COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NOS. 2018 CR 000054** **2018 CR 000156**
vs.	:	
		Judge McBride
ROBERT ALLEN CLOWERS	:	
		DECISION/ENTRY
Defendant	:	

Darren Miller, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Brian T. Goldberg, counsel for the defendant Robert Allen Clowers, 2662 Madison Road, Cincinnati, Ohio 45208.

This cause came before the court for a bench trial from October 16, 2018 through October 18, 2018. At the conclusion of the trial, the court took the issues raised in the case under advisement.

The defendant Robert Allen Clowers was indicted in Case No. 2018 CR 000054 on February 8, 2018 on the following counts: (1) kidnapping, in violation of R.C. 2905.01(A)(3), a felony of the first degree, (2) felonious assault, in violation of R.C. 2903.11(A)(2), a felony of the second degree, and (3) failure to stop after an accident involving property of others, in violation of R.C. 4549.03(A), a misdemeanor of the first degree. The state subsequently dismissed Count 3 at trial.

On February 22, 2018, the defendant was indicted on two counts of conspiracy to commit aggravated murder in Case No. 2018 CR 000156. Count 1 was charged under R.C. 2923.01(A)(1) and R.C. 2903.01(A), a felony of the first degree. Count 2 was charged under R.C. 2923.01(A)(1) and R.C. 2903.01(C), also a felony of the first degree.

Upon consideration of the record of the proceedings, the evidence presented for the court's consideration, the oral arguments of counsel, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT

The court makes the following findings of fact based upon the testimony of the witnesses and the exhibits it found to be admissible, credible, and reliable as presented at trial:

The defendant Robert Allen Clowers was in a relationship with the victim Teresa Akroush. On January 7, 2018, the victim was separated from her husband but was expecting a baby with the defendant.[1] Earlier that day, the victim had been in the presence of her husband. The defendant had been texting her all day and asked if they could go for a drive later to talk. Around 7:40 p.m. the victim voluntarily got into the defendant's vehicle.

At first, their conversation was amicable. At some point, the conversation changed to why the victim had been with her husband earlier in the day, and it became heated. The defendant screamed at the victim and repeatedly called her a liar.

[1] Teresa Akroush delivered her baby in April of 2018.

At that point, the defendant drove the two of them to East Fork State Park in Clermont County and stopped at a cemetery that the victim had never been to before. When they arrived, the defendant entered the trunk and brought an axe back into the car. When the victim asked the defendant where they were, he said that it was where she was going to die. The defendant also told the victim she was not going home. He said the victim had better call her young son and say goodbye.

While in the car, the defendant strangled the victim for 30 to 40 seconds. She was scared and struggled to free herself. She believed she was about to die. The defendant released the victim's neck, and the victim asked the defendant why he was doing this to her. He told her that he had to kill her, and that he would then bury her and kill himself.

The defendant told the victim to get out of the car so he could cut her head off. She did not move. Then the defendant took an axe and moved the blade portion of the axe toward her throat. As he pressed the axe toward her, the victim put her arms and legs up to protect herself and her abdomen. She could feel the axe graze her neck as she struggled to keep the defendant from cutting into her. The victim testified that by thinking of her unborn baby, she was able to harness a tremendous strength sufficient to push the defendant back. At that point, the defendant said he would crash the car with both of them in it and kill them both. The victim thought she was about to die.

Either between the time the defendant strangled her and pressed the axe against her throat, or shortly after the axe incident, the victim tried to get out of the car and opened the door. As she did so, he grabbed her by the hair and pulled her back into the car.

The defendant told the victim to give him the number for her husband so he could call him and tell him that he was going to kill her. The victim lied and gave him the number

for a friend instead. The defendant called the friend and said he was going to kill the victim.

The victim repeatedly asked the defendant to take her home. The defendant said she was not going home. Then he began to drive in "donuts," before driving off onto the road. As they approached a stop sign, before the car stopped, the victim opened the door and ran out. At first, the defendant pursued her on foot before then returning to his car.

Don Jewell, who was passing through the park, saw the victim flee from the defendant's car and turned his vehicle around to return and help her. When he reached her, the victim appeared very upset, and she said that her boyfriend said he was going to kill her and bury her in the park. She mentioned the axe. At one point, the defendant drove up next to Jewell and told him that his vehicle was overheating, so he had to leave. After talking to the victim, Jewell contacted 911. When the police arrived, they observed that the victim was scared, afraid, upset, and crying. After being interviewed, she went to the hospital to make sure her unborn child was not hurt during the struggles she had with the defendant.

The defendant fled the scene and crashed his vehicle. He then fled from the location of the crash and hid at his grandmother's home, where police found him. Police recovered the axe from the backseat of his crashed car.

