[Cite as *State v. Skerness*, 2011-Ohio-188.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	
-vs-	:	Case No. 09-CA-28
	:	
	:	
EDWARD SKERNESS	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Coshocton County Court of Common Pleas Case No. 09 CR 0053
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 18, 2011

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROBERT A. SKELTON Special Prosecuting Attorney 309 Main Street Coshocton, Ohio 43812	BRIAN W. BENBOW 605 Market Street Zanesville, Ohio 43701

Edwards, P.J.

{¶1} Appellant, Edward Skerness, appeals a judgment of the Coshocton County Common Pleas Court convicting him of two counts of felonious assault (R.C. 2903.11(A)(2)) and two counts of assault (R.C. 2903.13(A)). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} In May of 2009, Attorney Van Blanchard II was acting as legal counsel for appellant's wife, Vicki Skerness, for the purpose of divorce proceedings. Appellant stored a number of items of personal property at a residence located at 2614 South Lawn Avenue Extension. Based on his past experience in handling divorce cases, Blanchard was concerned that if they notified appellant that they sought an appraisal of the personal property, some of the items might disappear. After determining that Vicki was in fact co-owner of the 2614 South Lawn Avenue property, Blanchard decided that they should appraise the property when they knew appellant would not be present.

{¶3} Blanchard secured a locksmith and an appraiser, Larry Corder, to meet him and Vicki at the property on Sunday morning, May 10, 2009, at 7:00 a.m. After the locksmith gained entry to the house, the locksmith left and Blanchard, Corder and Vicki entered the property to allow Corder to gain the information needed for purposes of appraisal.

{¶4} A neighbor, Robert Aronhault, noticed two men and a woman entering the house. Robert drove to appellant's residence to alert him that someone was breaking into the property. When appellant's pickup truck was not at his residence, Aronhault proceeded to the home of appellant's girlfriend and informed her that someone was

breaking into appellant's property. Appellant's girlfriend drove to appellant's place of employment and told him that someone was breaking into the property, and also notified him that the sheriff's department had been called.

{¶5} Aronhault placed a 911 call concerning the alleged break-in. He told police that two men and a woman were entering the property. He described one of the men as 5'6 or 5'7" tall and wearing a plaid shirt. He described the woman as having bleached blonde hair and carrying a beer can. During the course of the 911 call, he identified Blanchard by name. Blanchard represented Aronhault in his own divorce proceeding. He also told police that the woman said she owned the property. Deputies responded to the scene at 7:12 a.m. After speaking to Blanchard and being assured that they had the right to be there because Vicki was part-owner of the property, the deputies left the premises.

{¶6} Appellant arrived home as Blanchard and Corder were finishing the appraisal. Appellant spoke to Aronhault, who told appellant that appellant's wife, Van Blanchard, and some other guy were inside. Appellant told Aronhault, "I'll take care of it." Tr. 401.

{¶7} Blanchard heard Vicki speak to appellant outside, and Corder heard appellant yelling and cursing at his wife, asking her what she was doing there and who was with her. Appellant then entered the house, carrying a cup of coffee. When Blanchard attempted to identify himself to appellant, appellant threw the coffee in his face. As Blanchard reached up to wipe the coffee from his eyes, appellant struck him in the head with a cordless drill. Eventually appellant knocked Blanchard to the ground.

{¶8} After Blanchard was on the ground, appellant turned the drill on and attempted to poke Corder in the chest with the drill. Appellant continued to lunge at Corder, trying ot stick the drill bit in his chest. Corder grabbed the drill with his hand and pushed appellant away. In the process, Corder fell down the stairs. After he was on the ground, appellant struck Corder in the head with the drill. By this point in time, Blanchard was up and grabbed appellant around the waist, pulling him away from Corder. Corder drove himself to the hospital where he received ten stitches.

{¶9} Vicki Skerness placed a 911 call, telling the dispatcher that appellant had "flipped out" and beat up Van Blanchard and Larry Corder. On his way to the scene, Deputy Wes Wallace passed Blanchard. Blanchard was riding a bicycle and bleeding from a cut on his head. Deputy Wallace spoke to appellant at the scene. Appellant stated that two men were breaking into his house so he "laid them out." Tr. 47. Appellant claimed he did not know who the men were.

