

ORIGINAL

IN THE SUPREME COURT OF OHIO
Supreme Court Case Number 13-0536

STATE OF OHIO

Appellee

v.

DAWUD SPAULDING

Appellant

On Appeal from the Summit
County Court of Common Pleas
Case No. CR 12 05 1508

CAPITAL CASE

MERIT BRIEF OF APPELLEE
STATE OF OHIO

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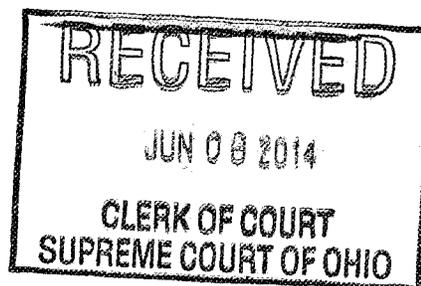
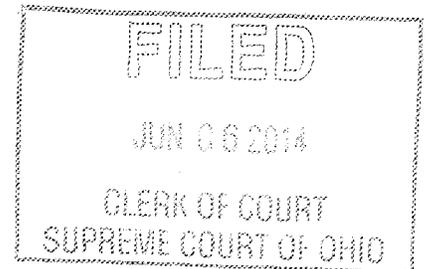


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STATEMENT OF THE CASE AND FACTS

Appellant, Dawud Spaulding, was found guilty by a jury of: Aggravated Murder, a special felony, with a specification that the killing was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, and a firearm specification; Aggravated murder, a special felony, with a specification that the killing was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, and a firearm specification; Attempted Murder, a felony of the first degree, with a firearm specification; Felonious Assault, a felony of the second degree; Having Weapons While Under Disability, a felony of the third degree; Domestic Violence; a felony of third degree; Intimidation of a Crime Victim or Witness, a misdemeanor of the first degree; and, Violating a Protection Order. Following a mitigation hearing, the jury recommended that Spaulding be sentenced to death. The trial court accepted the jury's recommendation and sentenced Spaulding to death. The charges stemmed from the following events.

At approximately 2:00 a.m., on December 15, 2011, Patrick Griffin was shot near the doorway of the residence located at 1104 Grant Street, which was the residence of Ernest and Carl Thomas, sustaining life threatening, paralyzing injuries which caused him to remain hospitalized through the time of the trial in this case. (Tr. 1102-1111; 1130-1132-1140; 1457; 1464; 1491). As a result of the shooting, Patrick Griffin is a quadriplegic, requires a colostomy bag, and requires a ventilator. (Tr. 1182-1185). Patrick Griffin testified via a closed circuit deposition and identified Spaulding as the shooter. (Tr. 1420-1424; Deposition Tr. Page 14-15; State's Exhibits 180 & 181). Griffin also identified Spaulding as the shooter in a photo array. (Tr. 1750-1751).

Anthony Shellman, an eye witness to this shooting, testified that he was inside the residence and heard Patrick say "Ah, Shit", he heard a few gunshots, and he saw a tall individual, who he could not identify, unloading and reloading a gun. (Tr. 1138-1141; 1170). Mr. Shellman further averred that, at some point he was later incarcerated in the Summit County Jail, and told Spaulding, "You killed my dude?" (Tr. 1147). Shellman said that, rather than deny it, Spaulding replied, "Man, like how do you know it was me?" (Tr. 1147). Shellman testified that he told Spaulding he saw him and he was there at the crime scene and Spaulding replied, "No you weren't." (Tr. 1147-148).

Just hours after Griffin was shot at 1104 Grant Street, Ernest Thomas and Erica Singleton, who had recently entered into a romantic relationship, were shot and killed in the driveway of the same house. (Tr. 1106; 1134-1135). Both Erica Singleton and Ernest Thomas died from a gunshot wound to the head. (Tr. 1913; 1921).

At the time of her death, Ms. Singleton was 28 years old and had two children, ages three and eight, with Spaulding. (Tr. 1042-1043). Singleton and Spaulding's relationship took a violent turn in 2006 and the police were called multiple times over the next five years. (Tr. 1044-1045). The relationship ended in 2009 and Erica Singleton moved in with her mother, Kimberly Singleton. (Tr. 1045).

Kimberly Singleton testified that, while her daughter was living with her, Spaulding sent Erica threatening text messages and told Kimberly Singleton, "Miss Kim, you are going to bury your daughter." (Tr. 1046). Kimberly Singleton averred that, when Spaulding told her that she was going to bury Erica, she believed his threat. (Tr. 1046; 1075; 1077). Charges were filed, but Erica later dropped the charges. (Tr. 1075).

On April 18, 2010, Erica Singleton called the police first to report that her car radio had been stolen and later to report that she believed Spaulding, who had had been repeatedly contacting her, stole the radio. (Tr. 1234-1235). A law enforcement officer, who responded to the call, averred that Erica was outside and visibly upset. (Tr. 1236). Erica Singleton played three voicemail messages for the officer wherein Spaulding threateningly advised Erica: that the radio was going to look good in his car; that Erica was making him lose his temper; he was “going to fuck everyone up”; and, he was going to get in her “grill.” (Tr. 1236-1240).

The officer testified that as he was speaking with Erica, she received several phone calls and texts from Spaulding. (Tr. 1240). The officer answered one of the calls and introduced himself to Spaulding, who told the officer, “Tell that bitch I got something for her.” (Tr. 1241). The officer said that Erica was afraid of Spaulding and that Spaulding had guns, was trigger happy, and had previously made comments about not being afraid to shoot the police. (Tr. 1244). As a result of this incident, Spaulding was convicted of misdemeanor domestic violence and telecommunication harassment. (Tr. 1247-1248; State’s Exhibits 153 and 154).

In 2010, Spaulding left a voice mail specifically threatening to kill Erica. (Tr. 1046-1049; State’s Exhibit 152.)

On February 6, 2011, Erica Singleton called the police reporting that Spaulding slapped her in the face and she was scared. (Tr. 1050-1057; State’s Exhibits 167). Spaulding was convicted of domestic violence for this incident. (Tr. 1269; State’s Exhibit 155).

On October 22, 2011, Erica called 911 and reported that her tires had been slashed at the Motel 6 in Copley. (Tr. 1931). The responding officer testified that Erica was terrified and believed that Spaulding was stalking her and had let the air out of her tires. (Tr. 1932). The

officer testified that, while the officer was on scene, Spaulding called Erica and the officer heard Spaulding cursing, calling Erica names, and accusing her of sleeping with someone. (Tr. 1933).

On November 28, 2011, Erica Singleton called 911 for the last time after Spaulding entered her residence through an open window, armed with a gun and a knife, and demanded \$15,000 of the social security payment she had received, threatened to rape and kill her, and advised her that he already had a grave site for her. (Tr. 1050-1061). Erica Singleton filed a police report and went to a shelter with her children for approximately one week. (Tr. 1061-1062).

The responding officers testified that when they arrived at the home, they found Erica hysterical, scared, and crying. (Tr. 1278; 1303). While law enforcement officers were still on scene, Spaulding called Erica and said, "Real Smooth, calling the cops on me like this." (Tr. 1307). Erica replied, "You shouldn't have come to my house with a gun." (Tr. 1307). Spaulding then told Erica, "You just need to let this go. You just need to let this go. You just need to let this go." (Tr. 1307). Spaulding further advised Erica, "I'm watching you now." (Tr. 1308).

As a result of this incident, Spaulding was charged with aggravated robbery, aggravated burglary, domestic violence and kidnapping. (Tr. 1285). The following day, November 29, 2011, Spaulding sent Erica a text message saying he was the only one "that will die and kill for you. Who going - - who going to try to hurt you when you mines nobody." (Tr. 2114-2115). Eric replied, "I'm not yours or nobody's. That's your problem and I'm not dropping shit." (Tr. 2114). Spaulding tried to persuade Erica to drop the charges in exchange for money. (Tr. 1063). At the time of Erica's murder, the charges were still pending and Spaulding was on probation for domestic violence with a three-year suspended prison sentence. (Tr. 1292; 1399).

Magistrate Collins testified that, in December of 2011, Erica requested a civil protection order against Spaulding and he issued a civil protection order because Erica “gave some pretty compelling testimony as to the nature of the violence that she had experienced.” (Tr. 1376). At that time, the defense stipulated to the civil protection order issued on December 1, 2011, which was marked as State’s Exhibit 178. (Tr. 1380-1382).

On December 13, 2011, Erica Singleton and her children stayed at the residence of Kimberly Singleton. (Tr. 1065). On December 14, Erica went out for the evening, leaving the children with her mother. (Tr. 1066). The following morning, at 7:45 a.m., Erica, who had not yet returned home from the prior evening, called her mother and advised her that she was on her way home. (Tr. 1066; 1080; 1090).

Kimberly Singleton testified that after receiving the call from her daughter, she received a call from Spaulding who asked, “Did Erica make it there yet?” (Tr. 1066). Kimberly Singleton said that she advised Spaulding that Erica was not there yet, but she was on her way. (Tr. 1066). She testified that Spaulding laughed and replied, “Oh, she on her way? Okay?” (Tr. 1067). Twenty minutes later, Kimberly Singleton learned that her daughter Erica was dead and immediately went to the crime scene and told law enforcement officers that she believed that Spaulding killed Erica. (Tr. 1067-1069; 1090).

Police were dispatched to 1104 Grant Street at 8:01 a.m. regarding people lying in the driveway. (Tr. 1622). When officers arrived on scene, they found Ernie Thomas and Erica Singleton on the ground, bleeding and lifeless. (Tr. 1623-1624).

