

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : On Appeal from the Court of Appeals,  
 Plaintiff-Appellee : Third Appellate District, Seneca County

-v- : CASE NO. 2012-0471

DAVID L. DEANDA :  
 Defendant-Appellant :

---

MERIT BRIEF OF APPELLEE DAVID L DEANDA

Plaintiff-Appellee

Derek W. DeVine, Prosecuting Attorney (0062488)  
 Brian O. Boos, Asst. Prosecuting Attorney (0086433)  
 Seneca County Prosecutor  
 71 S. Washington Street  
 Tiffin, Ohio 44883  
 Phone: 419-448-4444  
 Fax: 419-443-7911  
 Email: bboos@senecapros.org

Defendant-Appellant

John M. Kahler II, #0066062  
 Attorney at Law  
 Kahler and Kahler Law Offices  
 216 S. Washington Street  
 Tiffin, Ohio 44883  
 Phone: 419-447-2285  
 Fax: 419-443-8627  
 Email: johnmkahlerii@yahoo.com

**FILED**  
 AUG 29 2012  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	Page
Table of Authorities	3
Facts	4
Argument	7
Proposition of Law	7
Conclusion	12
Certification of Service	12
Appendix	13

TABLE OF AUTHORITIES

	Page
<u>CASES</u>	
<i>State v. Barnes</i> (2002), 94 Ohio St.3d 21	7, 9, 10
<i>State v. Briscoe</i> , 2008-Ohio-6276, (OHCA 8)	11
<i>State v. Deem</i> (1988), 40 Ohio St.3d 205, 533 N.E.2d 294	7, 8, 9
<i>State v. Evans</i> (2009), 122 Ohio St.3d 381	7, 8, 9
<i>State ex rel. v. Cos. V. Marshall</i> (1997), 81 Ohio St.3d 467	10
<u>STATUTES</u>	
R.C. §2903.02(B)	10, 11
R.C. §2903.11(A)(1)	7, 9, 10

## FACTS

On September 19, 2009 David Deanda was residing at 15 ½ Frost Parkway in Tiffin, Ohio. (Transcript, Vol.3, Pg. 661). It was here, in his own garage, that David was attacked by a man, David Swartz, who beat him over the head with a large, thick stick until David saw white spots. (Transcript, Vol.3, Pgs. 667, 668). Fortunately for David, also in this garage where he was attacked, he saw a knife lying on a kiln. (Transcript, Vol.3, Pg. 672). As David was being beaten over the head with the stick by Swartz, he managed to grab the knife and stab his attacker in self-defense until the attacker stopped beating him, got up and threw a chair at David, and then left the garage. (Transcript, Vol.3, Pgs. 672, 677). It was David, however, not the attacker, who was then arrested and charged with attempted murder. (Transcript, Vol.3, Pg. 687 and Vol.4, Pg. 802).

Earlier in the day, David Deanda was in the process of fixing a Plexiglas window on the house with the help of Toni Haubert, his ex-girlfriend's sister who lived in the downstairs apartment. (Transcript, Vol.3, Pgs. 662, 664). David had been using a big stick -- a dowel rod - to measure the window that he was fixing. (Transcript, Vol.3, Pgs. 663). It was a long dowel rod that looked like it could cause some serious bruising. (Transcript, Vol.4, Pg. 826). He then took the stick and walked into his garage. (Transcript, Vol.3, Pg. 667). When he walked into the garage he saw a group of kids that David knew. One of the kids was his 12-year-old nephew, Joey Deanda, and another was Toni Haubert's 10-year-old daughter, Harley Makeever. (Transcript, Vol.3, Pg. 692, 640).

When David walked into the garage he saw that David Swartz (his soon to be attacker) had a baseball bat in his hand and was swinging it at the children, threatening and menacing

them with it. (Transcript, Vol.3, Pg. 692). Swartz had taken the bat from one of the children because the kids were telling him to get out, to leave. (Transcript, Vol.3, Pgs. 691, 692).

David Deanda walked into the garage carrying his dowel rod and saw Swartz wielding the bat. (Transcript, Vol.3, Pg. 667). Swartz saw David, threw the bat down, walked up to David, and immediately got aggressive towards him. (Transcript, Vol.3, Pgs. 692, 667). Swartz walked up to David, stuck his chest in David's face, puffed his chest up, and started giving David an attitude. (Transcript, Vol.3, Pgs. 667, 668).