{¶10} Appellant was indicted by the Coshocton County Grand Jury with two counts of felonious assault and two counts of assault. The case proceeded to jury trial in the Coshocton County Common Pleas Court.

{¶11} At trial, appellant testified that he did not know who the men in his house were, and he feared for his life. He claimed the men came out of the dark and attacked him. Aronhault testified that he saw the scuffle, and Blanchard and Corder appeared to be the aggressors.

{¶12} Appellant was convicted on all charges. He was sentenced to four years incarceration on each count of felonious assault, to be served concurrently. He was sentenced to six months incarceration on each count of assault, and the court merged

the assault sentences with the felonious assault sentences. He assigns three errors on appeal:

{¶13} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT THE RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 1, ARTICLE I, AND SECTION 16, ARTICLE I, AND SECTION 10 ARTICLE I, OF THE OHIO CONSTITUTION AS FOLLOWS:

{¶14} "1. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY CONDUCTING IRRELEVANT AND INFLAMMATORY CROSS EXAMINATION OF THE KEY INDEPENDENT WITNESS CALLED BY APPELLANT IN FRONT OF THE JURY. SAID CROSS EXAMINATION RELATED TO OUT-OF-COURT STATEMENTS ALLEGEDLY MADE TO THE PROSECTOR (SIC), WHICH WERE NOT PREVIOUSLY DISCLOSED TO APPELLANT AND WHICH WERE FILLED WITH IMPROPER INNUENDO. THE TRIAL COURT ACCORDINGLY COMMITTED PREJUDICIAL ERROR IN ALLOWING IMPROPER CROSS-EXAMINATION BY THE PROSECUTOR TO STAND THEREBY EXPRESSLY SANCTIONING SUCH MISCONDUCT ON THE PART OF THE STATE IN THE PRESENCE OF THE JURY.

{¶15} "2. THE TRIAL COURT CONDUCTED IMPROPER CROSS EXAMINATION OF THE KEY INDEPENDENT WITNESS CALLED BY APPELLANT IN FRONT OF THE JURY, WHICH IMPROPER QUESTIONING BY THE TRIAL COURT IMPROPERLY TAINTED THE CREDIBILITY OF THE WITNESS.

{¶16} "3. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE INTRODUCTION OF OTHERWISE INADMISSIBLE HEARSAY IN VIOLATION OF THE OHIO RULES OF EVIDENCE AND APPELLANT'S RIGHT OF CONFRONTATION GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS AS APPLIED IN *CRAWFORD V. WASHINGTON* (2004), 541 U.S. 36.

{¶17} "4. THE TRIAL COURT DENIED APPELLANT THE RIGHT TO PRESENT A COMPLETE DEFENSE GUARANTEED BY *HOLMES V. SOUTH CAROLINA* (2006), 547 U.S. 319, *CRANE V. KENTUCKY* (1986), 476 U.S. 683, WHEN IT REFUSED TO SUBMIT APPELLANT'S PROPOSED JURY INSTRUCTIONS RELATING TO DEFENSE OF PROPERTY AND WHEN IT SUSTAINED AN OBJECTION DURING APPELLANT'S CLOSING ARGUMENT RELATING TO SAID DEFENSE.

{¶18} "II. PURSUANT TO THE CUMMULATIVE (SIC) ERROR DOCTRINE, SHOULD THIS COURT CONSIDER THE FOUR SEPARATE ERRORS LISTED IN ASSIGNMENT OF ERROR NUMBER ONE TO BE HARMLESS BY THEMSLVES (SIC), SAID HARMLESS ERRORS, WHEN CONSIDERED TOGETHER, DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 1, ARTICLE I, AND SECTION 16, ARTICLE I, AND SECTION 10, ARTICLE I, OF THE OHIO CONSTITUTION.

