[Cite as *State v. DiCarlo*, 2010-Ohio-3759.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	Case No. 09CA3301
	:	
Plaintiff-Appellee,	:	
	:	DECISION AND
v.	:	JUDGMENT ENTRY
	:	
JACOB DICARLO,	:	
	:	**Released 8/5/10**
Defendant-Appellant.	:	

APPEARANCES:

Marc E. May, Portsmouth, Ohio, for appellant.

Mark E. Kuhn, SCIOTO COUNTY PROSECUTOR, and Joseph L. Hale, SCIOTO COUNTY ASSISTANT PROSECUTOR, Portsmouth, Ohio, for appellee.

Per Curiam

{¶1} Jacob DiCarlo appeals his conviction for assaulting an employee of the Southern Ohio Correctional Facility ("SOCF") while DiCarlo was incarcerated there. DiCarlo contends that the trial court erred by admitting into evidence video footage and testimony of his aggressive behavior after the alleged assault because it is irrelevant, it constitutes inadmissible "other acts" evidence under Evid.R. 404(B), and its prejudicial effect substantially outweighed its probative value. We disagree. This evidence depicts acts that occurred contemporaneously with the assault on Sergeant Kaut. And it describes how the combative behavior DiCarlo exhibited as Kaut tried to control him continued when other officers struggled to subdue DiCarlo and remove him from Kaut's office. Thus, we find it inextricably intertwined with the assault. The trial court did not abuse its discretion, let alone commit plain error, in admitting the video tape or testimony.

{¶2} Next, DiCarlo argues that the court abused its discretion by ordering him to wear handcuffs and leg shackles during trial. However, at the pre-trial security hearing the State presented evidence that restraints were necessary to prevent violence because DiCarlo (1) had prior convictions that included intimidation of a victim or witness and two counts of felonious assault; (2) was an inmate in a supermax facility; and (3) had threatened a witness in this case**.** Thus, the trial court's decision was not unreasonable, arbitrary or unconscionable**.**

{¶3} DiCarlo also contends that the cumulative effect of the trial court's errors in admitting prejudicial, other acts evidence and restraining him during trial warrant the reversal of his conviction even if no single error constitutes reversible error. Because we have found that the trial court did not err in these regards, the cumulative error principle is inapplicable. Accordingly, we reject DiCarlo's argument.

{¶4} Finally, DiCarlo argues that the jury's verdict form is insufficient to convict him of fifth degree felony assault. We agree. The verdict form states that the jury found DiCarlo guilty of assault but fails to indicate the degree of the offense or any additional elements enhancing his conviction from a first degree misdemeanor to a fifth degree felony. Thus, we vacate DiCarlo's conviction and remand with instructions to the trial court to enter a conviction for first degree misdemeanor assault and to sentence DiCarlo accordingly.

I. Facts

{¶5} The Scioto County Grand Jury indicted DiCarlo on one count of assault, in violation of R.C. 2903.13(A) and (C)(2), a fifth-degree felony, for allegedly assaulting an employee of the department of rehabilitation and correction inside the state correctional

institution where he was incarcerated. DiCarlo pleaded not guilty to the charges, and the matter proceeded to a jury trial. Although several witnesses testified at length during the trial, only an abbreviated summary of the events is necessary at this point.

{¶6} The State presented evidence that DiCarlo was an inmate at the SOCF. He met with Sergeant Joe Kaut, a SOCF employee, inside Kaut's office at the facility concerning a conduct report that had been filed against DiCarlo. After Kaut determined that DiCarlo had committed the alleged rule violations and imposed discipline, DiCarlo got upset and started arguing with him. Kaut told DiCarlo that his decision was final. As Kaut stood to open his office door, DiCarlo stepped toward him and head butted him in the lip and chin, causing redness in those areas. Kaut stumbled back, and DiCarlo kept coming at him. Kaut grabbed DiCarlo, and in the struggle, DiCarlo's "head caught a window ledge[,]" causing a cut by his eye. Officer Scott Perdas responded to Kaut's "man down" alarm and saw Kaut trying to control DiCarlo by placing him on the floor. Perdas sprayed DiCarlo twice with a chemical agent. DiCarlo was in handcuffs and leg shackles during this incident.