A neighbor, Todd Wilbur, testified that, at approximately 8:00 a.m., he observed a man and a woman with an overnight bag, exiting 1104 Grant Street. (Tr. 1506-1515). Mr. Wilbur saw a man approach the residence, walking along the sidewalk. (Tr. 1516-1517). Mr. Wilbur

said that, when the woman saw the man approaching, she stopped and stared and the two men engaged in a heated conversation. (Tr. 1519-1520). Mr. Wilbur said that, because he had his child in the car, he drove off when the man postured to fight. (Tr. 1522-1524).

Mr. Wilbur testified that, a few minutes later, he saw a large number of police en route to Grant Street and he returned to the scene to see what had happened. (Tr. 1523-1524). Mr. Wilbur identified Spaulding as the man who walked up the walkway and approached the man and woman who were exiting 1104 Grant Street, on the morning of December 15, 2011, at approximately 8:00 a.m. (Tr. 1527-1528).

A member of the FBI Crime Task Force testified that the defendant's cell phone placed an outgoing call at 2:04 a.m. on December 15, 2011 which interacted with a cell tower located within the area of 1104 Grant Street. (Tr. 1995-1997). In addition, the defendant's cell phone was in the area of the crime scene at 7:28 and 7:58 a.m. on the morning of the double homicides. (Tr. 2001). At 8:00 a.m., an outgoing call was made from the defendant's cell phone and was picked up on a cell tower located at the intersection of I-77 and I-76, east of the crime scene. (Tr. 2002-2003).

Cell phone records showed that, at 10:00 p.m., on December 14, 2011, Spaulding texted Singleton expressing his frustration that she was with Mr. Thomas when they had just ended their relationship. (Tr. 2131.). At midnight, Spaulding texted Singleton asking her to kiss the children. (Tr. 2132). Singleton, replied, "Okay." (Tr. 2132).

On December 15, at 2:11 a.m., minutes after Griffin was shot, Spaulding texted Singleton and asked "You sleep. I'm bored." (Tr. 2133). At 7:32 a.m., Spaulding sent Erica a text, which was unread, asking to see their son before he went to school. (Tr. 2133). The child had to be at school at 8:00 a.m. (Tr. 2134). Receiving no reply, Spaulding texted "K" to Erica at 7:33 a.m.

(Tr. 2133). At 8:14 a.m., after Erica and Ernie were killed, Spaulding texted Erica asking “Can I talk to my son or what mommy.” (Tr. 2134). Later, at 10:24 a.m., Spaulding sent a text message to Erica’s phone, asking “Are you cool?” (Tr. 2134). In Spaulding’s statement, he said that he learned about Erica’s death at 9:00 a.m. and police reports show that a witness reported that Spaulding called her at 7:58 a.m. on December 15, 2011 distraught that Erica had been killed. (Tr. 2135; 2144).

PROPOSITION OF LAW I

A DEFENDANT FACING A DEATH PENALTY SPECIFICATION SUFFERS A DENIAL OF THE RIGHT TO COUNSEL AND THE RIGHT TO DUE PROCESS, AS PROTECTED BY CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF OHIO WHEN ONE OF HIS TWO APPOINTED-ATTORNEYS FAILS TO APPEAR AT MULTIPLE PROCEEDINGS OF THE LITIGATION.

LAW AND ARGUMENT

In his first proposition of law, Spaulding contends that that he was denied the right to due process and the right to effective assistance of counsel because his trial lawyers were not always both present during the trial and pretrial hearings. The State disagrees.

Sup.R. 20, which governs the appointment of counsel for indigent defendants in capital cases, provides that “[a]t least two attorneys shall be appointed by the court to represent an indigent defendant charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in R. C. 2929.04(A).” The rule does not require that both attorneys be present at every proceeding in the case. Spaulding cites to no case that holds that both attorneys must be present at every hearing or every moment of the trial. Sup.R. 20 only requires that at least two attorneys be appointed to represent the accused, not that the attorneys be together at every court appearance. With few exceptions, Spaulding’s attorneys were both at the court proceedings in this case.

In his brief, Spaulding contends that only one of his lawyers was present during the deposition of Mr. Griffin; however, a review of the record shows that this assertion is untrue. The second page of the transcript of the deposition shows that, in addition to Mr. Griffin, the following people were present: Assistant Prosecuting Attorneys Walls-Alexander and Kroll; defense attorneys Walker and Wells; Judge Gallagher; Dawud Spaulding; the videographer; and, medial staff. (State’s Exhibit 181, Pages 14-19). In addition, the transcript reflects that both

Attorney Walker and Attorney Wells asked questions during the deposition. (State's Exhibit 181, Pages 6, 10; 20-30).

Next, Spaulding argues that one of his attorneys was not present at two pretrial hearings, which occurred on August 23, 2012 and August 30, 2012, prior to the deposition of Patrick Griffin. On August 23, 2012, Assistant Prosecutor Walls-Alexander and Attorney Wells appeared before court. Attorney Wells had no objection to his client not being present as they were simply discussing the video connection for the upcoming deposition and the need for a court order to allow BCI to set up test equipment at the hospital. (August 23, 2012, Tr. 2-3). A week later, Assistant Prosecutor Walls-Alexander, Attorney Wells, and the defendant were in court for a hearing which was scheduled after the assistant prosecutor approached defense counsel that morning to schedule the deposition of Mr. Griffin because Mr. Griffin was scheduled to have surgery the following week and there was a possibility that he might not survive the operation. (August 30, 2012, Tr. 2-3). As a result of the short notice of the hearing, Attorney Walker was not present and there was some concern that Attorney Walker might not be able to attend the deposition as he was not at the hearing to verify his availability when the court scheduled the deposition. (August 30, 2012, Tr. 2-3). As noted *supra*, Attorney Walker did, in fact, appear at the deposition.

These hearings were limited to obtaining a court order so testing equipment could be put in place for an already scheduled deposition and an unexpected hearing to schedule the date of the deposition due to the victim's health issues. Rule 20 of the Rules of Superintendence do not require that both attorneys appointed for the defendant be present at every pretrial hearing. Nor was Spaulding prejudiced by having one or his two attorneys present for these hearings.

Spaulding also points to the fact that Attorney Wells was not present for a hearing on prospective jurors that had asked to be excused and a discussion as to the jury view. (October 4, 2012, Page 1-53). The record reflects that Spaulding waived the appearance of Attorney Wells at his proceeding. (October 4, 2012, Page 3). As such, he cannot assert error at this time.

Spaulding further contends that Attorney Walker was not present during a portion of the trial. The record reflects that, when court resumed at 1:15, following a lunch break, the court inquired as to whether the parties were ready to resume and said, "Oh, you're waiting for Doc?", referring to Attorney Donald Walker. (Tr. 1092). Attorney Wells, replied, "I'm fine, Your Honor. We can go ahead." There is nothing in the record to demonstrate whether Attorney Walker was still out of the courtroom when the trial resumed or if he returned immediately thereafter.

The record simply reflects that the jury was seated and trial resumed with Attorney Walls-Alexander conducting direct examination of a witness and Attorney Wells cross examining the witness. (Tr. 1093-1120). However, it is evident that even if Attorney Walker had not returned prior to the commencement of trial, he was only out of the court room for a short period of time as the record reflects that he was in court and cross-examined the very next witness who testified. (Tr. 1121-1172).

Spaulding also asserts that Attorney Walker was not present when the verdict was returned. The record does not support this assertion. The record shows that Attorney Walker was not present at 10:49 a.m. for jury questions at which time Attorney Wells advised the court that Spaulding waived the appearance of his second attorney during these final phases of the trial. (Tr. 2407-2408). Later, Court reconvened at 12:00 p.m. (Tr. 2409). The record is devoid of any affirmative assertion that Attorney Walker was not present. (Tr. 2409). To the contrary, the

journal entry of conviction states that Spaulding was in court with both counsels, Donald Walker and Jason Wells, for the verdict. (Journal entry of conviction 11/26/12, amended 11/23/12).

Finally, Spaulding asserts that trial counsel was not in contact with him between the guilt and mitigation phases of the trial. In support of this argument, Spaulding points to a single reference in the transcript which occurred when the parties were in court to discuss the fact that, after he was convicted, Spaulding refused to come to court and Attorney Walker told the court that he would discuss the issue with Spaulding that day because he had not had a chance to discuss it earlier since he had been in Columbus for most of the week. (Tr. 2419). The judge noted that he had been gone the prior week too. (Tr. 2420). There is nothing inherently prejudicial about trial counsel not communicating with a client for a few days in between the guilt and mitigation phases of a trial.

Spaulding has not demonstrated that he has a right to have two attorneys present at every court appearance; instead, he has simply shown that he has a right to have two court appointed lawyers represent him, pursuant to the Ohio Rules of Superintendence. In this case, Spaulding was appointed two attorneys to represent him and these attorneys did represent him. The record shows that lead counsel was present for all but two hearings, which related to scheduling a deposition and the issuance of a court order to set up the equipment for the same. Co-counsel was present for all but the one hearing discussed *infra*. As such, the record shows that Spaulding was represented by two lawyers throughout the case and both attorneys were present in court throughout the trial, except for perhaps a few minutes when Attorney Walker may have been out of the courtroom during a portion of the testimony of one witness and a few minutes of the reading of the verdict. Spaulding's first proposition of law is without merit and must be overruled.

PROPOSITION OF LAW II

A DEFENDANT FACING A DEATH PENALTY SPECIFICATION IS DENIED THE RIGHT TO EFFECTIVE COUNSEL AS PROTECTED BY THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE ONE, SECTION TEN OF THE CONSTITUTION OF THE STATE OF OHIO WHEN COUNSEL FILES A LATE, BOILERPLATE MOTION TO CHALLENGE THE EYEWITNESS IDENTIFICATION IN A CASE LACKING PHYSICAL EVIDENCE TYING A DEFENDANT TO THE SCENE OF A CRIME AND WHERE A DETECTIVE BOLSTERED THE EYEWITNESS TESTIMONY WITHOUT OBJECTION.

