

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	Nos. 115545, 115546, and 115547
	:	
ANTOINE TOLBERT, ET AL.,	:	
	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED

RELEASED AND JOURNALIZED: September 3, 2026

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-25-700220-A, CR-25-700220-B, and CR-25-700220-C

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Tasha L. Forchione and Michael R. Wajda,
Assistant Prosecuting Attorneys, *for appellant*.

The Pattakos Law Firm LLC, Peter Pattakos, Gregory
Gipson, and Zoran Balac, *for appellees*.

LISA B. FORBES, J.:

{¶ 1} The State of Ohio appeals following the jury verdicts finding Antoine Tolbert (“Tolbert”), Rameer Askew (“Askew”), and Austreeia Everson (“Everson”) (collectively, “Appellees”) not guilty of various offenses. After a thorough review of

the facts and the law, we sustain the State's first assignment of error regarding the instructions submitted to the jury addressing qualified immunity for law enforcement.

I. Procedural History

A. The Charges

{¶ 2} On March 11, 2025, Appellees were named in a 13-count indictment in the Cuyahoga County Common Pleas Court. The indictment named Tolbert and Askew in Count 1, aggravated robbery, a first-degree felony, in violation of R.C. 2911.01(A)(1) and Count 2, kidnapping, a first-degree felony, in violation of R.C. 2905.01(A)(2).

{¶ 3} Tolbert was named in Count 3, extortion, a third-degree felony, in violation of R.C. 2905.11(A)(3); Count 4, extortion, a third-degree felony, in violation of R.C. 2905.11(A)(5); Count 5, aggravated riot, a fourth-degree felony, in violation of R.C. 2917.02(A)(2); Count 6, aggravated riot, a fifth-degree felony, in violation of R.C. 2917.02(A)(3); Count 7, breaking and entering, a fifth-degree felony, in violation of R.C. 2911.13(B); Count 8, aggravated menacing, a first-degree misdemeanor, in violation of R.C. 2903.21(A); and Count 9, intimidation of an

attorney, victim or witness in a criminal case, a third-degree felony, in violation of R.C. 2921.04(B)(1).¹

{¶ 4} Everson was named in Count 10, extortion, a third-degree felony, in violation of R.C. 2905.11(A)(3); Count 11, intimidation of an attorney, victim, or witness in a criminal case, a third-degree felony, in violation of R.C. 2921.04(B)(1); Count 12, intimidation of an attorney, victim, or witness in a criminal case, a first-degree misdemeanor, in violation of R.C. 2921.04(A); and Count 13, aggravated menacing, a first-degree misdemeanor, in violation of R.C. 2903.21(A).

B. Trial and Jury Instructions

{¶ 5} The case proceeded to a jury trial. Following testimony from 30 witnesses, including Tolbert, Askew, Everson, and more than ten law-enforcement officers, the case was submitted to the jury. Over the State's objection, the trial court instructed the jury as follows:

The defendants in this case maintain that they've been charged in this case not for legitimate purposes, but because one or more of the State's officers responsible for the decision to charge them has a motive to retaliate against them or is otherwise biased against them. The State strongly disagrees. Because one or more jurors might believe that police officers would tend not to pursue retaliatory or bias[ed] charges against citizens for fear of being held legally accountable for such conduct in a later civil lawsuit, you should be aware that police officers are protected by legal doctrines that may immunize them from civil lawsuits by citizens from biased or retaliatory conduct.

The law also prohibits citizens from pursuing civil claims against state officials in connection with the purs[uit] of criminal charges when the citizen is actually convicted of those charges. In considering whether

¹ Counts 1 through 9 included one- and three-year firearm specifications under R.C. 2941.141(A) and 2941.145(A), respectively. Counts 3 through 9 each included three weapons-forfeiture specifications under R.C. 2941.1417(A).

investigating police officers' actions in investigating and pursuing the charges at issue in this case were motivated by bias or intent to retaliate against the defendants, you may consider that the law may substantially shield police officers from legal accountability for such alleged bias or retaliatory acts. Your primary focus, however, should be on the actual charges in this case and the evidence concerning each and in giving your absolutely fair and impartial consideration to whether the State has proved the guilt of any or all the defendants by evidence beyond a reasonable doubt.

