

[Cite as *State v. Wright*, 2009-Ohio-5474.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080437
	:	TRIAL NO. B-0704087
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
JEBRELL WRIGHT,	:	
	:	
Defendant-Appellant.	:	

**Criminal Appeal From: Hamilton County Court of Common Pleas**

**Judgment Appealed From Is: Affirmed as Modified**

**Date of Judgment Entry on Appeal: October 16, 2009**

*Joseph T. Deters*, Prosecuting Attorney, and *Ronald W. Springman*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

*Michaela Stagnaro*, for Defendant-Appellant.

**Note: We have removed this case from the accelerated calendar.**

**CUNNINGHAM, Judge.**

{¶1} Defendant-appellant Jebrell Wright appeals from the trial court's judgment convicting him of murder and felonious assault. We affirm.

{¶2} On the evening of July 11, 2007, two men assaulted Kerria Anderson, who was seven months' pregnant. Anderson's unborn child, the target of the attack, died as a result. Anderson identified Wright and his co-defendant, Alphonso Price, who was believed to be the father of the unborn child, as the perpetrators of the attack. Two other witnesses confirmed Wright's participation in the attack.

{¶3} Wright and Price were charged with aggravated murder, felonious assault, and kidnapping in connection with the July 11 attack. They were tried together as complicitors.

{¶4} The jury acquitted Wright of aggravated murder, but he was found guilty of the lesser-included offense of murder, felonious assault, and kidnapping. Wright moved for an acquittal under Crim.R. 29(C), based on insufficient evidence. The trial court overruled the motion for acquittal, merged the kidnapping with the felonious assault, and sentenced Wright to a mandatory prison term of 15 years to life for murder and a consecutive prison term of eight years for the felonious assault. Wright now raises five assignments of error.

I. The Trial

{¶5} Anderson testified that on the evening of July 11, 2007, she went to Findlay Park, located in the Over-the-Rhine area of Cincinnati, with her toddler, Jakayla, and a friend. At the time, Anderson was pregnant, and both she and Price believed—incorrectly—that Price was the father of the unborn child. Weeks before, in June, at Price's Aunt Eileen's house on McMicken Avenue near Findlay Park, Price

had demanded that Anderson abort the pregnancy, but she had refused. The refusal prompted a beating by Price, which centered on Anderson's stomach and included his threat "to kill" the unborn baby. After this June assault, Anderson was treated at Good Samaritan Hospital by Dr. Patrick Dawson, who observed bruises on both sides of Anderson's abdomen and determined that the baby she was carrying was healthy. Dawson told Anderson to stay away from the father of the unborn child, whom Anderson had blamed for her injuries. Anderson claimed that she had tried to avoid Price after the June assault.

{¶6} While at Findlay Park on July 11, Anderson saw Price. He was uncharacteristically nice to her and even rubbed her belly. Anderson testified that Price had convinced her to go to a nearby apartment with him, and that she had brought her child, her stroller, and food that she had earlier purchased from an Arby's restaurant. When they arrived outside the apartment building at 1818 Race Street, they stayed there talking for a short time. Then they climbed the stairs to apartment 317 and entered, leaving the stroller in the hallway. Almost immediately upon entering the main room of the apartment, Anderson was struck in the face by Wright, whom Anderson had never met. When she called out to Price for help, he picked up Jakalya and gave her to a man named James Hurt who was standing in the hallway outside the apartment. Price then came back into the apartment, shut the door, and joined Wright in kicking and punching Anderson. When Anderson fell to the ground, Wright and Price repeatedly stomped on her stomach. While this was going on, Wright kept calling Anderson "bitches," and Price said that she should have had an abortion and that he was going "to kill" the unborn child. The beating was so brutal that Anderson defecated on herself.

{¶7} Anderson claimed that she was able to escape when Chris Barnes, the resident of the apartment who had been in a back room, entered the front room, yelled for Wright and Barnes to stop, and was then attacked by Wright. Anderson left the apartment, grabbed Jakayla from Hurt, and started down the steps with Price in pursuit, leaving her stroller, purse, and other belongings behind. As she started down the steps, Price pushed her and she fell down the steps. Price then started kicking Anderson again in the stomach while she held Jakayla, saying that she should have had an abortion.

