[Cite as *State v. Nicholson*, 2010-Ohio-763.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: W. Scott Gwin, P.J.
	:	Hon: Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon: Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-0069
DEMOND NICHOLSON	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland Couonty Court of Common Pleas, Case No. 2008-CR-892
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 1, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
JAMES J. MAYER, JR. PROSECUTING ATTORNEY BY KIRSTEN L. PSCHOLKA-GARTNER 38 South Park Street Mansfield, OH	R. JOSHUA BROWN 32 Lutz Avenue Lexington, OH 44904

Gwin, P.J.

{¶1} Appellant Demond Nicholson appeals his conviction in the Richland County Court of Common Pleas for one count of assault of a corrections officer, in violation of R.C. 2903.13(A), a felony of the fifth degree. The appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On October 29, 2008, Sergeant Gary Iceman was working his shift at the Richland Correctional Institution located in Mansfield, Ohio. As a sergeant in housing unit H2 Upper, one of his duties was to conduct hearings on conduct reports and complaints filed against inmates in the unit, and to impose appropriate discipline. One of the conduct reports Sergeant Iceman heard on that particular day involved appellant.

{¶3} The conduct report alleged that appellant had engaged in a verbal altercation with a case manager in the housing unit. According to the complaint, appellant had asked the case manager to complete some paperwork for him. When it was not done in what appellant thought was a timely manner, appellant began yelling at the case manager, and called him a “lazy mother-fucker.” The case manager wrote appellant a conduct report for disrespecting a staff member.

{¶4} When Sergeant Iceman read the conduct report to appellant, he at first tried to dismiss it as if he had not done anything wrong; however, Sergeant Iceman noted that appellant had several disrespect-type violations before this particular conduct report. Because appellant had only moved into the housing unit about a month before the conduct report was filed against him, Sergeant Iceman decided to sanction appellant with a thirty-day commissary restriction. He planned to suspend that restriction

on the condition that appellant did not have further violations. When Sergeant Iceman got about halfway through explaining the sanction, appellant became "pretty belligerent." (1T. at 90). He yelled "fuck you, fuck both of you [,]" which Sergeant Iceman took to mean he and the case manager. (1T. at 90). As he started for the office door, appellant yelled something to the effect of "I don't give a shit about this commissary restriction." (1T. at 90).

{¶5} Sergeant Iceman advised appellant that he was taking him to the captain's office where they would continue their discussion. In accordance with institutional policy, Sergeant Iceman told appellant to turn around so that he could be handcuffed. Appellant initially appeared to comply; however, as Sergeant Iceman approached him, appellant turned around and swung his arm, striking Sergeant Iceman in the mouth. He continued to throw punches while Sergeant Iceman struggled to get control over him.

{¶6} Corrections Officers Robert Bair and David Dowler were in the dayroom outside the sergeant's office when this altercation occurred. They heard appellant yelling at Sergeant Iceman in his office, and went to assist. As they approached the door to Sergeant Iceman's office, they observed appellant punch Sergeant Iceman in the mouth, and continue to fight with him. Officers Bair and Dowler jumped in to assist Sergeant Iceman. Appellant continued to resist and throw punches. Eventually, Sergeant Iceman was able to pull out his mace and sprayed it in appellant's face, ending the confrontation.

{¶7} At trial, both Officer Bair and Officer Dowler testified that they did not see Sergeant Iceman or anyone else, punch appellant or put their hands around appellant's throat during the altercation. Officer Dowler also testified that appellant's demeanor was

hostile at the time he entered Sergeant Iceman's office, while Sergeant Iceman appeared shocked at having been punched in the face. Lieutenant Anthony Benson, who arrived on the scene after appellant was subdued, also testified that Sergeant Iceman appeared "really shook up, nervous, holding his lip." He described Sergeant Iceman's lip as swollen out like a grapefruit.

{¶8} Appellant was cuffed and taken to the infirmary to be examined, which is prison protocol anytime force is used to subdue an inmate. The only noticeable injury to appellant was redness and irritation to his eyes and his left ear because of the mace. He had no cuts or abrasions because of the altercation with Sergeant Iceman, and did not complain of any other pain or injury.

