

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

STATE OF OHIO,	:	APPEAL NO. C-060515
	:	TRIAL NO. C-05CRB-46797
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
ROBERT SILVERMAN,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a bench trial, defendant-appellant, Robert Silverman, was convicted of assault under R.C. 2903.13. He now appeals that conviction, presenting two assignments of error for review. We find no merit in his assignments of error, and we affirm the trial court's judgment.

The record shows that Silverman and his fiancée, Deanna Newman, went to a Goodwill store to return a videotape. The clerk, Charlene Lewis, told him that the store policy did not allow the return of videotapes. Silverman became verbally abusive and threw the videotape on the floor.

Lewis stated that she apologized to Silverman and then turned around and walked away. He followed her and pulled on her clothes and her collar. When she arrived at an

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

area with a telephone, she tried to call security personnel, but she could not because Silverman pulled on the phone wire.

Silverman grabbed and shook her, causing her glasses to fall off her face. He spit in her face and then hit her in the mouth with his fist. She thought that he was going to hit her again, so she put her hand in front of her face. Then, two young men intervened. They subdued Silverman and pinned him to the ground. Lewis testified that Silverman broke her finger and knocked out one of her teeth.

Silverman, a retired engineer with no previous criminal record, presented evidence that he had been diagnosed with diabetes approximately ten years before this incident. He had been under the care of a physician for this condition. Originally, he took oral medication to control his blood sugar. As his condition became more severe, he switched to insulin injections. He had been under the new treatment regimen for approximately a month at the time of the incident.

After starting the new treatment, Silverman suffered from hypoglycemic episodes, where his blood sugar would rapidly drop. When this occurred, he would start to feel clammy and sweaty, and then nervous and shaky. If left untreated, his condition would leave him feeling confused and irritable. Silverman knew the signs of one of these episodes and would usually take glucose tablets before his condition became serious.

On the day of the alleged offense, Silverman had taken his insulin as usual, and at the time he entered the store, he was feeling fine. While they were shopping, Newman noticed that Silverman's condition was deteriorating. She had known Silverman for approximately 19 years. She had a nursing degree and was employed as an emergency medical technician. She had experience dealing with people suffering through hypoglycemic episodes. She was also familiar with Silverman's condition and had often helped to treat it.

Silverman told Newman that he did not feel well and that he needed to leave. Newman recognized that his blood sugar was dropping, and she knew that they had to leave quickly. But they did not leave. Newman had already talked to a clerk about getting credit for the videotape, so they rushed to the checkout station. Silverman then began sweating profusely. He became irritable and did not seem to hear what Newman had said.

Newman told Silverman to “stay put,” and she ran out to the car to get his glucose tablets. As she left, she saw him follow the clerk and say, “This is no way to treat a customer.” She was gone approximately three to four minutes. A young man ran out of the store and told her, “He needs his tablets.” She gave the man the medicine, and he ran back into the store.

When Newman went back into the store, Silverman was lying on the floor, being restrained by several young men. She could not give him the pills immediately because he was lying on the floor being handcuffed by a policeman. When she explained his condition, the officer removed the handcuffs and allowed him to sit, and she gave him the tablets.

Silverman testified that he remembered having an argument with Lewis. He stated that he became angry because he did not like the way she had treated Newman. He remembered Lewis picking up the telephone, but had no memory at all of the assault. The next thing that he remembered was being held on the floor. He was later arrested and taken to the hospital. He stated that this episode was frightening and that he had seen his doctor as soon as possible afterward.

In his first assignment of error, Silverman contends that the trial court erred in sua sponte excluding probative evidence of his medical condition. He argues that the evidence was relevant to the issue whether he could have formed the requisite mental state to commit the offense. This assignment of error is not well taken.

