ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio	*	On Appeal from the Court of Appeals, Third Appellate District, Seneca County
Appellant,	*	
v.	*	Case #2012-0471
David L. Deanda	*	
Appellee.	*	

MERIT BRIEF OF APPELLANT STATE OF OHIO

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	1
ARGUMENT	2
PROPOSITION OF LAW	2
A trial court may instruct a jury on R.C. 2903.11(A)(1) as a lesser included offense of attempted murder. This jury instruction is not inconsistent with the amended version of the *Deem* test set forth in *Evans*.	
CONCLUSION	11
CERTIFICATE OF SERVICE	11
APPENDIX	Appx. Page
Notice of Appeal to the Ohio Supreme Court (3/20/12)	1
Judgment Entry of Seneca County Court of Appeals (Feb. 6, 2012)	3
Opinion of the Seneca County Court of Appeals Feb. 6, 2012)	4

TABLE OF AUTHORITIES

	PAGE NO.
CASES	
State v. Barnes (2001), 94 Ohio St.3d 21	4, 8
State v. Briscoe, 2008-Ohio-6276, (OHCA 8)	10
State v. Deanda, 2012-Ohio-408, 13-10-23 (OHCA3)	4, 6
State v. Deem (1988), 40 Ohio St.3d 205	2,3,4,5,6,8
State v. Evans (2009), 122 Ohio St.3d 381	2,3,4,5,6,7,8 11
State v. Lawrence, 2008-Ohio-1354, (OHCA12)	6, 7
State v. Nelson (1996), 122 Ohio App.3d 309	7, 8, 9
State v. Thomas (1988), 40 Ohio St.3d 213	5
State ex rel. The V Cos. v. Marshall (1997), 81 Ohio St.3d, 467	10
STATUTES AND RULES	
Ohio Revised Code 2923.02	1, 5
Ohio Revised Code 2903.02(A)	1, 5
Ohio Revised Code 2903.11(A)(1)	2, 4, 5, 6, 7,9
Ohio Revised Code 2911.01(A)(1)	3
Ohio Revised Code 2911.02(A)(2)	3
Ohio Revised Code 2903.11(A)(2)	4, 5
Ohio Revised Code 2903.12(A)(1)	10

STATEMENT OF FACTS

On September 19, 2009, the Tiffin Police Department responded to a stabbing at 15 Frost Parkway, Tiffin, Seneca County, Ohio. (Tr. Trans. p. 142; 6-12). Evidence showed that David L. Deanda (hereinafter "Defendant") was involved in a fight with the victim, David B. Swartz. Defendant had initiated the fight and then handed a stick to the victim so the victim could hit Defendant with the stick. (Tr. Trans. p. 239; 18-19, p. 570; 18-23). After handing the victim the stick, Defendant grabbed a knife that he had in the garage and stabbed the victim multiple times, including wounds in the neck and the areas surrounding the lungs. (Tr. Trans. p. 422; 23 to p. 423; 7). As Defendant was stabbing the victim, he stated that he was going to kill the victim. (Tr. Trans. p. 212; 20-22). After the stabbing, in the presence of police and EMS personnel, Defendant continued to yell that he was going to kill the victim. (Tr. Trans. p. 357; 13-24).

The victim was transported to Tiffin Mercy Hospital, and then to Mercy St. Vincent's Medical Center by Life Flight helicopter. (Tr. Trans. p. 370; 8-22); (Tr. Trans. p 433; 2-23). The victim's injuries included damage near his lungs, the jugular vein, the carotid artery, the trachea, and the platysma muscle in the neck. (Tr. Trans. p. 447; 9 to p. 448; 12). Further, the victim suffered pain, scarring, and the risk of death as a result of Defendant's attack. (Tr. Trans. p. 451; 18 to p. 453; 5).

The Seneca County Grand Jury returned an indictment against Defendant on September 23, 2009 that charged him with one count of Attempted Murder, a felony of the first degree, in violation of Ohio Revised Code Sections 2923.02 and 2903.02(A).

A jury trial was held May 17-21, 2010. Defendant was convicted of the lesser included offense of Felonious Assault, a felony of the second degree. The jury

received the felonious assault instruction because Defendant requested the trial court instruct the jury on aggravated assault and assault, which prompted the State to ask for felonious assault as well. (Jury Instruction Trans. p. 2-3). A sentencing hearing was held on May 21, 2010, and Defendant was sentenced to a stated prison term of seven years.

The Court of Appeals reversed the judgment of the trial court pursuant to Defendant's fourth assignment of error. The fourth assignment of error claimed that the trial court committed plain error by instructing the jury on felonious assault as a lesser included offense of attempted murder. This occurred even though it was the Defendant who initially requested the trial court provide the jury with lesser included offense instructions, and made no objection to the Court's decision to instruct the jury on felonious assault. (Jury Instruction Trans. p. 8).

ARGUMENT

A trial court may instruct a jury on R.C. 2903.11(A)(1) as a lesser included offense of attempted murder. This jury instruction is not inconsistent with the amended version of the *Deem* test set forth in *Evans*.

