

IN THE SUPREME COURT OF OHIO

11-0990

STATE OF OHIO,

Appellant,

v.

CARL R. SIMONS,

Appellee.

} Supreme Court Case No. _____
 }
 } On Appeal from the Champaign
 } County Court of Appeals,
 } Second Appellate District
 }
 } Court of Appeals Case No.
 } 2010 CA 07
 }

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
 STATE OF OHIO

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EXPLANATION OF WHY THIS CASE IS ONE 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. More specifically, Defendant-Appellee, Carl A. Simons (“Simons”), left a threatening message on Tonia Justice’s cell phone concerning comments she had made to police regarding break-ins in the Urbana area.

Relying upon *State v. Malone*, 121 Ohio St.3d 244, 2009-Ohio-310, 903 N.E.2d 614 and *State v. Davis*, Montgomery App. No. 23858, 2011-Ohio-1280, the Court of Appeals of Champaign County, Second Appellate District held that the phrase “‘criminal action or proceeding’ as used in R.C. 2921.04, requires ‘proceedings flowing from the criminal act in a court of justice.’” *State v. Simons*, Champaign App. No. 2010 CA 07, 2011-Ohio-2071, ¶32, quoting *Davis*, at ¶29.

Yet, even while relying upon *Malone*, the Second District in *Davis* acknowledged ambiguity in its decision. In that regard, this Court stated in *Malone* that a “‘criminal action or proceeding’ implies that a formal process involving a court is underway. *Malone*, at ¶¶15, 18. This Court, however, also stated 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 purpose of R.C. 2921.04(B).” *Malone*, ¶30. Indeed, the Second District even went so far as to suggest that the issue raised *Malone* would benefit from further clarification by this Court. *Davis*, at ¶30.

In the end, the Second District reached a conclusion in this case that appears to be in stark contrast with *Malone*. Having held that that a “criminal action or proceeding” as used in R.C.

2921.04 requires “proceedings flowing from the criminal act in a court of justice,” the Second District found the evidence against Simons insufficient since there had only been an offense reported and a police investigation initiated. *Id.* at ¶33.

In contrast, this Court in *Malone*, liberally construing that statute in favor of the accused, found 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. 2921.04(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 more prevalent if suspects cannot be charged with a felony offense for threatening a witness before charges are filed in a case. Many crimes will simply go unsolved if witnesses are too intimidated to even speak to the police during an investigation. Finally, prosecutors 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

Simons was charged with intimidating a witness, in violation of R.C. 2921.04(B), as a result of a threatening cell phone message he left for Ms. Justice on August 12, 2009. The threat was made just after the Urbana Police Division had interviewed Ms. Justice a second time as part of its investigation of a string of burglaries and thefts that had taken place in the Urbana area. At

trial, Ms. Justice also testified that she had knowledge of these incidents and that this knowledge gave Simons reason to threaten her about contacting the police. She also testified that Simons knew she had talked to the police and that she felt threatened as a result of the message.

A jury returned a verdict finding Simons of three counts of burglary, three counts of theft, one count of grand theft, one count of having weapons while under disability, and one count of intimidating a witness. The trial court imposed a series of consecutive and concurrent sentences that resulted in an effective sentence of 19 years.

The Second District, however, found that there was insufficient evidence to sustain the intimidation conviction. Since there had only been the report of a crime and the initiation of a police investigation, proceedings in a court of justice flowing from the criminal act in a court of justice had not yet commenced, and therefore, the crime of witness intimidation had not been committed. *Simons*, at ¶33. The State seeks review of this decision, and offers the following proposed proposition of law.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: 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 Simons in this matter was witness intimidation in violation of R.C. 2921.04(B). This statute 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 that Simons left a threatening phone message for Ms. Justice just after the Urbana police had interviewed her on August 12, 2009, as

part of its investigation of a string of burglaries and thefts that had taken place in the Urbana area. At trial, Ms. Justice also testified that she had knowledge of these incidents and that this knowledge gave Simons reason to threaten her about contacting the police. She also testified that Simons knew she had talked to the police and that she felt threatened as a result of the message. Thus, the State proved that officers had begun a criminal investigation concerning thefts and burglaries in the Urbana area.

