

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO. 2015-0698
	:	
Plaintiff-Appellee,	:	Appeal from Fairfield County Court of
	:	Appeals, Fifth Appellate District
-vs-	:	
	:	
DUSTIN ELIZONDO,	:	Court of Appeals Case No.
	:	2014 CA 00020
Defendant-Appellant.	:	

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**MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO**

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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A  
SUBSTANTIAL CONSTITUTIONAL QUESTION, NOR A QUESTION OF  
PUBLIC OR GREAT GENERAL INTEREST**

Contrary to Appellant's assertion that this case is an example of "bad facts make bad law," this is a case where the law was properly applied to bad facts to achieve some modicum of justice. Over the course of many hours, Defendant-Appellant Dustin Elizondo repeatedly engaged in conduct which, if successful, would have caused the death of his live-in girlfriend. For various reasons, Appellant's separate acts were unsuccessful, though Appellant's lack of success did not prevent him from trying again, and again. As a result of this brutal conduct, Appellant was tried and convicted of three separate counts of attempted murder.

Appellant is seeking to appeal the unanimous judgment of the Fifth District Court of Appeals affirming his conviction on these three separate counts of attempted murder. *See State v. Elizondo*, 5th Dist. Fairfield No. 14-CA-20, 2015-Ohio-1109. The Court of Appeals, however, determined that the trial court did not err by convicting Appellant of three separate counts of attempted murder because, in reviewing the record, the Court of Appeals was able to find "at a minimum, three acts of attempted murder demonstrating that the three guilty verdicts for attempted murder were not against the manifest weight of the evidence." *Id.* at ¶ 27.

Appellant now seeks to raise one proposition of law that would create a bright-line rule making conviction for multiple counts of attempted murder "arising out of a

single course of conduct” against a single victim a legal impossibility, regardless of the facts of a given case. But the facts of this case support the multiple convictions for attempted murder. This issue is necessarily fact-specific, and, as such, does not create a question of public or great general interest. Appellant is simply unhappy with the appellate court’s decision and his attempt to re-litigate the issues that were properly decided by the appellate court does not warrant further review by this Court.

## STATEMENT OF THE CASE AND FACTS

As noted above, this case is heavily fact-dependent. A substantial portion of the Court of Appeals's decision was devoted to reviewing the facts of this case, which can be summarized as follows:

The background of these incidents is that appellant, by his own admission, believed the victim was having an affair, and the victim testified appellant was upset with her because she had not talked to him the night before. T. at 51, 262-263; State's Exhibit 82. The victim has two children, ages eight and five. T. at 33. All three lived with appellant in an apartment. T. at 34. After waking up on the morning of October 8, 2013, appellant confronted the victim with the statement " 'You didn't care about me last night. You didn't care about how I was feeling last night. I hope you enjoyed the last night with your boys, because today is it.' " T. at 38. During the course of the next four hours, appellant reiterated " 'Yeah, today's it. Today's the day. This is it. It's over.' " T. at 153-154. At one point, appellant even threw the dog on the ground and said " 'She's next.\*\*\*' " T. at 105. The entire time, the victim was in fear for her life. T. at 152- 153.

A fair reading of the strangulation incidents could lead one to the conclusion that there were actually six incidents of strangulation.

### Incident I

While in the bedroom, appellant strangled the victim with both hands, squeezing her neck. T. at 40. It was hard enough that she could not breathe and her nose started to bleed. T. at 40-41. She "farted" and appellant let her go, saying " 'Do you realize how close you are to death? Do you realize how close - - the reason why your nose is bleeding is because the pressure of me squeezing you is popping the vessels in your nose. And the reason why you farted is because you're going to lose your bowels.' " T. at 41-42.

The victim told appellant to calm down and that she needed to walk her older child to school. T. at 42. Appellant stated she was not leaving and he would make sure the child left for school. T. at 42. He told her " 'Don't

fucking move. Don't get up. Don't go anywhere. You stay right here.' " T. at 44. He then left the bedroom. *Id.*

#### Incident II

The victim was attempting to unlock her cell phone to call for help when appellant re-entered the bedroom, grabbed the phone, and said " 'Oh, no, you're not calling anybody for help.' " T. at 45. He then began strangling the victim again with both hands around her neck. T. at 45, 46-47. Because the bedroom door was open, the victim pointed to the door, suggesting the children were at the door to get him to stop. T. at 45-46. She could only point because she could not breathe, let alone talk. T. at 47. Appellant let go to check, and left the bedroom to send the older child off to school. T. at 46, 48. During this incident, appellant told the victim he was willing to do twenty-five years to life. T. at 50. The victim believed appellant was going to strangle her "until I didn't wake up any more." *Id.*

#### Incident III

Appellant returned to the bedroom (the youngest child was still in the apartment, in his own bedroom), closed the door, and assaulted the victim by punching her legs and lower body so "I couldn't go to work and that I'd lose my job." T. at 49, 51- 53. Appellant then told the victim he was going to hang her, and grabbed a chin-up bar, tied a towel around it to form a noose, and placed the bar in the doorway of the closet. T. at 61-63. Because the noose was too short, appellant picked up the victim and attempted to place her head in the noose, but she resisted. T. at 64. He then threw her to the floor and attempted to strangle her with the chin-up bar pressed against her neck, but again she resisted, and he gave up. T. at 69-71.

