

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 :
 vs. :
 :
 DAVID L. LABER, :
 :
 Defendant-Appellant. :

Case No. 2013-1174
On Appeal from the Lawrence County
Court of Appeals
Fourth Appellate District
C.A. Case No. 12CA24

APPELLANT DAVID LABER'S MERIT BRIEF

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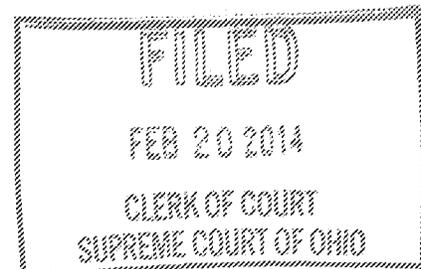


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INTRODUCTION

The decision below authorizes Ohio courts to punish people for expressing speculative thoughts. In doing so, it sets a dangerous precedent infringing upon all Ohioans' fundamental constitutional right to free speech. Ohio's terrorist-threat statute requires a specific intent to intimidate or coerce, *and* that the words used caused a reasonable expectation or fear of the imminent commission of a felony offense of violence. And only serious expressions of an intent to commit an unlawful act of violence, which constitute "true threats," may be constitutionally banned under the First Amendment. But here, the court below misinterpreted Ohio's statute to criminalize David Laber's statements that did not rise to the level of threats that can be criminalized. As such, Mr. Laber's conviction for making a terrorist threat is not supported by sufficient evidence. Accordingly, this Court should reverse the decision below and vacate his conviction and sentence.

STATEMENT OF THE CASE AND FACTS

Mr. Laber is serving three years in prison because he shared some bizarre, speculative thoughts with a co-worker. That co-worker, Linda Lawless, testified that Mr. Laber asked her if she ever thought of shooting someone or bombing their place of employment. *State v. Laber*, 4th Dist. Lawrence No. 12CA24, 2013-Ohio-2681, ¶ 3. She said she had not. *Id.* He then, according to her, continued that he had "thought" of shooting two co-workers and commented that he had bombs and "would start at the front office." *Id.* But Ms. Lawless emphasized that he never "convey[ed]" to her that he was going to shoot someone or bomb their place of employment." *Id.* at ¶ 11. Instead,

he “wonder[ed] what it would be like.” Tr. 79; *see also id.* at 65-67. As a result, Mr. Laber was fired. *Laber* at ¶ 3. And he was later charged and convicted for making a terrorist threat. *Id.* at ¶ 5. He was sentenced to 36 months in prison, the maximum sentence. *Id.* Mr. Laber appealed. *Id.* Relevant to this appeal, he challenged the sufficiency of the evidence, arguing that his speculative words did not demonstrate the specific intent to intimidate or coerce under R.C. 2909.23(A)(1)(a). *Id.* at ¶ 9, 11. The court below affirmed his conviction and sentence. *Id.* at ¶ 17, 25.¹ This Court accepted Mr. Laber’s appeal. December 24, 2013 Reconsideration Entry.

ARGUMENT

PROPOSITION OF LAW

An articulation of mere thoughts is not a terrorist threat under R.C. 2909.23(A). Fifth and Fourteenth Amendments, United States Constitution; Section 16, Article I, Ohio Constitution; R.C. 2909.23; *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In short, the State did not, and could not, prove that Mr. Laber expressed his statements with the specific intent to intimidate or coerce. Moreover, the State did not, and could not, prove that his statements caused a reasonable expectation or fear of the imminent commission of a felony offense of violence. As such, Mr. Laber’s conviction for making a terrorist threat is not supported by sufficient evidence. Accordingly, this Court should reverse his conviction and sentence.

¹ The court of appeals subsequently reopened Mr. Laber’s appeal. That appeal is pending—briefing is complete and argument has been requested—in which Mr. Laber has challenged the constitutionality of R.C. 2909.23 on First-Amendment grounds.

I. To obtain a valid conviction for making a terrorist threat, the State had to prove that Mr. Laber, through his statements to Ms. Lawless, had the specific intent to intimidate or coerce, *and* that those statements caused a reasonable expectation or fear of the imminent commission of a felony offense of violence.

Before a state can obtain a conviction of any offense, it must prove beyond a reasonable doubt every element of that offense. *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *In re Winship*, 397 U.S. 358, 361-64, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction based upon evidence insufficient to meet that standard must be overturned. *Jackson* at 315-18.

Relevant to this case, the State had to prove that Mr. Laber, through his statements to Ms. Lawless, had the specific intent to intimidate or coerce. See R.C. 2909.23(A)(1)(a); see also R.C. 2901.22(A) (defining “purposely” as the “specific intention to cause a certain result”). The State also had to prove that those statements caused a reasonable expectation or fear of the imminent commission of a felony offense of violence. R.C. 2909.23(A)(2); see also R.C. 2909.21(M)(1) (defining “specified offense” under R.C. 2909.23(A)).

II. The First-Amendment definition of “true threats” is key because the Ohio Revised Code does not define “threat.”

Because Mr. Laber’s alleged threat came in the form of statements, the First Amendment must be fully considered. But the court below failed to distinguish “[w]hat is a threat * * * from what is constitutionally protected speech.” *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664.

Under the First Amendment, Mr. Laber's words must be evaluated "against the backdrop of a profound national commitment to the principle that debate * * * should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks * * *." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Especially in this case, involving employment-dispute language, which "is often vituperative, abusive, and inexact." (Citation omitted.) *Watts* at 708; *see also* Tr. 66-67 (demonstrating that Ms. Lawless understood that Mr. Laber was frustrated by his superiors at work).

Finally, Mr. Laber's words must be weighed against the constitutional definition of a "true threat," because only "true threats" may be criminalized. *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). This consideration is magnified given that the term "threat" is not defined by the Ohio Revised Code. *See State v. Krupa*, 7th Dist. Mahoning No. 09-MA-135, 2010-Ohio-6268, ¶ 31; *see also State v. Cress*, 112 Ohio St.3d 72, 2006-Ohio-6501, 858 N.E.2d 341, ¶ 36 (using a dictionary definition of "threat"). Under the First Amendment, "[t]rue threats' encompass those statements where the speaker means to communicate a *serious expression* of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (Emphasis added.) (Citations omitted.) *Black* at 359.

III. The State did not, and could not, prove that Mr. Laber, through his statements to Ms. Lawless, had the specific intent to intimidate or coerce, and that those statements caused a reasonable expectation or fear of the imminent commission of a felony offense of violence.

Mr. Laber's words simply did not demonstrate the necessary specific intent to intimidate or coerce. *See* R.C. 2909.23(A)(1)(a); R.C. 2901.22(A). But the decision below misapplied R.C. 2909.23(A)(2) and (B) to negate that required specific intent. *Laber* at ¶ 11-14. As such, there was not sufficient evidence to convict Mr. Laber, and his conviction and sentence must be overturned. *See Jackson* at 315-318.

The court below held that the statute was violated because Ms. Lawless took Mr. Laber's expressed thoughts seriously, and that Mr. Laber did not have to intend to actually commit the violent acts under R.C. 2909.23(B) in order for his words to be considered a terrorist threat. *Laber* at ¶ 13-14. But, again, a threat has to be made "with purpose to * * * intimidate or coerce * * *." R.C. 2909.23(A)(1)(a). And, again, "purposely" is defined as the "specific intention to cause a certain result * * *." R.C. 2901.22(A). Accordingly, the communication must, when viewed objectively, inherently indicate a specific intent to intimidate or coerce. *See also Black* at 359-360 (explaining that statements must be evaluated objectively to determine whether they constitute a threat). And a statement made with the specific intent to intimidate or coerce, by definition, applies pressure on, or restrains, its recipient. *See Cress* at ¶ 39 (defining intimidate to convey pressure); *see also State v. Woods*, 48 Ohio St.2d 127, 135-136, 357 N.E.2d 1059 (1976), overruled in part, on other grounds by *State v. Downs*, 51 Ohio St.2d 47, 364 N.E.2d 1140 (1977) (defining coerce to convey restraint).

