ORIGINAL

IN THE SUPREME COURT OF OHIO

12-0441

STATE OF OHIO	*	
	*	
APPELLEE	*	ON APPEAL FROM THE
	*	PUTNAM COUNTY COURT
V.	*	OF APPEALS, THIRD
	*	APPELLATE DISTRICT
JESSE L. HURLEY	*	
	*	COURT OF APPEALS
APPELLANT	*	CASE NO. 12-11-01

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JESSE L. HURLEY

JESSE L. HURLEY
P.O. BOX 57
MARION, OHIO 43302-0057

COUNSEL FOR APPELLANT JESSE L. HURLEY, PRO SE

GARY LAMMERS
PUTNAM COUNTY PROSECUTOR
336 E. MAIN STREET
OTTAWA, OHIO 45875

COUNSEL FOR APPELLEE STATE OF OHIO GARY LAMMERS

FILED
MAR 14 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Page

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF CASE AND FACTS 2

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW . . . 8

PROPOSITION OF LAW No. I:
THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE APPELLANT'S REQUEST FOR EXPERT FEES WHEN SUCH EXPERT WOULD BE USED TO CONTRADICT THE STATE'S THEORY OF THE CASE 8

PROPOSITION OF LAW No. II:
THE TRIAL COURT ERRORED IN FAILING TO GRANT APPELLANT'S CRIMINAL RULE 29 MOTION TO DISMISS THE ALL OF THE CHARGES AT THE CONCLUSION OF THE STATE'S CASE IN CHIEF 9

PROPOSITION OF LAW No. III:
THE JURY ERRORED TO THE PREJUDICE OF THE APPELLANT BY FINDING HIM GUILTY OF FELONIOUS ASSAULT . . . 9

PROPOSITION OF LAW No. IV:
THE TRIAL COURT ERRORED AS A MATTER OF LAW WHEN IT IMPOSED THE MAXIMUM SENTENCES FOR THE OFFENSES IN VIOLATION OF THE GUIDELINES SET FOR IN O.R.C. 2929.12 . . 10

CONCLUSION 11

CERTIFICATE OF SERVICE . . . . . .!!

APPENDIX Appx. Page

OPINION 1

JUDGMENT ENTRY 2-18

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The Appellant has been denied his Fundamental right to be heard on his only appeal of right, where as here the trial court record reflects no finding of guilt beyond a reasonable doubt see JACKSON V. VIRGINIA.___U.S.___; likewise, this record shows also there is an insufficient amount of evidence to support a conviction for felonious assault via the standard setforth in TIBBS V. FLORIDIA,___U.S.___, the same denies this Appellant fundamental fairness redress requested.

Moreover, the denial of expert witness fees for non-capital cases in Ohio has never been fully addressed, and due to the wrong doers seeking to place blame on others for there mis-deeds, the Public at large has a great interest in this Supreme Court's Court's developement of a brightline rule of law here.

And finally, with the creation of H.B. 86, and the Govor's plan to ease the over crowding of our prison system, and the Common Law as it relates to sentencing, has yet to be defined, this Supreme Court should exercise its jurisdiction to instruct the state on the ramafications of H.B. 86 on the common law anounced in STATE V. BATES,(2008), ___Ohio St.3d ___.

And for the granting of jurisdiction to hear this appeal the Appellant prays Justitia Piepondrous Laus Deo.

STATEMENT OF CASE AND FACTS

The Appellant Jesse Hurley was arrested and charged with the offense of felonious assault after Nicole Kirk reported he attacked her with a kitchen knife, on or about the day of October 3, 2010. Brian Siefker was the first to arrive on the sence, where he almost immediately called off the ambulance, which was in route to treat Ms. Kirk.

Sargent Sielfker, went to the residence of Sarah Tice, lot 27continental, Ohio, where he located Nicole Kirk, after questioning her he found out that Jesse Hurley might be located at the Mother of Brent and Westley Hostettler residence, two trailers down. Shortly after Sgt. Siefker arrived on the scene, Deputy Mark Doster of the Putnam County Sheriff's office also arrived on scene, where he went to the house of the Hostettler boys Mothers house. When he knocked on the door the Hostettler's Mother answered the door.

At that time Deputy Doster asked for Jesse Hurley, and Mr. Hurley immediately came outside to speak with Mr. Doster, which he advised Doster of a warrant he might have for missing court date in Lima, Ohio where he lives, assuming that was why Deputy Doster was there.

After finding out Mr. Hurley did not have a warrant, he told Mr. Hurley he was detaining him, stating he was not under arrest, and that he just wanted to detain him. Mr. Hurley asked why he didn't detain anyone else. Deputy Doster pulled Mr. Hurley to the side and said your a big guy, and, I am not worried about these other guys, reluctantly Mr. Hurley agreed. And that is when Doster advised him of the report Mrs. Kirk had made. He then begain to question Mr. Hurley, and Mr. Hurley told officer Doster, that Nicole does not like him, and she recently attempted suicide, and that she is mentally unstable. Mr. Hurley told

Doster that Nicole Kirk arrived at Sarah Tice's trailer, her sisters house, where Mr. Hurley was spending time with his little girl. Hurley stated that, Ms. Kirk unexpectantly showed up, and knocked on the door and Ms. Tice's oldest boy Domnick Tice 9 yrs. old looked out the window of the door, and informed Mr. Hurley, that it was his Aunt, and could he let her in.? Hurley told him it was okay to let her in.

Mr. Hurley stated to Deputy Doster, that when Nicole Kirk entered the residence, she immediately starting putting the children to bed.