{¶7} Although the incident between Kaut and DiCarlo was not recorded, the State presented video footage of DiCarlo struggling with officers after they removed him from Kaut's office immediately following the altercation. In addition, other officers testified about DiCarlo's behavior after the altercation in Kaut's office. Sergeant Jason Joseph testified that when he responded to the alarm, he saw Kaut trying to control DiCarlo while the pair lay on the floor of Kaut's office. When Joseph stood DiCarlo up, DiCarlo tried to pull away from him. Once in the hallway, DiCarlo was "very agitated" and again struggled to pull away from Joseph. Officer William Bauer testified that when

he responded to the alarm, he observed DiCarlo struggling with and threatening staff members in the hallway. Bauer thought DiCarlo was agitated and acting aggressively. Officer Ralph Merritt testified that when he responded to the alarm, he saw DiCarlo try to use his body to assault staff members and heard him verbally assault staff members in the hallway. He also thought DiCarlo seemed agitated and aggressive at the time.

{¶8} DiCarlo offered no evidence at trial. Although he made no attempt to specifically raise the affirmative defense of self-defense, he argued that this was "a case of inmate abuse" and that Kaut assaulted him. DiCarlo pointed out that (1) no witnesses saw the actual assault; (2) he was handcuffed and shackled during the altercation; (3) he suffered injuries in the altercation; and (4) the State's video footage merely depicted him being "hauled out [of Kaut's office] after getting pepper sprayed like an animal."

{¶9} The jury found DiCarlo guilty. After the trial court sentenced him, DiCarlo filed this appeal.

II. Assignments of Error

{¶10} DiCarlo assigns the following errors for our review:

> THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING IRRELEVANT AND PREJUDICIAL EVIDENCE.
>
> THE TRIAL COURT COMMITTED PLAIN ERROR BY ADMITTING IRRELEVANT "OTHER ACTS" EVIDENCE.
>
> THE TRIAL COURT COMMITTED PLAIN ERROR BY ORDERING APPELLANT HANDCUFFED AND SHACKLED DURING THE TRIAL.
>
> THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED AT TRIAL PREVENTED APPELLANT FROM RECEIVING A FAIR TRIAL.

III. Admissibility of Evidence

{¶11} In his first and second assignments of error, DiCarlo contends that the trial court erred by admitting into evidence (1) the security video footage; (2) testimony that he appeared agitated and aggressive after the alleged assault; and (3) testimony that he threatened and tried to assault other staff members in the hallway after the incident with Kaut. He argues that this evidence was irrelevant under Evid.R. 401, that it constituted inadmissible "other acts" evidence under Evid.R. 404(B), and that its prejudicial effect substantially outweighed its probative value under Evid.R. 403(A).

{¶12} We ordinarily review a trial court's ruling on these evidentiary matters for an abuse of discretion. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, at ¶129 (trial court's determination of relevancy reviewed for abuse of discretion); *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, at paragraph two of the syllabus ("admission or exclusion of relevant evidence rests within the sound discretion of the trial court"). The term "abuse of discretion" implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144, citing *Steiner v. Custer* (1940), 137 Ohio St. 448, 31 N.E.2d 855; *Conner v. Conner* (1959), 170 Ohio St. 85, 162 N.E.2d 852; and *Chester Twp. v. Geauga Cty. Budget Comm.* (1976), 48 Ohio St.2d 372, 358 N.E.2d 610.

