

[Cite as *State v. Laber*, 2015-Ohio-2758.]

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

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

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Peter Galyardt, Ohio Assistant Public Defender, 250 East Broad Street, Ste. 1400, Columbus, Ohio 43215<sup>1</sup>

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

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CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED:6-26-15

ABELE, J.

{¶ 1} This matter is before us on a re-opened appeal from a Lawrence County Common Pleas Court judgment of conviction and sentence. A jury found David L. Laber, defendant below and appellant herein, guilty of making terrorist threats in violation of R.C. 2909.23(A)(1)(a)(2). Appellant assigns the following errors for our consideration:

FIRST ASSIGNMENT OF ERROR:

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<sup>1</sup> Different counsel represented appellant during the trial court

“OHIO REVISED CODE SECTION 2909.03 IS UNCONSTITUTIONAL, BOTH FACIALLY AND AS APPLIED DAVID LABER.”

SECOND ASSIGNMENT OF ERROR:

“DAVID LABER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.”

THIRD ASSIGNMENT OF ERROR:

“DAVID LABER WAS DEPRIVED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.”

{¶ 2} On August 1, 2012, appellant was employed by “Labored” in Ironton, Ohio.<sup>2</sup> While employed, he engaged in a conversation with Linda Lawless and asked her if she ever thought of shooting someone or bombing their place of employment. Lawless replied in the negative. Appellant continued that he thought of shooting two company co-workers and that he had three bombs and “would start at the front office.” Lawless thereupon contacted her superiors, who terminated appellant’s employment later that day and notified the authorities.

{¶ 3} Three weeks later, the Lawrence County Grand Jury returned an indictment that charged appellant with making a terrorist threat. At the jury trial, Lawless testified as to appellant's comments. Lawless further related that she took his threats seriously and felt like he tried to intimidate her. In addition, several other Labored employees testified concerning the company’s response to appellant’s remarks. Appellant offered no evidence.

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proceeding and in his first appeal of right.

<sup>2</sup> The employer was referred to, alternatively, as “Labored” and “Emerson Labored.” For simplicity, we use the shorter name.

{¶ 4} After hearing the evidence, the jury returned a guilty verdict. The trial court sentenced appellant to serve three years in prison. We affirmed his conviction. See *State v. Laber*, 4<sup>th</sup> Dist. Lawrence No. 12CA24, 2013-Ohio-2681 (*Laber I*). The Ohio Supreme Court subsequently allowed an appeal from our decision. See *State v. Laber*, 137 Ohio St.3d 1445, 2013- Ohio-5678, 999 N.E.2d 699 (*Laber I-A*).

{¶ 5} On November 5, 2013, we granted an App.R. 26(B) Application to reopen appeal. Appellant argued in his application that his appellate counsel was constitutionally ineffective for failing to argue (in the first appeal of right) that trial counsel had been ineffective for failing to challenge the constitutionality of the statute under which appellant was convicted. After our review of R.C. 2909.23(A)(1)(a)(2), we agreed that appellant raised a genuine issue as to whether he received effective assistance of counsel. Thus, we allowed the reopening of this appeal. See *State v. Laber*, 4<sup>th</sup> Dist. Lawrence No. 12CA24, Entry on Application for Reopening Appeal (Nov. 5, 2013) (*Laber I-B*).

{¶ 6} Eight months later, the Ohio Supreme Court dismissed appellant’s appeal as having been improvidently allowed. *State v. Laber*, 140 Ohio St.3d 65, 2014-Ohio-3154, 14 N.E.3d 1039 (*Laber I-C*). The matter is now before us on the re-opened appeal.

## I

{¶ 7} Before we begin, it is important to define what issues are before us for review. Appellant posited in his App.R. 26(B) application that, if his appeal is reopened, he would assign the following error:

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

AMENDMENTS.” *Laber IB*.

Appellant’s second assignment of error closely parallels this, but he also sets out two additional assignments of error that are not mentioned in his Application to Reopen. Appellant's third assignment of error asserts that he received ineffective assistance from appellate counsel.