After putting the childern to be Hurley stated that Ms. Kirk asked Brent Hostetter his name. Shortly after that Brent lit a cigarette , an Ms. Kirk asked him to go outside, because of the kids. When Brent Hostettler came back in, he was accompanied by his brother Wesley Hostettler Ms. Kirk also asked him his name.

Shortly, after that Mr. Hurley stated to the aforementined Deputy that Nicole asked Brent for a cigarette and a lighter, which he gave her.

Mr. Hurley then told Deputy Doster that Ms. Kirk started to go outside to smoke a cigarette, but paused, and went back towards the childrens room. Mr. Hurley then stated that when she was in the back himand the Hostettler boys decided to go outside on the deck to smoke a cigarette, and that usually he doesn't smoke outside. But since Nicole was there he decided to go outside. After a while of being outside Hurley stated, that he heard the door lock and heard Nicole Kirk on the phone asking for medical assistance.

Mr. Hurley then told Doster, he and both Hostettler boys went back to Mrs. Hostettler's trailer two doors down. where he contacted the Mother of his daughter, Sarah Tice at work, and asked her to kick the door down. Mr. hurley then told Doster that while waiting on Sarah to call back, he wnt back to the trailer in concern for his child, due to

the fact that Nicole Kirk recently attempted suicide.

Hurley states that he went back down to Sarah Tice's trailer and banged on the door while calling out loud to Nicole to open up the door Hurley told the Deputy that Nicole did not open the door, and on the way back to the Hostettler's trailer, he saw a police car go past in the opposite direction. Hurley then told Deputy Doster that the Hostettler's younger brother had followed him when he went back to Sarah Tice's tr ailer, the younger brothers name is Preston.

Mark Doster then questioned Brent Hostettler age 18, then Wesley Hostettler age 17, they both gave the same account of Mr, Hurley's verbal statement. Mr. Hurley was placed in the cop car at his request.

Mark Doster then went back to the residence where Sgt. Siefker and Ms. Kirk was located. Shortly after that the Mother of Sarah Tice ,Nicole Kirk, Vicky Kirk, arrived on the scene. At the same time Ms. Tice also arrived. That's when Deputy Doster allowed Sarah to speak with Jesse Hurley for a brief moment. Then Doster and Ms. Tice went back in the house, and Vickie Kirk took her two daughters Sarah and Nicole to her house.

Brian Siefker and Doster then attempted to find a joint which Nicole said she took from Brent Hostettler, and threw it out the door, they did not locate it. Deputy Doster then dropped off two statement forms for the Hostettler boys to fill out. They then proceeded to take Mr. Hurley to the Putnam County jail. Brian Siefker went to the residence of Joe and Vickie Kirk, Nicoles Mother, and Father to obtain a written statement Nicole. Sgt, Siefker never attempted to gather information by questioning Mr. hurley or the Hostettler boys the night of the alleged incident.

At Mr. Hurley's bond hearing the Judge set bond at $100,000.00 on Oct. 4,2010. Appellant never made bond and was remended to the custody of the Putnam County Jail until trial. Mr. Hurley was declared indigent by the court and appointed counsel. Appellant first preliminary hearing was cancelled, reschudled 4 week later.

At the preliminary hearing the state presented no evidence at all to support a charge. Nor was Nicole Kirk present to give testimony, in fact the only evidence the state presented was a picture of a knife that was supposed to look like same alleged knife since both were said to have sarated edge. Also no investigation was ever attempted by the state e.g. there was no crime scene investigation, Jesses Hurley was never asked to give a statement, nor were there any detective assigned to this case, no medical reports, the alleged victums cloths were not examed, Nicole finger nails were not checked for possible blood evid., Mr. Hurley was not exaimed to see if a dog may have bitten him,no knife was ever recoved, notwithstanding, Mr. Hurley was still bond over by the Grand Jury for trial.

After, an arraignment and various pre-trials, im which no proceedings were had, defendant went to jury trial with appointed coundel Aaron Massel. The general motions were filed in the days leading up to jury trial. One particular motion of importence, the defennce request for expert witness fees should have been granted, and its denial by the Judge violates Mr. Hurley's right to fundamental fairness, since an expert witness could determine wether the injuries Nicole Kirk sustained were consisted with her statement, and consistant with the knife in question (sarated edge), such evidence should have been weighed by the jury .

A jury trial was held for the defendant Dec. 28th,29th, but before

the trial could proceed counsel requested a change of venue, based on the fact there was no diversity in the jury pool in violation of the 6th, 14th Amends. U.S.C.A. Since counsel felt that Mr. Hurley being Black and the jury all white does not constitute a jury of his peers, the Judge summarily dened this motion.

The night of this alleged inncident the defemdant was at Sarah's trailer to spend time with his daughter, and Sarah's two other children, while she was at workNicole Kirk decided to visit the trailer at 8:30 as previously stated she immediately begain to put the children to bed. After which Nicole stated another boy had come into the trailer, to me. At that point according to Nicole she asked the neighbors to leave. Hurley opened door,the boys left the trailer. At this point Nicole alleges the appellant threw her on the couch, were she hit her head.

Her testimoney is he climbed on top of her and held her down, an said you'er not going to get me into any trouble, and used a kitchen knife to attack her. She testified that at first she did not scream, due to the fact that she knew Mr. Hurley did not think he would hurt her. And she didn't want the children to witness the alleged attack. She testified, that when she did scream her dog, whom she had brought with her came from the kids room where she left him, she said the dog growled and barked at Mr. Hurley, and he ran out the trailer, and she then locked the door behind appellant. She then testifed that when she called 911. Nicole also testified there were no tears in her shirt puncture marks , but that blood had socked through her white under shirt, and the grey sweater she had on, notwithstanding she said on the stand, that she refused medical treatment.

