

IN THE OHIO SUPREME COURT
COLUMBUS, OHIO

ROBERT LAWRENCE,	:	Case No. 2008-0844
	:	
Defendant-Appellant,	:	On appeal from the Butler Co.
	:	Court of Appeals, 12 th Appel-
vs.	:	late District
	:	
STATE OF OHIO	:	
	:	
Plaintiff-Appellee.	:	

MERIT BRIEF OF APPELLANT ROBERT LAWRENCE

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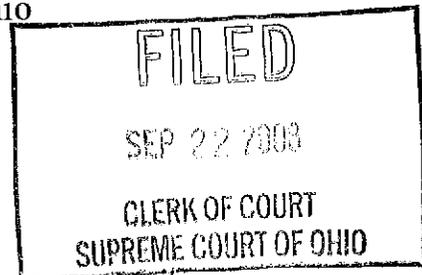


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II. STATEMENT OF THE CASE

This case concerns allegations that the defendant Robert Lawrence (“Lawrence”), on June 26, 2006, sexually assaulted a young boy, Steven Kincer (“Kincer”). Essentially, the state charged that Lawrence, in broad daylight, on a public highway, and in front of several witnesses, attempted to have anal intercourse with Kincer.

On October 4, 2005, the Butler County Grand Jury returned a one-count Indictment against Lawrence, charging him with Attempted Rape in violation of R.C. §§2907.02(A) and 2921.02. (*See* Indictment, Transcript of docket (“T.d.”) at 2.) On October 18, 2006, Lawrence entered a plea of “not guilty” to that charge. (*See* Notation, T.d. at 8.)

On November 27, 2006, the matter went to trial before a jury. At the close of trial, the prosecution asked for an instruction on Gross Sexual Imposition as a “lesser, included offense” of Attempted Rape. The trial judge, after reviewing the testimony of the state’s witnesses, and over defendant’s objection, gave the requested instruction. Eventually, the jury returned a verdict of acquittal of Attempted Rape (*see* Verdict of Not Guilty, T.d. at 46), but found him guilty of Gross Sexual Imposition. (*See* Verdict of Guilty, T.d. at 47.)

Lawrence thereupon moved for a new trial, of the grounds that (1) the trial court had improperly given an instruction of Gross Sexual Imposition as a lesser, included offense of Attempted Rape; and (2) the trial court had failed to give an instruction that the jury could not consider conduct not charged as a crime in the Indictment as a basis for convicting Lawrence. (*See* Motion for Post-Conviction Relief, or Alternatively, for a New Trial, T.d. at 55.) After an oral hearing, held on January 3, 2007, the trial court denied that motion. (Order Denying Motion for Post-Conviction Relief, or Alternatively, for a New trial, T.d. at 63.) Immediately thereafter, the trial

judge found Lawrence to be a Sexual Predator and sentenced him to a term of incarceration of 2-years. (See Judgment of Conviction, T.d. at 64 [Appendix “D”].)

On January 16, 2007, Lawrence timely filed an appeal from that judgment to the Twelfth District Court of Appeals. (See Notice of Appeal, T.d. at 73.) After a full briefing of the issues, and oral argument, the Twelfth District, on March 24, 2008, issued an opinion affirming Lawrence’s conviction for gross sexual imposition. (See Appellate Decision (Appendix “C”).)

On May 1, 2008, Lawrence appealed his conviction to the Ohio Supreme Court. (See Notice of Appeal to Ohio Supreme Court [Appendix “A”].) By Order dated August 6, 2008, this Court accepted jurisdiction over that appeal. Lawrence now submits the foregoing brief in support of his appeal.

II. STATEMENT OF THE FACTS

At trial, the state called two eyewitnesses to the attempted rape: the victim, Kincer, and Alex Walston (“Walston”). The defense also presented two eyewitnesses: the defendant and Tyler Lawrence (“Tyler”), the defendant’s grandson.

Kincer testified that, on the day in question, he was playing with Tyler when, at Tyler’s insistence, they approached Lawrence, who was sitting on a cement retaining wall in front of 1770 See Avenue in Hamilton, Ohio. (See *generally* Transcript of proceedings (“T.p.”) at 42, line 12, to 43, line 24.) Shortly thereafter, Walston approached these three on his bicycle. Walston began to tease Kincer about being fat, and in particular about having large breasts for a boy. (*Id.* at 60, line 5, to 61, line 25.) Lawrence apparently joined in and may have, once, actually grabbed Kincer’s chest. (*Id.* at 54, line 20-24.) The teasing then became more physical: Walston pushed Kincer to the

ground, and after Kincer got back up, pulled his pants down. (T.p. at 44, line 21, to 45, line 17.) Kincer testified that he quickly pulled his pants back up and ran home. (*Id.* at 49, lines 14-15, and 61, lines 14-16.) He also testified that no one touched him while his pants were down. (*Id.* at 49, lines 20-22.)

Walston testified somewhat differently. He admitted to pushing Kincer to the ground. (*Id.* at 69, lines 11-16.) After Kincer got back up, Walston stated that Kincer stole Lawrence's cigarette pack. Lawrence, when demanding that Kincer give him his cigarettes back, began teasing him about being fat, and in particular about his breasts. (*Id.* at 70, lines 1-24.) Lawrence, however, did not actually touch Kincer's breasts. (*Id.* at 70, lines 22-24.)