Significance of *Evans*

Pursuant to this Court's holding in *State v. Evans* (2009), 122 Ohio St.3d 381, R.C. 2903.11(A)(1) is a lesser included offense of attempted murder. In *Evans* this Court amended its test for determining whether an offense is a lesser included offense of another. *Id.* at 387. Prior to *Evans*, *State v. Deem* (1988), 40 Ohio St.3d 205 provided the three-part test for lesser included offenses. In *Deem* this Court held that:

> An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as

> statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense.

Id. at 209.

However, in *Evans* this Court decided to amend the *Deem* test to omit the word "ever" from the second part of the test. *Evans* at 387. In that case this Court was called upon to determine whether robbery is a lesser included offense of aggravated robbery. The analysis centered on the second part of the *Deem* test. This Court was asked to determine whether the conduct of "displaying, brandishing, indicating possession, or using a deadly weapon" in the attempt or commission of a theft offense as stated in the greater offense of aggravated robbery, [R.C. 2911.01(A)(1)], also constituted "a threat to inflict physical harm" in the attempt or commission of a theft offense, as defined in the lesser offense of robbery, [R.C. 2911.02(A)(2)]. The defendant argued that robbery is not a lesser included offense of aggravated robbery because one could conceivably indicate possession of a deadly weapon without implying a threat to inflict bodily harm if one were "purchasing a hunting knife in a hardware or sporting goods store as he simultaneously shoplifts a bag of nails by placing them in his pocket." *Id.* at 386. This Court was not swayed by the defendant's hunting knife hypothetical and went on to justify its omission of the word "ever" from the second part of the *Deem* test by stating it wished "to ensure that such implausible scenarios will not derail a proper lesser included offense analysis". *Id.* at 387.

In this case the Court of Appeals overlooked the significance of this Court's decision in *Evans* and advanced its own implausible scenario to justify its holding. The Court held that felonious assault is not a lesser included offense of attempted murder by

hypothesizing that one could put cyanide in another's food and the intended victim could then not eat the food. *State v. Deanda*, 2012-Ohio-408, 13-10-23 (OHCA3), ¶ 8. This is the precise type of scenario this Court sought to ensure would not disturb an appropriate lesser included offense analysis. As Justice Shaw noted in his dissent, "the Court in *Evans* expressly rejected the use of abstract possibilities as the primary tool of analysis for lesser included offenses in Ohio and modified the language of *Deem* accordingly, by specifically deleting the word 'ever' from the *Deem* test." *Deanda* at ¶ 16.

The Court of Appeals cited *State v. Barnes* (2001), 94 Ohio St.3d 21 as justification for the notion that felonious assault is not a lesser included offense of attempted murder. "Following the reasoning of the Ohio Supreme Court in *Barnes*, this Court must find that R.C. 2903.11(A)(1) is not a lesser included offense of attempted murder." *Deanda* at ¶ 8. However, in *Barnes* the trial court instructed the jury on the lesser included offense of felonious assault with a deadly weapon under R.C. 2903.11(A)(2) and this Court's analysis centered on whether felonious assault with a deadly weapon could be a lesser included offense of attempted murder. *Barnes* at 27. On the contrary, the case at bar involves R.C. 2903.11(A)(1). Thus, in *Barnes* this Court was not called on to consider whether felonious assault as a result of serious physical harm could be a lesser included offense of attempted murder. Moreover, *Barnes* was decided eight years prior to *Evans*. Thus, the *Deem* test employed by this Court in *Barnes* to determine R.C. 2903.11(A)(2) is not a lesser included offense of attempted murder is no longer controlling because *Evans* has since amended the analysis required for lesser included offenses.

When one applies the amended *Deem* test in accordance with the standard set forth in *Evans*, it is clear that R.C. 2903.11(A)(1) is a lesser included offense of attempted murder. The first part is satisfied because 2903.11(A)(1) carries a lesser penalty than attempted murder. The third part is also easily satisfied because a violation of attempted murder under R.C. 2923.02(A) and 2903.02(A) requires engaging in conduct that, if successful, would result in causing the death of another. Whereas, one can be convicted of violating R.C. 2903.11(A)(1) without engaging in conduct that, if successful, would result in causing the death of another. Thus, some element of the greater offense is not required to prove the commission of the lesser offense. Finally, when one applies the second part of the *Deem* test without the use of abstract scenarios, as mandated by *Evans*, one must conclude that attempted murder cannot also be committed without also committing a violation of R.C. 2903.11(A)(1). In *Evans* this Court cited *State v. Thomas* (1988), 40 Ohio St.3d 213, where this Court concluded that involuntary manslaughter is a lesser included offense of aggravated murder. *Evans* at 386. In *Thomas*, the Court reasoned that although two elements are not identically phrased, "The proper overall focus is on the nature and circumstances of the offenses as defined, rather than on the precise words used to define them." *Thomas* at 216-17. Perhaps most significantly, when discussing part two of the *Deem* test this Court stated:

> Thus, the test does not require identical language to define the two offenses, but focuses upon whether the words used in the statute defining the greater offense *will put the offender on notice* that an indictment for that offense could also result in the prosecution of the lesser included offense.