Here, Ms. Lawless explicitly testified that Mr. Laber never stated that he would commit the violent acts that he was thinking about. Tr. 79; *see also* 65-67. Instead, he was simply “wondering what it would be like.” *Id.* at 79. In other words, Mr. Laber was articulating mere speculative thoughts. *See Laber* at ¶ 11. That is an apt, objective description of Mr. Laber’s words. As such, those words constituted hyperbole expressed by a disgruntled worker against his employer, rather than a serious expression of the specific intent to intimidate or coerce. *See Black* at 359; *see also* R.C. 2909.23(A)(1)(a); R.C. 2901.22(A). Accordingly, at most, Mr. Laber’s words were “a kind of very crude offensive method of stating * * * opposition” to his co-workers. *See Watts* at 708.

Other making-a-terrorist-threat cases illustrate the language necessary to violate R.C. 2909.23. In those cases, the defendants communicated unequivocal threats that inherently conveyed pressure or restraint.

For example: “I hate people! I’d like to kill everybody! Don’t be stupid & think I’m just blowing off steam because I’m in here. That’s so not the case. I have an insatiable desire & thirst for revenge & killing.” *State v. Baughman*, 6th Dist. No. L-11-1045, 2012-Ohio-5327, ¶ 24. Indeed, articulating an insatiable desire and thirst for killing conveys an innate purpose to intimidate or coerce.

An affirmative assertion to blow up a courthouse has also been found to constitute a violation of R.C. 2909.23: “[I]f something doesn’t get done, I will * * * do it.” *State v. Hansen*, 3d Dist. No. 13-12-42, 2013-Ohio-1735, ¶ 3. To be sure, an express

statement of future action such as "I will do it" demonstrates a specific intent to intimidate or coerce.

The tone, severity, imminence, and inherent promise of action displayed in the threats used in *Baughman* and *Hansen*, juxtaposed against Mr. Laber's cordial conversation with Ms. Lawless, reveals the flawed interpretation of the decision below. Mr. Laber simply verbalized his wonder. Tr. 79; *see also Laber* at ¶ 11. Accordingly, when viewed objectively, Mr. Laber's words did not demonstrate the specific intent to intimidate or coerce. As such, there was not sufficient evidence to convict Mr. Laber, and his conviction and sentence must be overturned. *See Jackson* at 315-318.

IV. Ohio cannot criminalize bad thoughts, but that is what the decision below permits.

"Our system of laws does not criminalize bad thoughts * * *." *United States v. Sanchez*, 667 F.3d 555, 561 (5th Cir.2012), citing *Sanchez v. Resendiz-Ponce*, 549 U.S. 102, 107, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007). The law of attempt requires an intent to commit an offense and an act that, if successful, would result in the offense. *See R.C. 2923.02(A)*. Similarly, the law of conspiracy requires a meeting of the minds to commit an offense and an overt act in furtherance of committing the offense. *See R.C. 2923.01(A) and (B)*. In these contexts, the overt acts are mandated to ensure that mere bad thoughts are not criminalized. *See Sanchez* at 561. Here, a specific intent to intimidate or coerce is required to ensure that bad thoughts are not criminalized. *See R.C. 2909.23(A)(1)(a)*. But the State did not, and could not, prove that specific intent.

See Part III, above. Accordingly, the decision below allows Ohio to criminalize mere speculative thoughts.

CONCLUSION

When viewed objectively, no matter how alarming, Mr. Laber's words did not indicate the specific intent to intimidate or coerce, and did not cause a reasonable expectation or fear of the imminent commission of a felony offense of violence. As such, they did not violate Ohio's terrorist-threat statute and were not "true threats" that may be constitutionally criminalized.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of Appellant David Laber's Merit Brief has been sent by regular U.S. mail to Mack Anderson, Assistant Lawrence County Prosecuting Attorney, Lawrence County Courthouse, One Veterans Square, Ironton, Ohio 45638, this 20th day of February, 2014.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2013-1174
Plaintiff-Appellee,	:	
	:	On Appeal from the Lawrence County
vs.	:	Court of Appeals
	:	Fourth Appellate District
DAVID L. LABER,	:	
	:	C.A. Case No. 12CA24
Defendant-Appellant.	:	

APPENDIX TO

APPELLANT DAVID LABER'S MERIT BRIEF

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

DAVID L. LABER,

Defendant-Appellant.

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Case No. 13-1174

On Appeal from the Lawrence County
Court of Appeals
Fourth Appellate District

C.A. Case No. 12CA24

APPELLANT DAVID LABER'S NOTICE OF APPEAL

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FILED
JUL 25 2013
CLERK OF COURT
SUPREME COURT OF OHIO

APPELLANT DAVID LABER'S NOTICE OF APPEAL

Appellant, David L. Laber, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lawrence County Court of Appeals, Fourth Appellate District, entered in Court of Appeals Case No. 12CA24 on June 11, 2013.

This case raises substantial constitutional questions, involves a felony, and is of public or great general interest.

Respectfully submitted,

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A copy of the foregoing Appellant David Laber's Notice of Appeal has been sent by regular U.S. mail to Mack Anderson, Assistant Lawrence County Prosecuting Attorney, Lawrence County Courthouse, One Veterans Square, Ironton, Ohio 45638, this 25th day of July, 2013.



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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

WME PATTERSON
CLERK OF COURTS
LAWRENCE COUNTY

STATE OF OHIO, :
Plaintiff-Appellee, : Case No. 12CA24
vs. :
DAVID L. LABER, : DECISION AND JUDGMENT ENTRY
Defendant-Appellant. :

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CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:
ABELE, J.

This is an appeal from Lawrence County Common Pleas Court judgments of conviction and sentence. A jury found David L. Laber, defendant below and appellant herein, guilty of making terrorist threats in violation of R.C. 2909.23(A)(1)(a)(2).

Appellant assigns the following errors for review¹:

¹Appellant's brief does not contain a separate statement of the assignments of error. See App.R. 16(A)(3). Consequently, we take these assignments of error from the table of contents.

FIRST ASSIGNMENT OF ERROR:

"THE JURY'S VERDICT FINDING APPELLANT GUILTY OF VIOLATING R.C. § 2909.03 WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT JUDGE ABUSED HIS DISCRETION BY TAKING INTO CONSIDERATION APPELLANT'S PRIOR RECORD AND IMPOSING A SENTENCE FOR THREE YEARS FOR VIOLATING R.C. §2909.23."

THIRD ASSIGNMENT OF ERROR:

"PROBABLE CAUSE DID NOT EXIST FOR APPELLANT'S WARRANTLESS ARREST, AND AS A RESULT, THE ARREST OF APPELLANT VIOLATED HIS FOURTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION."

On August 1, 2012, appellant was employed at "Emerson Labored" in Ironton, Ohio.² While so employed, he engaged in a conversation with Linda Lawless and asked if she ever thought of shooting someone or bombing their place of employment. Lawless replied in the negative. Appellant continued that he thought of shooting two co-workers and that he had three bombs and "would start at the front office." Lawless contacted her superiors who, later that day, terminated appellant's employment and notified authorities.

