

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No. <u>13-1562</u>
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Delaware County Court
	:	of Appeals, Fifth
v.	:	Appellate District
	:	
FELIX A. MAURENT,	:	Court of Appeals
	:	Case No. 12CAA-08-0055
Defendant-Appellant.	:	

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MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN  
SUPPORT OF JURISDICTION

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## INTRODUCTION

The State of Ohio (“Appellee”) opposes the request for jurisdiction by Felix A. Maurent’s (“Appellant”) because discretionary jurisdiction is not warranted when applying the guidelines outlined in Rule III of the Rules of Practice of the Supreme Court of Ohio. These principles require an appellant to demonstrate either (1) the involvement of a substantial constitutional question; (2) the existence of a public or great general interest; or (3) in a felony case, an explanation as to why leave to appeal should be granted. S. Ct. Prac. R. III, § 1, (B)(2). Here, Appellant primarily argues two of the above-mentioned prongs, namely that the case at bar involves a substantial constitutional question and is of public or great general interest. As discussed more fully below, the appellate issues presented by the Appellant are exactly the type of factual, discretionary arguments that are precluded by this Court’s Rules of Practice.

## STATEMENT OF FACTS

On February 1, 2011 at approximately 8:00 p.m., victim Kevin Davidsen and his wife Michelle were attempting to put their small children to bed when two unfamiliar dark-skinned males began to ring the doorbell to the family’s home. Mr. Davidsen traveled to a front window and spoke with the two males, who repeatedly told Mr. Davidsen they “needed to talk to him about the house next door.” Mr. Davidsen refused to allow the persons into his house and instead went to an upstairs area of the home where his wife called the authorities.

The two males continued to knock on the doors of the home and Mr. Davidsen began to speak to the individuals while they were standing outside of a

dining room window. One of the unknown persons then displayed an unidentified badge and told Mr. Davidsen to open the window immediately while the other male approached the window and pointed a handgun at Mr. Davidsen.

As a result, Mr. Davidsen was forced to open the front door and allow the individuals into his residence. With the front door open and the suspects now inside his home, Mr. Davidsen was ordered to the ground by gunpoint in the foyer area of the house, which is the first room one enters into upon entering the Davidsen residence from the front door. One of the suspects indicated Mr. Davidsen "needed to drop the lawsuit" and "release the money" or they would kill both Mr. Davidsen and his family. Mr. Davidsen remained on his knees and held at gunpoint for approximately thirty seconds to a minute before a neighbor pulled into the Davidsen's driveway. At that time, Mr. Davidsen was ordered through his home's dining area and onto his hands and knees once again in the kitchen where he was similarly threatened for a period of approximately one minute.

Before exiting out of the rear door of the home, the individual who spoke most often once again threatened Mr. Davidsen and his family. Mr. Davidsen waited for a few minutes to ensure the suspects had left before checking on the safety of his wife and children, who had locked themselves in an upstairs bedroom.

Officers soon responded to the scene and located two sets of footprints that ended at nearby driveway where the suspects allegedly drove away. Mr. Davidsen was later able to provide a description for the unknown male who primarily threatened him and a sketch of the suspect was also completed (which

looked remarkably similar to Appellant when he was later identified as one of the culprits). Regarding a motive for the crime, detectives learned Mr. Davidsen was involved in pending litigation with a former business associate named Andrew Levene, who was suspected in engaging in fraudulent transactions regarding property in Colorado that Levene and Mr. Davidsen had purchased together. After the litigation became quite contentious, officers believed Mr. Levene hired the individuals in attempt to facilitate a swift and favorable end to the lawsuit.

Such a motive was confirmed when Mr. Davidsen's sister, Gretchen Davidsen, received a threat at her Boston apartment on February 9, 2011 when an unknown individual, through Ms. Davidsen's condominium speaker system, told Ms. Davidsen "to tell her brother to release the money." Shortly thereafter, Mr. Davidsen received two threatening voicemails seven minutes apart on his employment phone voicemail system on February 15, 2011. The caller, who Mr. Davidsen identified as the same person who threatened him in his home, indicated that he will kill Mr. Davidsen, his family, and his sister in Boston.

Detectives were able to conclude the threatening voicemails left at Mr. Davidsen's work originated from the same phone number. The caller had attempted to block his phone number using the "\*67" function; however, the "\*67" function did not eliminate the call from the carrier's records. A subsequent Internet search for the number in question revealed a website for an executive bodyguard service in New Jersey displaying a picture of Appellant who was identified as president of the company.