Once in jail, the defendant called the victim multiple times. He oscillated between apologizing and begging the victim to not come to court to testify against him. At one point, the defendant stated he did not mean to hurt the victim, and that he only wanted to scare her. On another occasion, the defendant apologized for taking it too far. He

repeatedly stated or insinuated that the only evidence that would lead to his conviction was the victim's testimony, and that he did not want to go to prison for a long time.

While confined at the Clermont County Jail, the defendant met Brent Bergman, who was also confined and was housed in the same block as him. The defendant requested that Bergman kidnap the victim and hold her hostage until he could kill her. However, if the defendant was not out of jail before she went into labor, Bergman was to kill her.

The defendant agreed to pay Bergman $2,000. Bergman was to receive the money from the defendant's mother, once he showed her pictures proving that the victim was dead. The defendant gave Bergman his mother's address, the victim's address, and the make and model of the victim's vehicle, which Bergman wrote on a piece of paper. The defendant also described the victim's property to Bergman, and Bergman drew a map of her home and driveway.

The defendant told Bergman to cause the victim to wreck her vehicle on the way to a Suboxone clinic to create an opportunity to kidnap her. The defendant indicated she frequented a clinic in Amelia or Beechmont. The defendant instructed Bergman to then take her back to her house and keep her there, awaiting the defendant's release. If she did go into labor, Bergman was instructed to shoot her.

Bergman reported the plan to officers, who then enlisted Bergman's services as a a confidential informant. After being released early, Bergman went to the defendant's mother's home to speak with her, while wearing a wire. They spoke about the case, he gave her his phone number, and he told her to tell the defendant to call him.

After being released for several days, he visited the defendant at the jail. They were joined by a woman the defendant formerly dated, Mindy Mills. The defendant told Bergman to "take care of it" and "shoot the bitch." After the meeting, Bergman went for a drive with Mills.

In a jail call to his mother on February 7, 2018, the defendant spoke about Bergman visiting her and how he needs to "pay this," which the court believes refers to the $2,000 fee to kill the victim. He also instructed his mother give "the girl's" information, "everything about her . . . where she lives and everything," to Bergman, including her number. The court believes "the girl" refers to the victim. The defendant also stated that the victim needed to go on a "vacation" to "get her out of the way." When his mother expressed doubt that she would, since she was about to have a baby, the defendant said "She is going to have to go. She isn't going to have a fucking choice."

In two other calls from jail on February 7th and 11th of 2018, the defendant requested the person on the line to call the man who stopped by his mom's house, i.e. Bergman, to give him the information he needs. He also stated, "I'm going to get out of here soon."

In a jail call with Mills on February 13, 2018, Mills expressed that she was scared Bergman was watching her. The defendant responded: "He's not watching you. He's watching other people. At the girl. He waiting for the green light."

In another jail phone call with Mills on February 14, 2018, Mills complained that Bergman was still contacting her. The defendant told Mills to text Bergman "stop texting me. I will text you to give you the green light. If Rob [the defendant] gives me the green light, I will text you." The defendant explained that Bergman was waiting for the "green

light, what to do," and the defendant was waiting for a person named Kathy to come see him first. The court understands these conversations to mean that the defendant's plan to kill the victim was to tell Mills to contact Bergman when the time was right.

STANDARD OF REVIEW

In a criminal case, it is the state's burden to prove the defendant's guilt beyond a reasonable doubt.[2] R.C. 2901.05(E) describes reasonable doubt as follows:

> "'Reasonable doubt' is present when the [trier of fact], after * * * carefully consider[ing] and compar[ing] all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs."

Further, "[i]t is axiomatic that the state must prove each and every element of an offense * * *."[3]

As the trier of fact, the court "* * * makes the determinations of credibility and the weight to be given to the evidence."[4] The trier of fact is in the best position to take into

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[2] R.C. 2901.05(A).

[3] *State v. Jones*, 91 Ohio St. 3d 335, 347, 744 N.E.2d 1163 (2001). *See State v. Brown*, 12th Dist. Warren No. CA2006-10-120, 2007-Ohio-5787, ¶ 29 ("The state has a duty to present evidence, beyond a reasonable doubt, as to each and every element of the crime as set forth in the indictment.")

[4] *State v. Burrell*, 12th Dist. Fayette No. CA2016-04-005, 2016-Ohio-8454, ¶ 22, citing *State v. Clements*, 12th Dist. Butler No. CA2009-11-277, 2010-Ohio-4801, ¶ 20, citing *State v. Erikson*, 12th Dist. Warren No. CA2014-10-131, 2015-Ohio-2086, ¶ 42.

account any inconsistencies of evidence, "along with manner and demeanor to determine witness credibility," and is free to believe or disbelieve all or any of the testimony.[5]

LEGAL ANALYSIS

I. KIDNAPPING

In Count 1 of Case No. 2018 CR 000054, the defendant is charged with kidnapping, in violation of R.C. 2905.01(A)(3), a felony of the first degree.

