Davis returned to the Fountainhead Apartment complex where Nelson lived. As a result of the shooting incident, the van had broken windows and bullet holes on the exterior of the vehicle. Davis parked at the back of the Fountainhead Apartment complex and covered the bullet holes in the van with duct tape.

When he returned to Sinnie Nelson's apartment, Davis was nervous and had blood on his shirt. Davis told Nelson that he was running from the police. He changed clothing and eventually left Nelson's apartment, but not before threatening to kill Sinnie Nelson if she didn't tell the authorities that a man named Patrick had been driving her van that day. Later, Sheriff's deputies did come to Nelson's apartment to ask her about her van. The first time deputies came to her apartment, Nelson told them Patrick had been driving the van. However, when the deputies returned to speak with her a second time, Nelson revealed that Davis had been the one driving her van. Davis was taken into custody later that night.

At the conclusion of the trial, Davis was found guilty of one count of tampering with evidence and of intimidating a witness. He was acquitted of the other count of tampering with evidence. Because the jury could not reach a verdict on the felonious assault against a peace officer charge, the Hon. A. J. Wagner declared a mistrial on count one of the indictment.

In January of 2010, the State dismissed the felonious assault charge pertaining to Deputy Haas (count one of the indictment) after Davis entered a no contest plea to a bill of information that charged him with intimidation in violation of R.C. 2921.03(A) and was found guilty. Davis was sentenced as follows: four years in prison for intimidating Sinnie Nelson (count three); two years in prison for tampering with evidence (count two); and three years in prison for intimidation of Deputy Haas (bill of information) – all to be served concurrently. Davis appealed.

On March 18, 2011, the Second District Court of Appeals issued an Opinion and Final Entry reversing Davis' conviction for intimidating a witness as charged in count three of the indictment. The court of appeals held that the State failed to prove Sinnie Nelson was a witness "involved in a criminal action or proceeding" when Davis threatened to kill her. The State now appeals to this Honorable Court.

### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

#### **Proposition of Law:**

**A conviction for intimidation of a witness under R.C. 2921.04(B) is sustainable when the witness is threatened after law enforcement officers have commenced investigation in a case.**

One of the charges against Davis in this matter was witness intimidation in violation of R.C. 2921.04(B), which states: "No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a

crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness.” At trial, the State presented evidence showing Davis tried to hit Deputy Joshua Haas with a van owned by his ex-wife, Sinnie Nelson, and the investigation into that alleged felonious assault began immediately after Davis sped away from the scene. Sergeant Rodney Ables arrived at the scene less than one minute after hearing Deputy Haas’ radio transmission regarding the incident. When Ables arrived, Trotwood officers were already on scene and were assisting Deputy Haas in marking the location of shell casings that were ejected from Haas’ service weapon when he fired at Davis as Davis drove the van toward the deputy.

Other deputies arrived shortly after Sergeant Ables. They secured the area where the alleged felonious assault and shooting had occurred with crime scene tape. Sergeant Ables called to other crews to start searching the area from North Main Street going east to Riverside Drive for the van that was involved in the alleged felonious assault. Ables told Deputy Brauney to walk the area of the apartment complex where the shooting occurred to see if anyone witnessed the event. He also took Deputy Haas’ duty belt and weapon for evidentiary purposes. And, when Ables received a radio transmission that Deputy Phelps had located the van driven by Tracy Davis at the Fountainhead Apartment complex, he responded to that location where he joined other officers in the additional investigation that took place.

Thus, the State proved that officers began a criminal investigation of the alleged felonious assault against Deputy Haas as soon as the event ended with Davis fleeing in the van. The investigation then continued at the Fountainhead Apartments with, among other things, officers processing Sinnie Nelson’s van, searching the apartment complex for the driver of the van, and interviewing Sinnie Nelson. From the evidence about when and how the officers

conducted the investigation, coupled with Sinnie Nelson's testimony that Davis told her he was running from the police, there can be no doubt that law enforcement officers had started a criminal investigation of the incident between Davis and Haas right away. In other words, the State proved that, by the time Davis got back to Sinnie Nelson's apartment where he threatened to kill Nelson if she did not lie to the authorities for him, a criminal investigation was underway.

