**[Cite as *State v. McFadden*, 2014-Ohio-5294.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

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| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | Case No. 14CA5 |
| | : | |
| vs. | : | |
| | : | DECISION AND JUDGMENT |
| GARY L. McFADDEN, II, | : | ENTRY |
| | : | |
| Defendant-Appellant. | : | **Released: 11/17/14** |

APPEARANCES:

Stephen K. Sesser, Chillicothe, Ohio, for Appellant.

Paul G. Bertram, III, Marietta City Law Director, and Daniel Everson, Marietta City Assistant Law Director, Marietta, Ohio, for Appellee.

McFarland, J.

**{¶1}** Gary L. McFadden, II, Appellant, appeals his conviction in the Marietta Municipal Court after a jury found him guilty of one count of assault, a violation of R.C. 2903.13(A). Appellant contends the trial court erred by refusing to give a lesser included instruction on the charge of disorderly conduct by engaging in fighting, R.C. 2917.11(A)(1). Upon review, we find Appellant did not request the lesser included instruction in writing, as required by Crim.R. 30. As such, the trial court did not abuse its discretion when it denied Appellant's oral request. Accordingly, we

overrule the sole assignment of error and affirm the judgment of the trial court.

FACTS

**{¶2}** Appellant was charged with two violations of assault, R.C. 2903.13(A), arising from an incident which occurred on July 8, 2013 in Marietta, Ohio. The alleged victims were Walter E. "Pete" Friend, Jr., and Kimberly Fortney. The matter proceeded to a jury trial on February 13, 2014. The jury heard testimony from several witnesses, who included: Sergeant Rodney Hupp, Patrolman Allen Linscott, Friend, Fortney, Carl Newbrough, Melissa Harris, and Officer Katherine Warden, on behalf of the State of Ohio. Violet McFadden (Appellant's mother), Veronica Angela "Angie" Plaugher (Appellant's sister), and Rosalie Powell (Appellant's girlfriend), testified on behalf of the defense.[1]

**{¶3}** During trial, Appellant orally requested an instruction on the lesser included offense of disorderly conduct by fighting, a violation of R.C. 2917.11(A)(1). The trial court denied the instruction. Appellant was subsequently found guilty of assault as to Walter Friend, Jr. The jury found him not guilty of assault as to Kimberly Fortney. The court imposed a sixty (60) day jail sentence. This timely appeal followed.

[1] Appellant is Walter Friend's cousin. Violet McFadden in Walter Friend's aunt. Walter Friend and Kim Fortney were living in property owned by Appellant and his mother. The incident between Appellant and Friend arose from a landlord-tenant dispute.

ASSIGNMENT OF ERROR

I. APPELLANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE COURT IMPROPERLY REFUSED DEFENDANT A JURY INSTRUCTION ON DISORDERLY CONDUCT BY FIGHTING.

A. STANDARD OF REVIEW

**{¶4}** "When the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser included offense." *State v. Maynard,* 4th Dist. Washington No. 10CA43, 2012-Ohio-786, ¶ 25, quoting Crim.R.31(C). See, also, R.C. 2945.74.

**{¶5}** "In reviewing a trial court's decision regarding whether to give a jury instruction on a lesser-included offense, we employ a two-tiered analysis. *Maynard, supra,* at ¶ 26. First, we must determine whether the offense for which the instruction is requested is a lesser-included offense of the charged offense." *Id.* (Citation omitted.). *State v. Smith,* 4th Dist. Scioto No. 09CA3321, 2010-Ohio-5953, ¶ 23. A criminal offense may be a lesser included offense of another if (1) the offense carries a lesser penalty than the other; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to

prove the commission of the lesser offense. *State v. Barnes,* 94 Ohio St.3d 14 26-27, 759 N.E.2d 1240, citing *State v. Deem,* 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), paragraph three of the syllabus.

