

IN THE SUPREME COURT OF OHIO

11-2092

State of Ohio
Plaintiff-Appellee

* On Appeal from the Fayette
County Court of Appeals,
Twelfth Appellate District

-vs-

*
COURT OF APPEALS
CASE NO. CA2010-01-001

Kenneth Jackson
Defendant-Appellant

* TRIAL COURT CASE NO. 10CR100177

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT KENNETH JACKSON

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London Correctional Institution
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Defendant-Appellant, pro-se

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Plaintiff-Appellee

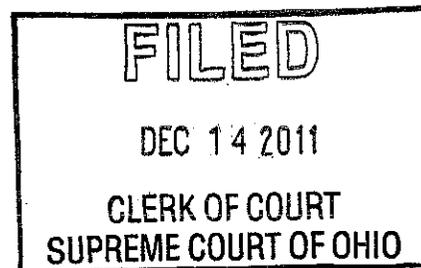


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**EXPLANATION OF WHY THIS CASE IS OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL
QUESTION.**

THIS CASE IS IN GREAT INTEREST TO THE GENERAL PUBLIC IN WHICH THE
FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION IS BEING VIOLATED.
THIS AMENDMENT PROTECTS ALL U.S. CITIZENS FROM A STATE TO DEPRIVE
ANY PERSON OF LIFE, LIMB, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS
OF LAWS.

STATE COURTS HAVE RULES TO ENSURE PROTECTION. RULES OF EVIDENCE
MUST BE STRICTLY GOVERNED, ENFORCED, AND TO ANTHINICATE BY CLEAR
EVIDENCE OF RULES A COURT MUST FOLLOW. WITHOUT SUCH SAFEGAURDS IN
PLACE, ANY CITIZEN OF THE U.S. IS SUBJECT TO A VAGNESS OF RULES;
HENCE NO DUE PROCESS.

A HUMAN BEING IS ENTITLED TO THE PROCESS THAT'S DUE.

STATEMENT OF THE CASE

DEFENDANT-APPELLANT, KENNETH JACKSON WAS THE SUBJECT OF A CRIMINAL INVESTIGATION IN JULY AND AUGUST 2010, BY THE WASHINGTON COURT HOUSE POLICE DEPARTMENT. DEFENDANT-APPELLANT'S WIFE COURTNEY JACKSON GAVE A STATEMENT TO POLICE IN THE ON GOING INVESTIGATION INVOLVING HER HUSBAND, THE DEFENDANT-APPELLANT. KENNETH JACKSON WHILE IN FAYETTE COUNTY JAIL MADE A CALL TO WIFE COURTNEY JACKSON. HE TOLD COURTNEY HE KNOS SHE WROTE A STATEMENT ABOUT HIM. HE CONTINUED, "YOU DID ME DIRTY BITCH WHEN I GET OUT OF PRISON YOU'D BETTER PUT A PROTECTION ORDER ON ME ... YEA, CAUSE I'M COMIN TO SEE YA FOR WHAT YOU DID ... I'M GONNA MAKE SURE WE BOTH KNOW WHAT HAPPENED."

THE NEXT DAY, AUGUST 28TH, 2010, COURTNEY REPORTED THE INCIDENT REGARDING APPELLANT'S PHONE CALL TO PATROLMAN SOCKMANN OF WASHINGTON COURT-HOUSE POLICE DEPARTMENT, THEREAFTER, COURTNEY OBTAINED A PROTECTION ORDER AGAINST APPELLANT. THE STATE CHARGED APPELLANT WITH INTIMIDATION OF A WITNESS IN VIOLATION OF R.C. § 2921.04(B).

FOOTNOTE - (COURTNEY JACKSON LATER DISMISSED THE PROTECTION ORDER)

STATEMENT OF THE FACTS

DEFENDANT-APPELLANT WAS CHARGED WITH A FELONY OF THE THIRD DEGREE IN VIOLATION OF R.C. § 2921.04(B). A JURY TRIAL WAS HELD ON DECEMBER 22, 2010. AT TRIAL, THE JURY HEARD TESTIMONY FROM COURTNEY JACKSON, PATROLMEN SOCKMAN, QUEEN, AND SERGEANT JODI KELLEY. JURY FOUND DEFENDANT-APPELLANT GUILTY: HE WAS SENTENCED TO A TERM OF (4) FOUR YEARS IN PRISON, (3) THREE MANDATORY, ALSO, A PERIOD OF POST-RELEASE CONTROL AND ORDERED TO PAY COURT COST.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I: THE TRIAL COURT ERRED BY ADMITTING EVIDENCE WITHOUT PROPER FOUNDATION AND AUTHENTICATION: FAILING TO AUTHENTICATE STATE'S EXHIBIT PRIOR TO ADMISSION.

STATE MUST PROPERLY LAY FOUNDATION AS PREREQUISITE TO THE ADMISSION OF STATE'S EXHIBIT I.

TO BE ADMISSIBLE, A TAPE RECORDING "MUST" BE AUTHENTIC, AND TRUSTWORTHY. PRIOR TO PLAYING THE TAPE RECORDING FOR THE JURY, THE ONLY TESTIMONY OFFERED AS FOUNDATION WAS THAT OF SGT. JODI KELLEY. SHE TESTIFIED THAT: 1) PHONE CALLS MADE FROM THE FAYETTE COUNTY JAIL ARE RECORDED AND STORED ON A COMPUTER HARD DRIVE. 2) SHE DID NOT KNOW IF INMATE'S WERE INFORMED AT THE RECORDING OF THE PHONE CALLS (T.P.7), 3) SHE FIRST LISTENED TO THE CALLS WHILE BURNING THEM (T.P.7&10) AND 4) SHE HAD NO PERSONAL KNOWLEDGE OF WHO MADE THE CALLS (T.P.8).

ON DIRECT EXAMINATION, SGT. KELLEY WAS ASKED IF SHE RECOGNIZED THE CD MARKED STATE'S EXHIBIT 1 AND INDICATED THAT SHE DID (T.P.9). HOWEVER, UPON INQUIRY INTO HOW SHE WAS ABLE TO RECOGNIZE THE CD, BY THE TRIAL JUDGE, SHE STATED "I KNOW THAT WE USE SONY DISCS (T.P.9.)

FURTHER INQUIRY REVEALED THAT THERE ARE NO DISTINCTIVE MARKINGS TO THE CD, THE ONLY UNIQUE CHARACTERISTIC IS THAT SOMEONE, OTHER THAN SGT. KELLEY HAD WRITTEN ON IT JAIL RECORDINGS.S.O. KENNY JACKSON." (T.P.9) THE TRIAL COURT ERRED BY ACCEPTING THIS FOUNDATION SINCE IT HAD NOTICED THAT THE ITEM WAS AN EXTREMELY COMMON ITEM WITH NO DISTINGUISHABLE CHARACTERISTICS AND THAT IT HAD BEEN HEARD

SINCE LEAVING THE POSSESSION OF THE TESTIFYING WITNESS.