Kidnapping is criminalized in R.C. 2905.01(A)(3), which provides in pertinent part:

> "(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: * * *
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> (3) To terrorize, or to inflict serious physical harm on the victim or another * * *."[6]

Under R.C. 2901.22(A), "a person acts purposely when it is the person's specific intention to cause a certain result * * *."[7] "The Ohio Supreme Court has determined that, if difficult to prove with direct evidence, a defendant's mental state may be 'inferred from the surrounding circumstances.'"[8] Although "terrorize," as used in R.C. 2905.01(A)(3) is

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[5] *State v. Cope*, 12th Dist. Butler No. CA2009-11-284, 2010-Ohio-6430, ¶ 47, citing *State v. Johnson*, 10th Dist. Franklin No. 10AP-137, 2010-Ohio-5440, ¶ 18.
[6] R.C. 2905.01(A)(3).
[7] R.C. 2901.22(A).
[8] *State v. Chasteen*, 12th Dist. Butler No. CA2007-12-308, 2009-Ohio-1163, ¶ 21, quoting *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979).

not defined by statute, courts have defined it "according to its common usage, i.e. 'to fill with terror or anxiety.'"[9]

"[K]idnapping does not depend on the distance the victim is removed or the manner in which he is restrained; rather, it depends on whether the removal or restraint places the victim in the offender's power and beyond immediate help, even temporarily."[10] Moreover, "the restraint involved need not be actual confinement, but may be merely compelling the victim(s) to stay where they are."[11]

Additionally, the victim's consent to be with the defendant can be a defense to kidnapping.[12] "However, consent is not a defense where a victim who initially agrees to accompany an offender wishes to depart, but is later prevented from leaving."[13]

In *State v. Sharp*, 12th Dist. Butler No. CA2009-09-236, 2010-Ohio-3470, the defendant had been convicted of kidnapping under R.C. 2905.01(A)(3). The defendant, in a vehicle with another person, drove up to the victim, and the victim entered the vehicle.[14] The defendant and victim argued, and the defendant hit the victim in the face and abdomen.[15] The victim tried to exit the vehicle, but the driver would not slow down or stop the car, and when she tried to leave the defendant pulled her back into the

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[9] *State v. Bryant*, 12th Dist. Butler No. CA2011-06-109, 2012-Ohio-676, quoting *Chasteen*, 2009-Ohio-1163 at ¶ 21.
[10] *State v. Cope*, 12th Dist. Butler No. CA2009-11-284, 2010-Ohio-6430, ¶ 15, citing *State v. Peck*, 4th Dist. Athens No. 1361, 1988 WL 85104, *5-6 (July 26, 1988).
[11] *Cope*, 2010-Ohio-6430 at ¶ 15, citing *Peck*, 1988 WL 85104 at *5-6.
[12] (Internal citation omitted.) *State v. Sharp*, 12th Dist. Butler No. CA2009-11-3470, 2010-Oiho-3470, ¶ 75.
[13] *Sharp*, 2010-Ohio-3470 at ¶ 75. *See State v. Flannery*, 5th Dist. Richland No. 03-CA-24, 2005-Ohio-1614, ¶ 120 (finding sufficient evidence of kidnapping where victim initially entered vehicle willingly, but were later prevented from leaving); *State v. Williams*, 11th Dist. Ashtabula No. 2001-A-0044, 2002-Ohio-6919, ¶ 28-29, 32 (finding sufficient evidence of kidnapping where victim voluntarily entered truck, but was subsequently prevented from leaving when the defendant failed to stop the vehicle or let the victim out).
[14] *Sharp*, 2010-Ohio-3470, ¶ 2.
[15] Id.

vehicle.[16] Eventually the defendant let the victim leave when she was dropped off at her grandparents' home.[17]

On appeal, the defendant argued that he had not kidnapped the victim because the victim consented to enter the car and remain in his company.[18] However, the court found that the defense of consent did not apply because when the victim tried to leave the vehicle, but was prevented from doing so, she no longer consented to be in the vehicle.[19] Further, there was evidence that the victim's liberty was restrained, by force, because of testimony that the defendant would not slow the car to let the victim leave, as well as testimony that the defendant pulled the victim back into the car when she tried to exit.[20]

In *State v. Cope*, 12th Dist. Butler No. CA2009-11-284, 2010-Ohio-6430, the Twelfth District Court of Appeals examined a challenge to the sufficiency and weight of the evidence for a kidnapping conviction under R.C. 2905.01(A)(3), also involving confinement in a vehicle. In *Cope*, the defendant and victim recently broke off their relationship, when the defendant drove to the victim's home and said he wanted to talk.[21] The victim voluntarily got into the defendant's vehicle and then he drove off, eventually parking.[22] The defendant became angry and accused the victim of not wanting to talk to him because she wanted to reconcile with her ex-husband.[23] Her struck her, grabbed her

