**[Cite as *State v. Muniz*, 2010-Ohio-3720.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 93528**

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## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## ABISAL MUNIZ

DEFENDANT-APPELLANT

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**JUDGMENT:**
REVERSED AND VACATED

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Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514835

**BEFORE:** Gallagher, A.J., Rocco, J., and Sweeney, J.

**RELEASED AND JOURNALIZED:** August 12, 2010

**ATTORNEY FOR APPELLANT**

J. Gary Seewald
Law Firm of J. Gary Seewald
The Bradley Building, Suite 205
1220 West 6th Street
Cleveland, Ohio 44113

**ATTORNEYS FOR APPELLEE**

William D. Mason
Cuyahoga County Prosecutor

BY: Brett Kyker
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, A.J.:

**{¶ 1}** Appellant Abisal Muniz appeals her conviction from the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we reverse and vacate her conviction for intimidation.

**{¶ 2}** On August 21, 2008, a Cuyahoga County grand jury indicted Muniz on two counts: intimidation, in violation of R.C. 2921.04(B), and disseminating matter harmful to juveniles, in violation of R.C. 2907.31(A)(3). The matter proceeded to a jury trial on April 29, 2009.

**{¶ 3}** The state presented eight witnesses, including three on-duty Cleveland police officers and five of Muniz's neighbors who witnessed the

events that occurred on July 24 and 25, 2008. The testimony shows that on the evening of July 24, Muniz confronted her next door neighbor, Dan Hozsee, with the words, "Your woman's got a problem." Muniz continued to verbally assault Hozsee with comments about his wife as Muniz continued to walk toward him on his property. Hozsee was concerned for his and his wife's safety, so he used his cell phone to call 9-1-1. Muniz then called out to Teresa Butler ("Teresa"), who lives in the house on the other side of Hozsee's, and thus two doors down from Muniz, who was outside in her front yard watering her lawn.

**{¶ 4}** According to Teresa, Muniz yelled "If your husband wasn't a f***ing cop, I'd pretty much kick your f***ing ass all over the place because * * * you know, you're lucky you're a police officer's wife." Teresa testified Muniz then said to her, "You know what. I don't even care that you are. What you need is a good ass kicking. Maybe I'm exactly the person that needs to do it." Then Muniz lifted her shirt, exposed and fondled her naked breasts, and made lewd comments to Teresa. Teresa telephoned her husband, Michael Butler, a Cleveland police officer, and told him "things had started up again," referring to Muniz's behavior.

**{¶ 5}** Butler came home and arrived shortly after Officer Leonard Graf had arrived in response to Hozsee's 9-1-1 call. When additional police arrived, Muniz retreated into her home and closed the door, refusing to come

outside as requested by the responding officers. Butler and Hozsee could hear Muniz screaming obscenities at the officers from inside her house. The officers did not attempt to enter Muniz's house, and she was not arrested that evening. However, the officers did take statements from the Butlers and the Hozsees.

**{¶ 6}** Officer Graf testified he generated a police report based on the events of July 24, in which he wrote the Butlers and the Hozsees were victims of aggravated menacing by Muniz. No report was offered into evidence at trial, nor was it made part of the record. Instead, the record contains only a Case Information Form, dated 07-29-08, which reads: "Details of Offense–On 7-24-08 at 4415 Behrwald [sic] Ave. suspect did knowingly get into altercation w/ victim were [sic] Agg. D.C. warrant was issued. On 7-25-08 while police arrived on scene again–suspect stated 'If you prosecute I'll kill you.'"

**{¶ 7}** On July 25, Teresa again contacted her husband, who was with Hozsee trying to locate Muniz's landlord, to tell him Muniz was "starting back up again." By the time Butler and Hozsee returned to their homes, Muniz was on her front porch, exposing her naked breasts and screaming obscenities. Brandon Weeber, a 14-year-old boy who lives across from Muniz, was standing at his dining room window, from which he saw Muniz lift up her shirt and grab her breasts.

**{¶ 8}** When the police arrived, Muniz ran into her house and refused to exit. Eventually, Muniz was arrested, handcuffed, and placed in the back of a zone car. From the zone car, Muniz yelled to the Butlers, "If you follow through with this, I'll kill you." Muniz was taken to Metro General Hospital for evaluation and released later that day.

**{¶ 9}** The jury found Muniz not guilty of disseminating matter harmful to juveniles and guilty of intimidation. On May 28, 2009, the trial court sentenced Muniz to two years of community control and 30 days in jail to be served prior to August 31, 2009.

**{¶ 10}** On appeal, Muniz raises three assignments of error for our review, all dealing with the state's failure to establish Teresa Butler was the victim of a predicate crime to the charge of intimidation.

**{¶ 11}** Muniz was convicted under R.C. 2921.04(B), which states the following: "No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness." The indictment specifically charged her with intimidation of a "victim of a crime," not intimidation of a witness.

**{¶ 12}** R.C. 2930.01(H) defines "victim," in part: "(1) A person who is identified as the victim of a crime or specified delinquent act in a police report or in a complaint, indictment, or information that charges the commission of a crime and that provides the basis for the criminal prosecution or delinquency proceeding and subsequent proceedings to which this chapter makes reference * * *."

