[Cite as *State v. Greaves*, 2012-Ohio-1989.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio	Court of Appeals No. H-11-012
Appellant	Trial Court No. CRB 110782
v.	
Gabriel S. Greaves	**DECISION AND JUDGMENT**
Appellee	Decided: May 4, 2012

* * * * *

G. Stuart O'Hara, Jr., Norwalk Law Director, and T. Douglas Clifford, Assistant Law Director, for appellant.

Thomas H. Freeman, for appellee.

* * * * *

YARBROUGH, J.

{¶ 1} Appellant, state of Ohio, appeals a judgment of the Norwalk Municipal Court granting a motion in limine filed by defendant-appellee, Gabriel S. Greaves.

I. Background

{¶ 2} On June 2, 2011, Greaves was first charged with using a weapon while intoxicated in violation of R.C. 2923.15(A). This charge arose from an incident on

May 22, 2011, in which Greaves' wife, Kellie, called the Norwalk 9-1-1 dispatcher and reported that he was intoxicated, had a handgun, and that she "feared for his safety." Greaves, it was also claimed, had held the gun up under his neck and "considered suicide." Norwalk police responded to their home. Once there, and pursuant to her request, the officers removed Greaves and any weapons from the home. Among other statements Kellie allegedly made to the responding officers about Greaves' behavior is the following: "Him and I had a fight right beforehand. He said to me, 'I hope you die bitch,' and I went in the bedroom to find the gun up to his chin."

{¶ 3} On July 19, 2011, Greaves moved in limine to prohibit his wife's testimony on the weapons charge based upon spousal incompetency under Evid.R. 601 and spousal privilege under R.C. 2317.02. On July 21, 2011, while this motion was pending and based on Greaves' last (alleged) statement above, the state filed a domestic-violence charge against him.[1]

{¶ 4} In a judgment entry dated August 12, 2011, which Greaves' counsel prepared, the trial court granted the motion.

{¶ 5} In pertinent part, this entry states:

> The court finds defendant's motion in limine well-taken and it is therefore ordered that the state is prohibited from calling the defendant's

[1] The state then moved to join the two charges for trial. Greaves opposed joinder. In the same judgment entry in which it granted the in-limine motion, the court denied the joinder motion.

spouse, Kellie J. Greaves, as a witness in this case because Evid.R. 601 excepts her as a competent witness against her husband, the defendant, and R.C. 2317.02(D) provides that husband or wife shall not testify concerning any communication made by one to the other, or an act done by either in the presence of the other.

{¶ 6} The state has timely appealed, assigning the following error:

> The trial court erred to the prejudice of the appellant state of Ohio by granting the defendant's "motion in limine/motion to suppress" and prohibiting the testimony of defendant's spouse as a witness on the basis of incompetency under Evid. Rule 601 and ORC 2317.02(D), as reflected in the trial court's judgment entry of August 12, 2011.

{¶ 7} For the following reasons, we reverse. As there appears to be confusion in both the court's ruling and the parties' arguments over spousal privilege and spousal incompetency, we will dispel it now. In part, this apparent confusion stems from the trial court's reflexive reliance on the wrong privilege statute.

II. Standard of Review

{¶ 8} As an initial matter, the appropriate standard of review needs to be identified. A motion in limine, as it is ordinarily understood, is intended to alert the court that the other party may present prejudicial or inadmissible evidence at trial. Because a later ruling is anticipated, the court's initial treatment of the motion is often deemed "interlocutory." It is but the first of two steps. The second step occurs during trial when

the basis for the motion can be assessed in its full evidentiary or testimonial context and a conclusive ruling made. *State v. Grubb*, 28 Ohio St. 3d 199, 201-203, 503 N.E.2d 142 (1986). In criminal cases, however, a successful motion in limine frequently effectuates the pre-trial suppression of disputed evidence.

> *Any motion, however labeled*, which, if granted, restricts the state in the presentation of certain evidence and, thereby, renders the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, is, in effect, *a motion to suppress*. The granting of such a motion is a final order and may be appealed[.] (Emphasis added.) *State v. Davidson*, 17 Ohio St.3d 132 (1985), syllabus; *see also* Crim.R. 12(K).