Sgt. Brian Siefker was the first to arrive at the alleged scene, and he testifed that he did not see the appellant. Siefker further

testified, after knocking on the door Nicole Kirk answered, and showed him what appeared to be a scrach, or scrape. He spoke with Ms. Kirk and recored her description of the events, he then took photo's of the so-called injuries. He said he did not see any brusing or injuries to Nicole's arms or wrists, where she said Mr. Hurley held her down. He the Sergeant did not exaime her fingers or nails. Sergeant also said the Appellant and his guests had been smoking marijuana. And Sergeant Siefker was unable to find a knife during the search of the area.

Sgt. Siefker also said that he was able to speak to Sarah's 9 yr. old son and 7 yr. old Dalys Tice, but did not interview them more in the formal investigation.

Brent Hostettler who testified at the preliminary hearing was unavailable for trial, however, an audio of his testimoney was played for the jury, they were also given transcripts of his testimony, where he admitted to smoking the marijuana. Mr. Hostettler testified Nicole Kirk's eyes were like real big. He testified that after lighting a cigarette Ms. Kirk asked him to go outside because of the kids, at this time Ms. Kirk also asked him his anme. He said he went out to smoke, and at the whole time he could see Mr. Hurley sitting in the same chair he had been sitting in, and that while outside he saw his younger Brother, and that they both came inside, and Nicole asked his younger brother what his name was. He stated Nicole asked him for a cigarette. And after a wile Jesse and him decided to go out on the deck to smoke a cigarette. And that wile out there on the deck Brent testified he heard the door lock, and that he heard Nicole on the phone asking someone for help. It was at that point that all three men went over to the Hostettler house. This witness also testified he had been questioned the night of the alleged inncident, Deputy Doster, and had

later completed a written statement and given it to the Sheriff's office.

The State also called Ms. Sarah Tice, she testified about some knives she owns, as well as her relationship to Mr. Hurley.

The State also called the Mother and Father of Sarah Tice and Nicole Kirk. Defense counsel had previously filed a motion in limine. The Court rule that motion would be ruled on durning trial, after the calling of both witnesses, the Mother, Father, Nicole, Joe, and Vickie Kirk. Defense counsel re-asserted his objections, which the courtoverruled. They both testified, to fact neither had knowledge of i.e.the alleged attack. The State rested its case and admitted some photographic exhibits. Defense counsel admitted Nicole Kirk's only written statement over the objection of the state, due to the fact of her inconsistency between her written statement and testimony, The Defense to meet its burden oalled Mr. Wesley Hostettler, he stated that he did see or hear anything, that suggested Ms. Kirk was injured before he left the trailer with both his brothers and Mr. Hurley. He stated that after all of them went out to smoke he heard the door lock. He then testified that all three of them after that went over to his Mothers house. and he further stated that Mr. Hurley contacted Ms. Tice via telephone once they arrived at his Mothers house. He said that after Mr. Hurley had talked to Ms. Sarah Tice, he went back to the trailer to get his kid. But Ms. Kirk would not let him in. He also testified that he and Mr. Hurley knew each other for about a year, and were friends. He also was questioned that night by Deputy Doster, and gave a statement (written) to sheriff's office.

Ms. Tice was re-called to the stand, she testified,she has a continuing relationship with Mr. Hurley since the alleged attack, that

include writting letters, in which she told him, she loves him. She also testified, that she was at work during the alleged attack. And Mr. Hurleycontacted her. She told the Court, that she picked Mr. Hurley up in Lima, Ohio, where he lives, and that he usually only comes to her house about every two weeks. She was asked do she believe mr. Hurley is innocent, the state objected, and the Court sustained.

Mr. Hurley testified, that although he did not have to testify, he wanted to because, he wanted to state the truth. Mr. Hurley stated that he was innocent, and wrongly accused man. And that he has been in complete compliance with the authorities. And that he'd agreed to take a lie detector test. then after the state had asked him if he'd take take a lie detector test, the state denied him from taking that test. He further testified no way, what so-ever did he attack Nicole Kirk. Mr. Hurley testified as Wesley Hostettler testified and ech reflects the same testimony, that they knew each other about a year is what Wesly said, however, Mr. Hurley testified that he'd known Wesley about five months. And that he met the Hostettler boys after being released from prison March 3, 2010. Mr. Hurley testified everything started out very normal with Ms. Kirk, Mr. hurley said Ms. kirk put the children to bed, and that then she (Nicole) was walking around the house. He stated that Nicole asked for a cigarette and a lighter, an went back to the childrens area. He stated that wile Ms. kirk was in the back, him and the Hostettler boys decided to go outsideon the deck to smoke a cigarette, and that he usually did not go outside to smoke, but since she was there, he went outside. He said that wile he was outside he heard the door lock. And after knocking on the door he heard Nicole

on the phone, as if she was hurt asking for medical help. He stated at that point he went to the Hostettler's Mother's house, and called Ms. Tice, and asked her to kick the door down, an that she said not to, an that she was going to call her sister. He stated taht he then returned to the trailer, and banged on the door calling out Nicole's name Hurlley testified that he came out side when he heard Deputy Dosterask for his name , and stated to him that he might have a warrant for his arrest. He was then asked to be detained, and after agreeing to being detained he testified that he was informed of Ms. Nicole Kirk's report, he said he told the deputy his side of the story. Mr. hurley testified deputy Doster, then questioned Brent Hostettler, an before questioning him, told Mr. Hurley not to say anything. Mr. Hurley stated that he turned his back so brent could not see his face, while he spoke to the officer. Mr. Hurley stated Mr. Wesley Hostettler was inside because, he was on probation, but Mr. Hurley told officer Doster Wesley was there too, an he was also questioned.

