

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

TRACY B. DAVIS, SR.

Defendant-Appellee.

CASE NO. 11-0685

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

COURT OF APPEALS  
CASE NO. 23858

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APPELLANT'S REPLY BRIEF

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**REPLY TO TRACY B. DAVIS SR.'S MERIT BRIEF**

**Appellee's narrow interpretation of R.C. 2921.04(B) thwarts the legislature's intent.**

This Court has previously explained that the “cornerstone of statutory construction and interpretation is legislative intention.” *State v. Jordan* (2000), 89 Ohio St.3d 488, 491, 733 N.E.2d 601, citation omitted. Where a statute is ambiguous, this Court, in determining the intent of the General Assembly, may consider several factors, including the object sought to be obtained, the legislative history, and other laws upon the same or similar subjects. *Jordan*, at 493, citation omitted.

In his merit brief, Davis contends the “involved in a criminal action or proceeding” language of R.C. 2921.02(B) indicates the legislature intended to prohibit intimidation of a witness only after a formal process involving a court has begun. (Appellee's Brief, 5-6) Since Sinnie Nelson was threatened by Davis before he was formally charged with felonious assault in connection with his act of trying to hit Deputy Haas with Nelson's van, Davis claims she was “not a witness with any duty in which Davis threatened her into not discharging.” (Appellee's Brief, 7) Davis is incorrect, and his narrow interpretation of R.C. 2921.04(B) thwarts the General Assembly's apparent intent to make the act of threatening harm to a victim, witness, or attorney for the purpose of impeding or interfering with the justice system a felony.

Revised Code 2921.04(B) should not be interpreted to apply only to a witness who is threatened for the purpose of influencing, intimidating, or hindering the discharge of her duties after formal proceedings in court have begun because a witness's duties actually begin *prior* to commencement of formal proceedings. A case that shows witnesses have some obligation to be truthful with law enforcement officials during the investigation of a crime is *State v. Lazzaro* (1996), 76 Ohio St.3d 261, 667 N.E.2d 384.

In that case, a nursing home administrator appealed her convictions for falsification and obstructing official business that were based upon false statements she made to the police who were called in to investigate an assault by a nursing home employee on a resident of the home. *Lazzaro*, at 262-263. At the syllabus, this Court held that, “The making of an unsworn false oral statement to a public official with the purpose to mislead, hamper or impede the investigation of a crime is punishable conduct within the meaning of R.C. 2921.13(A)(3) and 2921.31(A).” In other words, a witness who speaks to the police about an alleged crime – before formal proceedings have begun in court – has an obligation to refrain from lying for the purpose of misleading or impeding the investigation of that crime.

The *Lazzaro* case is important for two reasons: 1) it shows that Davis’s contention that Sinnie Nelson had no duty as a witness when he threatened her is wrong – she had a duty not to lie to the authorities for the purpose of hindering their investigation; and 2) it speaks to the issue of how this Court should resolve the ambiguity contained in R.C. 2921.04(B). If the legislature’s intent in enacting R.C. 2921.04(B) was to prevent intimidation that is designed to interfere with the justice system by keeping witnesses from discharging their duties as witnesses, then R.C. 2921.04(B) should apply to threats made to a witness from the time that *Lazzaro* indicates a witness’s duties begin, i.e., during the investigation of the alleged crime.

### CONCLUSION

Here, the court of appeals erred when it determined that the State failed to present sufficient evidence to prove the charge of felony witness intimidation simply because Davis’s threat to Sinnie Nelson occurred during the investigation of his alleged felonious assault, as opposed to after a formal charge had been brought against Davis in a court of law. The legislature’s purpose in enacting R.C. 2921.04(B) was to make it a felony to impede the criminal

justice system by threatening physical harm to a witness to intimidate her from discharging her duties as a witness. Like all witnesses who have information about an alleged crime, Sinnie Nelson's duties as a witness began when she spoke to the authorities during their investigation of the alleged felonious assault. Consequently, the court of appeals' interpretation of R.C. 2921.04(B) was faulty and should be reversed.

Alternatively, if the court of appeals interpreted R.C. 2921.04(B) and this Court's decision in *State v. Malone*, 121 Ohio St.3d 244, 2009-Ohio-310, 903 N.E.2d 614 correctly, then the State respectfully requests that this Court consider modifying *Malone* to permit prosecution for witness intimidation where a witness is threatened after a reported crime is being investigated by law enforcement, even though a formal charge has yet to be filed.

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