

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF FACTS.....	1
ARGUMENT.....	5
 <u>Proposition of Law No. I:</u>	
The trial court abused its discretion and the prosecuting attorney wrongly and improperly advised the State's own key witness that he had no right to invoke his privilege under the Fifth Amendment to the United States Constitution, to not testify, regarding his expressed under oath statement that "I do have a right from self-incrimination under the Fifth Amendment and I do have a right to refuse to testify," with the trial court effectually and repeatedly denying same, and otherwise advising the witness of contempt of court, thereby resulting in reversible error.	5
 <u>Proposition of Law No. II:</u>	
Defendant-appellant was denied a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution, by the trial court's repeated pattern of demonstrating that it had prejudicially presumed the defendant-appellant's guilt throughout the course of the trial, thereby resulting in reversible error.	7
 <u>Proposition of Law No. III:</u>	
The trial court reversibly erred by allowing the State's key witness to read his written statement to the police, over defense objection, into evidence at trial, thereby denying the defendant-appellant's fundamental right to confront witnesses under the Sixth and Fourteenth Amendments to the Constitution of the United States, as the State's key witness had already invoked his Fifth Amendment privilege and had testified that he didn't remember what had happened, and therefore couldn't be cross-examined or otherwise confronted about his written statement.	11
CONCLUSION.....	13
PROOF OF SERVICE.....	14

TABLE OF CONTENTS (Con't)

APPENDIX

Appx. Page

Notice of Appeal to the
Supreme Court of Ohio
(May 8, 2014).....A-1

Entry of the Supreme Court of Ohio:
the Court accepts the appeal (September 3, 2014).....A-3

Judgment Entry of the Appeals Court of Ohio
Third Appellate District, Seneca County
State of Ohio v. Jeffery C. Arnold, Case No. 13-13-27
(March 24, 2014).....A-4

Opinion of the Appeals Court of Ohio
Third Appellate District, Seneca County
State of Ohio v. Jeffery C. Arnold, Case No. 13-13-27
(March 24, 2014).....A-5

Judgment Entry of Adjudication and Sentencing
Fostoria Municipal Court
State of Ohio v. Jeffery C. Arnold, Case No. 13-CRB-116
(June 18, 2013).....A-35

CONSTITUTIONAL PROVISIONS AND STATUTES:

United States Constitution,
Amendment V.....A-37

United States Constitution,
Amendment VI.....A-37

United States Constitution,
Amendment XIV.....A-38

Ohio Revised Code:
Domestic Violence, §2919.25 (A).....A-39

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>On Page (s)</u>
<u>Crawford v. Washington</u> (2004), 541 U.S. 36, 124 S.Ct. 1354.....	11
<u>Ohio v. Reiner</u> (2001), 532 U.S. 17.....	6
<u>State v. Beebe</u> (2007), 172 Ohio App. 3d 512, 2007-Ohio-3746.....	6
<u>State v. Goff</u> (2005), 2005-Ohio-339.....	11
<u>State v. Martin</u> (1983), 20 Ohio App. 3d 172, 485 N.E. 2d 717.....	9
<u>State v. Thompkins</u> (1997), 78 Ohio St. 3d 380, 678 N.E. 2d 541.....	9
 <u>CONSTITUTIONAL PROVISIONS:</u>	
United States Constitution: Fifth Amendment.....	2, 3, 5, 6, 9, 11, 13
United States Constitution: Sixth Amendment.....	7, 11, 12
United States Constitution: Fourteenth Amendment.....	11, 12
 <u>STATUTE:</u>	
Domestic Violence, first degree misdemeanor: Ohio Revised Code §2919.25(A).....	1

STATEMENT OF FACTS

On March 25, 2013, officers of the Fostoria Police Department were dispatched to the Arnold family residence, located at 483 Monroe Street, Fostoria, Ohio, on a neighbor's report of hearing a disturbance at the residence.

After several minutes of trying to make contact with the family members inside of the residence, the police observed the garage door opening, and out walked Lester Arnold, the father of the defendant-appellant Jeffery Arnold.

Other than Lester Arnold having disheveled hair, the police observed no other abnormalities, and definitely did not observe any signs of physical harm, to wit, no abrasions, no bruises, no swellings, no cuts, i.e. nothing to indicate the causing, or the attempted causing, of the elements of the offense of domestic violence, under O.R.C. §2919.25(A).

Wherefore, after waiting for Jeffery Arnold to come out of the house, the police learned from a neighbor that the son of Lester Arnold, ...defendant-appellant Jeffery Arnold had been seen leaving the house about twenty minutes earlier.

Whereupon, defendant-appellant Jeffery Arnold was later found and charged with the aforementioned offense of domestic violence, a misdemeanor of the first degree.

On June 18, 2013, a court trial was held in the Fostoria Municipal Court, State of Ohio v. Jeffery C. Arnold, Case No. 13-CRB-116, in which the State's own witness, the alleged victim Lester Arnold, on numerous occasions, from the outset and through

the course of his testimony, repeatedly invoked or otherwise attempted to invoke his privilege under the Fifth Amendment to the United States Constitution, to not testify, and he specifically and expressly stated under oath as follows, "I have a right from self-incrimination under the Fifth Amendment and I do have a right to refuse to testify." (From Transcript of Proceedings, Page 6, lines 23 through 26).

The aforementioned under oath assertion of his right to invoke his Fifth Amendment privilege, was witness Lester Arnold's direct response to the prosecutor having advised him (the State's own witness) that he should understand that he didn't have the right to refuse to testify. (From Transcript of Proceedings, Page 6, lines 21 and 22).

State witness Lester Arnold then went on to invoke his Fifth Amendment privilege numerous times, to which the trial court impliedly threatened the use of its contempt of court powers, should the State witness refuse to answer. (From Transcript of Proceedings, Page 7, lines 1 and 2).

Defense counsel objected to the State witness Lester Arnold's reading of his written statement, on grounds that the witness had invoked his Fifth Amendment privilege, which objection was overruled. (From Transcript of Proceedings, Page 8, line 18 through Page 9, line 8).

Further, defense counsel raised a continuing objection to the State's questioning of its own witness, Lester Arnold, for having invoked his Fifth Amendment rights. (From Transcript of

Proceedings, Page 10, line 25 through Page 11, line 6).

The State's witness that followed Lester Arnold to the stand, Officer Bethel of the Fostoria Police Department testified that he didn't recall seeing any injuries on Lester Arnold. (From Transcript of Proceedings, Page 17, lines 16 through 25).

Later in the trial, State's witness Connie Arnold, the wife of Lester Arnold (and the mother of defendant-appellant Jeffery Arnold), testified that "there wasn't any sign of a physical -- any physical harm," with regard to her observation of her husband as he came out of the garage, that "he was okay physically." (From Transcript of Proceedings, Page 25, lines 16 through 21).

Further, State witness Connie Arnold testified that her husband, Lester Arnold, "has a temper, that he'll get agitated sometimes over things that to me I wonder why he gets so upset. But he kind of goes up like a rocket..." (From Transcript of Proceedings, Page 31, lines 10 through 12).

Wherefore, with the State's key witness, Lester Arnold, having invoked his Fifth Amendment privilege numerous times, on grounds that it would tend to incriminate him, and with the prosecutor having told him that he had no right to invoke the Fifth Amendment privilege, and with the trial court repeatedly overruling the defense's objection and ongoing objections to further questioning the Fifth Amendment-invoking State's key witness, Lester Arnold, ...the trial court on the basis of no physical evidence of any harm, nor of any attempt to harm Lester Arnold, still came to what the defense respectfully argues was a

prejudicially foregone conclusion to convict the defendant-appellant of domestic violence.

Wherefore, the trial court did find that the defendant-appellant, Jeffery Arnold, had been proven guilty beyond a reasonable doubt, and sentenced defendant-appellant to serve one hundred and fifty days in jail, and about which the defendant-appellant pursued an appeal therefrom.

Accordingly, in the Court of Appeals, Third Appellate District, Seneca County, Ohio, ...on March 24, 2014, ...there was a split decision for affirming the trial court's judgment, with said decision being hereto attached, along with the opinion and dissent, on Appendix Pages A-4 through A-34.

Wherefore, on May 8, 2014, defendant-appellant Jeffery C. Arnold filed a notice of appeal with a memorandum in support of jurisdiction before the Supreme Court of Ohio, providing and explaining, via argument in support of propositions of law, as to why this case is a case of public or great general interest and involves a substantial constitutional question.

Whereupon September 3, 2014, the Supreme Court of Ohio accepted the appeal and ordered the transmittal of the record from the Court of Appeals for Seneca County, and wherefrom the record was filed with the Clerk of the Supreme Court of Ohio on September 16, 2014.

Accordingly, the defendant-appellant, Jeffery C. Arnold, herein files and respectfully submits this Statement of Facts in the brief of appellant.

ARGUMENT

PROPOSITION OF LAW NO. I:

The trial court abused its discretion and the prosecuting attorney wrongly and improperly advised the State's own key witness that he had no right to invoke his privilege under the Fifth Amendment to the United States Constitution, to not testify, regarding his expressed under oath statement that "I have a right from self-incrimination under the Fifth Amendment and I do have a right to refuse to testify," with the trial court effectually and repeatedly denying same, and otherwise advising the witness of contempt of court, thereby resulting in reversible error.