Walston further admitted to pulling Kincer's pants down, but claimed he did so at Lawrence's direction. (*Id.* at 71, lines 11, to 74, line 13.) Lawrence then stood behind Kincer, pulled his own pants down, and began to simulate sex, exclaiming "If I had some vaseline it would slide right in." (*Id.* at 73, Lines 9-15, and 74, lines 3-6.)

On cross examination, however, Walston conceded that the written statement he gave to Det. Mark Nichols, dated August 6, 2006, read much differently: Lawrence began to "dry hump" Kincer after he pushed Kincer to the ground. At the time, neither Lawrence nor Kincer had their pants down. (*Id.* at 82, lines 3-13.) And when he pushed Kincer a second time, against the wall, and pulled his pants down, he did not see what Lawrence was doing. (*Id.* at 83, lines 21-24.) He further admitted that his conversation with Nichols occurred before his prosecution in Butler County Juvenile Court on charges stemming from this incident. (*Id.* at 82-84.)

On redirect, the prosecution attempted to gloss over this discrepancy by eliciting that, at the time of his interview with Det. Nichols, Walston was "scared" and therefore neglected to mention

that, in fact, he did see what Lawrence was doing. He further asserted that this was the occasion when Lawrence “dry humped” Kincer. (T.p. at 85, lines 8-22.) The state called two additional witnesses, Ethan Collins and Det. Mark Nichols, neither of whom were an eyewitness to the incident at issue. (*See, id.* at 87-104, *passim.*)

After the prosecution rested, Lawrence testified that his grandson, Kincer, and later Walston were engaging in horseplay during which they fell into him, almost spilling his beer, after which he admonished the boys to play further up in the yard, behind him. (*Id.* at 112, line 16, to 114, line 17, and 125, line 21, to 127, line 10.) At one point, Kincer did take his cigarettes, and Lawrence grabbed Kincer in return, reaching over his right shoulder and placing his hand on Kincer’s chest. (*Id.* at 115, lines 5-15.) He emphatically denied, however, that he had attempted to, or even pretended to, rape Kincer after Walston pulled his pants down. (*Id.* at 115, lines 16-24, and 135, lines 7-18.)

Tyler Lawrence also testified for the defense. He essentially corroborated his grandfather’s testimony that nothing untoward had happened to Kincer. (*Id.* at 149, line 8, to 150, line 13.) Tyler did state that, at one point, Lawrence teased Kincer about being fat and referring to his breasts as “titties,” but added that Lawrence had, on prior occasions, always “played” with Kincer “like that” (*id.* at 161, lines 17-25), and that Kincer was aware that Lawrence was joking. (*Id.* at 166, lines 20-25.) He further stated that this happened when Kincer and he first approached Lawrence, before Walston arrived. (*Id.* at 162, lines 1-4.)

At the close of trial, the prosecution asked for an instruction on the lesser, included offense of Gross Sexual Imposition, as set forth in R.C. §2907.05(A)(4). The trial judge, after reviewing a transcript of the trial testimony, determined that Walston had testified that Lawrence rubbed his penis on Kincer’s back, and that such testimony, if believe, could constitute such a crime. (Transcript of

proceedings (“T.p.”) at 170, Lines 5-10.) Consequently, the trial court, over defendant’s objection, gave an instruction on a lesser, included offense of Gross Sexual Imposition in violation of R.C. §2907.05(A)(4) . (*Id.* at 218, line 8, to 219, line 4; *see also* Jury Instructions, T.d. at 48.)

After the jury began deliberations, they sent a question back to the court asking, in effect, whether the phrase “without limitation” in R.C. §2907.01(B) meant that the court could only identify the regions of the body specifically delineated in that statute as erogenous zones, or whether they could also consider a male breast to be an erogenous zone for purposes of committing gross sexual imposition. Again, over defendant’s objection (*see*, T.p. at 222-25, *passim*), the court answered “that is something that you have to answer within the context of the case.” (*Id.* at 221, lines 1-2.)

Thereafter, the jury returned a verdict acquitting Lawrence of Attempted Rape, but finding him guilty of the “lesser offense” of Gross Sexual Imposition. (*Id.* at 226, lines 9-16.)

IV. LAW AND ARGUMENT

A. PROPOSITION OF LAW No. 1:

A Complete Offense Cannot be a Lesser Included Offense of an Attempt Offense.

As his first Proposition, Lawrence asserts that the trial court improperly allowed the jury to consider Gross Sexual Imposition, a complete crime, as a “lesser offense” of Attempted Rape, an attempt or incomplete crime. At the close of evidence, the prosecution requested a jury instruction on Gross Sexual Imposition, which it asserted was a lesser, included offense of the charged crime of Attempted Rape. (*See* T.p. at 169-72, *passim*.) The trial court agreed with the prosecution and gave the requested instruction. (*See* Jury Instructions, T.d. at 48.)