LAW AND ARGUMENT

In his second proposition of law, Spaulding argues that he was denied effective assistance of counsel because trial counsel filed a boiler plate motion to suppress the eye witness identification outside the statutory time period. The State disagrees.

A review of the transcript demonstrates that Spaulding's trial counsels considered filing a motion to suppress earlier but decided not to do so because they "had reservations about filing the motion at first." (Tr. 780). When trial counsel filed the motion, he indicated to the court that the motion was being filed only "to protect the record and to make sure it protects us to." (Tr. 780). Furthermore, although the motion was filed late, the court nonetheless chose to conduct a hearing on the motion. (Tr. 780-808). As such, Spaulding cannot demonstrate that he was prejudiced by counsel filing the motion late.

It is well-settled that, in order to establish ineffective assistance of counsel for counsel's failure to file a motion to suppress, the defendant must prove that there was a basis to suppress the evidence in question. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, at ¶ 65. If the defendant meets this burden, then he must show that there is also reasonable probability that, if the motion had been granted, the failure of counsel to file the motion was prejudicial by showing that there was a reasonable probability that, without the excluded evidence, he would have been acquitted. *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000), citing *Strickland v. Washington*,

466 U.S. 668, 695 (1984). In this case, Spaulding has not shown a reasonable probability that the motion would have been granted.

The State notes that Spaulding does not challenge the procedure used for the photo arrays; instead, he argues that the witness identification should have been suppressed because when the witness was first shown the photo array, which contained a picture of Spaulding, he did not indicate that the perpetrator was in the photos; however, when shown the photos a second time, he identified Spaulding as the perpetrator.

The record shows that, at the suppression hearing, Detective Morrison testified that when officers interviewed Patrick Griffin, who was in a state of paralysis and was intubated as a result of the injuries relating to this crime, at Akron General Medical Center, on December 20, 2011, Griffin indicated that he could identify the person who shot him and that the person was Erica's ex-boy-friend. (Tr. 785-794). Detective Morrison explained that a nurse was present during the interview and advised the officers that she held off on giving Mr. Griffin his medications so that he would be coherent. (Tr. 795).

Detective Morrison averred that when Mr. Griffin looked at the photo of Spaulding he "had a little angry look, but then shook his head no." (Tr. 796-797). Detective Morrison testified at trial, it is not unusual for people to take a bullet and not identify the shooter. (Tr. 1751).

The detective thought something seemed strange and asked the nurse whether Mr. Griffin had been advised that two of his friends had been killed and the nurse advised him that he had not been notified. (Tr. 797). With the consent of medical personnel, Detective Morrison advised Mr. Griffin that Ernest Thomas and Erica Singleton had been murdered. (Tr. 798). The detective never suggested that Spaulding was the shooter nor did he mention Spaulding's name.

(Tr. 798). Mr. Griffin was again shown the photo array and, when he viewed Spaulding's photo "tears started rolling down his eyes and he just—it was almost kind of a shake, and he shook his head yes. He gave the affirmative that that was him." (Tr. 798). Mr. Griffin indicated that he was one hundred percent sure that Spaulding was the shooter. (Tr. 798). Detective Morrison noted that officers later made a video recording of Mr. Griffin identifying Spaulding, for the purpose of providing it to the defense in light of the possibility that Mr. Griffin, who had already flat-lined once, could die before trial. (Tr. 801).

During his video deposition Mr. Griffin averred that he was honest when he identified Spaulding during the photo array in December and again in May. (State's Exhibit 181, Page 14-15). As such, a motion to suppress would not have been successful.

Furthermore, there is not a reasonable probability that without those statements, the jury would have acquitted him since, during his recorded deposition, Patrick Griffin testified that he was honest when he identified Spaulding as the shooter during the photo array and Mr. Griffin positively identified Spaulding as the person who shot him. (State's Exhibit 181, Page 14-19).

In light of the foregoing, Spaulding's second proposition of law should be overruled.

PROPOSITION OF LAW III

A DEFENDANT IS DENIED THE RIGHT TO DUE PROCESS AND SUFFERS FROM INEFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF OHIO WHEN A DEFENDANT FACES A PENALTY OF DEATH AND HIS ATTORNEYS WAIVE THE RIGHT TO PLACE A JURY VIEW ON THE RECORD AND WAIVE THE DEFENDANT'S RIGHT TO BE PRESENT AND FAIL TO OBJECT TO THE PARTICIPATION OF THE TRIAL JUDGE.

LAW AND ARGUMENT

In his third proposition of law, Spaulding argues that he was denied the right to due process and the right to effective assistance of counsel because his trial lawyers waived the presence of a court reporter, waived his right to be present, and failed to object to the judge not accompanying the jury during the jury view.

The record reflects that the defense waived the presence of a court reporter. (Tr. 963-964). The record does not reflect that counsel waived Spaulding's presence at the jury view, nor does the record reflect that Spaulding was not present at the jury view. (Tr. 961-964).

The State respectfully submits that Spaulding's argument that he was denied due process and received ineffective assistance of counsel because counsel waived his right to be present at the jury view is based on the faulty premise that Spaulding was not present at the jury view and therefore lacks merit. Furthermore, to the extent that Spaulding did raise the issue of whether the court violated his due-process rights by allegedly not allowing him to be present at the jury view of the crime scene, he has therefore waived all but plain error. *State v. Were*, 118 Ohio St.3d 448, 890 N.E.2d 263, at ¶187, Crim.R. 52(B).

A review of the transcript shows that, after a jury was selected, the judge advised the jury they would be taken to the location where the crimes took place "to help you understand the evidence as it is presented to you." (Tr. 962). The Court advised the jury that, while the lawyers

and parties may accompany the jury on the jury view, they must not discuss the case or demonstrate anything related to the case. (Tr. 961). The Court advised the jurors that, during the jury view, they will “only be talking with the bailiff” and are to have “no contact with the lawyers or the parties.” (Tr. 962). Outside the presence of the jury, an assistance prosecutor noted that the defense waived a court reporter’s presence during the jury view but agreed to have the bailiff read a copy of instructions to the jury, which was marked as Court’s Exhibit 3 for purposes of identification. (Tr. 963-964). After the jury view, the Court asked Attorney Walker whether there were any problems during the jury view and defense counsel replied, “No, there wasn’t any problems, Your Honor.” (Tr. 968). Thus, there is simply nothing in the record to support Spaulding’s assertion that his presence was waived at the jury view.

Moreover, a view of a crime scene is not considered evidence, nor is it a crucial step in the criminal proceedings. *State v. Richey*, 64 Ohio St.3d 353, 367, 595 N.E.2d 915, 927(1992), overruled on other grounds; *State v. McGuire*, 80 Ohio St.3d 390, 1997-Ohio-335, 686 N.E.2d 1112; Accord *State v. Smith*, 90 Ohio App.3d 177, 180, 628 N.E.2d 120, 121(12th Dist.1993); *State v. Hopner*, 112 Ohio App.3d 521, 542, 679 N.E.2d 321(2nd Dist.1996).

R.C. 2945.16, which pertains to a jury view reads as follows, “When it is proper for the jurors to have a view of the place at which a material fact occurred, the trial court may order them to be conducted in a body * * * to such place, which shall be shown to them by a person designated by the court. * * * The accused has the right to attend such view by the jury, but may waive such right.” While a defendant has a statutory right to be present at the jury view, he does not have a constitutional right to be there. *State v. Were*, 118 Ohio St.3d 448 at ¶96; citing *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S.Ct. 330, 78 L.Ed. 674 (1934), wherein the

Supreme Court of the United States held that denial of a defendant's presence at a jury view did not violate due process.

Spaulding has not demonstrated plain error. He has not even cited to specific reference in the record to demonstrate that his trial counsel waived his presence at the jury view or that he himself was not present at the jury view. Since Spaulding did not waive his presence and counsel indicated that there were no problems on the jury view, it appears likely that the defendant was transported to the jury view in the Summit County Sheriff's van.

Furthermore, since the statute permits a defendant to waive his presence at a jury view, even assuming *arguendo* that Spaulding had not been present at the jury view, he could not demonstrate error. Moreover, Spaulding could not show that he was materially prejudiced by his alleged absence at the jury view, since counsel was at the jury view and advised the court that there were no problems at the jury view. (Tr. 968). See, e.g. *State v. Were, supra*, at ¶98.

Spaulding further argues that he was denied a fair trial because the trial judge did not go on the bus with the jury when they visited the crime scene. Spaulding did not object at trial to the judge's decision not to ride on the bus and thereby has waived all but plain error. See, *State v. Williams*, 9th Dist. No. 19994, at *2, unreported (Feb. 7, 2001). Neither the statute nor due process requires that a judge be present at jury view.

The Ohio Supreme Court examined a case where the defendant argue that it was error to allow the judge to attend the jury view and the Court held that plain error did not occur when the judge accompanied the jury on the jury view. *Were, supra*, at ¶99. In conducting its plain error analysis, the Court did not find that a defendant had a right to have a judge present, instead it concluded that plain error had not occurred by the judge's presence. There is no support for Spaulding's contention that he has a right to have the judge on the jury view.

