

IN THE SUPREME COURT OF OHIO

10-1537

STATE OF OHIO,
Appellee,

: CASE NO: C-0920291
: TRIAL NO: B-0805752

vs.

BRYAN SWINFORD,
Appellant,

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APPEAL FROM THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

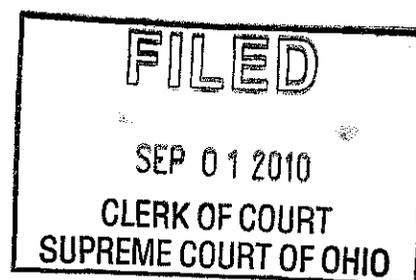
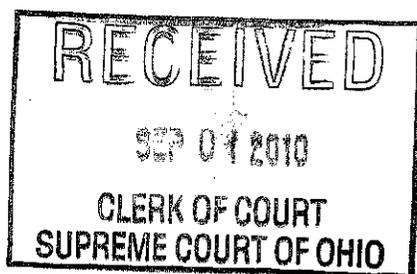
NOTICE OF APPEAL

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ATTORNEY FOR APPELLEE

ATTORNEY FOR APPELLANT



IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Appellee

: Case No. C-090622
: Trial No. B-0806053

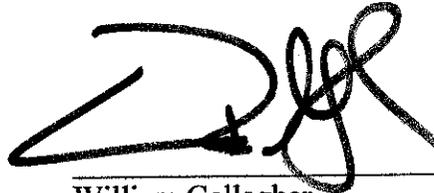
vs.

BRYAN SWINFORD,
Appellant

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Now comes Bryan Swinford, Appellant, and hereby files his Notice of Appeal to the Ohio Supreme Court in the above captioned matter. Said appeal is from the decision of the First District Court of Appeals, entered on July 21, 2010, affirming the trial court's judgment. This appeal involves constitutional questions and questions of great public interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by mail upon Joseph Deters Hamilton County Prosecuting Attorney, this 31th day of August, 2010.



William Gallagher
Attorney for Appellant

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,

Plaintiff-Appellee,

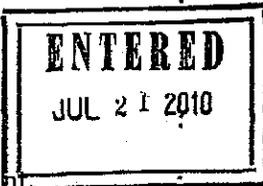
vs.

BRYAN SWINFORD,

Defendant-Appellant.

APPEAL NO. C-090622

TRIAL NO. B-0806053



JUDGMENT ENTRY.

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a jury trial, defendant-appellant Bryan Swinford was found guilty of felonious assault. The trial court sentenced him to four years' incarceration and ordered restitution. Swinford now appeals.

Amy Miller, Swinford's former girlfriend, testified that she and Swinford had been arguing in her basement one evening. The argument culminated in Swinford hitting her over the head with what Miller thought may have been a large, heavy flashlight. Miller suffered extensive injuries to her face and skull.

Miller could not initially recall the incident. And when she did begin to remember what had happened, her memory returned sporadically. State's witness

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.



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Raj Narayan, a neurologist, testified that this type of spotty memory recall was normal in patients with Miller's type of head injury.

Swinford's defense centered on attacking Miller's credibility and on casting doubt on the police investigation of the crime. Swinford also claimed that he was at his mother's apartment when the attack occurred.

In his first assignment of error, Swinford asserts that the trial court should have declared a mistrial due to prosecutorial misconduct during closing argument. Swinford takes issue with the following remark: "If they [the defense] were so convinced that Bryan was going to be excluded on DNA, they could have had it tested * * * . We know that didn't happen either, so none of those witnesses come [sic] into court."

We agree with Swinford that this was improper since it suggested to the jury that Swinford needed to prove that he was innocent. But our analysis does not stop here. We must determine if this improper statement was so egregious that it deprived Swinford of a fair trial.²

Viewing the closing argument and the trial in their entirety, as we are required to do³, we hold that this single statement did not violate Swinford's right to a fair trial. Following defense counsel's objection, the court instructed the jury to ignore the improper statement, and it also issued a lengthy and proper curative instruction. Later, the jury was again properly instructed that the state had the burden to prove Swinford guilty beyond a reasonable doubt. Jurors are presumed to follow the trial

² See *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 94 S.Ct. 1868; *State v. Smith*, 87 Ohio St.3d 424, 2002-Ohio-450, 721 N.E.2d 93; *State v. Freeman* (2000), 138 Ohio App.3d 408, 741 N.E.2d 566.

³ See *Freeman*, *supra*.

court's instructions.⁴ And we find nothing to demonstrate the contrary in this case. Swinford's first assignment of error is overruled.

In his second and third assignments of error, Swinford claims that the jury's verdict was against the weight and sufficiency of the evidence. It was not. Miller testified that Swinford had hit her over the head with a heavy object. It was undisputed that Miller had sustained severe injuries. This was sufficient evidence to support Swinford's felonious-assault conviction.⁵ And while Swinford presented a version of the events that, if believed, would have exonerated him, there is no indication that the jury "clearly lost its way" in choosing to believe the state's case so as to create a "manifest miscarriage of justice" warranting a new trial.⁶ Swinford's second and third assignments of error are therefore overruled.

The judgment of the trial court is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HENDON and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on July 21, 2010

per order of the Court _____
Presiding Judge

⁴ *State v. Herring*, 94 Ohio St.3d 246, 254, 2002-Ohio-796, 762 N.E.2d 940.

⁵ See R.C. 2903.11(A)(1); *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492; *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

⁶ *Martin*, supra; *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.