[Cite as *State v. Needs*, 2009-Ohio-3980.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

CHARLES ALLEN NEEDS

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 08 CA 81

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 46
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 6, 2009

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Wise, J.

{¶1} Appellant appeals his conviction and sentence on one count of felonious assault and one count of domestic violence entered in the Fairfield County Court of Common Pleas following a trial by jury.

{¶2} Appellee is the State of Ohio.

STATEMENTS OF FACTS AND CASE

{¶3} On February 8, 2008, an indictment was filed charging Charles Allen Needs with one count of Felonious Assault, in violation of R.C. §2903.11(A)(1), and three counts of domestic violence, in violation of R.C. §2919.25(A) and (D)(3).

{¶4} These charges arose out of an incident which took place on January 29, 2008, at the home of Richard Needs, Appellant's elderly father. On the day in question, Appellant had been drinking for several hours and had become emotional about the deaths of his two daughters in a fire which occurred 12 years prior. (T. at 477, 528-529, 533). After finding the log book from the funeral, Appellant confronted his father Richard Needs, demanding to know why Mr. Needs, who had been present on the night of the fire, had not died as well. (T. at 196-197, 365). Mr. Needs testified that this was not the first time that he had been subjected to this type of questioning from Appellant, and that he tried to convince Appellant that they should not discuss that topic when Appellant had been drinking. (T. at 198-199, 364). Mr. Needs testified that Appellant threw the hard-covered book at him and returned to the basement, where he proceeded to turn off the power to the house. (T. at 198, 200, 365, 367, 540).

{¶5} Richard Needs went down to the basement to turn the power back on and found Appellant sitting in a chair in front of the fuse box. (T. at 200-201). Mr. Needs

stepped around the chair to switch the power back on and, before he could turn back around, was grabbed by Appellant and thrown down on a couch. (T. at 368). Appellant pinned Mr. Needs down and proceeded to hit him repeatedly in the head and face. (T. at 251, 374). Appellant's mother, Loretta Needs, tried to intervene and was pushed away by Appellant. (T. at 368, 370, 418). At one point, while Appellant was distracted by Mrs. Needs, Mr. Needs managed to roll onto the floor in front of the couch. (T. at 204). Appellant got back on top of Mr. Needs, while continuing to punch him, and also pressed all of his weight on top of Mr. Needs, making it difficult for him to breathe. (T. at. 204, 211-212, 257). Mr. Needs repeatedly told Appellant he could not breathe, to which Appellant replied, "Now you know how the girls felt when they died. You can die the same way." (T. at 104, 204-205). Shortly thereafter, Appellant's sister, Susan Runyon, arrived and also attempted to intervene. (T. at 100-101, 105-106, 205). After pushing Mrs. Runyon across the basement and onto the floor, Appellant went back upstairs, stating that he intended to overdose on his prescription pills. (T. at 107, 110-111, 554-555). After taking a substantial number of pills, Appellant left the house and was found passed out in the yard by police and medics. (T. at 158, 179-180, 556). Appellant and his parents were transported to the hospital. (T. at 207, 336).

{¶6} On September 23, 2008, a jury trial commenced in this matter.

{¶7} At trial, the family physician, Dr. Michael Martin, who examined Richard Needs after the assault, testified as to Mr. Needs' injuries. (T. at 281). He confirmed that Mr. Needs suffered from a pre-existing condition called silicosis, caused by a chemical being deposited in the lungs which makes breathing difficult during any activity in which he exerts himself. (T. at 279). Dr. Martin also testified as to an x-ray done in the

emergency room which showed a rib fracture, an injury the doctor described as something that must heal on its own and typically takes at least four to eight weeks to heal. (T. at 286-289). Dr. Martin also stated that, if the history from his patient, Mr. Needs, was accurate, he could say to a reasonable degree of medical certainty that Richard Needs suffered the rib injury as a result of the assault by Appellant. (T. at 303-304).

{¶8} On September 26, 2008, the jury returned verdicts of guilty on the felonious assault charge and one of the counts of domestic violence.

{¶9} The trial court found that the felonious assault charge and the domestic violence charge merged for purposes of sentencing and sentenced Appellant to a stated prison term of seven (7) years.

{¶10} Appellant now appeals his conviction, setting forth the following assignments of error:

ASSIGNMENTS OF ERROR

{¶11} "I. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE IMPROPER ADMISSION OF INCOMPETENT EXPERT MEDICAL OPINION TESTIMONY."

{¶12} "II. THE DEFENDANT-APPELLANT'S CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE IN VIOLATION OF ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

I.

{¶13} In his first assignment of error, Appellant argues that the admission of Dr. Martin's testimony concerning the proximate cause of Richard Needs' injuries was improper. We disagree.