On appeal, the State argued that this Court's decision in *Malone*, supra supported the conviction for witness intimidation while Davis argued that *Malone* required its reversal. In *Malone*, supra, this Court was asked to resolve a conflict between the appellate districts as to whether a conviction for intimidation of a witness is sustainable where the intimidation occurred after a criminal act but prior to any police investigation of the criminal act and thus prior to proceedings in a court of justice. *Malone*, at ¶9. After examining the conflicting decisions, this Court determined that R.C. 2921.04(B) does not apply to witnesses who might become involved in a criminal action or proceeding, but rather applies to witnesses who are involved in such an action or proceeding. *Malone*, at ¶25.

In discussing the meaning of the term "criminal action or proceeding," this Court did use language like the term "commonly indicates the involvement of a court," and "implies a formal process involving a court." *Malone*, at ¶15, 18. Nevertheless this Court held, "*when no crime has been reported and no investigation or prosecution has been initiated*, a witness is not 'involved in a criminal action or proceeding' for purposes of R.C. 2921.04(B)." *Malone*, at ¶30, (emphasis added).

The language of this Court's holding in *Malone* leaves room for prosecutions for witness intimidation under R.C. 2921.04(B) in cases like this where a witness' life is threatened after law enforcement officers begin investigating a reported crime, even if no formal process involving a

court has begun as a result of the investigation. Thus, where the State proves an investigation of a reported crime is underway when the suspect threatens to harm a witness unless she lies to the authorities for him, the evidence is sufficient to prove the elements of witness intimidation.

### CONCLUSION

The reversal of Tracy Davis' conviction for intimidation of a witness on the ground that the State failed to prove Sinnie Nelson was a witness involved in a criminal action or proceeding when Davis threatened to kill her unless she lied about who was driving her van on November 25, 2007 was error. The court of appeals misinterpreted this Court's decision in *State v. Malone*, supra, when it held that witness intimidation under R.C. 2921.04(B) cannot be proven unless the witness is threatened after a formal process involving a court has commenced. In the State's view, the holding of *Malone* allows prosecution under R.C. 2921.04(B) when the witness is threatened after a crime has been reported and a police investigation has begun. For that reason, the State respectfully requests that this Court take jurisdiction over this case, reverse the decision of the Second District Court of Appeals, and reinstate Tracy Davis' conviction for witness intimidation.

Respectfully submitted,

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23858
v.	:	T.C. NO. 07CR4865
TRACY B. DAVIS, SR.	:	(Criminal appeal from
Defendant-Appellant	:	Common Pleas Court)

**OPINION**

Rendered on the 18<sup>th</sup> day of March, 2011.

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FROELICH, J.

Defendant-appellant Tracy Davis appeals from his conviction and sentence for intimidation of a witness and tampering with evidence. For the following reasons, the

judgment of the trial court is Affirmed in part and Reversed in part.

Late on the morning of November 25, 2007, Montgomery County Sheriff's Deputy Haas was on routine patrol when he paused to allow a black Chevy Astro van to back out of a parking lot in front of him. The driver, who was later identified as Davis, watched the deputy avidly as he maneuvered his van, nearly turning around in his seat, which struck the deputy as odd. The deputy's interest was further piqued when Davis waited through a red light before turning right, though he could have legally turned on red.

The deputy decided to run the license plate, but before he was able to do so, Davis began to speed up before suddenly turning into the parking lot of another apartment building. Davis jumped out of the van and started running away. Deputy Haas parked his cruiser and ran after Davis, who ignored the deputy's commands to stop. Deputy Haas chased Davis around the apartment complex, back to the parked van. Davis got into the driver's seat and started the van. Deputy Haas drew his weapon, pointed it at Davis, and ordered him to get out of the van. Ignoring the officer, Davis first quickly reversed the van, then stopped it and accelerated directly toward Deputy Haas. As Deputy Haas moved to the side, he fired several rounds. Davis left the scene.

Deputy Haas radioed in to dispatch to advise the direction in which he had seen Davis fleeing. While other officers attempted to locate and pursue Davis, Deputy Haas remained in the parking lot to preserve the crime scene. Deputy Haas felt pain in his knee and believed that the van might have hit him.

Several minutes later, another deputy found the van parked at a near-by apartment complex. She saw two males collecting broken glass from the windshield of the van.

Back-up arrived, and as the deputies approached the van, the men disappeared between two buildings. The deputies noticed that the van had bullet holes in it, and there were pieces of duct tape on the van, which were found to be covering more bullet holes.