"THE REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION AS A CONDITION PRECEDENT TO ADMISSIBILITY IS SATISFIED BY EVIDENCE SUFFICIENT TO SUPPORT A FINDING THAT THE MATTER IN QUESTION IS WHAT ITS PROponent CLAIMS."

EVID.R. 901(A). A WITNESS WITH KNOWLEDGE MAY AUTHENTICATE AN ITEM BY TESTIFYING THE MATTER IS WHAT IT IS CLAIMED TO BE STATE -vs- MARRERO, 2011-OHIO-1390, 10AP 344 AT 29 (OHCA10).

A TELEPHONE CONVERSATION MUST BE AUTHENTICATED BEFORE THE CONTENTS OF THAT PHONE CALL ARE ADMISSIBLE. STATE -vs- WILLIAM, (1979), 64 OHIO APP.2D 271, 273. SEE ALSO, STATE -vs- WERE, 118 OHIO ST.3D 448, 2008-OHIO-2762 AT 109 (RECORDINGS MUST BE "AUTHENTIC, ACCURATE, AND TRUSTWORTHY" IN ORDER TO BE ADMISSIBLE).

THE PARTY SEEKING ADMISSION OF TELEPHONE CALLS AND/OR RECORDINGS MUST PROVE "EVIDENCE SUFFICIENT TO SUPPORT A FINDING THAT THE MATTER IN QUESTION IS WHAT ITS PROponent CLAIMS." EVID.R. 901(A). THIS IS A LOW THRESHOLD STANDARD [which] DOES NOT REQUIRE CONCLUSIVE PROOF OF AUTHENTICATION" INSTEAD THERE NEED ONLY BE "SUFFICIENT FOUNDATIONAL EVIDENCE FOR THE TRIER OF FACT TO CONCLUDE THAT THE EVIDENCE IS WHAT ITS PROponent CLAIM IT TO BE."

IN STATE -vs- MARRERO, PRIOR TO PLAYING THE 911 CALL THE VICTIM PLACED WHILE SHE WAS IN THE CAR WITH DEFENDANT, THE STATE ASKED THE VICTIM IF SHE LISTENED TO STATE'S EXHIBIT 6, SHE REPLIED SHE DID, AND THE TAPE CONSISTED OF HER "CALLING 911, AND ALL RETURNING THE PHONE CALL TALKING TO MR. MARRERO." (TR.50.) CONTRARY TO DEFENDANT'S

CONTENTION'S, THE ABOVE EXCHANGE IS SUFFICIENT TO AUTHENTICATE THE TAPE PURSUANT TO EVID.R. 901 (B)(1), AS THE VICTIM TESTIFIED THE TAPE WAS WHAT THE STATE CLAIMED IT BE: THE VICTIM'S CALLING 911, A 911 OPERATOR CALLING BACK, AND A 911 OPERATOR TALKING TO DEFENDANT. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TAPE INFO EVIDENCE. ID AT 63

IN THE PRESENT CASE THERE WAS NO EVIDENCE PRESENTED THAT SGT. KELLY PREVIEWED THE CD IN ITS PRESENT CONDITION NOR THAT SHE WAS ABLE TO CONFIRM IT WAS THE CD SHE MADE FOR THE POLICE DEPARTMENT. ACCORDING TO THE STATE'S OWN WITNESSES ALTERATIONS WERE MADE TO THE CD AFTER SHE DELIVERED IT TO THE POLICE DEPARTMENT, THEREFORE CALLING INTO QUESTION ITS ACCURACY AND TRUSTWORTHINESS. THE TRIAL COURT DID ABUSE ITS DISCRETION BY ADMITTING THE CD INTO EVIDENCE.

PROPOSITION OF LAW II: THE TRIAL COURT ERRED BY ALLOWING THE TESTIMONY OF APPELLANT'S SPOUSE IN VIOLATION OF PRIVILEGE LAWS: R.C. § 2945.42, COMPETENCY OF WITNESSES. IT IS CLEAR WHEN THE LAW STATES "HUSBAND OR WIFE SHALL NOT [EMPHIASIS] TESTIFYING CONCERNING COMMUNICATION MADE BY ONE TO THE OTHER, OR ACT DONE BY EITHER IN THE PRESENCE OF THE OTHER, DURING COVERTURE, UNLESS THE COMMUNICATION WAS MADE OR ACT DONE IN THE KNOWN PRESENCE [EMPHASIS] OR HEARING OF A THIRD PERSON COMPETENT TO BE A WITNESS OR IN CASE OF PERSONAL INJURY BY EITHER THE HUSBAND OR WIFE TO THE OTHER ... VIOLATION OF A PROTECTION ORDER OR CONSENT AGREEMENT OR NEGLECT OR ABANDONMENT OF A SPOUSE UNDER A PROVISION OF THESE SECTIONS".

THE STATE ARGUES THAT COURTNEY JACKSON BEING THE ALLEGED VICTIM

OF INTIMIDATION OF A WITNESS AND THAT THE PERSONAL INJURY EXEPTION IS APPLICABLE. HOWEVER, MS. JACKSONS OWN TESTIMONY AT TRIAL INDICATES SHE WAS NEVER [EMPHASIS] IN FEAR OF THIS VISIT, THAT SHE REMAINED MARRIED TO APPELLANT, AND HAS MADE NO EFFORT TO CHANGE THAT. MOREOVER, HER RESPONSE IN THE PHONE CALL ITSELF INDICATES THAT SHE FELT NO FEAR OR APPREHENSION IF THE PROPOSED VISIT. THE APPELLATE COURT FAILED TO RECOGNIZE, STATE -vs- BROWN, 2007-OHIO-4837, 115 OHIO ST.3D 55, 873 N.E. 2D 858 (OHIO 2007) WHERE A COURT CLEARLY STATES THE DUTY OF THE TRIAL JUDGE TO TAKE AN ACTIVE ROLE IN DETERMINING COMPETENCY WHEN A SPOUSE IS TESTIFYING.