{¶9} Sergeant Iceman was also examined pursuant to protocol. Nurse Tina Lutz noted redness to his left eye, swelling to his lips, a small cut to his right upper lip, and a cut inside his left upper lip. Nurse Lutz testified that these injuries were consistent with Sergeant Iceman's report that he had been punched in the mouth by an inmate, and had gotten mace in his eye. She offered Sergeant Iceman some ointment for his cuts, which he declined, and gave him an ice pack for the swelling. Nurse Lutz described Sergeant Iceman's demeanor at the time of the exam as "[c]alm as always."

{¶10} All injuries were documented and photographed as a part of the protocol for the use of force report. Written statements were taken from all of the staff members involved. Appellant was given the opportunity to make a written statement, detailing his account of the altercation; however, he declined.

{¶11} After all of the statements were collected, Lieutenant Benson forwarded the use of force packet to the warden, the major, the deputy warden of operations, the shift captain, the prison investigator, and the Highway Patrol for investigation.

{¶12} Trooper Errington of the Ohio State Highway Patrol was assigned to review the incident because he was already at the institution when the altercation took place. He reviewed each of the statements, and interviewed each of the parties individually, starting with Sergeant Iceman. Trooper Errington indicated that Sergeant Iceman's account of the incident during his interview was consistent with his trial testimony. He testified that he was not concerned by Sergeant Iceman's statement that he put his hand on the Appellant's shoulder prior to the assault because it is very common for an officer to direct an inmate toward the wall to handcuff him. Trooper Errington also testified that Sergeant Iceman's order for appellant to turn and be handcuffed was not unusual under the circumstances. He stated, "It probably would have happened sooner for a lot of officers. Sergeant Iceman is a very laid back individual." (2T. at 181).

{¶13} Trooper Errington next contacted appellant. Trooper Errington indicated that in the use of force packet, there was a notation that appellant had refused to make a written statement. Appellant agreed to talk to Trooper Errington.

{¶14} Appellant told Trooper Errington that the incident started when Sergeant Iceman began screaming and yelling at him, and then came around his desk and tried to choke him. Appellant admitted that at that point, he punched Sergeant Iceman; however, he claimed it was in self-defense. During the interview, Trooper Errington noted that appellant never complained of any sort of injury because of the altercation.

Further, Trooper Errington did not observe any apparent injuries, such as redness or swelling of the neck, which would support appellant's story.

{¶15} After completing his investigation, Trooper Errington concluded that appellant was fabricating his story, and that Sergeant Iceman, Officer Bair, and Officer Dowler were very truthful in their interviews and statements. As a result, he determined that the inmate assaulted the officer, and there was no excessive use of force in the use of mace to subdue appellant.

{¶16} Appellant's jury trial commenced on March 19, 2009. After a jury was seated, the trial court gave its standard instructions. One of those instructions was that jurors are permitted, but not required, to take notes and to ask questions of witnesses during the course of the trial. (1T. at 75). With regard to questioning of witnesses, the trial court stated:

{¶17} "Asking questions of witnesses, it has to be done in a formal way, according to the Supreme Court. After the Attorneys have finished questioning of the witness, I will turn to you and ask, do any of you have additional questions you want to ask this witness. You will have a chance to write that question down for me. Mr. Myers will bring it up to the bench there, and the attorneys and I will read your questions. They have the same right to object to your questions as they do to each other's questions. Then I will turn to the witness and ask your questions. It's kind of a formal way of getting it done, but if you have a question you wish to have asked, you are going to have a chance to do that.

{¶18} "Don't feel I expect you to ask questions, I'm not. But I can now give you that opportunity if there is something you really wanted to know, and it's within our Rules of Evidence, so we will get it answered in that way." (1T. at 76).

{¶19} After the first witness, Sergeant Gary Iceman, testified, the trial court gave the jury the opportunity to ask questions. At that time, the jurors posed five additional questions to Sergeant Iceman, all of which were asked by the trial court. (1T. at 104-106).

{¶20} After the second witness, Corrections Officer Robert Bair testified the jury posed five additional questions, all of which were asked by the trial court. (1T. at 119-121). While these questions covered material that was addressed on direct and cross, some of the questions appeared to slant towards the defense, such as the question of whether Officer Bair heard Sergeant Iceman use profanity towards appellant, and whether all of the Officers were allowed to sit together when filling out their incident reports. (1T. at 120-121).