Phone records indicated the number in question was registered to Appellant. Text messages also demonstrated Appellant was conversing with Mr. Davidsen's former business associate, Andrew Levene. For example, Appellant is provided with details regarding Mr. Davidsen's wife's name, employment, and children. In another series of messages, an unknown number tells Appellant "I'll give you another 2k if you get it done tonight" to which Appellant responds "I got him." Through other records, detectives determined Appellant's phone was using nearby towers including one tower which is located approximately one fourth of one mile away from the victim's phone. In reviewing the records, a clear route from Columbus to the New Jersey area can be viewed as well. Mr. Davidsen later chose Appellant's photo from a photo array in June 2011 and described Appellant as the person who primarily talked during the invasion of his home.

Appellant was arrested during the early morning hours of February 1, 2012 at his apartment in Jersey City, New Jersey after a search warrant was executed at his residence. Officers located multiple cellular phones, a "fugitive recovery agent badge," and even a Massachusetts Turnpike toll receipt corresponding to the date when Gretchen Davidsen was threatened at her condominium. Shortly thereafter, Appellant was booked into a local jail and read his *Miranda* rights at 6:00 a.m. that same morning by an arresting detective. Appellant Defendant acknowledged his rights and indicated he understood the rights that were presented to him.

Appellant remained at the jail for approximately three and one half hours until he was interviewed by three individuals associated with the Federal Bureau

of Investigation. Appellant was not provided with his *Miranda* rights at that time, however, Appellant freely talked with officers over the course of his one hour interview and provided multiple versions as to his actions regarding the Davidsen family. The interview was eventually concluded and Appellant was remanded to a holding cell at which time the interviewers realized they had a few more questions to ask. Upon Appellant's reentry into the interview room, he was asked if he was previously read his *Miranda* rights, to which he responded in the affirmative. Appellant also advised he understood those rights applied during the second interview as well and then discussed Appellant's knowledge of additional criminal actions committed by Andrew Levene.

### ARGUMENT

**I. APPELLEE'S RESPONSE TO APPELLANT'S FIRST ASSIGNMENT OF ERROR, ISSUE ONE: Appellant's statement to officers should not be suppressed because Appellant engaged in a "course of conduct indicating waiver" of his *Miranda* rights.**

Appellant's argument under this portion of his First Assignment of Error concerns whether officers should have once again provided him with his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), when interviewing him approximately three to four hours after he was read his *Miranda* rights upon being booked into a New Jersey detention facility. However, Appellant's assertion is not supported by applicable precedent.

In *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010), the United States Supreme Court recently revisited the subject of an alleged stale *Miranda* waiver. The Supreme Court noted the State must first

demonstrate (1) a *Miranda* warning was given; (2) the accused made an uncoerced statement; and (3) the accused understood his *Miranda* rights. *Id.* at 2261-62. As a result of Appellee plainly meeting the initial requirements set forth by *Berghuis*, Appellant asserts the *Miranda* warnings provided to him had become stale by the time he was interviewed a short period of time later. However, Appellant's staleness argument is without merit as the Supreme Court specifically noted in *Berghuis* that "[p]olice are not required to rewarn suspects from time to time." *Berghuis*, 130 S.Ct. 2250 at 2263. (emphasis added). Much like the case at bar, the Supreme Court in *Berghuis* stated "[t]he fact that [the defendant] made a statement about three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in a course of conduct indicating waiver." *Id.* (emphasis added).

Here, Appellant engaged in a "course of conduct indicating waiver" as he freely talked with officers over the course of his one hour interview and was more than willing to discuss his version(s) of the events or ask questions approximately three to three and one half hours after he was initially provided with his *Miranda* rights. Defendant clearly acted in a manner inconsistent with the exercise of his *Miranda* rights. Appellant did not (1) ask for an attorney, (2) ask for advice as to whether to hire an attorney or have an attorney appointed on his behalf, and (3) mention that he did not want to speak with officers anymore. *Id.* at 2262 (finding "the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protections those rights afford.")

Thus, Appellant's behavior in speaking with officers can be classified as "a course of conduct indicating waiver' of the right to remain silent." *Id* at 2263 (citations omitted). Based on such precedent, Appellant's first prong of his First Assignment of Error does not present any substantial constitutional question and is not of public or great general interest as the United States Supreme Court has specifically found Appellant's argument to be without merit.