The circumstances in which an instruction on a lesser, included offense may be given are set forth in R.C. §2945.74 and Crim. R. 31(C). This Court has construed these provisions to include

three groups of lesser offenses: (1) attempts to commit the crime charge, if such offense is a criminal act; (2) inferior degrees of the indicted offense; and (3) lesser, included offenses. State v. Deem (1988), 40 Ohio St.3d 205, *syllabus* ¶1, 533 N.E.2d 294, 294. Here, Gross Sexual Imposition is neither an attempt crime, nor an inferior degree of Attempted Rape. *Compare* R.C. §§2907.02(A)(1) with 2907.05(A)(4). Accordingly, the giving of the requested instruction was proper only if Gross Sexual Imposition is a lesser, included offense of Attempted Rape.

One offense may be a lesser, included offense of another offense where (i) the first offense carries a lesser penalty than the second offense, (ii) the greater offense, as statutorily defined, cannot be committed without the lesser offense, as statutorily defined, also being committed, and (iii) some element of the greater crime is not required to prove the commission of the lesser offense. *Id.* at *syllabus* ¶3; 533 N.E.2d at 294; State v. Kidder (1987), 32 Ohio St.3d 279, 280, 513 N.E.2d 311, 314.. As a further limitation, before charging a jury to consider a lesser, included offense, the trial court must also determine whether the evidence warrants such an instruction. State v. Davis (1983), 6 Ohio St.3d 91, 451 N.E.2d 772; State v. Wilkins (1980), 64 Ohio St.2d 382, 415 N.E.2d 303. Such an instruction is only proper where the evidence presented at trial supports a conviction for the lesser offense, but not the greater offense. Specifically

... a charge on the lesser included offense is not required, unless the trier of fact could reasonably reject an affirmative defense and could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense.

State v. Kidder, *supra*, 32 Ohio St.3d at 282-83, 513 N.E.2d at 315-16; State v. Johnson (1988), 36 Ohio St.3d 2224, 226, 522 N.E.2d 1082, 1084. Following this analysis, the instruction on Gross Sexual Imposition at issue was proper only if the jury could reasonably disbelieve any evidence of

conduct constituting sexual conduct, but reasonably believe that the same evidence demonstrated sexual contact.

At trial, Lawrence argued that Gross Sexual Imposition, a completed crime, could never be a lesser, included offense of Attempted Rape, an inchoate crime, since by definition an attempt crime is missing one or more elements necessary to make a completed crime. Applying Kidder, a party could therefore commit Attempted Rape without necessarily committing Gross Sexual Imposition. The trial court, however, did not even consider such an abstract approach. (*See generally*, T.p. at 169-72, *passim*.) Instead, the trial judge looked to the evidence introduced at trial to determine whether such evidence could support a conviction on the proposed lesser offense, characterizing Walston's testimony as follows:

... [Walston testified] [t]hat he saw the defendant rubbing his genitals on the back of the victim in this particular case. And the Court believes that if the jury believes that was done for purposes of sexual gratification, that would constitute sexual contact as opposed to sexual conduct. And therefore, in this particular case, that if the jury believes his testimony or believes that constitutes the offense of gross sexual imposition, that is what the jury has to decide.

(*Id.* at 218, lines 16-25.) Such a fact-based approach, relying wholly upon the evidence at trial and ignoring the greater question of notice embodied in the Fourteenth Amendment to the U.S. Constitution and Sec. 10, Art. I of the Ohio Constitution, and thereby violated Due Process.

On appeal, the Twelfth District, perhaps in recognition of this defect in the trial court's reasoning, accepted the proposition that Deem and Kidder require both an abstract and a factual analysis. State v. Lawrence (Butler 2008), CA08-01-0017, 2008-Ohio-1354 at ¶¶25-26. Yet the court refused to compare the greater of offense of Attempted Rape to the lesser offense of Gross Sexual Imposition as those decisions require. Rather, the court held that whenever analyzing an attempt offense as a greater offense, the court should look to the elements of the underlying, complete

offense, not to the attempt offense itself, and compare those elements to the lesser offense in question to determine whether the elements of the two are sufficiently synchronous:

... One cannot logically align the elements of a completed offense, such as gross sexual imposition, with the elements of an inchoate offense, such as attempted rape. Therefore, this court finds that in determining whether a completed offense is a lesser, included of an attempted offense, we must look the underlying offense laying the attempt aspect aside for the analysis.

State v. Lawrence, *supra*, 2008-Ohio-1354 at ¶27. This approach allowed the appellate court to focus on the offense of Rape, rather than Attempted Rape, and avoid the analytical problem identified in the first prong of the Deem and Kidder analysis. The court therefore held that because Gross Sexual Imposition was a “lesser included offense” of Rape, it was also a “lesser included offense” of Attempted Rape. *Id.* at ¶27.