As the prosecution has the burden of proving its domestic violence charge against defendant-appellant by the standard of proof beyond a reasonable doubt, and as there was no one else present in the room of the alleged incident, other than State witness Lester Arnold and defendant-appellant Jeffery Arnold, it is respectfully submitted that it is reversible error for the prosecuting attorney to wrongly and improperly advise the State's own key witness that quote, "Do you understand you don't have the right to refuse to testify." (From Transcript of Proceedings, Page 6, on lines 21 and 22).

To which State witness Lester Arnold then responded as follows, "I have a right from self-incrimination under the Fifth Amendment and I do have a right to refuse to testify." (From Transcript of Proceedings, Page 6, on lines 23 and 25).

Whereupon, the trial court then advised the State's key witness that "You also must understand you also may be held in contempt for failing to answer." (From Transcript of Proceedings, Page 7, on lines 1 and 2).

Wherefore, it is respectfully herein argued that the prosecuting attorney cannot advise a witness that he doesn't have

the right to exercise his fundamental and substantial constitutional right to not incriminate himself under the Fifth Amendment to the United States Constitution, and it is reversible error for the State officer of the Court to have advised a sworn witness of same. See State v. Beebe, 172 Ohio App. 3d 512 at 516, 517 (2007). 2007-Ohio-3746.

Accordingly, it is submitted that a witness, any witness, has a valid Fifth Amendment privilege, and even though he or she may maintain any innocence of wrongdoing. Ohio v. Reiner, 532 U.S. 17, at 19, 20. (2001).

Thus, the prosecutor's advisory and conclusion of law statement to the State's own key witness was clearly wrong and improper, as a matter of law, and should result in reversible error. Reiner, Supra. Further, the trial court's admonishment to the State's witness, literally telling him that he also may face contempt of court charges if he doesn't answer the questions of the prosecutor, is similarly wrong under both Beebe and Reiner.

It follows that the subsequent repeated invoking of the Fifth Amendment privilege, with the defense objecting to the continued questioning on direct by the prosecuting attorney, and with the trial court's twice overruling of same, should result in reversible error, based on the State's and the trial court's virtual ignoring of witness Lester Arnold's fundamental and substantial Fifth Amendment invoked privilege. (From Transcript of Proceedings, Page 8, line 11 through Page 9, line 8, and Page 10, line 25 through Page 11, line 6).

Proposition of Law No. II:

Defendant-appellant was denied a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution, by the trial court's repeated pattern of demonstrating that it had prejudicially presumed the defendant-appellant's guilt throughout the course of the trial, thereby resulting in reversible error.

Whereas, it is respectfully argued that during the course of the bench trial in this case, the court indicated that it had prejudicially presumed the defendant-appellant's guilt by its comments and conduct.

To wit, when ruling on a defense objection to a police officer's testimony regarding hearsay, and when defense counsel asserted that the hearsay was not an excited utterance, the trial court indicated its bias with regard to the future of evidence not yet offered and not yet heard, by improperly and prejudicially predicting, "I'm sure we'll be getting to some excited utterances soon." (From Transcript of Proceedings, Page 15, on lines 5 and 6).

When taken in the context and against the backdrop of the trial court's repeated ignoring and overruling of the right of State's witness Lester Arnold to invoke his Fifth Amendment privilege, it reveals that the trial court has already decided where it wants this case to go, in favor of the State, and hence, the trier of facts' prediction which would otherwise be unthinkable in the mind of a fair and impartial trier of facts, was prejudicially sure to be getting to some excited utterances soon.

And in conclusion, both literally and figuratively, and as if to make its points of the fait accompli, the trial court improperly assumed an adversarial, prosecutorial role during the

defense's closing argument, and interrupted same on numerous occasions, thereby abandoning any pretense of fairness and impartiality. To wit, the trier of facts never once interrupted the prosecuting attorney's closing argument or rebuttal closing argument.

Yet the trier of facts went out of its way to demean and berate the fact that the alleged victim, Lester Arnold, had no signs whatsoever of any physical harm, which would logically follow that there was no attempt made to cause physical harm.

However, the trier of facts, assuming the prosecutorial role of a rebuttal closing argument for the State, interrupted the defense's closing argument as follows,

THE COURT: "Are we gonna talk in riddles here or are you gonna be -- I mean, I understand what you're arguing for, but there is no requirement of a showing of physical harm, correct?"

MR. MURRAY: "Cause or attempt to cause physical harm --"

THE COURT: "Correct,"

MR. MURRAY: -- "is the requirement. And I'm respectfully submitted -- "

THE COURT: "No gushing blood. No broken bones. No bruises. No gunshot wounds, right?"

(From Transcript of Proceedings, Page 47, lines 13 through 23).

Wherefore, it is respectfully submitted and concluded that Page 46 and Page 47 of the Transcript of Proceedings, epitomize the prejudicial attitude and leanings of the trial court, and is the closing summation argument by the court, made on behalf of the

State, to volitionally, improperly and so prejudicially argue for the State's conviction of defendant-appellant, thereby resulting in reversible error.

As a corollary, the collateral damage from such a prejudicial trier of facts is that the resultant verdict of guilty of domestic violence was against the manifest weight of the evidence.

For the State's key witness Lester Arnold, when he wasn't having his invoked Fifth Amendment privilege on grounds of self-incrimination, being ignored and overruled by the trial court, was insisting that at best for the prosecution's case, he didn't remember what happened; and at worst for the prosecutor's case, testified that he didn't remember, but he didn't think so, in regard to whether or not his son, defendant-appellant Jeffery Arnold, caused or attempted to cause him physical harm. (From Transcript of Proceedings, Page 12, lines 15 through 21).

Accordingly, in weighing the evidence and all of the reasonable inferences, including the credibility of witnesses, the trier of facts clearly lost its way and created a manifest miscarriage of justice, and therefore, the conviction must be reversed and a new trial should be ordered. State v. Martin, 20 Ohio App. 3d 172, at 175. 485 N.E. 2d 717 (1983). State v. Thompkins, 78 Ohio St. 3d 380, at 387. 1997-Ohio-52, 678 N.E. 2d 541.

In fact, at the trial, both of the police officers admitted that they saw no signs whatsoever of any physical harm to Lester Arnold. In corroboration, State witness Connie Arnold, the wife of Lester Arnold and the mother of defendant-appellant Jeffery

Arnold, testified that on the date of the alleged incident, Lester Arnold came out of the house, through the garage and "he was, he was okay physically, I mean there wasn't a sign of a physical -- any physical harm." (From Transcript of Proceedings, Page 25, lines 18 through 20).

Wherefore, it is respectfully submitted that in the State's case to prove beyond a reasonable doubt, the evidence just wasn't there to prove domestic violence, and it is the respectful argument of defendant-appellant that the trial court's guilty finding was manifestly outweighed by the principle of presumptive innocence.

It is obvious that the trial court prejudicially looked over this case, from the outset, and beheld a family situation in which the trial court decided it would preemptively act in loco parentis, and thereupon rule from the bench that regardless of whether the evidence did not prove beyond a reasonable doubt that the defendant-appellant caused or attempted to cause physical harm to his father, the trial court was going to take the side of the prosecution, lifting it over the threshold of proof, and contentiously argue with the defense at the closing of the case, and thereby tolerate none, and impermissibly so, of the father's (Lester Arnold's) repeated invoking of his Fifth Amendment privilege.

For when it comes to the protection of substantial and elemental constitutional rights, regarding self-incrimination, confrontation of witnesses and the right to a fair trial, erring on the side of caution is nevertheless a prejudicial and fundamental, reversible error.

Proposition of Law No. III:

The trial court reversibly erred by allowing the State's key witness to read his written statement to the police, over defense objection, into evidence at trial, thereby denying the defendant-appellant's fundamental right to confront witnesses under the Sixth and Fourteenth Amendments to the Constitution of the United States, as the State's key witness had already invoked his Fifth Amendment privilege and had testified that he didn't remember what had happened, and therefore couldn't be cross-examined or otherwise confronted about his written statement.

By allowing the State's witness, Lester Arnold, to read from his written statement, over defense objection, the trial court committed reversible error, on grounds that the State's witness testified that he could not remember the substantive nature of what he had written in said statement, thereby rendering any meaningful cross-examination about the written statement as being impossible, and therefore violating the Confrontation Clause of the Sixth Amendment to the United States Constitution, as applicable to the states through the due process clause of the Fourteenth Amendment to the United States Constitution. State v. Goff, 2005-Ohio-339, at 345. Also, Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, at 1378 (2004) (unanimous decision). (See Transcript of Proceedings, Page 8, line 16, to Page 9, line 8, and from Page 10, line 25 to Page 11, line 6).

Wherefore, if the trial court, in an apparent attempt at a gotcha moment, then later granted the State's motion to admit State's Exhibit A, with defense counsel not responding, because he was engaged in a conversation with the defendant at the time that said exhibit was offered into evidence, and the Court was indeed aware of defense counsel's conversation with his client at the time, the defendant-appellant's counsel would respectfully ask

this Court to consider the earlier defense objection to the State witness' reading of State's Exhibit A, or of the continuing objection of defense trial counsel, or of a plain error consideration of the admission of State's Exhibit A, or of the invited error of ineffective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. (See Transcript of Proceedings, Page 43, lines 20 through 25, and Transcript of Proceedings, Page 45, lines 14 through 20).