Three weeks later, the Lawrence County Grand Jury returned an indictment that charged appellant with making a terrorist

²The employer below was referred to, alternatively, as both "Labored" and "Emerson Labored." For the sake of simplicity, we use the shorter of the two names.

threat. Appellant pled not guilty and the matter proceeded to a jury trial. At trial, Lawless testified concerning the comments and further related that she (1) took appellant's threats seriously, and (2) felt like appellant tried to intimidate her. In addition, several other Labored employees testified as to the company's response to appellant's remarks.

After hearing the evidence, the jury returned a guilty verdict and the trial court imposed a three year prison sentence. This appeal followed.

I

We first consider, out of order, appellant's third assignment of error. Appellant asserts that insufficient probable cause existed for a warrantless arrest and, therefore, his arrest was improper. We, however, need not, and do not, reach the merits of this assignment of error.

First, a warrantless arrest should be challenged in a motion to suppress. See *State v. Whitt*, 2nd Dist. No. 2010 CA 3, 2010-Ohio-5291, at ¶40; *State v. Askew*, 5th Dist. No. 2004CA275, at ¶¶25-26. We find no such motion after our review of this matter. Second, the absence of a motion to suppress notwithstanding, it does not appear that appellant used any other method to raise this particular issue. We must not consider constitutional issues for the first time on appeal. *State v. Johnson*, 4th Dist. Nos. 11CA925, 11CA926 & 11CA927, 2012-Ohio-5879, at ¶15; *State v.*

Cottrill, 4th Dist. 11CA3270, 2012-Ohio-1525, at ¶6.

For these reasons, we hereby overrule appellant's third assignment of error.

II

In his first assignment of error, appellant challenges the evidence adduced at trial. The actual assignment of error is couched in terms of his conviction being against the manifest weight of the evidence. In his argument, however, appellant posits that insufficient evidence supports his conviction. These arguments are not interchangeable. Manifest weight and sufficiency arguments are, both quantitatively and qualitatively, different from one another. See *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997) at paragraph two of the syllabus; also see *State v. Hill*, 4th Dist. No. 09CA30, 2010-Ohio-2552, at ¶13. Nevertheless, we conclude that appellant's arguments fail under either standard of review.

When appellate courts conduct a sufficiency of the evidence review, the court will look to the adequacy of the evidence and determine whether such evidence, if believed by the trier of fact, supports a finding of guilt beyond a reasonable doubt. *Thompkins*, supra at 386; *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991). In other words, after viewing the evidence, and each inference reasonably drawn therefrom in a light most favorable to the prosecution, could a rational trier

of fact have found all the essential elements of the offense beyond a reasonable doubt? See *State v. Were*, 118 Ohio St.3d 448, 890 N.E.2d 263, 2008-Ohio-2762; at ¶132; *State v. Hancock*, 108 Ohio St.3d 57, 840 N.E.2d 1032, 2006-Ohio-160, at ¶34; *State v. Jones*, 90 Ohio St.3d 403, 417, 739 N.E.2d 300 (2000).

R.C. 2909.23 states, in pertinent part, as follows:

"(A) No person shall threaten to commit or threaten to cause to be committed a specified offense when both of the following apply:

(1) The person makes the threat with purpose to do any of the following:

(a) Intimidate or coerce a civilian population:

* * *

(2) As a result of the threat, the person causes a reasonable expectation or fear of the imminent commission of the specified offense."

Appellant first argues that he did not actually make a "threat" for purposes of this statute. Throughout Lawless's testimony she stated that appellant did not convey to her that he was going to shoot someone or bomb their place of employment. Rather, he speculated about committing these acts. Appellant posits that such comments do not rise to the level of a "threat" for purposes of R.C. 2909.23(A). However, the statute states that "[i]t is not a defense . . . the defendant did not have the intent or capability to commit" the threatened offense." *Id.* at (B). (Emphasis added.) In other words, whether the appellant actually intended to carry through on the remarks that he

conveyed to Lawless is irrelevant. The fact that he made those comments is sufficient for the trier of fact to conclude that they constitute threats.

Appellant next argues that no evidence was adduced at trial to show that the threat was made "to intimidate or coerce a civilian population." Appellant points out that he communicated the threat to Lawless and no other person. However, in *State v. Baughman*, 6th Dist. No. L-11-1045, 2012-Ohio-5327, the court concluded that letters that the defendant sent to an ex-girlfriend and mother of his children, wherein he threatened to kill "pigs" and "maggots," (language the ex-girlfriend explained that the defendant used to describe people involved in the judicial system) is sufficient for a reasonable trier of fact to conclude that the defendant intended to intimidate or to coerce a civilian population. *Id.* at ¶¶ 25-27.

In the case sub judice, appellant was even less removed from the targets of his threats than the defendant in *Baughman*. In *Baughman*, the defendant was incarcerated when he threatened the judicial system. Here, appellant conveyed threats to a fellow employee against his employer while at his place of employment. These facts are sufficient for the trier of fact to conclude that appellant meant to intimidate the population at the workplace. Moreover, as the *Baughman* court noted, it is not a defense to a R.C. 2909.23 violation that the threat was made to someone other

than the subject of the offense. See *id.* at (B); *Baughman*, *supra* at ¶26.

Finally, appellant asserts that the evidence failed to establish that the threat "caused a reasonable expectation or fear" of the imminent commission of the threatened act. Again, we disagree. During her testimony, Lawless was asked whether she took appellant's "threats seriously." She answered affirmatively. Indeed, Lawless testified that "I did take him very serious." Nona Callahan, Human Resources Manager at Labored, also testified as follows:

"Q. Was management concerned about the um, eminent threat that was made?

A. Absolutely, absolutely. As a matter of fact we made arrangements for extra security, we called law enforcement, we called our corporate security people. We mobilized."

Appellant cites Callahan's testimony to point out that his employer permitted him to leave the plant after his shift as evidence that the company did not take him seriously. Callahan, however, addressed that point and explained that (1) appellant's shift was over, and (2) "[w]e were still in the process of deciding what to do." Here, the trier of fact may have concluded that it is not unreasonable for an employer to allow someone who threatened fellow employees to leave the place of employment, rather than keep the employee on site with an extended opportunity to carry out the threats.

It is fundamental that evidence weight and credibility are issues that the trier of fact must determine. See e.g. *State v. Frazier*, 115 Ohio St.3d 139, 873 N.E.2d 1263, 2007-Ohio-5048, at ¶106; *State v. Dye*, 82 Ohio St.3d 323, 329, 695 N.E.2d 763 (1998); *State v. Williams*, 73 Ohio St.3d 153, 165, 652 N.E.2d 721 (1995). Here, the jury, sitting as the trier of fact, could opt to believe all, part or none of the testimony of any witness. *State v. Colquitt*, 188 Ohio App.3d 509, 2010-Ohio- 2210, 936 N.E.2d 76, at ¶10, fn. 1 (2nd Dist.); *State v. Nichols*, 85 Ohio App.3d 65, 76, 619 N.E.2d 80 (4th Dist. 1993); *State v. Caldwell*, 79 Ohio App.3d 667, 679, 607 N.E.2d 1096 (4th Dist. 1992). The underlying rationale for deferring to the trier of fact on evidence weight and credibility issues is that the trier of fact is best positioned to view the witnesses, to observe their demeanor, gestures and voice inflections and to use those observations to weigh witness credibility. See *Myers v. Garson*, 66 Ohio St.3d 610, 615, 614 N.E.2d 742 (1993); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

In the case sub judice, it is apparent that the jury, sitting as the trier of fact, found the evidence, including the testimony of Lawless and Callahan, sufficient to show a reasonable expectation or fear that appellant may carry out his threat. In light of the evidence adduced at trial to support that determination, we will not second-guess the jury. For these

reasons, we conclude that sufficient evidence supports appellant's conviction.

