

**COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT**

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 2001CA0022
JERMAINE ELDER	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2000CRB0840B

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 24, 2001

APPEARANCES:

**For Plaintiff-Appellee
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**For Defendant-Appellant
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Gwin, P. J.,

Defendant Jermaine Elder appeals a judgment of the Court of Common Pleas of Stark County, Ohio, convicting and sentencing him for felonious assault in violation of R.C. 2903.11. Appellant assigns six errors to the trial court:

ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS TO THE INFERIOR OFFENSE OF AGGRAVATED ASSAULT UNDER O.R.C. SECTION 2903.112 (A)(1) AND THE LESSER INCLUDED OFFENSE OF ASSAULT UNDER O.R.C. SECTION 2903.13 (B).
2. THE TRIAL COURT ERRED IN PERMITTING CROSS-EXAMINATION OF STATE'S WITNESS ASHLEY JOHNSON BY THE PROSECUTOR.
3. THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF ASHLEY JOHNSON'S HEARSAY STATEMENTS INTO EVIDENCE.
4. THE TRIAL COURT ERRED IN LIMITING THE TESTIMONY OF THE STATE'S EXPERT WITNESS CONCERNING THE LEVEL OF HARM SUFFERED BY THE ALLEGED VICTIM.
5. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO REQUEST AN INSTRUCTION ON THE INFERIOR OFFENSE OF AGGRAVATED ASSAULT.
6. THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

At trial, the State presented evidence in the early morning hours of June 15, 2000, Jason Nutter became intoxicated and had an argument with his girlfriend Karassa Prosser. Karassa left Nutter and went to a residence occupied by appellant and Kevin Billman. A short time later, Nutter and another man went to appellant's

residence to find Karassa.

When Nutter arrived at appellant's residence, appellant answered the door and an altercation ensued. Appellant and Billman fought Nutter and his friend. The State presented testimony Nutter attempted to leave the residence, but appellant followed him, knocked him to the ground, and kicked him numerous times on the body and head. Nutter was hospitalized.

I

In his first assignment of error, appellant urges the trial court should have instructed the jury on the lesser included offense of aggravated assault and assault. The State points out appellant only requested an instruction on assault, not on aggravated assault. Thus, we may only review the failure to charge on the aggravated assault under the plain error analysis. Under plain error, we may not reverse unless, but for the error, the outcome of the trial clearly would have been different, *State v. Lilly* (1999), 87 Ohio St. 3d 97.

Appellant is not entitled to these instructions unless there is evidence presented under which the jury could reasonably find against the State on the greater offense, but against the defendant on the remaining elements of the offense, see *State v. Wilkins* (1980), 64 Ohio St. 2d 383.

First we must determine whether either assault or aggravated assault are lesser included offenses of felonious assault. The Ohio Supreme Court has devised a three-prong test for us to apply to determine when an offense is a lesser included offense of

another: First, the offense must carry a lesser penalty than the other; second, the greater offense cannot, as statutorily defined, ever be committed without the lesser included offense, as statutorily defined, also being committed; and third, some element of the greater offense is not required to prove the commission of the lesser offense, *State v. Deem* (1988), 40 Ohio St. 3d 205. *Deem* was a felonious assault case, and the Supreme Court held when a defendant presents sufficient evidence there is serious provocation, such that the jury could both reasonably acquit the defendant of felonious assault, and yet convict the defendant of aggravated assault, the trial court must give an instruction on aggravated assault as a lesser included offense of felonious assault.

Felonious assault is knowingly causing serious physical harm to another, see R.C. 2903.11. Pursuant to R.C. 2903.12, aggravated assault includes the additional element that the defendant be 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, and which is reasonably sufficient to incite the person to use deadly force. Finally, pursuant to R.C. 2903.13, assault is defined as knowingly, or recklessly, causing or attempting to cause physical harm to another.

Appellant urges based upon the evidence presented, the jury could have found appellant acted recklessly when he pursued Nutter off the porch and kicked him. The State argues appellant failed to present any evidence of serious provocation which would have

entitled him to an instruction on aggravated assault.

The State also argues that assault is not a lesser included offense of felonious assault, because the offense of felonious assault can be committed without the offense of reckless assault also being committed.

Our review of the record leads us to conclude the jury could not have reasonably acquitted appellant of felonious assault, and convicted him of reckless assault, given that the evidence presented showed no serious provocation. We find the trial court did not commit reversible error by failing to instruct the jury on inferior degree offenses. Accordingly, the first assignment of error is overruled.

II, III, IV

In the second, third, and fourth, assignments of error, appellant challenges the trial court's ruling on the admissibility of certain evidence at trial. Our standard of reviewing evidentiary rulings is to review the record and determine whether the trial court abused its broad discretion. Abuse of discretion implies the trial court's ruling was arbitrary, unreasonable, or unconscionable, see *State v. Sage* (1987), 31 Ohio St. 3d 173.