Evans at 386. (Emphasis added.) In this case the indictment stated the Defendant engaged in conduct that, if successful, would result in the death of another. That

language was certainly enough to put the Defendant, who stabbed the victim repeatedly, on notice that he could also be prosecuted for a violation of R.C. 2903.11(A)(1), which requires knowingly causing serious physical harm to another. As such, R.C. 2903.11(A)(1) can be a lesser included offense of attempted murder. To conclude otherwise requires one to concoct the type of implausible scenarios this Court sought to prevent in *Evans*. As Justice Shaw of the Court of Appeals noted in his dissent, "the statutory offenses are now to be examined for possible compatibility instead of for any possible incompatibility as in *Deem*." *Deanda* at ¶ 21.

Evans reflects an acknowledgement by this Court that the *Deem* test and its focus on formalism can result in unjust outcomes and some relaxation of that test is required. This case presents this Court with an opportunity to reinforce the notion that implausible factual scenarios should not defeat reasonable application of the *Deem* test.

Difficulty Applying *Deem* to Inchoate Offenses

The difficulty in aligning the elements of a completed offense like felonious assault with an inchoate offense like attempted murder has led the 12th District Court of Appeals to apply an approach that sets aside the attempt language of the underlying offense when conducting a lesser included offense test. In *State v. Lawrence*, 2008-Ohio-1354, (OHCA12), the 12th District upheld a trial court's decision to instruct the jury on gross sexual imposition as a lesser included offense of attempted rape. The 12th District reasoned that:

> A criminal attempt is not, by itself, an offense. One cannot logically align the elements of a completed offense, such as gross sexual imposition, with the elements of an inchoate offense such as attempted rape. Therefore, this court finds that in determining whether a completed offense is a lesser included of an attempted offense, we must look to the underlying offense laying the attempt aspect aside for the analysis. In this

> case, that offense is rape. As stated above, it is undisputed that gross sexual imposition is a lesser included offense of rape. One cannot engage in sexual conduct, defined as penetration, without also committing sexual contact,. defined as the touching of an erogenous zone for purposes of sexual gratification.

Lawrence at ¶ 27.

The 12th District's approach is useful because it serves two purposes. First, it does not deviate from this Court's consistent position that facts of the specific case should not be considered when conducting a lesser included offense analysis. Second, it limits the possibility of an abstract hypothetical derailing the analysis, a situation this Court has sought to avoid. *Evans* at 387. When applying the 12th District's approach to this case, one must conclude that R.C. 2903.11(A)(1) is a lesser included offense of attempted murder. When the attempt is factored out, the analysis centers on whether it is possible to cause the death of another without causing serious physical harm. Because that is not possible, R.C. 2903.11(A)(1) is a lesser included offense of attempted murder.

Ramifications of Affirming Court of Appeals

Importantly, if this Court were to affirm the Court of Appeals' search for any conceivable fact pattern where the greater offense could possibly be committed without committing the lesser offense, more appellate decisions will yield unjust outcomes, as was the case prior to the *Evans* decision. *State v. Nelson* (1996), 122 Ohio App.3d 309 exemplifies the illogical results that occur when courts search for any conceivable fact pattern when conducting a lesser included offense analysis. In *Nelson* the 5th District Court of Appeals ruled that the trial court erred when it instructed the jury on felonious assault as a lesser included offense to attempted murder. The 5th District explained:

> Though we find the decision to sustain the appellant's third assignment of error distasteful, we are compelled to do so as a matter of law. What is distasteful is that we fully believe that the evidence totally supports the jury's finding that appellant was guilty of felonious assault.

Nelson at 313. The 5th District went on to further explain its holding:

> *Deem's* use of the word 'ever' in paragraph three of the syllabus does more than invite hypothetical analysis, it requires it. Because attempted murder can sometimes be committed without committing felonious assault under subsection (A)(2) (e.g. attempt to push someone out a window), paragraph three of the syllabus of *Deem* requires reversal.

Id. at 315. *Nelson* illustrates the frustrating outcomes that can occur when courts allow abstract hypothesizing to disrupt a lesser included offense analysis, but more importantly *Nelson* indicates how drastically *Evans'* omission of the word "ever" from the *Deem* test changes the lesser included offense analysis. The test no longer invites the type of "implausible" factual scenarios that this Court rejected in *Evans*.

Moreover, if this Court affirms the Court of Appeals' application of the *Deem* test it could set a standard that allows criminal defendants to escape justice. As Justice Lundberg Stratton wrote in her concurrence in *Barnes*:

> I believe that the abstract test that this court employs today will beget illogical results in the future. Decision making in the abstract leaves trial courts to struggle with a test that allows criminal defendants to walk away from their crimes, despite the fact that they fit all of the elements of the lesser included offense, unless the state indicts them separately on each potential offense.