ONCE IT HAS BEEN DETERMINED THAT A WITNESS [873 N.E.2D 870] IS MARRIED TO THE DEFENDANT, THE TRIAL COURT MUST INSTRUCT THE WITNESS ON SPOUSAL COMPETENCY AND MAKE A FINDING ON THE RECORD THAT HE OR SHE VOLUNTARILY CHOSE TO TESTIFY. FAILURE TO DO SO CONSTITUTES REVERSIBLE PLAIN ERROR. ADAMSON, 72 OHIO ST.3D AT 434 [650 N.E. 2D 875]

ACCORDINGLY, IN THIS CASE, THE TESTIFYING SPOUSE BEING THE VICTIM OF THE CRIME ALLEGED IN THE INDICTMENT DOES NOT HAVE AN ELECTION TO TESTIFY. SHE HAS BEEN SUPOENED AND IS SUBJECT TO CROSS EXAMINATION BY THE DEFENSE. SO I WILL OVERRULE THE OBJECTION. I WILL SPECIFICALLY NOT INFORM THIS WITNESS OF ANY RIGHT NOT TO TESTIFY AND NOTE THE DEFENSE OBJECTION FOR RECORD PURPOSES. (T.P. 17) THE OHIO SUPREME COURT HAS HELD THAT:

*** R.C. § 2945.42 CONFERS A SUBSTANTIVE RIGHT UPON THE ACCUSED TO EXCLUDE PRIVILEGED SPOUSAL TESTIMONY CONCERNING A CONFIDENTIAL COMMUNICATION MADE OR ACT DONE DURING [MARRIAGE] *** [EMPHASIS ADDED] STATE -vs- RAHMAN (1986), 23 OHIO ST.3D 146, 149, 23 OBR, (492 N.E.2D 401) 405

SEVERAL FACTORS INCLUDING THE NATURE OF THE MESSAGE OR THE CIRCUMSTANCES UNDER WHICH IT WAS DELIVERED MAY DESTROY A CLAIM THAT

CONFIDENTIALITY WAS INTENDED. MCCORMICK, EVIDENCE (3ed CLEARLY Ed. 1984) 193, SECTION 80. FOR EXAMPLE, THE OHIO SUPREME COURT HAS HELD THAT THREATS OF BODILY HARM, BEING AN OBVIOUS VIOLATION TO MARTIAL DUTY, SHOULD NOT BE PRIVILEGED. STATE -vs- ANTILL (1964), 176 OHIO ST. 61, 26 O.O. 2D [564 N.E. 2D 711] 366, 197 N.E. 2D 548

THERE WERE NO THREATS OF BODILY HARM MADE TO THIS WITNESS. THERE ARE NO CHARGES OF ASSAULT OR KIDNAPPING IN THIS CASE. THE ALLEGED THREAT WAS "TO COME SEE YOU."

PROPOSITION OF LAW III: THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S RULE 29 MOTION TO ACQUIT. THE TRIAL COURT FAILED TO PROVE ESSENTIAL ELEMENTS OF UNLAWFUL THREAT OF HARM TO ESTABLISH THE CRIME.

IN STATE -vs- GATSON, 2009-OHIO-120, IN DISTINGUISHING BETWEEN THE MISDEMEANOR AND FELONY OFFENSES OF INTIMIDATION, THE OHIO SUPREME COURT IN STATE -vs- CRESS, 112 OHIO ST3D 72, 2006-OHIO-6501STATED: "INTIMIDATION BY DEFINITION INVOLVES THE CREATION OF FEAR IN A VICTIM, AND THE VERY NATURE OF A THREAT IS THE CREATION OF FEAR OF NEGATIVE CONSEQUENCES FOR THE PURPOSE OF INFLUENCING BEHAVIOR. WE SIMPLY DO NOT DISCERN A MEANINGFUL DIFFERENCE BETWEEN INTIMIDATION OF A WITNESS AND THE MAKING OF A THREAT TO A WITNESS. ACCORDING, BOTH R.C. § 2921.04(A) AND (B) PROHIBIT THE THREATENING OF A WITNESS.

AN UNLAWFUL THREAT MUST ACCORDINGLY CONNOTE MORE THAN JUST A THREAT, I.E., MORE THAN JUST A COMMUNICATION TO A PERSON THAT PARTICULAR NEGATIVE CONSEQUENCES WILL FOLLOW SHOULD THE PERSON NOT ACT AS THE

COMMUNICATOR DEMANDS. THE WORD 'UNLAWFUL' IN R.C. § 2921.04(B) MUST ADD SUBSTANTIAL MEANING, OR IT IS SUPERFLUOUS. ***

*** [T]HE STATUTORY LANGUAGE IN R.C. § 2921.04(B), PROSCRIBING INTIMIDATION BY AN 'UNLAWFUL THREAT OF HARM,' IS SATISFIED ONLY WHEN THE VERY MAKING OF THE THREAT IS ITSELF UNLAWFUL BECAUSE IT VIOLATES ESTABLISHED CRIMINAL OR CIVIL LAW. Id AT ¶140-42

"INDEED, TANYA'S APPREHENSION OR FEAR OF GATSON ALONE, EVEN IF JUSTIFIABLE, IS INSUFFICIENT TO SUPPORT A FELONY CONVICTION OF INTIMIDATION. CRESS, SUPRA: SEE ALSO, STATE -vs- GOODEN, 8TH DIST. NO, 81320, 2003-OHIO-2864, ¶127 (VICTIMS FEAR OF DEFENDANT IS INSUFFICIENT TO SUPPORT INTIMIDATION COUNT). WE FURTHER FAIL TO SEE HOW GATSON'S ALLEGED ACT OF REMOVING THE TELEPHONE CORD CONSTITUTES AN UNLAWFUL THREAT OF HARM. EVEN IF THE STATE'S EVIDENCE ARGUABLY DEMONSTRATED A "THREAT," THEREBY SUPPORT A MISDEMEANOR CONVICTION FOR INTIMIDATION, THE STATE FAILED TO MEET THE HIGHER THRESHOLD OF "AN UNLAWFUL THREAT OF HARM." STATE -VS- GATSON, 2009-OHIO-120.

SIMILARY, IN THE PRESENT CASE COURTNEY JACKSON'S TESTIMONY WAS THAT SHE DIDN'T RECALL ANY THREATS AND THAT SHE NEVER FELT THREATENED. APPELLANT DID NOT COMMIT ANY ACT IN FURTHERANCE OF THE ALLEGED THREAT EITHER. THUS, RESULTING IN THE FAILURE OF THE STATE TO MEET THE HIGHER THRESHOLD FOR A FELONY CONVICTION.

CONCLUSION

FOR THE REASONS DISCUSSED ABOVE, THIS CASE INVOLVES MATTERS OF PUBLIC AND GENERAL INTEREST AND SUBSTANTIAL CONSTITUTIONAL QUESTIONS. THE APPELLANT REQUESTS THAT THIS COURT ACCEPT JURISDICTION IN THIS CASE SO THAT THE IMPORTANT ISSUES PRESENTED WILL BE REVIEWED ON THE MERITS.

