[Cite as *State v. Khaliq*, 2016-Ohio-7859.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- OMRAN A. KHALIQ Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 15-CA-64 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Common Pleas Court, Case No. 2014CR00305
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 9, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH W. OSWALT Licking County Prosecutor By: PAULA M. SAWYERS Assistant Prosecuting Attorney 20 S. Second Street, Fourth Floor Newark, Ohio 43055	MICHAEL R. DALSANTO 3 South Park Place, Suite 220 Newark, Ohio 43055

Hoffman, P.J.

{¶1} Defendant-appellant Omran A. Khaliq appeals his conviction and sentence entered by the Licking County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} At all times relevant herein, Appellant and Andrea Jagodzinski were involved in a custody dispute concerning their minor child. During the proceedings, Jagodzinski hired a private investigator relative to Appellant's sale of counterfeit items.

{¶3} Cerise Allen, an agent of Silvania Investigative Services, forwarded the results of her private investigation to the Newark Police Department. As a result, on November 6, 2013, the Newark Police Department executed a search warrant for Appellant's residence for evidence relating to trademark counterfeiting. During the search of Appellant's home, the Newark Police Department seized a small bag containing a white powder later identified as cocaine. The officers also seized numerous items believed to be counterfeit goods.

{¶4} On November 26, 2013, Appellant called the Licking County Sheriff's Office and left a telephone message for Captain David Starling. Captain Starling received the message upon returning to his office. An audio recording of the message was played at trial herein as Exhibit 31. Appellant stated on the message, in pertinent part,[1]

[1] The record does not contain a transcript of the audio message introduced at trial as Exhibit 31. For purposes of this appeal, the Court refers to Appellant's Brief for a reading of the message left by Appellant.

Uh, Mr. Starling, how ya doin' man? This is Ramon, used to be "Smith," it's Omran Khaliq now. Uh don't mind if you call me Ramon, but the Smith thing, that's not me anymore. Uh, I need you to call me back as soon as you can. 740-344-7814 an uh, uh you can contact me on my cell phone, I don't even know the number. 740-644-3622, uh, that's my girlfriend's number and she can give you my number to call me on my cell.

Uh, I need some serious, um, help with uh this Newark Police Department, and uh, I need a number to internal affairs, you know, I'm, I'm just sick and tired of this man, I gotta do this the right way this time, um, I'm fed up man, you know what I'm sayin', and I'm just, I'm just letting you know I'm real fed up and if nobody's gonna do something about um this damn Newark Police Force with their bullshit I'm gonna have to do something my damn self, you know what I'm sayin'?

I got kids, I care about 'em, I love 'em, I love people, I love life, but you know what…before I let mother fuckers destroy my life, some shits gotta happen man, you feel me? I know, people don't understand, you can only keep doin' certain things to certain people man and pressure bursts pipes, you know? I see why mother fuckers grab shit, guns and run up in these motha fuckin' buildings shootin' mother fuckers and shit, I can understand it. I can understand peoples ya know, they just get too fed up and if you ain't strong, ya know what I mean, you can just go out the back door doin' some crazy shit so I understand, ya know, the shit with the kids shootin' kids at school. I can't understand that shit, ya know it's a little different, but grown

> people, I can understand it. They get fed up, ya know, and they gotta take matters into they own hands.
>
> I need some help man. I need some real, serious help. Newark is on some bullshit, they always on some bullshit, you know it, the Sheriff's department knows it, they know how Newark Police are, and I'm sick and tired of it bro. I gotta get some help or somethin's gonna happen man I'm tellin' ya. I'm not goin' out like this, I'm not going to have these mother fuckers disrupting my life when I done made a change ya know what I'm sayin, doin' things better, coaching biddy wrestling, tryin' to get my life together, tryin' to keep my family structured, it's not gonna happen man. I'm done with it. I'm 44 years old…ya know what I mean? So, it either 44…you know what I mean? Magnum, or somebody gonna do somethin' about this man. That's where I'm at with it…44 Magnum.

Appellant's Merit Brief, 12-13.

{¶5} On December 11, 2013, Appellant made another telephone call to the Newark City Law Director's Office. Casey Osborne, the receptionist for the Law Director's Office, answered the phone and Appellant asked to speak with Mike King, the Assistant Law Director. Appellant identified himself to Osborne as "Sergeant Davis." Tr. at 314-315. When Casey Osborne inquired as to the subject matter of the telephone call, Appellant answered, "A case that we have, it's confidential." Id. When transferred to Assistant Law Director King, Appellant announced himself as Omran Khaliq. Osborne could overhear the conversation and Appellant state his true name. Id.

{¶6} As a result, the Licking County Grand Jury indicted Appellant on one count of illegal possession of cocaine, in violation of R.C. 2925.11(A), a felony of the fourth degree; one count of engaging in trademark counterfeiting, in violation of R.C. 2913.34(A)(4), a misdemeanor of the first degree; one count of attempting to influence, intimidate or hinder a public servant in the discharge of his or her duty, in violation of R.C. 2921.03, a felony of the third degree; and one count of impersonating a peace officer, in violation of R.C. 2921.51(B), a misdemeanor of the fourth degree.

{¶7} Following a jury trial, Appellant was found not guilty of possession of cocaine, but guilty as to the remaining counts. On August 3, 2015, the trial court sentenced Appellant to eighteen months in prison.

{¶8} Appellant appeals, assigning as error:

{¶9} "I. THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE THAT THE APPELLANT'S THREAT WAS AN 'UNLAWFUL THREAT' IN VIOLATION OF R.C. §2921.03. R. AT 175.

{¶10} "II. THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE JURY ON THE *CRESS* DEFINITION OF 'UNLAWFUL THREAT.' R. AT 175.

{¶11} "III. THE JURY'S VERDICT CONVICTING THE APPELLANT OF INTIMIDATION WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE BECAUSE (A) TAKEN AS A WHOLE, THE APPELLANT'S WORDS DID NOT CONSTITUTE A THREAT AT ALL; (B) THE APPELLANT'S WORDS WERE TOO UNEQUIVOCAL, UNCONDITIONAL, NOT IMMEDIATE, AND NOT SPECIFIC ENOUGH TO CONSTITUTE AN R.C. §2921.03 VIOLATION; (C) THE INFERENCE THAT THE

APPELLANT THREATENED THE NEWARK POLICE DEPARTMENT IS MANIFESTLY OUTWEIGHED BY THE INFERENCE THAT HE WAS VENTING HIS FRUSTRATION, ASKING FOR HELP, AND EXPRESSING THE SERIOUSNESS OF THE SITUATION; (D) THE APPELLANT DID NOT KNOWINGLY ATTEMPT TO INFLUENCE, INTIMIDATE, OR HINDER THE NEWARK POLICE DEPARTMENT BECAUSE HE NEVER CALLED THEM AND NEVER REQUESTED THAT ANYONE TO RELAY THIS SUPPOSED THREAT TO THEM. R. AT 175.

{¶12} "IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL. R. AT 193.

{¶13} "V. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED THE APPELLANT TO EIGHTEEN MONTHS IN PRISON. R. AT 194.

{¶14} "VI. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT DENIED THE DEFENDANT'S REQUEST FOR ORAL HEARING ON DEFENDANT'S FIRST MOTION TO SUPPRESS EVIDENCE. R. AT 42.

{¶15} "VII. TRIAL COUNSEL WAS INEFFECTIVE AND TRIAL COUNSEL'S INEFFECTIVENESS PREJUDICED APPELLANT WHEN SHE FAILED TO ATTACH SUPPORTING DOCUMENTATION TO THE DEFENDANT'S FIRST MOTION TO SUPPRESS. R. AT 26.

{¶16} "VIII. THE TRIAL COURT ABUSED ITS DISCRETION TO THE PREJUDICE OF THE APPELLANT WHEN IT DENIED THE DEFENDANT LEAVE TO FILE HIS THIRD MOTION TO SUPPRESS EVIDENCE. R. AT 156."