C. Verdict, Motion for Leave to Appeal, and This Appeal

{¶ 6} The jury found Appellees not guilty on all offenses and specifications.

{¶ 7} On September 9, 2025, the State filed with this court a motion for leave to appeal. The State sought this court's review of two issues: first, whether the court erred in instructing the jury to consider law-enforcement immunity in its deliberations, and, second whether the court erred by instructing the jury that a guilty verdict for extortion, aggravated riot, breaking and entering, aggravated menacing, and intimidation of a victim required a finding that a defendant communicated true threats of violence under U.S. Const. Amend I.

{¶ 8} This court addressed the State's motion for leave to appeal via a journal entry dated October 30, 2025. The journal entry noted that this court "may review substantive rulings of law when it is presented with an underlying legal question that is capable of repetition yet evading review." The State was granted leave to appeal the jury instruction regarding the immunity of law-enforcement officers. The State was denied leave to appeal the jury instructions concerning true threats of violence.

{¶ 9} The State now raises the following assignments of error:

I. The trial court erred by instructing the jury to consider law-enforcement qualified immunity in its deliberations, unduly influencing the jury to decide guilt based on irrelevant factors, as prohibited by *State v. Group*, 2002-Ohio-7247, ¶ 117-[1]18 and *State v. Scott*, 26 Ohio St. 3d 92, 101 (1986).

II. The trial court erred by instructing the jury on First Amendment “true threat” principles, thereby submitting questions of constitutional law to the jury, mischaracterizing the nature of the charges, and imposing a heightened burden of proof not required by Ohio law.

II. Law and Analysis

A. Assignment of Error No. 1 — Jury Instructions Concerning Law-Enforcement Officer Immunity

{¶ 10} With its first assignment of error, the State asserts that the trial court erred by instructing the jury in this criminal matter about immunity doctrines that protect law-enforcement officers from liability for civil damages. We agree.

{¶ 11} “A trial court must ‘[w]hen instructing the jury . . . provide “a plain, distinct, and unambiguous statement of the law applicable to the evidence.”’” *State v. Elko*, 2020-Ohio-4466, ¶ 29 (8th Dist.), quoting *State v. Torres*, 2013-Ohio-5030, ¶ 50 (8th Dist.), quoting *State v. Driggins*, 2012-Ohio-5287, ¶ 73 (8th Dist.). “A trial court’s decision to grant or deny a requested jury instruction is reviewed under an abuse of discretion standard.” *State v. Glass*, 2025-Ohio-4670, ¶ 46 (8th Dist.), quoting *State v. Hayes*, 2024-Ohio-4679, ¶ 10 (8th Dist.). An abuse of discretion occurs when a court exercises “its judgment, in an unwarranted way, in regard to a matter over which it has discretionary authority.” *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35. An abuse of discretion “implies that the court’s attitude is unreasonable,

arbitrary or unconscionable.” *W.A.F.P., Inc. v. Sky Fuel Inc.*, 2024-Ohio-3297, ¶ 13 (8th Dist.), quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 12} The trial court abused its discretion by instructing the jury as it did. The Ohio Supreme Court has warned against the type of jury instruction in dispute. *See Group*, 2002-Ohio-7247 (Trial court did not abuse its discretion in declining to give the jury proposed instructions related to law-enforcement officer credibility.). “[A] trial judge may not single out a particular witness or group of witnesses to discuss their credibility, since such discussion exerts an undue influence on the jury.” *Id.* at ¶ 118, citing *Curtis v. State*, 113 Ohio St. 187, 209-210 (1925), and *State v. Scott*, 26 Ohio St.3d 92, 101 (1986). In this case, the court expressly related its immunity instructions to the credibility of specific witnesses. The court stated that it was issuing the immunity instruction “[b]ecause one or more jurors might believe that police officers would tend not to pursue retaliatory or bias[ed] charges against citizens for fear of being held legally accountable” in light of the fact that “[t]he defendants in this case maintain that they’ve been charged . . . not for legitimate purposes.” Again, each of the Appellees testified, as did other witnesses, including more than ten law-enforcement officers. Because the court expressly related the immunity instruction to how readily the jury might believe the testimony of specific witnesses, the court ran afoul of the prohibitions discussed in *Group*.²