Whatever it takes to sustain this proposition of law, and preserve the principle that a document which the writer claims that he cannot remember the substantive nature of its contents, and hence cannot be effectively cross-examined about, should not have been allowed to read the contents of that document into evidence.

For the argument remains that the reading of State's Exhibit A into admitted evidence, by said reading, over objection, violates the Confrontation Clause of the Sixth and Fourteenth Amendments to the United States Constitution, and should not have been taken into consideration by the trial court in the rendering of its verdict, thereby requiring reversal of the trial court's judgment.

CONCLUSION

Wherefore, on the basis of the foregoing three propositions of law, it is hereby respectfully submitted that appellant Jeffery Arnold did not receive a fair and impartial bench trial, and was denied his fundamental and substantial constitutional rights to same, and was also denied his right to confront the State's key witness against him, while the State's key witness repeatedly had his substantial constitutional right to invoke his Fifth Amendment privilege against self-incrimination being refused and threatened with contempt and so violated.

Accordingly, appellant Jeffery Arnold, by and through his appellate counsel, herewith incorporates by reference the dissenting opinion from his court of appeals case, herewith attached, into this conclusion, and respectfully therefore asks for the Supreme Court fo find merit in this appeal, and to thereby sustain the appellant's three propositions of law, and in doing so, reverse the majority judgment of the divided appellate opinion in this case.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, Gene P. Murray, do hereby certify that a copy of the foregoing Merit Brief of Appellant Jeffery C. Arnold was sent via Regular First Class U.S. Mail on this 27th day of October, 2014, to counsel for Appellee, State of Ohio, Timothy J. Hoover, Law Director of the City of Fostoria, 125 S. Main Street, Suite 201, Fostoria, OH 44830.


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APPENDIX

INDEX TO DOCUMENT REFERENCE IN APPENDIX

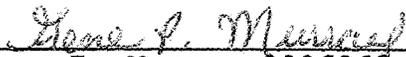
<u>DOCUMENT NAME</u>	<u>APPENDIX PAGE NO.</u>
Notice of Appeal to the Supreme Court of Ohio.....	A-1
Entry of the Supreme Court of Ohio: the Court accepts the appeal.....	A-3
Judgment Entry of the Appeals Court of Ohio, Third Appellate District, Seneca County <u>State of Ohio v. Jeffery C. Arnold</u> Case No. 13-13-27.....	A-4
Opinion of the Appeals Court of Ohio, Third Appellate District, Seneca County <u>State of Ohio v. Jeffery C. Arnold</u> Case No. 13-13-27.....	A-5
Judgment Entry of Adjudication and Sentencing Fostoria Municipal Court Case No. 13-CRB-116 <u>State of Ohio v. Jeffery C. Arnold</u>	A-35
 <u>CONSTITUTIONAL PROVISIONS AND STATUTES:</u>	
United States Constitution, Amendment V.....	A-37
United States Constitution, Amendment VI.....	A-37
United States Constitution, Amendment XIV.....	A-38
Ohio Revised Code: Domestic Violence, §2919.25(A).....	A-39
Certificate of Service.....	A-42

NOTICE OF APPEAL OF APPELLANT JEFFERY C. ARNOLD

Appellant Jeffery C. Arnold hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment and Opinion of the Seneca County Court of Appeals, Third Appellate District of Ohio, entered in the Court of Appeals Case No. 13-13-27 on March 24, 2014.

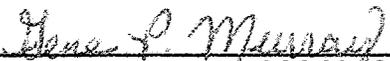
This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,


Gene P. Murray 0006962
Counsel of Record
ATTORNEY FOR APPELLANT
JEFFERY C. ARNOLD

CERTIFICATE OF SERVICE

I, Gene P. Murray, do hereby certify that a copy of this Notice of Appeal was sent via Regular First Class U.S. Mail, on this 8th day of May, 2014, to counsel for Appellee, State of Ohio, Timothy J. Hoover, Law Director of City of Fostoria, 125 S. Main Street, Suite 201, Fostoria, OH 44830.


Gene P. Murray 0006962
ATTORNEY FOR APPELLANT
JEFFERY C. ARNOLD

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FILED

The Supreme Court of Ohio

SEP 03 2014

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

Case No. 2014-0718

FILED IN THE COURT OF APPEAL
SENECA COUNTY

v.

ENTRY

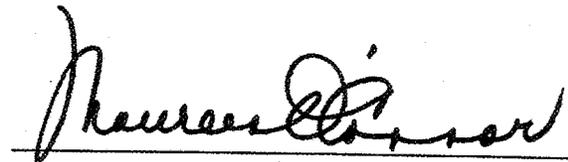
SEP 8 2014

Jeffrey C. Arnold

JEAN A. ECKELBERRY, CLERK

Upon consideration of the jurisdictional memoranda filed in this case, the court accepts the appeal. The clerk shall issue an order for the transmittal of the record from the Court of Appeals for Seneca County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Seneca County Court of Appeals; No. 13-13-27)



Maureen O'Connor
Chief Justice

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SENECA COUNTY

FILED IN THE COURT OF APPEALS
SENECA COUNTY

MAR 24 2014

STATE OF OHIO,

MARY K. WARD, CLERK

PLAINTIFF-APPELLEE,

CASE NO. 13-13-27

v.

JEFFREY C. ARNOLD,

JUDGMENT
ENTRY

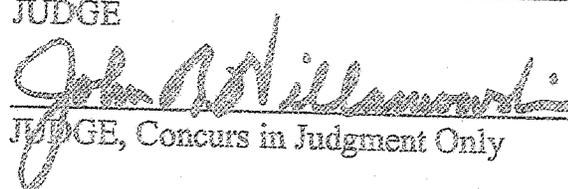
DEFENDANT-APPELLANT.

For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.



JUDGE



JUDGE, Concurr in Judgment Only

ROGERS, J. DISSENTS

JUDGE

DATED: March 24, 2014

A-4

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SENECA COUNTY

FILED IN THE COURT OF APPEALS
SENECA COUNTY

MAR 24 2014

STATE OF OHIO,

MARY K. WARD, CLERK

PLAINTIFF-APPELLEE,

CASE NO. 13-13-27

v.

JEFFREY C. ARNOLD,

OPINION

DEFENDANT-APPELLANT.

Appeal from Fostoria Municipal Court
Trial Court No. CRB1300116

Judgment Affirmed

Date of Decision: March 24, 2014

APPEARANCES:

Gene P. Murray for Appellant

Timothy J. Hoover for Appellee

SHAW, J.

{¶1} Defendant-appellant Jeffery C. Arnold ("Arnold") appeals the June 18, 2013, judgment of the Fostoria Municipal Court sentencing Arnold to 150 days in jail following Arnold's bench trial conviction for Domestic Violence in violation of R.C. 2919.25(A), a first degree misdemeanor.

{¶2} The facts relevant to this appeal are as follows. On March 28, 2013, a complaint was filed against Arnold alleging that Arnold committed Domestic Violence in violation of R.C. 2919.25(A), a first degree misdemeanor. (Doc. 1). The complaint alleged that Arnold did cause, or attempt to cause, physical harm to his father, Lester Arnold. (*Id.*) The complaint further alleged that Arnold, who lived with his father and mother, became agitated and grabbed his father by the hair "and then strangled him." (*Id.*)

{¶3} On April 1, 2013, Arnold entered a plea of not guilty to the charge against him. (Doc. 7).

{¶4} On June 18, 2013, the case proceeded to a bench trial. At the trial, the State called four witnesses: Lester Arnold, the victim, Connie Arnold, the victim's wife and mother to Arnold, and two officers that responded to the scene. The State then rested its case. Arnold's counsel cross-examined all of the witnesses, but Arnold did not present any further evidence. Following closing

arguments, the court found Arnold guilty of Domestic Violence in violation of R.C. 2919.25(A), a first degree misdemeanor.

{¶5} The trial court then proceeded directly to sentencing, and sentenced Arnold to 150 days in jail. (Doc. 28). A judgment entry reflecting this was filed that same day, June 18, 2013. (*Id.*)

{¶6} It is from this judgment that Arnold appeals, asserting the following assignments of error for our review.

ASSIGNMENT OF ERROR 1

THE TRIAL COURT ABUSED ITS DISCRETION AND THE PROSECUTING ATTORNEY WRONGLY AND IMPROPERLY ADVISED THE STATE'S OWN KEY WITNESS THAT HE (LESTER ARNOLD, THE ALLEGED VICTIM) HAD NO RIGHT TO INVOKE HIS PRIVILEGE UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, TO NOT TESTIFY, REGARDING LESTER ARNOLD'S EXPRESSED UNDER OATH STATEMENT THAT "I HAVE A RIGHT FROM SELF-INCRIMINATION UNDER THE FIFTH AMENDMENT AND I DO HAVE A RIGHT TO REFUSE TO TESTIFY," WITH THE TRIAL COURT EFFECTUALLY AND REPEATEDLY DENYING SAME, AND OTHERWISE ADVISING THE WITNESS OF CONTEMPT OF COURT, THEREBY RESULTING IN REVERSIBLE ERROR.