**II. APPELLEE'S RESPONSE TO APPELLANT'S FIRST ASSIGNMENT OF ERROR, ISSUE TWO: The trial court did not err when overruling Appellant's motion to suppress victim Kevin Davidsen's out-of-court and in-court identifications of Appellant because the identification procedure used was not "unduly suggestive."**

Appellant's Second Issue contained within his First Assignment of Error concerns whether the trial court erred in overruling his motion to suppress the out-of-court and in-court identifications of Appellant by victim Kevin Davidsen. However, such an argument does not present either a substantial constitutional question or the type of great interest that is needed for this Court to accept jurisdiction. Rather, whether a photo lineup is unduly suggestive has been thoroughly litigated throughout courts of appeal in the State of Ohio and Appellant is merely asking this Court to review the facts of his case once more.

The burden is placed on a criminal defendant "to show that the identification procedure [at issue] was unduly suggestive." *State v. Gloss*, 5<sup>th</sup> Dist. No. 2009 CA 4059, 2010-Ohio-4059, ¶ 55 (citations omitted). If Appellant was to meet that burden, the "court must then consider whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character." *Id.* (citing *State v. Willis* (8<sup>th</sup> Dist. 1997), 120 Ohio App.3d 320, 324).

Initially, Appellee would note Appellant's recitation of the trial court's supposed statement regarding the photo array is wholly inaccurate and not supported by the record. In the case at bar, the trial court indicated that it was "not convinced in the least that there was any suggestion to the lineup, certainly not unduly suggestive. And the Court would find that based on the totality of the circumstances, [the photo lineup at issue was] certainly reliable." At no point did the trial judge make any of the alleged statements quoted by Defendant.

Secondly, Appellant cannot meet his burden of demonstrating the procedure and photographs used were impermissibly suggestive. Regarding the actual lineup itself, each of the photographs has minor deviations in facial hair, ear placement, etc., but such small differences are not so unduly suggestive as to give rise to a substantial likelihood of irreparable misidentification. In fact, the trial court specifically noted the other photographs contained "dark skinned individuals, some lighter than others, all similar age, some have facial hair, some minor facial hair, the ears, the Court doesn't find that's of any significance." Thus, "[w]here the other men depicted in the photo array with the defendant all appear relatively similar in age, features, skin tone, facial hair, dress, and photo background, the photo array is not impermissibly suggestive." *Gloss*, 2010-Ohio-4059 at ¶ 56 (citations omitted).

Further, the process used to administer the lineup did not invite suggestibility. Kevin Davidsen was first asked to recall the facts of the home invasion and to describe the suspect's physical characteristics to which Mr. Davidsen described in great detail. Mr. Davidsen was also told to take his time

and carefully look at each picture before making any decision. Mr. Davidsen was also told that he was not compelled to pick anyone out and the suspect may or may not be present. Once Mr. Davidsen acknowledged that he understood the photo array process, his attention was immediately drawn to Appellant's photo in the lower left hand corner at which point he immediately said "that's him, that's him" as he began to cry. Mr. Davidsen next signed and dated the photo array.

Appellant also notes that the photo identification procedure at issue did not meet the requirements of R.C. 2933.83, a contention Appellee conceded from the outset. As stated by the Fourth District Court of Appeals, "failure to comply with R.C. 2933.83 does not, by itself, warrant the suppression of evidence." *State v. Jackson*, 4<sup>th</sup> Dist. No. 11CA20, 2012-Ohio-6276, ¶ 25. Instead, Appellant was entitled a specific jury instruction pursuant to the parameters of R.C. 2983.33(C)(3) and which the trial court provided to the jury.

As a result, Appellant cannot meet his burden of demonstrating the procedure and photographs used in the instant case were impermissibly suggestive. Wherefore, the second prong of Appellant's First Assignment of Error is without merit.

**III. APPELLEE'S RESPONSE TO APPELLANT'S SECOND ASSIGNMENT OF ERROR, ISSUES ONE AND TWO: The trial court's decision admitting a jail call made by Appellant should be affirmed because the call was properly authenticated and allowing the jury to listen to the call did not violate Appellant's right to confront the witnesses against him.**

In his Second Assignment of Error, Appellant argues the trial court erred by allowing the admission of a jail phone call made by Appellant while

incarcerated as the call was not authenticated properly and violated his rights under the Confrontation Clause.

Regarding the issue of authentication “[t]he threshold for admission is quite low, as the proponent need only submit ‘evidence sufficient to support a finding that the matter in question is what its proponent claims.’” *State v. Tyler*, 196 Ohio App.3d 443, 2011-Ohio-3937, 964 N.E.2d 12 (4<sup>th</sup> Dist.), ¶ 25 (citing Evid.R. 901(A)). To be admissible, a sound recording of a telephone call must be, authentic, accurate, and trustworthy. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 109. “Evid.R. 901 provides two theories upon which a trial court might admit a sound recording.” *Tyler*, 2011-Ohio-3937 at ¶ 26 (citations omitted). “First, Evid.R. 901(B)(5) provides for authentication by voice identification ‘whether heard firsthand or through mechanical or electronic transmission or recording.’ Second, under Evid.R. 901(B)(9), a sound recording may be authenticated through evidence that demonstrates a process or system used that produces an ‘accurate result.’” *Id.*

Here, the trial court correctly admitted the recording of the jail call of Appellant. A law enforcement officer testified he subpoenaed all jail calls made by Appellant while incarcerated in New Jersey. The detective then stated he received a compact disc from a lieutenant at the jail along with a letter certifying the calls were true and accurate copies of all calls made by Appellant and which were transferred to the compact disc in question. The detective stated he listened to the calls and recognized Appellant’s voice. The disc was then

admitted into evidence to allow the trier of fact to compare Appellant's known voice to the threatening messages left on the victim's voicemail.

Appellant argues the call was not "self-authenticating" as posited by Appellee at trial and before the Fifth District Court of Appeals. While the Fifth District could not locate any authority on the topic, it nonetheless noted the threshold for admission of recordings to be "quite low." As a result, the Fifth District correctly found that the trial court did not abuse its discretion in admitting the call.

Even if this Court was to find the jail call was not properly authenticated, such error was clearly harmless. To find an error harmless, an appellate court must be able to declare a belief that the error was harmless beyond a reasonable doubt. *State v. Lytle*, 48 Ohio St.2d 391, 403, 358 N.E.2d 623, (1976). An appellate court may overlook an error where the other admissible evidence, standing alone, constitutes overwhelming proof of guilt. *State v. Williams*, 6 Ohio St.3d 281, 452 N.E.2d 1323 (1983), paragraph six of the syllabus. Any such error here would be harmless because 1) Appellee presented overwhelming evidence of Appellant's guilt as discussed above and 2) the jury was allowed to hear the voicemails left on Mr. Davidsen's work phone line so that they could make their own conclusions as to whether Appellant's voice was heard on the phone call and the voicemails. Accordingly, the jail call at issue was properly authenticated and even if the trial court erred in allowing its admission, such error was harmless beyond a reasonable doubt.

In the second prong of his Second Assignment of Error, Appellant asserts that playing the call at issue to the jury violated his rights under the Confrontation Clause. However, the recorded jail call itself does not violate the Confrontation Clause because it is an admission of a party-opponent under Evid.R. 801(D)(2). Therefore, the call is not hearsay by definition and the Confrontation Clause is not implicated. See, e.g., *State v. Lloyd*, 2<sup>nd</sup> Dist. No. 20220, 2004-Ohio-5813, ¶¶ 13-17.

Even if this Court was to find the admission of the recorded call violated the Confrontation Clause, such violations are subject to a harmless error determination, specifically, “whether the Confrontation Clause error was ‘harmless beyond a reasonable doubt.’” *State v. Siler*, 164 Ohio App.3d 680, 687, 2005-Ohio-6591, 843 N.E.2d 863 (5<sup>th</sup> Dist.) (citations omitted). As discussed previously, any error in admitting the call at issue was harmless in light of the overwhelming evidence demonstrating Appellant was guilty beyond a reasonable doubt. Consequently, the call at issue did not violate the Confrontation Clause and even if the admission of said call was error, any error was harmless beyond a reasonable doubt. As such, the second prong of Appellant’s Second Assignment of Error is also without merit.