David's experience growing up is evidence of his state of mind when the fight began. He did not have a good childhood. When David was a child, his stepfather regularly beat him and sexually molested him. (Transcript, Vol.4, Pg. 778). This type of childhood abuse would certainly affect one's mental health as an adult. Further, David has had issues with paranoia and depression as an adult. (Transcript, Vol.4, Pgs.778, 781).

Before David made any aggressive move toward Swartz, Swartz took the dowel rod from David's hands and started hitting David over the head with it. (Transcript, Vol.3, Pgs. 668, 669). David didn't fight back right away. David simply tried to push Swartz around; to try to get him to stop hitting him with the stick -- but it wasn't working. (Transcript, Vol.3, Pgs. 670, 671). Swartz got back up, came back at David, and hit him with the stick again. David Deanda never did hit or kick Swartz. He simply pushed Swartz away, trying to get him to stop hitting him over the head. (Transcript, Vol.3, Pg. 670, 671). At one point, Swartz grabbed David's hoodie on the back of his sweatshirt, pulled it up over David's head, and proceeded to hit David with the dowel rod over his head several times. (Transcript, Vol.3, Pg. 672).

David had to do something to try to get Swartz to stop hitting him. (Transcript, Vol.3, Pg. 675). David saw a knife sitting on the kiln in the garage. David picked up the knife and

pulled Swartz close to him so he wouldn't keep hitting him. (Transcript, Vol.3, Pgs. 672, 673). David was just trying to get Swartz to stop hitting him when he stabbed Swartz, what David had thought to be three times. (Transcript, Vol.3, Pg. 675).

Eventually David was able to throw Swartz off of him. (Transcript, Vol.3, Pg. 675). Swartz was thrown toward the exit of the garage and nothing was stopping him from leaving. (Transcript, Vol.3, Pg. 676). But Swartz did not leave. Instead he came back at David and then fell over. (Transcript, Vol.3, Pg. 676). Swartz got up again and threw a chair at David before finally leaving the garage. (Transcript, Vol.3, Pg. 677).

Swartz headed towards the road and waited for the police to arrive. David did not follow Swartz. Instead, he went back towards the house. (Transcript, Vol.3, Pgs. 679, 680). David was still upset when the police arrived because he'd just been attacked and then he didn't think the police were listening to him. He was trying to explain to them as they were arresting him that he was acting in self-defense. Further, he was trying to tell the police that he had injuries of his own, that he had injuries on his head, and, once again, he felt that nobody was paying any attention to him. David thought he wasn't going to get the medical treatment that he thought he needed for his head injuries. (Transcript, Vol.3, Pgs. 687, 689).

Mr. Swartz had a motive to lie. He was swinging that bat at, threatening, and menacing the children. (Transcript, Vol.3, Pg. 692). He did not want to get in trouble for doing that. Further, his girlfriend's, Jolene Haubert's, ex-boyfriend, David Deanda lived upstairs from Jolene. (Transcript, Vol.3, Pg. 662, 664). Mr. Swartz didn't like David Deanda because David was one of Jolene's ex-boyfriends and Swartz is a jealous person. (Transcript, Vol.1, Pg. 225). He had even made rude comments about David to Jolene before the fight. (Transcript, Vol.1, Pgs. 227, 228).

David Deanda acted in self-defense. (Transcript, Vol.3, Pg. 682). David honestly believed, based on his experiences with abuse and beatings that as he was being beaten in the head with the dowel rod by Swartz, that it was necessary at that moment to use force in order to get the beating to stop. (Transcript, Vol.3, Pg. 675). Also, David Swartz had reason to lie about starting this altercation and beating David with a dowel rod. (Transcript, Vol.3, Pg. 692 and Vol. 1 Pg. 225). Further, Swartz had the opportunity to leave and stop going after David but he didn't. (Transcript, Vol.3, Pg. 676). Yet the police arrested David Deanda who was subsequently charged with attempted murder. (Transcript, Vol.3, Pg. 687 and Vol.4, Pg. 802).

## ARGUMENT

### PROPOSITION OF LAW

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

### Significance of Evans

The Third District Appellate Court's decision should be affirmed and the defendant-appellee'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.