{¶21} After the third witness, Corrections Officer David Dowler, testified, the jury posed eight additional questions. (1T. at 134-135). One question, whether Sergeant Iceman took a telephone call during appellant's hearing, was deemed inadmissible and was not asked. (1T. at 133-134). The trial court did ask the remaining seven questions. (Id.). Again, one of the questions focused on whether Officer Dowler could tell if it was appellant, not Sergeant Iceman, yelling. (1T. at 134). Another focused on whether Officer Dowler filled out his incident report on his own or in consultation with other officers. (1T. at 135).

{¶22} After the fourth witness, Lieutenant Anthony Benson, testified, the jury posed thirteen additional questions. (1T. at 155-160). This prompted defense counsel to remark that the jury "paid better attention than [he] did." (1T. at 155). The trial court did not ask one of the questions because it was not "designed to get at any issue in the case [,]" noting, "[t]hat's the danger of letting jurors ask questions." (1T. at 155). The remaining twelve questions were posed to Lieutenant Benson. (1T. at 156-160). Again, one of these questions focused on whether the officers filled out their statements together. (1T. at 156).

{¶23} Before the State called its next witness on the second day of trial, the trial court admonished the jury:

{¶24} "I will just say one other thing to you, folks, when I give you the opportunity to ask questions, I don't expect you to be an attorney who does a lengthy examination of witnesses. You can ask one question, but not a whole series of questions. So if you have one question, fine, but don't give me three or four questions." (2T. at 164).

{¶25} Following this instruction, the State resumed its case, calling Tina Lutz, the prison nurse who examined the Appellant and Sergeant Iceman after the altercation. (2T. at 164). After Nurse Lutz testified, the trial court gave the jurors the opportunity to ask any questions they had for her; however, there were no additional questions. (2T. at 176).

{¶26} Thereafter, the State called Trooper Timothy Errington, who conducted an investigation into the altercation. (2T. at 176). After both sides had questioned Trooper Errington, the trial court again gave the jurors the opportunity to ask any additional questions that they may have. (2T. at 197). At that point, the jurors did pose one

additional question for Trooper Errington, which was asked by the trial court. (2T. at 197). That question was "how consistent were the corrections officers' written statements with each other?" (2T. at 197-198). After Trooper Errington answered the question, the State rested its case.

{¶27} Appellant took the stand on his own behalf. Following his testimony, the jury was again given the opportunity to ask additional questions of the appellant; however, they declined that opportunity. (2T at. 230). The defense rested without calling any additional witnesses. The State then called Trooper Errington as a rebuttal witness. (2T. at 231-233).

{¶28} The jury found appellant guilty of assault on a corrections officer. The trial court sentenced the Appellant to twelve months, consecutive to the sentence appellant was already serving.

{¶29} Appellant timely appealed and raises the following assignment of error for our consideration:

{¶30} "I. THE TRIAL COURT COMMITTED "STRUCTURAL ERROR" BY ADMONISHING THE JURY FOR POSING MULTIPLE QUESTIONS TO THE WITNESSES. "

I.

{¶31} In his sole assignment of error, appellant contends that the trial court committed structural error by informing the jurors on the second day of trial that they may ask one question, but not a whole series of questions, of the witnesses. We disagree.

{¶32} In *State v. Fisher,* 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, the Ohio Supreme Court recognized that "[i]n *Arizona v. Fulminante* (1991), 499 U.S. 279, 306-312, 111 S.Ct. 1246, 113 L.Ed.2d 302, the United States Supreme Court denominated the two types of constitutional errors that may occur in the course of a criminal proceeding--'trial errors,' which are reviewable for harmless error, and 'structural errors,' which are per se cause for reversal. * * * 'Trial error' is 'error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.' * * * 'Structural errors,' on the other hand, 'defy analysis by "harmless error" standards' because they 'affect [ ] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself.' [*Fulminante*] at 309 and 310, 111 S.Ct. 1246, 113 L.Ed.2d 302. Consequently, a structural error *mandates* a finding of 'per se prejudice.' "(Emphasis sic.) *Fisher* at ¶ 9. See, also, *State v. Wamsley*, 117 Ohio St.3d 388, 884 N.E.2d 45, 2008-Ohio-1195 at ¶ 15. In *Wamsley,* the Ohio Supreme Court noted,

{¶33} "We have previously held that if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional[l] errors that may have occurred are subject to harmless-error analysis. *State v. Hill* (2001), 92 Ohio St.3d 191, 197, 749 N.E.2d 274, quoting *Rose v. Clark* (1986), 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460. Moreover, as we stated in *State v. Perry,* 101 Ohio St.3d 118, 2004- Ohio-297, 802 N.E.2d 643, [c]onsistent with the presumption that errors are not structural, the United States Supreme Court ha[s] found an error to be structural, and thus subject to automatic reversal, only in a very limited

class of cases. *Johnson v. United States,* 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel)); *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins,* 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction).' "Perry*,* 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 18, quoting *Neder v. United States* (1999), 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35. *Wamsley, supra* 117 Ohio St.3d at 391-392, 884 N.E.2d at 48-49, 2008-Ohio-1195 at ¶ 16. [Internal quotation marks omitted].

