

**IN THE COURT OF APPEALS OF MERCER COUNTY, OHIO
THIRD APPELLATE DISTRICT**

State of Ohio,)	Court of Appeals Case No.:
)	10-19-15
Plaintiff/Appellee)	Trial Court No.: CRB-16-00943
)	
v.)	Regular Calendar
)	
)	ORAL ARGUMENT REQUESTED
Jeffery Rasawehr,)	
)	
Defendant/Appellant)	

BRIEF OF DEFENDANT-APPELLANT

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Assignments of error

- I. Mr. Rasawehr was denied his rights to a fair trial, before an impartial jury, his right to remain silent, and his right due process under the U.S. and Ohio Constitutions when, over the objection of the defense, the trial judge instructed the jury that Freedom of Speech was an Affirmative Defense which Mr. Rasawehr had to prove by a preponderance of evidence**
- II. As to Count Five the prosecution failed to present sufficient evidence to prove every element of Menacing by Stalking as required by the United States and Ohio Constitutions**
- III. As to Count Six, the prosecution failed to present sufficient evidence to prove every element of Telecommunications Harassment as required by the United States and Ohio Constitutions**
- IV. As applied to the facts of this case, a conviction under the Menacing by Stalking statute violates the United States First Amendment, and Sect. 10, Art I of the Ohio Constitution and Due Process under both Constitutions**
- V. As applied to the facts of this case, a conviction under the Telecommunications Harassment statute violates the United States First Amendment, and Sect. 10, Art I of the Ohio Constitution and Due Process under both Constitutions**

Issues presented for review

1. Does a jury instruction purporting to require Freedom of Speech to be argued as an Affirmative Defense, with the burden on the defendant to prove his Constitutional Rights create a structural error, and if not, may the jury ever be said to have reached a valid finding of guilt beyond a reasonable doubt?
2. Where the sole basis for a Menacing by Stalking charge is a purported “mental distress,” may “mental distress” under the statute encompass a claim from a person already under psychiatric care that the person saw their counselor more often, or had their medication adjusted, and may the citizen be properly charged with “knowingly caus[ing]” “mental distress on those facts?
3. May a telephone message indicating that the party was going to take someone else “down” and suggesting that the recipient “pop some pills” constitute a comment that is, “threatening, intimidating, menacing, coercive, or obscene” sufficient to sustain a Telecommunications Harassment charge?
4. As applied to facts where there is no threat whatsoever, and the defendant is accused of reminding an at-fault driver of a multi-fatality automobile accident and speculating, or even making accusations as to the as to the cause of the accident with a third party, is the Menacing by Stalking statute overbroad in that it captures constitutionally protected speech and/or void for vagueness as it does not clearly define the scope of the statute?
5. As applied to facts where there is no threat and the defendant is accused of leaving a message that the recipient should “go and pop some pills” and that the defendant was going to take “out” a political figure is the Telecommunications statute overbroad in that it captures constitutionally protected speech and/or void for vagueness?

Statement of the facts

This is a unique case. Appellant, Jeffery Rasawehr is an independent journalist of sorts, and part of the accusations leveled against him involve articles written by the Mr. Rasawehr in the Lima newspaper. Tr. (prosecution opening) at 13. There is no doubt that Mr. Rasawehr has been, and continues to be, highly critical of the government in Mercer County, and especially the sitting Sheriff. Mr. Rasawehr has also been heavily critical of his own family, who are major landholders in Mercer County through the Bryson Trust. *Id.* at. 11. The Bryson Trust is now, as a matter of public record, the defendant in a lawsuit filed by the City of Celina.

For the sake of brevity in an appeal of a misdemeanor case which was in pre-trial litigation for nearly three years (from 10/25/2016-05/24/2019), Mr. Rasawehr acknowledges that he engaged in significant speech that might be described as “vitriol” and even some which might be, if untrue, defamatory. What he did not do is violate any criminal statute. What the prosecution described as “conspiracy theories” and claimed somehow were not enough to meet the purported burden of the *defense* to produce evidence that Mr. Rasawehr had *Freedom of Speech* in regard to his ex-wife, is instead Mr. Rasawehr’s deep held beliefs about corruption in Mercer County, and his families involvement in the same. See, Tr., prosecution

second closing, at 272 (claiming that Rasawehr failed to meet the purported free Speech Affirmative Defense burden to use vitriol against his ex-wife. Mr. Rasawehr is not being quiet about his claims. And yes- he does it with vitriol at times.

Of the 26 separate counts in two complaints alleged against Mr. Rasawehr, he was convicted of one count each of Menacing by Stalking and Telecommunications Harassment with the complainant in each being Mr. Rasawehr's ex-wife. He was acquitted of the 24 other counts alleged against him.

The Menacing by Stalking charge is based upon a phone message and Facebook messages sent to a third party, Mr. Rasawehr's Ex-Wife's Church focused upon a car accident Rasawehr's Ex-Wife was involved in in 1995. As Mr. Rasawehr's Ex-Wife admitted under oath, she hit two road workers on an ordinary day on her way to school, and killed them both. The Ex-Wife admitted to there being civil liability in the accident, but there were no criminal charges. Tr. at 42-43.