This analysis is clearly wrong, as it completely abrogates the notice aspect of Due Process that allow the giving of an instruction on a lesser, included offense in the first place. The distinction between Rape and Gross Sexual Imposition is essentially that between “sexual conduct” and “sexual contact.” *Compare* R.C. §§2907.02(A) [Rape] and 2907.05(A) [Gross Sexual Imposition]. Sexual conduct is defined to include vaginal or anal intercourse, cunnilingus, fellatio, or digital penetration, see R.C. §2907.01(A), while sexual contact is the touching of an “erogenous zone.” R.C. §2907.01(B). The distinction between sexual conduct and sexual contact is the element of penetration. Gross Sexual Imposition is therefore a lesser, included offense of Rape, *see State v. Johnson* (1988), 36 Ohio St.3d 224, 226, 522 N.E.2d 1082, 1084, because one could never engage in vaginal or anal intercourse, cunnilingus, fellatio, or digital penetration without also touching an erogenous zone.

An attempt crime is defined as one where a person , purposely or knowingly, “engage[s] in conduct that, if successful, would constitute or result in the offense.” R.C. §2923.02(A). Therefore, the offense of Attempted Rape must be defined as engaging in conduct which, if successful, would result in vaginal or anal intercourse, cunnilingus, fellatio, or digital penetration. R.C. §§2907.02(A); 2923.02(A). Such conduct need not include the touching of an erogenous zone.

The rationale underlying the entire concept of a “lesser, included offense” is that where a Grand Jury finds “probable cause” to charge a defendant with a particular crime, the ensuing Indictment puts the defendant on notice, not only of that crime, but of attempt crimes, inferior degrees of the same crime, and lesser, included offenses, *i.e.* crimes have identical elements as the charged offense. State v. Deem, *supra*, 40 Ohio St.3d at 208, 533 N.E.2d at 297. An instruction on a lesser included offense only passes constitutional muster because of the synchronicity of essential elements in the greater and lesser offenses, so that when a criminal defendant is given notice of the greater offense, he is also given notice of the lesser offense. This scheme satisfies Due Process. *Id.* at 205, 533 N.E.2d 294.

In the case at hand, the Grand Jury had already determined that probable cause did not exist to charge Lawrence with the completed crime of Rape. As the Twelfth District conceded “[o]ne cannot logically align the elements of a completed offense, such as gross sexual imposition, with the elements of an inchoate offense, such as attempted rape.” State v. Lawrence, *supra*, 2008-Ohio-1354 at ¶27. Applying this same reasoning, the Indictment charging Lawrence with Attempted Rape could not, logically, have put him on notice that he was also charged with a lesser, included offense of Gross Sexual Imposition.

Indeed, this approach accords with that adopted by this Court in State v. Barnes (2002), 94 Ohio St.3d 21, 759 N.E.2d 1240. In that case, this Court considered whether Felonious Assault was a lesser, included offense of Attempted Murder. Emphasizing the importance of the second prong of the Deem test, this Court “examine[d] the offenses as statutorily defined and not with reference to specific factual scenarios,” *id.* at 26, 759 N.E.2d at 1244, and concluded:

... felonious assault under R.C. 2903.11(A)(2) is not a lesser included offense of attempted murder because it is possible to commit the greater offense without committing the lesser one. For example, an offender may commit an attempted murder without use of a weapon, meaning that “attempted murder can sometimes be committed without committing felonious assault ...

Id. [citing State v. Nelson (Tuscarawas 1996), 122 Ohio App.3d 309, 315, 701 N.E.2d 747, 750]. This Court therefore determined that the giving of such an instruction by the trial court was erroneous. *Id.*

The instant case presents the same scenario. A person could commit Attempted Rape, as statutorily defined, without ever committing Gross Sexual Imposition, as statutorily defined, such as when one person may attempt to force himself on another without ever actually touching an erogenous zone. As a general Proposition of Law, then, when comparing a greater and a lesser offense to determine whether the latter is a lesser, included offense of the former, where that greater offense is an attempt offense, the elements of the two offenses can never align and notice of the greater, attempt offense cannot provide notice satisfying Due Process with respect to the lesser, complete offense.

B. ASSIGNMENT OF ERROR No. 2:

A Criminal Defendant May Not be Convicted on the Basis of Facts neither Presented to a Grand Jury nor Charged in an Indictment.

As his second Proposition of Law, Lawrence argues that the trial court's instruction on Gross Sexual Imposition, and more particularly, the trial judge's clarification of that instruction allowing the petit jury to consider a male breast as an "erogenous zone" under R.C. §2907.01(B), opened the door for that jury to convict Lawrence of a crime not charged in the Indictment. As such, Lawrence's conviction for Gross Sexual Imposition violated his constitutional right to Due Process, and more specifically, his right to presentment to a Grand Jury.

The Ohio Constitution mandates that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a grand jury." SEC. 10, ART. I, OHIO CONST. This provision enforces the due process requirement of the Fourteenth Amendment that a criminal defendant must be given "fair notice" of the charge or charges against him in order to permit him to prepare a defense. AMEND. XIV, U.S. CONST.; In re Oliver (1948), 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed.2d 682. In practice, this constitutional provision guarantees

[t]he material and essential facts constituting such an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury.

State v. Harris (1932), 125 Ohio St. 257, 264, 181 N.E. 104; State v. Headley (1983), 6 Ohio St.3d 475, 478-79, 453 N.E.2d 716.