{¶34} In State *v. Fisher*, supra, the Ohio Supreme Court rejected any argument that the practice of allowing jurors to question witnesses violates either the Ohio or United States Constitution. 99 Ohio St.3d 127, 135 2003-Ohio-2761 at ¶ 27, 789 N.E.2d 222, 229. Rather, the Court held the practice of allowing jurors to question witnesses is a matter committed to the discretion of the trial court. In order to minimize the danger of prejudice the trial court should,

{¶35} "(1) require jurors to submit their questions to the court in writing, (2) ensure that jurors do not display or discuss a question with other jurors until the court reads the question to the witness, (3) provide counsel an opportunity to object to each question at sidebar or outside the presence of the jury, (4) instruct jurors that they should not draw adverse inferences from the court's refusal to allow certain questions,

and (5) allow counsel to ask follow-up questions of the witnesses." Id. at ¶ 29. [Footnotes omitted].

{¶36} It is clear that a trial court's decision to allow or disallow juror questions is discretionary, and must be reviewed under the abuse of discretion standard if an objection is raised in the trial court.

{¶37} In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings. Crim.R. 52(A), which governs the criminal appeal of a non-forfeited error, provides that "[a]ny *error* * * * which does not *affect substantial rights* shall be disregarded." (Emphasis added.) Thus, Crim.R. 52(A) sets forth two requirements that must be satisfied before a reviewing court may correct an alleged error. First, the reviewing court must determine whether there was an "error"-i.e., a "[d]eviation from a legal rule." *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S.Ct. 1770, 123 L.Ed.2d 508. Second, the reviewing court must engage in a specific analysis of the trial court record-a so-called "harmless error" inquiry-to determine whether the error "affect[ed] substantial rights" of the criminal defendant.

{¶38} In criminal cases where an objection is not raised at the trial court level, "plain error" is governed by Crim. R. 52(B), which states, "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.

{¶39} 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. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240; *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.

{¶40} 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).

{¶41} Although appellant has not raised the issue of plain error in his assignments of error, this court will review it under the plain error standard. *Seaburn v. Seaburn*, Stark App. No. 2004CA00343, 2005-Ohio-4722 at ¶ 47.

{¶42} Appellant does not argue that his conviction for assault of a correction officer is against the sufficiency of the evidence or against the manifest weight of the evidence. In the case at bar, we find no plain error affecting appellant's substantial rights. The trial court followed the procedure outlined by the Supreme Court in *Fisher*, supra before it allowed jurors to ask questions of the witnesses. Although it would have perhaps been clearer had the trial court instructed the jury that they should limit their questions to important points, not draw any inferences from unasked questions, and only ask questions seeking clarification rather than attempting to investigate a matter further, we find nothing in the record to demonstrate that the jury would have found

appellant not guilty had they been permitted to ask multiple questions of each and every witness. In any event, the trial court did not limit the number of questions that appellant's trial counsel was permitted to ask the witnesses. We will not presume prejudice from the trial court's actions in the case at bar.

{¶43} Under these circumstances, there is nothing in the record to show that the trial court abused its discretion or otherwise committed plain error in limiting the number of questions that the jury could pose to the witnesses.

{¶44} Appellant's sole assignment of error is overruled.

{¶45} For the foregoing reasons, the judgment of the Richland County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

_____

HON. W. SCOTT GWIN

_____

HON. JULIE A. EDWARDS

_____

HON. PATRICIA A. DELANEY

WSG:clw 0128

[Cite as *State v. Nicholson*, 2010-Ohio-763.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DEMOND NICHOLSON	:	
Defendant-Appellant	:	CASE NO. 2009-CA-0069

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

_____
HON. W. SCOTT GWIN

_____
HON. JULIE A. EDWARDS

_____
HON. PATRICIA A. DELANEY