#### Incident IV

After the unsuccessful chin-up bar hanging and strangulation, appellant placed the victim in front of a full length mirror and while both were kneeling, he strangled her with his hands from behind until her face turned purple, her eyes rolled back in her head, and she could not breathe. T. at 73-75. She thought she was going to die. T. at 75. The victim passed out and woke up in the closet with appellant smacking her face. T. at 74, 76-77.

### Incident V

Eventually appellant and the victim go to the kitchen to obtain ice for a black eye the victim had incurred. T. at 92, 96-97. The victim got the ice and laid down on the couch. T. at 100. Appellant had calmed down at this point. T. at 103-105. All of a sudden, appellant “snapped” and threatened the dog and punched three holes in the wall. T. at 105. He dragged the victim back to the bedroom by the back of her hair, pulling her across the floor. T. at 107-109. Once in the bedroom, appellant punched the victim and strangled her until she passed out. T. at 110, 112. The victim woke up with appellant smacking her face, shaking her hard, and “sternum rubbing” her. T. at 112-113, 115-116.

### Incident VI

Appellant thought he had broken his hand, so he started stomping the victim with his bare feet. T. at 117-119. Sometime thereafter, he grabbed a t-shirt and used it to strangle the victim until she passed out. T. at 124-126. When she came to, he was tying the t-shirt around her wrists. T. at 127. The victim did not think she was going to make it out alive. T. at 129. Appellant then carried the victim downstairs and placed her on the dining room table, telling her “he could beat me easier on the table.” T. at 134. Appellant started crying, laid on the floor, and fell asleep/passed out. T. at 136-137. The victim crawled to a hidden cell phone and called police. T. at 138, 140, 144.

*Elizondo* at ¶¶ 14-22.

## ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

APPELLANT'S CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION NOR DOES IT PRESENT A QUESTION OF GREAT PUBLIC OR GENERAL INTEREST.

Appellant contends that "Legally, either Mr. Elizondo lacked the intent to kill his girlfriend the first two times he assaulted her, or he abandoned the attempt to kill her before the completion of the underlying offense of Murder." (Appellant's Memo. in Support at 3). This logic is flawed. It overlooks several other possibilities other than lack of intent or abandonment, such as inability to complete the act, or simple failure to complete the act on the part of Appellant.

Indeed, based on Appellant's rational, it is a legally impossible to commit *any* attempted crime. Either a crime is completed, or if the crime is not completed, the actor abandoned his attempt or never had the requisite intent in the first place. But attempted crimes often fail for other reasons. For example, a situation could easily be pictured where an actor ceases conduct that, if successful, would cause the death of another because he believes such conduct to have been successful, even though the victim is not, in fact, dead. Still, the actor had the requisite intent, and did not abandon the attempt.

In this case, the Court of Appeals highlighted several intervening causes that caused Appellant's failures and yet did not constitute abandonment:

Incident I was a separate and distinct act. Appellant's statement to the victim, "Do you realize how close you are to death?" demonstrates his intent, and the conduct of strangulation, if successful, would have resulted in the victim's death.

In Incident II, appellant's act of strangulation was not stopped by his abandonment, but by the victim suggesting that the children were watching. Appellant's statement to the victim that he was willing to do twenty-five years to life demonstrates his intent, and the conduct of strangulation, if not interrupted by the victim, would have resulted in the victim's death.

In Incident III, appellant's act of attempting to hang the victim with the chinup bar and towel was not stopped by his abandonment, but because the victim struggled and the methodology was faulty (towel noose too short). Appellant's statement to the victim that he was going to hang her demonstrates his intent, and this method, if successful, would have resulted in the victim's death.

*Elizondo* at ¶¶ 24-26.

Moreover, Appellant's argument in this case implies that there should be some sort of presumption of abandonment. To argue that Appellant either lacked the intent to kill or abandoned the attempt relieves Appellant of his burden to assert and prove the affirmative defense of abandonment.

R.C. 2923.02(D) provides that "[i]t is an affirmative defense to a charge [of attempted commission of a crime] that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose." Accordingly, "the burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused." R.C. 2901.05(A). Thus, Appellant is not entitled to a presumption of abandonment simply because his attempted crime was unsuccessful.

The Court of Appeals in this case thoroughly reviewed the evidence presented at trial, and concluded that the weight of the evidence supported Appellant's three convictions, and implicitly that Appellant had not met his burden of proving abandonment. *Elizondo* at ¶ 27. No further review of this issue by this Court is warranted. Jurisdiction should be declined.

## CONCLUSION

For the foregoing reasons, the State of Ohio, Appellee herein, respectfully requests that this Honorable Court deny jurisdiction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Response of Appellee State of Ohio was sent by regular U.S. Mail on the 27th day of May, 2015, to the following:

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