**{¶6}** Once it is determined that a charge constitutes a lesser-included offense of another charged offense, we then examine whether the record contains evidentiary support upon which a jury could reasonably acquit the defendant of the greater offense and convict him on the lesser offense. *Maynard, supra,* at ¶ 28. The trial court has discretion in determining whether the record contains sufficient evidentiary support to warrant a jury instruction on the lesser-included offense, and we will not reverse that determination absent an abuse of discretion. *Maynard, supra,* citing *Smith, supra,* at ¶ 24. An abuse of discretion connotes more than a mere error of judgment; it implies that the court's attitude is arbitrary, unreasonable, or unconscionable. *Maynard, supra,* at ¶ 29, citing *State v. Adams,* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

B. LEGAL ANALYSIS

**{¶7}** Appellant sought an instruction for a minor misdemeanor disorderly conduct, pursuant to R.C. 2917.11(A)(1), which the trial court denied. Appellant argues several witnesses testified that the victim, Friend, and he, were antagonizing each other to have a mutual fight. Appellant

argues the record clearly contains evidentiary support upon which the jury could reasonably have acquitted him of the greater offense, assault, and convicted him on the lesser offense, disorderly conduct. We have repeatedly held that disorderly conduct is a lesser-included offense of assault. *Maynard, supra,* at ¶ 27. See *State v. Breidenbach,* 4th Dist. Athens No. 2010-Ohio-4335, ¶ 14.[2] Appellant concludes that the trial court erred by not allowing the jury to be instructed on the lesser included offense.[3]

**{¶8}** Appellee responds that: (1) the trial court properly refused to give the requested instruction on disorderly conduct because Appellant did not file a request in writing as required by Crim.R. 30(A); and, (2) Appellant was not entitled to the lesser included instruction because it was not supported by the evidence. A review of the record demonstrates Appellant's counsel asserted in his opening statement that the incident was a "disorderly conduct" not an "assault." Counsel and the trial court engaged in discussions early on in trial regarding Appellant's written request for

[2] See, also, *State v. Rice,* 4th Dist. Ross No. 03CA2717, 2003-Ohio-6515, at ¶ 13; *State v. Walton,* 4th Dist. Ross No. 03CA2716, 2003-Ohio-6514, at ¶ 13; *State v. Ault,* 4th Dist. Athens No. 99CA56, 2000 WL 1264600, *2; *State v. Lemley,* 4th Dist. Gallia No. 95CA24, 1996 WL 718264, *3 (relying on *State v. Roberts,* 7 Ohio App.3d 253, 455 N.E.2d 508 (1st Dist. 1982); *State v. Hughes,* 4th Dist. Ross No. 1158, 1985 WL 8353 (relying on *Roberts).* We also acknowledge that other courts have reached a different conclusion. *Breidenbach, supra,* at ¶ 14. See, e.g., *State v. Ocasio,* 2nd Dist. Montgomery No. 19859, 2003-Ohio-6240, at ¶ 20; *State v. Neal,* 10th Dist. Franklin No. 97APA12-1676.

[3] The trial court ruled that based on an understanding of the law, disorderly conduct by fighting in violation of 2917.11(A)(1) is not a lesser included of assault. This court has ruled otherwise. See fn. 5, infra. However, for the reason which will follow, the trial court did not err by refusing to give the lesser included instruction.

instructions on "provocation" and other legal definitions, yet did not request the lesser included instruction in writing.[4] We consider Appellee's first contention.

**{¶9}** Crim.R. 30(A) states:

> "At the close of evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The Court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court need not reduce its instructions to writing."

"In *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982), paragraph two of the syllabus, the Supreme Court of Ohio held:

> '[A] requested special jury instruction must be in writing and made at the close of the evidence, or at such earlier time as the court reasonably directs to be proper.'

Several appellate courts have found that *Fanning* applies to requests for jury instructions involving lesser included offenses." See, *State v. Lemley*, 4th Dist. Gallia No. 95CA24, 1996 WL 718264, *3.

**{¶10}** In *Lemley*, we found that *Fanning* requires a written request. We further concluded that the trial court did not err when it denied the oral

[4] Appellant requested in writing instructions on "provocation," "knowingly," "sudden passion, sudden fit of rage," "serious provocation," "emotional state of defendant," and as to the charge of assault involving Kimberly Fortney, "self-defense of another."

request to instruct the jury on the lesser included offense. Based on that precedent, we find the trial court did not abuse its discretion when it denied Appellant's oral request for the lesser included offense instruction on disorderly conduct.

**{¶11}** Because of our finding above, that the trial court did not err in denying Appellant's oral request for the lesser included offense instruction, we need not address his argument that the record contained evidentiary support upon which the jury could reasonably have acquitted him of the greater offense. As such, Appellant's assignment is overruled and the judgment of the trial court is affirmed.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**