Mr. Rasawehr is alleged to have left a message on his Ex-Wife's answering machine stating, "what happened 21 years ago, you murdered those two men." Additionally, it is claimed that Mr. Rasawehr made a facebook post on his Ex-Wife's Churches facebook page, that was immediately taken down which contained:

It says, Ask xxxxxxxxx how many pills she took the morning she ran over and killed Mr. Long and Mr. Joseph. It was covered up by Mercer County officials. That morning, she popped pills and never checked for how loaded she was on pharmaceutical drugs.

Tr. at 47.

A second post read:

Next time you are sitting in church with xxxxxxxxxxxx, ask her how many pills she had in her system when she ran over and killed the Joseph and Long. Coverup of murder is okay in Mercy County, if you sit in church.

Tr. at 50.

Mr. Rasawehr's Ex-Wife testified to having been in in-patient psychiatric hospitals multiple times. Tr. at 70. She testified that she has had issues with depression and anxiety for over 30 years. Tr. at 70. She has been on medications throughout. Tr. at 70. She did not testify to being incapacitated, nor did she testify that the alleged pattern of conduct *caused* a mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, instead she testified that she went to counseling more, and her medication changed. Tr. at 70-71.

Though she initially claimed that her moving to a cul de sac was for the purpose of security, Mr. Rasawehr's Ex-Wife admitted on cross that she moved to the location soon after the divorce, and the move was not related to the present charges. Tr. at 74. She admitted that the divorce was markedly bitter, and that Mr. Rasawehr and her had serious arguments before, and that the worst was years earlier and did not result in criminal charges. Tr. at 76.

She admitted that there were never any threats of physical violence. Tr. at 79. She admitted talking with Mr. Rasawehr about the children, and that it was not unusual or improper for him to be concerned when he did not know where the children when he called to pick them up for visitation. Tr. at 83. A number of text messages were discussed, unrelated to the charge for which Mr. Rasawehr was convicted, and she admitted that she could easily block him from her cell phone, had done so in the past, but did not block him. Tr. at 85-86.

Mr. Rasawehr's Ex-Wife was not asked and did not deny the allegation that she was O.V. I. at the time of the fatal accident in 1995. Jeffery Rasawehr is, as is well known, a man of means- no civil action for defamation was filed against him.

The above is certainly "vitriol," but it is not a threat, and any "mental distress" that could be said to have arisen from it would have come from the weight of conscience regarding the at-fault death of two men, not a facebook post to a third party. Mr. Rasawehr did not cause that mental distress. He did what Ex-Spouses sometimes do to one another, especially in vicious divorces. It is ugly, perhaps immature, and even vulgar, but it is with the intention to hurt, or get even, not to cause fear of physical harm or to incapacitate.

The second charge of 26 that the jury found guilt on is a charge of Telecommunications Harassment, again with Mr. Rasawehr's Ex-Wife as the complainant. The charge is based upon a telephone message on his Ex-Wife's machine in which Mr. Rasawehr is alleged to have said, "he was taking Jeff Grey out" and that

she “should go pop some pills.” Complaint, Count 6. It is unclear how these statements constitute a violation of O.R.C. 2917.21(A)(6) which requires a statement that is “threatening, intimidating, menacing, coercive, or obscene. . .”.

At the end of the day, after nearly three years of litigation and 26 separate charges, none of them meritorious; Mr. Rasawehr was convicted of two counts of “vitriol” against his Ex-Wife. And, according to the trial judge’s instructions to the jury, Mr. Rasawehr had to prove he had Freedom of Speech. Tr. at 271-72, 297.

Statement of the case

This case started on 10/25/2016 with a complaint comprising 26 separate misdemeanor counts, filed under two case numbers that were consolidated for trial, for which *not a single police report was produced*. Tr. at 257. The case eventually would have three trial judges assigned to it over a nearly three-year period before the case was finally tried to a jury in May of 2019. Of the 26 misdemeanor counts against Mr. Rasawehr- every last one of them related to words that he spoke or wrote-the court or the jury acquitted on 24 counts. After the jury was instructed that Mr. Rasawehr had a burden to prove his constitutional right to Free Speech, the jury convicted on one count of Menacing by Stalking and one count of Telecommunications harassment. This appeal followed.

Argument

Jeffery Rasawehr does not keep his opinions to himself, nor is he gentle in his commentary. There can be little doubt that the behavior alleged here caused his Ex-Wife's feelings to be hurt, and no doubt caused her humiliation and anger. Causing annoyance, hurt feelings, and even humiliation and anger is not illegal, and cannot be illegal under the U.S. and Ohio Constitutions.

The criminal law, particularly those laws, such as the Menacing by Stalking Statute and the Telecommunications Harassment statute which directly impact free speech, free interaction, and association, must be strictly construed against the prosecution and in favor of the accused. O.R.C. 2901.04. If such statutes are not so construed, society risks the ugly spectacle of the criminal law being used as a weapon in bitter divorces and their aftermath. The Constitutions of Ohio and the United States do not allow this, and no one is required to prove that they have Constitutional rights, ever.