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[16] Id. at ¶¶ 2, 75.
[17] Id.
[18] Id. at ¶ 75.
[19] Id.
[20] Id. at ¶ 77.
[21] *Cope*, 2010-Ohio-6430 at ¶ 17.
[22] Id.
[23] Id. at ¶ 18.

by the hair, and dragged her into the back seat.[24] The defendant screamed at her, strangled her, and sexually assaulted her.[25]

The victim was scared and begged him to let her go so she could see her children, but the defendant threatened to kill her and have others harm her family.[26] The victim could hear the defendant unlock the car doors but was too afraid to leave the vehicle because of the defendant's threats, even when the defendant would temporarily leave the vehicle.[27] After two days the defendant took the victim back home.[28] The appellate court found that, in view of the evidence, a rational trier of fact could have found beyond a reasonable doubt that the defendant had restrained the victim's liberty for the purpose of terrifying her or to inflect serious physical harm on her.[29]

In *State v. Bryant*, 12th Dist. Butler No. CA2011-06-109, 2012-Ohio-678, the appellate court examined whether a conviction under R.C. 2905.01(A)(3) was against the manifest weight of the evidence. In *Bryant*, the defendant had entered his employer's office following a conversation two hours earlier during which the victim declined the defendant's request for a raise.[30] After the victim ordered the defendant to leave his office, the defendant came back with a rifle, and this time there was another person in the office with the victim.[31] The defendant blocked the doorway and told the victims they had to listen to him or he would kill them.[32] The confrontation ended 20 minutes later when

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[24] Id.
[25] Id.
[26] Id.
[27] Id.
[28] Id. at ¶ 22.
[29] Id. at ¶ 45.
[30] Id. at ¶¶ 2-3.
[31] Id. at ¶ 4.
[32] Id.

the parties "bear hugged" and the defendant left.[33] The victims testified that they were fearful when the defendant had pointed the rifle at their heads and threatened to shoot them.[34] Further, the police observed that the victims were shaken up when they arrived.[35]

Upon review, the appellate court found that there was "overwhelming evidence" indicating that the defendant went into the office, threatened to kill the victims, and pointed a rifle at them.[36] The defendant claimed he merely wanted to raise work related issues. However, the court reflected that there were countless other ways to do so that did not involve a rifle or threats.[37] The court found that the evidence clearly showed that the defendant acted with the purpose to fill the victims with terror or anxiety while restraining them at gunpoint and making repeated threats to kill them, and accordingly the defendant's conviction was upheld.[38]

In examining the present case, the court concludes that the defendant is guilty beyond a reasonable doubt of kidnapping under R.C. 2905.01(A)(3). The defendant restrained the victim in his vehicle through death threats and physical force. Although the victim initially entered the defendant's car voluntarily, she repeatedly asked for him to take her home once he began to threaten her. Although the defendant at one point told the victim to exit the car so he could cut her head off, this statement does not, as the defense has argued, mean that the defendant was allowing the victim to leave his restraint. It is clear from the context of that statement that she was not free to leave him. Further, when

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[33] Id.
[34] Id. at ¶ 16.
[35] Id.
[36] Id. at ¶ 17.
[37] Id.
[38] Id.

the victim opened the door to leave, the defendant grabbed her by the hair and pulled her back inside.

Moreover, it is clear to the court that the defendant acted with the purpose to terrorize or to inflict serious physical harm on the victim. His threats and assaults against her are nothing short of terrifying, and at the very least were purposed to cause the victim anxiety. Furthermore, his statements and multiple attempts to hurt, if not kill, the victim indicate he was also acting with the purpose to cause her serious physical harm. He said he was going to kill her, he strangled her, he told her he was going to cut her head off, he pressed an axe against her throat, he told her he was going to crash the car to kill them both, and then he drove in fast circles. Based on this evidence, the court finds the defendant guilty beyond a reasonable doubt of kidnapping.

II. FELONIOUS ASSAULT

In Count 2 in Case No. 2018 CR 000054, the defendant is charged with felonious assault, in violation of R.C. 2903.11(A)(2), a felony of the second degree. Felonious assault is criminalized in R.C. 2903.11, which provides, in relevant part: "(A) No person shall knowingly do either of the following: * * * (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."[39]

[39] R.C. 2903.11(A)(2).

In turn, a "deadly weapon" is defined as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."[40] An axe or hatchet is a deadly weapon.[41]

Under R.C. 2901.22(B):

> "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact."[42]

Further, attempt of an offense is prohibited in R.C. 2923.02(A): "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."[43]

"The act of pointing a deadly weapon at another 'coupled with a threat, which indicates an intention to use such weapon,' is sufficient evidence to support a conviction for felonious assault."[44]

In turning to the present case, the court finds the defendant guilty of felonious assault as charged in Count 2 of Case No. 2018 CR 000054. The overwhelming evidence

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[40] R.C. 2923.11(A).
[41] *See State v. Diamond*, 8th Dist. Cuyahoga No. 48432, 1985 WL 6635, *2 (Feb. 28, 1985).
[42] R.C. 2901.22(B).
[43] R.C. 2923.02(A).
[44] *State v. Bryant*, 12th Dist. Butler No. CA2011-06-109, 2012-Ohio-678, ¶ 19, quoting *State v. Kehoe*, 133 Ohio App.3d 591, 599-600 (12th Dist. 1999).

has collectively convinced the court beyond a reasonable doubt that the defendant did attempt to cause the victim physical harm using a dangerous weapon.