{¶13} However, DiCarlo only objected to the admission of the video footage under Evid.R. 401 and Evid.R. 403(A) at trial. He did not challenge the admission of the footage under Evid.R. 404(B), and he did not object to the admission of the testimony under any of these evidentiary rules.[1] Thus, he has forfeited all but plain error with

[1] We note one exception to this statement. DiCarlo did object under Evid.R. 401 when the prosecutor asked Joseph to describe DiCarlo's demeanor in the hallway. Joseph testified that DiCarlo was "very agitated." However, DiCarlo did not object when Merritt also testified that DiCarlo seemed agitated in the hallway.

regard to the arguments he failed to raise at trial. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). "A silent defendant has the burden to satisfy the plain-error rule[,] and a reviewing court may consult the whole record when considering the effect of any error on substantial rights." *State v. Davis*, Highland App. No. 06CA21, 2007-Ohio-3944, at ¶22, citing *United States v. Vonn* (2002), 535 U.S. 55, 59, 122 S.Ct. 1043, 152 L.Ed.2d 90.

{¶14} For a reviewing court to find plain error: (1) there must be an error, i.e., "a deviation from a legal rule"; (2) the error must be plain, i.e., "an 'obvious' defect in the trial proceedings"; and (3) the error must have affected "substantial rights," i.e., it "must have affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. Furthermore, the Supreme Court of Ohio has stated that 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., quoting State *v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus.

{¶15} Initially, DiCarlo contends that the video footage and complained of testimony is irrelevant. All relevant evidence is admissible unless otherwise excluded by law. Evid.R. 402. Under Evid.R. 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

{¶16} Although DiCarlo did not specifically raise the affirmative defense of self-defense at trial, he argued that this was a case of "inmate abuse" and that Kaut

assaulted him. Evidence that DiCarlo was agitated, aggressive, and threatening as officers tried to subdue him and remove him from Kaut's office makes the existence of the fact that DiCarlo was the aggressor more probable than it would be without this evidence. It also bolsters Kaut's allegation that DiCarlo attacked him to initiate the incident. Moreover, as we explain below, this evidence was inextricably intertwined with the alleged assault. Therefore, the trial court did not abuse its discretion, let alone commit plain error, in determining that any of the challenged evidence was relevant.

{¶17} Next, DiCarlo contends that the video footage and testimony constitutes inadmissible "other acts" evidence the State used to show that he "had an aggressive and violent character." Evid.R. 404(A) prohibits the admission of "[e]vidence of a person's character or a trait of character * * * for the purpose of proving action in conformity therewith on a particular occasion," subject to certain exceptions. Evid.R. 404(B) provides:

> **Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

See, also, R.C. 2945.59.

{¶18} "The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment." *In re Sturm*, Washington App. No. 05CA35, 2006-Ohio-7101, at ¶51, citing *State v. Schaim*, 65 Ohio St.3d 51, 59, 1992-Ohio-31, 600 N.E.2d 661. Moreover, there must be

"substantial proof" that the defendant committed the other acts. *Portsmouth v. Wrage*, Scioto App. No. 08CA3237, 2009-Ohio-3390, at ¶28, citing *State v. Lowe*, 69 Ohio St.3d 527, 530, 1994-Ohio-345, 634 N.E.2d 616.

{¶19} However, it is not necessary to exclude evidence of other conduct when "the 'other acts' form part of the immediate background of the * * * crime charged in the indictment." *In re J.M.*, Pike App. No. 08CA782, 2009-Ohio-4574, at ¶38, quoting *State v. Curry* (1975), 43 Ohio St.2d 66, 73, 330 N.E.2d 720. "In such cases, it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts. To be admissible * * * the 'other acts' testimony must concern events which are inextricably related to the alleged criminal act." *Curry* at 73. "This situation is sometimes described as evidence of "res gestae[.]" Gianelli & Synder, Evidence (2 Ed. 2001) 240, Section 404.20. But, as the Supreme Court of Ohio explained in *State v. Wilkinson* (1980), 64 Ohio St.2d 308, 318, 415 N.E.2d 261:

> To hold the prosecution to a standard of "virtual impossibility" of proving the crime [without the other acts evidence] * * * is unrealistic. The policies behind prohibiting evidence of other independent criminal acts do not require such a stringent standard for admissibility. *The rule is served well enough by a requirement that the contested evidence be inextricably intertwined and, thus, necessary to give the complete picture of what occurred.*

(Emphasis added). We note that *Curry* and *Wilkinson* interpret R.C. 2945.59, not Evid.R. 404(B). *Curry* was decided prior to the adoption of Evid.R. 404(B). And although *Wilkinson* was decided after the rule's adoption, the rule was not in effect at the time of the trial. However, we have previously found that cases interpreting R.C. 2945.59 have precedential value in interpreting Evid.R. 404(B) given its substantial similarity to the statute. *State v. McDaniels* (Nov. 9, 1993), Vinton App. No. CA487,

1993 WL 472903, at *3, fn. 3. In sum, "[t]he jury is entitled to know the 'setting' of a case because it cannot be expected to make its decision in a void, without knowledge of the time, place and circumstances of the acts which form the basis of the charge." *State v. Miller* (Oct. 14, 1993), Meigs App. No. 92 CA 496, 1993 WL 415306, at *11, citing *State v. Ellis* (Aug. 1, 1989), Franklin App. No. 88AP-1154, 1989 WL 85670.

{¶20} Here, the video footage and complained of testimony explained the setting of the case by depicting and describing DiCarlo's conduct immediately after the alleged assault. In fact, his conduct can best be described as one continuous course of action. The testimony describes how the combative behavior DiCarlo exhibited when Perdas and Joseph saw Kaut trying to control DiCarlo continued as other officers struggled to take charge of the situation by subduing DiCarlo and moving him away from Kaut's office. Likewise, the video footage depicts this struggle after it progressed into the hallway.

{¶21} Given this chronology and the factual overlap between the alleged assault and DiCarlo's post-assault conduct, we find the footage and complained of testimony inextricably intertwined with the alleged assault. Cf. *Curry* at 73 (finding that in statutory rape case, evidence that defendant molested an eleven-year old over six months after the charged incident was a "chronologically and factually separate occurrence[ ]" such that it was not inextricably related to the charged offense). Thus, the trial court did not commit error of any nature by admitting this evidence under Evid.R. 404(B).

{¶22} Finally, DiCarlo argues that the video footage and testimony was inadmissible under Evid.R. 403(A) because "its probative value is substantially outweighed by the danger of unfair prejudice[.]" However, "because the 'res gestae' is

inextricably related to the charged crime, we do not believe that its probative value was substantially outweighed by its prejudicial effect." *McDaniels*, supra, at *5. Thus, the trial court also did not abuse its discretion, let alone commit plain error, in determining that this evidence was admissible under Evid.R. 403(A).

{¶23} Accordingly, we overrule DiCarlo's first and second assignments of error.

IV. Restraints During Trial

{¶24} In his third assignment of error, DiCarlo contends that the trial court erred by directing that he wear handcuffs and leg shackles during trial. The Supreme Court of Ohio has stated that "no one should be tried while shackled, absent unusual circumstances." *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, at ¶54, quoting *State v. Kidder* (1987), 32 Ohio St.3d 279, 285, 513 N.E.2d 311. "It is uniformly held, however, that the prisoner may be shackled when such precaution is shown to be necessary to prevent violence or escape." *State v. Woodards* (1966), 6 Ohio St.2d 14, 23, 215 N.E.2d 568.

{¶25} DiCarlo characterizes the court's decision as "plain error." However, the plain error doctrine is not implicated when the defendant brings the purported error to the trial court's attention. See Crim.R. 52(B). Here, DiCarlo clearly opposed the trial court's decision at the security hearing.