This Court has long recognized that a such a defective Indictment does not convey subject-matter jurisdiction to the trial court, rendering any criminal conviction derived from that Indictment

void ab initio:

A judgment of conviction based on an indictment which does not charge an offense is void for lack of jurisdiction of the subject matter and may be successfully attacked on direct appeal to a reviewing court ...

State v. Cimpritz (1953), 158 Ohio St. 490, *syllabus* ¶6, 110 N.E. 416; *see also State v. Hous* (Greene 1984), 2004 WL 259261 at 3, 2004-Ohio-666 at ¶¶12-14. Lawrence asserts that the Indictment here did not state an essential element of the crime of Gross Sexual Imposition, as defined by the trial court and presented to the petit jury, to wit: sexual contact by touching a breast. The Grand Jury considered such evidence. Consequently, Lawrence's conviction for Gross Sexual Imposition is likewise *void ab initio*.

The Indictment in this case charges Lawrence with a single count of Attempted Rape, and reads, in pertinent part, as follows:

On or about June 26, 2006, at Butler County, Ohio, Robert Lawrence did purposely or knowingly ... engage in conduct which if successful would constitute or result in the offense of RAPE, O.R.C. §2907.02(A)(1)(b), to wit: engage in *sexual conduct* with another who is not the spouse of the offender ... when the other person is less than thirteen years of age ...

(Indictment, T.d. at 2 [emphasis added].) "Sexual conduct" is defined as vaginal or anal intercourse, cunnilingus, fellatio, or digital penetration. R.C. §2907.01(A). Thus, the Indictment put Lawrence on notice that he engaged in a course of conduct which, if successful, would have resulted in vaginal or anal intercourse, cunnilingus, fellatio, or digital penetration. More importantly, the Indictment gives no indication that the Grand Jury ever considered the touching of a male breast as part of that course of conduct.

At trial, the court gave an instruction of Gross Sexual Imposition on the theory that such a crime was a "lesser offense" of the charged crime of Attempted Rape. (*See* T.d. II at 218, line 9, to

219, line 4.) The theory underlying such an instruction is that an Indictment properly setting forth a particular crime also gave sufficient notice of attempts, inferior degrees of the same crime, and lesser, included offenses, *i.e.* crimes have identical elements as the charged offense. State v. Deem, *supra*, 40 Ohio St.3d at 208, 533 N.E.2d at 297. Because all the elements of the lesser, included offense are included in the greater charge, this would satisfy the fair notice and Grand Jury presentment aspects of Due Process addressed in the federal and state constitutional provisions cited above. *Id.* at 210, 533 N.E.2d at 299.

The elements of the crime of Gross Sexual Imposition are: (i) sexual contact (ii) with another not the spouse of the first person, (iii) where that other person is under thirteen years of age. R.C. §2907.05(A)(4). “Sexual contact” is the touching of an erogenous zone, defined as, without limitation, the thigh, genitals, buttocks, pubic region or, in the case of a female, the breasts. R.C. §2907.01(B). To the extent that Gross Sexual Imposition may be a lesser, included offense of Attempted Rape, the Indictment in this case properly put Lawrence on notice of any sexual contact that might be incidental to any sexual conduct: the touching of genitals, pubic area, anus, thighs or buttocks during anal or vaginal intercourse; the touching of genitals, pubic area, or mouth during fellatio or cunnilingus; and the touching of the anus or vagina during digital penetration.

During its deliberation, the jury sent a question back to the court asking, in effect, whether they could consider a male breast to be an erogenous zone. The trial court answered in the affirmative, adding “that’s something you have to consider within the context of the case.” (T.p. at 221, lines 1-2.) Such an answer opened the door for the jury to consider any facts, such as the touching of Kincer’s breast — not just those alleged in the Indictment — as evidence of sexual contact. (*See generally, id.* at 222-25.)

Significantly, the Indictment did not and could not put Lawrence on notice of any sexual contact involving the touching of breasts, which is not incidental to sexual conduct of any kind. The Indictment further gives no notice that the charge of attempting to engage in anal intercourse with Kincer also involved groping Kincer's breast. And most importantly, there is nothing in the record indicating that the Grand Jury ever considered such evidence as constituting part of the offense of Attempted Rape with which it charged Lawrence. In the "context of this case" then, the touching of a male breast cannot be considered sexual contact because such conduct lies outside the scope of the Indictment.

As a result, the trial judge's answer to the jury's constitutes a *de facto* amendment of the Indictment to include an entirely new offense, to wit: Gross Sexual Imposition by groping Kincer's breast. While the criminal rules permit a trial court to amend an Indictment, they flatly prohibit an amendment that changes the substance or identity of the crime. RULE 7, OHIO R. CRIM. PROC.; State v. O'Brien (1987), 30 Ohio St.3d 122, 126, 508 N.E.2d 144.

A trial court commits reversible error where it amends an indictment to change the substance or identity of the offense charged, regardless of whether the defendant is prejudiced by said amendment. State v. Plaster (Richland 2005), 164 Ohio ZSt.3d 750, 757, 843 N.E.2d 1261, 1266, 2005-Ohio-6770; State v. Jackson (Clark 1992), 78 Ohio App.3d 479, 605 N.E.2d 426.

To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basis protection which the intervention of a grand jury was designed to secure. For a defendant to be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury who indicted him.