The van was registered to Davis's ex-wife, Sinnie Nelson. The deputies learned that the address on the registration was incorrect. When they asked a maintenance man at the complex where the van was found who owned the van, he pointed out Nelson's apartment to the officers. When deputies spoke with Nelson, she told them that a person named Patrick had been driving the van.

Davis was later arrested on an unrelated matter and taken to the district headquarters. Deputy Haas was writing up his report from the morning incident and saw Davis as he was brought in. Deputy Haas recognized Davis as the man who had been driving the black Astro van that morning.

Later that day, when deputies returned and collected bloody towels and clothing from Nelson's home, they told her that Davis was in jail. Feeling safe because Davis was in jail, Nelson changed her story and admitted to the deputies that she had allowed Davis to drive her van that morning in order to drive his friend Patrick to the store. When Davis returned, he had blood on his shirt. Nelson told the deputies that she asked Davis what had happened, but he told her that it was none of her business. He appeared to be very nervous; he kept looking out the window as he cleaned himself up and changed his clothes. Nelson told the deputies that she had lied to them at first because Davis told her that if the police came to talk to her, she should tell them that Patrick was driving the van, and Davis threatened to kill Nelson and blow up her apartment if she refused.

Davis was indicted on one count each of felonious assault and intimidating a witness

and two counts of tampering with evidence (one count for taping over the bullet holes and one count for changing his clothes and washing away blood). Davis filed a motion to suppress, which was granted in part, and the case proceeded to trial.

Davis testified in his own defense. He insisted that Deputy Haas was in front of him, rather than behind. As Davis parked, Deputy Haas made a U-turn. Patrick got out and ran away from the van, and the deputy followed him. Davis went to the apartments of some acquaintances, but neither answered their door. Not seeing the cruiser, Davis returned to his van. As he started to back out, Deputy Haas came running up, yelling and shooting at Davis, who accelerated and tried to get away from the deputy. Davis denied ever driving toward Deputy Haas or trying to hit him.

Davis claimed that he returned to Nelson's apartment and tried to clean up the broken glass with the help of a neighbor. Davis admitted that he used duct tape to keep the windshield from cracking further and to cover the other holes because he did not want anyone, including the police, to ask questions. Davis testified that he told Nelson that the police had tried to kill him, and he admitted that he told Nelson to tell the police that Patrick was driving the van. However, he denied threatening Nelson. Davis cleaned up, changed his clothes, and went to work.

A jury found Davis guilty of intimidating a witness and one count of tampering with evidence (taping over the bullet holes). Davis was acquitted of the second tampering count (changing his clothes and washing away blood). The jury could not reach a verdict on the felonious assault charge, and the court declared a mistrial on that charge, which is not at issue in this appeal. Davis was ordered to serve concurrent sentences of four years for intimidating a witness and three years for tampering with evidence. Davis appeals.

## II

Davis's First Assignment of Error:

"DAVIS' CONVICTION FOR INTIMIDATION OF A WITNESS IS UNSUPPORTED BY SUFFICIENT EVIDENCE AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

Davis's Second Assignment of Error:

"DAVIS' CONVICTION FOR TAMPERING WITH EVIDENCE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

In his First Assignment of Error, Davis maintains that his conviction for intimidation of a witness was not supported by sufficient evidence and that it was against the manifest weight of the evidence. In his Second Assignment of Error, he argues that his conviction for tampering with evidence was against the manifest weight of the evidence.

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 to sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. 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: "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."

In contrast, when reviewing a judgment under a manifest weight standard of review “[t]he court reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which evidence weighs heavily against the conviction.” *Thompkins*, supra, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

Davis was convicted of intimidation of a witness in violation of R.C. 2921.04(B), which states: “No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness.” (Emphasis added.)

Directing our attention to *State v. Malone*, 121 Ohio St.3d 244, 2009-Ohio-310, Davis argues that because no “criminal action or proceeding” had been initiated when he threatened Nelson, he could not be convicted of intimidation of a witness. In response, the State insists that although no formal charges had been filed, there was an active, on-going criminal investigation, which constitutes a “criminal action,” and is sufficient to support a conviction for intimidation of a witness under R.C. 2921.04(B).

The facts, as found by the jury, are not materially in dispute. The narrow legal question is whether threats made after the reporting of a crime and during its investigation constitute a violation of R.C. 2921.04(B). This, in turn, requires us to answer whether the

reporting and investigation of a crime is "a criminal action or proceeding" so as to be a violation of R.C. 2921.04(B).