The defendant attempted to cause the victim physical harm by pushing the blade of an axe towards her throat and threatening to kill her multiple times, including by specifically saying he would cut her head off. The only reason the axe grazed her throat, instead of seriously injuring her, was because the victim was blocking the defendant using her arms and legs and harnessed all of her strength to push him back. The defendant attempted to hurt the victim with a deadly weapon, namely the axe. As discussed, an axe or hatchet is an inherently dangerous instrumentality, the use of which on a person's neck is likely to produce death.

The defendant argues that brandishing an axe at the victim is insufficient evidence to support a conviction for felonious assault. In support he cites to *State v. Smith*, 9th Dist. Lorain No. 98CA007168, 2000 WL 110411 (Jan. 26, 2000), which held that pointing a knife at an individual is different from pointing a gun, and although both are deadly weapons, pointing a knife, even with verbal threats, is an insufficient action to constitute a substantial step in the commission of a felonious assault.[45] The defendant posits that a knife is more akin to an axe than a gun, and thus the evidence is insufficient to find the defendant guilty of felonious assault. Additionally, he argues that he cannot be found guilty because the victim cannot remember what exactly he said to her while he was pressing the axe into her.

The *Smith* Court had found there was insufficient evidence to support a felonious assault conviction when the defendant was "flailing" a Swiss army pocket knife around

[45] *State v. Smith*, 9th Dist. Lorain No. 98CA007168, 2000 WL 110411, *3 (Jan. 26, 2000).

and did nothing more than continue a verbal tirade towards the alleged victim.[46] The court found that the defendant "was not holding the knife in a manner that would permit him to carry out his stated intentions."[47] However, multiple courts have distinguished *Smith*, including the Twelfth District Court of Appeals, and as will be discussed, there is a substantial body of case law finding that holding a knife to a victim is a substantial step sufficient to find the defendant guilty of felonious assault.

The Twelfth District Court of Appeals distinguished *Smith* in *State v. Wiseman*, 12th Dist. Warren No. CA2004-06-072, 2005-Ohio-3225. In *Wiseman*, the defendant appealed his felonious assault conviction under R.C. 2923.02(A) on the bases that there was insufficient evidence to support the conviction and it was against the manifest weight of the evidence. While in an argument with his girlfriend, the defendant went into a kitchen and obtained a knife.[48] He raised the knife over his head and threatened to kill his father.[49] He also had disconnected the phone, locked the front door of the house, and pushed his father against a wall.[50]

On appeal the defendant argued that the state did not demonstrate that he attempted to cause physical harm, and in support he cited *Smith*.[51] The appellate court reflected that "*Smith* is not binding precedent on this court."[52] The court highlighted that pointing a deadly weapon at another and making verbal threats can be sufficient to sustain a felonious assault conviction.[53] Upon reviewing the evidence, the court concluded that

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[46] Id. at *2-3.
[47] Id.
[48] *State v. Wiseman*, 12th Dist. Warren No. CA2004-06-072, 2005-Ohio-3225, ¶ 36.
[49] Id.
[50] Id.
[51] Id. at ¶ 33.
[52] Id.
[53] Id. at ¶ 36.

the defendant's conduct "is strongly corroborative of appellant's criminal intent to cause physical harm by means of a deadly weapon."[54] As such, the court upheld the conviction.

The Twelfth District Court of Appeals is not alone in holding that brandishing a knife at another, accompanied by verbal threats, can constitute felonious assault. Indeed, the First, Fourth, Eighth, and Eleventh Districts have held likewise, which this court finds more persuasive than *Smith*.[55] Furthermore, the defendant did more than merely brandish an axe. He pressed it to the victim's throat and told the victim multiple times prior to doing so that he was going to kill her and cut off her head. Accordingly, the court finds the defendant guilty beyond a reasonable doubt of felonious assault as charged in Count 2 in Case No. 2018 CR 000054.

III. CONSPIRACY TO COMMIT AGGRAVATED MURDER

The defendant was indicted on two counts of conspiracy to commit aggravated murder in Case No. 2018 CR 000156. Count 1 was charged under R.C. 2923.01(A)(1)

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[54] Id. at ¶ 36.