² The jury instructions in *Group* mandated the amount of credibility that jurors should assign to law-enforcement officer testimony relative to that of other witnesses, that is, that officer testimony “must be weighed by the same standards you apply to every other witness” and “should not be given any greater or lesser weight merely because they are police officers or detectives.” *Group* at ¶ 115. The Court found that “there [was] no need

{¶ 13} Further, as a matter of law, the jury instructions regarding the civil immunity afforded law-enforcement officers were not, as required, “applicable to the evidence” in this matter. “In Ohio, political subdivision immunity, which is governed by R.C. Chapter 2744, applies to civil cases for injury or loss to persons or property.” *Cleveland v. Graham*, 2024-Ohio-336, ¶ 73 (8th Dist.), citing *Meekins v. Oberlin*, 2018-Ohio-1308, ¶ 21 (8th Dist.) (declining to apply political-subdivision immunity in a criminal prosecution of a law-enforcement officer). Further, “[i]ndividual state officials and employees have immunity from Ohio law money damage claims under R.C. 9.86.” *Peachock v. Momen*, 2006-Ohio-6439, ¶ 14 (8th Dist.). None of the Appellees tried in this case were government officials confronting an action for civil damages. The jury in this case was tasked with determining Appellees’ guilt or innocence of the charged criminal offenses. Regardless of the jury’s appraisal of the facts, its findings, as a matter of law, could not trigger the immunity doctrines discussed in the trial court’s instructions. Moreover, the court inaccurately summarized Ohio’s immunity doctrines by stating that “the law may substantially shield police officers *from legal accountability* for . . . alleged bias or retaliatory acts.” (Emphasis added.) Ohio’s immunity doctrines do not protect law-enforcement officers against criminal accountability for conduct undertaken in their

for any special comment or instruction regarding police credibility” because “the subject of witness credibility was covered in the general jury charge” informing the jurors that they were “the sole judges of . . . the credibility of the witnesses.” *Id.* at ¶ 117. The jury instructions disputed in the present case did not require the jury to consider officer testimony to be more credible, less credible, or of equal credibility to that of other witnesses. Nonetheless, the court expressly connected its immunity instructions to the jury’s credibility assessment of specific witnesses, as countenanced against in *Group*.

professional capacities, as demonstrated by the prosecution of the officer in *Graham*.

{¶ 14} In light of the foregoing, we find that the trial court abused its discretion in instructing the jury on the issue of law-enforcement officers' civil immunity. Accordingly, the State's first assignment of error is sustained.

B. The State's Motion for Leave to Appeal

{¶ 15} In its second assignment of error, the State asks this court to reconsider its decision to deny leave to appeal the jury instructions regarding "true threat" principles. We decline to do so.

{¶ 16} R.C. 2945.67(A) identifies the limited circumstances under which the State may appeal in a criminal case. The State "may appeal as a matter of right" certain trial court decisions, like the grant of a motion to suppress evidence. R.C. 2945.67(A). The State may also "appeal by leave of the [appellate] court . . . any other decision, except the final verdict, of the trial court in a criminal case." *Id.* "A court of appeals has discretionary authority pursuant to R.C. 2945.67(A) to review substantive law rulings made in a criminal case which result in a judgment of acquittal so long as the judgment itself is not appealed." *State v. Hatfield*, 2011-Ohio-6620, ¶ 13 (8th Dist.), quoting *State v. Bistricky*, 51 Ohio St.3d 157 (1990), syllabus. "Ordinarily . . . there will be no appellate review unless the underlying legal question is capable of repetition yet evading review." *Id.*, citing *id.* at 158.

