

IN THE SUPREME COURT OF OHIO

STATE OF OHIO) CASE NO. 07 -2426 & 07 -2030
APPELLANT) On Appeal from the
v) Crawford County Court
KIRK SESSLER) of Appeals, Third
APPELLEE) Appellate district
) Court of Appeals
) Case No. 3-06-0023

MERIT BRIEF OF THE APPELLEE

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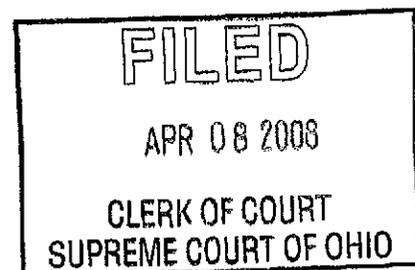


TABLE OF CONTENTS

	Page No.
TABLE OF AUTHORITIES.....	1
STATEMENT OF FACTS.....	2
ARGUMENT.....	4
<u>CERTIFIED QUESTION OF LAW; Is the holding in State v</u> <u>Pelfrey, 112 Ohio St. 3d 422, applicable to charging statutes</u> <u>that contain separate sub-parts with distinct offense levels?</u>	
CONCLUSION.....	6
CERTIFICATE OF SERVICE.....	7
APPENDIX	<u>Appx page</u>
Verdict form, Crawford County Common Pleas.....	1
Indictment, Crawford County Common Pleas.....	2

TABLE OF AUTHORITIES

CASES:

<u>Apprendi v. New Jersey</u> (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435,.....	6
<u>Blakely v. Washington</u> (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.....	6
<u>Ring v Arizona</u> 536 U.S. 584 (2002).....	6
<u>State v Kepiro</u> , 2007 -Ohio- 4593, Franklin App No. 06AP-1302.....	4,5
<u>State v Lacey</u> , (2006) Richland App. No. 2005-CA-119, 2006 -Ohio- 4290.....	6
<u>State v Pelfrey</u> , 112 Ohio St.3d 422, 2007-Ohio- 256	2,3,4,5,6
<u>State v Woullard</u> 158 Ohio App3d 31, 2004-Ohio-3395.....	5

STATUTORY PROVISIONS:

Ohio Revised Code 2907.05.....	4,5
Ohio Revised Code 2919.25.....	5
Ohio Revised Code 2945.75.....	2,3,4,6

STATEMENT OF THE CASE AND FACTS

The State of Ohio, Appellant, appeals from the judgment of the Crawford County Court of Appeals, Third Appellate District. This judgment ruled that the conviction of the Defendant for two felony counts of intimidation must be reversed and the Defendant be convicted of two misdemeanor intimidation counts. This case involves the interpretation of State v Pelfrey, 112 Ohio St.3d 422, 2007-Ohio-256, (hereinafter "Pelfrey"), and Ohio Revised Code 2945.75.

The Court of Appeals decision was an appropriate and accurate interpretation of Pelfrey based upon the facts presented. Kirk Sessler, the Appellee, (hereinafter, "Defendant") was charged with striking his live-in girlfriend; and in the course of the domestic fracas he is alleged to have intimidated the girlfriend to prevent her from calling authorities, on two occasions. He was found guilty at a trial wherein the jury verdict form stated " * * * in the manner and form charged in the indictment." Specifically, the verdict form stated just "intimidation", without either the expression about 'force' nor the degree of the indictment, and without stating the subpart of (A) or (B):

"We the jury in this case, duly impaneled, sworn and affirmed, after deliberating, find the DEFENDANT KIRK B. SESSLER, * _____ of the offense of INTIMIDATION, in manner and form as he stands charged in the indictment.

*insert in ink: GUILTY OR NOT GUILTY

Each of us jurors concurring in said verdict signs his/her name hereto this 21 day of September, 2006."

Appellant Sessler was sentenced to two consecutive counts of incarceration upon the jury verdicts. The Court of Appeals, Third

Appellate District, reversed and ruled that the jury verdict form did not comply with the requirements of this Supreme Court's decision of Pelfrey, supra, in its application of Ohio Revised Code 2945.75.

Thereupon the Appellant appealed the ruling in the instant cause.

ARGUMENT REGARDING CERTIFIED QUESTION OF LAW

Is the holding in State v Pelfrey, 112 Ohio St. 3d 422, applicable to charging statutes that contain separate sub-parts with distinct offense levels?

The Appellant, the State of Ohio, seeks to reverse this case upon the authority of State v Kepiro, 2007 -Ohio- 4593, Franklin App No. 06AP-1302, Tenth Appellate District, September 6, 2007, 2007 WL 2505506. The State argues that the instant Third Appellate decision is in conflict with the Kepiro decision. It is respectfully submitted that the issue should be which case more properly reflects the holding of this Honorable Supreme Court in Pelfrey. It is believed this decision of the Third Appellate District does.

