

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
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Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 50
v.	:	T.C. NO. 07 CR 582
	:	
JUSTIN E. HENSON	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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**OPINION**

Rendered on the 26<sup>th</sup> day of June, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Justin E. Henson, filed July 1, 2008. On August 16, 2007, Henson was indicted on one count of felonious assault of a peace officer, in violation of R.C. 2903.11(A)(1), a felony of the first degree, and one count of attempted murder, in violation of R.C. 2923.02(A) and 2903.02(B), also a felony of the first

degree. On September 7, 2007, Henson pled not guilty. Henson's motion to suppress was overruled, and the matter proceeded to trial on June 23, 2008. Henson was found guilty of felonious assault, and the jury was unable to reach a verdict on the attempted murder charge. The trial court declared a mistrial as to the charge of attempted murder. The trial court sentenced Henson to ten years imprisonment for felonious assault.

{¶ 2} The events giving rise to this matter began on August 11, 2007, around 2:00 a.m., when Officer Joseph Pence of the Fairborn Police Department, while on routine patrol, observed a suspicious vehicle in the parking lot of Dizzy Jim's bar. The driver's side door of the vehicle was open and the vehicle appeared to be unoccupied. When Pence approached the vehicle, he observed an intoxicated female inside, lying across the front seat. Pence woke the woman, and she told him that she had fallen asleep while waiting for a ride home. Pence asked her to call someone else for a ride, and she did so. Pence remained with the woman, waiting for her ride to appear.

{¶ 3} As Pence waited, he heard the sound of breaking glass and men arguing on the other side of the building. Pence proceeded to investigate, and when he came around the corner of the bar, he observed another vehicle parked in the well lit lot, with the driver's side door open, and Pence did not see anyone in or near the vehicle. Pence then observed five or six men walking away from the area. Pence shined his flashlight on the men, identified himself as a police officer, and asked them to come back and talk with him. The men said nothing and continued walking away.

{¶ 4} As Pence proceeded toward the men, a bar patron approached Pence. Pence asked the individual if he knew who owned the unsecured vehicle in the lot. The individual

indicated that he did not know, and Pence again yelled to the men to come back. After getting no response, Pence told the men, “Fellows, don’t make me chase you down. Come back here and talk to me.” Two of the men began to run.

{¶ 5} Pence pursued the men, and then other men in the group also began to run. Pence radioed his dispatcher and chased the men through a dark alley. When he reached an intersection with a streetlight, he “looked up and saw one of the two males, who originally started running and who became my targets when I initiated the foot pursuit, and it was a male in a white tank top and khaki shorts, and he was just at the intersection of Third Street and Cedar and just turned southbound on Third Street.”

{¶ 6} As Pence rounded the corner onto Third Street, he lost sight of the suspect. Pence continued down the street, and he eventually observed the suspect off to his right, in a grassy area between two apartment buildings, bent over at the knees. Pence twice told the suspect to get on the ground, and the suspect refused to comply. According to Pence, “to avoid getting into another foot pursuit, I ended up just pushing the guy to the ground.” Pence told the suspect, later identified as Joe Johnson, that he was under arrest. Pence did not ask him any questions. Johnson rolled over onto his back, and as Pence reached for his handcuffs, he observed a second man “in a light-gray tank top and blue jeans stand up from a row of bushes.”

{¶ 7} The second man, later identified as Henson, stated, “You can’t do that to my brother,” and he approached Pence. Pence, who still had not secured Johnson in handcuffs, shoved Henson back with his left hand and told him to “back off.” According to Pence, Henson “back peddled and looked like he fell into the bushes. Once he fell into the bushes, I reached up, began to notify my dispatcher over my mike that I was engaged with two subjects and where

I was at, and before I could get my transmission out, [Henson] came back out toward me.” Pence testified that Henson began to punch his arm, shoulder and chest repeatedly.

{¶ 8} Pence stated that he placed his left hand on Henson’s chest, trying to hold him off while backing away. Next, “[t]he attack came so quickly that I ended up having to react by striking the subject in the head with my flashlight.” Pence testified that the blow to the head had “absolutely minimum effect.” Pence tried to take Henson to the ground with a “hip toss,” rather than continue to struggle with him upright. In attempting the hip toss, Henson’s shirt ripped, Pence lost his grip on him, and Pence fell face down to the ground. Pence then felt Henson “fall belly down on top of me. So he’s essentially laying on top of my back.” Pence reached his arm behind Henson’s head and tried unsuccessfully to regain the dominant position by rolling Henson off his back. Pence lost his grip on Henson’s head, and he “felt the male rotate on me basically to where his head was just above my head. I felt his right arm come up underneath my chin, right around my throat, and I felt his left arm secure around the backside of my neck locking in a choke hold.”

{¶ 9} Pence was unable to loosen Henson’s hold on him, and he was having trouble breathing. Pence testified that he felt Henson’s “left arm let off the back of my neck and then I started feeling punches coming down on the left side of my face.” Henson maintained his choke hold with his right arm around Pence’s throat. Pence was breathing “very little.” Pence tried to get up and “as soon as I got up on my hands and knees, I felt the left arm or the left hand that was punching me resecure around the back of my neck and then lock back in on the choke hold.” As Pence struggled to get up from his hands and knees, he looked up and observed Johnson “take three steps in quick succession and then he kicked me right in the face with the

right foot.”

{¶ 10} Pence eventually struggled to a standing position while still in the choke hold. He testified that he was unable to breathe at this point. Pence attempted to reach the panic button on his radio, but he was unable to do so, because Henson’s body was blocking the radio. Pence began to panic, and he testified, “At this point in time I’ve noticed that I can neither breathe in nor breathe out. As hard as I can try, I cannot get air in.” Pence testified that Henson’s grip grew tighter.

{¶ 11} Henson then leaned back and lifted Pence onto his “tip toes.” Pence testified at that time he “could not focus on anything. I was looking straight ahead because I couldn’t move my head and I could not focus on any of the stuff that was in front of me. I started noticing like there was a light haze around my peripheral vision. I couldn’t see anything off to the sides, and at points, it almost looked like somebody was flashing lights off to the side of me because there was little flashes of lights going off on the sides of my vision.” Pence testified that there was no indication that Henson would loosen his grip, and Pence realized “that I have probably maybe one more chance to try to break free of this grip or I was done.”

{¶ 12} Pence reached up again and grabbed the fingers of Henson’s right hand. He bent the fingers back, and he heard “two distant pops, and as soon as those pops happened I just remember falling to the ground.” Pence looked up and observed Henson running away eastbound. Pence tried to pursue Henson and radio for assistance, but he had “zero energy,” he still could not breathe, and he was having trouble maintaining his balance because he was dizzy. Pence also observed Johnson running southbound.

{¶ 13} Eventually, other officers arrived at the scene. Pence indicated Henson’s

direction of flight to Officer Mark Kohler, who was the first to arrive, and Kohler began to look for Henson. Pence was bent over with his hands on his hands on his knees, trying to catch his breath. He “noticed that there was blood that was pouring off my face.” Pence testified that Officers Joe May, Jim Hartman and Bill Jones also arrived on the scene, along with paramedics. Pence was taken to the hospital for treatment. He was diagnosed with “head injury, unspecified injury, contusion, facial scalp, headache, sprain to the neck.” Following treatment, he was released after approximately two and a half hours.

{¶ 14} After his release, Pence returned to the police department and then to Dizzy Jim’s, where he spoke with Detective Ryan Whittaker. Whittaker showed the bar’s surveillance video to Pence, and Pence identified Johnson as the man who kicked him and Henson as the man who choked him. Pence testified that he did not know either of the men.

{¶ 15} Officer Kohler testified next for the State. He responded to an emergency tone signal on his radio from dispatch regarding Pence. Kohler responded to the area where Pence was located and observed that he had blood all over his face and was breathless. Kohler eventually found and apprehended Johnson, and he secured the scene, locating the keys to Pence’s cruiser and a pair of sunglasses before proceeding to Dizzy Jim’s.

{¶ 16} Officer Joseph May, an evidence technician, next testified for the State. May responded to a dispatch to the scene on August 11, 2007. Upon arrival, May found Pence on all fours, having trouble breathing, and with blood on his forehead, lips and nostrils. May took possession of the sunglasses. May also testified that later, at the jail, he observed that Jones had just brought in Johnson, and May patted Johnson down. May observed blood on Johnson’s shoes and shorts, and he removed the items as evidence.

{¶ 17} Amy Rismiller, a forensic scientist employed at the Miami Valley Regional Crime Laboratory next testified for the State. According to Rismisller, she performed DNA testing on the sunglasses found at the scene, finding a match to Henson’s DNA on the nose pads of the glasses. Rismiller also testified that she performed DNA analysis on Johnson’s shoes, matching the DNA found to Pence’s DNA.

{¶ 18} Glenna Sturgill, a bartender at Dizzy Jim’s testified next. Sturgill observed Henson in the bar on August 11, 2007, and she testified that he had sunglasses on his head and a tattoo on the side of his right arm. Sturgill identified Henson, as well as Johnson, both of whom she knows, on the bar’s surveillance videotape.

{¶ 19} James Taylor, who owns Dizzy Jims’, testified regarding his indoor and outdoor use of videotape surveillance at his bar, and that he allowed the Fairborn Officers to review the tapes from the date of the incident as part of their investigation.

{¶ 20} Detective Whittaker testified next for the State. Whittaker responded to the Fairborn Police Department, after being contacted by his Captain on the night of the incident. Whittaker then proceeded to Dizzy Jim’s to view the surveillance tape to determine who assaulted Pence. Whittaker recognized Henson on the videotape from “prior dealings” with him.

{¶ 21} Henson was later arrested in Kentucky. Whittaker testified that he learned in the course of his investigation that Henson did not have injuries to his fingers but that he did have an injury to his head.

{¶ 22} Robert L. Shadowens, a Fire Lieutenant/Paramedic for the City of Fairborn testified that he was dispatched to aid Pence the morning of the incident. Shadowens found

Pence lying on the ground, and he observed a large red mark on his forehead and placed him in a cervical collar. Pence's symptoms included dizziness, sleepiness and nausea at the scene, according to Shadowens. Shadowens transported Pence to the hospital.

{¶ 23} Dr. Kevin Sharrett, a family physician in Jamestown, Ohio, who has also been the Greene County Coroner for 12 years, testified for the State without objection. Sharrett testified that he met with the prosecutor and reviewed "a statement written by Officer Pence; an Emergency Medical System Run Sheet that the paramedics filled out at the time of their dispatch; and some records from Miami Valley Hospital."

{¶ 24} Sharrett described the physical effect of being choked for the jury. He began with an explanation of the carotid arteries, explaining their location in the neck and the resulting lack of blood flow to the brain in the event the arteries are obstructed. Initially, according to Sharrett, the blood vessels dilate by means of a chemical process to allow blood to flow past any obstruction, and this process may result in a drop of blood pressure. Sharrett explained, "all of your vital structures for your respiratory system are located in your neck, connecting your mouth, which is the opening to the outside world and oxygen to your lungs, and you have the air passages or the main bronchus that connects your mouth to your lungs, and the oxygen is carried into the lungs, is absorbed into the bloodstream, circulates through the heart and through the vital organs in the body. \* \* \* If that passageway is cut off, you can attempt to move air in and out for a period of time. As long as the oxygen levels are sustained in the blood, you can continue to move air, or continue to attempt to move air. But over time those muscles that move the air will become, with lack of oxygen, ineffective and will no longer be able to move air and ultimately the oxygen levels drop and can drop below the critical level."



{¶ 25} Sharrett continued, “the process that occurs when someone is choked, there are two things that can happen.

{¶ 26} “One is the obstruction of the airway, blocking any oxygen from coming into the lungs and going to the heart and going out to the rest of the body.

{¶ 27} “The other process is the obstruction of these carotid arteries. These carotid bulbs, and both of them can operate independent of each other, and yet, at the same time, both of them are contributing to each other and can become additive in their effect.

{¶ 28} “So to look at the things one at a time, the most simple process is, is if you block the airway and you stop oxygen from coming into the lungs, what happens is the oxygen levels drop. The muscles in the body and vital structures \* \* \* will quickly use whatever oxygen reserves are available, and then once those \* \* \* are used up and there’s no further oxygen available, then you start to have cellular death. In other words, the cells start to die on a cellular level, \* \* \*. Once you have cellular death, you have tissue death. Tissue death leads to organ death and organ death leads to overall general death of the individual. \* \* \*

{¶ 29} “The more complicated process that occurs is when you block those carotid arteries or you massage that carotid bulb, and this is something that can happen as simply as taking your finger and rubbing the carotid bulb.” According to Sharrett, “\* \* \* when the carotid arteries get stimulated, you have the process of vasodilatation, blood pressure drops. \* \* \* When the blood pressure drops below a level that affects the brain, the natural response is to lose consciousness.”

{¶ 30} In a choking episode, Sharrett stated that the first step is anxiety, in which the victim attempts to hyperventilate, increasing the pulse rate. As oxygen levels decrease the

victim's "sensorium will begin to be affected." A choking victim will then experience "numbness and tingling in their fingers and in their toes, which is the furthest point away from the heart. They will start to feel weakness in their extremities. They will start to notice that their thinking is not as clear and not as concise and there will be some \* \* \* confusion. That process, if it continues, ultimately will lead to severe confusion, severe weakness and ultimately to a loss of consciousness.

{¶ 31} "\* \* \* By that point in time the oxygen levels have dropped and the blood pressure levels have dropped usually to the point that it starts to affect the myocardia, which is the heart muscle.

{¶ 32} "\* \* \*

{¶ 33} "\* \* \*

{¶ 34} "\* \* \* in these instances when the heart muscle becomes deprived of oxygen, you develop what is called unstable arrhythmias. \* \* \* And so the arrhythmias will then progress to something called ventricular tachycardia, and then ultimately to something called ventricular fibulation, which is not compatible with life.

{¶ 35} "And so what happens is you start this process and you have initiated this sequence of events. At some point in time this sequence of events will result and lead to a point that the individual will not recover without heroic measures, without intubation and oxygenation and without medications, without electrical shock, \* \* \*

{¶ 36} "\* \* \* What one individual can sustain is different than another individual. It's based on certain factors, age, the state of physical health the individual is in, whether the individual has any exsanguineous or outward factors, such as smoking."

{¶ 37} Sharrett also testified that if a person is choked almost to the point of no return, or death, “and the progression is interrupted before they get to that point, you would expect them to make a full recovery,” as long as there is no internal structural damage.

{¶ 38} Sharrett noted, from reading Pence’s report, that Pence was under stress at the time of the incident, having been running after several suspects. The size difference between Pence and Henson was significant to Sharrett, as was the fact that Pence was lifted onto his toes. Sharrett noted also that Pence had been struck several times in the head and face. He stated that Pence’s records reflected that he is a smoker, and “no matter what his age is, he’s already at a lower threshold as to what he would be if he were not a smoker.” Regarding the fact that Pence indicated nausea, dizziness and visual effects at the scene, Sharrett noted those symptoms are part of the sensorium affect. Sharrett testified that he “absolutely cannot give an exact time frame” within which Pence would have lost consciousness. Sharrett testified, however, “if he was not able to free himself, based on the symptoms he was having, I would anticipate that his mental capacity would have deteriorated, that he ultimately would have lost consciousness, that his heart would have developed one of those irregular fatal arrhythmias, and he would have subsequently died.”

{¶ 39} Sharrett was further asked, “in this case or in any case where somebody had their carotid artery cut off or their airway is cutoff and they’re not breathing and it’s going on for a matter of a minute, two minutes, three minutes, after a lot of stress, is there a substantial risk of death occurring there?” Sharrett responded, “Yes.”

{¶ 40} On cross-examination, Sharrett testified that he has never met or examined Pence. Sharrett also testified that dizziness and nausea could also result from other actions, such

as a foot chase, and not just a choking incident.

{¶ 41} Henson asserts two assignments of error. His first assignment of error is as follows:

{¶ 42} DR. SHARRETT’S TESTIMONY SHOULD NOT HAVE BEEN ADMITTED BECAUSE IT DID NOT ASSIST THE TRIER OF FACT, WAS NOT BASED ON ANY RELIABLE METHOD, AND WAS MORE PREJUDICIAL THAN PROBATIVE.”

{¶ 43} According to Henson, “Dr. Sharrett’s testimony should have been excluded because it did nothing more than advance the obvious proposition that choking can cause death. Further, the testimony of Dr. Sharrett did not advance any credible method by which he could have determined that Officer Pence was in danger of a substantial risk of death. Finally, even [if] his testimony was arguably admissible, its probative value was so low that it should have been excluded.”

{¶ 44} While normally a “reviewing court will not reverse the trial court’s admission of evidence absent an abuse of discretion,” (*State v. Bellomy*, Montgomery App. No. 21452, 2006-Ohio-7087, ¶12) in the absence of objection to the admission of Sharrett’s testimony, we are limited to plain error review, as Henson admits. Crim.R. 52(B) specifically provides, “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” “Plain error does not exist unless it can be said that but for the error, the outcome of the trial would have been different.” *State v. Denham* (August 2, 2002), Greene App. No. 2001 CA 2002-Ohio-3912, ¶10.

{¶ 45} At trial, the State bore the burden to prove beyond a reasonable doubt that Henson knowingly caused “serious physical harm” to Pence. R.C. 2903.11(A)(1). The jury was

instructed that “serious physical harm” means “any physical harm that carries a substantial risk of death.” R.C. 2901.01(5)(b). “‘Substantial risk’ means a strong possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist.” R.C. 2901.01(8).

{¶ 46} “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid.R.401. “Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice \* \* \* .” Evid.R.403(A).

{¶ 47} Evid.R.702 provides that a “witness may testify as an expert if all of the following apply:

{¶ 48} “(A) The witness’ testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶ 49} “(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶ 50} “(C) The witness’ testimony is based on reliable scientific, technical, or other specialized information. \* \* \* .”

{¶ 51} “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing.” Evid.R. 703. “The expert may testify in terms of opinion or inference and give the expert’s reasons therefor after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise.” Evid.R.705.

{¶ 52} Having reviewed Sharrett’s testimony, we conclude that the trial court did not plainly err in admitting it. Prior to testifying, Sharrett reviewed Pence’s written statement about the incident, the paramedics’ Run Sheet, and Pence’s records from Miami Valley Hospital. Sharrett set forth his qualifications as an expert. Based upon his medical knowledge and experience, Sharrett described in detail the physiological sequence of events that occurs when an individual is choked, up to death, a complicated sequence of physiological reactions beyond the knowledge of lay persons. At no time did Sharrett exceed the bounds of admissible expert testimony. In other words, Sharrett described the general physical response to choking and testified that the physical harm that Pence reported he experienced from choking carries a strong possibility that Pence’s death may have resulted therefrom. We see no plain error; Sharrett’s testimony was properly admitted under Evid.R. 702. Henson’s first assignment of error is overruled.

{¶ 53} Henson’s second assignment of error is as follows:

{¶ 54} “THERE WAS INSUFFICIENT EVIDENCE TO PROVE SERIOUS PHYSICAL HARM, OR, IN THE ALTERNATIVE, THE FINDING OF SERIOUS PHYSICAL HARM WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 55} “In reviewing a claim of insufficient evidence, ‘[t]he relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.’ *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.” *State v. McKnight*, 107 Ohio St.3d 101,

112, 2005-Ohio-6046, ¶ 70.

{¶ 56} “When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence ‘weighs heavily against the conviction,’ should an appellate court overturn the trial court’s judgment.” *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 57} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. “Because the factfinder \* \* \* has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder’s determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.” *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 58} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 59} The jury heard evidence, which it clearly believed, that Henson choked Pence

after a chase. Henson stated, “You can’t do that to my brother,” as Pence tried to secure Johnson, and Henson began to hit Pence. Pence struck Henson with his flashlight, and he was unable to immobilize him with a “hip toss.” When Pence fell to the ground, he was unable to get out from under Henson, and Henson put Pence in a choke hold and hit him repeatedly. As Pence was struggling to get up, Johnson kicked him in the face.

{¶ 60} Pence described being unable to breathe as Henson’s grip became tighter, and he described his sense of panic. Pence’s other symptoms included an inability to focus, and he observed a light haze around his peripheral vision, along with what appeared to be flashing lights off to the side. Pence feared if he did not escape immediately, he was “done.” Once free of Henson, Pence had no energy, was dizzy and had trouble with his breathing and his balance.

{¶ 61} Pence’s symptoms were corroborated by Kohler’s, May’s, and Shadowens’s testimony, all of whom observed Pence at the scene. Pence’s symptoms were also consistent with the general sequence of events involved in a choking, as described in detail by Sharrett.

{¶ 62} Sharrett made it clear to the jury that he had not examined Pence, and the jury was free to weigh his testimony regarding whether Pence faced a substantial risk of serious physical harm, namely “any physical harm that carries a substantial risk of death.” While Henson argues, “it is certain that Pence never reached the point of no return,” and that he recovered quickly, and that therefore there was no substantial risk of death, Sharrett asserted, based on Pence’s symptoms, that had Pence not broken the choke hold he described, he would have died, and the jury was free to credit the expert’s testimony on the subject of substantial risk of death.

{¶ 63} Having reviewed the entire record in a light most favorable to the State, we



conclude that any rational trier of fact could have found the essential elements of felonious assault of a peace officer proven beyond a reasonable doubt. Further, having weighed all of the evidence and reasonable inferences, and deferring to the factfinder's determinations of witness credibility, we cannot conclude that the jury lost its way in convicting Henson of felonious assault of a peace officer.

{¶ 64} There being no merit to Henson's second assignment of error, it is overruled.

Judgment affirmed.

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GRADY, J. and FROELICH, J., concur.

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