State v. Vitale (Cuyahoga 1994), 96 Ohio App.3d 695, 645 N.E.2d 1277. This Court, in a recent case, State v. Davis (September 16, 2008), *slip opinion*, 2008-Ohio-4537, reaffirmed the sanctity of

a criminal defendant's right of presentment to a Grand Jury, and of the ineffectiveness of a later amendment changing those facts set forth in that Indictment.

We disagree with the state's argument that Headley is distinguishable on the ground that the amendment in that case supplied "an essential element of the crime" that had previously been omitted. The state incorrectly cites the following passage in favor of this argument: "Where one of the vital elements identifying the crime is omitted from the indictment, it is defective and cannot be cured by the court as such a procedure would permit the court to convict the accused on a charge essentially different from that found by the grand jury" ... [A] court cannot allow an amendment that *would allow the court to convict the accused on a charge essentially different from that found by the grand jury*.

Id. at ¶10 [citations omitted, emphasis added].

The very nature of the jury's question regarding the definition of "erogenous zone" and the trial court's affirmative response make it a near certainty that the jury convicted Lawrence of Gross Sexual Imposition on such evidence. Yet, the record of the proceedings below contains no evidence that a Grand Jury heard testimony regarding Lawrence's alleged touching of Kincer's breast when it returned an Indictment on the charge of Attempted Rape. Essentially, the trial court gave the petit jury free rein to convict Lawrence on a crime not charged in the Indictment — a *de facto* amendment of that Indictment, albeit to the lesser-degree offense of Gross Sexual Imposition by touching a male breast.

An analogous situation arose in State v. Crooks (Hamilton 1984), 1984 WL 7110 at 2-3. There, the defendant was charged as a principal in numerous sexual assaults, including two counts of rape. At trial, however, the state could only produce evidence that a codefendant had actually penetrated the victim. And at the close of the case, the trial court, upon the state's request, gave a jury instruction regarding complicity. *Id.* at 2-3. On Appeal, the First District Court found this to be a *de facto* amendment of the two rape charges, since the Indictment did not contain language

charging the defendant with aiding or abetting the those crimes. State v. Crooks, *supra*, 1984WL 7110 at 4. The court reversed the defendant's conviction on those two counts, explaining

... As it was, the defendant had no idea or reason to suspect that he was placed in jeopardy by the two count indictment of conviction as a complicitor in the acts of his companion until ... the conclusion of the state's case. Under such circumstances, we simply cannot assume that the defendant was adequately informed of the nature and cause of the accusation in a fashion permitting him his undoubted right to present a reasonable and adequate defense to the latter charges..

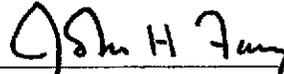
Id. at 5. In the very same manner, Lawrence had no notice, until the trial court answered the jury's question as to whether it could consider the touching of Kincer's breast in conjunction with the lesser, included offense of Gross Sexual Imposition, that such conduct even constituted an offense. As such, he was deprived of any opportunity to present a defense to such a charge.

In short, there is a very high probability that the jury convicted Lawrence of Gross Sexual Imposition based on evidence outside the scope of the Indictment in this case. Such a result deprived him of his right to "fair notice" guaranteed by the Fourteenth Amendment of the U.S. Constitution and Sec. 10, Art. I of the Ohio Constitution. Even allowing the jury to consider such evidence deprived him of his right to defend against such evidence. As a consequence, Lawrence' conviction for Gross Sexual Imposition violates Due Process, is *void ab initio* and must be vacated.

V. CONCLUSION

For all the reasons set forth more completely above, Lawrence asserts that his conviction on the charge of Gross Sexual Imposition was unconstitutional and must be vacated *en grosse*. In the alternative, he asserts that his conviction should be reversed and this case remanded for a new trial.

Respectfully submitted,

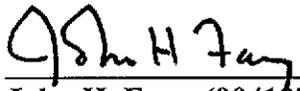


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Robert Lawrence

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellant was served upon Robin Piper, Butler County Prosecuting Attorney, at 315 High St., 11th Floor, Hamilton, Ohio 4502, by hand delivery, on this 15th day of September, 2008.



John H. Forg (0041972).

Attorney for Appellant
Robert Lawrence

Appendix "A"
Notice of Appeal to the Ohio Supreme Court (May 1, 2008)

IN THE OHIO SUPREME COURT
COLUMBUS, OHIO

08-0844

ROBERT LAWRENCE : Case No. _____
: :
Defendant-Appellant, : On Appeal from the Butler
: Co. Court of Appeals, 12th
-vs- : Appellate District
: :
STATE OF OHIO :
: :
Plaintiff-Appellee. :

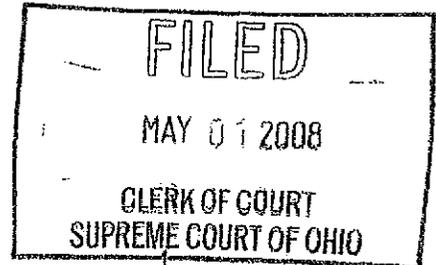
=====
**NOTICE OF APPEAL
OF APPELLANT ROBERT LAWRENCE**
=====

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State of Ohio

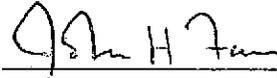


NOTICE OF APPEAL

NOW COMES defendant-appellant Robert Lawrence, by and through counsel, and hereby appeals to the Supreme Court of Ohio, from the Order of the Butler County Court of Appeals, Twelfth Appellate District, entered in Case No. CA05-01-0005 on March 24, 2008.