Mr. Rasawehr respectfully asks this Court to consider the following assignments of error and grant him relief from these wrongful convictions.

- I. Mr. Rasawehr was denied his rights to a fair trial, before an impartial jury, his right to remain silent, and his right due process under the U.S. and Ohio Constitutions when, over the objection of the defense, the trial judge instructed the jury that Freedom of Speech was an Affirmative Defense which Mr. Rasawehr had to prove by a preponderance of evidence

As discussed above, the trial court in this case, over the objection of the defense who argued that everyone has the Constitutional right to Freedom of Speech, instructed the Jury that Mr. Rasawehr needed to prove he had Freedom of Speech by a Preponderance of the Evidence as an Affirmative Defense. This was utterly improper and does not appear to have a precedent. The instructions as read to the Jury is unclear as to which case it refers, but the prosecutor argued that it applied to the charges involving Mr. Rasawehr's Ex-Wife in his closing argument. Tr. at 271-72. It appears that this issue is one of first impression.

Even if prosecutor had not directly infected all charges with the insurmountable error, the error is irreconcilable with a fair trial, constitutes a Structural Error under Due Process, denied Mr. Rasawehr his Sixth Amendment right to have a fair and impartial jury determine every element of the charges against him, denied Mr. Rasawehr his Fifth Amendment right to remain silent and to not testify, and relieved the prosecution of its burden of proof.

- a. Freedom of Speech is NOT an Affirmative Defense, the instruction given to the jury that Freedom of Speech was an Affirmative Defense that Mr. Rasawehr had to prove constituted a Structural Error which requires immediate reversal

"Structural errors are "constitutional defects that ""defy analysis by 'harmless error' standards" because they "affect[] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself."'"'"' *State v. Cihonski*, 178 Ohio App.3d 713, 2008-Ohio-5191, 900 N.E.2d 212, ¶ 17 (3d Dist.), quoting *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶ 20.

"[I]n order to find structural error, a court must (1) determine that a constitutional error has occurred, (2) conduct analysis under the presumption that the error is not structural, and (3) determine that the constitutional error has permeated the entire trial, rendering it unable to serve its function as a "vehicle" for determination of the defendant's guilt or innocence." *Id.* at ¶ 19. When this occurs, a reversal is mandated, with no further analysis required. *Id.*; *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Succinctly, a structural error occurs where, "structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards." *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

Here the error is so immense that even if it had not been objected by counsel at trial, Mr. Rasawehr could have first raised the issue on appeal. See, *Cihonski*, 178 Ohio App.3d at 17. This error was properly objected to at trial, and cannot be construed as a harmless error beyond a reasonable doubt, however there is no

question that the jury instruction in this case violated Mr. Rasawehr's rights to a fair trial, a fair and impartial jury, and his right to remain silent.

In fact, the instruction did more than that, at the invitation of the prosecution, it compromised the very fabric of the trial structure and turned the Constitution on its head in such a way that it must be condemned in the harshest possible terms. This error could be decided in Mr. Rasawehr's favor under harmless error analysis, but since it "put[s] into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence" a finding of structural error is more appropriate. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶ 23

- b. Because of this error, there is no way to know if the jury convicted Mr. Rasawehr of the elements of the crime charged, or of failing to meet his burden of production as to the purported Affirmative Defense of the United States and Ohio Constitutions: a violation of his right to a Jury Trial under the United States and Ohio Constitutions, and as such the convictions here are invalid and must be reversed as the jury cannot be said to have made a finding of guilt beyond a reasonable doubt on all counts

As the late Justice Scalia found in *Sullivan*, the right to a trial before a jury "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is

guilty beyond a reasonable doubt." *Id.* at 278. "[T]o hypothesizes a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury-trial guarantee." *Id.* at 279.

In *Sullivan*, the issue was an erroneous instruction as to the standard for reasonable doubt, but the same analysis must apply where a Constitutional Right itself is put forth as a question of fact that the defendant must prove. There can be no fair trial, and no certainty as to the jury's reaching the requisite reasonable doubt finding.

c. The trial courts instruction to the jury, over objection, that Mr. Rasawehr bore a burden to prove beyond a reasonable doubt that that he had Freedom of Speech is not a harmless error, and the convictions must be reversed

"Crim.R. 52(A) sets forth two requirements that must be satisfied before a reviewing court may correct an alleged error. First, the reviewing court must determine whether there was an "error"--i.e., a "deviation from a legal rule." . . . Second, the reviewing court must engage in a specific analysis of the trial court record--a so-called "harmless error" inquiry--to determine whether the error "affected substantial rights" of the criminal defendant." *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 7, quoting *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S. Ct. 1770, 123 L. Ed. 2d 508.

"This language has been interpreted to "mean[] that the error must have been *prejudicial*: It must have affected the outcome of the [trial] court proceedings." *Id.* Constitutional trial errors must be harmless beyond a reasonable doubt, or reversal is required. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

Here, as argued above, criminal defendants have no obligation to prove their constitutional rights, and the error absolutely effected Mr. Rasawehr's substantive rights. The error cannot be seen as being harmless beyond a reasonable doubt as the prosecution referenced the purported affirmative defense in relation to the charges that the jury returned convictions upon. The convictions cannot stand.

