

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2012-0471
Plaintiff-Appellant,	:	On Appeal from the Seneca County
vs.	:	Court of Appeals, Third Appellate
DAVID L. DEANDA,	:	District Case No. 13-10-23
Defendant-Appellee.	:	

**MERIT BRIEF OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLEE DAVID L. DEANDA**

BRIAN O. BOOS (0086433)
Assistant Prosecuting Attorney

JOHN M. KAHLER, II (0066062)
Attorney at Law

71 South Washington Street, Suite 1204
Tiffin, Ohio 44883
(419) 448-4444
(513) 443-7911 – Fax
bboos@senecapros.org

216 South Washington Street
Tiffin, Ohio 44883
(419) 447-2285
(419) 443-8627 – Fax
johnmkahlerii@yahoo.com

COUNSEL FOR STATE OF OHIO

**COUNSEL FOR APPELLANT,
DAVID L. DEANDA**

OFFICE OF THE OHIO PUBLIC DEFENDER

JEREMY J. MASTERS (0079587)
Assistant State Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
jeremy.masters@opd.ohio.gov

**COUNSEL FOR AMICUS CURIAE,
OHIO PUBLIC DEFENDER**

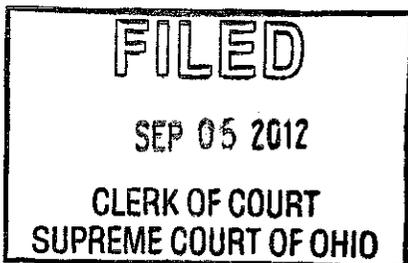


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RULE:

Crim.R. 313

STATEMENT OF THE CASE AND OF THE FACTS

On September 19, 2009, David Deanda was involved in a fight with David Swartz. During that fight, Mr. Deanda stabbed Mr. Swartz while stating that he was going to kill him. Mr. Swartz was flown to a hospital due to his injuries. *State v. Deanda*, 3d Dist. No. 13-10-23, 2012-Ohio-408, ¶ 2. Mr. Deanda was indicted for one count of attempted murder, a felony of the first degree and a violation of R.C. 2923.02 and 2903.02(A). After a jury trial, Mr. Deanda requested and received a jury instruction regarding aggravated assault as a lesser included offense. The State also requested and received a jury instruction regarding felonious assault as a lesser included offense. The jury returned a guilty verdict regarding felonious assault, a violation of R.C. 2903.11(A)(1), and the offense for which the State had requested a jury instruction. *Deanda* at ¶ 3. The trial court sentenced Mr. Deanda to seven years of incarceration. *Id.*

Mr. Deanda appealed his conviction, arguing that the trial court had erred in instructing the jury regarding felonious assault as a lesser included offense of attempted murder. *Deanda* at ¶ 13. Relying upon this Court's established opinions regarding lesser included offenses, the court of appeals reversed Mr. Deanda's conviction. In doing so, the court of appeals discussed the three-part, lesser-included-offense test described by this Court in *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), applied in *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240, and clarified in *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889. *Deanda* at ¶ 4.

The court of appeals then examined the offenses at issue in the present case in light of *Evans*, this Court's most recent decision regarding the lesser-included-offense test. The court of appeals found that felonious assault carries a lesser penalty than attempted murder and that an element of attempted murder is not required to prove the commission of felonious assault.

However, with regard to the remaining part of the lesser-included-offense test, the court of appeals held that it is not necessary to cause serious physical harm to another in order to attempt to cause the death of another. As a result, the court of appeals found that felonious assault under R.C. 2903.11(A)(1) is not a lesser included offense of attempted murder and that the trial court had erred in instructing the jury regarding felonious assault. *Deanda* at ¶ 8. The court of appeals reversed Mr. Deanda's conviction, the State filed a Memorandum in Support of Jurisdiction, and this Court accepted the present case for review.

**STATEMENT OF INTEREST OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the present case insofar as this Court may address the appropriate application of the three-part, lesser-included-offense test that this Court recently clarified in *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889.

ARGUMENT

THE STATE'S PROPOSITION OF LAW

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*.