Barnes at 30-31. This exact situation is present in this case. The Defendant's conduct of stabbing the victim repeatedly clearly fits all the elements of a violation of R.C. 2903.11(A)(1), the lesser included offense, which calls for knowingly causing serious physical harm to another, and yet the Defendant, who committed a brutal crime, stands to walk away from his crime as a result of the Court of Appeals' abstract hypothesis.

Additionally, if this Court affirms the Court of Appeals' decision, trial courts may be more fearful to instruct juries on lesser included offenses that are clearly appropriate because one party has imagined an improbable hypothetical scenario where the greater offense could be committed without the lesser offense being committed. Moreover, this scenario could create additional errors by trial courts that decline to provide lesser included offense instructions in situations where they should have been provided.

Finally, there is also evidence of legislative intent for felonious assault to be considered a lesser included offense of attempted murder. In *Nelson*, the court noted, "We specifically acknowledge that the 1974 Legislative Service Commission Comment to 1972 Am.Sub.H.B. No. 511 states felonious assault is a lesser included offense of attempted murder." *Nelson* at 314. The *Nelson* opinion then quoted the following portion of the Commission's Comment:

> This section [R.C. 2903.11, felonious assault] is a lesser included offense to attempted murder, which is a felony of the first degree. See, section 2923.02. For example, if with purpose to kill, an offender shoots and wounds another, he may be charged with attempted murder. If it is not clear that the offender had a murderous purpose, his act may be an offense under this section.

Id.

Invited Error

The jury would not have been instructed on any lesser included offenses had the Defendant not opened the door by requesting the jury be instructed on aggravated assault. (Jury Instruction Trans. p. 2; 11-15). Only then did the State of Ohio ask the court to also include the felonious assault instruction, and no formal objection was made by the Defendant. (Jury Instruction Trans. p. 3-8). It is unfair that the Defendant stands to be rewarded for objecting to the same lesser included offense instructions that he

sought to utilize for his benefit at the trial level. The 8th District Court of Appeals has concluded that a party should not benefit from an error that the party invited or induced the trial court to make. In *State v. Briscoe*, 2008-Ohio-6276, (OHCA 8), the 8th District overruled the defendant's second assignment of error alleging the indictment was defective because it failed to state a necessary element of the offenses. *Id.* at ¶ 35. The court used the invited error doctrine as part of its justification for overruling the objection. The 8th District noted this Court's opinion in *State ex rel. V Cos. v. Marshall* (1997) and wrote:

> Further, according to the record the parties agreed to the jury instruction on R.C. 2903.02(B) as a lesser included offense to the charge of aggravated murder. "Under the invited-error doctrine, a party will not be permitted to take advantage of an error that he himself invited or induced the trial court to make." *State ex rel. V Cos. v. Marshall* (1997), 81 Ohio St.3d 467, 471, citing *State ex rel. Fuqua v. Alexander* (1997), 79 Ohio St.3d 206, 208, other citations omitted.

Id. at ¶ 33.

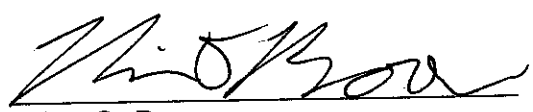
Although it was the State that actually requested the felonious assault instruction, it was only done after the Defendant requested an aggravated assault instruction. It is significant that the Defendant requested an aggravated assault instruction because like felonious assault, it also requires serious physical harm. Rev.Code 2903.12(A)(1). As a result, the Court of Appeals' analysis would have been the same had the jury convicted the Defendant of aggravated assault. Thus, it is clear the Defendant stands to benefit from an error that his own conduct and reasoning brought about.

Conclusion

The foregoing indicates that the trial court was correct to instruct the jury on felonious assault. Since the trial court's instruction on felonious assault is consistent with the principles of *Evans*, the trial court did not err and thus, the Court of Appeals should not have reversed the decision of the trial court. As a result, the State of Ohio requests that the Court of Appeals ruling be reversed and that Ohio law be made clear that felonious assault is a lesser included offense of attempted murder. Failure to address this issue will continue to plague trial courts as they attempt to determine the mandates of *Evans*.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing instrument was served upon counsel for Defendant, John M. Kahler, II, by mailing said copy to his office at 216 S. Washington St., Tiffin, Ohio, 44883, this 3rd day of August, 2012.



Brian O. Boos
Assistant Prosecuting Attorney
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APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio	*	On Appeal from the Court of Appeals, Third Appellate District
Appellant	*	
v.	*	Court of Appeals Case No. 13-10-23
David L. Deanda	*	
Appellee	*	12-0471

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

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Notice of Appeal of Appellant State of Ohio

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals of Ohio, Third Appellate District, entered in Court of Appeals Case No. 13-10-23 on February 6, 2012.

This case involves a felony and is one of public or great general interest.