However, in allowing this appeal to be reopened, we agreed that he arguably received ineffective assistance on appeal. Thus, his third assignment of error is overruled as moot.

{¶ 8} Appellant’s first assignment of error directly challenges the constitutionality of R.C. 2909.23. Indeed, the vast majority of the parties' briefs are also devoted to this particular issue. We, however, overrule that assignment of error for the following reasons. To begin, this assignment of error is not listed in the App.R. 26(B) application as one that appellant would present if his appeal is reopened. More important, the Ohio Supreme Court has stated that constitutional issues should not generally be decided for the first time on appeal. See *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, at ¶15; *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277, at the syllabus (1986). We even noted as such, albeit with regard to a different issue, in *Laber I*, 2013-Ohio-2681, at ¶7. This is no mere artifice to simply avoid deciding an issue, particularly in this case. Statutes may be challenged as unconstitutional either (1) on their face, or (2) as applied to a particular person under a particular set of circumstances. *In Re A.Z.*, 4<sup>th</sup> Dist. Meigs No. 11CA3, 2011-Ohio-6739, at ¶15; also see *Fagan v. Boggs*, 4<sup>th</sup> Dist. Washington No. 10CA17, 2011-Ohio-5884, at ¶22. These are separate and distinct challenges, the differences of which have been explained as follows:

“A facial attack on the constitutionality of a statute is to be decided by considering the statute without regard to extrinsic facts. An “as applied” attack on the

constitutionality of a statute is to be decided by considering the facts. The burden is upon the party making the attack to present clear and convincing evidence of a presently existing state of facts that makes the statute unconstitutional when applied to the state of facts.” (Citations Omitted.) *In re Sturm*, 4<sup>th</sup> Dist. Washington No. 05CA35, 2006-Ohio-7101, at ¶88.

{¶ 9} Although appellate courts retain some discretion to hear facial challenges on constitutional grounds when the issue was not raised at the trial level, see *In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988), the same is not true for “as applied” challenges. The Supreme Court has opined that those issues must be raised at the earliest possible level (for our purposes here, the trial court) so that a full evidentiary record can be developed. See *Wymyslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, at ¶20; *State ex rel. Kingsley v. State Emp. Relations Bd.*, 130 Ohio St.3d 333, 2011-Ohio-5519, 958 N.E.2d 169, at ¶18.

{¶ 10} In the case sub judice, appellant’s first assignment of error raises both a facial and an “as applied” challenge to the constitutionality of R.C. 2909.23. Although a trial was held and a record made, the prosecution was not given notice that an “as applied” challenge to the statute was to be made. Had the State been given such notice, it may have couched its evidence differently, or even presented additional evidence during the trial court proceedings.

{¶ 11} For these reasons, we do not believe appellant’s first assignment of error is ripe for review. Accordingly, we hereby overrule appellant’s first and third assignments of error.

## II

{¶ 12} This brings us to appellant’s second assignment of error, which contains the sole stated purpose asserted for the reopening his appeal, and the sole reason we granted that request.

Appellant argues that he received ineffective assistance from trial counsel because counsel did not challenge the constitutionality of R.C. 2909.23. We agree.

{¶ 13} It is well-settled that criminal defendants have a right to the effective assistance from counsel. *McCann v. Richardson*, 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); also see *State v. Sinkovitz*, 4<sup>th</sup> Dist. Hocking No. 13CA12, 2014-Ohio-4492, 20 N.E.3d 1206, at ¶16. To establish constitutionally ineffective assistance of counsel, a defendant must show (1) counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); also see *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). However, both prongs of the *Strickland* test need not be analyzed if the claimed ineffective assistance can be resolved under one. See *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). To establish the latter element, i.e. the existence of prejudice, a defendant must show “a reasonable probability” exists that, but for counsel's alleged error, the result of the trial would have been different. *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus (1989). A “reasonable probability” is one sufficient to undermine confidence in the outcome. *State v. Meddock*, 4<sup>th</sup> Dist. Ross No. 08CA3020, 2008- Ohio-6051, at ¶13; *State v. Judy*, 4<sup>th</sup> Dist. Ross No. 08CA3013, 2008-Ohio-5551, at ¶35; *State v. McKnight*, 4<sup>th</sup> Dist. Vinton No. 07CA665, at ¶71.