This case raises a substantial constitutional question and is one of public or great general interest. *and this case is a felony.*

Respectfully submitted,

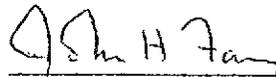


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Attorney for Appellant
Robert Lawrence

CERTIFICATE OF SERVICE

A copy of this Notice of Appeal was served upon Robin Piper, Butler County Prosecuting Attorney, at 315 High St., 11th Floor, Hamilton, Ohio 45012, by hand delivery, on this 1st day of May, 2008.



John H. Forg (0041972)

Attorney for Appellant
Robert Lawrence

Appendix "B"
Judgment Entry of the Twelfth District Court of Appeals (March 24, 2008)

FILED
IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CINDY GARRETT
BUTLER COUNTY
CLERK OF COURTS

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2007-01-017
 :
 - VS - : JUDGMENT ENTRY
 :
 ROBERT LAWRENCE, :
 :
 Defendant-Appellant. :

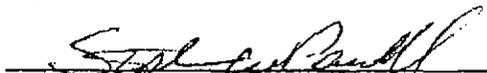
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


H.J. Bressler, Presiding Judge


James E. Walsh, Judge


Stephen W. Powell, Judge

Appendix "C"
Opinion of the Twelfth District Court of Appeals (March 24, 2008)

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2007-01-017
	:	
- vs -	:	<u>OPINION</u> 3/24/2008
	:	
ROBERT LAWRENCE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2006-09-1738

Robin N. Piper, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Repper, Powers & Pagan, John H. Forg III, 1501 First Avenue, Middletown, Ohio 45044, for defendant-appellant

WALSH, J.

{¶1} Defendant-appellant, Robert Lawrence, appeals from a judgment of conviction in the Butler County Court of Common Pleas for one count of gross sexual imposition. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} Appellant was indicted on October 4, 2006 on one count of attempted rape, a second-degree felony in violation of R.C. 2907.02(A)(1)(b) and R.C. 2923.02. The charges stemmed from a report that appellant held a ten-year-old victim, S.K., against a concrete wall

and simulated anal sex while grinding his pelvis against the victim's backside. Appellant entered a plea of not guilty and the case proceeded to a jury trial, held November 27-28, 2006.

{¶3} At trial, the state presented the testimony of the victim. S.K. testified that on the afternoon of June 26, 2006, he and his friend, T.L., went to meet appellant. Appellant is T.L.'s grandfather and the boys found him sitting on a concrete retaining wall on See Avenue in Hamilton, Ohio drinking a 40-ounce beer. S.K. testified that he and T.L. sat with appellant for approximately 15-20 minutes before another boy, A.W. arrived. A.W. began to tease the victim for being overweight, and eventually pushed him to the ground. S.K. testified that appellant then called A.W. over to him and S.K. heard them talking about pulling S.K.'s pants down. S.K. testified that A.W. then grabbed him and threw him over the concrete wall so that he was facing the wall and bent over it. A.W. then pulled S.K.'s pants down so that his bottom was exposed. S.K. testified that appellant then grabbed at him "up here," began unbuckling his belt and tried to put his penis inside S.K.'s bottom. S.K. testified that appellant did not actually touch his bottom. S.K. stated that he kicked himself free and ran to a nearby friend's house. He later told his mother, who reported the incident to police.

{¶4} The state also presented A.W.'s testimony. A.W. corroborated much of S.K.'s testimony, and admitted that he had pushed S.K. and thrown him against the concrete wall. A.W. testified that appellant told him to "pull [S.K.'s] pants down or I'm going to kill you." A.W. then testified that appellant took down his own pants, put his hand on S.K.'s back to hold him against the wall, and began "dry humping" him. A.W. explained that appellant was grinding his pelvis back and forth into S.K.'s backside, and that he was actually making contact with S.K.'s body. A.W. also testified that appellant commented, "Get me some Vaseline and it will slide right in."

{¶5} Appellant also testified at trial and denied ever simulating anal sex on the victim.

Appellant testified that he was sitting on the concrete retaining wall drinking a beer when his grandson and the victim arrived. Appellant stated that the boys were "horsing around" but that he never saw the victim's pants get pulled down and he never grinded his pelvis against the victim or attempted to sexually assault him. Appellant's grandson, T.L., also testified and denied ever seeing appellant hold S.K. to the concrete wall or grind his body against him. However, T.L. also testified that he heard appellant tease S.K. about being fat, saying that he wanted to "suck his tee tees," and that appellant grabbed at S.K.'s chest.

{¶6} After it had presented its case, the state requested an additional jury instruction on a lesser included offense of gross sexual imposition, a third-degree felony in violation of R.C. 2907.05(A)(4). Appellant objected and argued that gross sexual imposition was not a lesser included offense of attempted rape and that no such instruction was warranted by the evidence.