On appeal, however, the Second District, relying upon its earlier interpretation of *Malone*, found that there was insufficient evidence since the alleged intimidation occurred after the offenses had been reported and a police investigation initiated, but before any "criminal action or proceeding" had been initiated against Simons. *Simons*, at ¶33.

In *Malone*, this Court held that "[a] conviction for witness intimidation under R.C. 2921.04(B) is not sustainable when the intimidation occurred after the criminal act but prior to any proceedings flowing from the act in court." *Id.* at syllabus. This Court also stated in the body of its opinion that the phrase "criminal action or proceeding" commonly indicates the involvement of a court and implies a formal process involving a court. *Id.* at ¶¶15, 18.

Malone was a certified conflict case, with briefing ordered on the following question:

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

Id. at ¶9, quoting *State v. Malone*, 116 Ohio St.3d 1472, 2008-Ohio-153, 879 N.E.2d 781.

Moreover, the Supreme Court in the body of its opinion stated 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 purpose of R.C. 2921.04(B).” *Malone*, 2009-Ohio-310, at ¶30.

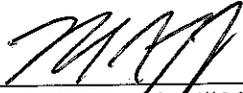
In light of this statement, and the actual text of the certified question, the State submits that R.C. 2921.04(B) applies when a cooperating witness in an ongoing criminal investigation is the subject of intimidation. Since Ms. Justice had been interviewed by law enforcement as part of its investigation of the burglaries and thefts, and Simons knew of the interviews, R.C. 2921.04(B) applies to the August 12, 2009 telephone message.

The language of *Malone* allows prosecutions for witness intimidation under R.C. 2921.04(B) in cases like the present one where there is an ongoing investigation of a crime and the suspect threatens a cooperating witness, even though no formal legal proceedings have been commenced. Thus, where the State proves that an ongoing investigation of a crime and the suspect threatens a cooperating witness, the evidence is sufficient to show a “criminal investigation or proceeding” and to sustain a conviction for witness intimidation.

CONCLUSION

The Second District’s reversal of Simons’ conviction for intimidation of a witness on the ground that the State had not shown that Ms. Justice was involved in a “criminal investigation or proceeding” when Simons called her on August 12, 2009 was error. The Second District misinterpreted this Court’s decision in *Malone*, when it held that witness intimidation under R.C. 2921.04(B) cannot be proven unless the threat occurs after the commencement of formal proceedings in a court of law. Rather, *Malone* allows prosecutions under R.C. 2921.04(B) when the witness is threatened after the commencement of a police investigation in response to the report of crime. Accordingly, the State requests that this Court accept jurisdiction so that the important issues presented by this case will be reviewed on the merits.

Respectfully submitted,



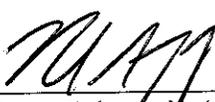
Nick A. Selvaggio (#0055607)
Champaign County Prosecuting Attorney
Counsel for Plaintiff-Appellant State of Ohio

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 13, 2011, a copy of the foregoing was served via regular first class mail, on:

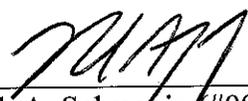
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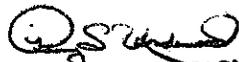
In accordance with S.Ct. Prac. R. XIV, § 2(A)(3), the undersigned also certifies that on June 13, 2011, a copy of the foregoing was served via regular first class mail on the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



Nick A. Selvaggio (#0055607)
Counsel for Plaintiff-Appellant State of Ohio

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CHAMPAIGN COUNTY OHIO
CLERK OF COURT OF APPEALS

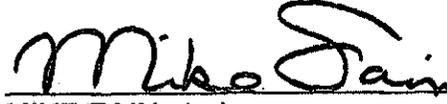
IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

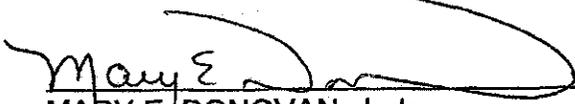
STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 2010 CA 7
v. : T.C. NO. 09CR227
CARL R. SIMONS : FINAL ENTRY
Defendant-Appellant :

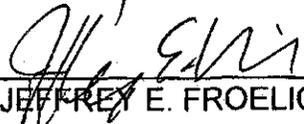
.....
Pursuant to the opinion of this court rendered on the 29th day of
April, 2011, Simons' conviction and sentence for intimidation of a witness is vacated.