ASSIGNMENT OF ERROR 2

DEFENDANT-APPELLANT WAS DENIED A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BY THE TRIAL COURT'S REPEATED PATTERN OF DEMONSTRATING THAT IT HAD PREJUDICIALLY PRESUMED THE DEFENDANT-APPELLANT'S GUILT THROUGHOUT THE COURSE OF THE TRIAL, THEREBY RESULTING IN REVERSIBLE ERROR.

ASSIGNMENT OF ERROR 3

THE VERDICT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, THEREBY RESULTING IN REVERSIBLE ERROR.

ASSIGNMENT OF ERROR 4

THE TRIAL COURT REVERSIBLY ERRED BY ALLOWING STATE'S WITNESS LESTER ARNOLD TO READ FROM HIS WRITTEN STATEMENT TO THE POLICE, OVER DEFENSE OBJECTION, INTO EVIDENCE AT TRIAL, THEREBY DENYING DEFENDANT-APPELLANT'S FUNDAMENTAL RIGHT TO CONFRONT WITNESSES UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS STATE'S WITNESS LESTER ARNOLD HAD ALREADY INVOKED HIS FIFTH AMENDMENT PRIVILEGE AND HAD TESTIFIED THAT HE DIDN'T REMEMBER WHAT HAD HAPPENED, AND THEREFORE COULDN'T BE CROSS-EXAMINED OR OTHERWISE CONFRONTED ABOUT HIS WRITTEN STATEMENT, STATE'S EXHIBIT A.

{¶7} For the sake of clarity, we elect to address the assignments of error out of the order in which they were raised.

Third Assignment of Error

{¶8} In Arnold's third assignment of error, he contends that the trial court's finding of guilt was against the manifest weight of the evidence. Specifically, Arnold argues that there were no signs of any physical harm to Lester and that Lester testified that he did not remember what happened.

{¶9} In reviewing whether the trial court's judgment was against the weight of the evidence, the appellate court sits as a "thirteenth juror" and examines the

conflicting testimony. *Id.* In doing so, this Court must review the entire record, weigh the evidence and all of the reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the factfinder “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Andrews*, 3d Dist. No. 1-05-70, 2006-Ohio-3764, ¶ 30, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983); *State v. Thompkins*, 78 Ohio St.3d at 380, 387 (1997).

{¶10} In this case, Arnold was charged with Domestic Violence in violation of R.C. 2919.25(A), which reads, “No person shall knowingly cause or attempt to cause physical harm to a family or household member.”

{¶11} At trial, both Lester and Connie testified that their son, Arnold, lived with them. Thus Arnold was a “household member” for purposes of R.C. 2919.25(A). (Tr. at 6, 22). This testimony was not contested. It was contested, however, whether Arnold caused or attempted to cause physical harm to his father, Lester.

{¶12} Testimony at trial revealed that on the evening of March 25, 2013, Arnold was having dinner with his parents, Lester and Connie. Arnold “wasn’t especially happy” with what Connie made for dinner and he became agitated. (Tr. at 23-24). Arnold “became threatening” so Lester got up and walked into “the

computer room.” (Tr. at 9). Arnold then followed Lester into the computer room, grabbed Lester by the hair and choked him. (*Id.*)

{¶13} Connie, who was not in the room at the time of the incident, heard a “commotion,” consisting of “a crashing sound” and “a struggling sound.” (Tr. at 24). At that point, Connie exited the residence along with her grandson. (*Id.* at 24-25). A neighbor happened to be outside, “so in the interest of safety [Connie] asked [the neighbor] to call the police.” (Tr. at 25).

{¶14} Subsequently, the police arrived at the residence. The officers approached the residence and spoke briefly with Arnold from outside. The officers asked Arnold if they could see Lester to make sure he was “okay.” (Tr. at 36). Arnold told the police that Arnold did not have to speak with them and then Arnold “slammed the door in [the officer’s] face.” (*Id.*)

{¶15} The officers repeatedly tried to make contact with Arnold inside the residence. As the officers considered whether they were going to have to make a forced entry into the residence, Lester came out of the garage. Officers later learned from a neighbor that around this time Arnold also walked out of another exit from the residence.

{¶16} Officer Brett Bethel of the Fostoria Police Department testified that Lester seemed to be “very scared, [and] agitated about the situation.” (Tr. at 16). Officer Bethel testified that he did not see any injuries on Lester but he did notice

that Lester's hair was disheveled. (Tr. at 17). At that time Lester gave a statement to the police officers that Arnold had grabbed him by the hair and choked him. (*Id.*) At trial, Lester testified that he did not remember his son trying to hurt him.

{¶17} On appeal, Arnold argues that his conviction was against the manifest weight of the evidence as there was no evidence of physical harm to Lester. In addition, Arnold contends that since the victim in this case, Lester, testified that he did not remember whether Arnold caused or attempted to cause him physical harm, the State could not prove its case beyond a reasonable doubt.

{¶18} While it is true that there was no testimony indicative of physical harm to Lester beyond Lester's hair being "disheveled" and the choking, the statute at issue does not require physical harm. It merely requires that Arnold cause or attempt to cause physical harm to a family or household member. Evidence was introduced that Arnold became agitated, and that he followed Lester out of the kitchen when Lester tried to remove himself from the situation. Evidence was introduced that Arnold grabbed Lester by the hair and "choked" him. Evidence was also introduced that Lester had a "ruptured disc in [his] neck," which could have made him particularly vulnerable to injury. (Tr. at 9).

{¶19} At trial Arnold's counsel elicited testimony on cross-examination of Arnold's mother that Lester was easily agitated and "goes up like a rocket" in an attempt to establish that perhaps Lester was the aggressor. (Tr. at 31). However,

Connie testified that in this instance, when Lester left the room once Arnold became agitated, Lester was trying “to cut it off or to get away from what they were doing.” (Tr. at 33). Thus while Lester may, in fact, have a temper, there is no indication that in this instance he started or escalated the argument.

{¶20} Based on the testimony that was presented at trial, we cannot find that under these circumstances the trial court “lost its way” or that there was a “manifest miscarriage of justice.” Accordingly, Arnold’s third assignment of error is overruled.

First Assignment of Error

{¶21} In Arnold’s first assignment of error Arnold contends that the prosecutor improperly advised State’s witness Lester Arnold that Lester could not invoke his Fifth Amendment right against self-incrimination to refuse to testify. In addition, Arnold argues that it was improper for the trial court to admonish Lester Arnold with the statement that Lester may face contempt of court if Lester did not answer the questions of the prosecutor.

{¶22} “There is no absolute right to invoke the Fifth Amendment.” *In re High Fructose Corn Syrup Antitrust Litigation*, 293 F.Supp.2d 854, 859 (C.D.Ill.2003) “To be privileged by the Fifth Amendment to refuse to answer a question, the answer one would give if one did answer it (and answer it truthfully) must have some tendency to subject the person being asked the question to

criminal liability.” *Id.* quoting *In re HFCS*, 295 F.3d at 663–64. The Fifth Amendment privilege is only properly invoked if the witness establishes an objectively reasonable belief that a responsive answer could expose that individual to criminal prosecution. *Id.*

{¶23} In this case, Arnold contends that the State and the trial court made improper comments to State’s witness Lester Arnold while he was on the stand during the following portion of Lester’s testimony.

Q: Mr. Arnold, were the police dispatched to your residence on March 25th of 2013?

A: I don’t remember the date.

Q: Were they dispatched there in the spring of this year?

A: Yes.

Q: Do you recall why?

A: Uhm, at this time, I’d like to plead the Fifth and I’m refusing to testify.

Q: Okay. Do you understand that you don’t have the right to refuse to testify?

A: I have a right from self-incrimination under the Fifth Amendment and I do have a right to refuse to testify.

THE COURT: You also understand you also may be held in contempt for failing to answer?

THE WITNESS: Well, if that’s the way that the rules work, yes.

* * *

Q: Did you speak with an officer on that spring day when they came to your house?

A: I refuse to answer on the grounds that it may tend to incriminate me.

Q: Did you make a written statement?

A: I refuse to answer based on my Fifth Amendment constitutional rights.

Q: So if an officer provides your written sworn statement that would be a statement you made to the court, correct, or to the officer, correct?

A: I don't remember. My blood sugar level was extremely high. My vision was distorted. The tinnitus in my ears were ringing so loud I couldn't hear anything, so. I - I couldn't see.

Q: I'm gonna show you State's Exhibit A. Do you recognize this?

A: I know my Fifth Amendment rights.

Q: Is that your signature at the bottom of that -

A: I stand on my Fifth Amendment rights.

Q: -- statement?

THE COURT: You're refusing to answer, Mr. Arnold?

THE WITNESS: Yes, sir I am.

[PROSECUTOR]: I'm gonna have you read the statement for the record.

THE COURT: Mr. Arnold?

THE WITNESS: Sir.

THE COURT: Will you read the statement?

MR. MURRAY [Defense Counsel]: Your Honor, I would object.

THE COURT: Basis?