{¶14} Specifically, Appellant argues the "serious physical harm" element of the felonious assault charge was proven by "incompetent" medical opinion testimony. Appellant argues that Dr. Martin did not state his medical opinion in terms of probability and therefore his testimony was "incompetent".

{¶15} Upon review of the trial transcript, we find that Dr. Martin testified as follows:

{¶16} "Q: Would you say to a reasonable degree of medical certainty that Richard Needs suffered that injury as a result of the incident of January 29th?

{¶17} "***

{¶18} "A: As long as I'm being told the truth, yes." (T. at 303-304).

{¶19} After being provided with the definition of "serious physical harm" as that being "any physical harm that involves acute pain of such duration as to result in substantial suffering or prolonged pain, with regard to the seriousness of Mr. Needs' injuries, Dr. Martin testified:

{¶20} "Q: *** Would a cracked rib potentially cause that?

{¶21} "A: If prolonged is talking about six to eight weeks, yes.

{¶22} "Q: Okay. Might it also involve temporary substantial incapacity?

{¶23} "A: Temporary, yes.

{¶24} "Q: In what way?

{¶25} "A: As I made note, when he moved, it hurt bad.

{¶26} "And would Mr. Needs have suffered temporary substantial incapacity based on the injury to the ribs that you observed?

{¶27} "A: Yes

{¶28} "Q: And was he also in substantial pain?

{¶29} "A: Yes.

{¶30} "Q: Why?

{¶31} "A: It's going to take longer for an elderly person's bones to heal. They're just not as strong or as active as a younger person.

{¶32} "***

{¶33} "Q: But do you agree that a fractured rib is a significant injury for an elderly person to receive?

{¶34} "A: Based on the definitions that you gave me, yes, it's significant." (T. at 305-307).

{¶35} Appellant did not object to Dr. Martin's testimony at trial and further stipulated to his qualifications. (T. at 275). Accordingly, our review of the alleged error must proceed under the plain error rule of Crim.R. 52(B).

{¶36} In criminal cases, plain error is governed by Crim.R. 52(B), which states:

{¶37} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." An alleged error "does not constitute a plain error ... unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

{¶38} The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to 'prevent a manifest miscarriage of justice.' " *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. *Perry,* supra, at 118, 802 N.E.2d at 646.

{¶39} The Supreme Court has repeatedly admonished that this exception to the general rule is to be invoked reluctantly. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus. See, also, *State v. Thompson* (1987), 33 Ohio St.3d 1, 10, 528 N.E.2d 542; *State v. Williford* (1990), 49 Ohio St.3d 247, 253, 551 N.E.2d 1279 (Resnick, J., dissenting).

{¶40} Upon review, we find that in addition to Dr. Martin's opinion that Mr. Needs' injuries were caused by Appellant's actions, Richard Needs and Loretta Needs also both testified that it was Appellant who caused Mr. Needs' injuries. (T. at 207, 276).

{¶41} Based on the foregoing, we find no manifest injustice occurred. We therefore find no reasonable possibility that had the jury not been permitted to hear Dr. Martin's opinion that they would have found Appellant not guilty.

{¶42} Appellant's first assignment of error is overruled.

II.

{¶43} In his second assignment of error Appellant argues that his conviction was based upon insufficient evidence. We disagree.

{¶44} 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.

{¶45} Appellant was charged with felonious assault in violation of R.C. 2903.11(A)(1), which states the following:

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

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

{¶48} Appellant again argues that the "serious physical harm" element is based on incompetent expert medical opinion as set forth in Assignment of Error I. We find this argument unpersuasive for the same reasons as contained in our analysis thereof.

{¶49} Additionally, we find that at trial, the jury heard testimony from Richard Needs, Loretta Needs and Dr. Martin as set forth above. 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 not to believe the version as set forth by Appellant.

{¶50} Upon review, we find there was sufficient evidence, if believed, to support the convictions.

{¶51} Appellant's second assignment of error is overruled.

{¶52} For the foregoing reasons, the judgment of the Court of Common Plea of Fairfield County, Ohio, is affirmed.

By: Wise, J.

Edwards, J., concurs.

Hoffman, P. J., concurs separately.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

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JUDGES

JWW/d 714

Hoffman, P.J., concurring

{¶53} I concur in the majority's analysis and disposition of Appellant's Second Assignment of Error.

{¶54} I further concur in the majority's disposition of Appellant's First Assignment of Error. I write separately only to state I find no error, plain or otherwise, occurred in admission of Dr. Martin's opinion.

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HON. WILLIAM B. HOFFMAN

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CHARLES ALLEN NEEDS	:	
	:	
Defendant-Appellant	:	Case No. 08 CA 81

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

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ JULIE A. EDWARDS_____

JUDGES