{¶17} We begin by addressing the form of Appellant's brief and the appellate rules pertaining to the form of briefs.

{¶18} This Court's Local Rule 9 provides, in pertinent part,

> (B) Length of Briefs. In addition to the requirements of App. R. 16, no brief by any party in an appeal or original action, excluding appendices, table of contents, table of cases, statement of assignments of errors, and statement of the issues shall exceed thirty pages, unless, upon a motion requesting an increase of a specific number of pages and the showing of good cause, this Court orders otherwise. No reply brief shall exceed fifteen pages.
>
> (C) Font Requirements. The text of all documents shall be at least 12-point, double-spaced, non-condensed type. Footnotes and quotations may be single spaced; however, they shall also be in 12-point, non-condensed type. As used in this provision, "non-condensed type" shall refer to Times New Roman type or to another type that has no more than 80 characters to a line of text.

{¶19} On May 9, 2016, this Court granted Appellant additional time for filing his merit brief, and Appellant's request to file an over-length *reply brief.* Appellant did not request this Court allow him to file an over-length Merit Brief.

{¶20} Appellant's February 17, 2016 Merit Brief is a non-conforming brief pursuant to the appellate rules and the rules of this Court. Appellant's brief contains 100 characters to a line, and is not 12-point, non-condensed type per rule. Therefore, this Court concludes Appellant reached his page limit following discussion of Assignment of Error

Four. This Court *sua sponte* strikes assignments of error five, six, seven and eight for non-compliance to our appellate rules.

I., II., and III.

{¶21} Appellant's first, second and third assigned errors raise common and interrelated issues. We will address the arguments together.

{¶22} Appellant maintains the state did not present sufficient evidence Appellant's threat as quoted supra, was an "unlawful threat" in violation of R.C. 2921.03, and the trial court erred in not instructing the jury pursuant to *State v. Cress*, 112 Ohio St.3d 72, 2006 Ohio 6501. He further argues his conviction for intimidation, in violation of R.C. 2921.03(A), is against the manifest weight and sufficiency of the evidence.

{¶23} The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held,

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

{¶24} Appellant further maintains the trial court committed plain error in failing to instruct the jury on the definition of "unlawful harm" set forth in *State v. Cress,* 112 Ohio St.3d 72, 2006 Ohio 6501.

{¶25} Appellant was convicted of R.C. 2921.03(A), a felony of the third degree, which reads,

> (A) No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder a public servant, a party official, or an attorney or witness involved in a civil action or proceeding in the discharge of the duties of the public servant, party official, attorney, or witness.

{¶26} In *State v. Cress*, 112 Ohio St.3d 72, 2006 Ohio 6501, the Ohio Supreme Court held,

> We hold, rather, that the statutory language in R.C. 2921.04(B), proscribing intimidation by an “unlawful threat of harm,” is satisfied only when the very making of the threat is itself unlawful because it violates established criminal or civil law. For example, where the making of a threat constitutes the offense of coercion, in violation of R.C. 2905.12, [footnote omitted] a misdemeanor, that offense would serve as a predicate offense for the crime of witness intimidation as proscribed by R.C. 2921.04(B), a felony.

> The court of appeals erred in holding that R.C. 2921.04(B) proscribes only threats of impending *criminal* [emphasis in original] conduct. The court of appeals nevertheless correctly reversed Cress's conviction of felonious witness intimidation in violation of R.C. 2901.14(B), as the state failed to prove that Cress made an unlawful threat of harm, i.e., it did not introduce evidence demonstrating the elements of any predicate offense. [Footnote omitted.]
>
> The state obtained an indictment charging Cress with the felony offense of intimidation in violation of R.C. 2921.04(B) only. Although sufficient evidence may have been produced at trial to convict Cress of violating R.C. 2921.04(A), the state did not charge him with a violation of that section, nor did it ask the court to submit a charge of violation of R.C. 2921.04(A) to the jury for consideration as a lesser included offense.
>
> The state did not meet its burden of proving beyond a reasonable doubt that Cress made an "unlawful" threat, a required element for conviction of R.C. 2921.04(B), the only intimidation crime submitted to the jury. We therefore affirm the judgment of the court of appeals reversing the conviction of a violation of R.C. 2921.04(B) based on insufficiency of the evidence.