[55] *See State v. Zackery*, 31 Ohio App.3d 264, 511 N.E.2d 135 (1st Dist. 1987), paragraph two of the syllabus, citing *State v. Tate*, 54 Ohio St.2d 233, 377 N.E.2d 778) ("Brandishing a knife may be found to constitute an attempt to cause physical harm to sustain a conviction for felonious assault under R.C. 2903.11(A)(2)"; *State v. Smith*, 4th Dist. Pickaway No. 06CA7, 2007-Ohio-502, ¶ 39 ("In light of the Ohio Supreme Court's holdings in *Brooks* and *Green*, *supra*, we conclude that Smith's holding Cristi at knifepoint, coupled with his repeated threats to cause bodily harm constitute sufficient evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that Smith committed felonious assault."); *State v. Brown*, 97 Ohio App.3d 293, 299, 646 N.E.2d 838, 842 (8th Dist.1994), citing *Zackery*, 31 Ohio App.3d 264 ("It is well established that the mere act of brandishing a knife, even without such additional violent behavior against the victim during an entire weekend, may be found to constitute an 'attempt to cause physical harm' to sustain a conviction for felonious assault as in the case *sub judice*."); *State v. Figueroa*, 11th Dist. Ashtabula No. 2016-A-0034, 2018-Ohio-1453, ¶¶ 37-38 (distinguishing *Smith* and finding that stepping towards another with a knife may reasonably be viewed as taking a substantial step forward in the execution of an assault).

and R.C. 2903.01(A), a felony of the first degree. Count 2 was charged under R.C. 2923.01(A)(1) and R.C. 2903.01(C), a felony of the first degree.

Conspiracy to commit aggravated murder is criminalized in R.C. 2923.01(A)(1): "No person, with purpose to commit or to promote or facilitate the commission of aggravated murder * * * shall do either of the following: (1) With another person or persons, plan or aid in planning the commission of any of the specified offenses * * *."[56] R.C. 2923.01(B) further provides:

> "(B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by the accused or a person with whom the accused conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed."[57]

In turn, aggravated murder is prohibited in R.C. 2903.01(A) and (C). R.C. 2903.01(A) provides: "No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy."[58] R.C. 2903.01(C) provides: "No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense."[59]

Before the court can examine whether the defendant is guilty of the above charges, it must first determine whether the indictment charging him in Case No. 2018 CR 000156 is sufficient. Under R.C. 2941.29, "[n]o indictment or information shall be * * * dismissed * * * unless the objection to such indictment or information, specifically stating the defect

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[56] R.C. 2923.01(A)(1).
[57] (Emphasis added.) R.C. 2923.01(B).
[58] R.C. 2903.01(A).
[59] R.C. 2903.01(C).

claimed, is made prior to the commencement of the trial, or at such time thereafter as the court permits."[60] Citing case law at trial, the defendant argued that the indictment is invalid because it does not allege a substantial, overt act in furtherance of a conspiracy. The state argued that the indictment is sufficient, particularly since the bill of particulars specifies the substantial overt acts. The state was unfamiliar with the case law cited by the defendant and did not offer any to the contrary. The court indicated that it would review the issue.

Article I, Section 10 of the Ohio Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury."[61] "Thus, the Ohio Constitution guarantees an accused that the essential facts constituting the offense for which he is tried will be found in the indictment by the grand jury."[62]

Further, Crim.R. 7(B) provides:

> "The statement [specifying the offense in an indictment] may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged."[63]

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[60] R.C. 2941.29.
[61] Ohio Constitution, Article I, Section 10.
[62] *State v. Jackson*, 134 Ohio St.3d 184, 2012-Ohio-5561, 980 N.E.2d 1032, ¶ 12, quoting *State v. Pepka*, 125 Ohio St.3d 124, 2010-Ohio-1045, 926 N.E.2d 611, ¶ 14.
[63] Crim.R. 7(B).

The indictment serves multiple purposes.[64] First, it protects the defendant from future prosecutions for the same offense.[65] Second, it affords the defendant "adequate notice and opportunity to defend.[66]

The Ohio Supreme Court has explained that "[a] n indictment meets constitutional requirements if it first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend * * *."[67] As a general matter, "* * * the requirements of an indictment may be met by reciting the language of the criminal statute."[68] However, something more is required in indictments charging conspiracy.

In the seminal case In *State v. Childs*, 88 Ohio St.3d 194, 724 N.E.2d 781 (2000), the court held that a conspiracy indictment must allege "some specific, substantial, overt act performed in furtherance of the conspiracy." In *Childs*, the indictment alleged that the defendant:

> "[B]etween the dates of December 2, 1993 and February 13, 1995, in the County of Montgomery, aforesaid, and State of Ohio, with purpose to commit, or to promote or facilitate the commission of Aggravated Trafficking, a violation of Section 2925.03(A)(2) of the Revised Code, did agree with another person or persons that one (1) or more of them would engage in conduct that facilitated the commission of any such offense, and that subsequent to each defendant's entrance into said conspiracy, a substantial overt act was done by each defendant or a person with whom they conspired; contrary to the form of the statute (in violation of Section 2923.01(A)(2) of the Ohio Revised Code)."[69]

