

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.	*	

REPLY BRIEF OF APPELLANT STATE OF OHIO

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INTRODUCTION

It is clear Defendant wants to rehash the facts that were presented at trial. Defendant claims he acted in self-defense and that the victim of his brutal stabbing had motive to lie. Deanda Br. at 7. However, Defendant's conviction for felonious assault indicates that the jury believed the testimony of the victim and dismissed Defendant's claims that he acted in self-defense. Regardless, at this time this Court is not being called on to determine whether the Defendant acted in self-defense. After committing and being convicted of this brutal crime, Defendant now hopes to have his conviction overturned. Defendant argues erroneously that the trial court erred when it instructed the jury on felonious assault as a result of serious physical harm. Even if it is assumed that the trial court erred when it provided the instruction, Defendant cannot benefit at the appellate level because he invited the alleged error.

ARGUMENT

I. In *Barnes*, this Court was not called upon to consider whether R.C. 2903.11(A)(1) is a lesser included offense of attempted murder and this Court applied a lesser included offense analysis that has since been modified. For those reasons this Court's conclusion regarding felonious assault and attempted murder in *Barnes* is not dispositive of this case.

Defendant, like the 3rd District Court of Appeals, maintains that this Court's conclusion regarding felonious assault and attempted murder in *State v. Barnes* is applicable to this case. It is not. In *Barnes*, this Court was called upon to determine whether a trial court committed plain error when it instructed the jury on felonious assault under R.C. 2903.11(A)(2) as a lesser included offense of attempted murder. *State v. Barnes* (2001), 94 Ohio St.3d 21, 25. This Court ultimately determined that

felonious assault with a deadly weapon was not a lesser included offense of attempted murder, but decided that the trial court did not commit plain error because this Court had not yet decided whether R.C. 2903.11(A)(2) was a lesser included offense of attempted murder. *Id.* at 28. In this case, when the trial court instructed the jury on R.C. 2903.11(A)(1), this Court had not yet made a determination as to whether R.C. 2903.11(A)(1) is a lesser included offense of attempted murder.

Additionally, even if *Barnes* had involved R.C. 2903.11(A)(1), which it did not, this Court in *State v. Evans* modified the analysis for determining whether an offense is a lesser included offense of another. *State v. Evans* (2009), 122 Ohio St.3d 381, 387. Thus, this Court's lesser included offense analysis in *Barnes* is not dispositive of the issue in this case because the analysis this Court used has since changed and the court was analyzing an entirely different Revised Code section. Defendant notes that in *Evans* "this Court cited *Barnes* with no mention that the clarified test would result in this Court's decision in *Barnes* being reversed." Deanda Br. at 9. However, this Court's only mention of *Barnes* in the *Evans* opinion was that *Barnes* stands for the notion that the specific facts of a particular case are irrelevant when determining whether an offense is a lesser included offense of another. *Evans* at 385.

Defendant also notes three examples of situations where attempted murder could conceivably be committed without causing serious physical harm. Two of these scenarios involve bombs that don't detonate or burning houses with intended victims escaping. Deanda Br. at 10. These examples, like the 3rd District's example involving the poisoning of an individual's soup, are the type of far-reaching abstract hypothetical scenarios this Court sought to avoid in *Evans*. As Justice Shaw of the 3rd District wisely

stated, after *Evans* “the statutory offenses are now to be examined for possible compatibility instead of for any possible incompatibility.” *State v. Deanda*, 2012-Ohio-408, 13-10-23 (OHCA3), ¶ 21. Additionally, Defendant notes that one can commit attempted murder without causing serious physical harm by shooting a gun and missing. *Deanda Br.* at 10. However, as the State has noted this Court in *Thomas* stated that the proper focus of the analysis should be:

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.

State Br. at 5. It is significant that this Court’s *Evans* opinion, which amended the *Deem* test, chose to cite that portion of the *Thomas* opinion. It indicates what Justice Shaw stated, that the statutes should be reviewed for possible compatibility as opposed to any conceivable incompatibility. Clearly the language in the indictment in this case, which alleged engaging in conduct that, if successful, would result in the death of another, put Defendant, who stabbed the victim repeatedly, on notice that he could also be prosecuted for knowingly causing serious physical harm to another. Applying that standard leads one to conclude that R.C. 2903.11(A)(1) is a lesser included offense of attempted murder.