Respectfully Submitted,

Derek W. DeVine
Prosecuting Attorney

BY:

Brian O. Boos (Counsel of Record)
Assistant Prosecuting Attorney

COUNSEL FOR APPELLANT,
STATE OF OHIO

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing instrument was served upon counsel for Defendant-Appellant, John M. Kahler, II, by mailing said copy to his office at 216 S. Washington Street, Tiffin, Ohio 44883, and Ohio Public Defender at 250 E. Broad St., Ste 1400, Columbus, OH, 43215 this 19th day of March, 2012.

Brian O. Boos
Assistant Prosecuting Attorney

COUNSEL FOR APPELLANT,
STATE OF OHIO

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

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 13-10-23**

v.

DAVID L. DEANDA, **JUDGMENT ENTRY**

DEFENDANT-APPELLANT.

For the reasons stated in the opinion of this Court, the fourth assignment of error is sustained and it is the judgment and order of this Court that the judgment of the trial court is reversed with costs assessed to Appellee for which judgment is hereby rendered. The cause is hereby remanded to the trial court for further proceedings and 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.

FILED IN THE COURT OF APPEALS
SENECA COUNTY

FEB 6 2012

MARY K. WARD, CLERK

John R. Willamowski

SHAW, J., DISSENTS

JUDGES

DATED: February 6, 2012

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

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 13-10-23

v.

DAVID L. DEANDA,

OPINION

DEFENDANT-APPELLANT.

Appeal from Seneca County Common Pleas Court
Trial Court No. 09-CR-0210

Judgment Reversed and Cause Remanded

Date of Decision: February 6, 2012

APPEARANCES:

John M. Kahler, II for Appellant

Derek W. DeVine and Rhonda L. Best for Appellee

FILED IN THE COURT OF APPEALS
SENECA COUNTY

FEB 6 2012

MARY K. WARD, CLERK

WILLAMOWSKI, J.

{¶1} Defendant-appellant David L. Deanda ("Deanda") brings this appeal from the judgment of the Court of Common Pleas of Seneca County finding him guilty of felonious assault and sentencing him to seven years in prison. For the reasons set forth below, the judgment is reversed.

{¶2} On September 19, 2009, Deanda was involved in a fight with David B. Swartz ("Swartz"). During the fight, Deanda grabbed a knife and proceeded to stab the victim multiple times in the neck and chest. Deanda was yelling that he was going to kill Swartz. When the police and emergency medical technicians arrived, Deanda continued to yell that he was going to kill Swartz. Swartz was eventually life flighted to a hospital due to his injuries.

{¶3} On September 23, 2009, the Seneca County Grand Jury indicted Deanda on one count of attempted murder, a felony of the first degree, in violation of R.C. 2923.02 and 2903.02(A). A jury trial was held from May 17 to May 21, 2010. At the conclusion, the jury convicted Deanda of the lesser included offense of felonious assault, a felony of the second degree. On May 21, 2010, a sentencing hearing was held. The trial court sentenced Deanda to serve seven years in prison. Deanda appeals from these judgments and raises the following assignments of error.

First Assignment of Error

The trial court erred to the prejudice of [Deanda] by permitting [the State] to introduce various instances of inadmissible hearsay testimony over the objection of the defense in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

Second Assignment of Error

The trial court erred to the prejudice of [Deanda] by denying the proffered testimony of Joey Deanda and Vicki Deanda into evidence.

Third Assignment of Error

[Deanda's] conviction should be overturned because certain statements made during the prosecution's rebuttal argument at closing amounted to prosecutorial misconduct.

Fourth Assignment of Error

[Deanda's] conviction should be overturned because the trial court's instruction of felonious assault as a lesser included offense of attempted murder is erroneous and thus the trial court committed plain error.

Fifth Assignment of Error

[Deanda's] conviction was against the manifest weight of the evidence.

In the interest of clarity, we will address the assignments of error out of order.

{¶4} The fourth assignment of error alleges that the trial court erred by instructing the jury that felonious assault is a lesser included offense of attempted murder. "[A] criminal offense may be a lesser included offense of another if (1)

the offense carries a lesser penalty than the other; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some elements of the greater offense is not required to prove the commission of the lesser offense." *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240 (citing *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294. The Ohio Supreme Court in *Barnes* determined that R.C. 2903.11(A)(2) is not a lesser included offense of R.C. 2903.02(A) and R.C. 2923.02(A). Id.

{¶5} However, the Ohio Supreme Court did modify this test in *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889. In *Evans*, the Supreme Court removed the word "ever" from the test and set up a modified test. Id. at ¶25.

> **In determining whether an offense is a lesser included offense of another, a court shall consider whether one offense carries a greater penalty than the other, whether some element of the greater offense is not required to prove commission of the lesser offense, and whether the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed.**

Id. at paragraph 2 of the syllabus. When reviewing the offenses, the offenses must be examined in the abstract and the specific facts of the case may not be considered. Id. at ¶25.

The state contends that the strict comparison of elements required by the second part of the *Deem* test has produced incongruous and illogical results that fail to hold criminal defendants accountable for crimes in the absence of indictments for each related offense. The state urges us to modify the second part of the *Deem* test to permit courts to consider the particular facts and circumstances of each case in determining whether one offense is a lesser included offense of another, or to consider whether "the offenses are so similar that the commission of one offense will necessarily result in commission of the other," as we have done in our analogous test for allied offenses of similar import. * * *

On the other hand, [the defendant] contends that adoption of the state's fact-based approach will impinge upon a criminal defendant's constitutional right to a grand jury indictment, permitting convictions for offenses that were either considered and rejected or never even contemplated by the grand jury. He asserts that the state's proposed test would create uncertainty for prosecutors, defendants, and the courts by making it impossible to predict, before trial, what lesser included offenses would be at issue. In addition, [the defendant] argues that because we have previously held that robbery is not a lesser included offense of aggravated robbery, applying a contrary ruling would violate his due process rights.

We have consistently held that in applying *Deem* to lesser included offenses, " ' " 'the evidence presented in a particular case is irrelevant to the determination of whether an offense, as statutorily defined, is necessarily included in a greater offense.' "" * * * Indeed, in *Barnes*, we rejected the state's request that we consider the specific facts of the case in determining whether felonious assault with a deadly weapon was a lesser included offense of attempted murder. * * * But we note that the facts of a case *are* relevant in determining whether a court should instruct the jury on a lesser included offense. Specifically, we have stated that after the three parts of the *Deem* test are met, "[i]f the evidence is such that a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant

> **of the lesser included offense, then the judge should instruct the jury on the lesser included offense." * * * Based upon the foregoing, we decline the state's invitation to abandon our precedent in this regard.**

Id. at ¶11-13. Although the words need not be identical, the elements must match in such a way that one cannot commit the greater offense without committing the lesser offense. Id. at ¶22.

{¶6} In this case, Deanda was charged with a violation of R.C. 2903.02(A) and R.C. 2923.02(A), attempted murder. He was convicted of felonious assault in violation or R.C. 2903.11(A)(1). A review of the offenses in this case show that attempted murder, as charged, was a felony of the first degree, and felonious assault, as convicted, was a felony of the second degree. Thus, there is a greater potential punishment for the attempted murder charge than the felonious assault charge. Thus, the first part of the *Deem* test is met.

{¶7} Next we look at the statutory elements in the abstract. "No person shall purposely cause the death of another * * *." R.C. 2903.02(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." R.C. 2923.02(A). "[A] person is guilty of attempted murder when he or she 'purposely * * * engage[s] in conduct that, if successful, would constitute or result in' the purposeful killing of another."

Barnes, 94 Ohio St.3d at 26. Deanda was found guilty of violating R.C. 2903.11(A)(1), which states that no person shall knowingly cause serious physical harm to another. R.C. 2903.11(A)(1). In this case, the offense of attempted murder did require the State to prove an additional element, that the serious physical harm could result in death. Thus, the second part of the *Deem* test is met.

{¶8} Finally, this court must determine whether the greater offense can be committed without committing the lesser offense as statutorily defined. Despite the State's argument to the contrary, it is possible to commit attempted murder without violating R.C. 2903.11(A)(1). For example, if one were to put cyanide in another's food, but the intended victim does not eat it, the first party is still guilty of attempted murder because they purposely committed the act that, if successful, would result in the death of the victim. However, the first party would not have violated R.C. 2903.11(A)(1) because no serious physical harm occurred.[1] Following the reasoning of the Ohio Supreme Court in *Barnes*, this court must find that R.C. 2903.11(A)(1) is not a lesser included offense of attempted murder. Since Deanda was neither indicted on felonious assault, nor is it a lesser included offense of attempted murder, it is an error affecting a substantial right and is thus reversible error. The fourth assignment of error is sustained.

[1] This court would find however that attempted felonious assault is a lesser included offense of attempted murder because you cannot attempt to cause the death of another without attempting to cause serious physical harm.

{¶9} The dissent argues that given the facts of this case, the very acts which formed the basis of the attempted murder charge were felonious assault. We agree. The dissent then concludes that under the facts of this case, we should find that felonious assault is a lesser included offense of attempted murder. This conclusion is not supported by the holding in *Evans*, which clearly stated that the individual facts of the case may *not* be considered.[2] Instead, the *Evans* court specifically stated that we must consider whether the greater offense cannot be committed without committing the lesser offense. Id. at ¶26.

{¶10} In the first assignment of error, Deanda claims that the trial court erred by allowing hearsay testimony to be presented over objection by the defense. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Unless the statement meets one of the exceptions to the rule, hearsay is not admissible in a trial. Evid.R. 802.

{¶11} In support of his argument, Deanda presents four statements that he claims should have been excluded. The first is Officer Laverne Keefe's statement that Swartz had stated that Deanda was the person who injured him. Tr. 176-77. The third and fourth instances of hearsay statements were found in the testimony of Lieutenant Michelle Craig. She testified that Swartz called and said the

[2] We note, as does the dissent herein, that the Supreme Court in its analysis does appear to consider the facts. However, the Supreme Court specifically said we may not do so. We must do as they say.

hospital was going to keep him and that Deanda was the one who caused the injuries. Tr. 476-77. Deanda's counsel objected on the basis of hearsay, but the objections were overruled. No exception exists for identity. The first statement was made after the scene was secure and Deanda was being escorted away. The other two statements were made in a phone call to the police station made by Swartz from the hospital. There is no indication in the record that the statements meet any of the exceptions set forth in Evid.R. 803. Repeating the out of court statement of the victim that the defendant was the one responsible for his injuries and that the hospital was keeping him was meant to persuade the jury that the defendant was guilty and is thus a hearsay statement.

{¶12} The second instance of hearsay to which Deanda objects is a statement by Detective Shawn Vallery as to what he was told by an unidentified forensic nurse at St. Vincent's Medical Center concerning the condition of the victim. The statements of an unidentified third party concerning the injuries to the victim are hearsay. The State argues that these statements were merely offered to show how the investigation progressed. Although this may be true as well, the statements themselves were also offered to prove the truth of the matter asserted, i.e. the extent of the injuries. The witness could have explained the progress of the investigation without repeating the statements of third parties. However, since this court has already determined that prejudicial error occurred, the issue raised in the

first assignment of error of whether the admission of hearsay statements is prejudicial or harmless error is moot and will not be addressed by this court.

{¶13} Having found prejudicial error in the fourth assignment of error, the second, third, and fifth assignments of error are also moot and need not be addressed. The judgment of the Court of Common Pleas of Seneca County is reversed and the matter is remanded for further proceedings.

Judgment Reversed and
Cause Remanded

ROGERS, J. concurs.

SHAW, P.J., DISSENTS

{¶14} The majority concludes that because it is *possible in the abstract*, to conceive of a factual scenario where one might commit attempted murder without committing felonious assault, that felonious assault cannot be a lesser included offense of attempted murder in the case before us. The "abstract possibility analysis" derives from the second prong of a three part test set forth in *State v. Deem*, (1988), 40 Ohio St.3d 205. Specifically, the *Deem* test stated that before a trial court may instruct upon a lesser included offense, the court must find that "the greater offense cannot, as statutorily defined, *ever* be committed without the

lesser offense, as statutorily defined, also being committed." *Deem* at paragraph three of the syllabus (Emphasis added).

{¶15} The majority further cites the subsequent decision of the Ohio Supreme Court in *State v. Barnes,* (2002), 94 Ohio St.3d 21, which also strictly relied upon the *Deem* test, in order to determine that felonious assault was not a lesser included offense of attempted murder.

{¶16} However, in *State v. Evans,* (2009), 122 Ohio St.3d 381, the Supreme Court of Ohio acknowledged the implausible results that courts were reaching in attempting to follow the purely hypothetical and speculative analysis that seemed to be mandated by the language of the *Deem* test. As a result, the Court in *Evans* expressly rejected the use of abstract possibilities as the primary tool of analysis for lesser included offenses in Ohio and modified the language of *Deem* accordingly, by specifically deleting the word "ever" from the second prong of the *Deem* test. See *Evans*, at 383. As the Court stated, this was done to ensure that implausible scenarios advanced by the parties to suggest the remote possibility that one offense could conceivably be committed without the other being committed would no longer "derail a proper lesser included offense analysis." *Id.* at 387.

{¶17} Thus the "clarified" test for lesser included offenses in Ohio, as announced by *Evans*, now states:

> **In determining whether an offense is a lesser included offense of another, a court shall consider whether one offense carries a greater penalty than the other, whether some element of the greater offense is not required to prove commission of the lesser offense, and whether the greater offense, as statutorily defined, cannot be committed without the lesser offense as statutorily defined also being committed. (State v. Deem (1988), 40 Ohio St.3d 205, clarified.)**

Evans at second paragraph of the syllabus.

{¶18} The *Evans* court declined to further modify *Deem* by adopting a test for lesser included offenses based entirely on the facts and circumstances of each case. *Evans* at 386. However, it is also clear that under *Evans* the factual context of a case is no longer entirely irrelevant, and may be considered, both in conducting a more pragmatic comparison of statutory elements than permitted by *Deem*, and insofar as it may be necessary to determine whether the evidence supports an instruction on the lesser charge.

> **But we note that the facts of a case *are* relevant in determining whether a court should instruct the jury on a lesser included offense. Specifically, we have stated that after the three parts of the Deem test are met, 'if the evidence is such that a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser included offense, then the judge should instruct the jury on the lesser included offense.' (Emphasis in original) (Citations omitted.)**

Evans at 385.

{¶19} In concluding that robbery was a lesser included offense of aggravated robbery in the case before it, the *Evans* court was called on to

determine whether the conduct of "displaying, brandishing, indicating possession, or using a deadly weapon" in the attempt or commission of a theft offense as stated in the greater offense of aggravated robbery, [R.C. 2911.01(A)(1)], also constituted "a threat to inflict physical harm" in the attempt or commission of a theft offense, as defined in the lesser offense of robbery, [R.C. 2911.02(A)(2)].