{¶ 14} As we mention above, the issue of whether R.C. 2909.23 is unconstitutional on its face, or as applied to the appellant under the facts of this particular case, is not now properly before us. The question now before us is whether counsel was ineffective for not raising that

issue during the trial court proceedings. Without actually deciding the issue here, we can say that our concerns about the statute and its constitutionality are such that the failure of trial counsel to challenge it does, in fact, undermine our confidence in the outcome of the case. Our reasons for so holding are as follows:

A. General Principles:

{¶ 15} The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.” While this protection, like all other guarantees of the Bill of Rights, were originally written to be applied against federal government, see *Barron v. Baltimore*, 32 U.S. 243, 250 (1833), its provisions were later incorporated into the Due Process Clause of the Fourteenth Amendment and, thus, are now applicable to the States. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996); *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). Freedom of speech is the preeminent right in the constellation of Western Democratic Theory. See Nowak, Rotunda & Young, *Constitutional Law*, Section 16.2, 830 (3rd.Ed.1986). The right of everyone to speak freely “is the matrix, the indispensable condition, of nearly every other form of freedom” in our federal, republican, system of government. *Palko v. Connecticut*, 302 U.S. 319, 327, 58 S.Ct. 149, 82 L.Ed. 288 (1937) overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

{¶ 16} Of course, no right is absolute. *Orient Ins. Co. v. Dagg*, 172 U.S. 557, 566 19 S.Ct. 281, 43 L.Ed. 552 (1899); also see *U.S. v. Bogart*, M.D.PA No.4:12–CV–00347, 2014 WL 3385069 (Jul. 9, 2014). The State of Ohio, like all states, possesses inherent police powers to pass regulations that, among other things, protect the safety and welfare of its citizens. See

generally *State v. Varsel*, 6<sup>th</sup> Dist. Fulton No. F-13-006, 2014-Ohio-1899, 11 N.E.3d 327; *State v. Henderson*, 11<sup>th</sup> Dist. Portage No. 2010-P-0046, 2012-Ohio-1268, at ¶37.

{¶ 17} Additionally, we are aware that the statute challenged herein (R.C. 2909.23) was enacted approximately six months after the 2001 terrorist attacks. The express purpose of that legislation, as stated in its preamble, is to create “the offenses of terrorism.” See S.B. 184, 2002 Ohio Laws File 139. Richard Posner, a respected Judge on the United States Seventh Circuit Court of Appeals and prolific constitutional scholar, reminds us that the Constitution is more than just the Bill of Rights and that civil liberties guaranteed in the first eight amendments and must, sometimes, give way when national security concerns are heightened. See Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, 43-53, 105-126 (2006). No one would argue that preventing terrorism is a legitimate, if not compelling, government interest. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 694 (6<sup>th</sup> Cir.2014). We are also aware that workplace violence has increased and this, too, is an important government concern. However, therein lies the quandary. On the one hand, freedom of speech is a fundamental liberty interest that Americans enjoy. *Newman v. Burgin*, 930 F.2d 955, 961 (1<sup>st</sup> Cir.1991); *Chavez v. Lewis*, N.D.Cal. No. C-11-0376 EMC, 2012 WL 2906134 (Jul. 13, 2012). No court should surrender its role as guardian of those fundamental liberty interests. On the other hand, the State of Ohio has the inherent power to do what is necessary to protect the safety and welfare of Ohioans. This Court does not sit as a super-legislative body to dictate the best way to protect our own citizens, and we fully recognize that this function is the Ohio General Assembly's responsibility. With these competing principles in mind, we state our concerns about the constitutionality of R.C. 2909.23 and the reason why the failure to challenge that



statute undermines our confidence in this case's outcome.