We again note that although appellant's argument is largely a challenge to the sufficiency of evidence, his assignment of error also includes a manifest weight of the evidence argument. Insofar as a manifest weight challenge is concerned, a reviewing court will not reverse a conviction on grounds that the conviction is against manifest weight of the evidence unless it is obvious that the jury lost its way and created such a manifest miscarriage of justice that a reversal of the judgment and a new trial are required. See *State v. Earle*, 120 Ohio App.3d 457, 473, 698 N.E.2d 440 (11th Dist.1997); *State v. Garrow*, 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814 (4th Dist.1995); *State v. Daniels*, 4th Dist. No. 11CA3423, 2011-Ohio-5603, at ¶22. Here, we are not persuaded that the judgment is against the manifest weight of the evidence. First, appellant offered no evidence in his own defense. Second, ample competent, credible evidence adduced at trial supports the jury's conclusion. Accordingly, we cannot conclude that the evidence for an acquittal outweighs the evidence that supports a conviction.

For all of these reasons, we find no merit to appellant's first assignment of error and it is hereby overruled.

III

In his second assignment of error, appellant argues that the

trial court erred by (1) taking his prior criminal record of misdemeanor violations into account for purposes of sentencing, and (2) imposing a three year term of imprisonment.

Generally, appellate review of a criminal sentence involves a two step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124; *State v. Leffingwell*, 4th Dist. No. 12CA1, 2013-Ohio-1421, at ¶22. First, an appellate court must determine whether a trial court complied with all applicable rules and statutes. *Kalish*, supra at ¶26; also see *State v. Marino*, 4th Dist. No. 11CA36, 2013-Ohio-113, at ¶6 *State v. Pearson*, 4th Dist. No. 10CA17, 2011-Ohio-5910, at ¶5. If so, the appellate court will review the trial court decision for an abuse of discretion. *Kalish*, supra, at ¶26; *State v. Adams*, 4th Dist. No. 10CA3391, 2012-Ohio-255, at ¶4.

In the case at bar, appellant does not argue that the trial court violated any applicable statute. Instead, he argues that the trial court erred by considering his prior misdemeanor offenses. Appellant, however, cites no authority, as App.R. 16(A)(7) requires, to support his argument that prior misdemeanor violations should not be taken into account for sentencing purposes. To the contrary, we find considerable authority for the proposition that a court's consideration of prior convictions (of any degree) is highly relevant when determining an appropriate sentence. See e.g. *State v. Connin*, 6th Dist. No.

L-11-1312, 2012-Ohio-4989, at ¶34; *State v. Pettit*, 5th Dist. No. 11CA0108, 2012-Ohio-3057, at ¶41.

We now turn to the question of whether the trial court's sentence constitutes an abuse of discretion. A person convicted of making a terrorist threat under R.C. 2909.23 is guilty of a third degree felony. *Id.* at (C). Appellant's three year sentence fell within the sentence range of nine to thirty-six months. R.C. 2929.14 (A) (3) (b). Thus, we will review the sentence under the abuse of discretion standard. Generally, an "abuse of discretion" is more than an error of law or judgment; rather, it implies that a trial court's attitude is unreasonable, arbitrary or unconscionable. *State v. Herring*, 94 Ohio St.3d 246, 255, 762 N.E.2d 940 (2002); *State v. Adams*, 60 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). Additionally, when reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 732, 654 N.E.2d 1254 (1995); *In re Jane Doe 1*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991).

In the case sub judice, the testimony adduced at trial reveals that appellant's threats caused panic amongst his fellow employees (Lawless), as well as others who worked for his employer (Callahan). We cannot conclude that such panic should have been discounted, just as we cannot conclude the trial court

should have disregarded it when it imposed sentence. In the end, we find nothing arbitrary, unreasonable or unconscionable in the imposition of a three year sentence for the events that transpired and we hereby overrule appellant's third assignment of error.

Having considered all of the errors argued and assigned, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

LAWRENCE, 12CA24

13

JUDGMENT ENTRY

2013 JUN 11 PM 2:40

It is ordered the judgment be affirmed and appellant to recover of appellee the costs herein taxed.

MIKE W. PUGH
CLERK OF COURTS
LAWRENCE COUNTY

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

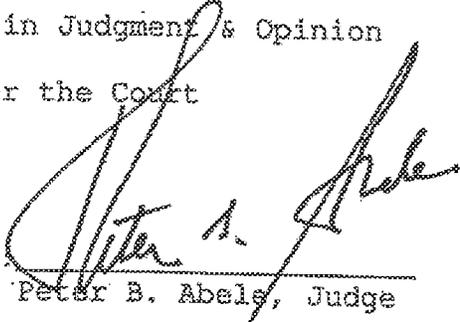
If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, P.J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY 
Peter B. Abels, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT NOV -5 PM 2:32
LAWRENCE COUNTY

STATE OF OHIO,	:	MIKE PATTERSON
	:	CLERK OF COURTS
	:	LAWRENCE COUNTY
Plaintiff-Appellee,	:	Case No. 12CA24
vs. ,	:	
DAVID L. LABER,	:	<u>ENTRY ON APPLICATION</u>
	:	<u>FOR REOPENING APPEAL</u>
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Peter Galyardt, Assistant State Public Defender, 250 East Broad Street, Ste. 1400, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: Brigham Anderson, Lawrence County Prosecuting Attorney, and W. Mack Anderson, Assistant Prosecutor, Lawrence County Courthouse, One Veterans Square, Ironton, Ohio 45638

ABELE, J.

This matter comes on for review of an App.R. 26(B) Application for Reopening Appeal filed by David L. Laber, defendant below and appellant herein. Appellant was found guilty of making terrorist threats in violation of R.C. 2909.23(A)(1)(a)(2) and we affirmed his conviction. See *State v. Laber*, 4th Dist. Lawrence No. 12CA4, 2013-Ohio-2681 (*Laber I*).

On August 20, 2013, appellant filed the present application and argued that he received "inadequate performance" from

appellate counsel on grounds that counsel did not raise on appeal trial counsel's failure to challenge the statute's constitutionality. If allowed to reopen his appeal, appellant argues that he would advance the following assignment of error that appellate counsel should have, but did not, advance in his first appeal of right:

"TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO FILE A PRETRIAL MOTION TO DISMISS THE INDICTMENT AS UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS."

At the outset we note that a criminal defendant is entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); also see *State v. Rojas*, 64 Ohio St.3d 131, 141, 592 N.E.2d 1376 (1992); *In re Petition of Brown*, 49 Ohio St.3d 222, 223, 551 N.E.2d 954 (1990). A failure to provide such assistance amounts to a significant denial of constitutional rights and requires a reversal of the conviction. See *Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988); also see *State v. Kenney*, 5th Dist. Butler No. CA93-480A, 2000 WL 699673 (May 10, 2000); *State v. McComas*, 4th Dist. Lawrence No. 93CA32, 1996 WL 71373 (Feb. 3, 1995).