In *Malone*, the defendant threatened a witness to a rape immediately after he committed the offense, but two days before anyone reported the offense to the police. The Supreme Court stated in the first paragraph of its decision that the "only issue" addressed "is whether R.C. 2921.04(B) applies to threats made before any investigation or legal proceeding has commenced in a case." *Id.* at ¶1. The next sentence holds "that R.C. 2921.04(B) does not apply in such situations." *Id.* Likewise, in its final paragraph, *Malone* "hold[s] that when no investigation or prosecution has been initiated, a witness is not 'involved in a criminal action or proceeding' for purposes of R.C. 2921.04(B)." *Id.* at ¶30. The State's reading of these quotes is that if an investigation has been initiated, a witness (i.e., one who could supply evidence) is involved in "a criminal action or proceeding."

The Supreme Court decision reviewed and affirmed *State v. Malone*, Marion App. No. 9-06-43, 2007-Ohio-5484, which found insufficient evidence of a violation of R.C. 2921.04(B) when the threats took place prior to the report of the crime or any investigation or prosecution of a criminal case. The Supreme Court certified that this holding was in conflict with *State v. Gooden*, Cuyahoga App. No. 82621, 2004-Ohio-2699, and *State v. Hummell* (June 1, 1998), Morrow App. No. CA-851.

In *Gooden*, the defendant threatened a witness to a homicide in which the defendant's cousin was a suspect. The witness later gave a statement and became a witness for the prosecution in the homicide investigation. *Gooden*, *supra*, at ¶¶8-9. The appellate court upheld the conviction holding that "it is not necessary for a criminal proceeding to be pending in order to sustain a conviction for intimidation under R.C.

2921.04." *Id.* at ¶37.

The Supreme Court also found *Malone* to be in conflict with *Hummell*, *supra*. In that case, as with *Malone*, the defendant threatened witnesses to a rape immediately after the offense, but weeks before any report to the police. The *Hummell* court affirmed the conviction because the defendant "was attempting to prevent the girls from discharging their duties as a witness to a criminal act." *Id.* at ¶3.

Thus, the Supreme Court in *Malone* affirmed an acquittal under R.C. 2921.04(B) when the intimidation took place before any police report or investigation of a criminal case (*Malone*); it implicitly reversed convictions where the intimidation was before any report of the offense (*Hummell*) and where the intimidation was after the report of the crime and its initial investigation (*Gooden*).

In its analysis, the Supreme Court in *Malone* states that while R.C. 2921.04 does not define "criminal action or proceeding," that phrase "commonly indicates the involvement of a court," *Id.* at ¶15, and "implies a formal process involving a court." *Id.* at ¶18. The court distinguished victim intimidation where R.C. 2921.04 "applies immediately upon commission of the underlying crime, prior to the involvement of legal authorities...." *Id.* at ¶19. Rather witness intimidation "does not apply to witnesses...who might become involved in a criminal action or proceeding. It applies to witnesses who are involved in a criminal action or proceeding." *Id.* at ¶25 (emphasis in original).

The State makes a strong argument that *Malone's* use of the word "investigation" in its first and last paragraphs implies that an investigation of a reported crime is a "criminal action or proceeding" so as to be within the prohibition of R.C. 2921.04(B). However, in *Gooden* (in which the Supreme Court found insufficient evidence of witness intimidation)

there had been a crime and an investigation. Further the *Malone* court states the question before it to be whether an R.C. 2921.04 conviction is “sustainable where the intimidation occurred after the criminal act but prior to any police investigation of the criminal act, and thus also prior to any proceeding flowing from the criminal act in a court of justice.” *Id.* at ¶9. Its answer is that such conviction “is not sustainable when the intimidation occurred after the criminal act but prior to any proceedings flowing from the criminal act in a court of justice.” *Id.* (emphasis added.)

We agree with the Supreme Court that witness intimidation “whether immediately after the commission of a criminal act or after the charges have been filed, should not be countenanced and does real harm to the administration of justice.” *Id.* at ¶27. However, our reading of *Malone* requires a holding that “criminal action or proceeding” as used in R.C. 2921.04 requires “proceedings flowing from the criminal act in a court of justice.” *Id.* at ¶9 (emphasis added). Thus, since there had only been an offense reported and a police investigation initiated, there was insufficient evidence of a “criminal action or proceeding” to sustain a conviction for witness intimidation in violation of R.C. 2921.04(B).