MR. MURRAY: That the witness has invoked his Fifth Amendment privilege.

THE COURT: [Prosecutor]?

[PROSECUTOR]: He hasn't given a basis for invoking that privilege.

* * *

MR. MURRAY: In that he would be reading a statement in which he indicated that he was, couldn't remember being –

THE COURT: He's refused to answer. I don't see what the harm would be in having him read the statement. Objection overruled. Answer the – please read the statement, Mr. Arnold.

THE WITNESS: "Jeff [Arnold] became threatening at dinner. * * * I left the table and went into the computer room. Jeff came into the computer room. He grabbed me by the hair, then he choked me. I have a ruptured disc in my neck[.] * * * He continued to yell and would not let me out. * * *

[Prosecutor]: And who is that signed by?

A: The name on it is – I can't read the witness, but Lester C. Arnold is the name at the bottom.

Q: And you are Lester C. Arnold?

A: I am one of Lester C. Arnold's, yes.

* * *

Q: And is that – Is that the statement you made to the officer on March 25th?

A: I've told you I'm seeking the protection of the Fifth Amendment. I don't remember. And –

*** * ***

Q: Do you remember speaking with Officer Bethel?

A: Vaguely.

Q: And do you remember making a written statement for Officer Bethel?

A: I just – I just remember telling him that he asked me what I wanted done. I told him I did not want my son arrested. I did not want him charged. All we needed was some space between us.

(Tr. at 6-10).

{¶24} Contrary to all of the arguments raised by the dissent, the preceding portion of testimony makes clear that Lester never presented any basis for invoking his Fifth Amendment “privilege against self-incrimination.” To the contrary, it would appear his only reason for invoking the “privilege” was in order to not testify against his son, Arnold, as Lester did not want Arnold charged in the first place. Nothing in the record establishes how Lester was remotely in danger of giving testimony that would incriminate himself. Therefore, there was nothing improper, either in the State's questioning or the court's admonishment that Lester could be held in contempt for refusing to answer.

{¶25} Simply put, Arnold has no standing to raise any supposed violation of the Fifth Amendment rights of another State's witness and, in any event, Arnold is unable to establish that any comment by the State or the trial court, especially in a bench trial, created reversible error.

{¶26} Accordingly, for all of these reasons Arnold's first assignment of error is overruled.

Second Assignment of Error

{¶27} In Arnold's second assignment of error, Arnold contends that he did not receive a fair trial. Specifically, Arnold argues that the trial court "prejudicially presumed the Defendant-Appellant's guilt by its comments and conduct." (Appt's Br. at 12).

{¶28} In this case, Arnold cites two instances where he contends that the trial court's actions were improper and erroneous. The first was during the following portion of testimony, when Officer Brett Bethel was on the stand as a State's witness.

Q [PROSECUTOR]: And what was the nature of that dispatch?

A [OFFICER BETHEL]: Possible domestic in progress.

Q: And what did you find upon your arrival?

A: Upon my arrival, uhm, a female was beginning – a female caller was speaking to her neighbors and she stated that her husband and her son –

MR. MURRAY: Objection, hearsay, Your Honor.

THE COURT: Ms. Dibble?

MS. DIBBLE: Present sense impression.

THE COURT: Mr. Murray?

MR. MURRAY: I would indicate that, uhm, it's still, it's not an excited utterance and it's still –

THE COURT: I'm sure we'll be getting to some excited utterances soon.

MR. MURRAY: Well –

THE COURT: Anything else, Ms. Dibble?

MS. DIBBLE: No.

THE COURT: Objection sustained.

(Tr. at 14-15).

{¶29} Here, Arnold contends that the trial court's statement that there would probably be "some excited utterances soon" illustrated that the court was already prejudiced toward Arnold's guilt. However, the court *sustained* Arnold's counsel's objection, precluding the testimony that the State intended to offer. It is difficult for us to see how the court sustaining Arnold's counsel's objection establishes that the court had already presumed his guilt.

{¶30} Moreover, at this point in the trial, the court had already heard opening statements and the testimony of Lester Arnold. The court was aware of

the altercation and thus was aware of the possibility of “excited utterances” being made. Therefore, the court’s extrapolation was not unfounded. For these reasons this argument is not well-taken.

{¶31} Arnold next contends that the trial court “improperly assumed an adversarial, prosecutorial role during the defense’s closing argument[.]” (Appt’s Br. at 12-13). During defense counsel’s closing argument, the following exchange occurred between defense counsel and the court.

DEFENSE COUNSEL: And he also indicated that with regard to, there was no sign of physical harm upon [Lester]. And no sign – and his wife testified that, uh, that she didn’t see any sign of physical harm upon [Lester].

And, therefore, we respectfully submit that the State – in fact, uhm, his father testified that he didn’t, that Mr., that Jeffrey Arnold did not cause or attempt to cause physical harm.

THE COURT: Did he say that? I think he said he didn’t remember.

DEFENSE COUNSEL: But he – with regard to not remembering, we respectfully submit, Your Honor, that is not the proof beyond a reasonable doubt. There’s absolutely no forensic evidence, no photographs, no – no testimony of any one who claims to have seen any physical harm, any marks or cuts or abrasions of any physical harm –

THE COURT: Is that a requirement under the statute, Mr. Murray?

DEFENSE COUNSEL: I would respectfully submit that’s indicative –

THE COURT: Is it a requirement under the statute?

DEFENSE COUNSEL: It's not a requirement under the statute, but I respectfully submit that it's evidence indicative that the State has not shown beyond a reasonable doubt that there was any physical harm to –

THE COURT: Which they're not required to do, right?

DEFENSE COUNSEL: They are required to prove proof beyond a reasonable doubt, Your Honor.

THE COURT: But they're not required to show harm.

DEFENSE COUNSEL: I respectfully –

THE COURT: Mr. Murray –

DEFENSE COUNSEL: The elements –

THE COURT: -- are we gonna talk in riddles here or are you gonna be – I mean, I understand what you're arguing for, but there is no requirement of a showing of physical harm, correct?

DEFENSE COUNSEL: Cause or attempt to cause physical harm –

THE COURT: Correct.

DEFENSE COUNSEL: -- is the requirement. And I'm respectfully submitted –

THE COURT: No gushing blood. No broken bones. No bruises. No gunshot wounds, right?

DEFENSE COUNSEL: Your Honor, I respectfully submit that the State has not shown beyond a reasonable doubt that there was any attempt to cause harm or physical harm to Mr. Les Arnold. * * *

(Tr. at 46-48).

{¶32} Arnold contends that this portion of testimony establishes that the court assumed an adversarial role in the proceedings and thus was biased against Arnold.¹ However, it is clear that the court was attempting to clarify the legal language of the statute at issue. Arnold's counsel repeatedly argued that there was no physical harm, and the court repeatedly attempted to clarify that the statute did not require physical harm to establish guilt. While the court perhaps did not need to inquire of Arnold's counsel regarding this matter during closing arguments, we cannot find in a bench trial that such inquiries by the court were improper, or prejudicial, as there was ample proof that Arnold *attempted* to cause physical harm to his father, Lester Arnold. Accordingly, Lester's second assignment of error is overruled.

Fourth Assignment of Error

{¶33} In Arnold's fourth assignment of error, Arnold contends that the trial court erred by allowing Lester Arnold to read from his written statement to the police over defense counsel's objection. Specifically, Arnold contends that allowing Lester to read his prior statement violated the Confrontation Clause of the Sixth Amendment to the United States Constitution.

{¶34} "The Confrontation Clause to the United States Constitution provides that a defendant in a criminal prosecution has a right to confront the witnesses

¹ He does not cite any legal authority for his contention.

against him.” *State v. Hudson*, 8th Dist. No. 89588, 2008-Ohio-1265, ¶ 40. The United States Supreme Court has held that the Confrontation Clause bars “testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify and the defendant had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354 (2004). “The key inquiry for Confrontation Clause purposes is whether a particular statement is testimonial or nontestimonial.” *Hudson, supra*, quoting *State v. Crager*, 116 Ohio St.3d 369, 2007-Ohio-6840. “For Confrontation Clause purposes, a testimonial statement includes one made ‘under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, quoting *Crawford*, at 52.

{¶35} Confrontation Clause violations are subject to harmless error analysis. See *State v. Kraft*, 1st Dist. No. C-060238, 2007-Ohio-2247, ¶ 67, citing *United States v. Summers*, 414 F.3d 1287, 1303 (10th Cir.2005). “A constitutional error can be held harmless if we determine that it was harmless beyond a reasonable doubt.” *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 78 citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824 (1967).

{¶36} In this case, when Lester repeatedly attempted to invoke his “right against self-incrimination,” refused to answer the State’s questions, and denied

any memory of giving a statement to the police, the prosecutor had Lester read the statement that Lester gave to the police on the date of the incident. That statement was subsequently entered into evidence as an exhibit. On appeal, Arnold argues that the reading and introduction of the police report violated the Confrontation Clause.

{¶37} At the outset, we would note that it is unclear, how the inclusion of this evidence violates Arnold's Confrontation Clause rights when the witness, Lester Arnold, was present in open court to *be confronted* regarding his testimonial statement. "The Court in *Crawford* was explicit: 'when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.'" *State v. Knauff*, 4th Dist. Adams No. 10CA900, 2011-Ohio-2725, ¶ 43, quoting *Crawford, supra*, at 59, fn. 9, citing *California v. Green*, 399 U.S. 149, 158; (1970).