{¶ 9} Here, in granting Greaves' motion, the court excluded his wife's testimony in the state's case-in-chief on the weapons charge. In substance, presumably, her testimony would recount Greaves' actions, statements and sobriety during the incident that brought Norwalk police to their home. Neither side has suggested there were other witnesses to his behavior. The court's exclusionary ruling has thus rendered the state's case so weak that it precludes effective prosecution of the charges. *Davidson*. Therefore, we will treat the in-limine ruling here as a suppression ruling.

{¶ 10} In turn, the state is incorrect to assert that "abuse of discretion" is the applicable standard of review. A different standard exists for reviewing suppression rulings and their functional equivalents, regardless of how the motion was labeled. And

that is the standard which applies here. *State v. Sparkman*, 6th Dist. No. H-03-017, 2004-Ohio-1338, ¶ 4; *State v. Noble*, 9th Dist. No. 07-CA-9083, 2007-Ohio-7051, ¶ 7 (granting of a "motion to strike" treated as a suppression order.)

{¶ 11} A challenged suppression ruling typically presents mixed questions of law and fact. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 50. We must accept the trial court's factual findings if supported by competent and credible evidence. *Id*. In taking those facts as true, however, we afford no deference to the court's legal conclusions. Those conclusions are reviewed de novo to assess whether its ruling comported with the applicable legal standard. *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (1977).

III. Analysis

{¶ 12} This appeal involves but few salient facts; yet, those on which the court premised its ruling are not credibly disputed. Kellie Greaves purportedly has personal knowledge of her husband's conduct that formed the basis for two criminal charges. One, a weapons offense, alleges the use (or threatened use) of a handgun while Greaves was intoxicated; the other, a domestic violence charge, posits that Kellie was the purported victim of a threat. Both relate to the same incident or transaction and the state requires her testimony to prosecute these charges. When the court granted Greaves' motion, the state contends that it erred in two respects: first, in applying the civil privilege of R.C. 2317.02(D) to a criminal proceeding and, second, in determining that Evid.R. 601 rendered Greaves' wife incompetent to testify against him.

{¶ 13} For confidential communications between husband and wife, Ohio evidence law treats spousal privilege and spousal incompetency as distinct legal concepts. *State v. Savage*, 30 Ohio St. 3d 1, 3, 506 N.E.2d 196 (1987) ("The two were and are separate, independent rules of exclusion.")

A. Spousal Privilege

{¶ 14} Evid.R. 501 states, in pertinent part:

{¶ 15} "The privilege of a witness [or] person * * * shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in the light of reason and experience."

{¶ 16} In criminal cases, R.C. 2945.42, not R.C. 2317.02(D), controls assertion of the spousal privilege. *Sparkman*, *supra*, at ¶ 5; *State v. Bradley*, 30 Ohio App.3d 181, 183-184, 507 N.E.2d 396 (8th Dist.1986). While R.C. 2945.42 also speaks to spousal incompetency, the relevant portion establishing the *privilege* and its scope states:

> Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or in case of personal injury by either the husband or wife to the other, or rape or the former offense of felonious sexual penetration in a case in which the offense can be committed against a spouse, or bigamy, or failure to provide for, or neglect or cruelty of either to their children under eighteen years of

age or their physically or mentally handicapped child under twenty-one years of age, violation of a protection order or consent agreement, or neglect or abandonment of a spouse under a provision of those sections.[2]

{¶ 17} The general thrust of judicial policy is to construe statutory privileges narrowly: "[T]hey impede the search for truth and contravene the principle that the public has a right to everyone's evidence." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 121; *State v. Bryant*, 56 Ohio App.3d 20, 22, 564 N.E.2d 709 (6th Dist.1988). As we have previously observed:

> Assertion of [an evidentiary] privilege serves to remove from the trier of fact otherwise relevant, reliable and competent evidence. Because the privilege operates to the detriment of the truth-seeking process, it has been viewed as a pernicious anomaly in our system of evidence. * * * "[T]he privilege has come to mean little but the suppression of useful truth[.]" (Internal citations omitted.) *State v. Dress*, 10 Ohio App.3d 258, 261, 461 N.E.2d 1312 (6th Dist.1982), *overruled on other grounds*, *State v. Smorgala*, 50 Ohio St.3d 222, 553 N.E.2d 672 (1990).

