

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	*	Supreme Court Case No.:
	*	
Appellee,	*	On Appeal from the
	*	Cuyahoga County Court of
vs.	*	Appeals, Eighth Appellate
	*	District
KEITH M. SEFCIK,	*	
	*	Court of Appeals
Appellant.	*	Case No. 101152

**MEMORANDUM IN SUPPORT OF JURISDICTION -  
KEITH M. SEFCIK, APPELLANT**

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*State v. Sefcik*, 8<sup>th</sup> Dist. Cuyahoga, No. 101152, 2014-Ohio-5792

**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL  
QUESTION AND WHY LEAVE TO APPEAL SHOULD BE GRANTED**

When you have eliminated the impossible, whatever remains, however improbable, must be the truth.

Arthur Conan Doyle, *The Sign of the Four*, Chapter 6.

Those words of Sherlock Holmes to Dr. Watson underlie the bedrock principles of any fair system of criminal justice: If the accused could not have committed the crime charged, he should be acquitted.

The ultimate question in any criminal trial is whether the accused in fact did that with which he is charged. Recognizing that absolute certainty will often be impossible because, as our statutory instruction on reasonable doubt, R.C. 2901.05(E), says, “[E]verything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt,” the Rules of Evidence, Sixth Amendment protections, and demand of proof beyond a reasonable doubt are designed to minimize the risk of a factually innocent person being convicted of a crime.

The same drive for accuracy of outcome motivated this Court some forty years ago in *McDonald v. Ford Motor Co.*, 42 Ohio St.2d 8, 326 N.E.2d 252 (1975), when it adopted the Physical Facts Rule.

The testimony of witnesses which is positively contradicted by the established physical facts is of no probative value and a jury will not be permitted to rest a verdict thereon.

*Id.* at the syllabus.

This case asks the Court to affirm the vitality of that rule and of this Court’s commitment to accuracy of verdict.

Keith Sefcik was convicted of felonious assault in violation of R.C. 2903.11(A)(2),

knowingly “caus[ing] or attempt[ing] to cause physical harm to another by means of a deadly weapon.” The specific claim is that he held a knife to her neck and pushed her out of their home.<sup>1</sup> The state presented evidence that her neck had scratches on it that, the state said, were caused by the knife. Evidence, however, indicated that although the knife was tested for DNA, and although DNA consistent with Mr. Sefcik’s was found on both the hilt and the blade, no DNA from his wife (in fact, none from any female) was found anywhere on the knife.

The court of appeals held that while the DNA showed that while her husband did not harm his wife with the knife, it did not prove that he did not use the knife. *State v. Sefcik*, 8<sup>th</sup> District Cuyahoga, No. 101152, 2014-Ohio-5792, ¶ 13. Mr. Sefcik does not disagree. The lack of her DNA on the knife does not show that the knife was not used. But if he held the knife near her neck and did not use it but instead pushed her out the door and down some steps, then he neither used nor attempted to use it.

And if he did not use or attempt to use the knife to cause physical harm to his wife, then Mr. Sefcik is, factually, not guilty of the felonious assault with which he was charged. He was, then, convicted of a crime he did not commit.

The question before this Court is whether those bedrock principles have any meaning today. Is the Physical Facts Rule laid down in *McDonald* still good law? Are the courts of this state bound to rely on actual evidence and physical possibility when rendering verdicts or may they just do what feels good?

To answer those questions, and to remind the lower courts of Ohio that their duty is

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<sup>1</sup> Mr. Sefcik was also found guilty of aggravated menacing and domestic violence. All three offenses were deemed to be allied, and the state elected to proceed on the felonious assault charge. He did not dispute in the court of appeals and does not dispute here the verdicts on those other charges.

to render justice and not merely verdicts, this court should accept jurisdiction over this case, adopt Mr. Sefcik's proposition of law, vacate his conviction for felonious assault, and remand the case to the trial court.

### **STATEMENT OF THE CASE AND FACTS**

#### **I. The Case**

In September 2013, Keith Sefcik, was charged by indictment with single counts of felonious assault in violation of R.C. 2903.11(A)(2), aggravated menacing, and domestic violence from an altercation with his wife, Sandra Sefcik, the previous month. He was also charged with a single count of domestic violence for pushing his son in the midst of the events with his wife. At a bench trial in January 2014, the court found him guilty of the charges concerning his wife. The court found him not guilty of domestic violence as it related to his son.

At the sentencing hearing the next month, the court first declared that it agreed with the jury's verdict before thanking defense counsel for reminding it that there was no jury; it was a bench trial. The court then held that the three counts of which Mr. Sefcik had been found guilty were allied offenses and imposed a five year sentence on Count 1, the felonious assault. The court said, "I do find that your actions are very serious indeed and you did cause serious physical harm to this victim." (TR 336)

On appeal to the Eighth District Court of Appeals, Mr. Sefcik raised two assigned errors:

APPELLANT'S CONVICTION FOR FELONIOUS ASSAULT IS NOT  
SUPPORTED BY SUFFICIENT EVIDENCE WHERE THE STATE  
FAILED TO PRESENT EVIDENCE THAT APPELLANT CAUSED OR  
ATTEMPTED TO CAUSE PHYSICAL HARM.