RESPECTFULLY SUBMITTED,

KENNETH JACKSON
PRO-SE
Loci
P.O. BOX 69
LONDON, OHIO 43140

CERTIFICATE OF SERVICE

I CERTIFY THAT A COPY OF THIS MEMORANDUM IN SUPPORT OF JURISDICTION WAS SENT BY ORDINARY U.S. MAIL TO COUNSEL DAVID B. BENDER (0037249) PROSECUTING ATTORNEY, FAYETTE COUNTY PROSECUTING ATTORNEYS OFFICE AT 110 EAST COURT STREET, WASHINGTON COURT HOUSE, OHIO 43140 PHONE (740) 335-0888 FAX (740) 333-3539 Date sent Dec. ,2011

In The Supreme Court of Ohio

State of Ohio,
Plaintiff-Appellee,
vs.
Kenneth Jackson
Defendant-Appellate

Case No. _____
on appeal from the Fayette
County Court of Appeals
12th Appellate District
C.A. Case No. CA2011-01-001

Appendix To

Memorandum in Support of Jurisdiction
of Appellant Kenneth Jackson

EVELYN A. PENTZER
CLERK OF COURTS
FAYETTE COUNTY
WASHINGTON C.H. OHIO

2010 DEC 27 AM 11:27

IN THE COURT OF COMMON PLEAS, FAYETTE COUNTY, OHIO

State of Ohio, Plaintiff	}	Case No. 10CRI00177
vs.	}	Judge Steven P. Beathard
KENNETH R. JACKSON, Defendant	}	

645-323

**JUDGMENT ENTRY
OF CONVICTION AND SENTENCE**

This cause came on for jury trial on December 22, 2010. The defendant appeared in open court represented by attorney, Renae Zaboudil. The State was represented by Fayette County Prosecutor, David B. Bender and Fayette County Assistant Prosecutor, Kristina Rooker. After deliberation, the jury returned its verdict on December 22, 2010, finding the defendant **Guilty** of Count One, Intimidation of a Witness, in violation of Revised Code §2921.04(B), a felony of the 3rd degree. The jury was discharged and the matter was set for sentencing on Monday, December 27, 2010 at 10:00 a.m. The defendant will be held without bond until further notice of the Court.

On December 27, 2010, the defendant, with counsel, Renae Zabloudil, appeared before the Court for sentencing. The Court heard statements in mitigation presented by the defendant and his counsel. The Court has considered the statutory provisions set forth in Ohio Revised Code §2929.11 and 2929.12 and finds that a prison sentence is consistent with those provisions, that the defendant is not amenable to an available community control sanction and a prison sentence would not impose an unnecessary burden on State resources.

Based upon the foregoing, it is **ORDERED** that the defendant be sentenced to a term of **four (4) years on Count One in the appropriate correctional institution.** The defendant **MAY NOT** participate in the I.P.P. or Transitional Control programs if offered by the institution.

POST RELEASE CONTROL

The defendant will be subject to a three (3) year **mandatory** period of supervision by the Adult Parole Authority. If the defendant violates a Post-

Release Control sanction established by the Parole Board or the Adult Parole Authority, all the following apply:

The Adult Parole Authority or Parole Board may impose a more restrictive sanction.

The Parole Board may increase the duration of the Post-Release Control subject to a specified maximum.

The more restrictive sanction that the Parole Board may impose consists of a prison term, provided that the prison term cannot exceed nine months for any violation and the maximum cumulative prison term so imposed for all violations during the period of Post-Release Control cannot exceed one-half of the stated prison term originally imposed upon the defendant.

If the violation of the sanction is a new felony conviction, the Court having jurisdiction over the new felony may impose a prison term of the greater of one year or the time remaining on post-release control, which shall be served consecutively to the prison term imposed for the new felony.

Ohio Revised Code §2901.07 requires adult offenders convicted of any felony and certain qualifying misdemeanors to provide a DNA sample for inclusion into the state DNA database. The Defendant has been convicted of or pleaded guilty to a qualifying offense and is required to submit to a DNA sample. The Defendant is **HEREBY ORDERED** to submit to a DNA collection at the date and time to be specified by the Department of Corrections and Rehabilitation.

The defendant is given one hundred twenty-two (122) days jail time credit of the foregoing date because of time spent in custody in this case prior to sentence together with future custody days while the defendant awaits transportation to the appropriate state institution.

The defendant is **ORDERED** to pay the costs of prosecution for which judgment and execution is awarded.

The defendant and defendant's surety, if any, are discharged upon the defendant's bail at such time as the defendant is taken into custody by the Sheriff, in compliance with this order.

It is **ORDERED** that the Sheriff of Fayette County, Ohio or his duly authorized deputies, convey the defendant to the Corrections Reception Center, Orient, Ohio, to commence the serving of his sentence forthwith.

The Defendant was informed that he has an appeal as a matter of right pursuant to Ohio Revised Code §2953.08 (A) (2).



Judge Steven P. Beathard

To The Clerk: Please issue a copy of the foregoing to the following by regular U.S. mail or by Court mail box:

David Bender, Attorney for Plaintiff
Renaë Zabloudil, Attorney for Defendant
Kenneth R. Jackson, defendant
Adult Probation
Fayette County Jail

Clerk

FAYETTE COUNTY COURT OF COMMON PLEAS

110 E. COURT STREET
3RD FLOOR
WASHINGTON CH, OHIO 43160
(740) 335-6371

State Of Ohio

Statement of Costs

Vs.

KENNETH R JACKSON
Defendant

CASE NO. 10CRI00177

* * * * *

To: KENNETH R JACKSON
809 WASHINGTON AVE
WASHINGTON C H, OH 43160

Please be advised that \$ 752.00 is owed the above named Court for COURT COST
Your early remittance will greatly oblige parties entitled to fees.

EVELYN A. PENTZER, Clerk of Courts


Deputy Clerk

***** PLEASE RETURN TO THE CLERK OF COURTS OFFICE WITH PAYMENT *****



IN THE COURT OF COMMON PLEAS, FAYETTE COUNTY, OHIO

EVELYN A. PENTZER
CLERK OF COURTS
FAYETTE COUNTY
WASHINGTON C.H. OHIO
2010 DEC 27 AM 11:27

State of Ohio,
Plaintiff

Case No. 10CRI00177

vs.

NOTICE AND
ACKNOWLEDGMENT OF
RIGHTS OF APPEAL

Kenneth R. Jackson
Defendant

Kenneth R. Jackson acknowledges and the Court finds that defendant has been informed that he/she has a right to appeal from the judgment of conviction and the sentence in this case, and that the Court has informed the defendant of the following specific rights:

1. That if defendant does not have the funds to pay for such appeal, the costs of such appeal, including any filing fees; the costs of a transcript of proceedings, and the costs of other documents, will be provided by the Court.
2. That if the defendant does not have the funds to pay for a lawyer on appeal, the Court will appoint counsel to represent the defendant and that lawyer will be paid by the Court.
3. That defendant has a right to have a notice of appeal filed in a timely fashion.



