[Cite as *State v. Rogers*, 2009-Ohio-4899.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

WALTER J. ROGERS

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. CT2008-0066

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. CR2008-0228

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 16, 2009

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Wise, J.

{¶1} Defendant-Appellant Walter J. Rogers appeals his conviction and sentence entered by the Muskingum County Court of Common Pleas on one count of aggravated assault following a guilty plea.

{¶2} Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶3} Defendant-Appellant, Walter J. Rogers, was indicted by the Muskingum County Grand Jury on one (1) count of Felonious Assault, in violation of R.C. §2903.11(A)(1) a second degree felony, alleging that he knowingly cased serious physical harm to another and one (1) count of Having Weapons While Under Disability, a third degree felony. Appellant initially entered a plea of not guilty to the charges.

{¶4} At his plea hearing, Appellant pled guilty to an amended charge of aggravated assault, in violation of R.C. §2903.12(A)(2), a felony of the fourth degree, for knowingly causing physical harm to another with a deadly weapon, and to count two as contained in the indictment.

{¶5} By Judgment Entry filed December 12, 2008, the trial court sentenced Appellant to five (5) years on the aggravated assault and one (1) year on the charge of having weapons while under disability. Said sentences were ordered to be served consecutively.

{¶6} Defendant-Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶7} "I. THE DEFENDANT-APPELLANT'S PLEA WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HE WAS NOT ADVISED THAT HE WAS WAIVING HIS CONSTITUTIONAL RIGHT TO JURY UNANIMITY.

{¶8} "II. THE DEFENDANT-APPELLANT'S CONVICTION FOR AGGRAVATED ASSAULT IS VOID UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HE PLED TO AN OFFENSE FOR WHICH HE HAD NOT BEEN INDICTED."

I.

{¶9} In his first assignment of error, Appellant asserts his guilty plea was not voluntary, knowing, or intelligent, because the trial court failed to inform him of his constitutional right to a unanimous jury verdict. We disagree.

{¶10} In *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, the Ohio Supreme Court reviewed a defendant's claim the trial court did not adequately inform him of his rights. *Ketterer* cited *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, wherein paragraph one of the syllabus, the court held there was no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial. The *Ketterer* court explained the trial court was not required to specifically advise the defendant on the need for jury unanimity, *Ketterer,* supra at paragraph 68, citing *State v. Bays* (1999), 87 Ohio St.3d

15, 716 N.E.2d 1126, which in turn cited *United States v. Martin* (C.A.6 1983), 704 F.2d 267. In *Bays,* the Supreme Court held "a defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it," *Ketterer,* paragraph 68.

{¶11} This Court, along with several courts, including the Ohio Supreme Court, has held there is no requirement that a trial court inform a defendant of his right to a unanimous verdict. *State v. Dooley*, Muskingum App. No. CT2008-0055, 2009-Ohio-2095; *State v. Hamilton*, Muskingum App. No. CT2008-0011, 2008-Ohio-6328; *State v. Fitzpatrick,* 102 Ohio St.3d 321, 2004-Ohio-3167, at ¶ 44-46 (accused need not be told that jury unanimity is necessary to convict and to impose sentence); *State v. Smith,* Muskingum App. No. CT2008-0001, 2008-Ohio-3306 at¶ 27 (there is no explicit requirement in Crim.R. 11(C)(2)(a) that a defendant be informed of his right to a unanimous verdict; *State v. Williams,* Muskingum App. No. CT2007-0073, 2008-Ohio-3903 at ¶ 9 (the Supreme Court held an accused need not be told the jury verdict must be unanimous in order to convict); *State v. Barnett,* Hamilton App. No. C-060950, 2007-Ohio-4599, at ¶ 6 (trial court is not required to specifically inform defendant that she had right to unanimous verdict; defendant's execution of a written jury trial waiver and guilty plea form, as well as her on-the-record colloquy with the trial court about these documents, was sufficient to notify her about the jury trial right she was foregoing); *State v. Goens,* Montgomery App. No. 19585, 2003-Ohio-5402, at ¶ 19; *State v. Pons* (June 1, 1983), Montgomery App. No. 7817 (defendant's argument that he be told that there must be a unanimous verdict by the jury is an attempted super technical expansion of Crim.R. 11); *State v. Small* (July 22, 1981), Summit App. No. 10105

(Crim.R. 11 does not require the court to inform the defendant that the verdict in a jury trial must be by unanimous vote).

{¶12} Appellant asks us to find in his favor notwithstanding the Supreme Court precedent, but this Court must apply Ohio law as directed by the Supreme Court. We have reviewed the record, and we find the trial court and the plea form adequately explained Appellant's constitutional rights.

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

II.

{¶14} In his second assignment of error, Appellant contends it was error for the trial court to accept his guilty plea to an offense for which he had not been charged in the indictment. Appellant argues that because the charges of felonious assault and aggravated assault contain different elements, that his conviction is void. We disagree.

{¶15} This Court addressed this issue on *State v. Patterson*, Muskingum App. No. CT2008-0054, 2009-Ohio-273, where the Appellant therein argued a manifest injustice existed because involuntary manslaughter predicated upon child endangering was not a lesser-included offense of the original indictment in that case which was for murder. Appellant asserted that the amendment of the indictment was impermissible and rendered it defective and therefore, void.

{¶16} This Court, upon review, found that "[b]ecause the amendment was part of a negotiated plea agreement, it matters not whether the amended charge was a lesser-included offense of the original charge. To hold otherwise violates the invited error doctrine. Furthermore, by not objecting to the amendment before the guilty plea was entered, Appellant has waived his right to assert error therein."

{¶17} This Court went on to note that "Crim. R. 11(F) contemplates such an amendment in negotiated pleas in felony cases. It provides:

{¶18} "When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more **other** or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court." (Emphasis added).

{¶19} "Accordingly, an amendment in negotiated plea felony cases is not limited to lesser included offenses."

{¶20} Based on the foregoing, we find Appellant's second assignment of error not well-taken. Appellant's second assignment of error is overruled.

{¶21} For the foregoing reasons, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is affirmed

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 831

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
WALTER J. ROGERS	:	
	:	
Defendant-Appellant	:	Case No. CT2008-0066

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

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ PATRICIA A. DELANEY_____

JUDGES