[Cite as *State v. Foster*, 2009-Ohio-3337.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DERRECK M. FOSTER Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P.J. Hon. William B. Hoffman, J. Hon. Julie A. Edwards, J. Case No. 2009CA0042 O P I N I O N
CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2006CR879D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 28, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KIRSTEN L. PSCHOLKA-GARTNER 38 South Park Street Mansfield, OH 44902	CASSANDRA J. M. MAYER 79 South Main Street Mansfield, OH 44902

Farmer P.J.

{¶1} On November 9, 2006, the Richland County Grand Jury indicted appellant, Derreck Foster, on two counts of felonious assault in violation of R.C. 2903.11, one alleging serious physical harm and the other alleging the use of a deadly weapon. Said charges arose from an altercation between appellant and Brian Moore over a handwritten note left on appellant's windshield. The alleged "deadly weapon" was appellant's cane which he used because of a bad knee.

{¶2} A jury trial commenced on August 16, 2007. The jury found appellant guilty as charged. By judgment entry filed August 20, 2007, the trial court sentenced appellant to an aggregate term of five years in prison.

{¶3} Appellant filed an appeal and this matter is now before his court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED BY DENYING DERRECK FOSTER'S REQUEST FOR A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF ASSAULT."

II

{¶5} "FURTHER, THE TRIAL COURT ERRED BY GRANTING, ON THE DAY OF TRIAL, DERRECK FOSTER'S REQUEST THAT THE VICTIM PROVIDE A HANDWRITING SAMPLE, BUT THEN REFUSED TO CONTINUE THE TRIAL TO ALLOW DERRECK FOSTER TO OBTAIN THE SAMPLE FOR REVIEW BY AN EXPERT."

III

{¶6} "MOREOVER, THE TRIAL COURT ERRED AND FURTHER PREJUDICED DERRECK FOSTER WHEN IT DENIED HIS MOTION IN LIMINE AND ALLOWED THE VICTIM TO PROVIDE A HANDWRITING SAMPLE FOR THE JURY."

IV

{¶7} "LAST, DERRECK FOSTER'S CONVICTION FOR FELONIOUS ASSAULT IS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶8} Appellant claims the trial court erred in failing to instruct the jury on the lesser included offense of assault. We disagree.

{¶9} The decision to give a jury instruction is within the trial court's sound discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶10} "A criminal defendant has a right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *State v. Williford* (1990), 49 Ohio St.3d 247, 251. In *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph three of the syllabus, the Supreme Court of Ohio explained lesser included offenses as follows:

{¶11} "3. An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as

statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense."

{¶12} "Even though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus.

{¶13} Appellant was charged with felonious assault in violation of R.C. 2903.11(A)(1) and (2) which state the following:

{¶14} "(A) No person shall knowingly do either of the following:

{¶15} "(1) Cause serious physical harm to another or to another's unborn;

{¶16} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶17} Prior to the trial court instructing the jury, defense counsel argued the charge of the lesser included offense of assault should be given despite the defense of self-defense because appellant admitted he struck the victim, Mr. Moore, one too many times:

{¶18} "MS. MAYER: Well, Your Honor, based on the prosecutor's questions this morning to the defendant and some of his answers, that is when I realized that simple assault may be an appropriate charge based on his admission that he did strike him, and once or twice too many. And I don't think that that would rise to the level of felonious assault, but it may be simple assault." T. at 402.

{¶19} The referenced testimony was as follows:

{¶20} "Q. The officer asked you regarding what you did to Brian, 'Do you think that that's excessive force?'

{¶21} "Answer: 'I know it is. I know it is. You know, I shouldn't have done it, but, you know . . .'

{¶22} "Correct?

{¶23} "A. Yes.

{¶24} "Q. And that is a fair statement of the way you viewed it?

{¶25} "A. I hit him probably once or twice more than what I should have; but when it comes to my children, you know, even if . . . My son is now 18. I would still protect my son. You know, I am always going to protect my kids." T. at 342.

{¶26} Appellant claimed self-defense of his son, and he specifically denied using his cane during the incident. T. at 302, 315, 323. Appellant also claimed any damages he might have caused did not result in the manifestation of the injuries complained of by Mr. Moore. T. at 315-317.

{¶27} Given appellant's arguments regarding the incident, the issues are whether appellant's actions equated to self-defense or defense of a person and whether or not a dangerous ordnance or instrument was used.