Mr. Hurley also testified that he intentionally lied to deputy Doster when questioned that night of the alleged attack, about smoking marijuana that night, but while under oath Mr. Hurley admitted that he was smoking it that night. The prosecution related Mr. Hurley criminal. background. The Defense then rested their case and both sides proceeded to closing arguments. Jury instructions were given and the jury retired for deliberations. At one point in the deliberations, they requested to hear the 9-1-1 tapes again. It was noted that they were not admitted in to evidence and the Court advised the jury to rely on their recollection. The jury returned a verdict of guilty and the jury was polled.

The Court immediately sentenced the Defendant to an eight year term of incarceration.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW No. I: **The trial court abused its discretion when it denied the Defendant-Appellant's request for expert fees when such an expert would be used to contradict the State's theory of the case.**

This is a non-capital case, so there is no authority mandating the allowance of expert witness fees. As such, this decision should be reviewed under an abuse of discretion standard. See *State v. Weeks* (1989), 64 Ohio App.3d 595, 598.

Even in non-capital cases "The factors the trial court should consider are "(1) the value of the expert assistance to the defendant's proper representation * * *; and (2) the availability of alternative devices that would fulfill the same functions as the expert assistance sought." Id., citing *State v. Jenkins* (1984), 15 Ohio St.3d 164.

Here the State's theory of the case was that Mr. Hurley attacked and injured Ms. Kirk with a kitchen knife, that had a sarated edge. The defense wished to show that these wounds were not consistant with the story as Ms. kirk told it. The defense also wanted to determine whether a sarated edge knife caused the scratches on Nicole Kirk. Also one can surmise that there is an implication that the wounds were self inflicted. Determining whether the wounds were consistant with a sarated knife edge, would have been essential to Mr. Hurley's defense. as should an expert beable to contradict Ms. kirk's testimony, the outcome of the case would most likely have been dramatically different.

The second step in the review is the ability of other means to flfill a role an expert would fill. There were no other means in this case this was a he said said she said case, with no physical evidence at all. An expert would have eliminated this uncertainty, and no other means could have accomplished this. The State's theroy was that Nicole Kirk told the truth and a expert witness could have only concured that with there theroy that is if it was indeed true. By denying the request for expert

witness fees the trial Court abused its discretion, and put Mr. Hurley in a losing position. This case was perfect for the approval of expert witness fees, especially due to the fact that there was no medical report, the request should have been granted.

PROPOSITION OF LAW No. II: **The trial court erred in failing to grant appellant's Criminal Rule 29 motion to dismiss the all of the charges at the conclusion of the State's case in chief.**

When determining whether there is sufficient evidence presented to sustain a conviction, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio.St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307.

A the close of the State's case there was no evidence at all to support the essential elements of the crime, and the rule 29 Motion to dismiss should have been granted. First, felonious assualt requires the use of a weapon, it was never determined whether a knife caused these injuries, nor was there any weapon found. There were very minor injuries, which required no medical treatment. But the source of these injuries were in question. And the crediablity of the State's only evidence, their lead witness, was most definitley in question and nothing was provided to support her testimony. At the close of the State's case there was no evidence to support Mr. Hurley cause any harm to Nicole Kirk, the state did not prove beyond a reasonable doubt that Mr. Hurley committed this crime, therefore the trial court should have granted the rule 29 motion, and errored by not doing so.

PROPOSITION OF LAW No. III: **The jury erred to the prejudice of the Defendant-Appellant by finding him guilty of felonious assault.**

Sufficiency of evidence is governed by Ohio Criminal Rule 29. *State v. Terry* (2002), Fayette App. No. CA2001-07-012, 2002-Ohio-4378, ¶9, citing *State v. Williams* (1996), 74 Ohio.St.3d 569, 576, 1996-Ohio-91; *State v. Miley* (1996), 114 Ohio.App.3d 738, 742. A trial court "shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Ohio Criminal Rule 29(A). "[A] [trial] court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, paragraph one of the syllabus. "The legal sufficiency of evidence necessary to sustain a verdict is a question of law." *State v. Harry* (2008), Butler App. No. CA2008-01-013, 2008-Ohio-6380, ¶43, citing *State v. Thompkins* (1997), 78 Ohio.St.3d 380, at 386, 1997-Ohio-52.

There was no evidence to support a finding, beyond a reasonable doubt, that any crime had occured. The weapon in question was never found. The clothing from the night of the alleged incident was not preserved, which could of easley determined whether an attack with a knife actully happened. There was no medical report, the only evidence of the alleged attack, was one person Nicole Kirk, who's crediablilty was definitely under question, and who's motivation for getting the defendant out of her families life, and who recently no more than two weeks prior, tried to take her own life. Three other people two with nothing to gain, or loose from being honest, directly contradicted her testimony. Upon review of the whole record reasonable minds can only conclude that the evidence was not sufficient to support a finding of guilt.

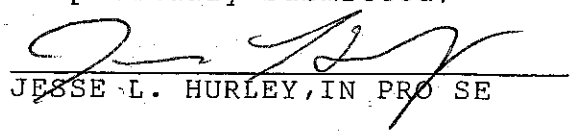
PROPOSITION OF LAW No. IV: **The trial Court erred as a matter of law when it imposed the maximum sentences for his offenses in violation of the guidelines set forth in O.R.C. 2929.12.**

For felonious assault, a violation of O.R.C. 2903.11, the maximum prison term is eight years, with no mandatory term nor presumption of necessity. The Ohio Revised Code Section 2929.12 sets forth several considerations to support principles of felony sentencing. This includes indicating "that the offender's conduct is more serious than conduct normally constituting the offense." Here, there is clearly no indication that the conduct Mr. Hurley was convicted of was more serious than similar offense, in fact it was the opposite. There was very minimal injury to the alleged victum. No medical treatment. And it was never proven that a deadly weapon a sarated knife edge caused these injuries. this was not a most serious offense when considering felonious assault. It should have been considered, that this was not the worse form of the offense, and a maximum sentence should have not been imposed.