A. Lesser Included Offenses

Section 10, Article I of the Ohio Constitution provides that “no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury * * *.” This Court has long recognized that a criminal defendant is guaranteed that the essential facts constituting the offense for which he or she is tried will be found in the indictment. An indictment will satisfy those constitutional requirements if it contains the elements of the offense charged, fairly informs a defendant of the charge against which he or she must defend, and enables a defendant to plead an acquittal or conviction as a bar to future prosecutions for the same offense. *Evans* at ¶ 7.

However, an indictment need not separately list every lesser included offense that the defendant may also be liable of having committed. An indictment that charges a greater offense necessarily and simultaneously charges the defendant with lesser included offenses as well, because the greater offense contains all the elements of all the lesser included offenses. *State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787, 905 N.E.2d 151, ¶ 15. Thus, a conviction for a lesser included offense does not deprive a defendant of his constitutional right to presentment or indictment by the grand jury, because by indicting the defendant for the greater offense, the grand jury has necessarily considered each of the essential elements of the lesser included offenses. *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶ 8. Ohio Revised Code Section 2945.74 and Crim.R. 31(C) codify the principle that a criminal defendant

may be convicted of an offense of a lesser degree, or of a lesser included offense, relative to a charge contained in his or her indictment.

While a greater offense conceptually encompasses its lesser included offenses, whether or not a lesser-included-offense instruction is appropriate in a particular case will depend upon whether the evidence produced at trial could lead a reasonable juror to find the defendant not guilty of the greater offense, but guilty of the lesser included offense. *Evans* at ¶ 13.

B. *State v. Evans* and the Lesser-Included-Offense Test

This Court recently addressed the appropriate test for evaluating lesser included offenses. In *Evans*, this Court clarified the three-part, less-included-offense test first presented in *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988). As clarified, the test requires that in order for an offense to be a lesser included offense of another, a court must determine that:

1. One offense carries a greater penalty than the other.
2. Some element of the greater offense is not required to prove commission of the lesser offense.
3. The greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed.

Evans at the syllabus.

As originally described in *Deem*, the test required that the greater offense could not as statutorily defined ever be committed without the lesser offense as statutorily defined also being committed. *Deem* at paragraph three of the syllabus. This Court's clarification of the test in *Evans* consisted of removing the word "ever" from the analysis. This Court explained its reasoning for that deletion in its analysis of Mr. Evans's argument that robbery is not a lesser included offense of aggravated robbery. *Evans* at ¶ 24-25.

This Court declined to accept a hypothetical scenario offered by Mr. Evans as an example of how a person could indicate the possession of a deadly weapon, without implying a threat to inflict physical harm, during the commission of a theft offense. *Evans* at ¶ 24. This Court noted that it has recently rejecting similar tortured hypotheticals, offered in the context of allied offenses of similar import, in *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, ¶ 24. This Court explained that removing the word “ever” from the lesser-included-offense test would ensure that “such implausible scenarios will not derail a proper lesser-included-offenses analysis.” However, this Court also stated that “[t]his clarification does not modify the *Deem* test, but rather eliminates the implausible scenarios advanced by parties to suggest the remote possibility that one offense could conceivably be committed without the other also being committed.” (Emphasis added.) *Evans* at ¶ 25. Finally, this Court restated that the lesser-included-offense test continues to require a “comparison of the elements of the respective offenses in the abstract to determine whether one element is the functional equivalent of the other.” *Evans* at ¶ 25.

C. The Present Case

Mr. Deanda was indicted for one count of attempted murder, in violation of both R.C. 2923.02 and R.C. 2903.02(A). Ohio Revised Code Section 2923.02 describes the elements of criminal attempt and states that “[n]o 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.” Ohio Revised Code Section 2903.02(A) prohibits an individual from purposely causing the death of another. In the present case, and at the State’s request, the jury was instructed regarding the offense of felonious assault, a violation of R.C. 2903.11(A)(1), which prohibits causing serious physical harm to another.