Steven P. Beathard, Judge

Acknowledgment:

I have read the foregoing advice of rights and I have been informed of them by the Court in open Court.

Kenneth R. Jackson
Defendant

Date: 12/27/10

[Signature]
Counsel for the Defendant

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2011-01-001
 :
 - vs - : OPINION
 : 10/31/2011
 :
 KENNETH R. JACKSON, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 10 CRI 00177

Jess C. Weade, Fayette County Prosecuting Attorney, Kristina M. Rooker, 1st Floor, 110 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

Susan R. Wollscheid, P.O. Box 176, Washington C.H., Ohio 43160, for defendant-appellant

PIPER, J.

{¶1} Defendant-appellant, Kenneth Jackson, appeals his conviction in the Fayette County Court of Common Pleas for intimidation of a witness.

{¶2} In July and August 2010, appellant was the subject of a criminal investigation by the Washington Court House Police Department. According to the evidence presented at trial, appellant's wife, Courtney Jackson, gave a statement on August 27, 2010 to police as part of this on-going investigation. Later that same day, appellant called Courtney from the

Fayette County Jail. During this conversation, appellant told Courtney that he knew she wrote a statement about him. He continued, "you did me dirty [b]itch when I get out of prison you'd better put a protection order on me * * * * yeh, [c]ause I'm comin to see ya for what you did . . . I'm gonna make sure we both know what happened."

{¶3} The next day, August 28, 2010, Courtney reported the incident regarding appellant's phone call to Patrolman Sockman of the Washington Court House Police Department. Thereafter, Patrolmen Sockman and Queen assisted Courtney in obtaining a protection order against appellant.¹

{¶4} Based on appellant's August 27, 2010, phone call to Courtney, the state charged appellant with intimidation of a witness in violation of R.C. 2921.04(B), a felony of the third degree. A jury trial was held on December 22, 2010. At trial, the recorded phone conversation between appellant and Courtney was played for the jury. Courtney also testified as to the phone call. Additionally, Patrolmen Sockman and Queen testified, as well as Sergeant Jodi Kelley, the officer who copied the phone conversation to a CD (compact disc). The jury found appellant guilty as charged. He was sentenced to a term of four years in prison, a three-year mandatory period of postrelease control and ordered to pay court costs. Appellant now timely appeals his conviction asserting four assignments of error. For ease of discussion, appellant's assignments of error will be addressed out of order and his first and third assignments of error will be addressed together.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED WHEN IT ADMITTED STATE'S EXHIBIT 1."

{¶7} Assignment of Error No. 3:

{¶8} "THE TRIAL COURT ERRED BY ALLOWING THE VOICE IDENTIFICATION

1. The protection order was later dismissed by Courtney.

BY OFFICER SOCKMAN BASED SOLELY ON HIS DECLARATION OF FAMILIARITY."

{¶9} Both of these assignments of error relate to the admission of the CD recording of the phone call between appellant and his wife, Courtney. Appellant asserts there was a lack of foundation and authentication (1) prior to the CD being played for the jury, (2) for the admission of the CD as an exhibit, and (3) for a proper voice identification of appellant.

{¶10} The first assignment of error is stylized as an attack on the admission of the CD recording of the phone call as an exhibit, however, appellant claims in the discussion of the argument that there was a lack of proper foundation and authentication *prior* to the phone call being played for the jury. Essentially, appellant asserts that there was a lack of foundation and that the CD was not properly authenticated both before it was played for the jury and before it was admitted as an exhibit.

{¶11} First, it should be noted that appellant argues that the recording was improperly admitted for the separate reasons of lack of foundation and authentication. However, these are interrelated concepts, rather than distinct concepts. Authentication or identification lays the foundation for admissibility of particular evidence. Evid.R. 901(A), Staff Notes. In this case, foundation is established by showing the evidence, the recording, is authentic.

{¶12} Appellant forfeited the argument that the state failed to lay proper foundation as to the authenticity of the recording prior to it being played for the jury. At trial, appellant's counsel objected to "the contents of the CD" and not to a lack of foundation.² Evid.R.103 (A) requires a party to timely object and state the specific ground for the objection. Because appellant failed to object on this basis at trial, this argument is waived unless playing the recording for the jury was plain error. See *State v. Wagers*, Preble App. No. CA2009-06-018,

2. After the CD was played for the jury but prior to the testimony of Courtney Jackson, appellant's counsel further explained her objection, "I initially raised this objection through Sergeant Kelley's testimony and that is the contents of the CD and the conversation between Mr. Jackson and Courtney Jackson I believe is protected by privilege which is 2945.42, as well as rule 601 of Rules of Evidence." It was not until the state moved to admit the CD as an exhibit that lack of foundation and authentication were asserted.

2010-Ohio-2311, ¶48; Crim.R. 52(D).

{¶13} An alleged error is plain error only if it is "obvious," and "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶181 quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus; *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Although, the identification of the CD by Sergeant Kelley was problematic as she was unable to identify it as the one she used to record the phone call, she testified that she listened to it while she was recording it. After hearing the recording in court, she recognized the recording as the call she burned to the CD because she recalled hearing about the protection order. Accordingly, there was no error, plain or otherwise, in the authentication of the recording by Sergeant Kelley prior to it being played for the jury.

{¶14} Appellant also argues in his first assignment of error that the trial court erred in admitting the CD as an exhibit because there was an insufficient basis for authentication. Further, in the third assignment of error, appellant argues the court erred in allowing improper voice identification of appellant on the CD. Both of these arguments relate to the authentication of the CD and will be addressed together.

{¶15} Evid.R. 901 governs the authentication of demonstrative evidence such as recordings of telephone conversations. A witness with knowledge may authenticate an item by testifying the "matter is what it is claimed to be." Evid.R. 901(B)(1). Moreover, voice identification can occur "whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Evid.R. 901(B)(5). The requirement of authentication or identification as a condition precedent to admissibility is satisfied by introducing "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A); *State v. Moshos*, Clinton App. No. CA2009-06-008,

2010-Ohio-735; *State v. Bettis*, Butler App. No. CA2004-02-034, 2005-Ohio-2917, ¶26. This threshold requirement for authentication of evidence is low and does not require *conclusive* proof of authenticity. *State v. Easter* (1991), 75 Ohio App.3d 22, 25. Instead, the state must only demonstrate a "reasonable likelihood" that the evidence is authentic. *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶30.

