[Cite as *State v. Reese*, 2009-Ohio-5046.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22907
vs.	:	T.C. CASE NO. 07CR2221
DONALD M. REESE	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 25th day of September, 2009.

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GRADY, J.:

{¶ 1} Defendant, Donald Reese, appeals from his conviction and sentence for felonious assault.

{¶ 2} The "Statement of Facts" at pp. 5-9 of Appellant's brief fails to portray the facts of the offense of which he

was convicted, consisting merely of references to trial testimony that Appellant contends was erroneously admitted. That form of presentation is wholly lacking in context. Therefore, we will rely on the facts as stated in the Appellee's brief.

{¶ 3} On June 7, 2007, Tyrone Davis contacted Defendant because his daughter, Tynesha Davis, wished to purchase marijuana from Defendant. Tyrone Davis and his daughter drove to 808 Dennison Avenue in Dayton to meet with Defendant. Tynesha Davis and Defendant got into an argument about the quality of the marijuana. When Defendant threatened to harm his daughter, Tyrone Davis became involved in the argument.

{¶ 4} Defendant took a swing at Tyrone Davis and missed. Davis responded by punching Defendant in the face and putting him in a headlock. When a child rode by on his bicycle, Defendant told the child, "go get my girl for me." Subsequently, Davis observed an approaching vehicle. The driver, a female, had a gun in her left hand. When the woman pulled up she ordered Davis to let Defendant go. Defendant told the woman to shoot Davis.

{¶ 5} Defendant was able to get out of Davis' grasp and obtain the gun from the woman. Davis took off running, and as he did Defendant shot Davis in the legs and buttocks. After

Davis fell to the ground, Defendant shot Davis several more times. Defendant also pistol whipped Davis before fleeing in the vehicle driven by the woman. Tynesha Davis ran for help and flagged down a police cruiser. Tyrone Davis suffered multiple gunshot wounds and was transported to the hospital for treatment.

{¶ 6} Defendant was charged in three separate indictments filed at various times with two counts of aggravated assault, two counts of felonious assault, one count of attempted aggravated murder, and one count of attempted murder. All of the charges included three year firearm specifications.

{¶ 7} Defendant was tried in May 2008, on only one felonious assault charge in violation of R.C. 2903.11(A)(2). All other charges and specifications were dismissed by the State. The trial resulted in a hung jury and a mistrial. A second jury trial commenced on or about July 14, 2008. Defendant was found guilty of felonious assault and the attached firearm specification. The trial court sentenced Defendant to consecutive prison terms of eight years for felonious assault and three years for the firearm specification, for a total sentence of eleven years.

{¶ 8} Defendant timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 9} "THE TRIAL COURT ERRED WHEN IT ALLOWED THE TESTIMONY OF DR. BRYAN CURTIS TO BE BY VIDEO TAPE RATHER THAN AN ACTUAL APPEARANCE IN COURT BECAUSE THE FORM OF SAID TESTIMONY DEPRIVED APPELLANT OF HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM."

{¶ 10} The trial court, over Defendant's objection, admitted in evidence a video recording of the testimony of Dr. Bryan Curtis given at Defendant's first trial. Dr. Curtis testified concerning the injuries the victim suffered. Defendant objected that the video testimony deprived him of his Sixth Amendment right of confrontation because he was unable to cross-examine Dr. Curtis in the current trial proceeding. (T. 386).

{¶ 11} The State represented that Dr. Curtis was unavailable to testify personally because he was on military duty in Japan, and that his unavailability in that regard had previously been determined. (T. 387). Defendant did not dispute that representation.

{¶ 12} A defendant's Sixth Amendment right to confront witnesses against him is not violated by evidence of a witness's out-of-court statements that were testimonial in nature if (1) the witness is unavailable to testify in person and (2) the

defendant had a prior opportunity to cross-examine the declarant under oath concerning his statements. *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1324, 158 L.Ed.2d 177. Those same requirements allow introduction of such evidence pursuant to Evid.R. 804(B)(1), as an exception to the rule against hearsay, Evid.R. 802.