{¶ 17} Ohio appellate courts have exercised their discretion under R.C. 2945.67(A) to permit the State to appeal jury instructions. *See, e.g., State v.*

Nguyen, 2026-Ohio-1699, ¶ 3 (4th Dist.) (granting State leave to appeal, asserting that the trial court erred in adding the element “substantial” to jury instructions about the offense of disrupting a lawful meeting); *State v. Rac*, 2019-Ohio-893, ¶ 10, 40 (2d Dist.) (granting State leave to appeal, contesting trial court instructions concerning reliability of human memory); *State v. Golsby*, 2020-Ohio-4651, ¶ 11, 29 (10th Dist.) (granting State leave to appeal whether the trial court erred in instructing the jury during the penalty phase of a capital case that the defendant bore “no burden of proof”). Conversely, in *State v. Gott*, 2011-Ohio-3608 (6th Dist.), the court of appeals denied the State leave to appeal jury instructions concerning involuntary manslaughter where the State did not show that the claimed error was “likely to be repetitive or not subject to further review.” *Id.* at ¶ 15. In *Gott*, the State did not claim that the jury instruction was not a correct statement of law, but rather that it was not warranted because the record included insufficient evidence to satisfy an element of involuntary manslaughter. *Id.* at ¶ 13, 15.

{¶ 18} In the present case, this court denied the State leave to appeal the question presented in its second assignment of error concerning the trial court’s jury instructions about “true threat” principles under U.S. Const. Amend I. In so doing, as demonstrated by our journal entry ruling on the State’s motion for leave, this court assessed whether the State claimed errors that were “capable of repetition yet evading review.”

{¶ 19} In its merit brief, the State asks us to reconsider that decision, citing *State v. Jones*, 2025-Ohio-5389, which was issued after this court ruled on the

State’s motion for leave to appeal in this case. In *Jones*, a criminal defendant’s motion for new trial was granted based on newly discovered evidence and a *Brady* violation. *Id.* at ¶ 8. The State sought to appeal issues related to the *Brady* violation. *Id.* at ¶ 9. The court of appeals denied leave, noting that the State’s appeal would be futile because it did not challenge the trial court’s finding that newly discovered evidence warranted a new trial. *Id.* at ¶ 10. The Ohio Supreme Court reversed, holding that the court of appeals failed to address App.R. 5(C), which establishes procedures the prosecution must follow in seeking leave to appeal. Notably, App.R. 5(C) requires that a motion for leave to appeal “must be accompanied by affidavits, or by the parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur.” The *Jones* Court, in reversing the denial of leave to appeal, determined that the appellate court had not analyzed “whether the State had shown the probability that the errors claimed did in fact occur.” *Id.* at ¶ 20.

{¶ 20} This case is materially different from *Jones* because it concerns an appeal from a not guilty verdict. Unlike in *Jones*, the error claimed here by the State — that the trial court issued an incorrect jury instruction on “true threats of violence” — would have no effect on the not guilty verdict because double jeopardy would prevent retrial. See *State v. Ramirez*, 2020-Ohio-602, ¶ 12, quoting *Evans v. Michigan*, 568 U.S. 313, 318 (2013) (“[A]ny ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense is functionally an acquittal for purposes of double jeopardy and prevents retrial.”). By contrast, in *Jones*, the

State sought leave to appeal the grant of a new trial, where a successful appeal could alter the outcome of the case.

{¶ 21} Notably, nowhere in *Jones* did the Ohio Supreme Court instruct appellate courts not to apply the “capable of repetition yet evading review” analysis set forth in *Bistricky*, 51 Ohio St.3d 157, which this court relied on in exercising its discretion to deny the State leave to proceed with its proposed second assignment of error. In light of the foregoing, we decline to modify our partial denial of the State’s motion for leave to appeal. We render no opinion as to the State’s second assignment of error.

{¶ 22} Judgment reversed; however, our decision does not have any effect on the verdicts.

It is ordered that the parties bear their own 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.

LISA B. FORBES, JUDGE

MICHELLE J. SHEEHAN, A.J., and
MICHAEL JOHN RYAN, J., CONCUR