{¶16} A trial court's decision to admit or exclude evidence will not be reversed by a reviewing court absent an abuse of discretion. *Moshos* at ¶10. An abuse of discretion × implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *State v. Pringle*, Butler App. Nos. CA2007-08-193, CA2007-09-238, 2008-Ohio-5421, ¶17.

{¶17} Patrolman Sockman testified at trial that on August 28, 2010, Courtney contacted him about receiving a phone call from appellant. Courtney testified that on August 27, 2010, appellant called her about the statement she made to police. She confirmed that he told her to "get a protection order." Although she did not recall any of the other specifics of the conversation, her recollection of the call was refreshed through a transcript of the recording. After reading the transcript, she testified that it refreshed her memory about what was said during the conversation. Sockman testified that based on Courtney's complaint on August 28, 2010, he contacted the Fayette County Sheriff's Office. He was directed to Sergeant Jodi Kelley and requested that she make a copy of the phone conversation. Sergeant Kelley testified that as the communications supervisor she oversees the phone recordings and is capable of pulling these recordings from a computer hard drive and "burning" them to a CD. She further testified that after receiving Sockman's request, she burned the requested phone call to a CD and then delivered the CD to Patrolman Sockman.

Sockman confirmed this during his testimony stating that he was able to identify the CD as the one Kelley delivered because his handwriting was on the CD. Therefore, both Sockman and Kelley being witnesses with knowledge, authenticated the CD by testifying that the CD is what the state claimed it to be, a recording of the phone conversation between appellant and Courtney.

{¶18} Additionally, both Sockman and Kelley testified that they reviewed the contents of the recording. Kelley identified the conversation as the one she recorded on the CD because she recalled the statement about the protection order. Sockman further testified that he recognized the voices on the CD. He stated that he had contact, specifically, conversations with both appellant and Courtney, prior to listening to the CD. Appellant asserts that because Sockman had not interviewed him in connection with this specific case, Sockman did not have sufficient familiarity with appellant's voice to identify it. Contrary to appellant's belief, Evid.R. 901 does not require the witness to have heard the voice on any specific occasion or circumstance in order to identify the speaker. "The rule explicitly allows the witness, 'based upon hearing the voice *at any time under circumstances connecting it with the alleged speaker,*' to express her opinion." (Emphasis sic.) Evid.R. 901(B)(5); *State v. Hutson*, Portage App. No.2007-P-0026, 2008-Ohio-2315, ¶15; *State v. Hunter*, Franklin App. No. 10AP-599, 2011-Ohio-1337, ¶27. Because Sockman testified that he had heard appellant's voice through "actual conversations" with appellant prior to listening to the CD, such testimony was sufficient to satisfy the requirements of Evid.R. 901 for the voice identification of appellant.

{¶19} Patrolman Sockman's testimony identifying the voices of appellant and Courtney, together with other corroborating evidence from Sergeant Kelley, Patrolman Sockman and Courtney, was sufficient evidence to support a finding that the matter in question is what the proponent claims, a recording of the conversation between appellant

and Courtney. Therefore, the trial court did not abuse its discretion in allowing the voice identification by Patrolman Sockman or in admitting the CD into evidence as an exhibit.

{¶20} Appellant's first and third assignments of error are overruled.

{¶21} Assignment of Error No. 2:

{¶22} "THE TRIAL COURT ERRED BY ADMITTING TESTIMONY OF APPELLANT'S SPOUSE IN VIOLATION OF MARITAL PRIVILEGE."

{¶23} In his second assignment of error, appellant raises two main issues with the admission of Courtney's testimony. He asserts that his wife, Courtney, was not competent to testify and that the communication between them was privileged.³

{¶24} Spousal competency and privilege are distinct legal concepts that interrelate. *State v. Adamson*, 72 Ohio St.3d 431, 433-34, 1995-Ohio-199. For spousal testimony to be admissible, it must be competent under Evid.R. 601(B) and it must not be privileged under R.C. 2942.45. As this issue involves a decision by the trial court to admit or exclude evidence, we review it under an abuse of discretion standard. *State v. Moshos*, Clinton App. No. CA2009-06-008, 2010-Ohio-735 ¶10; *State v. Hymore* (1967) 9 Ohio St.2d 122.

{¶25} Appellant asserts that Courtney was not competent to testify because the trial court neither determined Courtney had elected to testify nor informed her that she had a choice. We find no merit to this argument.

{¶26} Evid.R. 601 states: "Every person is competent to be a witness except: * * * (B) A spouse testifying against another spouse charged with a crime except when either of the

3. Appellant cites the wrong authority for the rules governing spousal testimony. Appellant correctly notes that there are two different levels of protection for communications between spouses, competency and privilege. He asserts that Courtney was not competent to testify pursuant to R.C. 2945.42 and that the communications between them were privileged pursuant to R.C. 2317.02(D) and Fed.R.Evid. 501. However, Evid.R. 601(B) dictates whether spousal testimony is competent and not R.C. 2945.42. Evid.R. 601 superseded R.C. 2945.42 as to competency. *State v. Rahman* (1986), 23 Ohio St.3d 146, 147-48. R.C. 2945.42 still governs the spousal privilege for criminal cases, not R.C. 2317.02(D). *State v. Mowery* (1964), 1 Ohio St.3d 192, 197; *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶110, fn. 3. Additionally, the spousal privilege contained in R.C. 2945.42 is preserved by Ohio Evid.R. 501 and not the Federal Rules of Evidence.

following applies: (1) a crime against the testifying spouse or a child of either spouse is charged; (2) the testifying spouse elects to testify." Thus, under this rule a spouse is deemed incompetent to testify against the other spouse charged with a crime unless one of the exceptions apply.

{¶27} In support of his argument, appellant cites *Adamson* for the proposition that the trial court must inform the witness spouse of the right to elect to testify and must make a determination on the record of such an election. However, *Adamson* is distinguishable from this case. In *Adamson*, the victim of the crime charged was not the testifying spouse. Therefore, the spouse was competent to testify only if the spouse elected to testify under Evid.R. 601(B)(2). *Adamson* at 434.

{¶28} Here, appellant was charged with intimidation of a witness. His wife, Courtney, was the victim of this crime. Therefore, she was competent to testify under Evid.R. 601(B)(1). It was not necessary for Courtney to elect to testify or be informed of such a right as her competency did not arise from the exception created by Evid.R. 601(B)(2). The trial court did not abuse its discretion in permitting Courtney to testify due to her status as the victim in this case. Further, the trial court did not err in failing to inform her of her right to elect to testify, as argued by appellant, as she did not have such a right. Consequently, appellant's assertion that Courtney was incompetent to testify is meritless.

{¶29} Appellant further contends that the spousal privilege protected the communication between him and Courtney. R.C. 2945.42 "confers a substantive right upon the accused to exclude privileged spousal testimony concerning a *confidential* communication made or act done during the coverture unless a third person was present or one of the other specifically enumerated exceptions contained in the statute is applicable." *Adamson*, 72 Ohio St.3d at 433; *State v. Rahman* (1986), 23 Ohio St.3d 146, syllabus.

(Emphasis added.)⁴ However, not all "communications" are protected by the statute. Rather, the Supreme Court has clarified that only "confidential communications" are meant to be protected by the spousal privilege. *Rahman* at 149. Clearly, the phone conversation is a communication between appellant and Courtney while they were married. Therefore, such communication is privileged only if it was confidential.

{¶30} In determining what communications are considered "confidential" several factors are considered, including the nature of the message or the circumstances under which it was delivered. See *State v. Bryant* (1988), 56 Ohio App.3d 20, 22 citing McCormick, Evidence (3 Ed. Cleary Ed 1984) 193, Section 80. The Supreme Court and other courts of this state have held that threats of bodily harm against a spouse are not privileged as they are not "confidential communications." *State v. Anthill* (1964), 176 Ohio St. 61, 64; *State v. Bryant*, 56 Ohio App.3d at 22; *Portsmouth v. Wrage*, Scioto App. No. 08CA3237, 2009-Ohio-3390, ¶21; *State v. Purvis*, Medina App. No. 05CA53-M, 2006-Ohio-1555, ¶5; and *State v. Vanoy*, Henry App. No. 7-2000-01, 2000-Ohio-1893, *4.

{¶31} In *Anthill*, the Supreme Court found that the need to promote marital peace is lacking where a person is tried for assaulting his spouse. *Anthill* at 64. Therefore, such threats, being obvious violations of marital duty, should not be privileged. *Id.* Similarly, in *Bryant*, the Sixth Appellate District found that the threats and/or acts of the accused spouse were not "confidential communications" where the husband threatened the life of his wife while brandishing a shotgun. *Bryant* at 22. The Fourth Appellate District has held that a husband's threat to have a "crackhead * * * slit [his wife's] throat with a steak knife" was not

4. Although this court has held that the admission of recorded jailhouse phone calls do not violate R.C. 2945.42 where the inmate is provided notice that telephone calls are recorded and monitored, the record before us does not suggest that appellant ever received such a warning prior to making the call to Courtney. See, e.g., *State v. Voss*, Warren App. No. CA2006-11-132, 2008-Ohio-3889, ¶23. Rather, when asked whether the inmates at the jail are informed that their calls are recorded, Sergeant Kelley testified, "I can't answer that. I don't know."

"confidential marital communications." *Wrage* at ¶1, 22. In *Purvis*, the Ninth Appellate District, in following the *Bryant* court, held that the accused's act of kidnapping his wife was not a "confidential communication" within the purpose of the law. Likewise, the Third Appellate District concluded that a telephone conversation between spouses was not in the nature of "confidential communications" that was intended to be protected by the statute. *Vanoy* at 5. In coming to this conclusion, the *Vanoy* Court stated:

{¶32} "The traditional justification for the marital communications privilege is that it promotes marital peace, *State v. Mowery* (1982), 1 Ohio St.3d 192, 198, 438, and this Court is certainly aware that strong public policy grounds favor promotion and preservation of marital confidences even if truthful and invaluable testimony i[n] certain cases is excluded. However, the marital privilege is intended only to protect those communications that are made in reliance upon the special trust and confidence placed in the marital relationship. The privilege is not designed to forbid inquiry into the personal wrongs committed by one spouse against the other, or intended to label confidential a communication aimed at destroying the marriage relationship. It follows then that when a case involves a crime by on[e] spouse against the other, as here, there is no marital peace to protect, and it is clear that the communications are not intended to be kept confidential, the offending spouse should be precluded from asserting the privilege. That is, the basis for the privilege is lacking where a person is tried for a crime against his or her spouse. Communications appurtenant to the crime against the testifying spouse, particularly when the communications are an essential element of the crime charged, are certainly not the character of 'confidential communications' that are intended to be protected by the marital privilege." *State v. Vanoy*, Henry App. No. 7-2000-01, 2000-Ohio-1893, *4.

{¶33} We find the reasoning of these courts persuasive and hold that threats against a spouse are not "confidential communications" intended to be protected by R.C. 2945.42,

and thus not privileged.

{¶34} In the present case, the communication between appellant and Courtney was clearly not in the nature of a "confidential communication" within the purpose of the law. During the call, appellant called Courtney a "bitch" and told her to get a protection order against him because he was going to "come to see" her for making a statement against him to the police. It is evident from the call that this conversation was driven by appellant's anger towards Courtney and his own motivation to ensure she made no other statements to the police. The conversation was not motivated by the reliance upon the intimate and special trust and confidence placed in the marital relationship. In such a situation, there is no need to promote marital harmony. The subject of Courtney's testimony did not involve a confidential remark made by appellant. Rather, it was a threat against his wife. Such communication clearly does not evolve out of the sanctity or confidential nature of marriage.

{¶35} Appellant also maintains that the privilege still applies because his statements were at best a "veiled threat" and that there was no act in furtherance of this threat. We find no merit to this argument.

{¶36} First, Courtney clearly accepted appellant's words as a threat of bodily harm against her as she immediately sought and received a protection order against him as a result of this conversation. Second, veiled threats communicated by a husband to his wife are still not "confidential communications" within the purpose of the spousal privilege. *Vanoy* at *5 (finding that husband's telephone calls where he called his wife a "slut" and a "son of a bitch" and told her she "would get [her] head knocked off" were not "confidential communications"). Accordingly, we hold that the telephone conversation between appellant and Courtney was not a "confidential communication" intended to be protected by the statute. As a result, the communication was not privileged.

{¶37} Appellant also argues that the personal injury exception of the statute did not

apply to permit Courtney's testimony. Although we have already determined that Courtney's testimony was admissible under Evid.R. 601 and R.C. 2945.42 as the communication was not confidential, we likewise find this argument meritless.

{¶38} R.C. 2945.42 permits testimony of otherwise privileged communications "in case of personal injury by either the husband or wife to the other." R.C. 2945.42. Just as an exception to competency exists when the testifying spouse is the victim of the crime charged, R.C. 2945.42 similarly contains an exception to the privilege when the crime charged is against the testifying spouse. See *Anthill* at 63; *Rahman* at 149; *State v. Voss*, Warren App. No. CA2006-11-132, 2008-Ohio-3889, ¶24; *State v. Buttron* (Dec. 11, 1998), Hamilton App. No. C-970406, 1998 WL 852558, *4-6; *State v. Wrage*, Scioto App. No. 08CA3237, 2009-Ohio-3390 at ¶25; *State v. Smith*, Seneca App. No. 13-03-25, 2003-Ohio-5461, at ¶17-18; *State v. Carpenter* (1992), 83 Ohio App.3d 842, 845-46.

{¶39} Appellant essentially asserts that the personal injury exception does not apply because he only threatened to "come see" Courtney rather than threatening bodily harm. This court is not persuaded by appellant's argument. R.C. 2945.42 in no way provides that the injury to the testifying spouse must be an element of the crime in which defendant is charged. See *State v. Purvis*, Medina App. No. 05CA53-M, 2006-Ohio-1555, ¶15. Further, it is irrelevant whether Courtney suffered personal injury in the form of emotional or physical injuries as a result of appellant's actions. Such a requirement would require a tortured interpretation of R.C. 2945.42. Because this was a criminal case involving personal injury and the victim of the crime was appellant's wife, the personal injury exception to R.C. 2945.42 applied, and thus the conversation was not privileged.

{¶40} Accordingly, the trial court did not abuse its discretion in allowing Courtney's testimony because the matters to which Courtney testified were not confidential or privileged.

{¶41} Finally, appellant argues that the recording of the conversation was also

covered by the spousal privilege and the trial court erred by allowing it to be played for the jury. However, even if we had found the communication was privileged, the Supreme Court recently ruled that the marital communications privilege does not preclude the introduction of such communications through other means, such as a tape recording of the communications. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶¶111, 120. Therefore, the tape recording in this case was properly admitted and did not violate the spousal privilege.

{¶42} Based on the foregoing analysis, appellant's second assignment of error is overruled.

{¶43} Assignment of Error No. 4:

{¶44} "THE TRIAL COURT ERRED BY DENYING APPELLANT'S RULE 29 MOTION FOR ACQUITTAL."

{¶45} In his fourth assignment of error, appellant argues that the trial court erred in denying his Crim.R. 29 motion when the state failed to prove each essential element of intimidation of a witness. Specifically, he contends the state failed to prove that he made an unlawful threat of harm towards Courtney.

{¶46} When reviewing the trial court's denial of a motion for acquittal under Crim. R. 29, this court applies the same test as it would in reviewing a challenge based upon the sufficiency of the evidence to support a conviction. *State v. Thompson* (1998), 127 Ohio App.3d 511, 525. The review of a sufficiency of the evidence claim focuses upon whether, as a matter of law, the evidence presented at trial is legally sufficient to sustain a verdict. *State v. Penwell*, Fayette App. No. CA2010-08-019, 2011-Ohio-2100, ¶¶66. Therefore, the inquiry on appeal is to determine, "after viewing the evidence in the light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Dougherty*, Butler App. No. CA2010-02-036, 2011-Ohio-788, ¶¶9, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶47} Here, the state charged appellant with intimidation of a witness in violation of R.C. 2921.04(B), a felony in the third degree. R.C. 2921.04(D). A felony witness intimidation charge requires proof that appellant "knowingly and by force or by unlawful threat of harm to any person or property" attempted to influence, intimidate, or hinder a witness involved in a criminal action or proceeding in discharging her duties as a witness. R.C. 2921.04(B). Appellant only disputes the existence of sufficient evidence to prove the essential element of an "unlawful threat of harm."

{¶48} The Supreme Court of Ohio has held that "an 'unlawful threat of harm,' is satisfied only when the very making of the threat is itself unlawful because it violates established criminal or civil law." *State v. Cress*, 112 Ohio St.3d 72, 2006-Ohio-6501, ¶42. "An *unlawful* threat must accordingly connote more than just a threat, i.e. more than just a communication to a person that particular negative consequences will follow should the person not act as the communicator demands." *Id.* at ¶41. Thus, the Supreme Court's decision in *Cress* suggests that in order for the state to meet its burden in an R.C. 2921.04(B) prosecution, the threat must violate a predicate offense. *Id.* at ¶42-43; *State v. Armstrong*, Summit App. No. 24479, 2009-Ohio-5941, ¶19. However, the Court in *Cress* did not hold that the "predicate offense" must be identified in the indictment or otherwise specified by the state. *State v. Off.*, Portage App. No. 2007-P-0093, 2008-Ohio-4049; *Armstrong* at ¶19.

{¶49} The state presented sufficient evidence to establish that appellant's threats were unlawful. As heard on the CD played for the jury, appellant told Courtney he was going to "come see" her for making a statement against him. He continued, "I'm gonna make sure we both know what happened." Even after Courtney suggested she would leave the area, appellant indicated that he would find her. Although these statements are implied, indefinite threats, the Supreme Court has noted that "[t]he most intimidating threat of all may be an

indefinite one ("You'll be sorry')." *Cress* at ¶37. In this case, the trier of fact could have concluded that appellant's nonspecific and indefinite threats were viable, and threatened physical harm against Courtney. Such threats would have constituted menacing, a violation of R.C. 2903.22 and thus served as the predicate offense for felony witness intimidation. See *Cress* at ¶78.

{¶50} Menacing occurs when an individual knowingly causes another to believe that the offender will cause physical harm to the person. R.C. 2903.22. At trial, evidence was presented that appellant called Courtney from jail and made several comments regarding the statement she made to police and that she should obtain a protection order against him. Such testimony, if believed, is sufficient to show that appellant was aware that his conduct would probably cause a certain result. R.C. 2903.22(B). The jury was also able to hear the actual conversation between appellant and Courtney, including the tone of their voices during the call. Additionally, Courtney testified that at first she did not want appellant to know that she wrote a statement against him. Patrolmen Sockman and Queen both testified Courtney appeared scared and fearful when reporting the phone call and in obtaining the protection order. Patrolman Sockman in particular, testified that Courtney was nervous and concerned about the "ramifications" of her actions. Finally, during the phone call, Courtney acknowledges that appellant was threatening her. She stated: "I don't care[;] you can threaten me, your sister can threaten me, you can do whatever you think you can do so." As the trier of fact, the jury chose not to believe Courtney's testimony at trial that she was "not worried" about appellant coming to see her, but rather the jury chose to take Courtney's action in obtaining a protection order as evidence of her fear and belief that appellant threatened her with physical harm.

{¶51} Viewing the evidence in a light most favorable to the state, we find that the jury could have reasonably inferred the unlawfulness of the threat communicated by appellant as

it would constitute menacing, a violation of R.C. 2903.22. As such, we find sufficient evidence to support the conviction for intimidation of a witness. Accordingly, appellant's fourth and final assignment of error is overruled.

{¶52} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur.

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