{¶38} Notwithstanding this fact, the information contained in the police report could properly have been used to impeach Lester, even though Lester was the State's own witness, as Lester repeatedly attempted to assert the privilege against self-incrimination and repeatedly stated he did not recall what happened. According to the dissent, this is apparently all any witness needs to say in order to avoid testifying—or to avoid even being cross-examined or impeached further by any prior inconsistent statement. However, such a rule would be, and always has

been, contrary to established case law. A statement that the witness “does not remember” is the equivalent of a denial to establish a foundation for cross examination and impeachment of a witness by the use of the prior statement in whatever form counsel chooses to use it. *State v. Pierce*, 2d Dist. Montgomery No. 24323, 2011-Ohio-4873, ¶ 82 quoting *State v. Harris* (Dec. 21, 1994), Montgomery App. No. 14343, 1994 WL 718227 (“If the witness says he cannot remember the prior statement, ‘a lack of recollection is treated the same as a denial, and use of extrinsic impeachment evidence is then permitted.’”); *State v. Allen*, 5th Dist. No. 2012CA00196, 2013-Ohio-3715, ¶11. Whether or not it takes place in front of a jury is up to the trial court not the court of appeals.

{¶39} At the very least the State is initially entitled to pursue the prior statement with the witness - both to give the witness the fullest opportunity to respond to the alleged prior statement and to more clearly determine whether the witness intends to specifically deny the statement. *See State v. Hubbard*, 7th Dist. Jefferson No. 01JE4, 2002-Ohio-6904, ¶¶ 13-14. At this stage, the issue is one of laying the proper foundation for possible impeachment about what the witness has already stated to another person and not a Fifth Amendment privilege involving something the witness is being asked to reveal for the first time at trial.

{¶40} Even assuming a more elaborate protocol was required by the prosecution in handling the prior statement or establishing any “affirmative

damage” to the State’s case any such error in this case was never specifically objected to by the defense and, in any event, “affirmative damage” was manifestly obvious where the witness was the sole complaining witness, the sole victim, and thereby the sole basis for the charge.²

{¶41} Therefore, this argument is not well-taken.

{¶42} Arnold makes additional arguments to assert that his rights were violated, stating that the trial court erred in allowing the police report to be admitted into evidence, and that his trial counsel was ineffective for failing to object to the admission of the police report. However, the trial court, which was the trier-of-fact, had already heard the evidence and thus the admission of the exhibit was merely cumulative and therefore harmless. Accordingly, Arnold’s fourth assignment of error is overruled.

{¶43} For the foregoing reasons, Arnold’s assignments of error are overruled and the judgment of the Fostoria Municipal Court is affirmed.

Judgment Affirmed

WILLAMOWSKI, P.J., concurs in Judgment Only.

/jlr

² Furthermore, we reject the contention of the dissent that *Dayton v. Combs*, 94 Ohio App.3d 291, 299 (2d Dist. 1993) stands for a universally accepted proposition that a witness’ failure to recall can “never constitute affirmative damage.” See *State v. Cupe*, 10th Dist. Franklin No. 98AP-64, 1999WL77219 (Feb. 18, 1999) (wherein the Tenth District Court of Appeals implied that such a holding was not universally accepted).

ROGERS, J. Dissents.

{¶44} I respectfully dissent from the opinion of the majority.

{¶45} As to Arnold's first assignment of error, I disagree with the majority that Lester did not have an adequate basis to assert his Fifth Amendment Privilege against self-incrimination. I would observe that requiring a witness to explain, in open court and on the record, why he wishes to invoke his Fifth Amendment Rights is equivalent to requiring that witness to testify against himself, which is the very thing the Fifth Amendment prohibits. "A valid assertion exists where a witness has reasonable cause to apprehend real danger of incrimination." *State v. Landrum*, 53 Ohio St.3d 107, 120 (1990). The claim of the witness is not enough. *Id.* The trial judge must determine from " 'the implications of the question in the setting in which it was asked' " whether the answer may criminally implicate the witness or provide a link in a chain of evidence that would do the same. *Id.* at 120-21, quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Once the privilege has been properly asserted, the continued questioning of the witness for the purpose of getting before the trier of fact inferences and innuendos that could not otherwise be elicited through direct testimony is prejudicial to the defendant. *State v. Dinsio*, 176 Ohio St. 460, 467 (1964).

{¶46} Here, when Lester refused to testify, the prosecutor told Lester he had no right to invoke the Fifth Amendment, but that was not the State's

prerogative. The trial court is tasked with the duty to determine whether the privilege has been properly invoked. The trial court then endorsed the State's conclusion without any discussion of the issue with the witness. Therefore, the trial court's threat of contempt under these circumstances was entirely improper.

{¶47} Moreover, under the circumstances, it cannot be said that the refusal to testify was improper. The majority speculates that the only reason Lester wanted to invoke the Fifth Amendment was to avoid testifying against his son. The reason could just as well have been that Lester was in fact the aggressor and wanted to avoid implicating himself. No one other than Lester and Jeffrey observed what happened, and Connie testified that Lester was easily agitated and "goes up like a rocket." Trial Tr., p. 31. Lester not only invoked his Fifth Amendment privilege on direct examination by the prosecutor, but continued to exert it upon cross examination by the defense, weakening the majority's assumption that he was attempting to avoid testifying against his son. As a result, Lester properly invoked his Fifth Amendment privilege, allowing him to refuse to testify.

{¶48} Once the privilege was properly invoked, it was improper for the trial court to allow the state to continue to ask Lester repeated questions about the events that transpired in the face of his repeated assertions of his Fifth Amendment privilege and refusals to testify. The State concedes that Lester invoked his Fifth

Amendment privilege, but argues that no prejudice to Appellant arose as a result of Lester's silence. Appellee's Br., p. 9. Instead, the State argues that, because the trial court disregarded Lester's testimony, it does not rise to the level of reversible error articulated in *Namet v. United States*, 373 U.S. 179, 83 S.Ct. 1151 (1963). Appellee's Br., p. 8. In essence, the State argues that Lester's silence was not used against Appellant by the trial court. *Id.* at 9.

{¶49} However, in the face of repeated questions, and after repeated Fifth Amendment assertions, Lester stated that he did remember telling a police officer that he did not want his son arrested. This, coupled with Lester's silence, provides the innuendo that he was silent so that his son will not be found guilty, an inference made by the majority. Further, it was through this silence that the State entered Exhibit A, his prior written statement, into evidence. As the State specifically used Lester's silence in conjunction with his statements that he did not want his son in jail to imply he was refusing to testify for an illegitimate purpose, and as a tactic to admit prior written statements into evidence instead of eliciting testimony, it prejudiced the defendant.

{¶50} As to Arnold's fourth assignment of error, the majority asserts that the confrontation clause was not implicated by admitting Lester's written statement, as Lester was on the stand for the purpose of cross examination. However, a witness who refuses to testify by invoking the Fifth Amendment

privilege against self-incrimination is considered unavailable. *State v. Sumlin*, 69 Ohio St.3d 105, 108 (1994). As Lester properly invoked his Fifth Amendment privilege against self-incrimination, he was not available for cross examination. As a result, Arnold's right of confrontation was implicated.

{¶51} As to requiring the witness to read his written statement, there is no support for that action in any rule or statute. While the majority³ claims that the admission of the written statement was proper for impeachment purposes, the statement is inadmissible, even under a variety of evidentiary rules, such as, recollection refreshed, past recollection recorded, or excited utterance.

Impeachment

{¶52} The majority asserts that the statement could be offered to impeach the witness. However, for a party to be able to use a prior inconsistent statement to impeach its own witness, the party must prove surprise and affirmative damage. Evid.R. 607. Surprise is proved when a witness testifies in a manner inconsistent with prior written statements. *Dayton v. Combs*, 94 Ohio App.3d 291, 299 (2d Dist. 1993). " 'Affirmative damage' can be established only if the witness testifies to facts which contradict, deny, or harm the calling party's trial position. * * * 'Affirmative damage' is not shown where the witness denies knowledge of the

³ The State also argues that the trial court disregarded Lester's written statement when making its decision, and therefore, Arnold was not prejudiced. However, the statement was admitted as an exhibit and, contrary to the State's assertion, the trial court only disregarded the statements Lester made in court. Trial Tr., p. 49. Nowhere in the record does the trial court state that it did not rely on the written statement of Lester when it found Arnold guilty.

facts contained in his prior statement or where he states that he does not remember the facts stated therein.” (Citations omitted.) *Id.* Here, Lester did not contradict his statement. Instead, he invoked his privilege and stated he could not remember what occurred that night. As a result, even if the State could prove surprise, it could not prove affirmative damage. Thus, the written statement was not admissible to impeach the witness.