- II. **The Defendant’s request for lesser included offense instructions that require serious physical harm, invited the trial court to instruct the jury on felonious assault, which also requires serious physical harm, and Defendant never objected to that instruction, thus Defendant cannot benefit from the trial court’s decision to instruct the jury on felonious assault.**

Defendant claims:

The defense in this case never ask [sic] 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.

Deanda Br. at 11. This Court held in *Marshall* that "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. (Emphasis added.) Defendant has staked his entire argument on the idea that one can conceivably commit attempted murder without causing serious physical harm. However, Defendant himself requested instructions for assault and aggravated assault, both of which require serious physical harm. During a discussion about jury instructions Defense counsel was asked by the trial court:

Explain to the Court how aggravated assault, what evidence supports aggravated assault? Well, I can see that, but what about assault?

Jury Instruction Trans. p. 2; 16-18. Defense counsel then provided this explanation:

Well, for assault the elements are the defendant knowingly caused or attempted to cause physical harm to David B. Swartz. Uhm, if the – the – The State is alleging that he intended to – to, uhm, kill him and did in fact stab him. I think that that would certainly qualify as knowingly causing or attempting to cause physical harm. Uhm, as would, uhm, it would also satisfy the recklessly causing *serious physical harm*.

I don't know what more I can say other than I think there's plenty of evidence, should the jury choose to believe it, that, uhm, Mr. Deanda knowingly caused physical harm to David Swartz, or recklessly caused *serious physical harm* to David Swartz.

Jury Instruction Trans. p. 2-3. (Emphasis added.) Thus, Defendant clearly represented to the trial court that he believed a lesser included offense that required a showing of serious physical harm was appropriate. Defendant is now attempting to have his conviction overturned solely because he was convicted of a lesser included offense that

requires serious physical harm. It is apparent that Defendant did induce the trial court to instruct the jury on felonious assault. The State would not have requested such an instruction and the trial court would not have given such an instruction had Defendant not asked for the aggravated assault and assault instructions. Additionally, the jury in this case received Defendant's requested instructions for aggravated assault and assault. (Transcript, Vol.4, Pg. 809, 813). Defendant also argues:

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.

Deanda Br. at 11. However, the only distinguishing feature between the aggravated assault instruction Defendant requested and felonious assault is the requirement that the offender be "under the influence of a sudden passion or in a sudden fit of rage." R.C. 2903.12(A)(1). Thus, Defendant's requested instruction of aggravated assault not only includes the serious physical harm requirement, but also an additional element that felonious assault does not. Defendant's conviction for felonious assault merely indicates the jury did not buy his claim of sudden passion.

Defendant also attempts to distinguish the present case with that of *Marshall* and *Briscoe*. Defendant claims that in those cases the parties agreed to the jury instruction and that in this case Defendant never agreed to the felonious assault instruction. Deanda Br. at 10-11. If Defendant did not agree to the felonious assault instruction he should have objected when the trial court indicated it would be providing that instruction. If Defendant had an issue with the serious physical harm requirement, he should not have requested jury instructions that require serious physical harm.

It is clear Defendant thought he could benefit at the trial level if the jury found him guilty of a lesser included offense. Now Defendant wants to benefit again. Defendant should not be able to have it both ways. It would be a misapplication of case law if criminal defendants were able to take advantage of lesser included offense instructions at the trial level and then appeal those same instructions that they invited. In this case, before any instructions were requested by the State or provided to the jury by the judge, Defendant undeniably represented to the trial court that he wanted a lesser included offense instruction that required serious physical harm. Now Defendant claims he was wronged because the trial court provided an instruction that required serious physical harm. As a result, Defendant cannot benefit from the trial court's alleged error.

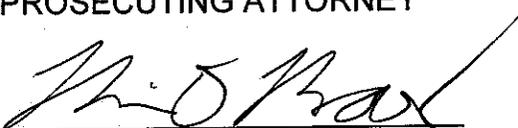
CONCLUSION

The trial court did not err when it instructed the jury on felonious assault. The indictment put the offender on notice that he could be prosecuted for felonious assault. Even if it is assumed that the trial court erred, when it provided the felonious assault instruction, Defendant cannot benefit at the appellate level because he induced the trial court into making the alleged error.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing instrument was served upon counsel for Defendant-Appellee, John M. Kahler, II, by mailing said copy to his office at 216 S. Washington St., Tiffin, Ohio, 44883, this 6th day of September, 2012.

A handwritten signature in black ink, appearing to read "B. O. Boos", written over a horizontal line.

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