{¶ 13} It is undisputed that Dr. Curtis was unavailable to testify, and that when he gave his prior testimony under oath in the video recording from the first trial that was presented to the jury, Dr. Curtis was cross-examined by Defendant's counsel. Defendant's *Crawford* argument lacks merit.

{¶ 14} Defendant argues that, nevertheless, the video presentation of Dr. Curtis's testimony was improper because "[t]he jury had no chance to view him live and in person, and to view his demeanor, nature, and actions on the stand." (Brief, p. 10). That argument implicates the trial court's discretion in admitting the evidence that was offered. The court's decision in that regard will not be disturbed on appeal absent an abuse of discretion. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, at ¶172. Defendant does not explain how the court abused its discretion in relation to the evidence it admitted, and we see none.

{¶ 15} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 16} "THE TRIAL COURT ERRED WHEN IT PROHIBITED APPELLANT FROM CROSS EXAMINING DETECTIVE MICHAEL DEBORDE CONCERNING INCONSISTENCIES IN THE STATEMENTS MADE BY THE ALLEGED VICTIM. THIS DENIED APPELLANT OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS."

{¶ 17} In Defendant's cross-examination of Detective Michael DeBorde concerning his investigation of the shooting, Defendant inquired whether the victim, Tyrone Davis, had told Detective DeBorde that the woman who arrived at the scene with the gun fired it before she gave the gun to Defendant. The State objected, and the court sustained the objection.

{¶ 18} We find no abuse of discretion. The testimony Defendant sought to elicit from Detective DeBorde would have been offered for purpose of impeaching Davis through evidence that Davis had earlier contradicted his testimony at trial that Defendant was the shooter. Any response the witness might make would be evidence extrinsic to Davis's testimony, and Evid.R. 613(B) requires that the declarant must be afforded a prior opportunity to explain or deny his inconsistent statement before extrinsic evidence of it is introduced. Davis was never asked about the matter. Therefore, the trial court did not abuse its discretion when it prevented Defendant from asking Detective

DeBorde about the alleged statement.

{¶ 19} Defendant also asked Detective DeBorde whether the statements made by Davis and his daughter concerning the incident conflicted. The court sustained the State's objection to the question. A witness is not permitted to evaluate or comment on the testimony or credibility of other witnesses. *Masser v. Johnson* (1958), 108 Ohio App. 419. We see no abuse of discretion.

{¶ 20} The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 21} "THE TRIAL COURT ERRED WHEN IT REFUSED TO CHARGE THE JURY ON THE LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT, R.C. 2903.12. ALSO, THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE A LESSER INCLUDED CHARGE FOR SIMPLE ASSAULT UNDER R.C. 2903.13(A)."

{¶ 22} Defendant was charged with and convicted of the offense of felonious assault, R.C. 2903.11(A)(2), a second degree felony. That section provides, in pertinent part: "No person shall knowingly . . . cause . . . physical harm to another . . . by means of a deadly weapon."

{¶ 23} Defendant asked the court to instruct the jury that it could instead find Defendant guilty of aggravated assault, R.C. 2903.12, a fourth degree felony, or assault, R.C.

2903.13(A), a first degree misdemeanor. The court declined to give the requested instructions.

{¶ 24} The decision whether to give a requested jury instruction is a matter left to the sound discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. *State v. Davis*, Montgomery App. No. 21904, 2007-Ohio-6680, at ¶14. An abuse of discretion means more than just a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151.

Aggravated Assault

{¶ 25} R.C. 2903.12 defines aggravated assault and provides, in part:

{¶ 26} "(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:

{¶ 27} "* * *

{¶ 28} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised

Code."

{¶ 29} **In *State v. Thornton,* Montgomery App. No. 20652, 2005-Ohio-3744, at ¶50-51, this court wrote:**

{¶ 30} **"Finally, Thornton argues that the trial court should have granted his requested instruction on aggravated assault. Aggravated assault is an offense of inferior degree of felonious assault. If a defendant, who is charged with felonious assault, presents sufficient evidence of serious provocation, the trial court must instruct the jury on aggravated assault. *State v. Wong* (1994), 95 Ohio App.3d 39, 641 N.E.2d 1137. In analyzing whether an aggravated assault instruction is appropriate, the trial court must first determine whether based on an objective standard the alleged provocation was reasonably sufficient to bring on a sudden fit of rage. *State v. Shane* (1992), 63 Ohio St.3d 630, 634, 590 N.E.2d 272. An aggravated assault instruction is only appropriate when the victim has caused serious provocation. *Id.* Serious provocation is provocation that is 'sufficient to arouse the passion of an ordinary person beyond the power of his or her control.' Id. at 635, 590 N.E.2d 272. Additionally, serious provocation has been described as provocation that is 'reasonably sufficient to bring on extreme stress and * * * to incite or to arouse the defendant into using deadly force.' *State v. Deem* (1988), 40 Ohio St.3d 205, 533**

N.E.2d 294. Classic examples of serious provocation are assault and battery, mutual combat, illegal arrest and discovering a spouse in the act of adultery. *Shane,* supra at 635, 590 N.E.2d 272.

{¶ 31} "If the objective standard is met, then the court must continue on to determine under a subjective standard whether this defendant was actually, 'under the influence of sudden passion or in a sudden fit of rage.' *Shane,* supra at 634, 590 N.E.2d 272. The emotional and mental state of the defendant and the conditions and circumstances that surround him at the time are only considered during this subjective stage of the analysis. *Id.*"

{¶ 32} Defendant argues that the trial court abused its discretion in refusing to give his requested jury instruction on aggravated assault because the evidence demonstrated serious provocation on the part of the victim sufficient to warrant the instruction. The evidence demonstrates that the victim, Tyrone Davis, punched Defendant twice in the face after Defendant first swung at Davis and missed, and that Davis then put Defendant in a headlock and held him that way for four or five minutes before Defendant's girlfriend showed up with a gun and Defendant repeatedly shot Davis.

{¶ 33} Viewed objectively, Davis' conduct in punching

Defendant twice in the face and holding Defendant in a headlock for a few minutes, in response to a physical altercation that Defendant began when he swung at Davis, does not portray serious provocation reasonably sufficient to arouse the passions of an ordinary person in Defendant's position beyond the power of his control and incite him to retrieve a gun and shoot that other person nine or ten times, as Defendant did Davis. Furthermore, the fact that Defendant then walked over to Davis and shot Davis several more times after Davis had collapsed on the ground is inconsistent with acting in a sudden passion, and is clearly excessive and out of all proportion to the provocation by Davis. Davis's actions are simply not sufficient to constitute serious provocation reasonably sufficient to incite Defendant into using deadly force.

{¶ 34} **Because the evidence fails to demonstrate the existence of serious provocation, an instruction on aggravated assault was not warranted by the evidence, and the trial court did not abuse its discretion in refusing to give that instruction.**

Assault

{¶ 35} **R.C. 2903.13(A) defines the offense of assault and provides: "No person shall knowingly cause . . . physical harm to another." Assault is a lesser included offense of felonious**

assault. *State v. Goodwin* (Jan. 25, 1995), Montgomery App. No. 14269.

{¶ 36} However, it is well established that a charge on a lesser included offense is required only when the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser included offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, at paragraph two of the syllabus. *State v. Hawkins*, Montgomery App. No. 21691, 2007-Ohio-2979, at ¶21-22.

{¶ 37} The greater offense of felonious assault cannot be committed without also committing the lesser offense of assault, except that felonious assault involves use of a deadly weapon. It is undisputed that a firearm is a deadly weapon, R.C. 2923.11(A),(B)(1), and that Defendant used a firearm to inflict physical harm on Tyrone Davis. Therefore, a jury could not reasonably acquit Defendant of felonious assault yet convict him of assault. The trial court did not abuse its discretion in declining to give the requested instruction.

{¶ 38} The third assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. And BROGAN, J., concur.

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