[2] Although some courts, in purporting to quote the "privilege" portion of R.C. 2945.42, have included one or more of the sentences preceding the above-quoted language, the Supreme Court has clearly identified only this portion of the statute as setting forth the spousal privilege. *See State v. Mowery*, 1 Ohio St.3d 192, 198-199, 438 N.E.2d 897 (1982).

{¶ 18} The right to invoke the spousal privilege, where it exists, belongs to the nontestifying spouse. *Perez* at ¶ 112. To be privileged, however, the communication at issue must be "confidential." *State v. Rahman*, 23 Ohio St.3d 146, 149, 492 N.E.2d 401 (1986). In assessing whether a communication was confidential, courts look to the language used, the nature of the message, the circumstances under which it was delivered, and other relevant facts. *Bryant*, *supra*, at 22; *Portsmouth v. Wrage*, 4th Dist. No. 08CA3237, 2009-Ohio-3390, ¶ 21; *State v. Jackson*, 12th Dist. No. CA2011-01-001, 2011-Ohio-5593, ¶ 30.

{¶ 19} Verbal threats and violent acts between spouses are not marital "confidences" which the privilege was intended to shield from courtroom disclosure. The ostensible purpose of the privilege, in protecting intimate exchanges, is to promote "marital peace and harmony." *Mowery* at 198. But as Ohio courts have long recognized, that purpose is wholly lost where one spouse has threatened or physically assaulted the other. *See Bryant* at 21-22 and *Wrage* at ¶ 21, both citing *State v. Anthill*, 176 Ohio St. 61, 64, 197 N.E.2d 548 (1964). Such threatening or turbulent behavior is incompatible with the traditional premise of inter-spousal harmony out of which the confidences of marriage are imagined to flow. *Anthill* at 64; *see also Mowery* at 198-199.

{¶ 20} Furthermore, while R.C. 2945.42 lists several crimes as exceptions to the privilege, we have held, in construing the privilege narrowly, that this list is nonexhaustive. *Bryant* (kidnapping); *see also State v. Vanoy*, 3d Dist. No. 7-2000-01, 2000 WL 799096 (June 22, 2000) (telephone harassment); *State v. Jackson*, *supra*

(intimidation of a witness); *State v. Purvis*, 9th Dist. No. 05CA53–M, 2006-Ohio-1555, ¶ 8 (kidnapping); *State v. Buttrom*, 1st Dist. No. C-970406, 1998 WL 852558 (Dec. 11, 1998) (arson prosecution—"The legislature did not so limit the [statutory privilege] even though it could easily have done so.")

{¶ 21} Here, two crimes were charged: a weapons offense and domestic violence. Because both arose from the same incident, the trial court's ruling must be assessed in that context. Greaves has not bothered to defend the court's reliance on R.C. 2317.02 (D). Rather, he now argues that R.C. 2945.42 requires some sort of predicate evidence that any "communication or act" between Greaves and his wife transpired "in the known presence or hearing of a third party competent to be a witness." This argument is meritless.

{¶ 22} First, it ignores clearly established law that a provably-made threat is not a "confidential communication," regardless of whether a third party was present to hear it. More to the point, the contemporaneous *act* of brandishing a firearm while intoxicated, if true, is in no sense behavior constituting a marital "confidence," much less something inspired by the euphoria of a blissful matrimony. Second, the public-interest analysis we applied in *Bryant* applies to the weapons charge here. In *Bryant*, the defendant had kidnapped his wife and then discharged a shotgun while threatening her. Kidnapping was not one of the crimes identified in R.C. 2945.42. We nevertheless held that "there is no 'public interest' to be served by excluding Peggy Bryant's testimony [on the kidnapping charge]. The alleged wrongdoer * * * has not only threatened harm to his wife, *he has*

also acted against the public, '* * * *and it is for his offense against the public* that he is subject to criminal prosecution.'" (Emphasis added.) *Id*. at 22, quoting *Antill* at 64. Finally, criminal acts against the other spouse are not within the reach of the privilege. *State v. Smith,* 3d Dist. No. 13-03-25, 2003-Ohio-5461, ¶ 18-19. It is thus no obstacle to spousal testimony on a domestic violence charge; indeed, if necessary, such testimony may be compelled. *Wrage* at ¶ 21-22.