Recollection Refreshed

{¶53} Under Evidence Rule 612, a witness who does not remember the answer to a direct question may read his or her prior statement, before or during his or her testimony, to refresh his or her recollection. *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, ¶ 57. While the witness is allowed to look at the prior statement, the testimony that is elicited after the recollection is refreshed is the evidence, not the prior statement itself. *Id.* “ ‘[A] party may not read the statement aloud, *have the witness read the statement aloud*, or otherwise place it before the jury.’ ” (Emphasis added.) *Id.*, quoting *State v. Ballew*, 76 Ohio St.3d 244, 254 (1996). As the state had Lester read his statement aloud, it was inadmissible as a recollection refreshed.

Past Recollection Recorded

{¶54} However, if after reading the prior statement the witness still has no current memory of the facts, the statement may be admissible as a past recollection recorded. Evid.R. 803(5). A past recollection recorded is:

[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

*Id.*⁴ To properly lay the foundation for a past recollection recorded, the Ohio Supreme Court has noted:

A memorandum made by a witness may be admitted in evidence in a criminal case as 'past recollection recorded' if the witness had first-hand knowledge of the subject matter of the memorandum, the memorandum was made at or near the time of the event and while the witness had a clear and accurate memory of it, the witness lacks a complete present recollection of the event, and the witness testifies on the stand that the written memorandum is accurate.

State v. Scott, 31 Ohio St.2d 1 (1972), paragraph 1 of the syllabus. When the witness does not attest that the memorandum accurately reflects the knowledge of the witness at the time the memorandum was made, it is inadmissible. *State v. Perry*, 147 Ohio App.3d 164, 2002-Ohio-1171, ¶ 79 (6th Dist.). The

⁴ Although such a statement may qualify for admission through a reading, there is no requirement that the witness be the one to read it, as the court required here. Indeed, witnesses can refuse to read their prior recorded statements, which is why the statement can otherwise be submitted into evidence by an adverse party. See *State v. Clay*, 187 Ohio App.3d 633, 2010-Ohio-2720, ¶ 38 (5th Dist.). However, there is no foul if the witness is willing. *State v. Henson*, 1st Dist. Hamilton No. C-060320, 2007-Ohio-725, ¶ 15.

memorandum will also be inadmissible when the witness cannot remember making the statement or when the statement does not accurately reflect the events as the witness remembered them. *Combs*, 94 Ohio App.3d at 301.

{¶55} Here, Lester repeatedly refused to answer any questions about his statement, asserting his Fifth Amendment privilege. When asked by the prosecution whether he remembered making a statement to the officers, he responded: "I just remember telling him that he asked me what I wanted done. I told him I did not want my son arrested. I did not want him charged. All we needed was some space between us." Trial Tr., p. 10. Lester never attested to the accuracy of the statement at the time it was recorded. In fact, on cross examination, when asked whether it was a true and accurate representation of the events of that night, Lester stated that he did not know and did not remember. *Id.* at p. 11-12. Thus, Lester's statement, under the circumstances of this case, is inadmissible as a past recollection recorded, as the state did not lay the necessary foundation for its admission.

{¶56} Further, in order to offer a memorandum as a past recollection recorded, it is necessary that the witness be available for full and complete cross-examination. "The admission of a memorandum as 'past recollection recorded' in a criminal case does not deprive the defendant of his right of confrontation and cross-examination, where the witness is present on the stand and is available for

full cross-examination by the defendant.” *Scott*, 31 Ohio St.2d at paragraph 2 of the syllabus. Here, Lester invoked his Fifth Amendment privilege, and as a result was unavailable.

Excited Utterance

{¶57} The State also appears to argue that the statement was an excited utterance. Not true! Evidence Rule 803(2) defines an excited utterance as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Where no evidence is presented as to the demeanor of the declarant when written testimony is prepared, it cannot be admissible as an excited utterance. *State v. Nixon*, 12th Dist. Warren No. CA2011-11-116, 2012-Ohio-1292, ¶ 15. Even where the victim is still visibly upset, the ability to gather coherent thoughts into a written statement that includes additional information, such as the events leading up to a crime, defeats the excited utterance exception. *State v. Scari*, 11th Dist. Portage No. 2002-P-0091, 2003-Ohio-3493, ¶ 63. Therefore, while Lester’s first statements to police upon exciting his garage might be classified as excited utterances his written statement is certainly not.

{¶58} As there are no evidentiary rules that would otherwise allow the prior written statement to be admitted, the defendant’s right to confront his witnesses under the Sixth Amendment was violated, as Lester’s statements were clearly

testimonial in nature. *See Crawford v. Washington*, 541 U.S. 36, 51-52 (2004). It is obvious that the police officer asked for Lester's written statement to assist in a future prosecution, not to assist in securing the scene.

{¶59} The State argues that the error is harmless. Appellee's Br., p. 13-14. The Ohio Supreme Court has found that the impermissible admission of evidence over the constitutional rights of the defendant is harmless if the "remaining evidence, standing alone, constitutes overwhelming proof of defendant's guilt." *State v. Williams*, 6 Ohio St.3d 281 (1983), paragraph six of the syllabus. However, a review of the record, without any of Lester's testimony and without his written statement, does not provide "overwhelming" evidence of guilt. It is undisputed that some sort of encounter happened between Arnold and Lester, but we have no indication as to who was the actual aggressor. We have an excited utterance by Lester that Arnold punched Lester in the head and attempted to choke him. Trial Tr., p. 17. However, the officer testified that Lester had no visible injuries at the time of incident. No witness actually witnessed the event in question, and no evidence was offered that Arnold was the aggressor. This is hardly "overwhelming" evidence of guilt.

{¶60} The overall tenor of this trial demands that the conviction be reversed and the matter remanded for a new trial.

/jlr

FILED IN THE COURT OF APPEALS
SENECA COUNTY

MAR 24 2014

FILED
FOSTORIA
MUNICIPAL COURT
2013 JUN 18 P 3 42

IN THE FOSTORIA MUNICIPAL COURT

State of Ohio
Agency: SFOS

Arnold, Jeffery C
DOB: 02-27-1985
Violation Date: 03/25/2013

Case Number: CRB 1300116
CRIMINAL CASE JOURNAL ENTRY

Vs. 6-19-13

ARRAIGNMENT

- The defendant appeared in open court
 - with attorney Gene Muisel
 - waived counsel in writing following discussion.
- Rights, pleas and penalties pursuant to Crim. R. 10 and 11 were explained and the defendant stated that he/she understood them.
- Defendant acknowledged receipt of the complaint in open Court.
- The defendant heard waived reading of the complaint in open court.
- The defendant requested a continuance to _____, 20____ at _____.
- The defendant has requested court appointed counsel pursuant to Crim. R. 44
 - The defendant testified that he/she is employed as follows: _____
 - The defendant is unemployed.
 - The Court determines that the defendant is entitled to Court appointed counsel and appoints _____ to represent the defendant.
 - The Court finds that based upon the Ohio Public Defender Indigent Eligibility Guidelines that the defendant may will be required to reimburse _____ County for the cost of court appointed counsel.
- The Court finds that the defendant does not qualify for Court appointed Counsel
- Defendant is ordered released upon signing a personal recognizance bond and a waiver of extradition
- An appearance bond in the amount of \$ _____ 10% allowed cash or surety
 - The Court finds that the following factors pursuant to Crim. R. 46 (C) apply:
 - Nature/ circumstances of the crime charged Weight of the evidence Length of residence
 - Lack of employment Confirmation of the defendant's identity Lack of family ties Jurisdiction of residence Lack of financial resources Defendant's character Defendant's mental condition
 - Record of convictions: _____
 - Record of appearances: _____
 - Current status: Probation Community Control Parole/PRC Awaiting trial
 - Other: _____

YOU HAVE BEEN CHARGED WITH:
 2919.25A DOMESTIC VIOLEN

Misdemeanor of the 1st degree
 Minor misdemeanor

MAXIMUM PENALTY:
 \$ 1000 - FINE
 AND/OR 90 day JAIL

MANDATORY MINIMUM PENALTY:

Permanent weapons disability section 2923.13
 No mandatory minimum penalty.

- THE DEFENDANT ENTERED A PLEA OF GUILTY NOT GUILTY NO CONTEST
 - This matter is hereby continued to _____ for _____
 - This matter is to be set for trial within thirty forty-five ninety days of _____
 - Waiver of rights and plea signed discussed in open court.

ADJUDICATION

FOLLOWING INITIAL PLEA CHANGE OF PLEA TRIAL BY JURY TRIAL BY THE COURT, THE DEFENDANT IS HEREBY FOUND GUILTY NOT GUILTY of 2919.25A DOMESTIC VIOLEN

SEE REVERSE SIDE

Case Number: CRB 1300116

HAVING CONSIDERED THE FACTORS SET FORTH IN SECT. 2929.22, THE COURT HEREBY SENTENCES THE DEFENDANT AS FOLLOWS:

- The defendant is sentenced to pay a fine of \$ _____ plus court costs.
- The defendant is ordered to serve 150 days in the Wood County Jail, with _____ days conditionally suspended upon compliance with the terms and conditions of probation. Said period of incarceration is to be served:
 - consecutive
 - concurrent to other misdemeanor jail time.
- The defendant is ordered into the custody of the _____ County Sheriff for the carrying out of said sentence.
- The defendant shall be permitted to report to the _____ County Jail for imposition of sentence on _____, 20__ at _____ upon signing an own recognizance bond and a waiver of extradition
- The defendant is placed on _____
 - non-reporting
 - intensive community control for _____
 - year
 - months.
- The defendant is subject to special terms and conditions of probation which were explained in open court and which are contained in a separate journal entry.
- The defendant is ordered to report to the Probation Department, 213 S. Main St., Fostoria, Ohio
 - immediately to review and sign the special and general terms of probation.
 - upon release from jail.
- The defendant's Ohio operator's license is suspended for _____
- Defendant is approved for restricted driving privileges, the terms of which are contained in a separate order after passing urine screen _____.
- All evidence seized in this case shall be surrendered to the arresting agency for destruction or official use unless held as evidence in another case.
- The defendant is placed under a permanent weapons disability pursuant to Sect. 2923.13 of the Ohio Revised Code.
- Case dismissed upon the motion of the City Prosecutor due to plea in companion Case No. _____
- Defendant is not eligible for early release based upon participation in any program offered by the _____ County Sheriff's Office.