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[64] *State v. Childs*, 88 Ohio St.3d 194, 198, 724 N.E.2d 781 (2000).
[65] *Childs*, 88 Ohio St.3d at 198, citing *State v. Sellards*, 17 Ohio St.3d 169, 170, 478 N.E.2d 781 (1985).
[66] *Childs*, 88 Ohio St.3d at 198, citing *Sellards*, 17 Ohio St.3d at 170.
[67] (Internal quotations omitted.) *Jackson*, 2012-Ohio-5561 at ¶ 13, quoting *Childs*, 88 Ohio St.3d at 199.
[68] *Jackson*, 2012-Ohio-5561 at ¶ 14, quoting *Childs*, 88 Ohio St.3d at 199.
[69] (Emphasis added.) *Childs*, 88 Ohio St.3d at 197.

The court recognized that the indictment included "* * * language asserting that Childs or one of his co-conspirators performed a substantial, overt act after his or her entrance into the conspiracy."[70] The court determined, however, that "merely recit[ing] the generic words of the statute" did not provide the defendant with adequate notice of the specific overt act done in furtherance of the conspiracy.[71] The court stated that "[t]he words of the indictment are little more than a recitation of the words of R.C. 2923.01(B), which defines the crime of conspiracy."[72] The court concluded that "the plain words of the statute defining the crime of conspiracy" reveal that "an indictment for conspiracy requires more than a mere recitation of the exact wording of the statute defining the offense of conspiracy."[73] The court thus held that "while the state may satisfy its burden by reciting the exact words of a criminal statute in an indictment for some offenses, an indictment for conspiracy * * * must allege some specific, substantial, overt act performed in furtherance of the conspiracy."[74] The court determined that "[t]he state's failure to allege a specific, substantial, overt act committed in furtherance of the conspiracy * * * renders the indictment invalid."[75]

In reaching its decision, the court rejected the state's assertion that the bill of particulars cured the lack of specificity in the indictment. The court observed that the bill of particulars did "set forth the nature of the charges" and "the specific conduct constituting the crimes with which he was charged."[76] The court further pointed out, however, that

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[70] Id.
[71] Id. at 198.
[72] Id.
[73] Id. at 199.
[74] Id.
[75] Id.
[76] Id. at 198.

Article I, Section 10 requires a grand jury indictment. The Court additionally referred to its prior decision in *State v. Wozniak*, 172 Ohio St. 517, 521, 178 N.E.2d 800 (1961), quoting *Harris v. State*, 125 Ohio St. 257, 264, 181 N.E. 104 (1932), which held:

> "'The material and essential facts constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury.'"[77]

The court thus disagreed with the state's contention that the bill of particulars saved the indictment. The court ultimately concluded that the indictment "was fatally defective" and upheld the appellate court's decision that reversed the defendant's conspiracy conviction.[78]

Since *Childs*, the Twelfth District Court of Appeals has not examined cases involving indictments that fail to identify specific, substantial, overt acts committed in furtherance of conspiracies. However, several other appellate districts have, all of which have found those indictments to be invalid when they lack such information.[79]

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[77] Id. at 198.

[78] Id. at 199.

[79] *See State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85, ¶ 23 (7th Dist.) ("In the instant case, the conspiracy charge in the indictment merely tracks the language of the conspiracy statute rather than setting forth specific facts that describe substantial, overt acts in furtherance of the conspiracy, as required by R.C. 2923.01(B) and *Childs*. Therefore, the indictment is insufficient to charge appellant with conspiracy to commit aggravated robbery. * * * Thus, we must vacate appellant's conviction and sentence for conspiracy to commit aggravated robbery and dismiss count 11 of the indictment."); *State v. Callahan*, 9th Dist. Summit No. 20432, 2001 WL 1240138, *4 (Oct. 17, 2001) ("Careful review of count three in the indictment reveals that there is no language specifically detailing any overt act done in furtherance of the conspiracy. *See Childs, supra*, at 197-198. The language used in count three merely generically tracks the applicable statute. Pursuant to the controlling authority of *Childs*, this Court is compelled to agree that the indictment and conviction for conspiracy is void for failure to specifically allege an overt act of the conspiracy apart from the generic language of the statute."); *State v. George*, 11th Dist.