{¶ 23} Here, in the course of a single incident, while allegedly intoxicated and holding up a handgun, Greaves uttered a statement toward his wife that the state contends was a "threat." Whether it was or not is an issue for the trier of fact to determine. But no public interest is furthered by prohibiting Kellie Greaves from testifying against her husband on the weapons charge, even though it is not among those offenses enumerated in the statute. *Bryant*. Thus, the trial court erred in ruling that R.C. 2317.02(D) prohibited the state from using her testimony to prosecute Greaves.

B. Spousal Incompetency

{¶ 24} Evid.R. 601(B) determines whether the witness-spouse will be allowed to testify. *State v. Mowery*, 1 Ohio St.3d 192, 194-195, 438 N.E.2d 897 (1982). In relevant part, this rule states:

> Every person is competent to be a witness except
>
> * * *
>
> (B) A spouse testifying against the other spouse charged with a crime except when *either* of the following applies:

(1) *a crime against the testifying spouse * * * is charged*;

(2) the testifying spouse elects to testify.

{¶ 25} Evid.R. 601(B) thus creates spousal *in*competency and its exceptions. As noted, certain language in R.C. 2945.42 also purports to address the scope of spousal incompetency. However, because the general issue of witness competency is deemed to be "procedural," the language of the rule supersedes any conflicting language in the statute. *Rahman* at 146-148.[3]

{¶ 26} In responding to the state's competency argument, Greaves maintains there is "no evidence that the crime [charged] was against" his wife *and* no evidence that she "elect[ed] to testify," citing as authority *State v. Adamson*, 72 Ohio St.3d 431, 650 N.E.2d 875 (1995). This reasoning, however, is disingenuous.

{¶ 27} First, a crime against Greaves' wife was *charged*—domestic violence (allegedly involving a statement of threatening import). *Wrage* at ¶ 25 (aggravated menacing). Whether the *evidence* will be sufficient at trial to support it is a separate matter. Indeed, under Evid.R. 601(B)(1), her testimony may be compelled. *State v. Ellis*, 83 Ohio App.3d 362, 364-365 (1992). Being fully competent to testify for the state on

[3] Privileges, in contrast, cannot be abridged by procedural rules of court. That portion of R.C. 2945.42 which establishes the spousal privilege is "substantive" in nature, as are other legislatively-created privileges. Evid.R. 501 preserves them along with their decisional interpretation. *See Rahman* at 148: "[Evid.R.] 601(B) supersedes R.C. 2945.42 as to spousal competency, but not as to spousal privilege," citing Article IV, Section 5(B) of the Ohio Constitution, which limits the Ohio Rules of Evidence "to procedural effect only." *Id.*

the domestic violence charge, Kellie Greaves is also competent to testify on the weapons charge, given that the same course of conduct or transaction gave rise to both. Second, the language introducing the exceptions to Evid.R. 601(B) is disjunctive (i.e., "except when *either* of the following applies"). Because one of the charges against Greaves involves his spouse as the victim, subsection (B)(1) of the rule excepts her from general incompetency *and* thereby obviates the "election" issue under subsection (B)(2). *State v. Byrd*, 4th Dist. No. 10CA3390, 2012-Ohio-1138, ¶ 90; *Smith, supra*, ¶ 17; *Jackson*, *supra*, at ¶ 25-28. Finally, *Adamson* is inapplicable here because the crime-victim in that case was not the testifying spouse. *Id.* at 435.

IV. Conclusion

{¶ 28} Accordingly, the state's assigned error is well-taken.

{¶ 29} The judgment granting Greaves' in-limine motion is reversed and vacated, and this case is remanded for further proceedings consistent with this decision and with *State v. Bryant, supra*. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE