

IN THE SUPREME COURT OF OHIO

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|----------------------|---|--------------------------------------|
| STATE OF OHIO, |) | Case No. 2007-2304 |
| |) | |
| Plaintiff-Appellee, |) | On Appeal from the |
| |) | Lake County Court of Appeals, |
| v. |) | Eleventh Appellate District |
| |) | |
| SAMUEL JOHNSON |) | |
| |) | |
| Defendant-Appellant. |) | Court of Appeals Case No. 2006-L-259 |

MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO

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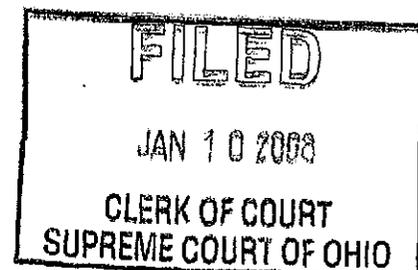


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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION, NOR A
QUESTION OF PUBLIC OR GREAT GENERAL INTEREST**

On December 12, 2007, appellant Samuel Johnson filed a Notice of Appeal and Memorandum in Support of Jurisdiction with this Court, appealing the judgment of the Eleventh District Court of Appeals in *State v. Johnson*, 11th Dist. No. 2006-L-259, 2007-Ohio-5783. In *Johnson*, the appellate court properly determined that the trial court did not err in denying his request for an alternate jury instruction, nor the trial court err in denying his motion for acquittal. The Court of Appeals also properly rejected appellant's arguments pertaining to the application of this Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, to his sentencing hearing.

In this appeal, appellant challenges each of the appellate court's holdings. While his appeal involves constitutional questions pertaining to due process, and the right to a fair trial, this Court has already rejected appellant's exact arguments contained in propositions of law (4)-(8). And appellant's remaining arguments in propositions of law (1), (2), and (3) challenging the trial court's rulings denying his request for an alternate jury instruction, and his motion for acquittal were thoroughly addressed and properly rejected by the Court of Appeals and, therefore, do not warrant further review.

STATEMENT OF THE CASE AND FACTS

On Dec. 24, 2005, Lakesha Clark lived with her daughter l'Yaunah in an apartment in Painesville, Ohio. That evening an argument between Ms. Clark and appellant, who was the father of Ms. Clark's daughter, ensued. At that time Ms. Clark was in the kitchen cooking food, and l'Yaunah was in her high-chair in the kitchen. Appellant became violent

with Ms. Clark in the kitchen: pulling her hair such that a large clump of it came out of her head. Appellant and Ms. Clark continued the physical altercation into the livingroom of Ms. Clark's apartment. At one point, Ms. Clark told appellant she was leaving the apartment to call the police, though she did not actually call the police. At Ms. Clark's request, a friend who was also in the apartment took I'Yaunah out of the apartment. Around the time that the friend left with I'Yaunah, appellant also left the apartment and Ms. Clark locked the door. There is no indication in the record where appellant went.

A short time later, appellant returned to the apartment and knocked on the door. But Ms. Clark told him that she was not going to let him in. Ms. Clark was then holding a kitchen knife for self defense. Appellant then kicked in the door to Ms. Clark's apartment. Appellant pushed Ms. Clark onto a couch and produced a folding knife, and stabbed her four times while on the couch. As a result there were injuries to Ms. Clark's arm, stomach, and breast. There were no injuries to appellant.

The friend who had removed I'Yaunah from the apartment then returned to the apartment, and hit Appellant with a pot. This allowed Ms. Clark to temporarily escape to the bathroom, but appellant followed her, knocked her into the bathtub and struggled with her there for a short time.

Appellant then left the apartment, and video surveillance shows him running from the apartment and looking or reaching out onto the window sill in the stairwell. At approximately the same time, the police arrived outside the apartment building. The police officers headed up the stairs where they encountered appellant as he was heading down the stairs. They also encountered Ms. Clark, and noted her injuries. Police officers later recovered the folding knife belonging to appellant on the window sill. (T.p. 66). There was

a small amount of blood on the tip of that knife that DNA analysis showed belonged to Ms. Clark. DNA testing also showed blood on Appellant's jacket belonging to Ms. Clark.

A more thorough review of the facts can be found in *Johnson* at ¶1-21.

ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. I

A trial court does not violate an individual's rights to due process and a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution by not instructing a jury on the lesser included offense of aggravated assault when the defendant presented no evidence that the defendant was seriously provoked by seeing his infant daughter scalded by boiling water thrown by the victim.

In appellant's first proposition of law, he challenges the trial court's failure to give the jury an instruction on the offense of aggravated assault. His exact argument was properly rejected by the Court of Appeals on direct appeal, and does not warrant further review by this Court. *Johnson* at ¶69.

Appellant's argument raises questions of fact, not of law. It is premised on the idea that when appellant left the apartment he went to check on his daughter, and then returned in a fit of rage after discovering she had been burned by boiling water thrown by Ms. Clark. But, as the Court of Appeals noted, "there is no evidence in the record that shows, directly or by inference, that Ms. Clark threw a pot of boiling water at any time. Her testimony that she did not throw any boiling water is uncontradicted in the record." *Johnson* at ¶80. Furthermore, there was absolutely no evidence at trial that Appellant went to check on his daughter when he left the apartment, as Appellant claims he "apparently" did. None-the-less, "[i]t must be noted that because appellant left the apartment for a time after his first

assault on Ms. Clark and then returned some time later, at which time he kicked in her door and stabbed her, appellant's motivation was based on past incitement." Id. at ¶82.

The Court of Appeals looked to established case law for the proposition that "[a] jury instruction is proper and relevant if: (1) the instruction is relevant to the facts of the case; (2) the instruction gives a correct statement of the relevant law; and (3) the instruction is not covered in the general charge to the jury." Id. at ¶70, citing *Mentor v. Hamercheck* (1996), 112 Ohio App.3d 291, 296. The Court of Appeals also correctly found that aggravated assault is a lesser included offense of felonious assault. *Johnson* at ¶72. But the Court of Appeals noted that a jury instruction is only required on a lesser included offense "[i]f the jury could reasonably find against the state and for the defendant on one or more of the elements of the crime charged and for the state and against the defendant on the remaining elements, which by themselves would sustain a conviction of a lesser included offense." Id. at ¶71, citing *State v. Nolton* (1969), 19 Ohio St.2d 133, 135.

This led the Court of Appeals to an analysis of the element distinguishing felonious assault from aggravated assault: the existence of serious provocation. *Johnson* at ¶73-77. After this lengthy analysis, the Court arrived at the conclusion that "[t]he undisputed evidence is that appellant was the aggressor. There is no evidence Ms. Clark provoked him in any way, let alone caused serious provocation. We hold the trial court properly refused to instruct the jury on aggravated assault because there was no evidence of serious provocation." Appellant simply did not present any evidence of serious provocation, and therefore he was not entitled to a jury instruction on aggravated assault. Thus, the Court of Appeals properly rejected appellant's argument and further review by this Court is not warranted.

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. II

A defendant is not entitled to a Crim.R. 29(A) Motion for Acquittal on a charge of aggravated burglary when the evidence presented at trial allowed the jury to find for the State on every element of the crime charged.

Appellant's second proposition of law is also premised on issues of fact. Appellant contends that he should not have been convicted of aggravated burglary because he was neither trespassing nor did he intend to inflict harm on Ms. Clark, as required to commit aggravated burglary. The Court of Appeals specifically rejected both of these claims, and further review is, again, not warranted. *Johnson* at ¶27.

The Court of Appeals relied on well established case law on sufficiency of evidence necessary to overcome a Crim.R. 29(A) motion for acquittal. That case law led the Court of Appeals to its holding that, viewing the evidence most favorable to the State, the trial court did not error by denying appellant's motion for acquittal. The facts of the case support the trial court's ruling.

Regarding Appellant's claim that he was not trespassing because he was living with Ms. Clark at the time, the Court of Appeals found that "Ms. Clark testified appellant was not living with her at her apartment and so was merely a guest." *Id.* at ¶34. Appellant's privilege to remain on Ms. Clark's premises terminated the moment he committed an assault on Ms. Clark. *Id.* at 33, citing *State v. Steffen* (1987), 31 Ohio St.3d 111, 509 N.E.2d 383. Appellant claims that Ms. Clark's testimony was "ambiguous and inconsistent." But the Court of Appeals noted:

Such argument fails to recognize the difference between analyzing the sufficiency and weight of the evidence. In reviewing the sufficiency of the evidence, the relevant inquiry is whether the state has presented evidence

on each element of the crime. * * *. Appellant's argument challenging Ms. Clark's testimony due to alleged inconsistencies is an argument appropriate on a challenge to the weight rather than the sufficiency of the evidence.

Johnson at ¶35.

Appellant also claims that the facts support the notion that Appellant was living with Ms. Clark, but “[e]vidence that appellant was an occasional overnight guest does not mean with her. There is no evidence in the record that appellant ever lived in Ms. Clark’s apartment.” *Id.* ¶36. Furthermore, the Court of Appeals also made light of the existence of other evidence that Appellant did not live with Ms. Clark, specifically that “Latasha Collins, who resides on the second floor directly below Ms. Clark, testified she never knew Ms. Clark to have a male living with her and if there had been, Ms. Collins would have seen him as he went to the third floor.” *Id.* at ¶37.

Regarding Appellant’s contention that he did not enter Ms. Clark’s apartment with purpose to inflict harm, the Court of Appeals correctly noted that purpose to inflict harm is not an element of aggravated burglary, but rather the purpose prohibited by the statute is purpose to commit any criminal offense. *Id.* at ¶38. None-the-less, the Court of Appeals addressed the issue of purpose to commit any criminal offense:

Prior to appellant kicking in Ms. Clark’s door, he had pulled a large clump of hair out of her head and physically fought with her in the kitchen and living room. He was angry and agitated with her because in the past she had left him and had a relationship with another man. Appellant left Ms. Clark’s apartment for a period of time and later returned to the apartment. He pounded on the door and ordered Ms. Clark to open it for him. She refused. Appellant kicked in the door; forced his way into the apartment; pushed her on the couch; and stabbed her four times with a butcher knife. When Ms. Clark ran to the bathroom to escape from appellant, he came after her and pushed her into the bathtub. We hold the state presented sufficient evidence that appellant acted with the purpose to commit an assault against Ms. Clark in her apartment.

Id. at ¶41. The State presented sufficient evidence on these elements, especially when viewed in a light most favorable to the State, and therefore the trial court properly rejected appellant's motion for acquittal. Thus, the Court of Appeals properly rejected appellant's argument and further review by this Court is not warranted.

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. III

A defendant is not entitled to a Crim.R. 29(A) Motion for Acquittal on a charge of felonious assault when the evidence presented at trial allowed the jury to find for the State on every element of the crime charged.

Appellant's third proposition of law is once again premised on issues of fact. In this proposition of law, again relating the sufficiency of the evidence, appellant specifically argues that the State failed to present sufficient evidence that he knowingly caused physical harm, as required for felonious assault. The Court of Appeals rejected this exact claim, and further review is, again, not warranted. *Johnson* at ¶27.

Addressing this issue, the Court of Appeals held that,

This mental state was sufficiently proven under both counts of felonious assault when appellant threw Ms. Clark on the couch and stabbed her four times with a butcher knife in her right arm, stomach and chest. One of the stab wounds to her arm was six inches in length and described by Off. Smith as deep. Stabbing Ms. Clark, especially in the area of her vital organs, further demonstrates that appellant was aware his conduct would probably result in serious physical harm or physical harm with a deadly weapon.

Johnson at ¶50. Further, the Court of Appeals viewed the testimony of Ms. Clark as buttressed by other evidence admitted at trial:

It should be noted that Ms. Clark's testimony was corroborated by Mr. Bolden, who yelled to the officers to hurry up to Ms. Clark's apartment because she was being stabbed. Her testimony was also corroborated by her neighbor Ms. Collins, who testified she heard "a lot of commotion, yelling, screaming, and baby screaming" for five to ten minutes coming from Ms.

Clark's apartment at the time. The knife and appellant's jacket with Ms. Clark's blood further corroborates that appellant stabbed her. The police officers' testimony concerning their discovery of blood on the couch and in the living room and bathroom corroborates Ms. Clark's testimony. The four separate stab wounds corroborate her testimony that appellant stabbed her four times. We hold the state presented sufficient evidence that appellant was aware his use of a knife to stab Ms. Clark would cause serious physical harm or physical harm with a knife.

Id. at ¶53. Additionally, the Court of Appeals noted that appellant's arguments that Ms. Clark's testimony may be internally inconsistent, and inconsistent with other evidence is an argument appropriate to an issue of manifest weight rather than the sufficiency of the evidence. Once again, the State presented sufficient evidence on this element, especially when viewed in a light most favorable to the State, and therefore the trial court properly rejected appellant's motion for acquittal. Thus, the Court of Appeals properly rejected appellant's argument and further review by this Court is not warranted.

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. IV

A trial court does not violate an individual's rights under Due Process and the Ex Post Facto Clauses of the Ohio and United States Constitutions when it sentences the individual to more-than-the-minimum and consecutive prison terms.

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. V

A trial court does not violate an individual's rights to Due Process when it sentences the individual to more-than-the-minimum and consecutive prison terms with no additional findings made by a jury and when the individual had no actual or constructive notice of the possible sentences.

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. VI

A trial court does not violate the principle of separation of powers provided in the United States and Ohio Constitutions by sentencing an individual to more-than-the-minimum and consecutive prison terms

based on this Court's severance of the offending statute provisions under *Foster*.

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. VII

A trial court does not violate the Rule of Lenity when it imposes more-than-the-minimum and consecutive prison terms upon an individual.

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. VIII

A trial court's decision to sentence an individual to more-than-the-minimum and consecutive prison terms is not contrary to the intent of the Ohio legislature.

In this appeal, appellant challenges his more-than-the-minimum and consecutive prison terms imposed post-*Foster*. On December 26, 2007, this Court dismissed two appeals involving his exact arguments in *State v. Smith*, 2007-1813, and *State v. Stoneburner*, 2007-1774. See *12/26/2007 Case Announcements*, 2007-Ohio-6803. Accordingly, because this Court has already rejected appellant's propositions of law, jurisdiction should be declined.

CONCLUSION

For the foregoing reasons, the State of Ohio, Appellee herein, respectfully requests that this Honorable Court deny jurisdiction.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing Memorandum in Response of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellant, Vanessa R. Clapp, Esquire, Supervising Attorney-Appellate Division, Lake County Public Defender's Office, 125 East Erie Street, Painesville, OH 44077, on this 9th day of January, 2008.



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