{¶19} "III. THE TRIAL COURT COMMITTED PREJUDIAL (SIC) ERROR AND ABUSED ITS DISCRETION BY DENYING APPELLANT THE RIGHT TO A FAIR AND COMPLETE SENTENCING HEARING BY IMMEDIATELY PROCEEDING TO SENTENCING AFTER THE JURY'S VERDICT WAS PUBLISHED. THE TRIAL

COURT FURTHER COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY NOT ORDERING A PRE-SENTENCE INVESTIGATION, BY DENYING APPELLANT THE RIGHT TO CALL A WITNESS IN MITIGATION WHO WAS PRESENT IN THE COURTROOM, AND BY DENYING APPELLANT'S REQUEST FOR A CONTINUANCE SO THAT ADDITIONAL MITIGATION WITNESSES COULD BE CALLED ON THE ISSUE OF SENTENCING."

I

{¶20} Appellant's first assignment of error contains four sub-parts, which we will address separately.

Prosecutorial Misconduct

{¶21} Appellant argues that the prosecutor committed misconduct by commenting on a witness's credibility. During direct examination, Robert Aronhault testified that when appellant returned home on the day in question, he told appellant, "Ed, they're inside." Tr. 243. He testified that he did not remember whether or not he told appellant the specific identities of the people inside.

{¶22} On cross-examination, the prosecutor conducted the following colloquy with Aronhault:

{¶23} "Q. Do you remember me - - do you remember telling me in my office what you said to Ed Skerness prior to him entering that building?

{¶24} "MR. BENBOW: Objection.

{¶25} "THE COURT: He may answer. Overruled.

{¶26} "A. No. I don't recall exactly what was said between you and I.

{¶27} "Q. Do you remember telling me what Mr. Skerness replied to you?

{¶28} "A. No. I really don't remember our conversation. All I know is we went over the events of that day. You asked me what went on. I answered you. You was writing it down. Word for word, I don't know what I said to you, you know." Tr. at 272-273.

{¶29} The prosecutor's duty in a criminal trial is two-fold. The prosecutor is to present the case for the State as its advocate and the prosecutor is responsible to ensure that an accused receives a fair trial. *Berger v. U. S.* (1935), 295 U. S. 78; *State v. Staten* (1984), 14 Ohio App.3d 78.

{¶30} Misconduct of a prosecutor at trial will not be considered grounds for reversal unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394; *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768. The touchstone of analysis is "the fairness of the trial, not the culpability of the prosecutor." *State v. Underwood* (1991), 73 Ohio App.3d 834, 840-841, 598 N.E.2d 822, 826, citing *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S. Ct. 940, 947, 71 L.Ed.2d 78, 87-88. An appellate court should also consider whether the misconduct was an isolated incident in an otherwise properly tried case. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, 613 N.E.2d 203, 209-210; *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

{¶31} Contrary to appellant's argument, the prosecutor's questioning of Aronhault did not constitute an improper expression of the prosecutor's belief in his credibility. The prosecutor attempted to impeach Aronhault with a prior statement he made on the issue of what he told appellant before appellant entered the house. When Aronhault continued to answer that he did not remember, the prosecutor moved on to a

different line of questioning. The few isolated questions by the prosecutor concerning prior statements Aronhault made to him did not deprive appellant of a fair trial.

Questioning by Court

{¶32} Appellant next argues that the trial court improperly conveyed to the jury that Aronhault was lying when the court asked a question of Aronhalt.

{¶33} During cross-examination of Aronhault, the court interjected a question:

{¶34} "Q. So where did you go after he walked in the residence?

{¶35} "A. I was still standing there in the garage - - in the yard.

{¶36} "Q. Your yard?

{¶37} "A. Yes.

{¶38} "Q. About 50 feet away?

{¶39} "A. Yeah. I can't tell you. I don't know how far away it is. It's just - -

{¶40} "Q. All right. So, Mr. Skerness - -

{¶41} "THE COURT: - - Excuse me. But earlier this morning you said that your home was 35 to 40 feet away?

{¶42} "THE WITNESS: Well, whatever the distance between the - - you know, however wide the street is there is, you know, I don't know how far it actually is. It's just across the street. You know, however far the street is." Tr. 265.

{¶43} Appellant failed to object to the trial court's question. Thus, we must address this assignment of error under the plain error doctrine. Implementation of the plain error doctrine is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. The plain error doctrine permits correction of

judicial proceedings where error is clearly apparent on the face of the record and is prejudicial to the appellant. Id.

{¶44} In *Kimble Mixer Co. v. St. Vincent*, Tuscarawas App. No. 2005AP090068, 2006-Ohio-2258, this Court relied on the Second District Court of Appeals case of *Jenkins v. Clark* (1982), 7 Ohio App.3d 93, in considering a claim of error in the trial court's questioning of a witness:

{¶45} "In regard to the examination of witnesses, the trial judge is something more than a mere umpire or sergeant at arms to preserve order in the courtroom. He has active duties to perform in maintaining justice and in seeing that the truth is developed and may for such purpose put proper questions to the witnesses, and even leading questions. *Gilhooley v. Columbus Ry. Power & L. Co*. (1918), 20 Ohio N.P. (N.S.) 545. If at any time during the trial of a cause a judge is prompted, in the interest of justice, to develop facts germane to an issue of fact to be determined by the jury, it is proper that he do so. *Dependabilt Homes, Inc. v. Haettel* (1947), 81 Ohio App. 422,* * *.

{¶46} "Although there may be a difference of opinion and taste as to how much a judge should ask questions from the bench, he may, according to the generally accepted view, in his discretion, propound to witnesses, proper and pertinent questions which are designed to develop the true character of the transaction in question, which counsel have failed to propound, and thus elicit testimony more fully revealing the true facts in the case. *Gilhooley,* supra. In fact, there should be no hesitancy on the part of the trial court, in the interest of justice, in examining a witness so as to clarify and bring out in an understandable way the material facts in issue, using proper discretion and

being particularly careful not to overemphasize one side of the case. *Smith v. Milhoff* (App. 1935), 20 Ohio Law Abs. 537.

{¶47} "To this end the trial court may ask leading questions where counsel cannot do so although, of course, the court should avoid asking a question in such a leading form as to indicate to the jury the mind of the court on a controverted fact. *Gilhooley,* supra. He must use great care not to assume the role of an advocate and should not conduct himself so as to give the jury any impression of his feelings (sic) *State, ex rel. Wise v. Chand* (1970), 21 Ohio St.2d 113, * * *. The third and fourth paragraphs of the syllabus in *Chand* are instructive, to wit:

{¶48} "'3. In a trial before a jury, the court's participation by questioning or comment must be scrupulously limited, lest the court, consciously or unconsciously, indicate to the jury its opinion on the evidence or on the credibility of a witness.

{¶49} "'4. In a jury trial, where the intensity, tenor, range and persistence of the court's interrogation of a witness can reasonably indicate to the jury the court's opinion as to the credibility of the witness or the weight to be given to his testimony, the interrogation is prejudicially erroneous.'

{¶50} "In the absence of any showing of bias, prejudice, or prodding of a witness to elicit partisan testimony, it will be presumed that the court acted with impartiality in attempting to ascertain a material fact or to develop the truth. *Gilhooley,* supra." Id. at 97-98. *Kimble Mixer*, 2006-Ohio-2258 at ¶91-96.

{¶51} In the instant case, the court's isolated question concerning the distance Aronhault was from the scene of the incident in no way conveyed the court's opinion on the credibility of the witness. Aronhault had earlier testified that he was 30-40 feet from

appellant's home. Tr. 235. On cross-examination, the prosecutor used a distance of 50 feet, to which Aronhault responded that he couldn't judge the distance. The court's single question was targeted to clear up the confusion regarding distance and location and did not in any way comment on the credibility of the witness or appellant's guilt.

Hearsay

{¶52} Appellant next argues that the court admitted inadmissible hearsay through the rebuttal testimony of Deputy Wes Wallace.

{¶53} On direct examination, Aronhault testified that he could not remember whether he told appellant who was inside the home when appellant arrived at the scene. Tr. 243. On cross-examination, the prosecutor asked Aronhault if he remembered making a prior statement to police that he told appellant it was his wife, Van Blanchard and another man inside the house. Tr. 263. Aronhault stated that he did not remember. Tr. 263. The state then called Deputy Wallace as a rebuttal witness. Deputy Wallace testified:

{¶54} "Q. Deputy, just a couple questions for you. In your investigation of this case, did you have the opportunity to question a Robert Aronhalt?

{¶55} "A. I did.

{¶56} "Q. When was that?

{¶57} "A. June the 20th.

{¶58} "Q. And what did Mr. Aronhalt tell you?

{¶59} "A. He told me that the day that it happened, that when Ed pulled up, he actually parked at - - well, what he told me that day, Ed pulled up, got out of his truck, and at that point Bob said to Ed that, 'It's your wife, Van Blanchard, and some other

guy.' And Ed turned to him and said, 'I'll take care of it,' and went into the garage." Tr. 458.

{¶60} Evid. R. 613(B) provides:

{¶61} **"(B) Extrinsic evidence of prior inconsistent statement of witness.** Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:

{¶62} "(1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;

{¶63} "(2) The subject matter of the statement is one of the following:

{¶64} "(a) A fact that is of consequence to the determination of the action other than the credibility of a witness;

{¶65} "(b) A fact that may be shown by extrinsic evidence under Evid.R. 608(A), 609, 616(A), 616(B) or 706;

{¶66} "(c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence."

{¶67} Under this Rule, Wallace's testimony was admissible as a prior inconsistent statement of a witness. The statement was offered to impeach Aronhault's testimony, Aronhault was given a prior opportunity to explain or deny the statement, and counsel for appellant had an opportunity to interrogate Aronhault concerning the statement. The issue of what appellant had been told when he entered the house was

material to the issue of his claim of self-defense. The prior statement by Aronhault was admissible hearsay under Evid. R. 613(B).

{¶68} While a prior statement by Aronhault concerning what appellant said in response was included in Wallace's testimony and is not admissible under Evid. R. 613(B), its admission was harmless because appellant previously admitted on the stand to saying that he would take care of it. Tr. 401.

{¶69} Appellant argues regardless of the admissibility of the prior statement under the Rules of Evidence, the statement was inadmissible under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.E.2d 177. In *Crawford*, the United States Supreme Court held that the admission of a hearsay statement, admissible under state law, violated the Sixth Amendment right to confront witnesses where the statement was testimonial in nature and the defendant had no opportunity to cross-examine the declarant. Id. at 68. In the instant case, the declarant testified at trial and was available for questioning by appellant on the prior statement. Appellant's *Crawford* claim is, therefore, without merit.

Jury Instruction

{¶70} In his final claim in the first assignment of error, appellant argues that the court erred in refusing to give the following instruction to the jury:

{¶71} "PRESUMPTION-DESCRIBED. The defendant is presumed to have acted in (self defense) (defense of another) when using defensive force that was (intended)(likely) to cause death or great bodily harm to another if the person against whom the defensive force was used (was in the process of entering) (had entered),

unlawfully and without privilege to do so, the (residence) (vehicle) occupied by the defendant."

{¶72} Ohio Jury Instructions 421.24.

{¶73} Generally, a party is entitled to the inclusion of requested jury instructions in the court's charge to the jury "[I]f they are a correct statement of the law applicable to the facts in the case * * *.'" *State v. Renicker*, Tuscarawas App. No. 2006 AP 10 0059, 2008-Ohio-288, citing *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828.

{¶74} Appellant was not entitled to the requested instruction. The undisputed evidence demonstrated that appellant's wife was co-owner of the property and she was therefore entitled to be on the property. No restraining orders or other orders had been issued in the divorce case to prevent her access to the property. The evidence established that Blanchard and Corder were there with her permission. Whether or not appellant subjectively knew who they were and that they were lawfully on the property with his wife relates to his claim of self-defense, and the court instructed the jury on self-defense. However, he was not entitled to an instruction that he was presumed to have acted in self-defense because they were unlawfully on the property. For the same reasons, the court did not err in sustaining an objection to appellant's comment in closing argument concerning this presumption.

{¶75} The first assignment of error is overruled.

II

{¶76} In his second assignment of error, appellant argues the cumulative effect of the errors raised in his first assignment of error constitute a denial of his right to a fair trial.

{¶77} Although violations of the Rules of Evidence during trial may singularly not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprived the defendant of the constitutional right to a fair trial. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, ¶2 of the syllabus. The *DeMarco* case involved numerous violations of the hearsay rule, which the Supreme Court found cumulatively, resulted in prejudicial error. Id. at 196-197. However, the doctrine is not applicable to cases where the court has not found multiple instances of harmless error. *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623, 1995-Ohio-168.

{¶78} In the instant case, we have found no error, harmless or otherwise, in the court's rulings on the issues raised in appellant's first assignment of error. Accordingly, the cumulative error doctrine does not apply.

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

III

{¶80} In his third assignment of error, appellant argues that the court erred in overruling his motion to continue sentencing and further erred in refusing to allow appellant to present witnesses at sentencing.

{¶81} The decision to grant or deny a continuance is generally committed to the sound discretion of the trial court. *State v. Grant* (1993), 67 Ohio St.3d 465, 479; *State v. Lorraine* (1993), 66 Ohio St.3d 414, 423. In order to find an abuse of discretion, we

must determine that 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.

{¶82} Appellant made an oral motion to continue just prior to sentencing based on the fact that counsel was not prepared. Tr. 549. The court noted that every criminal defendant runs the risk that if convicted, the court may proceed directly to sentencing. Appellant has not demonstrated that the court abused its discretion in overruling his motion to continue. Appellant presented no argument to the court regarding what he would have presented had he been given a continuance. Appellant's attorney argued to the court that appellant was a lifetime resident of the county and a Purple Heart winner, serving two tours of duty in Vietnam. Counsel noted that appellant worked 33 years at Stone Container and had to this point been a law-abiding citizen. Counsel argued that the recidivism rate of a 60-year-old man with no prior criminal record is very low, prison would be difficult on a man appellant's age, and sentencing him to prison would impact his opportunity to defend himself in his pending divorce case. Counsel also successfully argued that the two counts of assault should merge into the two counts of felonious assault. The record does not demonstrate that appellant's opportunity to argue in mitigation of sentence was prejudiced by the denial of the motion to continue.

{¶83} Appellant also argues the court erred in overruling his request to allow his girlfriend, who had testified earlier in the trial, to testify as a character witness in mitigation of sentence.

{¶84} Pursuant to Crim.R. 32(A)(1), a trial court is required to allow defense counsel and the defendant, if they so wish, to address the court at sentencing. The Rule

does not require a sentencing court to hear from defense witnesses. Pursuant to R.C. 2947.06(A)(1), a trial court "may hear testimony in mitigation of a sentence." Whether to hear testimony in mitigation of sentence is discretionary with the trial court. *State v. Anderson*, 172 Ohio App.3d 603, 876 N.E.2d 632, 2007-Ohio- 849, ¶20.

{¶85} Appellant has not demonstrated that the court abused its discretion in not allowing him to present a witness at the sentencing hearing. As noted above, counsel argued extensively for a lesser sentence that did not include incarceration, and argued concerning appellant's good character. Appellant addressed the court and expressed remorse for his actions and remorse for the resources the State had to use to try him. Tr. 554.

{¶86} Further, reversible error cannot be predicated on a ruling that excludes evidence unless the evidence was proffered to the court or it was clear from the context. Evid. R. 103(A). Appellant did not proffer Ms. Davis's testimony, nor did counsel summarize her testimony except to generally state that she would be a character witness for appellant.

{¶87} The third assignment of error is overruled.

{¶88} The judgment of the Coshocton County Common Pleas Court is affirmed.

By: Edwards, P.J.

Gwin, J. and

Wise, J. concur

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JUDGES

JAE/r1007

[Cite as *State v. Skerness*, 2011-Ohio-188.]

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
EDWARD SKERNESS	:	
Defendant-Appellant	:	CASE NO. 09-CA-28

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

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JUDGES