{¶8} Anderson eventually made it out to Race Street, where she boarded a bus that was stopped on the street. The driver dropped her off at the Hamilton County Justice Center, where Anderson ran into the women's restroom and called 911.

{¶9} Anderson, who was not wearing a watch that evening, was not able to provide the specific time of each event. And she admitted at trial that she had lied to the police by initially claiming that Price and others had forced her to go with Price to the apartment where she was beaten.

{¶10} Cincinnati Police Officer Barbara Maleski testified that she had received a dispatch around midnight on July 11, 2007, to respond to the Justice Center. When she arrived, she saw the visibly pregnant Anderson outside the women's restroom on her knees, crying and distraught. Anderson complained of severe pain, was unable to move, and screamed when she was touched. Feces were on her clothes and her legs. Her top was torn, she was shoeless, and many of her hair extensions were missing.

{¶11} Anderson was transported with Officer Maleski to University Hospital by ambulance. En route, she told Maleski that she had been assaulted by three black males and that she knew only one of them. She identified the person she knew as Lonzo Pitts, who the police later determined was Alphonso Price. Anderson said that Price was the unwilling father of her unborn baby and had dragged her inside a green building on Race Street where he had expressed his unwillingness to be a father and beaten her with another individual. Anderson clarified at this time that the third individual (Hurt) had not participated in the beating.

{¶12} Upon arriving at the hospital, Officer Maleski observed severe, deep purple bruising on Anderson's arms, thighs, back and abdomen, including bruising in the shape of a shoe or boot print on Anderson's thighs. Anderson received prompt treatment from Dr. Michelle Rosario. The doctor testified that she too had observed significant bruising and swelling on Anderson's abdomen, lower back, and thighs, and that some bruising was shaped as foot or boot prints.

{¶13} Dr. Rosario performed an ultrasound that showed that Anderson was seven months' pregnant, but that the viable baby girl that Anderson had been carrying was deceased. Labor was induced, and Anderson delivered a stillborn baby she named Precious Anderson. Dr. Rosario testified that she did not notice any abnormalities in the baby, except that her skull felt like it had been fractured. The coroner, Dr. Obinna Ugwu, confirmed that the viable unborn baby had suffered a skull fracture. He opined, in a videotaped deposition that was played at trial, that Precious had died as a result of severe head injuries sustained from blunt impact to the head that had been inflicted while Precious was in the womb, a short time before her death. He also found that the placenta had been injured.

{¶14} Cincinnati Police Homicide Detective Kurt Ballman investigated the attack and testified at trial. He and his partner, Detective Jeff Schare, had visited Anderson in the hospital shortly after her arrival. At that time, Anderson, who was “distraught” and concerned about the baby she was carrying, described what had happened to her in a green apartment building near Findlay Park. She provided the detectives with the names of “L’il Al,” whom she also knew as Alfred Pitts, and “Jamie,” later identified as James Hurt. She informed them that she did not know the third man involved, but that she would be able to identify him.

{¶15} Detective Ballman described Anderson as “beaten up pretty bad,” with visible injuries and swelling on her arm, abdomen, shoulder, and face. Criminalist Barbara Mirlenbrink photographed the injuries, and the photographs were admitted into evidence at trial.

{¶16} The police determined that “L’il Al” was Alfonso Price, and Anderson identified him as one of her attackers after she was shown his photograph. The police also located the green apartment building where the attack had occurred. Detective Ballman testified that the building had a long, steep stairwell. When he got to the top of the stairs, he saw Anderson’s stroller. Near the stroller was the door for apartment 317. The apartment belonged to Chris Barnes, who gave the police permission to search it. At trial, Ballman described the inside of the apartment as in shambles, with Anderson’s purse and shoes near the door and hair weave and fecal matter scattered on the floor. Ballman also recovered inside the apartment a broken denim belt for Anderson’s clothing, Anderson’s broken jewelry, an Arby’s bag, and blood stains.

{¶17} In the days following the beating, the police began a search for Price. On July 17, 2007, James Hurt came forward and provided the police with the names “Jebrian,” “Jebbron,” and “L’il Bro” for the other individual they were seeking.

{¶18} About two weeks later, a special police tactical unit located and arrested Price at the Four Towers Apartments. Detective Ballman was contacted and informed that Price was in custody. Ballman asked if Price was with anyone with the first name Jebrell. Ballman was told that Price was in an apartment with a Jebrell Wright. Wright was then arrested.

{¶19} After Wright’s arrest, police placed a photograph of him in a six-photograph lineup that was shown to Anderson and Hurt. Both Anderson and Hurt identified Wright as an attacker first to the police and again at trial.

{¶20} Chris Barnes, who resided in the apartment where the attack had taken place, also identified Wright as Anderson’s attacker at trial. Barnes added that Wright had arrived first at his apartment that night, and that he had told Barnes that Price would be arriving “shortly.”

{¶21} The defense presented four witnesses. Keyona Thomas, Wright’s sister, testified that she was with Wright all day and evening on July 11, 2007. According to Thomas, they had spent the day at their mother’s apartment on East 12<sup>th</sup> Street in Over-the-Rhine, where they both lived, and they had gone to a playground with her daughter from 5:00 p.m. until 8:30 p.m. They returned home together, and she went to sleep at 11:00 p.m., believing that Wright was in his bedroom.

{¶22} Sandra Smith testified that she had seen Anderson in Findlay Park on the evening of July 11, 2007, and that Anderson had told her that she was going to get an abortion. Price was with Anderson in the park, rubbing her belly.

{¶23} The two other defense witnesses, Ronkita Price and Johnrella Jackson, testified that on July 11, 2007, they had observed Anderson looking for Price at his Aunt Eileen's house several times.

{¶24} In rebuttal, the state presented over objection the testimony of Deputy John Kampaus and Deputy Kenneth Pendleton. Kampaus testified that he had been assigned to guard Wright and Price in the courthouse holding facility when court was in recess during the trial. On a lunch recess taken after jury voir dire, he had discovered a handwritten note in the paper-towel dispenser of the holding facility's restroom immediately after Price had exited from the restroom. The note contained many details paralleling the facts in the case and suggested a version of events about which one could testify that would exonerate the pair. The note was admitted into evidence over objection. Deputy Pendleton authenticated the videotaped surveillance of the restroom area taken around the time the note was recovered and a collection of still photographs that he had printed from the videotape.

## II. Sufficiency and Weight of the Evidence

{¶25} In his second and fourth assignments of error, Wright asserts that (1) the trial court erred in overruling his Crim.R. 29(C) motion for an acquittal; (2) his convictions were not supported by sufficient evidence; and (3) his convictions were against the weight of the evidence.

### **A. Sufficiency**



{¶26} For this court to reverse a conviction based on insufficient evidence, we must conclude, after viewing the evidence in the light most favorable to the state, that no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.<sup>1</sup> We review the trial court's denial of Wright's Crim.R. 29(C) motion under the same sufficiency standard.<sup>2</sup>

### **1. Murder**

{¶27} The state was required to show that Wright had purposely caused the unlawful termination of Anderson's pregnancy.<sup>3</sup> Wright first argues that the state failed to prove that he was the perpetrator of the acts that terminated Anderson's pregnancy because he had presented an alibi defense. But testimony from Anderson, Hurt, and Barnes showed that Wright was present at Barnes's apartment on the evening of July 11, 2007, and that he had participated in punching and kicking the pregnant Anderson. Finally, the state offered into evidence a note that Price had written to Wright in which Price suggested that Wright give testimony in an effort to cover up the crime. This evidence was more than sufficient for a reasonable trier of fact to conclude that Wright was a perpetrator.

{¶28} Next Wright argues that the state failed to establish that he had the requisite intent for the murder: to purposely cause the termination of Anderson's pregnancy. A person acts purposely when it is his specific intention to cause a certain result.<sup>4</sup>

{¶29} We reject Wright's argument because the manner in which he attacked the visibly pregnant Anderson supported an inference that Wright

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<sup>1</sup> *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

<sup>2</sup> See *State v. Carter*, 72 Ohio St.3d 545, 553, 1995-Ohio-104, 651 N.E.2d 965.

<sup>3</sup> R.C. 2903.02(A).

<sup>4</sup> R.C. 2901.22(A).

specifically intended to cause the death of her unborn child. Wright initiated the assault by sucker-punching Anderson in her face and then strove to knock her to the floor, where he could kick and stomp on her abdomen. His assault on Anderson's abdomen and back was so severe that it fractured the unborn baby's skull, injured the placenta, and left Anderson deeply bruised and swollen. In light of this evidence, one could reasonably have inferred that Wright had assaulted Anderson with the purpose of terminating her pregnancy.

{¶30} Wright argues last that the state failed to prove that his assault had terminated the pregnancy, even if it is assumed that he was present. He suggests that the fetus died from lack of prenatal care, or that the fatal injuries were inflicted in the June assault on Anderson. Alternatively, he argues that Price alone had caused the termination of the pregnancy on July 11 because, according to Anderson, Price had administered the last kicks to her abdomen after pushing her down the apartment stairs.

{¶31} We reject these arguments. First, the evidence sufficiently demonstrated that the trauma inflicted on the evening of July 11 had caused the death of the fetus: the coroner unequivocally testified that the fetus's skull had been fractured by recent trauma and that this had caused the death of the viable fetus; the physician who had treated Anderson after the June attack testified that he had heard the heartbeat of the unborn child; and Anderson herself testified that she had felt her unborn child moving and growing after the June attack. Second, the state was not required to establish that Wright had actually administered the fatal blow because it had proceeded under a complicity theory and had presented sufficient evidence that Wright had shared Price's intent to cause the termination of the pregnancy.

{¶32} We find no merit to Wright’s arguments and hold that his murder conviction was supported by sufficient evidence.

## **2. Felonious Assault**

{¶33} To convict Wright of felonious assault, the state was required to prove that Wright had knowingly caused serious physical harm to Anderson.<sup>5</sup> Wright again argues that the state failed to prove his involvement in the offense, and we again reject this argument based upon the eyewitness testimony. Wright further argues that the state failed to prove that any of Anderson’s injuries rose to the level of “serious physical harm.”

{¶34} “Serious physical harm” is defined in R.C. 2901.01(A)(5) as “(a) [a]ny mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) [a]ny physical harm that carries a substantial risk of death; (c) [a]ny physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) [a]ny physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; (e) [a]ny physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.” The gravity and duration of the harm separates “serious physical harm” from “physical harm.”<sup>6</sup>

{¶35} Wright reasons that Anderson’s unborn child, not Anderson, suffered serious physical harm. The state, in response, argues that “where a pregnant woman is assaulted and the fetus is killed, the fetus is considered to be part of the mother so

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<sup>5</sup> R.C. 2903.11(A)(1).

<sup>6</sup> See R.C. 2901.01(A)(3).

that the death of the fetus and the resultant stillborn birth and hospitalization of the mother for that purpose constitutes a temporary substantial incapacity, supporting a felonious assault conviction for serious physical harm to the mother.” As authority to support this argument, the state cites *State v. Winston*, a 1991 decision from the Second Appellate District.<sup>7</sup> *Winston* involved a felonious-assault prosecution after an assault on an expectant mother caused her no injuries but resulted in the death of her fetus. The *Winston* court upheld the following jury instruction directed to the “serious physical harm” element of felonious assault: “A person is defined as every natural person existing or present from birth. However, a viable unborn fetus is not a person as defined under the laws of Ohio. A viable unborn fetus is not a person. You are instructed, however, that a viable unborn fetus is considered to be part of the mother until such time as it is born.”<sup>8</sup>

{¶36} We decline to follow *Winston* because the jury instruction approved in that case predates current law, which recognizes the fetus as a separate crime victim in certain circumstances.<sup>9</sup> That said, the state’s evidence sufficiently supported a finding that Anderson’s injuries rendered her temporarily and substantially incapacitated as contemplated by R.C. 2901.01(A)(5)(C), and thus, the state showed “serious physical harm.” Anderson’s body absorbed the same intense blow that cracked the fetus’s skull. The trauma inflicted by Wright was so severe that it bruised Anderson’s back and abdomen, injured her placenta, and caused vaginal bleeding. Officer Maleski testified that when she had located Anderson outside the

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<sup>7</sup> (1991), 71 Ohio App.3d 154, 593 N.E.2d 308.

<sup>8</sup> *Id.* at 160.

<sup>9</sup> R.C. 2903.02(A) and 2903.09. See, also, R.C. 2901.01(B)(1)(a) (“Subject to division (B)(2) of this section, as used in any section contained in Title XXIX [29] of the Revised Code that sets forth a criminal offense, ‘person’ includes all of the following: (ii) an unborn human who is viable.”).

women's restroom at the Justice Center, Anderson was unable to move on her own. Anderson was hospitalized for several days after sustaining this trauma and giving birth to a stillborn female. We conclude that this evidence supported a finding that Anderson's physical harm involved a temporary, substantial incapacity and rose to the level of serious physical harm as defined in R.C. 2901.01(A)(5)(c).

{¶37} Additionally, we hold that the evidence supported a finding that Anderson's physical harm involved "acute pain of such duration as to result in substantial suffering" and rose to the level of "serious physical harm" as defined in R.C. 2901.01(A)(5)(e).

{¶38} Anderson described receiving a beating so severe that she defecated on herself. She estimated that she was struck 20 times by fist or foot and pushed down a flight of stairs. She described having pain "everywhere"—"in my stomach and back, on my face, on my arms, on my legs." When Officer Maleski located Anderson outside the women's restroom at the Justice Center, Anderson complained of severe pain and screamed in pain when she was touched. Anderson was transported to University Hospital, where she was admitted for several days and treated by Dr. Rosario. In addition to finding Anderson's fetus deceased, Dr. Rosario found "significant bruising and swelling" on Anderson's "upper extremities," "abdomen," "lower back," and "thighs." The coroner found trauma to the placenta. The detectives who met with Anderson in the hospital testified that they had also observed bruising and swelling all over her body. Officer Maleski, who had photographed Anderson's injuries, identified at trial the photographs showing red marks on Anderson's dark skin.

{¶39} The evidence presented at trial with respect to the gravity and duration of Anderson’s injuries was sufficient to prove that she had suffered “serious physical harm” within the meaning of both R.C. 2901.01(A)(5)(c) and (e), and that Wright had inflicted it. Thus, we reject Wright’s argument that his felonious-assault conviction was not supported by sufficient evidence.

{¶40} After reviewing the evidence in the light most favorable to the state, we determine that a rational trier of fact could have found the essential elements of the offenses beyond a reasonable doubt. Thus, we conclude that the state presented sufficient evidence to support Wright’s conviction for the felonious assault of Anderson and the murder of her unborn child, and that the trial court did not err in overruling Wright’s motion for an acquittal.

**B. Weight**

{¶41} In determining whether a judgment is against the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.<sup>10</sup> Our discretionary power to grant a new trial may only be exercised in the exceptional case in which the evidence weighs heavily against a conviction.<sup>11</sup>

{¶42} Although the evidence offered by the state conflicted with Wright’s alibi defense, it was primarily the obligation of the jury to assess the credibility of the

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<sup>10</sup> *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211.

<sup>11</sup> *Thompkins*, supra; *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

witnesses and to weigh the evidence. In carrying out this obligation, the jury was free to accord greater weight to the testimony of Anderson, Hurt, and Barnes, even after considering inconsistencies in their testimony and impeachment on cross-examination. The evidence of Wright's guilt was too strong for us to conclude that the jury lost its way in assessing these witnesses' credibility.

{¶43} Based upon our review of the record, we are unable to concur with Wright's assertion that the evidence weighed heavily against conviction or that the convictions resulted in a manifest miscarriage of justice. We conclude, therefore, that Wright's convictions were not against the manifest weight of the evidence.

{¶44} Accordingly, we overrule the second and fourth assignments of error.

### **III. The Note**

{¶45} In his first assignment of error, Wright argues that the trial court erred by admitting Price's note to Wright into evidence and allowing it to be used as rebuttal evidence; in the third assignment of error, he argues that the court erred by overruling his motions for a mistrial based upon the admission of the note. Because these assignments of error are related, we discuss them together.

#### **A. Admissibility**

{¶46} Wright claims that the note was inadmissible because it was not properly authenticated and contained hearsay. We first review whether the trial court abused its discretion in determining that the note passed the authentication test.

{¶47} Authentication is a condition precedent to admission, but the burden for authentication is not great.<sup>12</sup> Evid.R. 901 governs authentication: "The

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<sup>12</sup> *State ex rel. Montgomery v. Villa* (1995), 101 Ohio App.3d 478, 484-485, 655 N.E.2d 1342.

requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims,” which includes evidence of distinctive characteristics such as “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.”<sup>13</sup> The proponent of the evidence need only make a prima facie showing.<sup>14</sup>

{¶48} The trial court found the note authenticated after an extensive voir dire of Deputy Kamphaus. According to Kamphaus, he had found the note hidden in the paper-towel dispenser immediately after Price had been in a restroom that was used only by other inmates awaiting court hearings. Kamphaus searched the restroom because Wright had asked to use it upon Price’s return to his cell. The note was promptly provided to the trial court, which notified the parties.

{¶49} The note contained detailed information paralleling the facts of the case. For instance, the date of the offense was listed and underscored in the side margin. The top of the note was titled “Read my Nigga” and “Yo Part on that day.” The text provided an account of travels in terms of “you,” “I,” and “we,” and mentioned locations such as “Finley Park,” [sic] and “Aunt Alene [sic] House on McMicken” and “Race” Street, which were repeatedly mentioned at trial, and the note specifically referred to the victim, Kerria (spelled “Kayair” in the note). It also mentioned what “we” had discussed on “July 11” and advised that “we aint say shit about da hoe.”

{¶50} Wright contends that the state failed to present any evidence that Price had written the note other than that Price was the last occupant of the restroom

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<sup>13</sup> Evid.R. 901(B)(4).

<sup>14</sup> *State v. Brown*, 151 Ohio App.3d 36, 2002-Ohio-5207, 783 N.E.2d 539, at ¶35.



before the note's discovery. This circumstance was insufficient to satisfy Evid.R. 901(A), according to Wright, because over 30 prisoners had likely used the restroom that day, and because Kamphaus testified that he did not know when the note had been written or who had written it. But Wright has overlooked the pointed contents of the note that, along with circumstances in which it was found, served to authenticate the note and show that it was what the state claimed it to be: that is, a note written by Price instructing Wright about how to testify to exonerate the pair. In light of these facts, we hold that the note was properly authenticated, and that the trial court did not abuse its discretion admitting it.

{¶51} Wright claims next that the note, which he did not author, should have been excluded from evidence because it contained hearsay. The state argued and the trial court held, however, that the note was not hearsay under Evid.R. 801(D)(2)(e), the co-conspirator exception to the hearsay rule, and was admissible against Wright.

{¶52} Evid.R. 801(D)(2)(e) provides that “[a] statement is not hearsay if: \* \* \* (2) [t]he statement is offered against a party and is \* \* \* a statement by a co-conspirator or a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.”<sup>15</sup> In this case, the note was offered against Wright, a party and a co-conspirator, and was alleged to be a statement of Price made during the course and in furtherance of a conspiracy that included the concealment of their criminal conduct.<sup>16</sup> And the state presented a prima facie

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<sup>15</sup> Evid.R. 801(D)(2)(e); *State v. Daniels* (1993), 92 Ohio App.3d 473, 482, 636 N.E.2d 336.

<sup>16</sup> See *State v. Moore*, 9th Dist. No. 05CA008762, 2006-Ohio-4926, at ¶15-16, citing *State v. Shelton* (1977), 51 Ohio St.2d 68, 364 N.E.2d 1152, paragraphs one and two of the syllabus, vacated in part (1978), 438 U.S. 909, 98 S.Ct. 3133; *State v. Keeton*, 5th Dist. No. 03CA43, 2004-Ohio-3676, at ¶24-28; *Daniels*, supra.

showing of a conspiracy<sup>17</sup> between Price and Wright, independent of the note, involving a plan to kill Anderson's fetus on the evening of July 11 in Barnes's apartment. Thus, the statement was admissible under the rule.<sup>18</sup>

{¶53} To meet the prima facie requirement of the rule, the state presented the testimony of Anderson, Hurt, and Barnes. Anderson testified that Price believed the child she was carrying was his, and that he had repeatedly demanded that she have an abortion. She claimed that Price had punched and kicked her in the stomach about a month before the July attack. She also testified that Price was unusually kind to her in Findlay Park and had appeared to have a change of heart about fatherhood, that because of this she went with him to Barnes's apartment, where Wright, whom she had never met before, sucker-punched her, and that Wright and Price had beaten her in an assault that centered on her abdomen and successfully caused the death of her fetus. Hurt confirmed that Price had brought Anderson to Barnes's apartment that evening and that Wright had beaten Anderson. Barnes testified that he also had observed Wright beating Anderson, and he added that when Wright had arrived at his apartment that evening, Wright had told him that he was expecting Price to join him "shortly."

{¶54} Certainly one could infer from this evidence alone an agreement between Price and Wright to lure Anderson to Barnes's apartment on the evening of July 11 for the purpose of killing the fetus that Price believed was his unborn child. Thus, we find no error in the trial court's conclusion that the state had shown the existence of a conspiracy upon independent proof, and that the state had met the

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<sup>17</sup> See R.C. 2923.01.

<sup>18</sup> See *State v. Carter*, 72 Ohio St.3d 545, 1995-Ohio-104, 651 N.E.2d 965, paragraph three of the syllabus.

foundational requirements for admissibility of the note under the co-conspirator exception to the hearsay rule.

**B. Rebuttal Evidence**

{¶55} Next Wright argues that the note was not proper rebuttal evidence because the note could have been introduced during the state’s case-in-chief, and because the note did not rebut any evidence introduced by the defense.

{¶56} Rebuttal evidence is that which is given “to explain, refute, or disprove new facts introduced by the adverse party.”<sup>19</sup> The trial court has discretion to determine the scope of proper rebuttal.<sup>20</sup>

{¶57} In this case, the gist of Wright’s defense was that he was not at the scene of the beating, and that the state’s witnesses, especially Anderson, were not credible. The note rebutted this defense: the fact that Price had attempted to shape Wright’s testimony with a concocted version of events was relevant to the credibility of the state’s witnesses and undermined the alibi testimony from Wright’s sister, Keyona Thomas. Thus, we reject Wright’s argument that the trial court abused its discretion in allowing the state to use the note as rebuttal evidence.

{¶58} Wright’s contention that the trial court erred by admitting the note into evidence is feckless for all these reasons.

**C. Mistrial**

{¶59} In a related argument, Wright contends that the trial court erred by overruling his motions for a mistrial. Although Wright has not developed this argument on appeal, the trial transcript shows that Wright made several requests for a mistrial based upon the introduction of the note into evidence. He claimed that the

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<sup>19</sup> *State v. McNeill*, 83 Ohio St.3d 438, 446, 1998-Ohio-293, 700 N.E.2d 596.

<sup>20</sup> *Id.*; *State v. DuBose*, 1st Dist. No. C-070397, 2008-Ohio-4983, at ¶69.

admission of the unauthenticated note prejudiced him, and that even if the state had met the requirement of authentication, the note was only admissible against Price and should not have been admitted at their joint trial. Wright also claimed that a mistrial was warranted where the authentication of the note required testimony informing the jury that Wright was in custody.

{¶60} We hold that the trial court did not abuse its discretion in denying Wright's motions for a mistrial.<sup>21</sup> We have already held that the note was properly authenticated and was admissible against Wright as a co-conspirator, and the note would have been equally admissible against Wright if he had been tried separately from Price. Further, Wright's claim of prejudice from the jury's knowledge that he was in custody during trial was wholly speculative. Moreover, the trial court offered to give a limiting instruction to the jury on the issue, but Wright did not request one. He cannot now claim error.

{¶61} Finding no merit to Wright's claims concerning the introduction of the note into evidence, we overrule the first and third assignments of error.

#### **4. Allied Offenses**

{¶62} In his fifth and final assignment of error, Wright argues that the trial court erred by separately sentencing him for allied offenses of similar import. Although the state proceeded against Wright for offenses arising from a single course of conduct, each offense involved a separate victim—the felonious assault of Anderson and the murder of her unborn child. Thus, the offenses were of dissimilar import and separate sentences were permitted.<sup>22</sup> Because Wright's allied-offenses argument is meritless, we overrule his fifth assignment of error.

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<sup>21</sup> See *State v. Sage* (1987), 31 Ohio St.3d 173, 182, 510 N.E.2d 343.

<sup>22</sup> See *State v. Jones* (1985), 18 Ohio St.3d 116, 480 N.E.2d 408.

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{¶63} We note, sua sponte, that Wright was properly notified, during his sentencing hearing, that he would be subject to a term of three years' postrelease control. The sentencing entry, however, indicates that the period is five years. We hereby modify the sentencing entry to reflect the three-year period that is required by statute, and that the trial court informed Wright that he would serve.

{¶64} Accordingly, we affirm the trial court's judgment as modified.

Judgment affirmed as modified.

**HENDON, P.J., and HILDEBRANDT, J., concur.**

*Please Note:*

The court has recorded its own entry on the date of the release of this decision.