{¶26} "[S]hackling is left to the trial court's sound discretion." *Cassano* at ¶54, quoting *State v. Richey*, 64 Ohio St.3d 353, 358, 1992-Ohio-44, 595 N.E.2d 915, in turn, citing *Woodards* at 23. Thus, we will not reverse the court's decision absent an abuse of that discretion * * * implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Adams*, supra, at 157, citing *Steiner*, *Conner*, and *Chester Twp.*

{¶27} DiCarlo argues that the record from the pre-trial security hearing does not support a finding that handcuffs and shackles were necessary to prevent violence or escape. He contends that (1) he never threatened to kill anyone; (2) the injuries he allegedly caused Kaut were not serious enough to warrant restraints; (3) the State presented no expert testimony that he was subject to "unpredictable violent outbursts"; (4) he was not under "'constant watch' for being a danger to himself and others"; (5) the State presented no evidence that he was violent in prison prior to the alleged assault on Kaut; and (5) he appeared in court on prior occasions without creating any "cause for concern for the court or his trial counsel." DiCarlo claims that absent this type of evidence, the State failed to "clearly demonstrate a compelling need to impose the exceptional security procedures of handcuffing and shackling [him] during the trial." However, the State does not have to meet this stringent a burden. As we explained above, the State only needs to show that restraints are "necessary to prevent violence or escape." *Woodards* at 23.

{¶28} At the security hearing, Trooper Mark Ball testified that he believed DiCarlo "could pose a possibility of danger" to the people in the courtroom and should be restrained during trial. Ball testified that the week prior to the security hearing, he learned that DiCarlo had threatened a witness in the case. In a footnote in his brief, DiCarlo states that "[t]he state attempted to introduce evidence of a threat, but its admission was overruled and apparently not considered by the trial court in its determination." However, the trial court admitted evidence that DiCarlo threatened the witness but did not permit Trooper Ball to testify as to the substance of the threat.

{¶29} Ball also testified that in addition to the charge for allegedly assaulting

Kaut, DiCarlo had a separate allegation of felony assault pending against him for which charges had not yet been filed. In addition, Ball testified that DiCarlo was currently serving a 14-year sentence for two counts of felonious assault, aggravated robbery, burglary and intimidation of a victim or witness. And Ball testified that after the alleged assault of Kaut, DiCarlo was moved from the SOCF to the Ohio State Penitentiary, a supermax prison facility.

{¶30} Given DiCarlo's prior convictions – which included intimidation of a victim or witness and two counts of felonious assault, his status as an inmate in a supermax facility, and evidence that he threatened a witness in this case, we cannot say that the court's decision to keep him restrained during trial was unreasonable, arbitrary or unconscionable. See *Cassano* at ¶55 (finding that trial court did not abuse its discretion in requiring defendant to be shackled given his prior convictions, status as an inmate in a maximum security prison, and documented history of violence even while in custody).

{¶31} Additionally, we note that the trial court told DiCarlo that it would give the jury a cautionary instruction regarding the restraints but failed to do so. However, DiCarlo did not object to the court's omission or raise this issue on appeal. Moreover, the jurors knew DiCarlo was accused of assaulting an employee of the department of rehabilitation and correction while he was incarcerated in a state correctional institution, so they might have expected to see him restrained during court appearances. See id. at ¶56. Thus, we overrule DiCarlo's third assignment of error.

V. Cumulative Error

{¶32} In his fourth assignment of error, DiCarlo argues that the cumulative effect of the trial court's errors in admitting prejudicial, other acts evidence and restraining him

during trial warrant the reversal of his conviction even if no single error constitutes reversible error. However, "[b]efore we consider whether 'cumulative errors' are present, we must first find that the trial court committed multiple errors." *State v. Harrington*, Scioto App. No. 05CA3038, 2006-Ohio-4388, at ¶57, citing *State v. Goff*, 82 Ohio St.3d 123, 140, 1998-Ohio-369, 694 N.E.2d 916. Because we have already determined that the trial court did not err in these matters, the cumulative error principle is inapplicable. Thus, DiCarlo's argument is meritless.