In all other respects, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

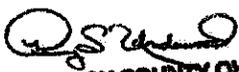

MIKE FAIN, Judge


MARY E. DONOVAN, Judge


JEFFREY E. FROELICH, Judge

FILED

APR 29 2011


CHAMPAIGN COUNTY OHIO
CLERK OF COURT OF APPEALS

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 2010 CA 7
v. : T.C. NO. 09CR227
CARL R. SIMONS : (Criminal appeal from
Defendant-Appellant : Common Pleas Court)

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OPINION

Rendered on the 29th day of April, 2011.
.....

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Attorney for Defendant-Appellant
.....

DONOVAN, J.

Defendant-appellant Carl Ray Simons appeals from his conviction and sentence for the following offenses: two counts of breaking and entering, in violation of R.C.

2911.13(A)(C), both felonies of the fifth degree; two counts of theft of property valued between \$500.00 and \$5,000.00, in violation on R.C. 2913.02(A)(1)(B)(2), both felonies of the fifth degree; one count of burglary, in violation of R.C. 2911.12(A)(3)(C), a felony of the third degree; one count of grand theft, in violation of R.C. 2913.02(A)(1)(B)(4), a felony of the third degree; one count of theft, in violation of R.C. 2913.03(A)(1)(B)(2), a misdemeanor of the first degree; one count of having weapons under disability, in violation of R.C. 2923.13(A)(2)(B), a felony of the third degree; and one count of intimidation of a witness in a criminal case, in violation of R.C. 2921.04(B)(D), a felony of the third degree. The count of burglary contained a firearm specification.

After a jury trial held on January 11 & 12, 2010, Simons was found guilty of the above offenses and sentenced to an aggregate prison term of nineteen years in prison. Simons filed a timely notice of appeal with this Court on March 11, 2010.

I

On September 2, 2009, Simons was indicted in Case No. 2009-CR-227 for two counts of breaking and entering, two counts of theft of property valued between \$500.00 and \$5,000.00, one count of burglary accompanied by one-year firearm specification, one count of grand theft, one count of theft, one count of having weapons under disability, one count of intimidation of a witness in a criminal case, and one count of complicity to receive stolen property.

All of the appealed counts against Simons stem from three separate incidents in which he was accused of breaking into and stealing from two businesses and a residence located in Urbana, Ohio. The first incident occurred at the Rock-n-Robin Diner during the night of December 6, 2008. The following morning, an employee arrived at the diner and

discovered that the cash register had been emptied and money had been stolen from a bank bag left in the office by the owner. There was no evidence of forced entry into the diner, and no windows were broken. An accounting revealed that between \$500.00 to \$600.00 was stolen from the diner.

The second incident occurred on or about the evening of December 28, 2008, when an officer from the Urbana Police Department discovered an open door at White's Ford Auto Dealership. Other than the open door, the officer found no other evidence that a break-in had occurred and left the premises. The next morning, on December 29, 2008, police were called to the dealership by employees after a report of a break-in. Once again, there was no sign of forced entry, but police discovered that mud had been tracked through the building and a dolly had been used to remove car batteries and other auto parts totaling approximately \$2,277.00 in value.

The third incident occurred sometime between June 29, 2009, and July 6, 2009, when the residence of George Jumper located at 613 College Way in Urbana, Ohio, was burglarized. While he was away on vacation, Jumper's house was broken into and approximately nineteen firearms, \$350.00 in cash, and a check made payable to Jumper were stolen. Upon investigation, Urbana police discovered that the front door to the residence had been forced open, and Jumper's neighbor neither saw nor heard anything unusual.

As part of their investigation into the thefts, Urbana police interviewed a woman named Tonia Justice. Justice was an employee at the Rock-n-Robin Diner during this time frame. The owner of the diner provided Justice's name to the police when she was asked about individuals she suspected of committing the robbery. Justice had called in sick on

the day that the diner was broken into and robbed. Furthermore, Justice was Jumper's tenant at the time that his residence was burglarized. We note that Justice was evicted from Jumper's rental property in mid-July of 2009 for failure to pay rent.

Upon being interviewed, Justice implicated Simons in all three incidents. Justice informed the police that Simons and her ex-boyfriend, Terry Current, had broken into Jumper's residence and stolen the firearms. Based on information provided by Justice, police were able to recover six of the stolen firearms at the residence of Carl Pullins, Sr., who told police that he bought the guns from Terry Current. Carl Pullins, Jr., made statements to police that implicated Simons in the burglary at the Jumper residence, as well. Evidence was also adduced that Simons contacted Justice and left a threatening voice mail regarding statements she had made to Urbana police regarding his and Current's involvement in the three incidents.