In addition, the Court ~~orders~~ finds based upon the Court's findings made in open court, the Court finds that the state has proven the defendant's guilt beyond a reasonable doubt.

Revised 01/11
 FILED
 FOSTORIA
 MUNICIPAL COURT
 JUN 18 2013

Judge Mark E. Repp

[Handwritten Signature]

JUN 18 2013 3:15

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Articles in addition to, and amendments of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth article of the original Constitution.

AMENDMENT I

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

(Effective 1791)

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

(Effective 1791)

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

(Effective 1791)

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(Effective 1791)

AMENDMENT V

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

(Effective 1791)

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(Effective 1791)

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

(Effective 1791)

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(Effective 1791)

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

(Effective 1791)

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

(Effective 1791)

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

(Effective 1798)

AMENDMENT XII

The Electors shall meet in their respective states and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives; open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the

President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

(Effective 1804)

AMENDMENT XIII

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

(Effective 1865)

AMENDMENT XIV

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

Ohio Constitution

Due process, OConst art I, § 16

Equal protection, OConst art I, § 2

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

Ohio Constitution

Apportionment, OConst art XI, §§ 1, 2, 3

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the

United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Ohio Constitution

Qualification for office, OConst art II, § 5

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

Ohio Constitution

Public debt, OConst art VIII, §§ 1, 3

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

(Effective 1868)

AMENDMENT XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

(Effective 1870)

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

(Effective 1913)

AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

(Effective 1913)

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 (A)(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 (A)(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 (A)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the third degree.

(6) If division (A)(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 (A)(6)(b) or (c) of this section, the court shall impose a mandatory prison 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 (A)(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 [2919.25.1] 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 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.

HISTORY: 137 v H 835 (Eff 3-27-79); 138 v H 920 (Eff 4-9-81); 140 v H 587 (Eff 9-25-84); 142 v S 6 (Eff 6-10-87); 142 v H 172 (Eff 3-17-89); 143 v S 3 (Eff 4-11-91); 144 v H 536 (Eff 11-5-92); 145 v H 335 (Eff 12-9-94); 146 v S 2 (Eff 7-1-96); 147 v S 1 (Eff 10-21-97); 147 v H 238 (Eff 11-5-97); 149 v H 327 (Eff 7-8-2002); 149 v H 548. Eff 3-31-2003; 150 v S 50, § 1, eff. 1-8-04; 152 v H 280, § 1, eff. 4-7-09.

§ 2919.25 Domestic violence.

Effective June 17, 2010.

(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 division (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 [2911.21.1], 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 (A)(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 (A)(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 (A)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the third degree.

(6) If division (A)(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 (A)(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 (A)(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 [2919.25.1] 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

(3) Division (A) of this section does not create a right in a person to appear before the court for the setting of bail or prohibit a court from requiring any person charged with an offense of violence who is not described in that division from appearing before the court for the setting of bail.

(E) As used in this section:

(1) "Controlled substance" has the same meaning as in section 3719.01 of the Revised Code.

(2) "Dangerous ordnance" and "deadly weapon" have the same meanings as in section 2923.11 of the Revised Code.

HISTORY: 141 v H 475 (EFF 3-7-86); 143 v S 3 (EFF 4-11-91); 144 v H 536 (EFF 11-5-92); 146 v S 2, EFF 7-1-96; 150 v S 50, § 1, eff. 1-8-04; 151 v H 29, § 1, eff. 8-26-05.

The provisions of § 3 of 151 v H 29 read as follows:

SECTION 3. The General Assembly acknowledges the Supreme Court's authority to prescribe rules governing practice and procedure in the courts of this state, as provided by Section 5 of Article IV of the Ohio Constitution. Recognizing the dangers posed to victims of domestic violence and other crimes of violence when the alleged perpetrators are not physically restrained, even though they may be under bond or subject to orders of protection, the General Assembly respectfully urges the Supreme Court to amend the existing Rules of Civil and Criminal Procedure, or to adopt new rules, to acknowledge the exigency of, give priority to, and otherwise encourage the speedy resolution of cases involving domestic violence.

The effective date is set by section 6 of SB 2.

§ 2919.26 Motion for temporary protection order; form.

(A)(1) Upon the filing of a complaint that alleges a violation of section 2909.06, 2909.07, 2911.12, or 2911.211 [2911.21.1] of the Revised Code if the alleged victim of the violation was a family or household member at the time of the violation, a violation of a municipal ordinance that is substantially similar to any of those sections if the alleged victim of the violation was a family or household member at the time of the violation, any offense of violence if the alleged victim of the offense was a family or household member at the time of the commission of the offense, or any sexually oriented offense if the alleged victim of the offense was a family or household member at the time of the commission of the offense, the complainant, the alleged victim, or a family or household member of an alleged victim may file, or, if in an emergency the alleged victim is unable to file, a person who made an arrest for the alleged violation or offense under section 2935.03 of the Revised Code may file on behalf of the alleged victim, a motion that requests the issuance of a temporary protection order as a pretrial condition of release of the alleged offender, in addition to any bail set under Criminal Rule 46. The motion shall be filed with the clerk of the court that has jurisdiction of the case at any time after the filing of the complaint.

(2) For purposes of section 2930.09 of the Revised Code, all stages of a proceeding arising out of a complaint alleging the commission of a violation, offense of violence, or sexually oriented offense described in division (A)(1) of this section, including all proceedings on a motion for a temporary protection order, are critical stages of the case, and a victim may be accompanied by a victim advocate or another person to provide support to the victim as provided in that section.

(B) The motion shall be prepared on a form that is provided by the clerk of the court, which form shall be substantially as follows:

"MOTION FOR TEMPORARY PROTECTION ORDER

..... Court
Name and address of court

State of Ohio

v.

No.

Name of Defendant

(name of person), moves the court to issue a temporary protection order containing terms designed to ensure the safety and protection of the complainant, alleged victim, and other family or household members, in relation to the named defendant, pursuant to its authority to issue such an order under section 2919.26 of the Revised Code.

A complaint, a copy of which has been attached to this motion, has been filed in this court charging the named defendant with (name of the specified violation, the offense of violence, or sexually oriented offense charged) in circumstances in which the victim was a family or household member in violation of (section of the Revised Code designating the specified violation, offense of violence, or sexually oriented offense charged), or charging the named defendant with a violation of a municipal ordinance that is substantially similar to (section of the Revised Code designating the specified violation, offense of violence, or sexually oriented offense charged) involving a family or household member.

I understand that I must appear before the court, at a time set by the court within twenty-four hours after the filing of this motion, for a hearing on the motion or that, if I am unable to appear because of hospitalization or a medical condition resulting from the offense alleged in the complaint, a person who can provide information about my need for a temporary protection order must appear before the court in lieu of my appearing in court. I understand that any temporary protection order granted pursuant to this motion is a pretrial condition of release and is effective only until the disposition of the criminal proceeding arising out of the attached complaint, or the issuance of a civil protection order or the approval of a consent agreement, arising out of the same activities as those that were the basis of the complaint, under section 3113.31 of the Revised Code.

Signature of person

(or signature of the arresting officer who filed the motion on behalf of the alleged victim)

Address of person (or office address of the arresting officer who filed the motion on behalf of the alleged victim)"

(C)(1) As soon as possible after the filing of a motion that requests the issuance of a temporary protection order, but not later than twenty-four hours after the filing of the motion, the court shall conduct a hearing to determine whether to issue the order. The person who requested the order shall appear before the court and provide the court with the information that it requests concerning the basis of the motion. If the person who requested the order is unable to appear and if the court finds that the failure to appear is because of the person's hospitalization or medical condition resulting from the offense alleged in the complaint, another person who is able to provide the court with the information it requests may appear in lieu of the person who requested the order. If the court finds that the safety and protection of the complainant, alleged victim, or

CERTIFICATE OF SERVICE

I, Gene P. Murray, do hereby certify that a copy of the foregoing Appendix to Merit Brief of Appellant Jeffery C. Arnold was sent via Regular First Class U.S. Mail, on this 27th day of October, 2014, to counsel for Appellee, State of Ohio, Timothy J. Hoover, Law Director of the City of Fostoria, 125 S. Main Street, Suite 201, Fostoria, OH 44830.


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