APPELLANT'S CONVICITON FOR FELONIOUS ASSAULT IS  
AGAINST THE MANIFEST WIEGHT OF THE EVIDENCE.

In an opinion journalized on December 31, 2014, the court overruled both assigned errors and affirmed Mr. Sefcik's conviction and sentence.

## **II. The Relevant Facts**

In August 2013, Keith Sefcik and his wife, Sandra, had been married for some nine and one-half years. Theirs was a tumultuous relationship. They'd spoken on a number of occasions about getting divorced, and the discussions regularly ended up in arguments over who would have custody of their eight-year-old daughter, Kaitlyn. Nevertheless, that month Sandra initiated divorce proceedings against Keith.

On August 20, 2013, Keith and his father, Dale, played golf. On their way to the golf course, Sandra called wondering if he knew where her car keys were as she couldn't find them. At some point while golfing, Keith realized that he actually had Sandra's keys in his pocket. Regardless, when they finished around 2 pm, they stopped at the golf course bar for a beer. After that, Dale drove Keith home and dropped him off.

When Keith went in the house, he and Sandra argued. Keith maintains that they argued over money and Sandra's drinking. Sandra testified that they argued over Keith being drunk and, continuing an argument from the day before, over his decision to go golfing. What happened next is disputed, though everyone agrees that at some point Keith left the house.

As relevant here, and the basis on which the court found Keith guilty of felonious assault, Sandra testified that when Keith returned to get some clothes, she shut the door to keep him out, he forced his way in, they argued more, and he grabbed a knife that was out on a counter.

Held it up to my neck and, like, he – I was, like, trying to get out the door

and he, like, shoved me out the screen door and I hit my face on my arm and my side on the concrete steps.

State's Exhibit 3, a photograph of Sandra's neck, shows marks that she testified were caused by the knife. The knife itself was tested for DNA. Testing revealed two people's DNA on the knife handle. DNA from one of those people was consistent with Keith. DNA consistent with Keith's was also found on the blade. No DNA consistent with Sandra was found anywhere on the knife. Indeed, there was no DNA on the knife from any female.

### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

Proposition of Law: When the undisputed evidence reveals that the crime for which the defendant was tried did not occur, it violates his constitutional rights to fair trial, to be free from cruel and unusual punishment, and to due process for him to be found guilty and sentenced.

As relevant here, Keith Sefcik was charged with, found guilty of, and sentenced for the felonious assault of his wife, Sandra Sefcik, in violation of R.C. 2903.11(A)(2). That section makes it an offense to knowingly "Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

The allegation is that he scraped his Sandra's neck with a knife. The relevant evidence on that point is from her testimony and from State's Exhibit 3. On August 20, 2013, Keith and his father played golf. When he returned home, they argued and he left. After a while he came back to get some clothes. She tried to close the door on him, but he pushed through. They argued more. They went into the kitchen where he grabbed a knife that was sitting on a counter.

Held it up to my neck and, like, he – I was, like, trying to get out the door and he, like, shoved me out the screen door and I hit my face on my arm and my side on the concrete steps.

State's Exhibit 3 shows marks on her neck that, she said, were caused by the knife.

The prosecutor made clear during closing argument that the issue was whether the knife caused those marks.

I would like to talk about Count 1, felonious assault. That does not require the State to prove serious physical harm. It only requires evidence of physical harm, any injury regardless of its gravity or duration. Here we've had testimony there was pretty significant damage to her neck. We do have physical harm on her neck. So long as that -- those injuries were caused by what could be deadly weapon, that's felonious assault.

The Defendant doesn't have to use the weapon as a deadly weapon. It merely has to be capable of causing death and used to cause any harm. So the fact that the Defendant didn't stab or there's no lacerations, that's not material for a felonious assault charge when you charge it under the deadly weapon version of the code. So if this Court were to believe that the knife caused those marks, the Defendant is guilty of felonious assault.

And then, again, during his rebuttal close.

Defense counsel keeps suggesting that those marks to her neck don't appear to be injuries that would be caused by a knife. Why? Because he says so? We have her testimony that he held a knife to her neck and then we have linear scrape-like scratch-like abrasion marks to her neck.

We have the Defendant's DNA on the blade. He conveniently was able to give self-serving testimony as to an explanation why his DNA is on the blade because he's able to review the reports and hear everyone's testimony but I think it's significant that his DNA is on that knife and the victim claimed he used that knife to hold it up against her neck.