The case most similar to the one at bar is *State v. Lambert*, 2017-Ohio-4310, 82 N.E.3d 29 (4th Dist.). In *Lambert,* the defendant was charged with two counts of conspiracy to commit aggravated murder. The indictment read:

> "On or about the 21st day of July, 2015 through the 28th day of July, 2015, at the County of Pickaway, or by some manner enumerated in Section 2901.12 of the Ohio Revised Code whereby proper venue is placed in the county aforementioned, Tara J. Lambert, did with purpose to commit, promote or facilitate the commission of Aggravated Murder with another person, plan or aid in planning the commission of such offense;
>
> Contrary to and in violation of Section 2923.01(A)(1) of the Ohio Revised Code and being a Felony of the First Degree, being against the peace and dignity of the State of Ohio."[80]

On appeal, the defendant asserted that the indictment omitted an essential element of a conspiracy offense and therefore violated her right to indictment by grand jury, as secured in Article I, Section 10 of the Constitution.[81] In particular, the defendant posited that the commission of a substantial overt act in furtherance of the conspiracy is an essential element of a conspiracy offense that the state was required to allege in the indictment.[82] After thoroughly examining *Childs*, the *Lambert* Court concluded that the defendant's indictment "not only suffers from the same defect as the indictment in *Childs* (i.e., it fails to allege a specific, substantial, overt act), but it also fails to recite 'the generic words of the statute.'"[83] The defendant's indictment did not even include the words

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Trumbull No. 99-T-0163, 2000 WL 1876771, *4 (Dec. 22, 2000) (finding an indictment deficient where "[a]s was the case in *Childs*, the indictment simply recites the statutory language without specifically identifying an overt act committed in furtherance of the conspiracy.").

[80] *State v. Lambert*, 2017-Ohio-4310, 82 N.E.3d 29, ¶ 2 (4th Dist.).

[81] Id. at ¶ 5.

[82] Id.

[83] Id. at ¶ 18, citing *Childs*, 88 Ohio St.3d. at 198.

"substantial overt act in furtherance of the conspiracy."[84] As such, the court deemed the indictment as "more deficient" than the one in Childs.[85]

In turning to the present case, the indictment for Count 1 in Case No. 2018 CR 000156 contains the following language:

> "**ROBERT ALLEN CLOWERS** on or about the 7th day of January, 2018, through the 22nd day of February, 2018, in Clermont County, Ohio, with purpose to commit or to promote or facilitate the commission of the offense, with another person or persons, did plan or aid in the planning of the commission of the offense, to wit;
>
> purposely, and with prior calculation and design, cause the death of another or the unlawful termination of anothers [*sic*] pregnancy,
>
> contrary to and in violation of Section 2923.01(A)(1)/2903.01(A) of the Revised Code of Ohio, a felony of the first [*sic*] and against the peace and dignity of the State of Ohio."

The indictment for Count 2 contains the following language:

> "**ROBERT ALLEN CLOWERS** on or about the 7th day of January, 2018, through the 22nd day of February, 2018i, [*sic*] in Clermont County, Ohio, with purpose to commit or to promote or facilitate the commission of the offense, with another person or persons, did plan or aid in the planning of the commission of the offense, to wit;
>
> Purposely cause the death of another who was under thirteen years of age at the time of the commission of the offense, contrary to and in violation of Section 2923.01(A)(1)/2903.01(C) of the Revised Code of Ohio, a felony of the first degree, and against the peace and dignity of the State of Ohio."

Like the indictment in *Lambert,* both counts in the defendant's indictment not only suffer from the same defect as the indictment in *Childs*, in that the counts fail to allege a

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[84] *Lambert*, 2017-Ohio-4310 at ¶ 18.
[85] Id.

specific, substantial, overt act, but they also fail to recite the generic words of the statute.[86] The defendant's indictment is devoid of the words "substantial overt act in furtherance of the conspiracy."[87] As such, the defendant's indictment in Case No. 2018 CR 000156 is deficient and both Counts 1 and 2 are dismissed.

CONCLUSION

The court finds that the state proved the following counts beyond a reasonable doubt, and as such the defendant is guilty of the following:

- Count 1 in Case No. 2018 CR 000054, kidnapping, in violation of R.C. 2905.01(A)(3), a felony of the first degree; and
- Count 2 in Case No. 2018 CR 00054, felonious assault, in violation of R.C. 2903.11(A)(2), a felony of the second degree.

The court dismisses Counts 1 and 2 of Case No. 2018 CR 000156, in which the defendant is charged with conspiracies to commit aggravated murder, in violation of R.C. 2923.01(A)(1) and R.C. 2903.01(A) and (C), felonies of the first degree.

Counsel shall conference by telephone and call the Assignment Commissioner (513-732-7108) within three days in order to schedule a sentencing hearing, which shall be scheduled and held within 3-5 weeks of the date of this decision.

This matter is referred to the Probation Department for a presentence investigation.

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[86] Id., citing *Childs*, 88 Ohio St.3d. at 198.
[87] *Lambert*, 2017-Ohio-4310 at ¶ 18.

IT IS SO ORDERED.

DATED: 11-9-18

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Entry have been sent on this 9th day of November 2018 by e-mail to Darren Miller, at dmiller@clermontcountyohio.gov, Assistant Prosecuting Attorney for the State of Ohio, and to Brian T. Goldberg, Attorney for the Defendant, at briantgoldberg@yahoo.com. A copy was provided to the Probation Department.

Judicial Assistant to Judge McBride