The standard of review for ineffective assistance of appellate counsel is the same and when considering a claim with respect to trial counsel. See *State v. Mack*, 101 Ohio St.3d 397, 2004-Ohio-1526, 805 N.E.2d 1108, at ¶4; *State v. Nickelson*, 75

Ohio St.3d 10, 11, 661 N.E.2d 168, 169 (1996); *State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456 (1996). Generally, a conviction will not be reversed unless a claimant can show both defective performance as well as resulting prejudice. See *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); also see *State v. Goodwin*, 84 Ohio St.3d 331, 334, 703 N.E.2d 1251 (1999); *State v. Goff*, 82 Ohio St.3d 123, 129, 694 N.E.2d 916 (1989); *State v. Loza*, 71 Ohio St.3d 61, 83, 641 N.E.2d 1082 (1994). An application to reopen appeal will be granted when an applicant establishes a "genuine issue" as to whether he was deprived of effective assistance of appellate counsel. App.R. 26(B)(5). A failure to make such a showing will defeat the application. *State v. McGlone*, 83 Ohio App.3d 899, 903, 615 N.E.2d 1139 (4th Dist. 1992); *State v. Fuller*, 4th Dist. Athens No. 92CA1551, 1993 WL 405490, (Mar. 2, 1998).

In the case sub judice, the gist of appellant's argument is that (1) the statute violates his First Amendment right to free speech, (2) trial counsel should have raised the issue in a motion to dismiss the indictment and (3) appellate counsel was ineffective for not raising trial counsel's failure to do so. Although we do not reach the underlying merits to appellant's constitutional argument, for the following reasons we agree that he has met the threshold burden of a "genuine issue" as to

whether he was denied effective representation on appeal.

Appellant is correct that neither trial nor appellate counsel raised any challenge to the constitutionality of the statute at issue. That statute (R.C. 2909.23) states in pertinent part:

"(A) No person shall threaten to commit or threaten to cause to be committed a specified offense when both of the following apply:

(1) The person makes the threat with purpose to do any of the following:

(a) Intimidate or coerce a civilian population;

* * *

(2) As a result of the threat, the person causes a reasonable expectation or fear of the imminent commission of the specified offense."

Statutes enjoy a presumption of constitutionality. See *State v. Knox*, 8th Dist. Cuyahoga Nos. Nos. 98713 & 98805, 2013-Ohio-1662, at ¶30; *State v. Widmer*, 12th Dist. Warren No. CA2012-02-008, 2013-Ohio-62, ¶13; *State v. Shinkle*, 4th Dist. Ross No. No. 08CA3049, 2009-Ohio-885, at ¶3. However, R.C. 2909.23 is potentially problematic for several reasons. Consequently, we agree with appellant that those problems warrant a full briefing on appeal.

To begin, the statute does not define the word "threat." The standard legal definition for a threat has been variously stated as follows:

"A communicated intent to inflict physical or other harm on any person or property. * * * A declaration of an intention to injure another or his property by some unlawful act. * * * A declaration of intention or determination to inflict punishment, loss, or pain on another[.] * * * A declaration of one's purpose or intention to work injury to the person, property, or rights of another [.]" (Emphasis added.) (Citations omitted.) *Black's Law Dictionary* 1327 (5th Ed.1979).

We could go on, but we believe it is apparent that "intent" is generally a legal prerequisite to characterizing a comment as a "threat." Why this is problematic is because R.C. 2909.23(B) states, *inter alia*, that "[i]t is not a defense to a charge of a violation of this section that the defendant did not have the intent or capability to commit the threatened specified offense[.]" (Emphasis added.)

This leads us to our second concern about the statute. The failure to define a threat, or the General Assembly's declaration that a lack of intent cannot be raised as a defense, is not simply a definitional or drafting problem. Rather, it raises, as appellant points out, genuine questions about the statute's constitutionality.

The First Amendment guarantees that Congress shall pass no law abridging freedom of speech. This guarantee is applicable to the States through the Fourteenth Amendment Due Process Clause. See *Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 15 (1939). The United States Supreme Court, as appellant correctly notes in his application, drew a clear distinction

between a "true threat" and hyperbole. In *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), an eighteen year old protesting the Vietnam draft was heard saying "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." The protester was arrested, charged and convicted under a federal statute that made it illegal to threaten the president's life. *Id.* at 706-707. The Supreme Court reversed and held:

"But whatever the 'willfulness' requirement implies, the statute initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' The language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise."
(Emphasis added.) (Citations omitted.) *Id.* at 708.

More recently, in *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) the Court emphasized that "[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Although we need not, and do not, decide the

issue here and now, we agree that a genuine argument could be made that the remarks that appellant uttered to his co-worker were not true threats, but rather hyperbole expressed by a disgruntled worker against his employer.

At trial, Linda Lawless admitted that appellant did not state that he was going to shoot someone or bomb their place of employment, but just that he thought about it. She also related that she did not think appellant was violent, but just angry. True, the witness testified that she took appellant's comments seriously and felt intimidated, but none of the "threats" were directed at her¹ - only to their employer.

Our research located four cases that referred to this statute. Two dealt with the statute on its merits and none addressed the genuine constitutional issue that appellant raises in his application to re-open appeal. Whether appellant can prevail on that argument is superfluous. Rather, the interests of justice, in our view, warrant that he be given the opportunity to present his argument.

¹ "When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection." People v. Wilson, 186 Cal.App.4th 789, 804 (Cal.App. 2010). Again, however, the alleged threat here was not against Lawless who further stated appellant did not ask her to relate their conversation to the target of his comments.

In its opposing memorandum, the State counters that trial counsel could not be deemed ineffective for failing to raise this issue as "[a]ppellant named specific individuals as targets of his terrorist threats as well as specifically stating how many bombs and where they would be placed[.]" This argument, however, does not address the constitutional free speech issues appellant raises in his application. The State's argument is essentially that enough evidence existed to convict appellant and we have overruled assignments of error that assert that sufficient evidence does not support the conviction and that the conviction is against the manifest weight of the evidence. See *Laber I*, 2013-Ohio-2681, at ¶¶10-19. Here, the pertinent issue here does not involve the quantity of the evidence adduced at trial, but whether the statute itself is constitutional.

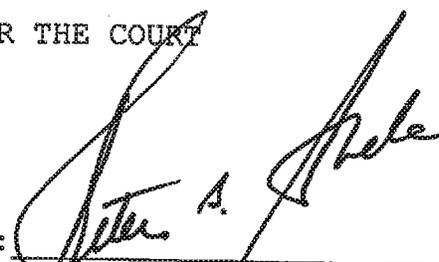
For all these reasons, we agree that appellant has raised a "genuine issue" as to whether he received effective assistance from counsel for purposes of App.R. 26(B)(5). Therefore, we hereby grant appellant's application and order the appeal to be re-opened for the purpose of addressing the issues raised herein.

MOTION GRANTED TO
REOPEN APPEAL.

McFarland, P.J. & Hoover, J.: Concur

FOR THE COURT

BY:

A handwritten signature in cursive script, appearing to read "Peter B. Abele", written over a horizontal line.

Peter B. Abele
Judge

THE COURT OF COMMON PLEAS
LAWRENCE COUNTY, OHIO

STATE OF OHIO,

PLAINTIFF,

VS.

DAVID L. LABER,

DEFENDANT.