VI. Verdict Form

{¶33} After reviewing the record, we discovered an error in the verdict form and instructed the parties to file an additional brief on the issue of whether it rose to the level of plain error. DiCarlo filed a brief, but the State did not. We will consider DiCarlo's arguments as part of his fourth assignment of error. DiCarlo contends that the verdict form on which his conviction is based was defective. DiCarlo failed to object to the verdict form. However, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). "A silent defendant has the burden to satisfy the plain-error rule[,] and a reviewing court may consult the whole record when considering the effect of any error on substantial rights." *Davis*, supra, at ¶22, citing *Vonn*, supra, at 59.

{¶34} For a reviewing court to find plain error: (1) there must be an error, i.e., "a deviation from a legal rule"; (2) the error must be plain, i.e., "an 'obvious' defect in the trial proceedings"; and (3) the error must have affected "substantial rights," i.e., it "must have affected the outcome of the trial." *Barnes*, supra, at 27. Furthermore, the Supreme Court of Ohio has "acknowledged the discretionary aspect of Crim.R. 52(B) by

admonishing courts to notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" Id., quoting *Long*, supra, at paragraph three of the syllabus.

{¶35} R.C. 2945.75(A)(2) provides:

> When the presence of one or more additional elements makes an offense one of more serious degree: * * * A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

See, also, *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, at syllabus.

{¶36} Here, the verdict form reads: "We the jury, being duly impaneled, hereby find the defendant **guilty** of **Assault**." Assault is a misdemeanor of the first degree unless one of the degree-enhancing provisions in R.C. 2903.13(C)(1)-(5) applies. R.C. 2903.13(C). Relevant here would be R.C. 2903.13(C)(2)(a), which elevates assault to a felony of the fifth degree if the offense "occurs in or on the grounds of a state correctional institution * * *, the victim of the offense is an employee of the department of rehabilitation and correction, * * * and the offense is committed by a person incarcerated in the state correctional institution * * *." Because the verdict form failed to set forth the degree of the offense or these additional elements, it did not comply with R.C. 2945.75(A)(2). Thus the guilty verdict constituted a finding of guilty of the least degree of the offense charged, i.e. first degree misdemeanor assault.

{¶37} The trial court sentenced DiCarlo to one year in prison. However, for a first degree misdemeanor, a court may only sentence a defendant to a prison term of not more than one hundred eighty days. R.C. 2929.24(A)(1). Therefore, the error in the

verdict forms affected DiCarlo's substantial rights and constitutes plain error. Thus we vacate DiCarlo's fifth degree felony assault conviction and remand with instructions to the trial court to enter a conviction for first degree misdemeanor assault and to sentence DiCarlo accordingly. Accordingly, we sustain DiCarlo's fourth assignment of error to the extent he challenges the verdict form.

VI. Conclusion

{¶38} We overrule DiCarlo's first, second, and third assignments of error. We overrule his fourth assignment of error to the extent he argues that cumulative errors warrant the reversal of his conviction. However, we sustain his fourth assignment of error to the extent he argues that the trial court improperly convicted him of a fifth degree felony based on the error in the verdict form. We remand the case to the trial court for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

Harsha J., Dissenting in part and Concurring in part:

{¶39} Based upon the unique facts of this case, I would follow the Supreme Court of Ohio's admonishment in *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, and refrain from applying the plain error doctrine to the verdict form. Thus, I would allow DiCarlo's fifth degree felony assault conviction to stand. I do agree however, with the rest of the opinion.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J. & Abele, J.: Concur in Judgment and Opinion.
Harsha, J.: Dissents in part and Concurs in part, with attached Opinion.

For the Court

BY: _____
Matthew W. McFarland, Presiding Judge

BY: _____
William H. Harsha, Judge

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.