After a two-day jury trial, Simons was found guilty of two counts of breaking and entering, two counts of theft of property valued between \$500.00 and \$5,000.00, one count of burglary accompanied by a one-year firearm specification, one count of grand theft, one count of theft, one count of having weapons under disability, and one count of intimidation of a witness in a criminal case. The jury was unable to reach a verdict on the count of complicity to receive stolen property, and the State ultimately dismissed the count with prejudice. At the sentencing hearing held on February 25, 2010, the trial court ordered Simons to serve an aggregate sentence of nineteen years in prison.

It is from this judgment that Simons now appeals.

II

Simons' first assignment of error is as follows:

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR BECAUSE APPELLANT'S CONVICTIONS ON COUNTS ONE, TWO, SIX, SEVEN, EIGHT, AND NINE WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

In his first assignment, Simons argues that his convictions for counts I, II, VI, VII, VIII, and IX were against the manifest weight of the evidence. Specifically, Simons asserts that the State relied heavily on the testimony of Tonia Justice and Terry Current in order to convict him on those counts. Simons contends that the testimony provided by Justice and Current was so inconsistent and contradictory that the jury must have lost its way and created a manifest miscarriage of justice.

"When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all 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. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to

what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *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 fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

A. Counts I & II

In counts I and II of the indictment, Simons was charged with breaking and entering and theft, respectively, from the Rock-n-Robin Diner on the night of December 6, 2008. At trial, Current testified that he and Simons, accompanied by Justice, went to a Speedway gas station located near the diner on the night that the break-in occurred. Current testified that Justice encouraged Simons to break-in the diner and told him where the money was located, as well as how to open the cash register. Current also testified that while they were at the gas station, Simons was out of his sight for approximately seven to ten minutes. When Simons reappeared, Current testified that he had a cigar box, a cup of change, and a wad of money in his pocket. Current further testified that Simons stated that "the money was easy to find and that he had a little bit of trouble with the cash register, something about a key where she [Justice] had told him where to turn the key to get in the cash register." Current testified that even though Simons had attempted to enlist his assistance in breaking into the diner, he did not help and was unaware of what had transpired until after Simons reappeared at the gas station.

Justice testified that on the night that the diner was broken into, she was at home all evening. Justice testified that Current and Simons were at her house that night, but left

to go to the Speedway gas station near the diner. Justice further testified that the two men were gone for approximately thirty to forty-five minutes. Justice testified that Simons told her upon his return that it was easy to get inside the diner because someone had left the door unlocked. Additionally, Justice testified that she observed in Current's possession a box that the owner of the diner kept underneath the register at the diner. Justice denied any involvement in the break-in at the diner.

Justice's testimony is inconsistent with Current's testimony insofar as they disagree over their respective levels of involvement in the break-in. Simply put, Justice denied any involvement, while Current testified that she encouraged Simons to break into the diner, told him how to do it, and accompanied both men when they went to the Speedway near the diner on the night of the break-in. We also note that Current denied any active involvement in the break-in at the diner. Both witnesses' testimony, however, place Simons in the close vicinity of the diner on the night of the break-in, and both Current and Justice testified regarding statements Simons made to them implicating himself in the crimes.

B. Counts VI, VII, VIII, & IX

In counts VI, VII, and VIII, Simons was charged with burglary, grand theft, and theft, respectively, at the residence of George Jumper in Urbana between the dates of June 29, 2009, and July 6, 2009. In count IX, Simons was convicted of with having weapons while under disability arising out of his grand theft of firearms from Jumper's residence, having previously been convicted of complicity to robbery in 2006. Current and Justice testified that Simons broke in Jumper's house and stole money and firearms therein. Once again, however, both witnesses denied any involvement in the burglary and thefts from Jumper's

residence. Moreover, Current and Justice implicated each other in the crimes. Specifically, Justice testified that Current had asked her whether there were any alarms at the Jumper residence. Current testified that he heard Justice ask Simons to break into Jumper's residence. We also note that Carl Pullins, Sr., told police that Current sold him six firearms that were later found to have been stolen from Jumper. Carl Pullins, Jr., however, implicated Simons in the thefts of the Jumper residence.