Silverman had introduced the videotape deposition of his treating physician, Dr. Randall Cox, into evidence, and the state did not object. The court later stated that, after reviewing the deposition, it was striking the doctor's entire testimony, relying on *State v. Wilcox*.²

In *Wilcox* and in subsequent cases, the Ohio Supreme Court held that a defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that due to mental illness, intoxication, or any other reason, the defendant lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime.³

This court followed *Wilcox* in *State v. Lachman*,⁴ which is similar to the present case. The defendant in *Lachman* had introduced evidence that he suffered from a personality disorder and a seasonal-affective disorder to show that he could not have formed the required mental state to commit felonious assault. We rejected his argument that, based on that evidence, his conviction was against the manifest weight of the evidence. We held, based on *Wilcox* and its progeny, that the evidence was not admissible. Other courts have reached the same conclusion in similar cases.⁵

This case falls squarely within the rule of *Wilcox* and *Lachman*. Silverman sought to introduce his doctor's testimony to show that, due to a severe hypoglycemia episode, he could not have formed the intent to commit the offense of assault under R.C. 2903.13. Therefore, the testimony was not admissible into evidence.

² (1982), 70 Ohio St.2d 182, 436 N.E.2d 523.

³ *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72; *State v. Mitts*, 81 Ohio St.3d 223, 1998-Ohio-635, 690 N.E.2d 522; *State v. Coeey* (1989), 46 Ohio St.3d 20, 544 N.E.2d 895.

⁴ (June 19, 1998), 1st Dist. No. C-970629.

⁵ See, e.g., *In re Kristopher F.*, 5th Dist. No. 2006CA00312, 2007-Ohio-3259; *State v. Cockrell*, 8th Dist. Nos. 86701 and 86703, 2006-Ohio-2301; *State v. Turner*, 3rd Dist. No. 9-04-21, 2004-Ohio-6489; *State v. Pennington* (May 6, 2000), 4th Dist. No. 99 CA 26.

Silverman relies upon *State v. Fulmer*.⁶ In that case, the court held that the trial court had erred in excluding evidence that the defendant, as the result of consuming too many pills, had become “biochemically imbalanced” and could not form the mental state required to commit felonious assault and assault. Noting that neither the defendant nor the state had raised the defense of diminished capacity, the court held that the trial court had “curbed the consideration of relevant, probative evidence based upon the speculative possibility that the jury might use the evidence to draw a legal conclusion that had not been argued.”

We note that the Ohio Supreme Court has accepted the case for review,⁷ and its decision is yet unknown. Nevertheless, in our view, *Fulmer* is contrary to the supreme court’s express holding in *Wilcox* and its progeny. Further, it appears to be an aberration, as we find no other cases citing it. We, therefore, decline to follow *Fulmer*.

We cannot hold that the trial court erred in refusing to admit the doctor’s deposition into evidence. Further, Silverman presented evidence, through his and Newman’s testimony, about his medical condition. Newman was permitted to testify as an expert due to her nursing degree and work experience. Therefore, to some extent, Dr. Cox’s testimony was cumulative. We overrule Silverman’s first assignment of error.

In his second assignment of error, Silverman argues that his conviction was against the manifest weight of the evidence. After reviewing the record, we cannot say that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse Silverman’s conviction and order a new trial. Therefore, the conviction was not against the manifest weight of the evidence.⁸ The trial court apparently believed that the

⁶ 11th Dist. No. 2005-L-137, 2006-Ohio-7015.

⁷ 113 Ohio St.3d 1512, 2007-Ohio-2208, 866 N.E.2d 511.

⁸ *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541; *State v. Allen* (1990), 69 Ohio App.3d 366, 590 N.E.2d 1272.

OHIO FIRST DISTRICT COURT OF APPEALS

assault was the result of anger, not of any medical condition. Matters as to the credibility of evidence are for the trier of fact to decide.⁹ Consequently, we overrule Silverman's second assignment of error and affirm his conviction.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App. R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., HILDEBRANDT and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 8, 2007
per order of the Court _____.
Presiding Judge

⁹ *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433.