{¶28} The defense of a person is an absolute defense to the charge of felonious assault. Under this defense, the issue of the degree of the assault is irrelevant. Further, the complete denial of using the cane was a complete defense to the R.C. 2903.11(A)(2) count of the indictment. The evidence established Mr. Moore suffered a broken arm as a result of "a nightstick fracture of the mid shaft of the ulna." T. at 196.

Mr. Moore also suffered loss of consciousness and a skull laceration to the bone. T. at 128, 194-195. These injuries take assault as a lesser included offense of felonious assault out of consideration.

{¶29} Upon review, we find the trial court did not err in denying appellant's request to charge the jury on the lesser included offense of assault.

{¶30} Assignment of Error I is denied.

II, III

{¶31} These assignments involve the issue of a handwriting sample regarding the note left on appellant's windshield. Mr. Moore denied ever writing the note. Appellant claims the trial court erred in denying him another continuance once the handwriting sample was provided, and then permitting Mr. Moore to provide a handwriting sample as demonstrative evidence at trial.

{¶32} The grant or denial of a continuance, as well as the admission or exclusion of evidence, rests in the trial court's sound discretion. *State v. Unger* (1981), 67 Ohio St.2d 65; *State v. Sage* (1987), 31 Ohio St.3d 173; *Blakemore.*

{¶33} On May 2, 2007, appellant filed a motion for continuance of the May 3, 2007 trial date, in part to obtain a handwriting sample from Mr. Moore and have an expert evaluate it against the handwritten note left on appellant's windshield. The trial court granted the continuance on May 9, 2007, and rescheduled the trial date for June 14, 2007. Thereafter, the trial court sua sponte continued the trial date to August 16, 2007. See, Order filed June 20, 2007.

{¶34} On August 6, 2007, appellant filed a motion for handwriting exemplar of victim (Mr. Moore). On August 15, 2007, one day prior to the scheduled trial, appellant

filed a motion for continuance, claiming although an order was never issued on the motion for handwriting exemplar, a handwriting sample was obtained on August 14, 2007. Appellant argued the handwriting sample was not properly completed pursuant to the expert's specifications, and therefore he was unable to receive a timely report.

{¶35} On the morning of trial, appellant filed a motion in limine to prevent Mr. Moore from producing a handwriting sample for the jury, arguing in part that he was not afforded the opportunity to secure an expert evaluation. Thereafter, the trial court denied appellant's request for a continuance, and the trial proceeded. See, Order filed August 16, 2007.

{¶36} The next entry in the docket, filed on August 17, 2007, is a judgment entry referencing August 10, 2007 as the date the matter was decided, granting appellant's request for a handwriting sample. Clearly there was some confusion on the issue of the handwriting sample.

{¶37} To put this issue into perspective, it is necessary to examine the facts and determine if the note is of any relevancy to the charges of felonious assault.

{¶38} Sometime in August of 2006, Mr. Moore sold appellant a DVD player which belonged to his mother. T. at 265. Mr. Moore did not have his mother's permission to sell the DVD player. T. at 266. Mr. Moore's mother recovered the DVD player from appellant. Id. Shortly thereafter, appellant found a note on his windshield which stated the following:

{¶39} "Dereck if you keep telling people your (sic) going to wip (sic) my ass I am going to catch you out and fuck you up you punk ass bitch it ain't my fault you gave that DVD player back to my mom so kiss by (sic) ass Later Bitch." See, Appellant's Brief at

2; T. at 269.

{¶40} Mr. Moore claimed he did not write the note or leave it on appellant's windshield. Sometime after the note was discovered, the incident occurred which led to the filing of the criminal charges.

{¶41} Mr. Moore alleged appellant started the incident by yelling at him. T. at 125. Thereafter, appellant's son grabbed him from behind, and appellant started hitting him with his cane. T. at 126. Mr. Moore testified he never struck or threatened appellant or his son. Id. Appellant alleged Mr. Moore engaged in a fight with his son, he went over to break it up, and Mr. Moore struck him in his bad knee. T. at 274-276. Appellant then struck Mr. Moore in self-defense. T. at 278. The issue for trial was whether appellant was defending his son thereby causing Mr. Moore's injuries or whether appellant knowingly assaulted Mr. Moore with a deadly weapon (cane).

{¶42} The existence of the handwritten note was only relevant as to its position in the chain of events leading up to the fight. Motive and/or ill-will are not elements of the crime of felonious assault.

{¶43} We find despite the confusion over the issue of the handwriting exemplar, the trial court did not abuse its discretion in denying the requested continuance.