CONCLUSION

Although the knife in question was never retrived, the State's theroy was that the knife with a sarated edge caused Nicole Kirk's injuries. An expert witness could of determined whether a sarated edge was used or not. Due to the denial of expect witness funding and lack of evidence, and the reasons discussed in this case involes matters of public and great general interest, and a substantial constitutional question, the Appellant respectfully request that this Court accept jurisdiction, and for this I pray Justitia Piepondrous Laus Deo.

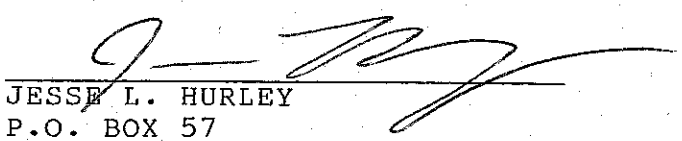
Respectfully submitted,



JESSE L. HURLEY, IN PRO SE

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for the Appellee State of Ohio Gary Lammers, 336 N. MAIN STREET, OTTAWA OHIO 45875 on March 12 2012.



JESSE L. HURLEY
P.O. BOX 57
MARION, OHIO 43302-0057

Pro se Counsel

COURT OF APPEALS
TERESA J. LAMMERS, CLERK
PUTNAM COUNTY, OHIO
2012 JAN 30 A 11: 01

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
PUTNAM COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 12-11-01**

v.

JESSE I. HURLEY, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Putnam County Common Pleas Court
Trial Court No. 2010 CR 75

Judgment Affirmed

Date of Decision: January 30, 2012

APPEARANCES:

Nicole M. Winget **for Appellant**

Todd C. Schroeder **for Appellee**

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
PUTNAM COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 12-11-01**

v.

JESSE I. HURLEY, **JUDGMENT ENTRY**

DEFENDANT-APPELLANT.

COURT OF APPEALS
TERESA J. LAMMERS, CLERK
PUTNAM COUNTY, OHIO
2012 JAN 30 A 11:0

For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

JUDGES

WILLAMOWSKI, J., Concurring Separately

DATED: January 30, 2012

ROGERS, J.

{¶1} Defendant-Appellant, Jesse Hurley ("Hurley") appeals the judgment of the Court of Common Pleas of Putnam County convicting him of felonious assault. On appeal, Hurley argues that the trial court abused its discretion when it denied his request for expert fees, that the trial court erred in failing to grant his Crim.R. 29 motion for acquittal, that the jury verdict of guilty was not supported by sufficient evidence, and that the trial court erred by imposing the maximum sentence. For the following reasons we affirm the judgment of the trial court.

{¶2} In October 2010, the Putnam County Grand Jury indicted Hurley on count I: felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree. The complaint arose from an incident whereby Hurley was in the victim's sister's trailer, the victim arrived, told Hurley and his friends to leave, and before leaving the residence, Hurley attacked the victim with a kitchen knife. Subsequently, Hurley entered a not guilty plea to the charge.

{¶3} On December 15, 2010, the trial court denied Hurley's motion for expert fees. The case proceeded to a jury trial on December 28 and 29, 2010. At trial, the State presented the testimony of the victim, Nicole Kirk, Sergeant Brian Siefker, Deputy Mark Doster, Brent Hostettler, Sarah Tice, Joseph Kirk, and Victoria Kirk during its case in chief. Hurley moved for a Crim.R. 29 motion for

acquittal at the close of the State's evidence. The trial court denied this motion. The defense then presented Wesley Hostettler, Sarah Tice, and Jesse Hurley.

{¶4} Nicole Kirk ("Nicole" or "Victim") testified that she knows Hurley because he has been dating her sister, Sarah Tice ("Sarah"), sporadically for the past five or six years and is the father of Sarah's daughter. On October 3, 2010, at approximately 8:00 p.m., Nicole took her dog to visit Sarah's children. When she arrived at Sarah's trailer, an unfamiliar man was in the living room with Hurley, Sarah's three children were also there, although one was asleep on the couch; food and empty food boxes were spread all over the living room, and the living room was filled with cigarette and marijuana smoke. Nicole took the children to their rooms to put them to bed. When she came back into the living room, a third man was there "with a joint in his hand." Trial Tr., p. 30. Nicole testified that she took the "joint" from his hand and threw it out the door. She told the men to leave and that she was going to call the police. As the Defendant stood up to leave, the other two men walked out the door, and instead of leaving, the Defendant shut the door, pushed her down onto the couch, said that she was not going to get him in any trouble, and cut and scraped her stomach with a knife. She described the knife as having a black handle and a serrated edge. Nicole testified that Hurley made six or seven cuts on her stomach. Nicole screamed and her dog came out of the bedroom and started barking, showed her teeth, and snapped towards him so that

Hurley got up and ran out the door. When he ran out the door, she locked it and called the police.

{¶5} The State played the recording from Nicole's 911 telephone call. When the police officer arrived at the trailer, Nicole showed him the cuts on her stomach. The police officer took photos of the cuts, interviewed Nicole, and took her home.