The State of Ohio argues that felonious assault should now become a lesser included offense of attempted murder because this Court in *State v. Evans* (2009), 122 Ohio St.3d 381 clarified the test for determining whether an offense is a lesser included offense of another. However, the clarification of the test in *Evans* does not change this Court's reasoning in *State v. Barnes* (2002), 94 Ohio St.3d 21, for finding that felonious assault is not a lesser included

offense of attempted murder and should not change the Third District Court of Appeals similar reasoning for finding that felonious assault is not a lesser included offense of attempted murder in the instant case.

At issue here is the second prong of the test for determining whether an offense is a lesser included offense. In *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, this Court described the second prong of the test as "whether the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed." *Deem*, at ¶3 of the syllabus. In *Evans*, this Court clarified the test to "whether the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed," thus removing the word "ever" from the test. *Evans* at ¶26. This Court explained that the removal of the word "ever" from the second prong of the test was "to ensure that such implausible scenarios will not derail a proper lesser included offense analysis." *Evans* at ¶25. The "implausible scenario" in *Evans* was in reference to *Evans* arguing that "a person can indicate possession of a deadly weapon without implying a threat to inflict physical harm, for example, by 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." *Evans* at ¶24.

It does not require an "implausible scenario" to see that under the analysis of the second prong of the *Deem* test even without the word "ever" felonious assault is not a lesser included offense of attempted murder. The clarified test under *Evans* still requires that the two offenses be considered *as statutorily defined*. As statutorily defined it is possible to commit attempted murder without also committing felonious assault (in this case resulting in serious physical harm). The Third District Court of Appeals in this case considered whether felonious assault is

a lesser included offense of attempted murder using the test as clarified by *Evans* and still determined that it was not. As the Third District wisely stated, “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.”

The Third District Court of Appeals in this case was following the decision that this Court made in *Barnes*. *Barnes* was very similar to the case at bar in that it involved a stabbing, an indictment for attempted murder, and an instruction on felonious assault as a lesser included offense. In *Barnes* this Court held that felonious assault is not a lesser included offense of attempted murder. It is interesting that in its reasoning in *Evans*, in which this Court clarified the *Deem* test for whether an offense is a lesser included offense, this Court cited *Barnes* with no mention that the clarified test would result in this Court's decision in *Barnes* being reversed.

The scenario proposed by the Third District Court of Appeals is no more implausible than the reasoning proposed by this Court in *Barnes*. In *Barnes*, this Court stated, “[b]ut the second prong of the *Deem* test requires us to examine the offenses at issue as statutorily defined and not with reference to specific factual scenarios.” (No mention of the word “ever” in that statement). This Court went on to reason that “[o]ur comparison of the statutory elements of the two offenses at issue here leads us to conclude that felonious assault under R.C. 2903.11(A)(2) is not a lesser included offense of attempted murder because it is possible to commit the greater offense without committing the lesser one. For example, an offender may commit an attempted murder without use of a weapon, meaning that ‘attempted murder can

sometimes be committed without committing felonious assault under [R.C. 2903.11(A)(2)].” This Court’s reasoning in *Barnes* sound very familiar to the Third District Court of Appeals reasoning in the instant case.

If it is not implausible to think that attempted murder can be committed without the use of a weapon, then it is not implausible to think that attempted murder could be attempted without inflicting serious physical harm. Many very plausible examples of attempted murder, other than poisoning by suicide, can be imagined – shooting a gun at someone and missing, setting a home on fire when the intended victim is not home or escapes before being injured, setting a bomb that doesn’t detonate – just to name a few.

The reason that this Court has previously ruled that felonious assault is not a lesser included offense of attempted murder and the reason that the Third District Court of Appeals found the same to be true in the instant case is sound. One can commit attempted murder without the use of a weapon. One can commit attempted murder without inflicting serious physical harm. It does not require an “implausible scenario” to easily envision either hypothetical circumstance. For the foregoing reasons the Third District Court of Appeals decision to reverse the trial court’s conviction in the instant case should be upheld.