II. As to Count Five the prosecution failed to present sufficient evidence to prove every element of Menacing by Stalking as required by the United States and Ohio Constitutions

"[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In Ohio, a court reviewing a conviction for the sufficiency of the evidence views the evidence in the light most favorable to the State, and then makes a determination as to whether or not a reasonable juror could find that all of the elements of a charged

offense were proven beyond a reasonable doubt. *State v. Feller*, 2012-Ohio-6016, 985 N.E.2d 210, ¶ 20 (1st Dist.).

The conviction against Mr. Rasawehr cannot lawfully stand and must be reversed with respect to Count Five (Menacing by Stalking) because the State did not establish an essential element of the offense. The prosecution failed to meet the burden of proof on the necessary element of “mental distress.” It was not alleged that Mr. Rasawehr made any threats of violence or harm, or for that matter, any threats at all.

The allegation was that he caused mental distress. Yet, the statute provides a very specific definition of “mental distress” – which is required to protect the statute from facial First Amendment /vagueness / overbreadth challenges.

Revised Code Section 2903.211(D)(@) provides in full:

“(D) As used in this section:

2. “Mental distress means any of the following:
 - a. Any mental illness or condition that involves some substantial incapacity;
 - b. Any mental illness that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

There was no evidence presented of a mental illness suffered by the ex-wife, triggered solely by Mr. Rasawehr’s behavior. Instead, the prosecution claims that Mr. Rasawehr exacerbated an already existing mental illness for which the

complainant had been under in-patient psychiatric care on multiple occasions. Due to Mr. Rasawehr's actions, his ex-wife claims to have needed to see her counselor more often, and that her medication changed. Tr. at 71.

Not only was no evidence presented of a "mental illness or condition" suffered by the ex-wife, triggered solely by Mr. Rasawehr's conduct, there was no evidence that such condition would be one that would normally require psychiatric or psychological treatment, or any other mental health services. The statute requires causation, and that the defendant act knowingly to affect that causation. In order to properly charge that the defendant acted "knowingly" in causing mental incapacity, to protect the statute from unconstitutionality, there must be an objective means of determining that the conduct would likely cause such a reaction. See, *State v. Benner*, 96 Ohio App.3d 327, 330, 644 N.E.2d 1130 (1st Dist.1994).

Here, Mr. Rasawehr is talking about a real life event where his Ex-Wife was, in fact, civilly culpable in killing two people, the only reason that his discussion of that event could objectively be thought to cause mental distress in the meaning of the statute is because of the subject matter. To impose criminal liability for commentary about a wrongful killing because it upsets the killer is an unreasonable construction of the statute and contrary to good public policy. If Mr. Rasawehr's Ex-Wife wishes to claim defamation, she has a civil option: a criminal charge was never proper here, and, for her sake, should never have been brought.

For these reasons, the conviction in Count Five must be reversed on sufficiency of the evidence grounds.

III. As to Count Six, the prosecution failed to present sufficient evidence to prove every element of Telecommunications Harassment as required by the United States and Ohio Constitutions

Under the same standard as Assignment of Error II, Mr. Rasawehr claims that the prosecution failed to present sufficient evidence to prove every element of the charged offense. Specifically, Mr. Rasawehr was convicted of a violation of O.R.C. 2917.21(A)(6), which requires the defendant to “[k]nowingly makes any comment, request, suggestion, or proposal to the recipient of the telecommunication that is threatening, intimidating, menacing, coercive, or obscene. . .”. *Id.*

The prosecution produced no evidence in connection with this charge that the uttered a threatening, intimidating, menacing, coercive or obsecene. Instead the prosecutor played a tape-recorded message that purported to be from Mr. Rasawehr where he says, “he was taking Jeff Grey out” and that she “should go pop some pills.” That does not meet the requirements of O.R.C. 2917.21(A)(6) as charged. Because of this, the prosecution failed to meet its burden, and Mr. Rasawehr must be discharged.

IV. As applied to the facts of this case, a conviction under the Menacing by Stalking statute violates the United States First Amendment, and Sect. 10, Art I of the Ohio Constitution and Due Process under both Constitutions as being overbroad and void for vagueness

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). “A clear and precise enactment may nevertheless be “overbroad” if in its reach it prohibits constitutionally protected conduct.” *Id.* at 114. “An “as applied” challenge asserts that a statute is unconstitutional as applied to the challenger’s particular conduct” *City of Columbus v. Meyer*, 152 Ohio App.3d 46, 2003-Ohio-1270, 786 N.E.2d 521, ¶ 31 (10th Dist.).

In this case, unlike the facial challenge in *Benner* where the court found that the statute was not facially void for vagueness if the offender “knowingly” caused a fear of physical harm or mental distress as strictly defined by the statute, Mr. Rasawehr asks the court to evaluate the statute under the interpretation applied to his conduct. *State v. Benner*, 96 Ohio App.3d 327, 330, 644 N.E.2d 1130 (1st Dist.1994).