12 CR 219
2012 NOV -1 PM 3:21

MIKE PAI JUDGMENT ENTRY
LAWRENCE FINAL APPEALABLE ENTRY
COURT OF COMMON PLEAS
LAWRENCE COUNTY, OHIO
CASE NO. 12-CR-219

466
Pg. 2 of 3

This matter came on for sentencing on October 31, 2012, before this Court with all parties present. The Defendant was represented by counsel, Scott D. Evans. The State of Ohio was represented by W. Mack Anderson, Assistant Prosecuting Attorney.

The Defendant was previously found guilty on by a jury on October 22, 2012, to a violation of Ohio Revised Code Section 2909.23(A)(1)(a)(2), Making Terrorist Threats, a third degree felony.

The Court inquired if the Defendant was a citizen of the United States of America and the Court was informed that in fact Defendant is a citizen of the United States of America.

The Court inquired of the attorney for the State of Ohio and the attorney for the Defendant as regarding the factual situation involved and their recommendations.

Thereafter, the Court then inquired if the Defendant had anything to say why sentence should not be imposed against him. The Defendant addressed the Court.

WHEREFORE, the Defendant, DAVID L. LABER, having been previously found guilty of violating Ohio Revised Code Section 2909.23(A)(1)(a)(2), Making Terroristic Threats, a felony of the third degree, and the Court having considered the statements of counsel and Defendant, having weighed the purposes and principles of sentencing in O.R.C. 2929.11, the seriousness and recidivism factors in O.R.C. 2929.12, and following the guidance of O.R.C. 2929.13, the Court found that this was the worst form of the offense, considered the psychological harm done to the victim, found that less than the maximum sentence would

PAGE 1 OF 3 PAGES

demean the seriousness of the charge, and considered the Defendant's prior misdemeanor record, and does **HEREBY SENTENCE THE DEFENDANT, DAVID L. LABER**, to serve a term of incarceration of three (3) years in the appropriate state penal institution.

Further, it is the Order of this Court that Defendant's participation in the Intensive Program Prison ("IPP") is hereby specifically denied.

The Court informed the Defendant that he could be subject to a period of post-release control. Post-release control is mandatory for all offenses of first degree felonies, second degree felonies, felony sex offenses or a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, and optional for all other felonies; that the period of post-release control for all felonies of the first degree and felony sex offenses, is five (5) years; for a felony of the second degree that is not a felony sex offense, three (3) years; for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three (3) years.

If the Defendant violates the terms of the post-release control, the Defendant may be returned to prison for up to nine (9) months with a maximum for repeat violations of 50% of the stated term. In the event the violation is a new felony, the Defendant may be returned to prison for one (1) year or the remaining period of the post-release control, which ever is greater, and receive a prison term for the new felony.

In the event the Defendant is ever placed on Community Control Sanctions, if the Defendant violates the term of the Community Control Sanctions, the Court may impose a longer period of time on Community Control Sanctions, more restrictive sanctions or a specified prison term.

Page Three
State v. David L. Laber
Judgment Entry
12-CR-219

This notice of post-release control is incorporated herein and made part of the Court's Order.

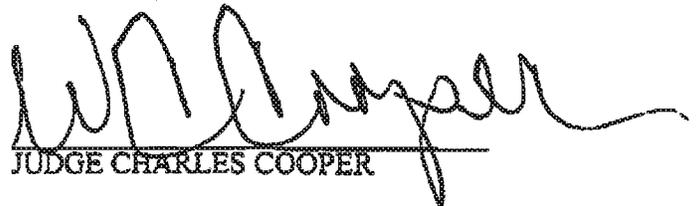
Bond discharged.

Defendant is granted credit for time served, to-wit: 84 days (08/29/12 - 10/31/12), along with future custody days while the Defendant awaits transportation to the appropriate state institution.

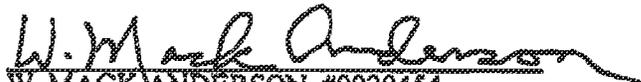
It is further Ordered that the Defendant pay all the costs of this prosecution for which execution is hereby awarded.

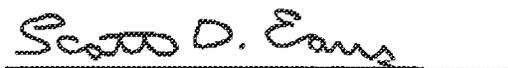
The Court advised the Defendant of his right to appeal and to do so without cost, to obtain counsel for an appeal and that counsel will be appointed without cost if he is unable to obtain counsel, and his right to documents required in that appeal without cost, and his right to have Notice of Appeal timely filed on his behalf.

As a result of these admonishments and the Defendant's replies thereto, appellate counsel was requested.


JUDGE CHARLES COOPER

J. B. COLLIER, JR. #0025279
PROSECUTING ATTORNEY


W. MACK ANDERSON, #0020454
ASSISTANT PROSECUTING ATTORNEY


SCOTT D. EVANS, #0088187
ATTORNEY FOR DEFENDANT

PAGE 3 OF 3 PAGES

THE COURT OF COMMON PLEAS
LAWRENCE COUNTY, OHIO

STATE OF OHIO,

PLAINTIFF,

VS.

DAVID L. LABER,

DEFENDANT.

FILED
COMMON PLEAS COURT
2012 DEC -3 12 CR 219
PM 2:15

MIKE PATTERSON
AMENDED JUDGMENT ENTRY
FINAL APPEALABLE ENTRY
CASE NO. 12-CR-219

467
Pg. 3/2

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The Court inquired if the Defendant was a citizen of the United States of America and the Court was informed that in fact Defendant is a citizen of the United States of America.

The Court inquired of the attorney for the State of Ohio and the attorney for the Defendant as regarding the factual situation involved and their recommendations.

Thereafter, the Court then inquired if the Defendant had anything to say why sentence should not be imposed against him. The Defendant addressed the Court.

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PAGE 1 OF 3 PAGES

demean the seriousness of the charge, and considered the Defendant's prior misdemeanor record, and does **HEREBY SENTENCE THE DEFENDANT, DAVID L. LABER**, to serve a term of incarceration of three (3) years in the appropriate state penal institution.

Further, it is the Order of this Court that Defendant's participation in the Intensive Program Prison ("IPP") is hereby specifically denied.

The Court informed the Defendant that he could be subject to a period of post-release control. Post-release control is mandatory for all offenses of first degree felonies, second degree felonies, felony sex offenses or a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, and optional for all other felonies; that the period of post-release control for all felonies of the first degree and felony sex offenses, is five (5) years; for a felony of the second degree that is not a felony sex offense, three (3) years; for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three (3) years.

If the Defendant violates the terms of the post-release control, the Defendant may be returned to prison for up to nine (9) months with a maximum for repeat violations of 50% of the stated term. In the event the violation is a new felony, the Defendant may be returned to prison for one (1) year or the remaining period of the post-release control, which ever is greater, and receive a prison term for the new felony.

In the event the Defendant is ever placed on Community Control Sanctions, if the Defendant violates the term of the Community Control Sanctions, the Court may impose a longer period of time on Community Control Sanctions, more restrictive sanctions or a specified prison term.

Page Three
State v. David L. Laber
Amended Judgment Entry
12-CR-219

This notice of post-release control is incorporated herein and made part of the Court's Order.

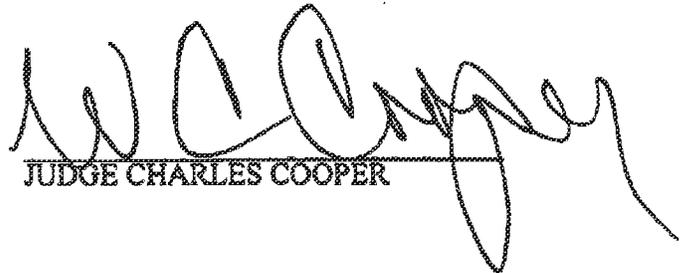
Bond discharged.