{¶6} Sergeant Brian Siefker of the Putnam County Sheriff's Office testified that on October 3, 2010 he responded to a call reporting an incident with a knife. When he arrived at the trailer, he noticed that Nicole was upset, crying, and holding onto her side. Nicole showed him her wounds, which he photographed. He testified that the wounds were fresh and that blood was coming to the surface. He also testified that he retrieved marijuana from the trailer, close to where the men had been sitting. Sergeant Siefker attempted to locate the knife, but was unsuccessful.

{¶7} Deputy Mark Doster of the Putnam County Sheriff's Office testified that he was on duty and reported to the trailer court on October 3, 2010. Upon arriving at the trailer court, he went to lot 29, where the two men who were at Sarah's trailer that night, Brent Hostettler and Wesley Hostettler, live. Deputy Doster also located Hurley at that trailer and interviewed him. Hurley told him that he had been babysitting the children at Sarah's trailer when Nicole came over,

and they argued because of the marijuana smoke. He stated that Hurley did not have his jacket or his shoes on during the interview as they were still at Sarah's trailer.

{¶8} Brent Hostettler ("Brent"), one of the two other men at Sarah's trailer, testified that he, his brother Wesley, and Hurley voluntarily left the trailer together that night to smoke a cigarette. When they were outside smoking, Nicole locked the door and made a phone call saying that she was in need of assistance. Brent also testified that he and Hurley were smoking marijuana that night before Nicole came over.

{¶9} Sarah testified that she met Hurley in February, 2006, and that he is the father of her daughter. She testified that she is the victim's sister. She and Hurley have had a troubled relationship and went through two significant events that caused them to separate. One of the events occurred two weeks prior to the incident at issue, which caused her not to speak with Hurley for a couple of weeks. During this time, Hurley had expressed that he wanted Sarah to live with him, but she told him he first needed to earn her trust and be a responsible person. She testified that Hurley had "two strikes against him" at this point. Trial Tr., p. 140. As Sarah was scheduled to work on the evening of October 3, 2010, she let Hurley stay with the children. She stated that Hurley and the Hostettler brothers are

friends. Lastly, she testified that the knives she has in her home have black handles and serrated edges.

{¶10} Wesley Hostettler ("Wes") then testified on direct examination for the defense. Wes stated that he is friends with the Defendant. He stated that on October 3, 2010, his mother sent him to Sarah's trailer to tell Brent to come home. Brent was outside of Sarah's trailer smoking a cigarette and the two went into the trailer to talk to Hurley. Once they were in the living room, Nicole came out of the back bedroom, asked Wes his name, and he, Brent, and Hurley left the trailer together.

{¶11} Hurley testified that he was babysitting Sarah's children at her trailer on October 3, 2010, when Brent came over. The two were smoking marijuana when Nicole arrived. Nicole put the children to bed and came back out to the living room and told them that they had to smoke outside. When the three went outside to smoke, Nicole locked the door. Hurley then went to the Hostettler's trailer and called Sarah to ask her if he could kick in the door. He said he never stabbed or slashed Nicole with a knife. He also testified that he never argued with Nicole that evening. He testified that, since 2001, he has had three convictions for obstructing official business, one felony burglary conviction, one falsification conviction, and one attempted domestic violence conviction.

{¶12} The jury found Hurley guilty of felonious assault, and the trial court imposed an eight-year prison term. It is from this judgment Hurley appeals, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT-APPELLANT'S REQUEST FOR EXPERT FEES WHEN SUCH AN EXPERT WOULD BE USED TO CONTRADICT THE STATE'S THEORY OF THE CASE.

Assignment of Error No. II

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S CRIMINAL RULE 29 MOTION TO DISMISS ALL OF THE CHARGES AT THE CONCLUSION OF THE STATE'S CASE IN CHIEF.

Assignment of Error No. III

THE JURY ERRED TO THE PREJUDICE OF THE DEFENDANT APPELLANT BY FINDING HIM GUILTY OF FELONIOUS ASSAULT.

Assignment of Error No. IV

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT IMPOSED THE MAXIMUM SENTENCES (sic) FOR HIS OFFENSES (sic) IN VIOLATION OF THE GUIDELINES SET FORTH IN ORC 2929.12.

Assignment of Error No. I

{¶13} In his first assignment of error, Hurley alleges that the trial court erred in denying his request for expert fees. Hurley requested $1,500 in funds to

be used in obtaining an expert to determine whether the wounds the victim suffered were consistent with the knife in question. He argues that essential to his defense was the implication that the wounds were self-inflicted in an effort by the victim to separate the defendant and the victim's sister, and absent the expert evidence, this is a "he-said, she-said case with very little, if any physical evidence." Appellant's Brief, p. 8.

{¶14} The State contends that the defense has failed to establish that expert fees were warranted in this case as Hurley failed to establish that the expert assistance is reasonably necessary. The State argues that the Defendant did not show that there is a reasonable probability that an expert would aid in his defense, and that the denial of the expert assistance would result in an unfair trial as required by *State v. Broom,* 40 Ohio St.3d 277 (1988).