In his second and third assignments of error, appellant challenges the trial court's handling of the witness Ashley Johnson. The State called Johnson as a witness in its case in chief, and claimed surprise that she testified she could not remember her testimony from the trial of the appellant's co-defendant, Mr. Billman. At that point, the trial court designated

Johnson as its own witness, and did not notify the jury of this change.

The State concedes appellant is correct the trial court erred in designating Johnson as the court's witness at the time it did, because Johnson had not yet testified inconsistently with her prior testimony. At that point, the prosecutor was entitled to attempt to refresh her recollection by reading her prior testimony in appellant's co-defendant trial. Appellant argues he was not present at the trial and was not entitled to cross-examine her at the time she made the statements.

Appellant also argues this evidence was hearsay and prohibited under Evid. R. 801. The State replies pursuant to Evid. R. 803, the prior statement may be used to refresh a witness' recollection when the witness testifies she does not remember the events she had previously been able to recall.

Specifically, the evidence contested here, is Johnson's inability to recall, in the case at bar, whether appellant kicked the victim. Johnson's testimony from the previous trial of appellant's co-defendant was that she had observed appellant kick the victim in the head repeatedly.

We find the testimony was admissible as a recorded recollection under Evid. R. 803. In conclusion, we find the trial court was technically incorrect in naming Johnson as its own witness, the ultimate result was that Johnson's testimony was properly introduced into the record. Accordingly, the second and third assignments of error are overruled.

Finally, appellant argues the court erred when it limited the testimony of the State's expert witness concerning the level of harm the victim suffered.

The State called Dr. Genesio Sherri, who testified there were no fractures or injuries other than a hemorrhage and concussion. On cross, Dr. Sherri testified in his opinion Nutter had not ultimately suffered serious physical harm. When defense counsel attempted to clarify or restate the witness' testimony, the State objected, arguing serious physical harm was a legal term. The court sustained the objection and instructed the jury to disregard both the question and the answer. However, the court permitted defense counsel to continue to cross-examine Dr. Sherri extensively regarding Nutter's injuries. We find the trial court permitted appellant to cross-examine Dr. Sherri extensively, in order to develop its theory that the victim did not suffer serious physical harm. For this reason, we find the trial court did not err in striking the single question and answer.

The fourth assignment of error is overruled.

V

In his fifth assignment of error, appellant argues his trial counsel was ineffective for failing to request the instruction on the inferior degree offense of aggravated assault, see *I, supra*.

In *Strickland v. Washington* (1984), 466 U.S. 668, the United States Supreme Court devised a two-prong test for reviewing courts to use in determining whether counsel was ineffective and the accused's rights under the Sixth and Fourteenth Amendment to the

United States Constitution were violated. First, the accused must show counsel's performance fell below an objective standard of reasonable representation, and violated counsel's essential duties to his client. If counsel's performance was deficient, the appellant must also show he actually was prejudiced by the error. Ohio has adopted the *Strickland* test, see *State v. Bradley* (1989), 42 Ohio St 3d 136.

In light of our ruling in *I, supra*, we find counsel's performance was not deficient. We conclude appellant was not denied the effective assistance of counsel.

The fifth assignment of error is overruled.

VI

In his final assignment of error, appellant urges the jury's verdict was against the manifest weight and sufficiency of the evidence.

In *State v. Thompkins* (1999), 78 Ohio St. 3d 380, the Supreme Court explained the similarities and differences in the concepts of sufficiency of the evidence and manifest weight. Sufficiency of the evidence refers to the legal standard in which the trial court applies in determining whether, as a matter of law, the State presented sufficient evidence to submit the matter to the jury. Manifest weight, on the other hand, concerns the fact-finder's determination regarding the greater amount of credible evidence. *Thompkins*, at 386-387, citations deleted.

We have reviewed the record, and we find there was sufficient evidence presented by the State to meet the threshold requirement

of sufficiency, and accordingly the trial court did not err in submitting the matter to the jury. Finally, we find there was sufficient, competent and credible evidence going to each of the elements of the crime charged to entitle a reasonable jury to find appellant guilty beyond a reasonable doubt. We conclude the verdict is not against the manifest weight of the evidence.

The sixth assignment of error is overruled.

For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed, and the cause is remanded to that court for execution of sentence.

By Gwin, P.J.,

Wise, J., and

Boggins, J., concur

JUDGES

WSG:clw 0910

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
 FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
	:	
JERMAINE ELDER	:	
	:	
Defendant-Appellant	:	CASE NO. 2001-CA-0022

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed, and the cause is remanded to that court for execution of

sentence. Costs to appellant.

JUDGES