In this case, Spaulding was not denied effective assistance of counsel nor did plain error occur in this case. Spaulding argues that he was denied a fair trial because of the possibility of unauthorized communication during the jury view; however, there is no evidence of any improper communications. It is well-settled that, for an appellant to secure reversal of a judgment against him, he must not only show some error, but must also show that that the error was prejudicial to him. See *Smith v. Flesher*, 12 Ohio St.2d 107, 233 N.E.2d 137(1967); *State v. Stanton*, 15 Ohio St.2d 215, 217, 239 N.E.2d 92, 94(1968); *Wachovia Mtg. Corp. v. Aleshire*, 5th Dist. App. No. 09 CA 4, 2009-Ohio-5097, ¶ 16. See, also, App.R. 12(D). Spaulding fails to articulate any prejudice he claims that resulted from the jury view. Accordingly, Spaulding's third proposition of law must be rejected.

PROPOSITION OF LAW IV

A DEFENDANT IS DENIED THE RIGHT TO EFFECTIVE COUNSEL WHEN DEFENSE COUNSEL FAILS TO FILE A MOTION TO SUPPRESS A TRANSCRIBED INTERROGATION OF A DEFENDANT WHERE DEFENDANT COMPLAINS THAT HE WANTED AN ATTORNEY PRESENT FOR THE INTERROGATION.

LAW AND ARGUMENT

In his fourth proposition of law, Spaulding argues that his trial counsel was ineffective for failing to file a motion to suppress the statements he made to detectives on December 19, 2011, a transcript of which was marked as State's Exhibit 230. Spaulding contends that, if filed, the motion would have been granted because he asked for an attorney, was not permitted to use the bathroom and was cold and hungry. The State disagrees.

To establish ineffective assistance of counsel for failure to file a motion to suppress, Spaulding must prove that there was a basis to suppress the evidence in question. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, at ¶ 65. If there is a reasonable probability that the motion would have been granted, the failure to pursue it nonetheless cannot be prejudicial unless there is also a reasonable probability that, without the excluded evidence, Spaulding would have been acquitted. *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 695 (1984). In this case, Spaulding has not demonstrated a reasonable probability that the motion would have been granted.

At the beginning of the recorded conversation on December 19, 2011, Spaulding asked to use the restroom and indicated he had been waiting for hours; however, he acknowledged that he did not knock on the door to request to use the restroom and instead was "just waiting it out." (Exhibit 230, page 1). Spaulding indicated that he was cold and hungry; however, he also acknowledged that he had been given a bag of chips and a water. (Exhibit 230, page 2). Additionally, Detective Bell later brought Spaulding pop and crackers. (Exhibit 230, page 178).

As such, Spaulding's assertion that he was interrogated without access to the bathroom and limited food is without merit.

With regard to the issue of whether Spaulding asserted his right to having counsel present during questioning, the transcript shows that, at the beginning of the conversation, Spaulding asked the detectives where his lawyer is, but he did not ask for his lawyer to be present before he answered questions. (Exhibit 230, page 1). Spaulding acknowledged that he had previously been read his Miranda rights and then was read his Miranda rights again. (Exhibit 230, page 1; 3).

When the detectives begin to question Spaulding, he stated: "So you still going to question me without a lawyer present, right? I'm tired of wasting my breath. I'm telling you all the same thing I been telling you, okay? (Exhibit 230, page 4). However, Spaulding did not ask for his lawyer to be present. Near the end of the conversation, Spaulding expressed his anger at having been repeatedly asked where he was on Wednesday night despite his repeated assertion that he was high at the time and did not know where he was that night. (Exhibit 230, page 177-181). Spaulding then said, "Do some homework. 'Cause I ain't going to tell you nothing else. Nothing. (Inaudible) mother fucking question, see what I say, fuck you. I'll get my lawyer. (Inaudible.)" (Exhibit 230, page 182).

If a suspect in a criminal investigation invokes his right to counsel at any time during a custodial interrogation, the police must cease all questioning until a lawyer has been made available or until the suspect reinitiates the conversation. *Edwards v. Arizona*, 451 U.S. 477, 484-485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). However, the suspect's request for an attorney must be clear and unambiguous. "[If] a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have

understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. * * * Rather, the suspect must unambiguously request counsel. * * * Although a suspect need not ‘speak with the discrimination of an Oxford don,’ * * * he must articulate his desire to have counsel present sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officer stop questioning the suspect.” *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362, (1994), (emphasis sic); *State v. Jackson*, 107 Ohio St.3d 300, 839 N.E.2d 362, 2006-Ohio-1. In this case, Spaulding was properly advised of his Miranda rights before being questioned by the police, he waived his Miranda rights and spoke to the police without ever unequivocally or unambiguously requesting an attorney. As such, a motion to suppress would not have been successful.

Furthermore, there is not a reasonable probability that without those statements, the jury would have acquitted him. Spaulding did not make any statements that were inculpatory. Instead, Spaulding told the detectives that: Erica was going to drop the pending charges against him; he had no involvement in her death; and, he “lost [his] mind” when he learned that Erica had been killed. (Exhibit 230, page57-58; 63; 77-78; 118; 134; 135; 154; 171). One cannot conclude that without the transcript of this recorded conversation, Spaulding would have been acquitted.

In light of the foregoing, Spaulding’s fourth proposition of law should therefore be overruled.

PROPOSITION OF LAW V

A DEFENDANT IS DEPRIVED A FAIR TRIAL WHEN A TRIAL COURT OVERRULES A MOTION FOR RELIEF FROM PREJUDICIAL JOINDER, COMBINING TWO SEPARATE CRIMES WHICH OCCURRED OVER TWO WEEKS APART.

LAW AND ARGUMENT

In his fifth proposition of law, Spaulding argues that the court erred in denying his motion to sever the domestic violence and menacing by stalking charges from the aggravated murder and attempted murder charges. The State disagrees.

Pursuant to Crim.R. 8(A), two or more offenses may be charged together if the offenses “are of the same or similar character, * * * or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.” In fact, “[t]he law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged ‘are of the same or similar character.’” *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990). However, “[i]f it appears that a defendant * * * is prejudiced by a joinder of offenses,” a trial court shall grant severance or other relief. Crim.R. 14. The burden is upon the defendant, however, to prove prejudice and to prove that the trial court abused its discretion by denying a request for severance. *State v. Torres*, 66 Ohio St.2d 340, 20 O.O.3d 313, 421 N.E.2d 1288, (1981), syllabus.

When a defendant raises a claim of prejudicial joinder, the State may rebut the claim and refute the defendant’s claim of prejudice by showing that, in separate trials it could introduce evidence of the joined offenses as “other acts” under Evid.R. 404(B); or, showing that “evidence of each crime joined at trial is simple and direct.” *Lott*, 51 Ohio St.3d at 163, 555 N.E.2d 293.

In this case, the indictment contained a specification alleging that Spaulding purposely killed Erica Singleton in retaliation for her testimony in another case. In addition, the aggravated

murders and attempted murder could not be viewed in isolation without reference to the domestic-violence and menacing-by-stalking charges. The charges in the indictment stemmed from a two week period during which there were two shootings involving three victims. The homicides were part of a continuing course of conduct and therefore would be admissible in separate trials.

On November 28, 2011, Spaulding broke into the home of Erica Singleton, armed with a gun and a knife and threatened to rape and kill Erica, who then filed a complaint against him. Over the next several days, Spaulding demanded that Erica drop the charges. Spaulding killed Erica in retaliation for filing the complaint or to prevent her further testimony against him. Without evidence of the domestic-violence and menacing-by-stalking offenses, the State would have been unable to show what provoked Spaulding to kill her. In addition, the evidence of each crime was simple and direct.

In light of the foregoing, Spaulding has failed to show that the trial court abused its discretion in denying the motion to sever. Spaulding's Fifth proposition of law is without merit and must be overruled.

PROPOSITION OF LAW VI

A DEFENDANT SUFFERS DEPRIVATION OF EFFECTIVE COUNSEL AND PLAIN ERROR WHEN A TRIAL COURT ALLOWS TESTIMONY ABOUT PRIOR BAD ACTS IN VIOLATION OF THE RIGHT TO DUE PROCESS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF OHIO.

LAW AND ARGUMENT

In his sixth proposition of law, Spaulding argues that it was plain error and ineffective assistance of counsel for his attorneys to allow testimony about prior bad acts. The State disagrees.

The admissibility of relevant evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus, (1987). Absent an abuse of discretion, as well as a showing that the appellant suffered material prejudice, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence. *State v. Martin*, 19 Ohio St.3d 122, 129, 483 N.E.2d 1157, (1985).

Pursuant to Evid.R. 404(B), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that a person acted in conformity therewith on a particular occasion. However, "other acts evidence" may be admitted for other purposes including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evid.R. 404(B).

In prosecutions for menacing by stalking, the victim's belief that the defendant will cause physical harm is an element of the offense which is often intertwined with their past interactions and prior acts of violence are relevant and highly probative of establishing the victim's belief of impending physical harm. See *e.g.*, *State v. Kinsworthy*, 12th Dist. App. No.CA2013-06-053, 2014-Ohio-1584, ¶ 19. Furthermore, "[o]ther acts evidence can be particularly useful in prosecutions for menacing by stalking because it can assist the jury in understanding that a

defendant's otherwise innocent appearing acts, when put into the context of previous contacts he has had with the victim, may be knowing attempts to cause mental distress." *State v. Shaver*, Warren App. No. CA96-09-094, (July 28, 1997) at 8, quoting *State v. Tichon*, 102 Ohio App.3d 758, 768, 658 N.E.2d 16 (1995).

Here, the State sought to prove Spaulding committed felony menacing by stalking, which required the state show that Spaulding, by engaging in a pattern of conduct, knowingly caused Singleton to believe that he would cause her physical harm or cause her mental distress. See R.C. 2903.211(A)(1). In order to elevate the offense to a fourth-degree felony, the state was required to prove there was a "history of violent acts" against Singleton or any other person. See R.C. 2903.211(B)(2)(e).