{¶20} The *Evans* court's rationale in reaching an affirmative answer is instructive to the case before us:

> **While these elements are not identically phrased, we have recognized: 'The test is not a word game to be performed by rote by matching the words chosen by the legislature to define criminal offenses. Some offenses, such as aggravated murder and murder, lend themselves to such a simple matching test; others do not. * * * We would also note that the elements of the offenses are 'matched' only * * * to determine if 'some element' of the greater offense is not found in the lesser offense. *The proper overall focus is on the nature and circumstances of the offenses as defined, rather than on the precise words used to define them.* (Citation omitted). Thus, the test does not require identical language to define the two offenses, but focuses upon whether the words used in the statute defining the greater offense will put the offender on notice that an indictment for that offense could also result in the prosecution of the lesser included offense.**

Evans at 386. (Emphasis added.)

{¶21} Under the quoted language from *Evans*, set forth above, the reference to the "*circumstances* of the offenses as defined" necessarily implies that at the very least, the factual conduct described in the statutory offense is relevant to

provide a realistic context for conducting the necessary comparisons of statutorily defined offenses. Additionally, as the *Evans* court does in the aggravated robbery/robbery comparisons conducted below, the statutory offenses are now to be examined for possible compatibility instead of for any possible incompatibility as in *Deem*.

{¶22} In *Evans*, the two statutory offenses at issue describe conduct in sufficient detail such as "displaying a deadly weapon" and a "threat to inflict physical harm" to enable the court to make the comparisons necessary to determine whether one type conduct also included the other in that case Thus, upon first concluding on its own rationale that "the threat of physical harm" in the robbery statute need not be explicit, but could also be an *implied* threat, the *Evans* court was then able to compare the conduct described in the aggravated robbery offense with the conduct described in the robbery statute and conclude that *"[o]ne cannot display, brandish, indicate possession of, or use a deadly weapon in the context of committing a theft offense without conveying an implied threat to inflict physical harm. It is the very act of displaying, brandishing, indicating possession, or using the weapon that constitutes the threat to inflict harm because it intimidates the victim into complying with the command to relinquish property without consent*." (Emphasis added.) *Evans* at 386.

{¶23} However, unlike *Evans*, in the case before us, the operative language of the attempted murder statute is only the allegation that the defendant did "engage in *conduct* that, if successful, would constitute or result in the offense" [of murder]. (Emphasis added.) The element of "conduct" as used in the attempt statute [R.C. 2923.02(A)] is unique in that it carries no further statutory definition or description of its own but instead, clearly requires the incorporation of whatever elements are present in the offense attempted, in this case the offense of murder.

{¶24} One could argue that as the only available reference for any comparison or analysis, the undefined word "conduct" as used in the attempt statute not only invokes, but necessarily requires reference to the factual allegations of conduct in any given case in order to conduct a proper lesser included offense analysis for an attempt charge under *Evans*. In this case, the multiple stabbings and serious physical harm alleged would be more than sufficient to satisfy any such lesser included offense analysis. However, because the same result can be reached in the case before us by conducting the same analysis of statutory language as conducted in *Evans*, without reference to the specific facts and circumstances in evidence, it is unnecessary to further address or rely upon this interpretation at this time.

{¶25} In any event, under the *Evans* test, the language of the attempted murder charge not only permits, but necessarily requires, closer examination of the

"statutory circumstances" of the attempted murder offense and the felonious assault offense charged in this case, and then if necessary, reference to the specific factual allegations and/or conduct in evidence in order to make a proper lesser included offense analysis. See *Evans* at 385. Thus, just as the *Evans* court had to determine whether the conduct of "displaying, brandishing, indicating possession, or using a deadly weapon" in an aggravated robbery offense also constituted a "threat to inflict physical harm" for purposes of a robbery offense, the only relevant question for this court to determine is whether the conduct of "knowingly causing serious physical harm" to the extent that if successful it would constitute purposely causing the death of another also constitutes "knowingly causing serious physical harm".

{¶26} Applying the statutory circumstances analysis of *Evans* to the case before us then, it is clear that the defendant could not "engage in conduct" *(knowingly causing serious physical harm)* that if successful (*serious enough to produce death)* would constitute purposefully causing the death of the victim [attempted murder as defined in R.C.2923.02(A)/R.C. 2903.02(A)], without also engaging in conduct that would constitute *knowingly causing serious physical harm* to that victim [felonious assault as defined in R.C. 2903.11(A)(1)]. Since this is also the scenario that is actually reflected in the evidence of this case, the instruction on the lesser included offense of felonious assault was warranted on

both statutory and evidentiary grounds, and in any event, did not constitute plain error.

{¶27} Based on the foregoing, I respectfully dissent from the decision of the majority to reverse this conviction. The trial court was correct to instruct the jury on the lesser included offense of felonious assault in this case. The fourth assignment of error should be overruled and this court should address the merits of the remaining assignments of error.

/jlr