Defendant is granted credit for time served, to-wit: 105 days (08/01/12 - 08/22/12 and 08/29/12 to 10/31/12), along with future custody days while the Defendant awaits transportation to the appropriate state institution.

It is further Ordered that the Defendant pay all the costs of this prosecution for which execution is hereby awarded.

The Court advised the Defendant of his right to appeal and to do so without cost, to obtain counsel for an appeal and that counsel will be appointed without cost if he is unable to obtain counsel, and his right to documents required in that appeal without cost, and his right to have Notice of Appeal timely filed on his behalf.

As a result of these admonishments and the Defendant's replies thereto, appellate counsel was requested.



JUDGE CHARLES COOPER

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PROSECUTING ATTORNEY



W. MACK ANDERSON, #0020454
ASSISTANT PROSECUTING ATTORNEY



SCOTT D. EVANS, #0088187
ATTORNEY FOR DEFENDANT

PAGE 3 OF 3 PAGES

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or other press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
CRIMINAL LIABILITY

ORC Ann. 2901.22 (2013)

§ 2901.22. Culpable mental states

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

HISTORY:

134 v H 511. Eff 1-1-74.

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2909. ARSON AND RELATED OFFENSES
 TERRORISM

ORC Ann. 2909.21 (2013)

§ 2909.21. Definitions

As used in sections 2909.21 to 2909.31 of the Revised Code:

(A) "Act of terrorism" means an act that is committed within or outside the territorial jurisdiction of this state or the United States, that constitutes a specified offense if committed in this state or constitutes an offense in any jurisdiction within or outside the territorial jurisdiction of the United States containing all of the essential elements of a specified offense, and that is intended to do one or more of the following:

- (1) Intimidate or coerce a civilian population;
- (2) Influence the policy of any government by intimidation or coercion;
- (3) Affect the conduct of any government by the act that constitutes the offense.

(B) "Biological agent," "delivery system," "toxin," and "vector" have the same meanings as in *section 2917.33 of the Revised Code*.

(C) "Biological weapon" means any biological agent, toxin, vector, or delivery system or combination of any biological agent or agents, any toxin or toxins, any vector or vectors, and any delivery system or systems.

(D) "Chemical weapon" means any one or more of the following:

(1) Any toxic chemical or precursor of a toxic chemical that is listed in Schedule 1, Schedule 2, or Schedule 3 of the international "Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC)," as entered into force on April 29, 1997;

(2) A device specifically designed to cause death or other harm through the toxic properties of a toxic chemical or precursor identified in division (D)(1) of this section that would be created or released as a result of the employment of that device;

(3) Any equipment specifically designed for use directly in connection with the employment of devices identified in division (D)(2) of this section.

(E) "Radiological or nuclear weapon" means any device that is designed to create or release radiation or radioactivity at a level that is dangerous to human life or in order to cause serious physical harm to persons as a result of the radiation or radioactivity created or released.

(F) "Explosive device" has the same meaning as in *section 2923.11 of the Revised Code*.

(G) "Key component of a binary or multicomponent chemical system" means the precursor that plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent chemical system.

(H) "Material support or resources" means currency, payment instruments, other financial securities, funds, transfer of funds, financial services, communications, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

(I) "Payment instrument" means a check, draft, money order, traveler's check, cashier's check, teller's check, or other instrument or order for the transmission or payment of money, regardless of whether the item in question is negotiable.

(J) "Peace officer" and "prosecutor" have the same meanings as in *section 2935.01 of the Revised Code*.

(K) "Precursor" means any chemical reactant that takes part at any stage in the production by whatever method of a toxic chemical, including any key component of a binary or multicomponent chemical system.

(L) "Response costs" means all costs a political subdivision incurs as a result of, or in making any response to, a threat of a specified offense made as described in *section 2909.23 of the Revised Code* or a specified offense committed as described in *section 2909.24 of the Revised Code*, including, but not limited to, all costs so incurred by any law enforcement officers, firefighters, rescue personnel, or emergency medical services personnel of the political subdivision and all costs so incurred by the political subdivision that relate to laboratory testing or hazardous material cleanup.

(M) "Specified offense" means any of the following:

(1) A felony offense of violence, a violation of *section 2909.04, 2909.081, 2909.22, 2909.23, 2909.24, 2909.26, 2909.27, 2909.28, 2909.29, or 2927.24 of the Revised Code*, a felony of the first degree that is not a violation of any provision in Chapter 2925. or 3719. of the Revised Code;

(2) An attempt to commit, complicity in committing, or a conspiracy to commit an offense listed in division (M)(1) of this section.

(N) "Toxic chemical" means any chemical that through its chemical action on life processes can cause death or serious physical harm to persons or animals, regardless of its origin or of its method of production and regardless of whether it is produced in facilities, in munitions, or elsewhere.

(O) "Hazardous radioactive substance" means any substance or item that releases or is designed to release radiation or radioactivity at a level dangerous to human life.

HISTORY:

149 v S 184. Eff 5-15-2002; 151 v S 9, § 1, eff. 4-14-06; 151 v H 231, § 1, eff. 7-20-06; 2012 HB 487, § 101.01, eff. Sept. 10, 2012.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2909. ARSON AND RELATED OFFENSES
TERRORISM

ORC Ann. 2909.23 (2013)

§ 2909.23. Making terroristic threat

(A) No person shall threaten to commit or threaten to cause to be committed a specified offense when both of the following apply:

(1) The person makes the threat with purpose to do any of the following:

- (a) Intimidate or coerce a civilian population;
- (b) Influence the policy of any government by intimidation or coercion;
- (c) Affect the conduct of any government by the threat or by the specified offense.

(2) As a result of the threat, the person causes a reasonable expectation or fear of the imminent commission of the specified offense.

(B) It is not a defense to a charge of a violation of this section that the defendant did not have the intent or capability to commit the threatened specified offense or that the threat was not made to a person who was a subject of the threatened specified offense.

(C) Whoever violates this section is guilty of making a terroristic threat, a felony of the third degree. *Section 2909.25 of the Revised Code* applies regarding an offender who is convicted of or pleads guilty to a violation of this section.

HISTORY:

149 v S 184. Eff 5-15-2002.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL;
CORRUPT ACTIVITY
CONSPIRACY, ATTEMPT, AND COMPLICITY

ORC Ann. 2923.01 (2013)

§ 2923.01. Conspiracy

(A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder, murder, kidnapping, abduction, compelling prostitution, promoting prostitution, trafficking in persons, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespassing in a habitation when a person is present or likely to be present, engaging in a pattern of corrupt activity, corrupting another with drugs, a felony drug trafficking, manufacturing, processing, or possession offense, theft of drugs, or illegal processing of drug documents, the commission of a felony offense of unauthorized use of a vehicle, illegally transmitting multiple commercial electronic mail messages or unauthorized access of a computer in violation of section 2923.421 of the Revised Code, or the commission of a violation of any provision of Chapter 3734. of the Revised Code, other than *section 3734.18 of the Revised Code*, that relates to hazardous wastes, shall do either of the following:

(1) With another person or persons, plan or aid in planning the commission of any of the specified offenses;

(2) Agree with another person or persons that one or more of them will engage in conduct that facilitates the commission of any of the specified offenses.

(B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by the accused or a person with whom the accused conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed.

(C) When the offender knows or has reasonable cause to believe that a person with whom the offender conspires also has conspired or is conspiring with another to commit the same offense, the offender is guilty of conspiring with that other person, even though the other person's identity may be unknown to the offender.

(D) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the conspiracy was impossible under the circumstances.

(E) A conspiracy terminates when the offense or offenses that are its objects are committed or when it is abandoned by all conspirators. In the absence of abandonment, it is no defense to a charge under this section that no offense that was the object of the conspiracy was committed.

(F) A person who conspires to commit more than one offense is guilty of only one conspiracy, when the offenses are the object of the same agreement or continuous conspiratorial relationship.

(G) When a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit the specific offense, the person shall not be convicted of conspiracy involving the same offense.

(H) (1) No person shall be convicted of conspiracy upon the testimony of a person with whom the defendant conspired, unsupported by other evidence.

(2) If a person with whom the defendant allegedly has conspired testifies against the defendant in a case in which the defendant is charged with conspiracy and if the testimony is supported by other evidence, the court, when it charges the jury, shall state substantially the following:

"The testimony of an accomplice that is supported by other evidence does not become inadmissible because of the accomplice's complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect the witness' credibility and make the witness' testimony subject to grave suspicion, and require that it be weighed with great caution.

It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

(3) "Conspiracy," as used in division (H)(1) of this section, does not include any conspiracy that results in an attempt to commit an offense or in the commission of an offense.

(I) The following are affirmative defenses to a charge of conspiracy:

(1) After conspiring to commit an offense, the actor thwarted the success of the conspiracy under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose.

(2) After conspiring to commit an offense, the actor abandoned the conspiracy prior to the commission of or attempt to commit any offense that was the object of the conspiracy, either by advising all other conspirators of the actor's abandonment, or by informing any law enforcement authority of the existence of the conspiracy and of the actor's participation in the conspiracy.

(J) Whoever violates this section is guilty of conspiracy, which is one of the following:

(1) A felony of the first degree, when one of the objects of the conspiracy is aggravated murder, murder, or an offense for which the maximum penalty is imprisonment for life;

(2) A felony of the next lesser degree than the most serious offense that is the object of the conspiracy, when the most serious offense that is the object of the conspiracy is a felony of the first, second, third, or fourth degree;

(3) A felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both, when the offense that is the object of the con-

spiracy is a violation of any provision of Chapter 3734. of the Revised Code, other than *section 3734.18 of the Revised Code*, that relates to hazardous wastes;

(4) A misdemeanor of the first degree, when the most serious offense that is the object of the conspiracy is a felony of the fifth degree.

(K) This section does not define a separate conspiracy offense or penalty where conspiracy is defined as an offense by one or more sections of the Revised Code, other than this section. In such a case, however:

(1) With respect to the offense specified as the object of the conspiracy in the other section or sections, division (A) of this section defines the voluntary act or acts and culpable mental state necessary to constitute the conspiracy;

(2) Divisions (B) to (I) of this section are incorporated by reference in the conspiracy offense defined by the other section or sections of the Revised Code.

(L) (1) In addition to the penalties that otherwise are imposed for conspiracy, a person who is found guilty of conspiracy to engage in a pattern of corrupt activity is subject to divisions (B)(2) and (3) of section 2923.32, division (A) of section 2981.04, and division (D) of *section 2981.06 of the Revised Code*.

(2) If a person is convicted of or pleads guilty to conspiracy and if the most serious offense that is the object of the conspiracy is a felony drug trafficking, manufacturing, processing, or possession offense, in addition to the penalties or sanctions that may be imposed for the conspiracy under division (J)(2) or (4) of this section and Chapter 2929. of the Revised Code, both of the following apply:

(a) The provisions of divisions (D), (F), and (G) of section 2925.03, division (D) of section 2925.04, division (D) of section 2925.05, division (D) of section 2925.06, and division (E) of *section 2925.11 of the Revised Code* that pertain to mandatory and additional fines, driver's or commercial driver's license or permit suspensions, and professionally licensed persons and that would apply under the appropriate provisions of those divisions to a person who is convicted of or pleads guilty to the felony drug trafficking, manufacturing, processing, or possession offense that is the most serious offense that is the basis of the conspiracy shall apply to the person who is convicted of or pleads guilty to the conspiracy as if the person had been convicted of or pleaded guilty to the felony drug trafficking, manufacturing, processing, or possession offense that is the most serious offense that is the basis of the conspiracy.

(b) The court that imposes sentence upon the person who is convicted of or pleads guilty to the conspiracy shall comply with the provisions identified as being applicable under division (L)(2) of this section, in addition to any other penalty or sanction that it imposes for the conspiracy under division (J)(2) or (4) of this section and Chapter 2929. of the Revised Code.

(M) As used in this section:

(1) "Felony drug trafficking, manufacturing, processing, or possession offense" means any of the following that is a felony:

(a) A violation of *section 2925.03, 2925.04, 2925.05, or 2925.06 of the Revised Code*;

(b) A violation of *section 2925.11 of the Revised Code* that is not a minor drug possession offense.

(2) "Minor drug possession offense" has the same meaning as in *section 2925.01 of the Revised Code*.

HISTORY:

134 v H 511 (Eff 1-1-74); 136 v H 300 (Eff 7-1-76); 139 v H 108 (Eff 6-23-82); 139 v S 199 (Eff 7-1-83); 140 v S 210 (Eff 7-1-83); 140 v H 651 (Eff 10-1-84); 141 v H 5 (Eff 1-1-86); 141 v H 338 (Eff 9-17-86); 141 v H 428 (Eff 12-23-86); 146 v S 2 (Eff 7-1-96); 146 v H 125 (Eff 7-1-96); 146 v S 269. Eff 7-1-96; 149 v S 123, § 1, eff. 1-1-04; 150 v H 383, § 1, eff. 5-6-05; 151 v H 241, § 1, eff. 7-1-07; 153 v S 235, § 1, eff. 3-24-11; 2011 HB 86, § 1, eff. Sept. 30, 2011.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL;
CORRUPT ACTIVITY
CONSPIRACY, ATTEMPT, AND COMPLICITY

ORC Ann. 2923.02 (2013)

§ 2923.02. Attempt

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of an offense, or of conspiracy to commit an offense shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose.

(E) (1) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder, murder, or an offense for which the maximum penalty is imprisonment for life is a felony of the first degree. An attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense is an offense of the same degree as the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth de-

gree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than *section 3734.18 of the Revised Code*, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

(2) If a person is convicted of or pleads guilty to attempted rape and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code*, the offender shall be sentenced to a prison term or term of life imprisonment pursuant to *section 2971.03 of the Revised Code*.

(3) In addition to any other sanctions imposed pursuant to division (E)(1) of this section for an attempt to commit aggravated murder or murder in violation of division (A) of this section, if the offender used a motor vehicle as the means to attempt to commit the offense, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of *section 4510.02 of the Revised Code*.

(F) As used in this section:

(1) "Drug abuse offense" has the same meaning as in *section 2925.01 of the Revised Code*.

(2) "Motor vehicle" has the same meaning as in *section 4501.01 of the Revised Code*.

HISTORY:

134 v H 511 (Eff 1-1-74); 140 v S 210 (Eff 7-1-83); 140 v H 651 (Eff 10-1-84); 144 v H 225 (Eff 10-23-91); 146 v S 2 (Eff 7-1-96); 148 v S 107. Eff 3-23-2000; 151 v S 260, § 1, eff. 1-2-07; 151 v H 461, § 1, eff. 4-4-07.