{¶15} The statutory authority allowing the state to provide the funds for an indigent defendant's expert is R.C. 2929.024 which states that, in aggravated murder cases, the trial court shall authorize defendant's counsel to obtain the necessary services at the state's expense if the trial court finds that the services of experts are reasonably necessary for the defendant's representation. R.C. 2929.024; *Broom*; *State v. Jenkins*, 15 Ohio St.3d 164 (1984), paragraph four of the syllabus; *State v. Weeks*, 64 Ohio App.3d 595 (12th Dist. 1989). In noncapital cases, however, there is no authority mandating the payment of an indigent

defendant's expert fees. *State v. Mathias*, 3d Dist. Nos. 13-97-35, 13-97-36, 13-97-37, *2 (May 6, 1998), citing *Weeks*. Ohio courts have nonetheless applied the factors used by the Ohio Supreme Court in resolving requests for state-funded experts pursuant to R.C. 2929.024 in non-capital cases. The relevant factors in resolving the appointment of a state-funded expert are: (1) the value of the expert assistance to the defendant's proper representation at trial; and (2) the availability of alternative devices that fulfill the same functions as the expert assistance sought. *Id.*, citing *Broom* at 283, quoting *Jenkins* at paragraph four of the syllabus. The burden is on the defendant to demonstrate the reasonableness of the request. *State v. Cooper*, 3d Dist. No. 03-02-02, 2003-Ohio-4236, ¶ 13, *rev'd on other grounds*, citing *Weeks*. "At a minimum, the indigent defendant must present the trial judge with sufficient facts with which the court can base a decision." *Weeks* at 598-99. Undeveloped assertions that the proposed assistance would be useful to the defense are patently inadequate. *Broom* at 283.

{¶16} The appropriate standard of review is an abuse of discretion. *Mathias*. A trial court will be found to have abused its discretion when its decision is contrary to law, unreasonable, not supported by the evidence, or grossly unsound. See *State v. Boles*, 2d Dist. No. 23037, 2010-Ohio-278, ¶ 17-18, citing Black's Law Dictionary (8 Ed.Rev.2004) 11. When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for

that of the trial court. *State v. Nagle,* 11th Dist. No. 99-L-089 (June 16, 2000), citing *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219 (1983).

{¶17} At the hearing on the matter of expert fees, the Defendant's attorney explained that the expert would look at the Victim's statement, the facts alleged, the knife in question, and the Victim's wounds in order to determine first, whether the knife could have inflicted these wounds, and second whether the wounds are consistent with the alleged events that gave rise to the Victim's wounds.[1]

{¶18} An application of the factors set forth above reveals that the trial court did not abuse its discretion in denying the request for a forensic scientist. Specifically, Appellant has failed to demonstrate the value and necessity of such testimony. Without the knife in question, the expert opinion would not be any more accurate or certain than that of a lay person. Bare assertions as to what the Defense hopes the expert opinion will show are insufficient to establish the value of the requested expert. Further, alternative methods are available to determine the accuracy of the State's theory. By thoroughly cross-examining the witnesses and the timing of the events, the defense could have explored whether the victim's wounds were self-inflicted as well as possible motives for such behavior. Where Defendant fails to show such need, we cannot find an abuse of discretion by the

[1] As Hurley's motion requesting expert fees is absent from the record, we are unable to address any arguments contained therein.

trial court in denying the appointment of an expert. Accordingly, Appellant's first assignment of error is overruled.

Assignment of Error Nos. II and III

{¶19} Due to the nature of Hurley's second and third assignments of error, we elect to address them together.

{¶20} Hurley argues that the trial court erred by denying his Crim.R. 29 motion to dismiss the charges at the close of the State's case-in-chief.[2] He also argues that the jury erred by finding him guilty as there was insufficient evidence to support such a finding. Specifically, Hurley asserts that the evidence was insufficient as there was no evidence that Hurley knowingly caused injury to the Victim, the alleged weapon was never found, the clothing had not been preserved from the night of the incident, and the only evidence of the attack was introduced through the Victim who had a motive to lie.

{¶21} Under Crim.R. 29(A), a court shall not order a judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt. *State v. Bridgeman*, 55 Ohio St.2d 261 (1978). A motion for acquittal tests the sufficiency of the evidence. *State v. Miley*, 114 Ohio App.3d 738, 742 (4th Dist. 1996).

[2] A Crim.R. 29 motion is one for acquittal.

{¶22} When an appellate court reviews a record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 47, citing *State v. Jenks*, 61 Ohio St.3d 259 (1991), *superseded by state constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89 (1997). Sufficiency is a test of adequacy, *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997), and the question of whether evidence is sufficient to sustain a verdict is one of law. *State v. Robinson*, 162 Ohio St. 486 (1955), *superseded by state constitutional amendment on other grounds as stated in Smith.*

{¶23} We hold that the evidence was sufficient to establish Hurley's guilt of felonious assault. Hurley was convicted of felonious assault in violation of R.C. 2903.11(A)(2), which provides:

> **(A) No person shall knowingly do either of the following:**
>
> * * *
>
> **(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.**

{¶24} A deadly weapon is defined in R.C. 2923.11(A) 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." Hurley does not claim that a knife is not a deadly weapon. Rather, he claims that there is insufficient evidence that a knife was used as it was never found. Although it would have been beneficial for the State to introduce the knife, the failure to do so is not fatal. The testimony at trial established that a knife was used as a weapon. The Victim's testimony that Hurley used a knife to slice her stomach was supported by the injuries she sustained as evidenced in the photographs. The recording of the 911 phone call was consistent with the Victim's story. The Victim's description of the weapon matched Sarah's description of her kitchen knives. The officers' testimony at trial established the difficulty of locating such a weapon in a trailer court.

{¶25} The State also presented sufficient evidence to establish that Hurley did knowingly cause the victim's wounds. The victim's testimony as well as Sarah's testimony was that Hurley was compelled to prevent Nicole from calling the police. Sarah's testimony established that Hurley knew this may have been one of his last chances to prove to Sarah that he was reliable and trustworthy. When Nicole threatened to call the police on Hurley due to the drug activity taking place in front of the children, Hurley needed to prevent police intervention if he was going to succeed in earning Sarah's trust. In an attempt to prevent Nicole from calling the police, he attacked her.