In the void for vagueness context this means considering if the complained of “mental distress” of an admittedly *already* mentally ill person seeking additional counseling, or claiming a medication adjustment as a result of

being privately reminded, and publicly shamed over an admitted at fault killing can put a reasonable person on notice that they were *knowingly* causing “mental distress”. *Grayned*, 408 U.S. at 113. It cannot, as the mental distress already existed, and to permit a conviction based upon a purely subjective impact would be improper.

Such a standard would be tantamount to the law casting an invisible shield about the mentally ill, and in so doing create a criminal corollary to the “eggshell skull plaintiff” does not presently apply to criminal conduct. Such a formulation would negate the “knowingly” element which has protected the statute from a facial showing of voidness. *Benner*, 96 Ohio App.3d at 329. No one could ever know what speech would cause a mentally ill person distress, but the acts at bar here were not threatening, and would not have caused an ordinary person to become incapacitated or seek psychiatric help as the statute requires.

Similarly, as applied, the Menacing by Stalking statute is overbroad because it has encompassed protected speech under the First Amendment. Mr. Rasawehr made no threats, and his commentary was confined to an acknowledged tragic event. Discussing it, even mean-spiritedly, with others cannot be a crime. Claiming a cause, here OVI, might be civil defamation if untrue, but defamation cannot become a crime. The case simply fails.

V. As applied to the facts of this case, a conviction under the Telecommunications Harassment statute violates the United States First Amendment, and Sect. 10, Art I of the Ohio Constitution and Due Process under both Constitutions

Based upon the same standard of review as in Assignment of Error IV above, Mr. Raswehr respectfully respects that this Court find that his conviction for a violation of the Telecommunications Harassment statute is unconstitutional as being void for vagueness or overbreadth under the First Amendment as applied here.

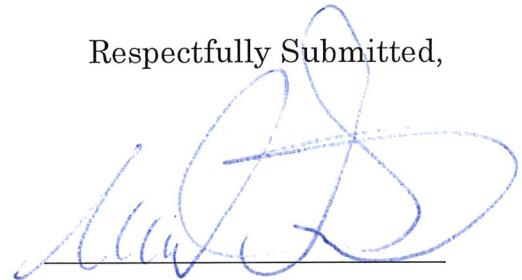
Mr. Raswehr's alleged comment, as noted in Assignment of Error III does not meet the terms of the statute as strictly construed against the state. Furthermore, if the statute is construed in such a way that his comment was, "threatening, intimidating, menacing, coercive, or obscene. . ." as required by the statute, then the limiting language in the statute would become meaningless and the so would fail to provide the required notice under the void for vagueness doctrine. *See, O.R.C. 2917.21(A)(6).*

In the context used here, the statute becomes overbroad as it would envelope broad swaths of protected speech if criminal liability was not contained to speech which is "threatening, intimidating, menacing, coercive, or obscene. . ." . See, *State v. Kronenberg*, 8th Dist. Cuyahoga No. 101403, 2015-Ohio-1020, ¶ 38, a facial challenge to the statute.

Conclusion

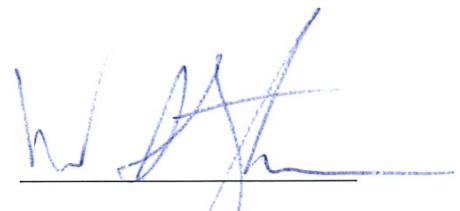
For the foregoing reasons, Mr. Rasawehr respectfully requests that this Court overturn his convictions, enter a judgement of acquittal, and or grant whatever other relief that the Court finds just.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Michael H. Stahl".

Michael H. Stahl, 0097049

for Appellant

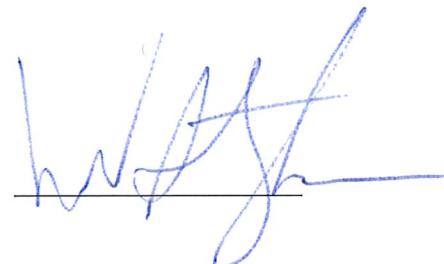
A handwritten signature in blue ink, appearing to read "William V. Stephenson".

William V. Stephenson, 0037839

for Appellant

Certification

This is to certify that a copy of this brief was served via regular mail upon
Matthew Fox, Mercer County Prosecutor, 119 North Walnut St
Celina, OH 45822.

A handwritten signature in blue ink, appearing to read "WV Stephenson".

William V. Stephenson, 0037839

Counsel for Appellant

IN THE CELINA MUNICIPAL COURT	
MERCER COUNTY, OHIO	
CELINA MUNICIPAL COURT	
STATE OF OHIO	JUL 12 2019*
v.	Sara Duggeman Clerk
JEFFREY E. RASAWEHR	CASE NO. 16CRB00943
* JUDGMENT ENTRY ON SENTENCING	

On June 13, 2019, this matter came on for hearing on sentencing pursuant to R.C. 2929.22. The offender had previously been found guilty by jury for the offenses for which he is sentenced as set forth below in this entry. Prosecuting Attorney Matthew K. Fox and Assistant Prosecuting Amy B. Ikerd appeared on behalf of the State of Ohio. The offender appeared with his attorney, Dennis E. Sawan.