The case for felonious assault, then, hangs on whether the marks on Sandra's neck were caused by the knife. The evidence makes clear that, regardless of her testimony, they cannot have been.

The knife was taken as evidence and the police had it tested for DNA. That testing revealed DNA consistent with Keith on the handle and the blade. It revealed DNA of another, unidentified person, on the handle. It specifically revealed that there was no DNA of Sandra's on any part of the knife. Indeed, there was no DNA from any female anywhere on the knife.

It follows, necessarily, that if there is no DNA on the knife which could have come from Sandra, that the knife did not touch her neck. If the knife did not touch her neck, then she was not injured by the knife. The court of appeals “summarily reject[ed]” Keith’s argument that there was, therefore, insufficient evidence of felonious assault. There remained, the court said,

consideration of a witness’s credibility. . . . If Sandra’s story is believed, Sefcik pulled a knife and held it against her neck during the assault. Such conduct satisfies the elements of felonious assault with a deadly weapon in and of itself.

*State v. Sefcik*, 8<sup>th</sup> Dist. Cuyahoga, No. 101152, 2014-Ohio-5792, ¶ 8 fn. 1.

But if he held the knife against her neck, there would be, necessarily, her DNA on it. And there was not. Therefore, insofar as she may have said that, she was either lying or mistaken. In fact, however, she didn’t say that he held the knife “against her neck.” She said he “[h]eld it up to my neck,” which is not quite the same thing. The difference in this case is not trivial as it is the difference between the knife actually causing physical harm and not causing physical harm. It is, as Mark Twain said, “the difference between the lightning-bug and the lightning.”<sup>2</sup>

But even if she had, in fact, said that he held the knife “against her neck” as she certainly did say that the knife caused the scratches on her neck, the statement would not be sufficient to support the conviction. It could not support the conviction because testimony at odds with physical possibility cannot be considered by a fact-finder. That rule, the Physical Facts Rule, was adopted by this Court in *McDonald v. Ford Motor Co.*, 42 Ohio St.2d 8, 326 N.E.2d 252 (1975).

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<sup>2</sup> Twain, Letter to George Bainton, Oct. 15, 1888, reprinted in Bainton, ed., *The Art of Authorship*, 85, 88. Available at [http://books.google.com/books?id=XjBjzRN71\\_IC&pg=PA87#v=onepage&q&f=false](http://books.google.com/books?id=XjBjzRN71_IC&pg=PA87#v=onepage&q&f=false) (accessed 2/5/2015).

The testimony of witnesses which is positively contradicted by the established physical facts is of no probative value and a jury will not be permitted to rest a verdict thereon.

*Id.* at the syllabus.

It is precisely that rule which was violated in this case.

The state's theory of the case, the theory on which they relied at trial, the theory on which they argued the case to the bench, the theory on which they relied in the court of appeals, simply cannot be supported based on the evidence.

The court of appeals, despite its summary dismissal of the sufficiency claim because Sandra testified to what was physically impossible, ultimately accepted that her testimony could not be true. It offered, instead, the claim that Keith could have been convicted on the theory "that a knife was merely used in the attempt to harm the victim." 2014-Ohio-5792, at ¶ 13.

But it was not. Sandra testified, Keith held the knife to her neck. Had he attempted to cause her physical harm with the knife, it is inconceivable that he would not have succeeded. Rather, and if her testimony about the incident is to be believed at all, he held the knife there in the effort to remove her from the house. If she was then injured as she fell outside, it was not as a consequence of, as the statute prohibits, a knowing attempt to injure her with a deadly weapon.

In fact, however, the distinction does not matter. Keith was not convicted of knowingly *attempting* to cause her physical injury by means of a deadly weapon but of actually *causing* physical injury by means of a deadly weapon. That he simply did not do.

Of course, a conviction based on less than proof beyond a reasonable doubt, violates the Due Process Clause of the Fourteenth Amendment. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Relying on *Winship*, the Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), held that conviction when the evidence was

insufficient also violated the Due Process Clause. Clearly that rule applies to a person convicted of a crime as to which he is factually innocent. And convicting him in the face of absolute proof of factual innocence denies his right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments. Finally, imprisoning him for a crime he did not commit is, ineluctably, cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

### **CONCLUSION**

For the reasons set forth above, this Court should accept jurisdiction, grant Mr. Sefcik's proposition of law, reverse the decision of the court of appeals, vacate his conviction for felonious assault, and remand the case to the trial court.

Respectfully submitted,

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**PROOF OF SERVICE**

This is to certify that a copy of the foregoing was served on Timothy J. McGinty, Cuyahoga County Prosecutor, The Justice Center – 9<sup>th</sup> Floor, 1200 Ontario Street, Cleveland, Ohio 44113 by regular U.S. Mail, postage prepaid, this 5<sup>th</sup> day of January, 2015.

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