Specifically, Pelfrey held that if the trial court sends incomplete jury forms, such as forms stating "in the manner charged in the indictment", to the jury, then the plain language of Ohio Revised Code 2945.75 states that the Defendant is convicted of solely the lowest degree of offense. "When the General Assembly has written a clear and complete statute, this court will not use additional tools to produce an alternative meaning." Pelfrey, paragraph 12. The Appellant seeks to substitute the decision of Kepiro wherein the clear language of 2945.75 was not applied. In Kepiro the Tenth Appellate District engaged in "mechanical" interpretation of the charging statute, which in Kepiro was Gross Sexual Imposition, Ohio Revised Code 2907.05. Based upon the construction of the gross sexual imposition statute, the Kepiro court justified its decision as not in conflict with Pelfrey. Ohio Revised Code 2907.05 contains two

subparagraphs in which one is a higher and another a lower degree of offense.

It is noteworthy that the Kepiro court relied upon the dissent in Pelfrey more than the actual holding. See paragraph 32 where the court cites the dissent.

The Honorable Supreme Court had considered the tampering with records statute in Pelfrey. It was argued in Kepiro that the different construction of the gross sexual imposition statute did not require the court to follow Pelfrey, Kepiro held that since the applicable paragraphs in the Code constituted different levels of offenses, therefore the offense statute's construction was the important variable. In fact however, the Supreme Court in Pelfrey considered not only the tampering with records provision, but also considered the case of State v. Woullard, 158 Ohio App.3d 31, 2004-Ohio-3395, a decision upon which the appellate court in Pelfrey had based its decision. See paragraph 5 of Pelfrey. The court in Woullard had considered domestic violence, Ohio Revised Code 2919.25, which is a statute where section (A) says that it is ordinarily a misdemeanor, but may be charged as a felony if section (D) applies. If the Supreme Court in Pelfrey had wanted to distinguish among statutes based upon how they are mechanically constructed, then the Court would have pointed to Woullard and other cases to discuss possible different constructions. The main focus in Pelfrey was on the question of whether the defendant would lose the protection of 2945.75 by waiver, and the Court held he did not.

Perhaps the factor that is most important is that Apprendi v.

New Jersey (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and Blakely v. Washington (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, have established that the jury must make a finding of each element of the offense for one to be sentenced upon a criminal charge. See State v Lacey, (2006) Richland App. No. 2005-CA-119, 2006 -Ohio- 4290. The Courts must not assume a felony; they must have the jury find one beyond a reasonable doubt. This can only be shown by the jury verdict forms.

Note that the jury verdict form in this case does nothing to discriminate between the higher and lower charge except for the phrase "as charged in the indictment". The Supreme Court stated in Ring v Arizona, 536 U.S. 584 (2002):

If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt. Pg 585-586

The jury verdict form is the specific means for the jury to relate exactly what is its holding. Ohio Revised Code 2945.75 is properly interpreted by Pelfrey. Careful drafting of the jury verdict form as required by Ohio Revised Code 2945.75 will avoid any claimed vagueness and avoid this problem altogether.

For all the foregoing reasons, this Honorable Court must affirm the decision of the Court of Appeals.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE DECISION OF THE COURT OF APPEALS MUST BE AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Appellee's Brief on the Merits to Appellant's attorneys, Stanley Flegm and Clifford Murphy, County Prosecutors, at 112 E. Mansfield, 3d floor, Bucyrus, Ohio 44820 by regular US mail this 8th day of April, 2008.

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App. 2

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SUE SEEVERS
CRAWFORD COUNTY

Two Count INDICTMENT

Crim. Rule 6,7

STATE OF OHIO

VS

KIRK B. SESSLER

DOB: [REDACTED]

SSN: [REDACTED]

06 CR 0094

In the Court of Common Pleas, Crawford County, Ohio, June Session of the May Term, Two Thousand and Six.

Count I

The Grand Jurors of the County of Crawford in the name and by the authority of the State of Ohio, upon their oaths do find and present that on or about the 23rd day of May, 2006, in Crawford County, Ohio, **KIRK B. SESSLER**, did,

knowingly and by force or by unlawful threat of harm to any person or property, attempt to influence, intimidate, or hinder the victim of a crime in filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness in violation of Ohio Revised Code Section 2921.04 (B) **INTIMIDATION**, a felony of the third degree.

In violation of the Ohio Revised Code, Title 29, Section 2921.04 (B) and against the peace and dignity of the State of Ohio.

Count II

The Grand Jurors of the County of Crawford in the name and by the authority of the State of Ohio, upon their oaths do find and present that on or about the 23rd day of May, 2006, in Crawford County, Ohio, **KIRK B. SESSLER**, did,

knowingly and by force or by unlawful threat of harm to any person or property, attempt to influence, intimidate, or hinder the victim of a crime in filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness in violation of Ohio Revised Code Section 2921.04 (B) **INTIMIDATION**, a felony of the third degree.

In violation of the Ohio Revised Code, Title 29, Section 2921.04 (B) and against the peace and dignity of the State of Ohio.