The court permitted the offender and offender's counsel to offer evidence and make any statements either desired prior to the court pronounced sentence. The offender's counsel made a statement on behalf of offender. Offender did not make a statement on his own behalf. The victim Pam Rasawehr presented a statement to the Court. The Prosecuting Attorney made a statement on behalf of the State of Ohio

Having considered the purposes of sentencing in R.C. 2929.21, all relevant statutes, the statements made in open court, and any evidence presented, the court pronounced sentence as follows:

For Count 5, Ohio Revised Code §2903.211(A)(1);(B)(1), Menacing by Stalking, a Misdemeanor of the First (M-1) degree, and

For Count 6, Ohio Revised Code §2917.21(A)(6);(C)(2), Telecommunications Harassment, a Misdemeanor of the First (M-1) degree

the Court, pursuant to R.C. 2929.25, placed the Defendant under Community Controlled Sanctions for a period of five (5) years. Conditions of Community Controlled Sanctions specifically include the following:

Defendant is to violate no laws, and

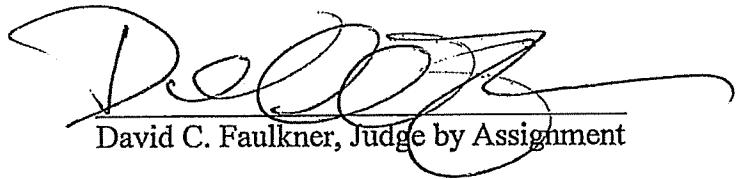
Defendant is to have no contact, direct or indirect with Pam Rasawehr.

The Court imposed a fine on each count for \$500.00 for a total fine of \$1,000.00, and Defendant shall pay said fine within 45 days

If the Defendant fails to comply with the terms of Community Controlled Sanctions, the Defendant is hereby sentenced to a term of incarceration in the Mercer County Jail of ninety (90) days for each count, concurrent.

Costs to Defendant

IT IS SO ORDERED



David C. Faulkner, Judge by Assignment

Copies sent to: Det Chad Fortkamp
Attorney Dennis E. Sawan
Pros Atty Matthew K. Fox
Atty Yamin
Judge David C Faulkner

STATE OF OHIO

v.

JEFFREY E. RASAWEHR

JUL 12 2019*

Carol Bruggeman
Clerk

CASE NO. 16CRB00942
16CRB00943

JUDGMENT ENTRY ON
JURY TRIAL

This matter came before the Court upon the verdict of the jury returned on May 24, 2019 after the jury concluded deliberating in this matter this same day.

In Case No. 16CRB00942, the jury found the defendant not guilty of the following offenses:

Counts 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, and 12, Ohio Revised Code §2921.31(A);(B), Obstructing Official Business, Misdemeanors of the Second (M-2) degree;

In Case No 16CRB00943 The jury found the defendant guilty of the following offenses:

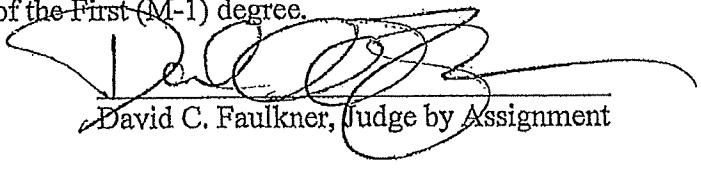
Count 5, Ohio Revised Code §2903.211(A)(1);(B)(1), Menacing by Stalking, a Misdemeanor of the First (M-1) degree, and

Count 6, Ohio Revised Code §2917.21(A)(6);(C)(2), Telecommunications Harassment, a Misdemeanor of the First (M-1) degree.

The jury found the defendant not guilty of the following offenses:

Count 7 Ohio Revised Code §2917.21(A)(6);(C)(2), Telecommunications Harassment, a Misdemeanor of the First (M-1) degree, and

Count 10 Ohio Revised Code §2917.21(A)(6);(C)(2), Telecommunications Harassment, a Misdemeanor of the First (M-1) degree.


David C. Faulkner, Judge by Assignment

Copies sent to: Det Chad Fortkamp

Attorney Dennis E. Sawan

Pros Atty Matthew K. Fox

Attorney Yamin

Judge David C Faulkner

2901.04 Rules of construction for statutes and rules of procedure.

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

Effective Date: 03-23-2000; 09-23-2004.