**{¶ 13}** The Ohio Supreme Court has held that the state is not required to prove that a defendant has been charged with an underlying crime in order to prosecute on intimidation. *State v. Malone,* 121 Ohio St.3d 244, 2009-Ohio-310, 903 N.E.2d 614. The *Malone* court held that, unlike a prosecution for intimidation of a witness, "[a]s far as a victim is concerned, R.C. 2921.04(B) makes clear that it applies immediately upon the commission of the underlying crime, prior to the involvement of legal authorities; under R.C. 2921.04(B), it is illegal for anyone to 'attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges.' That portion of the statute protects victims from intimidation prior to their filing of a criminal complaint and during any subsequent prosecution."

**{¶ 14}** Therefore, any argument that there must be a prior or simultaneous charge for an underlying offense must fail. This, however, is a separate issue from the specific issue Muniz raises here.

**{¶ 15}** In Muniz's second assigned error, she asserts, "The state's failure to list the elements of a predicate offense, the date and location of the alleged crime constituting the predicate offense in the indictment prevents the accused from receiving adequate notice of the charges against the defendant." We agree.

**{¶ 16}** "The purpose of an indictment is to inform the accused of the crime with which he is charged. The indictment, therefore, provides notice to the defendant of the charges against him so that he may prepare a defense." (Internal citations omitted.) *State v. Davis* (Sept. 17, 1992), Cuyahoga App. No 61076.

**{¶ 17}** The state relies on *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162, which held that "[a]n indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number need not also include each element of the predicate offense in the indictment." We also recognize that in *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, the Ohio Supreme Court held that an indictment need not track the language of the offense provided it put the defendant on notice of the crime he was charged with, in that case, aggravated burglary. Id. See, also, *State v. Harris*, Cuyahoga App. No. 90699, 2009-Ohio-5962, in which this court made a

similar finding despite the state's failure to specify the underlying offense in the bill of particulars and jury instructions.

**{¶ 18}** However, the issue of notice to the defendant in this case is distinguishable from the facts in *Buehner, Foust,* and *Harris.* In *Buehner,* the defendant was charged with ethnic intimidation, which requires inclusion of the statute number of the underlying offense. In *Foust* and *Harris*, which involved the charge of aggravated burglary, the indictment was not required to identify the specific offense the defendant intended to commit once inside the hotel.

**{¶ 19}** The case before us is more analogous to cases in which a defendant is charged with a crime that has its foundation on unindicted predicate acts. For example, R.C. 2923.32 makes it a crime to engage in a pattern of corrupt activity. The court in *State v. Lightner,* Hardin App. No. 6-08-15, 2009-Ohio-2307, _ 16, held that "[a]lthough the predicate acts in R.C. 2923.31 need not be supported by convictions, their occurrence must at least be proven beyond a reasonable doubt. In addition, the State must set forth the requisite predicate acts in the indictment that it intends on using as the foundation for a R.C. 2923.32 offense. This Court has previously stated that 'where a defendant is required to defend himself against additional unindicted predicate offenses, he should be notified of such by identification of those charges within the indictment.'" (Internal citations omitted.)

"Moreover, where unindicted offenses are utilized, the identification of the predicate acts in the indictment provides some assurance that the defendant was indicted on the same essential facts on which he was tried and convicted." *State v. Siferd*, 151 Ohio App.3d 103, 2002-Ohio-6801, 783 N.E.2d 591, _ 23.

**{¶ 20}** Likewise, we find that where a defendant is charged with intimidation of a "victim of a crime," an essential element of the charge is that the underlying crime occurred and thus created a victim. Muniz is entitled to notice of the predicate crime in the indictment. The charge of intimidation of a crime victim presupposes an earlier crime has been committed. The state has the burden of proof on all essential elements of the crime as charged; therefore, it must prove the underlying acts occurred for there to be a crime victim, regardless of whether a complaint has been filed or a charge brought for that underlying crime.

**{¶ 21}** We find that Butler's and Officer Graf's testimony of an alleged aggravated menacing report does not constitute notice to Muniz, especially when it was not introduced into evidence to corroborate their testimony, and the record only contains a case information form filed five days after the incident, referencing aggravated disorderly conduct. Thus, the record is unclear as to the nature of the predicate offense.

**{¶ 22}** The state presented its case against Muniz to the jury giving the impression that Muniz had committed a crime, which laid the foundation for the intimidation charge. As such, the state was never required to present any evidence of prior criminal conduct, but instead could simply declare Teresa a victim. In fact, there were never any charges for either aggravated menacing or disorderly conduct brought against Muniz.

**{¶ 23}** Make no mistake, we do not condone Muniz's behavior of July 24, which, if believed, certainly would support a finding that she committed either aggravated disorderly conduct or aggravated menacing. However, it is not enough that the state presented some evidence at trial of the acts constituting a predicate offense. The state's failure to give notice of the underlying predicate acts in the indictment render it defective from the outset, and therefore fatal to her conviction. Muniz's second assignment of error is sustained, and her conviction is vacated.

**{¶ 24}** Because of the disposition of the second assignment of error, the remaining assignments of error are rendered moot.

**{¶ 25}** Judgment reversed and conviction vacated.

**{¶ 26}** This cause is vacated and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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 common pleas court to carry this judgment into execution.

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

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

KENNETH A. ROCCO, J., and
JAMES J. SWEENEY, J., CONCUR