Prior to trial, the State filed a motion and notice of intention to use other acts evidence pursuant to Evidence Rule 404(B) and R.C. 2945.59, on August 30, 2012. In its motion, the State specified prior acts, including multiple incidents of domestic violence and stalking against Erica Singleton, during which Spaulding made threats to kill Ms. Singleton. (Motion filed 8/30/12). The last of these incidents, occurred on November 29, 2011, when Spaulding entered Singleton's apartment, threatened to kill her and held her at knife/gun point. (Motion filed 8/30/12). These felony charges were pending when Ms. Singleton was murdered. (Motion filed 8/30/12).

The State asserted that the other acts were permissible to show Spaulding's state of mind, motive, knowledge, identity and absence of accident pursuant to Evid.R. 404(B). (Motion filed 8/30/12). The State argued Spaulding planned to intimidate and threaten Ms. Singleton so she would not seek police protection. (Motion filed 8/30/12). In addition, Spaulding previously had

a gun during a domestic violence case involving this victim. (Motion filed 8/30/12). The prior acts were relevant to the menacing by stalking charge.

In addition, the prior acts showed that Spaulding had a motive to kill Ms. Singleton. At the time of the murder, Spaulding was facing multiple felony charges in Criminal Case No. 2011-12-3498, as result of the aforementioned November 29, 2011 incident and was facing imposition of a suspended prison sentence in the case for which he was on probation.

The trial court did not abuse its discretion in allowing testimony about these prior acts as the testimony was relevant to prove the defendant's menacing by stalking charge.

PROPOSITION OF LAW VII

A DEFENDANT SUFFERS A DEPRIVATION OF COUNSEL AND ALSO INCURS PLAIN ERROR WHEN A TRIAL COURT ALLOWS MAGISTRATES TO TESTIFY AS A WITNESS CONCERNING A PREVIOUSLY-FILED CIVIL PROTECTION ORDER TO INFLUENCE A JURY ABOUT PRIOR BAD ACTS AND TO VOUCH FOR A VICTIM'S VERACITY.

LAW AND ARGUMENT

In his seventh proposition of law, Spaulding argues that it was plain error and ineffective assistance of counsel for his attorneys to allow two magistrates to testify about a civil protection order. The State disagrees.

Spaulding was charged with violating a protection order, therefore, the State needed to prove that there was a civil protection order in place at the time of the violation. Spaulding refused to stipulate to the existence of the civil protection order. The State proved the existence of the same through the testimony of Magistrate Collins who testified that he issued a civil protection order against Spaulding because Erica “gave some pretty compelling testimony as to the nature of the violence that she had experienced.” (Tr. 1376). It was during the magistrate’s testimony, that the defense stipulated to the civil protection order issued on December 1, 2011, which was marked as State’s Exhibit 178. (Tr. 1380-1382). Since Spaulding refused to stipulate to the existence of the civil protection order prior to that, the State presented the testimony of the issuing magistrate to demonstrate its existence.

Furthermore, because the State sought to prove Spaulding committed felony menacing by stalking, which required the state show that Spaulding, by engaging in a pattern of conduct, knowingly caused Singleton to believe that he would cause her physical harm or cause her mental distress, the testimony of the magistrate was relevant. In addition, the magistrate averred that Ms. Singleton did not appear in court for the final hearing on the civil protection order

because she had been murdered. (Tr. 1386). This testimony was relevant to prove Spaulding's motive in killing Erica.

Spaulding's contention that the magistrate's testimony that he issued the civil protection order was prejudicial because it vouched for the victim's credibility is without merit. Any time a magistrate issues a civil protection order, it is based on the evidence presented to the magistrate, which includes the testimony of a victim. As such the magistrate's testimony was not any more prejudicial than the civil protection order itself.

Moreover, Magistrate Stoner testified that Erica had sought a civil protection order in August 2010 and, although the magistrate found that there was sufficient evidence to issue an order, the civil protection order was dismissed since Erica failed to appear at the final hearing. (Tr. 1393). Spaulding cannot demonstrate that he was prejudiced by Magistrate Stoner's testimony as the magistrate testified that the civil protection order was dismissed before it was issued.

In light of the foregoing, Spaulding has not shown that the trial court abused its discretion in allowing the testimony of these magistrates. Spaulding's seventh proposition of law is without merit and must be overruled.

PROPOSITION OF LAW VIII

ALL WITNESSES MUST EITHER BY [sic] LAY WITNESSES OR EXPERT WITNESSES. OHIO LAW DOES NOT PERMIT A TRIAL COURT TO ALLOW A NON-QUALIFIED WITNESS TO GIVE A GENERAL, PSEUDO-EXPERT OPINION ABOUT SOCIAL DYNAMICS TO INFLUENCE A JURY. PERMITTING SUCH TESTIMONY CONSTITUTES A DENIAL OF THE CONSTITUTIONAL RIGHT TO COUNSEL AND TO A FAIR TRIAL.

LAW AND ARGUMENT

In his eighth proposition of law, Spaulding argues that trial counsel was ineffective for failing to object to the testimony of Dana Zedak. The State disagrees.

The State offered Ms. Zedak as an expert, when the State asked the court to qualify Ms. Zedak as expert, the judge replied, “Just ask your questions.” (Tr. 1323-1324). While a trial court typically determines, pursuant to Evid.R. 104(A), whether an individual qualifies as an expert, if there is no challenge to an expert’s qualifications, all but plain error is waived. * * *.” (Citation omitted.) *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 114. Here, Spaulding did not challenge Ms. Zedak’s qualifications at the trial court and does not challenge her qualifications on appeal. Instead, he contends that counsel was ineffective for allowing her testimony because the court did not explicitly qualify her as an expert.

In this case, the record shows that despite numerous incidents of domestic violence, the victim remained in contact with the defendant. (Tr. 1046-1057; 1075; 1077; 1234-1248; 1931-33; 1050-1062; 1278-1292; 1303-1307; 1376; 1399; 2114). The State may introduce testimony on the cycle of violence and battered-women’s syndrome, in its case-in-chief, provided that such testimony is relevant and helpful. *State v. Haines*, 112 Ohio St.2d 393, 2006-Ohio-6711, ¶ 44. In order to show that the testimony is relevant, the State must set forth the requisite evidentiary foundation showing that the witness is a battered woman. *Id.* at ¶ 46-47. The Supreme Court of Ohio rejected any “set of rigid foundational requirements,” but did impose two specific

limitations on the admission of cycle of violence and battered-women's syndrome testimony: first, the evidence must be rehabilitative in nature and second the couple must have "go[ne] through the battering cycle at least twice." *Id.* at ¶ 44-49, quoting *State v. Koss*, 49 Ohio St.3d 213, 216 (1990). The trial court did not err in admitting the expert testimony because the State met the foundational requirements set forth in *Haines*. (Tr. 1046-1057; 1075; 1077; 1234-1248; 1931-33; 1050-1062; 1278-1292; 1303-1307;1376; 1399; 2114).

Moreover, Spaulding has failed to demonstrate prejudice resulted from its admission. Spaulding's attorneys allowed the testimony of Ms. Zedak as a matter of trial strategy. Generally, decisions relating to whether to call a witness or to not call an expert witness are matters of trial strategy and do not constitute ineffective of counsel. Spaulding's attorneys argued that Ms. Singleton's behavior was counterintuitive to expected victim behavior. For example, the defense questioned why Ms. Singleton continued to text Spaulding if she was so afraid. This is the very point that Ms. Zedak addressed. "[T]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Haines* at ¶ 62, quoting *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 78. In this case, one can only conclude that there is not.

In light of the foregoing, Spaulding's eighth proposition of law lacks merit and must be overruled.

PROPOSITION OF LAW IX

IT IS PLAIN ERROR FOR A JURY TO RECEIVE JOURNAL ENTRIES OF PRIOR CRIMINAL CONVICTIONS TO PROVE FELONY CHARGES OF DOMESTIC VIOLENCE AND WEAPONS UNDER DISABILITY AND IT ALSO CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THERE IS NO POSSIBLE BENEFIT TO A DEFENDANT WHEN PRIOR JOURNAL ENTRIES OF CONVICTIONS IS PUBLISHED TO A JURY.

PROPOSITION OF LAW X

A DEFENDANT'S JURY TRIAL IS FUNDAMENTALLY UNFAIR AND A DEFENDANT IS DENIED THE RIGHT TO DUE PROCESS WHEN A TRIAL COURT DOES NOT AFFORD THE DEFENDANT AN OPPORTUNITY TO STIPULATE TO PRIOR CRIMINAL CONVICTION.

LAW AND ARGUMENT

In his ninth and tenth propositions of law, Spaulding argues that the trial court did not afford him the opportunity to stipulate to his prior convictions. Spaulding does not, however, point to any place in the record where trial counsel sought to stipulate to his prior convictions or where the court declined to afford Spaulding the opportunity to stipulate to his prior criminal conviction.

In this case Spaulding was charged with, among other things, menacing by stalking and domestic violence in violation of R.C. 2919.25(A). While a violation of 2919.25(A) is generally a first-degree misdemeanor, the charge is elevated to a third-degree felony if the defendant previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or other offenses listed in that section. R.C. 2919.25(D)(4). Since a prior conviction for domestic violence raises the degree of a subsequent charge of domestic violence, the prior conviction is an essential element of the subsequent charge, and therefore must be proven beyond a reasonable doubt. *State v. Goodman*, 9th Dist. No. 24430, 2009-Ohio-2225, at *6. In light of this, the Ninth District Court of Appeals has held that, since the prior conviction is an

essential element of the offenses the state is not required to accept a defendant's stipulation to a prior conviction. See, e.g., *State v. Williams*, 9th Dist. No. 19994, at *2, unreported (Feb. 7, 2001). In addition, in order to prove the felony menacing by stalking charge, the State was permitted to prove that Spaulding had a history of violence toward the victim or any other person or that the offender has been determined to represent a substantial risk of physical harm to others as evidenced by recent violent or homicidal behavior.

The State contends that, since Spaulding did not wish to stipulate to any of his prior convictions, Spaulding's argument that he was not afforded an opportunity to stipulate to the convictions must fail. Furthermore, Spaulding cites to nothing in the record to indicate that he ever asked the trial court to apply the holding of *Old Chief v. United States*, 519 U.S. 172 (1997) in the instant matter. As such, Spaulding cannot demonstrate that the trial committed error in failing to apply *Old Chief*.

Moreover, Spaulding cannot demonstrate that trial counsel was ineffective for declining to stipulate to his prior convictions. As noted *supra*, some of the prior convictions were elements of the offense of domestic violence and others were relevant to the menacing by stalking charge. The defendant had the right to require that the prosecutor prove each and every element of each offense beyond a reasonable doubt, rather than to eliminate the State's burden by stipulating to the prior convictions.

In *Old Chief*, the Supreme Court of the United States held that a trial court errs when it *refuses* to allow a defendant to stipulate to the existence of a prior conviction and instead admits the full record of conviction, "when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to

prove the element of prior conviction.” *Id.* at 174. The Court did not, however, hold that a defendant must stipulate to the existence of his prior record.

The Ninth District Court of Appeals has found *Old Chief* completely inapplicable to state prosecutions, concluding it is not binding precedent as it involved interpretation of a federal statute. See *State v. Kole*, 9th Dist. No. 98CA007116, at *4, (June 28, 2000), overruled on other grounds by *State v. Kole*, 92 Ohio St.3d 303, 750 N.E.2d 148, (2001). But see, *State v. Baker*, 9th Dist. No. 23713, 2009-Ohio-2340, at ¶ 23 (Belfance, J., concurring in judgment only). Even if *Old Chief* was to be determined to be controlling authority, it would not have obligated the trial court in this case to exclude evidence of Spaulding’s prior domestic violence convictions especially when Spaulding chose not to stipulate to the same.

This case is factually distinguishable from *Old Chief* wherein the majority found that evidence of the name and nature of the defendant’s prior felony conviction had minimal probative value, because under the federal statute with which the defendant had been charged, Congress listed a number of felony convictions that qualified as sufficient to bar the defendant from possessing a firearm, and therefore the name and nature of the qualifying felony conviction was not needed. *Id.* at 652, 655. Therefore, the defendant’s stipulation provided the trial court with an evidentiary alternative that “would, in fact, have been not merely relevant but seemingly conclusive evidence of the [prior felony conviction] element.” *Id.* at 653. In contrast, here, the evidence of Spaulding’s prior domestic violence convictions did have substantial probative value, because under R.C. 2919.25(D), the state was required to prove beyond a reasonable doubt that he had two prior convictions for domestic violence or one of the other specific crimes set forth therein. See, e.g., *State v. Jones*, 12 Dist. CA201105044, 2012-Ohio-1480, at ¶7.

Spaulding essentially argues that it was plain error and ineffective assistance of counsel for his trial counsels to decline to stipulate to Spaulding's priors and to instead require that the State prove every element of the criminal offenses charged in the indictment. This argument is illogical and must be overruled. A defendant has the right to require the State to prove each and every element of every offense beyond a reasonable doubt.

Spaulding further argues that the admission of evidence of his three prior domestic violence convictions created the potential risk for the jury to find him guilty of the charge of domestic violence in the underlying case on the basis of his past conviction for domestic violence; however, this potential risk of unfair prejudice arises from the wording of the statute itself. *Id.* Furthermore, the record contains sufficient evidence to support the jury's verdict.

In light of the foregoing, Spaulding's Ninth and Tenth Propositions of Law lack merit as Spaulding has demonstrated not that he ever sought to stipulate to his prior convictions or that the trial court denied him the opportunity to stipulate to those convictions. Furthermore, Spaulding did not raise an *Old Chief* argument below and, therefore, has not preserved this issue for appeal. Moreover, even if Spaulding had sought to stipulate to his prior convictions and was denied the opportunity to do so by the trial court, and if he had argued that that he should have been able to do so pursuant to *Old Chief*, his argument would still lack merit as *Old Chief* is inapplicable to state prosecutions because it involves interpretation of a federal statute and, even if *Old Chief* was controlling authority, it still would not have obligated the trial court in this case to exclude evidence of Spaulding's prior domestic violence convictions because they are elements of the offenses to which Spaulding was charged.

PROPOSITION OF LAW XI

A TRIAL COURT ERRS BY DENYING A CRIMINAL RULE 29 MOTION FOR A JUDGMENT OF ACQUITTAL WHEN THE ONLY WITNESS TO IDENTIFY A DEFENDANT AS THE GUILTY PARTY INITIALLY TELLS INVESTIGATORS THAT THE DEFENDANT WAS NOT THE PERSON RESPONSIBLE.

LAW AND ARGUMENT

In his eleventh proposition of law, Spaulding argues that the trial court erred in denying his motion for judgment of acquittal. The State disagrees.

The denial of a defendant's Crim.R. 29 motion for acquittal is reviewed by assessing the sufficiency of the State's evidence. *State v. Carson*, 9th Dist. Summit No. 26900, 2013-Ohio-5785, ¶ 23. "[S]ufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997), quoting Black's Law Dictionary 1433 (6th Ed.1990). When a reviewing court examines a conviction for sufficiency, the court must view the evidence in a light most favorable to the prosecution. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. Therefore, the reviewing Court does not evaluate credibility and makes all reasonable inferences in favor of the State. *State v. Brown*, 9th Dist. No. 26409, 2013-Ohio-2665, ¶ 5; citing *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991). The State's evidence is sufficient if it allows the trier of fact to reasonably conclude that the essential elements were proven beyond a reasonable doubt. *Id.*

Spaulding only challenges the sufficiency of the evidence that the State presented as to the identity of the shooter. The State will limit its response to the argument raised by the appellant and address the sufficiency of the evidence presented as to identification.

The State must prove the identity of a perpetrator beyond a reasonable doubt. *State v. Flynn*, 9th Dist. No. 06CA0096-M, 2007-Ohio-6210, ¶ 12. Identity may be proved by direct or

circumstantial evidence, which have equal probative value. *State v. Gibson*, 9th Dist. No. 23881, 2008-Ohio-410, ¶ 8. In this case, the State presented evidence that would permit a trier of fact to conclude beyond a reasonable doubt that Spaulding committed the crimes.

Spaulding contends that, because Mr. Griffin did not initially identify Spaulding in a photo array, but identified Spaulding in the array after law enforcement advised him of the death of two of his friends, the State failed to present sufficient evidence as to identity. Spaulding's argument goes to the credibility and the weight of the evidence, not its sufficiency.

The testimony of Mr. Griffin, viewed in a light most favorable to the prosecution, is sufficient evidence that Spaulding was the shooter. As discussed *infra*, Detective Morrison averred that, when Mr. Griffin looked at Spaulding's photo in the array he "had a little angry look, but then shook his head no," the detective thought something seemed strange and he learned that Mr. Griffin had not been advised that two of his friends had been killed. (Tr. 796-797). After advising Mr. Griffin of the same, Mr. Griffin identified Spaulding as the shooter with one hundred percent certainty. (Tr. 798). During his video deposition Mr. Griffin averred that, when he identified Spaulding during the photo array in December and again in May, he was being honest. (State's Exhibit 181, Page 14-19). In addition, Mr. Wilbur identified Spaulding as the man who walked up the walkway and approached Ernest Thomas and Erica Singleton as they exited 1104 Grant Street, on the morning of December 15, 2011, at approximately 8:00 a.m. (Tr. 1527-1528).

In light of the foregoing, the State presented sufficient evidence as to the identification of the shooter and Spaulding's eleventh proposition of law is therefore without merit and must be overruled.

PROPOSITION OF LAW XII

A DEFENDANT FACING A DEATH PENALTY SENTENCE IN A PENALTY-PHASE OF A TRIAL, SUFFERS A DENIAL OF DUE PROCESS AS PROTECTED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF OHIO WHEN TRIAL COUNSEL FAILS TO RETAIN A MITIGATION EXPERT, FAILS TO CALL A PSYCHOLOGIST TO THE WITNESS STAND WHO WAS PREPARED TO TESTIFY, AND FAILS TO SUBMIT A PSYCHOLOGIST REPORT WITH MITIGATING EVIDENCE TO THE JURY.

LAW AND ARGUMENT

In his twelfth proposition of law, Spaulding argues that trial counsels were ineffective because they failed to retain a mitigating expert, failed to call a psychologist to testify, and failed to submit a psychologist report containing mitigating evidence to the jury. The State disagrees.

At the outset, the State notes that the record, including Dr. Fabian's report, shows that Spaulding's attorneys retained Dr. Fabian and mitigation expert Attorney Moran. In September 2011, Spaulding moved the court to appoint Dr. John Fabian as the Mitigation Specialist and Susan Moran as the person to assist Dr. Fabian. (JE 9/11/12). In a journal entry dated September 13, 2012, the trial court approved Spaulding's "Motion to Appoint a Mitigation Specialist, namely: Dr. Fabian at an initial cost of \$6,500 and a social worker to assist Dr. Fabian at a cost of \$5,000." (Journal Entry 9/13/12). The trial court ordered that Dr. Fabian and Susan Moran were granted access to the jail to interview Spaulding. (Journal Entry 9/13/12). The trial court established a "deadline for the final report of the mitigation expert" of January 22, 2013. (Journal Entry 1/23/13). It is clear that the defense and the court considered Dr. Fabian to be the mitigation specialist who was assisted by Attorney Moran, who is a mitigation expert.

Moreover, a review of the mitigation transcript shows that Attorney Moran was in court and sat with defense counsel, as their mitigation expert during the mitigation phase. (Tr. 2463). Thus, Spaulding's argument that counsel failed to retain a mitigating expert is false. In addition,

the record shows that the defense also obtained the assistance of an investigator, Tom Fields. (Journal Entry 6/12/12 & 6/14/12).

In light of the foregoing, Spaulding's trial counsels did not render ineffective assistance of counsel in the manner in which they prepared mitigation evidence in the penalty phase of this case when they obtained an investigator, a forensic psychologist and neuropsychologist who prepared a report in mitigation, and an attorney who was a mitigation expert. In addition, Dr. Fabian and Attorney Moran interviewed the defendant and family members. (See, Dr. Fabian's report). The defense presented the testimony of family members in mitigation. (Tr. 2509-2669).

The State respectfully submits that Spaulding has not demonstrated that his trial counsels were ineffective for deciding not to call Dr. Fabian as a mitigation witness or to submit his report to the jury. "The defense decision to call or not call a mitigation witness is a matter of trial strategy. * * * Likewise, the scope of questioning is generally a matter left to the discretion of defense counsel. Debatable trial tactics generally do not constitute ineffective assistance of counsel." *State v. Maxwell*, 2014-Ohio-1019, quoting *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 116.

While it is unclear why trial counsel did not call Dr. Fabian as a witness or submit his report to the jury, trial counsels could have legitimately decided not to call Dr. Fabian as a witness in order to avoid discrepancies between the report and what the family members testified to during mitigation as well as to avoid any conflicts between his report and any inconsistencies between the report and Spaulding's discipline history in the jail. Spaulding's disciplinary report was stipulated to and made part of the record. (Tr. 2675-2677; 2680; 2683). Deputy Black testified about Spaulding's write ups at the jail. (Tr. 2689-2700). Prior to resting, the defense moved to submit Dr. Fabian's report, under seal rather than to have it go to the jury. (Tr. 2672).

The presentation of mitigating evidence is a matter of trial strategy. *State v. Keith*, 79 Ohio St.3d 514, 530, 684 N.E.2d 47 (1997). The decision not to call Dr. Fabian as a witness did not result from a lack of investigation. Since Spaulding's lawyers knew what the expert would testify to at mitigation, counsels' decision not to call him as a witness during the penalty phase is "‘virtually unchallengeable.’" *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 158, quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

"Attorneys are not expected to present every potential mitigation theory, regardless of their relative strengths." *Fears v. Bagley*, 462 Fed.Appx. 565, 576 (6th Cir.2012). Thus, trial counsels were not duty-bound to present Dr. Fabian's testimony.

The defense chose to present the testimony of family members in mitigation. (Tr. 2509-2669). Attorney Walker then urged the court to spare his client's life because, he was affected in a negative way by his father death, his mother's alcoholism, and, the fact that he was around "a lot of lifers." (Tr. 2708-2711). Attorney Walker further asked the jury to spare Spaulding's life and give Spaulding's children an opportunity to have a relationship with him, if they choose. (Tr. 2716).

Based on the foregoing, Spaulding's trial counsels were not ineffective in their preparation and presentation of mitigation evidence in the penalty phase of this case. As such, Spaulding's twelfth proposition of law is without merit and must be overruled.

PROPOSITION OF LAW XIII

A DEATH SENTENCE LACKS PROPORTIONALITY WHEN A TRIAL COURT FAILS TO REVIEW ALL OTHER DEATH PENALTY SPECIFICATION INDICTMENTS THROUGHOUT THE STATE OF OHIO PRIOR TO IMPOSING THE SENTENCE OF DEATH AND THEREFORE VIOLATES THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION TEN OF THE CONSTITUTION OF THE STATE OF OHIO.

LAW AND ARGUMENT

In his thirteenth proposition of law, Spaulding argues that the death sentence lacked proportionality because, in conducting its proportionality review, the trial court was required to evaluate the death sentence for proportionality to other heinous crimes pursuant to R.C. 2929.05(A). The State disagrees.

R.C. 2929.05 pertains to the procedures in an appeal of sentence of death. Pursuant to R.C. 2929.05(A), “[w] henever sentence of death is imposed * * * the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case.” The statute requires that, on appeal, the court shall: review the judgment in the case and the sentence of death imposed by the court; review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate by considering whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. R.C. 2929.05(A).

Since R.C. 2929.05(A) pertains to appellate procedures in a capital case, Spaulding’s assertion that the trial court erred in complying with the same lacks merit. Spaulding’s thirteenth proposition of law, therefore, should be overruled.

PROPOSITION OF LAW XIV

CUMULATIVE ERRORS MAY RESULT IN THE DENIAL OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF OHIO AND MAY REQUIRE A REVIEWING COURT TO ORDER A NEW TRIAL.

LAW AND ARGUMENT

In his fourteenth proposition of law, Spaulding argues that the cumulative effect of trial counsel's errors violated his due process rights. The State disagrees.

Cumulative error exists only if errors during trial actually "deprive[d] a defendant of the constitutional right to a fair trial." *State v. DeMarco*, 31 Ohio St.3d 191 (1987), paragraph two of the syllabus. "[T]here can be no such thing as an error-free, perfect trial, and * * * the Constitution does not guarantee such a trial." *State v. Hill*, 75 Ohio St.3d 195, 212 (1996), quoting *U.S. v. Hasting*, 461 U.S. 499, 508-09 (1983).

Spaulding argues that, if this Court concludes that the defense counsel erred as he has argued in his propositions of law above, and this Court were to conclude such errors were not prejudicial, then the cumulative error doctrine applies. However, Spaulding acknowledges that this Court has held that "[s]uch errors cannot become prejudicial by sheer weight of numbers." *State v. Ketterer*, 111 Ohio St.3d 70, ¶177, 855 N.E.2d. 48, quoting *State v. Hill*, 75 Ohio St.3d 195, 212, 661 N.E.2d 1068 (1996).

The State incorporates by reference the arguments asserted *infra* and respectfully submits that Spaulding received a fair trial and a fair sentencing determination and no errors occurred that prejudiced his substantial rights. Therefore, Spaulding's fourteenth proposition of law is without merit and must be overruled.

CONCLUSION

Pursuant to the argument offered, the State respectfully contends that the judgment of the Ninth District Court of Appeals should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by regular U.S. Mail to Attorney Donald Hicks, 159 South Main Street, Suite 423, Akron, Ohio 44308 and to Attorney Donald Gallick, The Law Office of Donald Gallick LLC, 190 North Union Street #102, Akron, Ohio 44304, on the 4th day of June, 2014.



HEAVEN DIMARTINO
Assistant Prosecuting Attorney

APPENDIX

OHIO RULES OF APPELLATE PROCEDURE

RULE 12. Determination and Judgment on Appeal

(A) Determination.

(1) On an undismissed appeal from a trial court, a court of appeals shall do all of the following:

- (a) Review and affirm, modify, or reverse the judgment or final order appealed;
- (b) Determine the appeal on its merits on the assignments of error set forth in the briefs under App. R. 16, the record on appeal under App. R. 9, and, unless waived, the oral argument under App. R. 21;
- (c) Unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision.

(2) The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App. R. 16(A).

(B) Judgment as a matter of law. When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief and that the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly. When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.

(C) Judgment in civil action or proceeding when sole prejudicial error found is that judgment of trial court is against the manifest weight of the evidence. In any civil action or proceeding which was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and do not find any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and do not find that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings; provided further that a judgment shall be reversed only once on the manifest weight of the evidence.

(D) All other cases. In all other cases where the court of appeals finds error prejudicial to the appellant, the judgment or final order of the trial court shall be reversed and the cause shall be remanded to the trial court for further proceedings.

[Effective: July 1, 1971; amended effective July 1, 1973; July 1, 1992.]

OHIO RULES OF CRIMINAL PROCEDURE

RULE 8. Joinder of Offenses and Defendants

(A) Joinder of offenses. Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

(B) Joinder of defendants. Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

[Effective: July 1, 1973.]

OHIO RULES OF CRIMINAL PROCEDURE

RULE 14. Relief From Prejudicial Joinder

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown.

[Effective: July 1, 1973; amended effective July 1, 2011.]

OHIO RULES OF EVIDENCE

RULE 104. Preliminary Questions

(A) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(B) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(C) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall also be conducted out of the hearing of the jury when the interests of justice require.

(D) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(E) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

[Effective: July 1, 1980; amended effectively July 1, 2007.]

OHIO REVISED CODE

2903.211 Menacing by stalking.

(A)

(1) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.

(2) No person, through the use of any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, or computer system, shall post a message with purpose to urge or incite another to commit a violation of division (A)(1) of this section.

(3) No person, with a sexual motivation, shall violate division (A)(1) or (2) of this section.

(B) Whoever violates this section is guilty of menacing by stalking.

(1) Except as otherwise provided in divisions (B)(2) and (3) of this section, menacing by stalking is a misdemeanor of the first degree.

(2) Menacing by stalking is a felony of the fourth degree if any of the following applies:

(a) The offender previously has been convicted of or pleaded guilty to a violation of this section or a violation of section 2911.211 of the Revised Code.

(b) In committing the offense under division (A)(1), (2), or (3) of this section, the offender made a threat of physical harm to or against the victim, or as a result of an offense committed under division (A)(2) or (3) of this section, a third person induced by the offender's posted message made a threat of physical harm to or against the victim.

(c) In committing the offense under division (A)(1), (2), or (3) of this section, the offender trespassed on the land or premises where the victim lives, is employed, or attends school, or as a result of an offense committed under division (A)(2) or (3) of this section, a third person induced by the offender's posted message trespassed on the land or premises where the victim lives, is employed, or attends school.

(d) The victim of the offense is a minor.

(e) The offender has a history of violence toward the victim or any other person or a history of other violent acts toward the victim or any other person.

(f) While committing the offense under division (A)(1) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(1) of this section, the offender had a deadly weapon on or about the offender's person or under the offender's control.

Division (B)(2)(f) of this section does not apply in determining the penalty for a violation of division (A)(2) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(2) of this section.

(g) At the time of the commission of the offense, the offender was the subject of a protection order issued under section 2903.213 or 2903.214 of the Revised Code, regardless of whether the person to be protected under the order is the victim of the offense or another person.

(h) In committing the offense under division (A)(1), (2), or (3) of this section, the offender caused serious physical harm to the premises at which the victim resides, to the real property on which that premises is located, or to any personal property located on that premises, or, as a result of an offense committed under division (A)(2) of this section or an offense committed under division (A)(3) of this section based on a violation of division (A)(2) of this section, a third person induced by the offender's posted message caused serious physical harm to that premises, that real property, or any personal property on that premises.

(i) Prior to committing the offense, the offender had been determined to represent a substantial risk of physical harm to others as manifested by evidence of then-recent homicidal or other violent behavior, evidence of then-recent threats that placed another in reasonable fear of violent behavior and serious physical harm, or other evidence of then-present dangerousness.

(3) If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, menacing by stalking is either a felony of the fifth degree or, if the offender previously has been convicted of or pleaded guilty to an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

(C) Section 2919.271 of the Revised Code applies in relation to a defendant charged with a violation of this section.

(D) As used in this section:

(1) "Pattern of conduct" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents. Actions or incidents that prevent, obstruct, or delay the performance by a public official, firefighter, rescuer, emergency medical services person, or emergency facility person of any authorized act within the public official's, firefighter's, rescuer's, emergency medical services person's, or emergency facility person's official capacity, or the posting of messages or receipt of information or data through the use of an electronic method of remotely transferring information, including, but not limited to, a computer, computer network, computer program, computer system, or telecommunications device, may constitute a "pattern of conduct."

(2) "Mental distress" means any of the following:

(a) Any mental illness or condition that involves some temporary substantial incapacity;

(b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

(3) "Emergency medical services person" is the singular of "emergency medical services personnel" as defined in section 2133.21 of the Revised Code.

(4) "Emergency facility person" is the singular of "emergency facility personnel" as defined in section 2909.04 of the Revised Code.

(5) "Public official" has the same meaning as in section 2921.01 of the Revised Code.

(6) "Computer," "computer network," "computer program," "computer system," and "telecommunications device" have the same meanings as in section 2913.01 of the Revised Code.

(7) "Post a message" means transferring, sending, posting, publishing, disseminating, or otherwise communicating, or attempting to transfer, send, post, publish, disseminate, or otherwise communicate, any message or information, whether truthful or untruthful, about an individual, and whether done under one's own name, under the name of another, or while impersonating another.

(8) "Third person" means, in relation to conduct as described in division (A)(2) of this section, an individual who is neither the offender nor the victim of the conduct.

(9) "Sexual motivation" has the same meaning as in section 2971.01 of the Revised Code.

(E) The state does not need to prove in a prosecution under this section that a person requested or received psychiatric treatment, psychological treatment, or other mental health services in order to show that the person was caused mental distress as described in division (D)(2)(b) of this section.

(F)

(1) This section does not apply to a person solely because the person provided access or connection to or from an electronic method of remotely transferring information not under that person's control, including having provided capabilities that are incidental to providing access or connection to or from the electronic method of remotely transferring the information, and that do not include the creation of the content of the material that is the subject of the access or connection. In addition, any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control shall not be liable for

any action voluntarily taken in good faith to block the receipt or transmission through its service of any information that it believes is, or will be sent, in violation of this section.

(2) Division (F)(1) of this section does not create an affirmative duty for any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control to block the receipt or transmission through its service of any information that it believes is, or will be sent, in violation of this section except as otherwise provided by law.

(3) Division (F)(1) of this section does not apply to a person who conspires with a person actively involved in the creation or knowing distribution of material in violation of this section or who knowingly advertises the availability of material of that nature.

Effective Date: 08-29-2003; 2007 SB10 01-01-2008

OHIO REVISED CODE

2919.25 Domestic violence.

(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

(B) No person shall recklessly cause serious physical harm to a family or household member.

(C) No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member.

(D)

(1) Whoever violates this section is guilty of domestic violence, and the court shall sentence the offender as provided in divisions (D)(2) to (6) of this section.

(2) Except as otherwise provided in divisions (D)(3) to (5) of this section, a violation of division (C) of this section is a misdemeanor of the fourth degree, and a violation of division (A) or (B) of this section is a misdemeanor of the first degree.

(3) Except as otherwise provided in division (D)(4) of this section, if the offender previously has pleaded guilty to or been convicted of domestic violence, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially similar to domestic violence, a violation of section 2903.14 , 2909.06 , 2909.07 , 2911.12 , 2911.211 , or 2919.22 of the Revised Code if the victim of the violation was a family or household member at the time of the violation, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially similar to any of those sections if the victim of the violation was a family or household member at the time of the commission of the violation, or any offense of violence if the victim of the offense was a family or household member at the time of the commission of the offense, a violation of division (A) or (B) of this section is a felony of the fourth degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the second degree.

(4) If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or two or more violations or offenses of the type described in division (D)(3) of this section involving a person who was a family or household member at the time of the violations or offenses, a violation of division (A) or (B) of this section is a felony of the third degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the first degree.

(5) Except as otherwise provided in division (D)(3) or (4) of this section, if the offender knew that the victim of the violation was pregnant at the time of the violation, a violation of division (A) or (B) of this section is a felony of the fifth degree, and the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the third degree.

(6) If division (D)(3), (4), or (5) of this section requires the court that sentences an offender for a violation of division (A) or (B) of this section to impose a mandatory prison term on the offender pursuant to this division, the court shall impose the mandatory prison term as follows:

(a) If the violation of division (A) or (B) of this section is a felony of the fourth or fifth degree, except as otherwise provided in division (D)(6)(b) or (c) of this section, the court shall impose a mandatory prison term on the offender of at least six months.

(b) If the violation of division (A) or (B) of this section is a felony of the fifth degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, the court shall impose a mandatory prison term on the offender of twelve months.

(c) If the violation of division (A) or (B) of this section is a felony of the fourth degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, the court shall impose a mandatory prison term on the offender of at least twelve months.

(d) If the violation of division (A) or (B) of this section is a felony of the third degree, except as otherwise provided in division (D)(6)(e) of this section and notwithstanding the range of prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of six months or one of the prison terms prescribed in section 2929.14 of the Revised Code for felonies of the third degree.

(e) If the violation of division (A) or (B) of this section is a felony of the third degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, notwithstanding the range of prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of one year or one of the prison terms prescribed in section 2929.14 of the Revised Code for felonies of the third degree.

(E) Notwithstanding any provision of law to the contrary, no court or unit of state or local government shall charge any fee, cost, deposit, or money in connection with the filing of charges against a person alleging that the person violated this section or a municipal ordinance substantially similar to this section or in connection with the prosecution of any charges so filed.

(F) As used in this section and sections 2919.251 and 2919.26 of the Revised Code:

(1) "Family or household member" means any of the following:

(a) Any of the following who is residing or has resided with the offender:

(i) A spouse, a person living as a spouse, or a former spouse of the offender;

(ii) A parent, a foster parent, or a child of the offender, or another person related by consanguinity or affinity to the offender;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.

(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.

(2) "Person living as a spouse" means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.

(3) "Pregnant woman's unborn" has the same meaning as "such other person's unborn," as set forth in section 2903.09 of the Revised Code, as it relates to the pregnant woman. Division (C) of that section applies regarding the use of the term in this section, except that the second and third sentences of division (C)(1) of that section shall be construed for purposes of this section as if they included a reference to this section in the listing of Revised Code sections they contain.

(4) "Termination of the pregnant woman's pregnancy" has the same meaning as "unlawful termination of another's pregnancy," as set forth in section 2903.09 of the Revised Code, as it relates to the pregnant woman. Division (C) of that section applies regarding the use of the term in this section, except that the second and third sentences of division (C)(1) of that section shall be construed for purposes of this section as if they included a reference to this section in the listing of Revised Code sections they contain.

Amended by 128th General Assembly File No.50, SB 58, §1, eff. 9/17/2010.

Amended by 128th General Assembly File No.21, HB 10, §1, eff. 6/17/2010.

Effective Date: 11-09-2003; 2008 HB280 04-07-2009

OHIO REVISED CODE

2945.16 View of the premises - expenses of view.

When it is proper for the jurors to have a view of the place at which a material fact occurred, the trial court may order them to be conducted in a body, under the charge of the sheriff or other officer, to such place, which shall be shown to them by a person designated by the court. While the jurors are absent on such view no person other than such officer and such person so appointed, shall speak to them on any subject connected with the trial. The accused has the right to attend such view by the jury, but may waive this right.

The expense of such view as approved by the court shall be taxed as other costs in the case.

Effective Date: 09-11-1961

OHIO REVISED CODE

2945.59 Proof of defendant's motive.

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

Effective Date: 10-01-1953