More importantly, however, Current and Justice both testified that they observed Simons in possession of a black suitcase containing several firearms wrapped in a black and white diamond patterned afghan blanket. Justice further testified that Simons told her that he was surprised that he did not find any jewelry in Jumper's house when he burglarized the residence. Jumper corroborated the testimony of Current and Justice when he testified that one of the items stolen from his residence was a black suitcase which contained several firearms wrapped in a diamond patterned black, white and tan afghan that his wife had given him.

Upon review, the only instances where Current and Justice's testimony are inconsistent occur where one attempts to implicate the other while exculpating himself or herself. In all other instances, both witnesses' testimony consistently implicate Simons as the individual who committed the offenses for which he was charged and convicted of in counts I, II, VI, VII, VIII, and IX. The jury did not lose its way simply because it chose to believe the testimony of Current and Justice as it related to Simons' culpability for the burglaries and thefts at the diner and Jumper's residence. Having reviewed the entire record, we cannot clearly find that the evidence weighs heavily against a conviction, or that a manifest miscarriage of justice has occurred.

Simons' first assignment of error is overruled.

III

Simons' second assignment of error is as follows:

"THE TRIAL COURT ERRED BY CONVICTING APPELLANT UNDER R.C. 2921.04(B) BECAUSE THE ALLEGED INTIMIDATION OCCURRED BEFORE THE COMMENCEMENT OF ANY PROCEEDINGS IN A COURT OF LAW."

Simons was convicted of intimidation of a witness in violation of R.C. 2921.04(B), which states in pertinent part:

"No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder 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.)

In the instant case, the alleged intimidation occurred when Simons called Justice and left a threatening message on her cell phone regarding comments she made to police regarding the break-ins at the diner, White's Ford, and the Jumper residence. Simons argues that he could not have been convicted of the offense of intimidation of a witness because at the time that he let the message, he had not been charged or indicted for any crime, nor had any court proceedings been initiated against him.

In support of his argument, Simons relies on *State v. Malone*, 121 Ohio St.3d 244, 2009-Ohio-310, in which the Supreme Court held that a "conviction for intimidation of a witness under R.C. 2921.04(B) 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."

We recently discussed *Malone* in *State v. Davis*, Montgomery App. No. 23858,

2011-Ohio-1280, where in we stated the following:

“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*¹, (in which the [Eighth Appellate District] 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.)”

In *Davis*, we interpreted *Malone* to require 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). Accordingly, we held that 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*, Montgomery App. No. 23858, 2011-Ohio-1280.

In the instant case, the alleged intimidation occurred after the offenses had been reported and a police investigation initiated, but before any “criminal action or proceeding”

¹*State v. Gooden*, Cuyahoga App. No. 82621, 2004-Ohio-2699.

had been initiated against Simons. Thus, pursuant to our holding in *Davis*, "there [is] insufficient evidence of a 'criminal action or proceeding' to sustain a conviction for witness intimidation in violation of R.C. 2921.04(B)," and Simons' conviction for that offense is vacated.

Simons' second assignment of error is sustained.

IV

Simons' third and final assignment of error is as follows:

"THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION FOR MISTRIAL."

In his final assignment, Simons contends that the trial court abused its discretion when it overruled his motion for mistrial made by defense counsel after the following testimony was elicited from Terry Current during direct examination by the State:

"The State: Are you familiar with the Defendant Carl Ray Simons?"

"Current: Yes.

"Q: How long have you known Mr. Simons?"

"A: Approximately probably four or five years.

"Q: Is that because you lived near him or just came in contact with him through mutual friends or something else?"

"A: *I was incarcerated with him at London Correctional Institution.*

"Q: And –

"The Court: Excuse me. Counsel approach the bench, please.

(Bench Conference Held)

"The Court: I don't recall any conversation about that incarceration.

"The State: I was not expecting him to testify to that particular fact.

"The Court: So my question is correct. I didn't recall that we had –

"The State: Yes. That is correct.

"The Court: Was the incarceration for the Clark County conviction that makes him disabled to have a firearm or a different offense?

"The State: I believe based on this statement just now from the witness that it was [a] prior offense.

"The Court: Do you have any information?