2917.21 Telecommunications harassment.

(A) No person shall knowingly make or cause to be made a telecommunication, or knowingly permit a telecommunication to be made from a telecommunications device under the person's control, to another, if the caller does any of the following:

- (1) Makes the telecommunication with purpose to harass, intimidate, or abuse any person at the premises to which the telecommunication is made, whether or not actual communication takes place between the caller and a recipient;
- (2) Describes, suggests, requests, or proposes that the caller, the recipient of the telecommunication, or any other person engage in sexual activity, and the recipient or another person at the premises to which the telecommunication is made has requested, in a previous telecommunication or in the immediate telecommunication, that the caller not make a telecommunication to the recipient or to the premises to which the telecommunication is made;
- (3) During the telecommunication, violates section 2903.21 of the Revised Code;
- (4) Knowingly states to the recipient of the telecommunication that the caller intends to cause damage to or destroy public or private property, and the recipient, any member of the recipient's family, or any other person who resides at the premises to which the telecommunication is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged;
- (5) Knowingly makes the telecommunication to the recipient of the telecommunication, to another person at the premises to which the telecommunication is made, or to those premises, and the recipient or another person at those premises previously has told the caller not to make a telecommunication to those premises or to any persons at those premises;
- (6) Knowingly makes any comment, request, suggestion, or proposal to the recipient of the telecommunication that is threatening, intimidating, menacing, coercive, or obscene with the intent to abuse, threaten, or harass the recipient;
- (7) Without a lawful business purpose, knowingly interrupts the telecommunication service of any person;
- (8) Without a lawful business purpose, knowingly transmits to any person, regardless of whether the telecommunication is heard in its entirety, any file, document, or other communication that prevents that person from using the person's telephone service or electronic communication device;
- (9) Knowingly makes any false statement concerning the death, injury, illness, disfigurement, reputation, indecent conduct, or criminal conduct of the recipient of the telecommunication or family or household member of the recipient with purpose to abuse, threaten, intimidate, or harass the recipient;
- (10) Knowingly incites another person through a telecommunication or other means to harass or participate in the harassment of a person;
- (11) Knowingly alarms the recipient by making a telecommunication without a lawful purpose at an hour or hours known to be inconvenient to the recipient and in an offensive or repetitive manner.

(B)

- (1) No person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person's control, with purpose to abuse, threaten, or harass another person.
- (2) No person shall knowingly post a text or audio statement or an image on an internet web site or web page for the purpose of abusing, threatening, or harassing another person.

(C)

(1) Whoever violates this section is guilty of telecommunications harassment.

(2) A violation of division (A)(1), (2), (3), (5), (6), (7), (8), (9), (10), or (11) or (B) of this section is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense.

(3) Except as otherwise provided in division (C)(3) of this section, a violation of division (A)(4) of this section is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense. If a violation of division (A)(4) of this section results in economic harm of one thousand dollars or more but less than seven thousand five hundred dollars, telecommunications harassment is a felony of the fifth degree. If a violation of division (A)(4) of this section results in economic harm of seven thousand five hundred dollars or more but less than one hundred fifty thousand dollars, telecommunications harassment is a felony of the fourth degree. If a violation of division (A)(4) of this section results in economic harm of one hundred fifty thousand dollars or more, telecommunications harassment is a felony of the third degree.

(D) No cause of action may be asserted in any court of this state against any provider of a telecommunications service, interactive computer service as defined in section 230 of Title 47 of the United States Code, or information service, or against any officer, employee, or agent of a telecommunication service, interactive computer service as defined in section 230 of Title 47 of the United States Code, or information service, for any injury, death, or loss to person or property that allegedly arises out of the provider's, officer's, employee's, or agent's provision of information, facilities, or assistance in accordance with the terms of a court order that is issued in relation to the investigation or prosecution of an alleged violation of this section. A provider of a telecommunications service, interactive computer service as defined in section 230 of Title 47 of the United States Code, or information service, or an officer, employee, or agent of a telecommunications service, interactive computer service as defined in section 230 of Title 47 of the United States Code, or information service, is immune from any civil or criminal liability for injury, death, or loss to person or property that allegedly arises out of the provider's, officer's, employee's, or agent's provision of information, facilities, or assistance in accordance with the terms of a court order that is issued in relation to the investigation or prosecution of an alleged violation of this section.

(E)

(1) This section does not apply to a person solely because the person provided access or connection to or from an electronic method of remotely transferring information not under that person's control, including having provided capabilities that are incidental to providing access or connection to or from the electronic method of remotely transferring the information, and that do not include the creation of the content of the material that is the subject of the access or connection. In addition, any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control shall not be liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any information that the person believes is, or will be sent, in violation of this section.

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

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

(4) A provider or user of an interactive computer service, as defined in section 230 of Title 47 of the United States Code, shall neither be treated as the publisher or speaker of any information provided by another information content provider, as defined in section 230 of Title 47 of the United States Code, nor held civilly or criminally liable for the creation or development of information provided by another information content provider, as defined in section 230 of Title 47 of the United States Code. Nothing in this division shall be construed to protect a person from liability to the extent that the person developed or created any content in violation of this section.

(F) Divisions (A)(5) to (11) and (B)(2) of this section do not apply to a person who, while employed or contracted by a newspaper, magazine, press association, news agency, news wire service, cable channel or cable operator, or radio or television station, is gathering, processing, transmitting, compiling, editing, or disseminating information for the general public within the scope of the person's employment in that capacity or the person's contractual authority in that capacity.