{¶27} In *State v. Yambrisak*, Richland App. No. 2012CA50, 2013 Ohio 1406, this Court held,

Both intimidation and retaliation require that the state prove beyond a reasonable doubt an "unlawful threat of harm." The Supreme Court of Ohio suggested that, to be unlawful, the threat itself must violate a predicate offense. *State v. Cress,* 112 Ohio St.3d 72, 858 N.E.2d 341, 2006–Ohio–6501, ¶ 43.(Construing the "unlawful threat of harm" element of R.C. 2912.04(B), attempt to intimidate victim, witness or attorney for being a witness) The court held "that the statutory language in R.C. 2921.04(B), proscribing intimidation by an 'unlawful threat of harm,' is satisfied only when the very making of the threat is itself unlawful because it violates established criminal or civil law." *Id.* at ¶ 42, 858 N.E.2d 341. The court held that the threat itself, not the threatened conduct, must be unlawful. *Id.* at ¶ 38, 858 N.E.2d 341. As the "threat of harm" language of R.C. 2921.03 is identical to the language construed by the Court in *Kress,* we find the Supreme Court's analysis to be persuasive in a case involving intimidation under R.C. 2921.03(A).

In this case, the only evidence of an alleged unlawful threat of harm are the following statements,

I hate you, you fucking nigger. You black bitch, I'm going to fuck you up.

* * *

Do you like talking to young girls about sex? Do you like talking to prostitutes about sex? I hate you, you fucking nigger. I'm going to fuck you up. [citation to transcript omitted.]

Yambrisak does not deny that he made these statements or that he directed the statements to Detective Smith.

In and of themselves the majority of statements are not threatening. Statements such as “I hate you,” “Do you like talking to young girls about sex? Do you like talking to prostitutes about sex?”; “You black bitch”; and “I hate you, you fucking nigger” did not make an unlawful threat of harm toward Smith. Although contemptible and debauched, the substance of the “threats” were statements of Yambrisak's feelings and opinions.

The more vexing problem is posed by Yambrisak's use of the terms, “I'm going to fuck you up.” As the Supreme Court of Ohio has noted, “[t]he most intimidating threat of all may be an indefinite one (‘You'll be sorry’).” *State v. Cress,* 112 Ohio St.3d 72, 858 N.E.2d 341, 2006–Ohio–6501,¶ 37. The words chosen are themselves ambiguous and did not mention a particular criminal act or give other particulars. However, when taken in the context of Yambrisak's other rants the statement can take on a more troubling tone.

A second consideration is what did Yambrisak intend to convey by his tirade. To constitute retaliation Yambrisak must have had a specific intention to cause a certain result. In the case at bar, Detective Smith did investigate Yambrisak in 2009.

***

We find based upon all the surrounding circumstances, Yambrisak's words were too unequivocal, unconditional, not immediate and not specific

> enough to convey to Detective Smith that he was retaliating for her involvement with him two years earlier.

State v. Yambrisak, 2013-Ohio-1406, ¶¶ 31-42

{¶28} Here, Appellant asserts the trial court committed plain error in failing to instruct the jury as to the *Cress*, supra, definition of "unlawful threat of harm." Based upon Appellant's failure to proffer instructions or object to the instructions and bring the issue to the trial court's attention for consideration, we must address this assignment under the plain error doctrine. *State v. Williford* (1990), 49 Ohio St.3d 247, 551 N.E.2d 1279. In order to prevail under a plain error analysis, Appellant bears the burden of demonstrating the outcome of the trial clearly would have been different but for the error. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804; Crim.R. 52(B). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long,* at paragraph three of the syllabus.