#### Invited Error

The State of Ohio argues that the appellee in this case invited the trial court’s plain error in instructing the jury on felonious assault as a lesser included offense because the appellee requested an instruction on aggravated assault. The State of Ohio cites *State ex rel. v. Cos. V. Marshall* (1997), 81 Ohio St.3d 467 for the proposition that “a party should not benefit from an error that the party invited or induced the trial court to make.” But as the State of Ohio writes in its own brief the parties in *Marshall* *agreed* to the jury instruction of R.C. §2903.02(B)

(murder) as a lesser included offense to the charge of aggravated murder. In the case at bar the defense never agreed to the trial court instructing the jury on felonious assault as a lesser included offense of attempted murder. Also, in *State v. Briscoe*, 2008-Ohio-6276, (OHCA 8), a case also cited by the State of Ohio for the same proposition, the parties had *agreed* to the jury instruction on R.C. §2903.02(B) (murder) as a lesser included offense to the charge of aggravated murder.

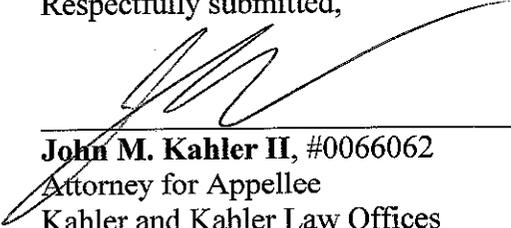
In the instant case the defense never agreed to the jury instruction of felonious assault as a lesser included offense of attempted murder. Had Mr. Deanda been convicted of aggravated assault as a lesser included offense of attempted murder then of course that conviction should not be reversed as plain error because the defense asked for that instruction. In that circumstance it would have been invited error. That is not the case though. The defense in this case never ask for and never wanted an instruction on felonious assault as a lesser included offense. To argue that the defense invited the trial court's plain error is not in line with the Eighth District Court of Appeals decision cited by the State of Ohio and is a stretch of the invited error doctrine.

It would be a miscarriage of justice to hold that if one party erroneously requests an instruction to the jury on one lesser included offense that the trial court is then free to instruct the jury on any other equally erroneous instruction. Such a holding would open the door to juries being instructed on just about any offense being a lesser included offense of any other. The result would be confusion and convictions for offenses never contemplated by the prosecutor, the defendant, or the grand jury.

CONCLUSION

For the foregoing reasons the decision of the Third District Court of Appeals should be upheld.

Respectfully submitted,



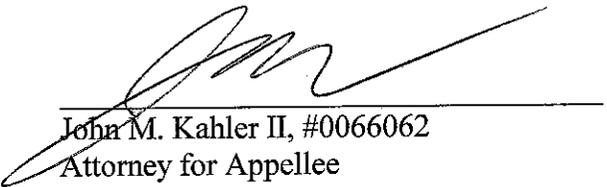
---

**John M. Kahler II, #0066062**  
Attorney for Appellee  
Kahler and Kahler Law Offices  
216 S. Washington Street  
Tiffin, Ohio 44883  
Phone: (419) 447-2285  
Fax: (419) 443-8627  
E-mail: johnmkahlerii@yahoo.com

CERTIFICATION OF SERVICE

I hereby certify that a true and exact copy of the foregoing Instrument was served upon the following on August 21, 2012:

Derek W. DeVine  
Seneca Co. Prosecutor  
71 S. Washington St.  
Suite 1204  
Tiffin, OH 44883-2351



---

**John M. Kahler II, #0066062**  
Attorney for Appellee

APPENDIX

**Ohio Statutes**

**Title 29. CRIMES - PROCEDURE**

**Chapter 2903. HOMICIDE AND ASSAULT**

*Includes all legislation filed with the Secretary of State's Office through 6/11/2012, as well as HB 262 and SB 321*

**§ 2903.02. Murder**

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

(D) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

**Cite as R.C. § 2903.02**

**History.** Effective Date: 06-30-1998

**Ohio Statutes**

**Title 29. CRIMES - PROCEDURE**

**Chapter 2903. HOMICIDE AND ASSAULT**

*Includes all legislation filed with the Secretary of State's Office through 6/11/2012, as well as HB 262 and SB 321*

**§ 2903.11. Felonious assault**

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D)(1)(a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads

guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (B)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

**Cite as R.C. § 2903.11**

**History.** Amended by 129th General Assembly File No. 29, HB 86, §1, eff. 9/30/2011.

Effective Date: 03-23-2000; 08-03-2006; 03-14-2007; 04-04-2007; 2008 HB280 04-07-2009