(G) As used in this section:

(1) "Economic harm" means all direct, incidental, and consequential pecuniary harm suffered by a victim as a result of criminal conduct. "Economic harm" includes, but is not limited to, all of the following:

- (a) All wages, salaries, or other compensation lost as a result of the criminal conduct;
- (b) The cost of all wages, salaries, or other compensation paid to employees for time those employees are prevented from working as a result of the criminal conduct;
- (c) The overhead costs incurred for the time that a business is shut down as a result of the criminal conduct;
- (d) The loss of value to tangible or intangible property that was damaged as a result of the criminal conduct.

(2) "Caller" means the person described in division (A) of this section who makes or causes to be made a telecommunication or who permits a telecommunication to be made from a telecommunications device under that person's control.

(3) "Telecommunication" and "telecommunications device" have the same meanings as in section 2913.01 of the Revised Code.

(4) "Sexual activity" has the same meaning as in section 2907.01 of the Revised Code.

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

(a) Any of the following who is residing or has resided with the recipient of the telecommunication against whom the act prohibited in division (A)(9) of this section is committed:

- (i) A spouse, a person living as a spouse, or a former spouse of the recipient;
- (ii) A parent, a foster parent, or a child of the recipient, or another person related by consanguinity or affinity to the recipient;
- (iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the recipient, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the recipient.

(b) The natural parent of any child of whom the recipient of the telecommunication against whom the act prohibited in division (A)(9) of this section is committed is the other natural parent or is the putative other natural parent.

(6) "Person living as a spouse" means a person who is living or has lived with the recipient of the telecommunication against whom the act prohibited in division (A)(9) of this section is committed in a common law marital relationship, who otherwise is cohabiting with the recipient, or who otherwise has cohabited with the recipient within five years prior to the date of the alleged commission of the act in question.

(7) "Cable operator" has the same meaning as in section 1332.21 of the Revised Code.

(H) Nothing in this section prohibits a person from making a telecommunication to a debtor that is in compliance with the "Fair Debt Collection Practices Act," 91 Stat. 874 (1977), 15 U.S.C. 1692, as amended, or the "Telephone Consumer Protection Act," 105 Stat. 2395 (I¹), 47 U.S.C. 227, as amended.

Amended by 131st General Assembly File No. TBD, HB 151, §1, eff. 8/16/2016.

Amended by 129th General Assembly File No. 29, HB 86, §1, eff. 9/30/2011.

Amended by 128th General Assembly File No. 43, SB 162, §1, eff. 9/13/2010.

Effective Date: 03-30-1999 .

Related Legislative Provision: See *129th General Assembly File No. 29, HB 86, §4* .

2903.211 Menacing by stalking.

(A)

(1) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or a family or household member of the other person or cause mental distress to the other person or a family or household member of the other person. In addition to any other basis for the other person's belief that the offender will cause physical harm to the other person or the other person's family or household member or mental distress to the other person or the other person's family or household member, the other person's belief or mental distress may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

(2) No person, through the use of any form of written communication or any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, r-computer system, or telecommunication device shall post a message or use any intentionally written or verbal graphic gesture with purpose to do either of the following:

(a) Violate division (A)(1) of this section:

(b) Urge or incite another to commit a violation of division (A)(1) of this section.

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

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

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

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

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

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

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

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

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

(f) While committing the offense under division (A)(1) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(1) of this section, the offender had a deadly weapon on or about the offender's person or under the offender's control. Division (B)(2)(f) of this section does not apply in determining the penalty for a violation of division (A)(2) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(2) of this section.

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

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

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

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

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

(D) As used in this section:

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

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

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

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

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

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

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

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

(7) "Post a message" means transferring, sending, posting, publishing, disseminating, or otherwise communicating, or attempting to transfer, send, post, publish, disseminate, or otherwise communicate, any

message or information, whether truthful or untruthful, about an individual, and whether done under one's own name, under the name of another, or while impersonating another.

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

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

(10) "Organization" includes an entity that is a governmental employer.

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

(a) Any of the following who is residing or has resided with the person against whom the act prohibited in division (A)(1) of this section is committed:

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

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

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

(b) The natural parent of any child of whom the person against whom the act prohibited in division (A)(1) of this section is committed is the other natural parent or is the putative other natural parent.

(12) "Person living as a spouse" means a person who is living or has lived with the person against whom the act prohibited in division (A)(1) of this section is committed in a common law marital relationship, who otherwise is cohabiting with that person, or who otherwise has cohabited with the person within five years prior to the date of the alleged commission of the act in question.

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

(F)

(1) This section does not apply to a person solely because the person provided access or connection to or from an electronic method of remotely transferring information not under that person's control, including having provided capabilities that are incidental to providing access or connection to or from the electronic method of remotely transferring the information, and that do not include the creation of the content of the material that is the subject of the access or connection. In addition, any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control shall not be liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any information that it believes is, or will be sent, in violation of this section.

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

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

10/8/2019

Lawriter - ORC - 2903.211 Menacing by stalking.

Amended by 130th General Assembly File No. TBD, HB 129, §1, eff. 9/17/2014.

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