{¶44} The demonstrative evidence at trial by Mr. Moore of his handwriting as proof that he was not the author of the note is a matter of great concern given the trial court's denial of the continuance request and the confusion over the motion for a handwriting exemplar. Because appellant properly brought the issue forward in a motion in limine, we find it was error to permit the demonstrative evidence. However, we find such error to be harmless error. Harmless error is described as "[a]ny error,

defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right.

{¶45} As we noted supra, the issue of the authorship of the note was tangential to the elements of the crime. Again, motive and/or ill-will are not elements of the crime of felonious assault. Whatever error occurred regarding the handwriting sample was harmless given that the true issue was self-defense or defense of a person vis-à-vis the crime of felonious assault.

{¶46} Assignments of Error II and III are denied.

IV

{¶47} Appellant claims his conviction was against the sufficiency and manifest weight of the evidence. We disagree.

{¶48} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "The relevant inquiry is whether, after viewing 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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State*

v. Thompkins, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶49} Appellant was convicted on two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (2) as cited in Assignment of Error I.

{¶50} As stated supra, Mr. Moore testified appellant started the incident by yelling at him. T. at 125. Thereafter, appellant's son grabbed him from behind, and appellant started hitting him with his cane. T. at 126. Mr. Moore testified he never struck or threatened appellant or his son. Id.

{¶51} A witness, Henry Conley, testified appellant and Mr. Moore exchanged words over the note, and then Mr. Moore turned around to walk away "because he didn't want no fighting, no trouble." T. at 85. Thereafter, appellant's son grabbed Mr. Moore "in a choke hold from behind and threw him to the ground." Id. Appellant went over and started hitting Mr. Moore with his cane. Id.

{¶52} Another witness, Justin Trotter, observed Mr. Moore "staggering across the tracks holding his ribs and his head." T. at 182.

{¶53} James Catallano, Jr., M.D., was the emergency room physician who treated Mr. Moore. Dr. Catalano testified Mr. Moore suffered a "7.5 centimeter laceration of the scalp and frontal forehead region. It was gaping down to the bone." T. at 194. The injury was consistent with being hit with a cane or a stick. T. at 198. Mr. Moore also suffered "a nightstick fracture of the mid shaft of the ulna" or forearm. T. at 196. Again, the injury was consistent with being hit by a cane or a stick. T. at 197.

{¶54} Appellant testified after a discussion with Mr. Moore about the note on his

windshield, he turned around and went into his house. T. at 272-273. Appellant then heard some yelling, went outside, and observed Mr. Moore and his son fighting. T. at 274. Appellant walked over without his cane to break up the fight, and Mr. Moore struck him in his bad knee. T. at 275-276. He then struck Mr. Moore with his left fist and his right hand. T. at 278. Appellant testified he did not have his cane with him. T. at 277. Appellant testified Mr. Moore "got up on his own" and ran across the tracks. T. at 279. Mr. Moore then turned around and flipped appellant off with both hands. T. at 279-280. Following the incident, appellant did not have any injuries or pain to his hands. T. at 326.

{¶55} Appellant's son, Bryant Foster, testified Mr. Moore came over yelling and screaming and took a swing at him. T. at 354. Bryant took him down and got up. T. at 354-355. Mr. Moore took another swing and Bryant took him down again. T. at 355. Appellant came out of the house and attempted to break up the fight when Mr. Moore kicked him in his bad knee. T. at 356. Appellant then struck Mr. Moore four to five times. T. at 357. Appellant did not have his cane with him. Id. Mr. Moore "got up and ran across the tracks and was flipping us off with both hands." T. at 358. A witness, William Shepherd, corroborated Bryant's version. T. at 386-389.

{¶56} The jury was confronted with two opposing versions of the incident. We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260. Clearly the

jury chose to believe Mr. Moore's version over appellant's.

{¶57} Upon review, we find there was sufficient evidence, if believed, to support the convictions, and find no manifest miscarriage of justice.

{¶58} Assignment of Error IV is denied.

{¶59} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Farmer, P.J.

Hoffman, J. and

Edwards, J. concur.

s/SHEILA G. FARMER

s/WILLIAM B. HOFFMAN

s/JULIE A. EDWARDS

JUDGES

SGF/sg 0421

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DERRECK M. FOSTER	:	
Defendant-Appellant	:	CASE NO. 2009CA0042

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio is affirmed.

s/SHEILA G. FARMER

s/WILLIAM B. HOFFMAN

s/JULIE A. EDWARDS

JUDGES