B. Free Speech and the criminality of threats:

R.C. 2909.23 proscribes the following behavior:

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

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

(a) Intimidate or coerce a civilian population;

\* \* \*

(2) As a result of the threat, the person causes a reasonable expectation or fear of the imminent commission of the specified offense.” R.C. 2909.23

{¶ 18} As we noted in *Laber I-B*, two significant problems with the statute concern us. First, the words “threat” or “threaten” are not defined in the statute. Generally, this term is meant to be a “communicated” intent to inflict physical or other harm on any person or on property.” (Emphasis added.) See *Black’s Law Dictionary* 1327 (5<sup>th</sup> Ed.1979). This leads us to our second problem - R.C. 2909.23(B) states, inter alia, “[i]t is not a defense to a charge of a violation of this section that the defendant did not have the intent or capability to commit the threatened specified offense[.]” (Emphasis added.) Not only does section (B) of the statute run counter to what is generally understood to be a “threat,” it also appears to allow a criminal conviction for speech that the United States Supreme Court has deemed protected.

{¶ 19} We do not mean to suggest that “threats” are protected speech. Ohio courts have repeatedly rejected that argument. See e.g. *Mansfield v. Studer*, 5<sup>th</sup> Dist. Richland Nos.

2011–CA–93 & 2011–CA–94, 2012-Ohio-4840, at ¶109; *State v. Myers*, 3<sup>rd</sup> Dist., Henry No. 7-99-05, 2000 WL 327238 (Mar. 30, 2000). However, the line between “true threats” and protected speech is, in our view, a closer issue than the Ohio General Assembly or the prosecution are willing to acknowledge.

{¶ 20} In *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), an eighteen year old protested the Vietnam draft and was heard saying ‘[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.’ The young man was arrested, charged and convicted under a federal statute that makes it unlawful to threaten the president's life. *Id.* at 706-707. The United States Supreme Court reversed, holding as follows:

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

{¶ 22} More recently, the Supreme Court ruled that “true threats” are not protected speech and

may be criminalized by the states. *Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535. The Court’s ruling in *Black*, however, is perplexing. On the one hand, the Court defined a “true threat,” in part, as having “a serious expression of an intent to commit an act,” (Emphasis added.) *id.* at 359. Shortly thereafter, the Court opined that the “speaker need not actually intend to carry out the threat . . .” (Emphasis added.) *Id.* at 360.

{¶ 23} Courts subsequent to *Black* seem to agree that a “true threat” must convey an actual “intent” to carry out the threat. See e.g. *Bell v. Itawamba County School Bd.*, 5<sup>th</sup> Cir. No. 12–60264, \_\_\_ F.3d \_\_\_, 2014 WL 7014371 (Dec. 12, 2014); *U.S. v. Heineman*, 767 F.3d 970, 976 (10<sup>th</sup> Cir.2014); *Virgin Islands v. Vanterpool*, 767 F.3d 157, 167 (3<sup>rd</sup> Cir.2014). Our review of case law appears to suggest that defining a threat, without the element of an intent to carry out that threat, may be hyperbole, as is the case in *Watts* and, thus, may intrude into the area of constitutionally protected speech.

{¶ 24} Our concern about the removal of “intent” is also supported by the lack of precision in Linda Lawless’ trial testimony:

“Q. I never heard you say that he said he would do it, I will do it, I’m hearing you saying he thought about it.

A. Yes, he never said . . .

Q. He only said that he thought about it. Not that he would do it. He will do it, correct?

A. Correct.”

{¶ 25} Lawless expressed that when appellant first began to speak with her, these “threats” were posed as hypothetical questions. Appellant asked her if she “ever thought about shooting anyone” or “ever thought about taking people and grinding them up . . . or making slushy’s out of them.” Absent the element of intent, we believe an argument can be made that

these are the ramblings of a disgruntled employee rather than a terrorist threat.