{¶29} Pursuant to *Cress*, supra, a "threat" is defined as "an expression of an intention to inflict evil, injury or damage on another usually as retribution or punishment for something done or left undone." In this case, it is clear Appellant's message left with Captain Starling of the Licking County Sheriff's Office was intended to convey a message he would inflict injury or damage to law enforcement, specifically the Newark Police Department, if it pursued the criminal investigation. Appellant specifically stated, he was "fed up," "I'm gonna have to do something my damn self, you know what I'm sayin?," "some shits gotta happen man, you feel me?," I see why mother fuckers grab shit, guns

and run up in these motha fuckin' buildings shootin' mother fuckers and shit," "grown people…they gotta take matters into they own hands," "I'm not goin' out like this…I'm done with it. I'm 44 years old…ya know what I mean? So, it's either 44…you know what I mean?," and "Magnum, or somebody gonna do somethin' about this man. That's where I'm at with it…44 Magnum."

{¶30} Appellant's statements were made to a member of the Licking County Sheriff's Department. It was reasonable to presume the message would be relayed to additional law enforcement, specifically the Newark Police Department.

{¶31} Sergeant Snow of the Newark Police Department testified at trial he perceived the threat as directed towards officers involved in Appellant's criminal investigation, himself included. He testified he perceived the threats as an attempt to influence the investigation and any potential criminal charges; therefore, meant to influence the outcome of the criminal investigation.

{¶32} Accordingly, we find Appellant's conviction is not against the manifest weight nor the sufficiency of the evidence.

{¶33} We further find the trial court did not commit plain error in failing to instruct the jury as to the *Cress*, definition of "unlawful threat of harm." No miscarriage of justice resulted from not giving a *Cress* instruction. Appellant's statements are clearly unlawful as Appellant threatened to take action against law enforcement with a Magnum .44, if they did not intercede on his behalf.

{¶34} The first, second, and third assigned errors are overruled.

IV.

{¶35} In the fourth assigned error, Appellant maintains the trial court abused its discretion not granting his motion for a mistrial pursuant to Ohio Rules of Criminal Procedure, Rule 33.

{¶36} Specifically, Appellant maintains the trial court should have granted the motion due to the State's failure to disclose discoverable evidence, including emails from various officers of the Newark Police Department and emails from the private investigator. Further, Appellant alleges prosecutorial misconduct in directing the testimony of witnesses.

{¶37} The trial court overruled the motion finding Appellant's motion was filed more than 28 days after the jury's verdict, and Appellant had not demonstrated his substantial rights had been prejudicially affected.

{¶38} The standard of review for evaluating a trial court's denial of a motion for mistrial is abuse of discretion. *State v. Maurer* (1984), 15 Ohio St.3d 239.

{¶39} Pursuant to Criminal Rule 16, evidence is material if there exists a reasonable probability the result of the trial would have been different had the evidence been disclosed. Here, Appellant has not demonstrated the outcome of the trial would have been otherwise had the emails at issue been disclosed.

{¶40} Appellant argues the emails would demonstrate prosecutorial misconduct as the prosecutor directed witness testimony introduced at trial. However, Appellant has not demonstrated the witness testimony was false or improper. In addition, Appellant has not demonstrated a prejudicial effect on the outcome of his trial, or that the outcome of the trial would have been otherwise.

{¶41} Further, we find, the emails were obtained through a public records request. As such, we find the emails were obtained outside the Ohio Rules of Criminal Procedure, as Criminal Rule 16 is the method a defendant may use to obtain discovery from the prosecution.

{¶42} Accordingly, we do not find the trial court abused its discretion in overruling Appellant's motion for a mistrial herein.

{¶43} The fourth assignment of error is overruled.

{¶44} Appellant's convictions and sentence in the Licking County Court of Common Pleas are affirmed.

By: Hoffman, P.J.

Wise, J. and

Delaney, J. concur