The jury found Mr. Deana guilty of felonious assault as a lesser included offense of attempted murder. *Deanda* at ¶ 3.

In order to be a lesser included offense of attempted murder, felonious assault as defined in R.C. 2903.11(A)(1) must meet the three-part test clarified in *Evans*. As the court of appeals in the present case explained, felonious assault carries a lesser penalty than attempted murder. And an element of attempted murder is not necessary to prove the commission of felonious assault, because felonious assault does not require the commission of conduct that if successful, would have resulted in the purposeful death of another. At issue in the present case is the State's contention that attempted murder as statutorily defined cannot be committed without felonious assault as statutorily defined also being committed.

The court of appeals correctly held that "it is possible to commit attempted murder without violating R.C. 2903.11(A)(1)." *Deanda* at ¶ 8. And that "since [Mr.] 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." *Deanda* at ¶ 8.

D. The State's Arguments

The State has claimed that felonious assault is a lesser included offense of attempted murder. In making that claim, the State has put forth several arguments that will be addressed below. The State has also warned that if this Court upholds the court of appeals's decision, Mr. Deanda "stands to walk away from his crime." (August 6, 2012 State's Brief, p. 8).

When an offense is not a lesser included offense, but may be reasonably supported by the evidence, it should be set out separately in the indictment. By choosing to indict Mr. Deanda solely for attempted murder, the State bore the risk that the jury might acquit him of that offense and that felonious assault under R.C. 2911.03(A)(1) is not a lesser included offense.

Furthermore, the State's claims fail to demonstrate that the court of appeals misapplied *Evans* in the present case, or that this Court must alter its lesser-included-offense analysis.

1. *State v. Barnes*

This Court held that felonious assault under R.C. 2903.11(A)(2) is not a lesser included offense of attempted murder in *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240. That variation of felonious assault requires causing or attempting to cause physical harm to another by means of a deadly weapon. This Court held 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)]” (Emphasis sic.) (Internal citation omitted.) *Barnes* at ¶ 26.

The State has argued that *Barnes* is inapposite to the present case for two reasons. First, it was decided before this Court's decision in *Evans*. Second, it involves a different variation of felonious assault than that involved in the present case. (August 6, 2012 State's Brief, p. 4). Both of the State's assertions are incorrect.

While *Barnes* does predate *Evans*, this Court's decision in *Barnes* did not turn upon the type of implausible scenarios that this Court criticized in *Evans*. Rather, the *Barnes* decision simply recognized that as statutorily defined, the use of a deadly weapon was not necessary to commit attempted murder. *Barnes* at ¶ 26. Finally, the fact that *Barnes* involved a different variant of felonious assault is not dispositive. In *Barnes*, as in the present case, the offense of felonious assault at issue required an element that was not contained in the offense of attempted murder. In *Barnes* that element was the use of a deadly weapon. In the present case, that

element is causing serious physical harm. As a result, neither form of felonious assault is a lesser included offense of attempted murder.

2. Taking the Attempt out of Attempted Murder

The State argues that this Court should disregard the fact that Mr. Deanda was indicted for *attempted* murder, and conduct its lesser-included-offense analysis as if the offense at issue was actually murder, in violation of R.C. 2903.02(A). (August 6, 2012 State's Brief, p. 6). The State has cited *State v. Lawrence*, 12th Dist. No. CA2007-01-017, 2008-Ohio-1354, in support of that argument. The *Lawrence* court examined the offenses of attempted rape and gross sexual imposition in the context of lesser included offenses. Finding gross sexual imposition to be a lesser included offense of attempted rape, the court explained that it had “[laid] the attempt aspect aside for the analysis.” *Lawrence* at ¶ 27.

Simply put, the *Lawrence* decision is wrong to the extent that it disregarded the fact that Mr. Lawrence was indicted for *attempted* rape, rather than rape, in conducting its lesser-included-offense analysis. Furthermore, it appears that no Ohio Court of Appeals has relied upon *Lawrence* for its treatment of attempted offenses and lesser-included-offenses. Finally, in proposing that the attempt component of Mr. Deanda's indicted offense of attempted murder be disregarded for purposes of this Court's lesser-included-offense analysis, the State engages in the sort of strained hypothetical analysis that it accuses the court of appeals of having indulged.