"Defense Counsel: I don't have different information, but I believe it's in regard to a prior offense that occurred ten years or more ago.

"The Court: I believe that the instruction that was going to be given about the conversation between Padolik will be given to the jury now.² It will be modified slightly saying: 'Evidence has been presented about the location of the individuals when they were acquainted with each other. Such testimony about location does not directly relate to any issue in the present case. Such testimony about location does not have any bearing on the character of the Defendant and shall not be – and you shall not consider the location of the statement as any indication of guilt of the Defendant.'

"Defense Counsel: Your Honor, I would respectfully have to ask that I would have to move for mistrial based upon the witness' response.

"I think it prejudices my client because it elicited a response that he was previously in prison. The jury could infer that he has prior felony convictions that he was sentenced

²Padolik was a witness called by the State who testified regarding certain admissions allegedly made by Simons while both men were being held in jail in Champaign County, Ohio.

to prison for, and I think there's a direct difference between being in prison and being in local jail; and I think the jury probably has that general knowledge and that would prejudice my client.

"The Court: Does that State agree to mistrial?"

"The State: No. State would oppose mistrial. The Court has already indicated that it would accept the testimony regarding statements made in a local jail, and the jury has already been made aware of a prior felony conviction by way of State's Exhibit 22, which indicated the prior felony conviction for complicity to robbery.

"Given that the jury either already knows or will know of those two facts, the State does not believe that that knowledge is sufficient basis for mistrial.

"The Court: Motion for mistrial is not granted. In the absence of granting that, do you have any objection to the statement?"

"Defense Counsel: No, Your Honor.

(In Open Court)

"The Court: Ladies and gentlemen of the jury, you've just heard testimony about the location of the individuals when they were acquainted with each other. Such testimony about location does not directly relate to any issue in the present case. Such testimony about location does not have any bearing on the character of the Defendant and you shall not consider the location of the statement as any indication of the guilt of the Defendant in the present case.

"With that admonition, we'll continue with the testimony. ****"

Initially, we note that the incarceration to which Current referred in his direct

testimony apparently did not stem from the conviction which gave rise to Simons' disability. Simons argues that although a reference had been made to a prior conviction through the introduction of State's Exhibit 22, he was unfairly prejudiced by Current's disclosure regarding their meeting while incarcerated at London Correctional Institution.³ Accordingly, Simons asserts that the trial court abused its discretion when it overruled his motion for mistrial.

The grant or denial of a mistrial lies within the sound discretion of the trial court. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961. "However, a trial court need not declare a mistrial unless 'the ends of justice so require and a fair trial is no longer possible.'" *Id.*, citing *State v. Franklin* (1991), 62 Ohio St.3d 118, 127.

Upon review, we find that the trial court did not abuse its discretion when it overruled Simons' motion for mistrial. In the instant case, Current's disclosure of Simons' prior incarceration was a brief, isolated remark and was promptly followed by a curative instruction. For purposes of mistrial analysis, there is a presumption of the efficacy of curative instructions with regard to improper comments made by a witness or prosecutor. *State v. Nichols* (1993), 85 Ohio App.3d 65, 69. We also note that although Current testified that he first met Simons while incarcerated, no further testimony was adduced regarding the nature of the conviction or the term of imprisonment. Furthermore, the record reveals that the State was surprised by Current's response and did not intentionally attempt to elicit a prejudicial response. In fact, the jury was already aware that Simons had

³State's Exhibit 22 was a judgment entry of conviction and sentence of two years for one count of complicity to robbery, in violation of R.C. 2923.03(A)(2), a felony of the second degree, in Case No. 06-CR-721 to which Simons plead no contest in 2006. This conviction served as the basis for Simons' disability to possess firearms.

been previously convicted and incarcerated based on the introduction of State's Exhibit 22. We note that no objection was made to the introduction of State's Exhibit 22. In light of the trial court's decisive action in calling a bench conference out of the hearing of the jury to discuss Current's disclosure immediately after it occurred, as well as the court's curative instruction to the jury, we find that Simons did not suffer any prejudice as a result of the court's decision to overrule his motion for a mistrial.

Simons' final assignment of error is overruled.

V

In light of the foregoing, Simons' conviction and sentence for intimidation of a witness is vacated. In all other respects, the judgment of the trial court is affirmed.

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FAIN, J. and FROELICH, J., concur.

Copies mailed to:

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