**V. APPELLEE’S RESPONSE TO APPELLANT’S THIRD ASSIGNMENT OF ERROR, ISSUE ONE: The trial court did not err when it did not merge Counts One, Four, and Thirteen because each of the offenses involved separate conduct and a separate animus.**

“R.C. 2941.25 protects a criminal defendant’s rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions.” *State v.*

*Blackford*, 5<sup>th</sup> Dist. No. 12 CA 3, 2012-Ohio-4956, ¶ 10 (citations omitted). The statute provides in pertinent part that “[w]here the same conduct by the defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain all counts for such offenses, but the defendant may only be convicted of one.” R.C. 2941.25(A). This Court, in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, set forth a two-part test in determining whether offenses are subject to merger under R.C. 2941.25. First, a court must determine “whether it is possible to commit one offense *and* commit the other offense with the same conduct[.]” *Id.* at ¶ 48. Second, “the court must determine whether the offenses were committed by the same conduct, i.e., ‘a single act committed with a single state of mind.’” *Id.* at ¶ 49 (citations omitted). If both questions are answered in the affirmative, then the offenses are allied offenses of similar import and will be merged. *Id.* at ¶ 50. The facts in the instant case demonstrate Appellant’s convictions for aggravated burglary, kidnapping, and extortion for his actions while in the Davidsen household should not merge as the offenses involved separate conduct and a separate animus.

Here, the aggravated burglary was committed when Appellant, pretending to affiliated with the vacant real estate next door to the Davidsens’ home, used deception to gain entrance to the Davidsen’s residence while having a deadly weapon under his control. The kidnapping did not occur until later when Appellant, after entering the residence, ordered Mr. Davidsen to the ground at gun point in the foyer of the home and constrained his movement for

approximately “thirty seconds to a minute” and concluded when Mr. Davidsen’s neighbor appeared in the driveway. The two crimes, therefore, involved separate conduct and a separate animus and are not allied offenses of similar import. See, e.g., *State v. Christie*, 3<sup>rd</sup> Dist. No. 4-10-04, 2011-Ohio-520, ¶ 42 (finding the defendant committed one act of aggravated burglary when he crawled through the back window of a residence with a shotgun and then committed two kidnappings when he ordered family members to separate parts of the home).

Additionally, the extortion offense does not merge with the aggravated burglary charge discussed above. Once again, Appellant committed the aggravated burglary upon entering the Davidsen’s residence via gunpoint and then made a conscious decision to then threaten Mr. Davidsen. Moreover, Appellant’s threats were of sizeable duration and occurred in multiple locations within the home.

Accordingly, the first prong of Appellant’s Third Assignment of Error is without merit because each crime consists of separate conduct that was committed with a separate animus. Yet again, Appellant is merely asking this Court to review the facts of his case as opposed to setting forth a substantial constitutional question or any sort of public or great general interest.

**VI. APPELLEE’S RESPONSE TO APPELLANT’S THIRD ASSIGNMENT OF ERROR, ISSUE TWO: The trial court did not err when it did not merge Appellant’s extortion convictions in Counts Thirteen and Fourteen because each phone call was a new and distinct crime with a separate animus.**

In the final portion of his Memorandum in Support of Jurisdiction, Appellant argues his two convictions relating to the two separate voicemails he

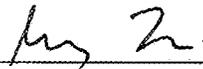
left for the victim on his work phone line should be merged because “they were only one act with one [.]” While the calls were made relatively close in time, the calls cannot be deemed as one continuous act because each act was a new and distinct crime with a separate animus.

Although the calls originated from the same phone number, Appellant made the conscious decision to place a one hundred sixty one second call at 11:08 in the morning. Appellant then made the choice to end the first call and wait approximately four and one half minutes to make another call, this call lasting one hundred thirty four seconds in duration. During the course of the second call, Appellant even intensified his intimidation of Mr. Davidsen by threatening family members that he had not mentioned previously. Unmistakably, each phone call is a separate and distinct act that should not be merged. Thus, even though the two calls were only minutes apart, Appellant committed a new act with a separate animus for each call. Accordingly, the second prong of Appellant’s Third Assignment of Error is without merit.

### **CONCLUSION**

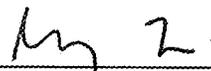
Appellant primarily seeks a factual review of the simple evidence presented in his case. Such evidence, coupled with the well-settled precedent described above, demonstrates that Appellant’s request for jurisdiction does not set forth a substantial constitutional question nor is the case of public or great general interest. As a result, for the reasons stated above, Appellee respectfully requests this Court decline Appellant’s request for jurisdiction.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Memorandum In Response To Appellant's Memorandum Of Jurisdiction was served upon Felix A. Maurent, No. 666-917, P.O. Box 7010, Chillicothe, Ohio 45601 this 18<sup>th</sup> day of October 2013, by U.S. mail.

  
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