The issue raised by *Malone* would greatly benefit from an appeal and clarification by the Supreme Court.

To the extent that Davis argues that the intimidation conviction was against the manifest weight of the evidence, he insists that Nelson's testimony was not credible both because she initially lied to the police and because she visited Davis in jail despite claiming to fear him. The credibility of witnesses and the weight to be given to their testimony are matters for the trier of fact to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. The jury heard the testimony of all of the witnesses and saw their demeanor on the stand.

Because the jury "is particularly competent to decide 'whether, and to what extent, to credit the testimony of particular witnesses,' we must afford substantial deference to its determinations of credibility." *State v. Spears*, 178 Ohio App.3d 580, 2008-Ohio-5181, ¶12, quoting *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. "This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict." *State v. Pounds*, Montgomery App. No. 21257, 2006-Ohio-3040, ¶39, citing *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

Nelson explained that she initially lied to the police about who had been driving her van because she was afraid of Davis. Once she knew that Davis had been arrested, she felt safe and told the police the truth of who had been driving her van; Nelson explained that while he was incarcerated, she had no reason to fear him. She visited him in jail because their daughter wanted to see her father. However, after Davis threatened Nelson during a visit at the jail, she stopped visiting him. The jury was in the best position to evaluate the credibility of Nelson's testimony. The jury's verdict indicates that it found Nelson to be a credible witness.

Davis was also convicted of tampering with evidence in violation of R.C. 2921.12(A)(1), which states: "No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall \* \* \* [a]lter, destroy, conceal, or remove any record, document, or thing, with the purpose to impair its value or availability of evidence in such proceeding or investigation."<sup>1</sup>

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<sup>1</sup>It is worth noting that "tampering with evidence" specifically refers to an "investigation," as opposed to intimidation's reference to "a criminal action or proceeding."

Davis does not dispute that he knew that an investigation was occurring or that he used duct tape to cover bullet holes in Nelson's van. Rather, Davis insists that the State failed to prove that he used duct tape to cover the holes for the purpose of impairing the van's value or availability as evidence. However, both Davis's actions and his testimony belie this claim.

While still bleeding from an injury sustained by flying glass from the incident with the deputy, Davis took the time to clean up the broken glass in the van and to tape over the bullet holes. Davis admitted that he knew that the police would be looking for him. He also admitted that he put the tape on the van and that he did so primarily because he did not want people - including the police - to see the holes and ask questions about them. On cross-examination, the following testimony took place:

"Q But you wanted to make sure [the police] didn't see the bullet holes in the van, correct?

"A Not necessarily the police, that was everybody.

"Q Okay. Is the police included in the everybody?

"A I mean, yeah. Just I didn't want nobody seeing it.

"Q Okay. Including the police?

"A Yeah, yes.

"Q What do you think would happen if the police saw that van there? Do you think they'd come looking for you?

"A They probably would."

Davis's testimony, in addition to his actions, indicate an intent to conceal the bullet holes in the van, hoping that the police would not find either the van or him.

Viewing the evidence, as we must, in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime of intimidation of a witness proven beyond a reasonable doubt. Furthermore, the jury's verdict reflects that it found the testimony of the State's witnesses to be more credible than that of Davis. A jury does not lose its way simply because it chooses to believe the State's witness over the defendant. *Pounds*, at ¶40. Based on the record before us, Davis's convictions for intimidation of a witness and tampering with evidence are not against the manifest weight of the evidence. Although we have found insufficient evidence of intimidation and need not address manifest weight, we do so in case the sufficiency holding is reversed.

Davis's first assignment of error is sustained, and his conviction for intimidating a witness is vacated. His second assignment of error is overruled, and his conviction for tampering with evidence is affirmed.

## III

Judgment Reversed in part and Affirmed in part.

.....  
GRADY, P.J. and DONOVAN, J., concur.

Copies mailed to:

R. Lynn Nothstine  
Brandin D. Marlow  
Hon. Steven K. Dankof



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Support was sent by first class mail on this 25 day of April, 2010, to the following: Brandin D. Marlow, 150 North Limestone Street, Suite 218, Springfield, Ohio 45501 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, OH 43215-9311.

**MATHIAS H. HECK, JR.**  
PROSECUTING ATTORNEY

By:   
\_\_\_\_\_  
**R. LYNN NOTHSTINE**