{¶26} Further, we note that the lack of the Victim's shirt does not prevent a finding of sufficiency as the shirt is not necessary to establish any of the elements of felonious assault.

{¶27} We find that the State presented sufficient evidence such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven. Viewing the evidence in the light most favorable to the prosecution, we hold that the evidence was sufficient to sustain the verdict. Accordingly, Hurley's second and third assignments of error are overruled.

Assignment of Error No. IV

{¶28} In his fourth assignment of error, Hurley argues that the trial court erred by imposing the maximum statutory prison term. Specifically, he contends that the factors set forth in R.C. 2929.12 are not present. Hurley asserts that there is no indication that his conduct was more serious than similar offenses as there was minimal injury to the victim who did not require professional medical treatment, and the weapon was a kitchen knife. Hurley asserts that since this was not the worst form of the offense, the maximum prison sentence should not have been imposed.

{¶29} An appellate court must conduct a meaningful review of the trial court's sentencing decision. *State v. Daughenbaugh,* 3d Dist. No. 16-07-07, 2007-

Ohio-5774, ¶ 8, citing *State v. Carter,* 11th Dist. No. 2003-P-0007, 2004-Ohio-1181. A meaningful review means "that an appellate court hearing an appeal of a felony sentence may modify or vacate the sentence and remand the matter to the trial court for re-sentencing if the court clearly and convincingly finds that the record does not support the sentence or that the sentence is otherwise contrary to law."[3] *Daughenbaugh,* citing *Carter* at ¶ 44; R.C. 2953.08(G).

{¶30} The trial court has full discretion to sentence an offender to any term of imprisonment within the statutory range without a requirement that it make findings or give reasons for imposing the maximum sentence, more than the minimum sentence, or ordering sentences to be served consecutively. *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph seven of the syllabus.

{¶31} When sentencing an offender, the trial court must consider the factors set forth under R.C. 2929.12 (D) and (E) relating to the seriousness of the offender's conduct and the likelihood of the offender's recidivism. R.C. 2929.12(A); *see also State v. Ramos,* 3d Dist. No. 4-06-24, 2007-Ohio-767, ¶ 25. However, the trial court is not required to make specific findings of its consideration of the factors. *State v. Kincade,* 3d Dist. No. 16-09-20, 2010-Ohio-1497, ¶ 8, citing *State v. Arnett,* 88 Ohio St.3d 208 (2000). Nor is the trial court

[3] We note that the Supreme Court of Ohio's plurality opinion in *State v. Kalish,* 120 Ohio St. 3d 23, 2008-Ohio-4912, established a two-part test utilizing an abuse of discretion standard for appellate review of felony sentencing decisions under R.C. 2953.08(G). While we cite to this Court's precedential clear and convincing review standard adopted by three dissenting Justices in *Kalish,* we note that our decision in this case would be identical under the *Kalish* plurality's two-part test.

required to state on the record that it has considered the statutory criteria or even discussed them. *State v. Foust*, 3d Dist. No. 3-07-11, 2007-Ohio-5767, ¶ 27.

{¶32} Contrary to Hurley's assertions, the trial court's imposition of the maximum sentence was not based on the seriousness of his offense, but rather was based on Hurley's "significant likelihood of recidivism, . . . prior criminal adjudications, . . . pattern of criminal activity and criminal violent activity, and that [he] has shown no remorse for his actions." Judgment Entry, Docket No. 78. In light of the nature of the instant offense, Hurley's prior criminal convictions, and likelihood of recidivism, we find that the trial court's imposition of the maximum term of imprisonment was not clearly and convincingly contrary to law.

{¶33} Accordingly, we overrule Hurley's fourth assignment of error.

{¶34} Having found no error prejudicial to the Appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

PRESTON, J., concurs.

/jlr

WILLAMOWSKI, J., Concurring Separately.

{¶35} I concur fully with the majority opinion as to assignments of error one, two, and three. However I write separately as to the fourth assignment of

error to emphasize the appropriate standard of review. The standard of review for sentences was set forth in the plurality opinion of *Kalish*, supra. In *Kalish*, four panel members noted that R.C. 2953.08(G) requires that appellants must meet a clearly and convincingly contrary to law standard of review when reviewing a sentence.[4] For example, if the sentencing court failed to consider R.C. 2929.12, the standard of review would be whether appellant has shown that the sentence was clearly and convincingly contrary to law. However, if the appeal is based upon alleged improper application of the factors in R.C. 2929.12, four panel members in *Kalish* would require review using an abuse of discretion standard as specifically set forth in R.C 2929.12.[5]

{¶36} I would find that Hurley has not clearly and convincingly demonstrated that the sentence is contrary to law. In other words, Hurley did not show that the trial court did not consider the factors set forth in R.C. 2929.12. I would further find that Hurley did not show that the trial court abused its discretion in how it applied the factors in R.C. 2929.12. In light of the nature of the instant offense, Hurley's prior criminal conviction, and the likelihood of recidivism, I find that the trial court's imposition of the maximum term of imprisonment was not an abuse of discretion. The trial court's judgment was not

---

[4] Justices Pfeifer, Lundberg Stratton, Lanzinger, and Judge Willamowski, sitting by assignment, all reached this conclusion.

[5] Justices O'Connor, Moyer, O'Donnell, and Judge Willamowski, sitting by assignment, concurred in this position, although the first three would use both standards of review in all cases.

clearly and convincingly contrary to law in that it did consider the factors set forth in R.C. 2929.12.

COURT OF APPEALS
TERESA J. LAMMERS, CLERK
PUTNAM COUNTY, OHIO
2012 JAN 30 A 11:01