{¶ 26} Accordingly, for these reasons, we hereby sustain appellant's second assignment of error. We agree that trial counsel was ineffective during the trial court proceedings for not having raised the free speech and constitutionality issue. That said, we do not reach the issue of whether R.C. 2909.23 is either constitutional on its face or as applied to appellant. Rather, these arguments should have been developed at the trial court level and, insofar as the claim that the statute is unconstitutional as applied to appellant, this may require additional development to the evidentiary record on appeal.

{¶ 27} Accordingly, we hereby sustain appellant's second assignment of error to this extent, reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND CASE  
REMANDED FOR FURTHER  
PROCEEDINGS CONSISTENT WITH  
THIS OPINION.

Harsha, J., concurring in part and dissenting in part:

{¶ 28} I concur in the judgment and opinion overruling Labor's first and third assignments of error and concur in the judgment sustaining of Labor's second assignment of error, which asserts that he was deprived of his constitutional right to the effective assistance of counsel.

{¶ 29} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability

that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014–Ohio–308, ¶ 23. The defendant has the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 62. Failure to satisfy either part of the test is fatal to the claim. *Strickland* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989). However, the majority opinion only addresses the second prong explicitly.

{¶ 30} For the first prong of the test we apply “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,” with the benchmark being “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland* at 686, 689; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 159; *State v. Siggers*, 4th Dist. Ross No. 13CA3368, 2014-Ohio-506, ¶ 9.

{¶ 31} Notwithstanding the strong presumption of constitutionality afforded to statutes, I agree that Labor’s trial counsel was deficient in failing to contest the constitutionality of R.C. 2909.23 on the grounds he now specifies—that R.C. 2909.23(B) prohibits speech that does not meet the constitutional definition of a “true threat,” or that it is unconstitutional as applied to the facts and circumstances of this case.

{¶ 32} However, unlike the majority opinion, I am not puzzled by the issue of intent. In *Black* the constitutional analysis focuses on the speaker’s *intent to intimidate* with threats of an unlawful act, rather than an intent to carry out the illegal violent acts threatened. R.C. 2909.23

is consistent with that analysis because it criminalizes threats made “with purpose to \* \* \* intimidate,” but specifies that “[i]t is not a defense to a charge of a violation of this section that the defendant did not have the intent or capability to commit the threatened specified offense \* \* \*.” R.C. 2909.23(A)(1)(a) and (B).

{¶ 33} But, I am concerned that some undefined language in the statute may be vague or overbroad. Due process is not satisfied if a statute is unconstitutionally vague. *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528, ¶ 22, citing *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 2928, 177 L.Ed.2d 619 (2001). “ ‘A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement. *Chicago v. Morales*, 527 U.S. 41, 56–57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999).’ ” *D.B.* at ¶ 22, quoting *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). For a statute to survive an overbreadth challenge, it must be narrowly tailored to achieve these interests but must use the least restrictive means of achieving these interests. *See, e.g., In re Judicial Campaign Complaint against O’Toole*, \_\_\_ Ohio St.3d \_\_\_, 2014-Ohio-4046, ¶ 30.

{¶ 34} The language “civilian population”, as the object of the purpose of the threat, appears vague and overbroad. It is not clear that this phrase provides people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. What is a “civilian population”? Does a workplace constitute a civilian population? Is the determining characteristic numerical or geographic, or some other criterion? It is unclear from language of the statute. Finally, is the use of this phrase narrowly tailored to serve the purpose of the statute, which was

enacted by the General Assembly in 2002 in the wake of the World Trade Center bombing and related terrorist events on September 11, 2001? And is it the least restrictive means to achieve that purpose? The answers to these troubling issues should have been explored below prior to the trial. Thus, I concur in the judgment sustaining Labor's second assignment of error and reversing the judgment of conviction and sentence.

JUDGMENT ENTRY

It is ordered that the trial court's judgment be reversed, that the case be remanded for further proceedings consistent with this opinion and appellant to recover of appellee the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Harsha, J.: Concurs in part & Dissents in part with opinion  
McFarland, J.: Dissents

For the Court

BY: \_\_\_\_\_  
Peter B. Abele, Judge



**NOTICE TO COUNSEL**

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