Rather than consider the offense of *attempted* murder, for which Mr. Deanda was indicted, tried, and acquitted, the State has asked this Court to imagine that the offense of murder was involved. In other words, the State asks this Court to conduct its lesser-included-offense analysis as if Mr. Swartz died in the present case, when in fact, he did not. This Court should decline the State's invitation to partake in such conjecture.

3. No Implausible Hypotheticals Required

The ways in which an attempted murder may be committed without causing serious physical harm are legion. Contrary to the State's assertions, the court of appeals did not rely upon the type of implausible, tortured scenarios that this Court condemned in *Winn* and *Evans*. Rather, the court of appeals expressed one example of such an occurrence, involving an attempt to cause the death of another by poisoning, in which the intended victim does not consume the poison. *Deanda* at ¶ 8. While the court of appeals could have chosen a more commonplace example, such as attempting to shoot someone in the head yet missing, or only causing physical harm rather than serious physical harm, the court of appeals's conclusion did not *require* the sort of strained examples at issue in this Court's previous decisions. In *Evans* this Court rejected "implausible scenarios advanced by parties to suggest the remote possibility that one offense could conceivably be committed without the other also being committed" (Emphasis added.) *Evans* at ¶ 25.

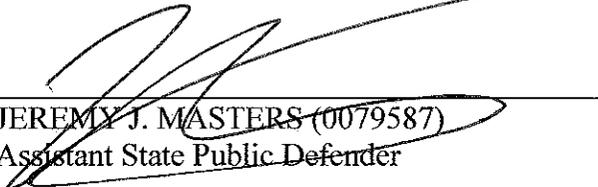
The court of appeals's decision in the present case does not rely upon remote possibilities or barely conceivable situations. That court recognized that under the three-part test clarified in *Evans*, felonious assault under R.C. 2911.03(A)(1) is not a lesser included offense of attempted murder because the former offense requires an element which the latter does not: causing serious physical harm. As a result, the trial court erred in instructing the jury regarding felonious assault as a lesser included offense of attempted murder, and the court of appeals correctly reversed Mr. Deanda's conviction. Therefore, this Court should reject the State's arguments in the present case and affirm the court of appeals's decision.

CONCLUSION

The Office of the Ohio Public Defender, as amicus curiae, urges this Court to affirm the judgment of the court below. Under the appropriate analysis, felonious assault under R.C. 2911.03(A)(1) is not a lesser included offense of attempted murder under murder R.C. 2923.02 and 2903.02(A).

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



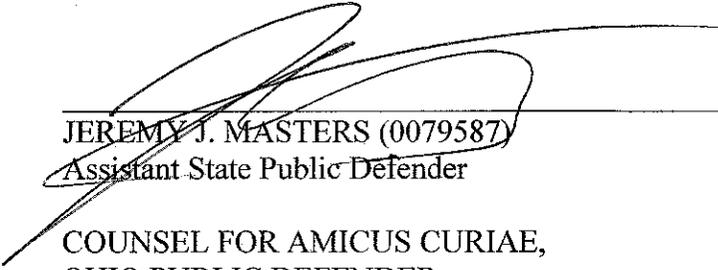
JEREMY J. MASTERS (0079587)
Assistant State Public Defender

250 East Broad Street
Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)
E-mail: jeremy.masters@opd.ohio.gov

COUNSEL FOR AMICUS CURIAE,
OHIO PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellant David L. Deanda was forwarded by regular U.S. Mail, postage prepaid to Brian O. Boos, 71 South Washington Street, Suite 1204, Tiffin, Ohio 44883, and John M. Kahler, II, 216 S. Washington Street, Tiffin, Ohio 44883, on this 5th day of September, 2012.



JEREMY J. MASTERS (0079587)
Assistant State Public Defender

COUNSEL FOR AMICUS CURIAE,
OHIO PUBLIC DEFENDER

#374766