{¶7} The trial court requested case law verification from the state and took the arguments under advisement for the evening. The next day, at the close of the evidence, the court overruled appellant's objection and included the instruction on gross sexual imposition as a lesser included offense of the charged offense, attempted rape.

{¶8} During deliberations, the jury submitted three related questions to the court pertaining to the crime of gross sexual imposition and the definition of sexual contact. The court brought the jury and both parties into the courtroom and read the questions.

{¶9} The jury's first question read, "What is meant by the phrase including without limitations" as applied to the definition of an erogenous zone for purposes of sexual contact. The court responded "It means that it could be more than what is listed in there, but that is listed as something that would traditionally be considered to be an erogenous zone, but it could be more than that, to answer your specific question."

{¶10} The court continued, "You [sic] specific is, Does it include more body parts than

listed?" The court responded, "The answer clearly is yes."

{¶11} The jury's final question read, "Can a male breast be considered an erogenous zone?" The court responded, "Well, really that's something that you have to answer within the context of this case." The court then went on to read the paragraph of the jury instructions which defined sexual contact to include any physical touching of an erogenous zone that a reasonable person would perceive as sexually stimulating or gratifying.

{¶12} After the court responded to the jury's questions, the jury was excused and allowed to return to deliberations. Appellant objected to the court's response and argued that it improperly implied that the jury may convict appellant for gross sexual imposition if they find that appellant grabbed the victim's breast for purposes of sexual gratification. This, appellant argued, would amount to a conviction on conduct not anticipated or included within the original indictment and charge for attempted rape by anal penetration. The court rejected appellant's argument. Appellant did not request any limiting or clarifying instruction for the jury.

{¶13} On that same day, the jury returned a verdict of not guilty on the indicted charge of attempted rape, but guilty on the lesser included offense of gross sexual imposition. The court later found appellant to be a sexual predator and sentenced him to imprisonment for a period of two years.

{¶14} Appellant filed a motion for postconviction relief or a new trial, arguing that the trial court had improperly allowed the jury to consider the crime of gross sexual imposition as a lesser included offense of attempted rape. The motion was denied by the court. Appellant then filed this appeal, raising three assignments of error for our review.

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING AN INSTRUCTION TO THE JURY ON A 'LESSER OFFENSE' OF GROSS SEXUAL

IMPOSITION."

{¶17} In his first assignment of error, appellant raises two issues with regard to the trial court's decision to instruct the jury that it could consider gross sexual imposition as a lesser included offense of attempted rape. Appellant first contends that gross sexual imposition is not a lesser included offense of attempted rape and it was improper for the court to allow the jury to consider the charge. Alternatively, appellant argues that even if gross sexual imposition is found to be a lesser included offense of attempted rape, an instruction on that charge was not supported by the evidence in this case.

{¶18} Appellant was originally charged with attempted rape. Pursuant to R.C. 2907.02, "[N]o person shall engage in sexual conduct with another * * * when any of the following applies: * * * (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person." "Sexual conduct," as used in R.C. 2907.02 and defined by R.C. 2907.01, includes anal intercourse.

{¶19} R.C. 2923.02 provides that "(A) No person, purposely or knowingly * * * shall engage in conduct that, if successful, would constitute or result in the offense." A criminal attempt requires a showing that a defendant completed a substantial step in a course of conduct planned to culminate in the commission of the crime. Specific to the facts of this case, appellant was charged with engaging in conduct that, if successful, would result in anal intercourse.

{¶20} Appellant was convicted, however, of gross sexual imposition. R.C. 2907.05 defines the crime of gross sexual imposition and provides that "(A) No person shall have sexual contact with another, * * * when any of the following applies: * * * (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person." "Sexual contact" as used in R.C. 2907.05 and defined by R.C. 2907.01 means "any touching of an erogenous zone of another, including

without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶21} "Pursuant to R.C. 2945.74 and Crim.R. 31(C), a jury may consider three groups of lesser offenses on which, when supported by the evidence at trial, it must be charged and on which it may reach a verdict: (1) attempts to commit the crime charged, if such an attempt is an offense at law; (2) inferior degrees of the indicted offense; or (3) lesser included offenses." *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph one of the syllabus.

{¶22} An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Kidder* (1987), 32 Ohio St.3d 279; *State v. Deem*. An instruction on a lesser included offense is warranted whenever the trial court: (1) determines that the offense on which the instruction is requested is necessarily lesser than and included within the charged offense, under the statutory elements test announced in *Kidder*; and (2) after examining the facts of the case, ascertains that the jury could reasonably conclude that the evidence supports a conviction for the lesser offense and not the greater. *State v. Johnson* (1988), 36 Ohio St.3d 224, 226.

{¶23} It is undisputed that gross sexual imposition is a lesser included offense of rape. *Id.* However, appellant argues that under the abstract approach created under *Kidder* and *Deem*, gross sexual imposition is not a lesser included offense of attempted rape because scenarios exist in which one may commit attempted rape (attempted sexual conduct) without also committing gross sexual imposition (sexual contact). Indeed, the Ohio Supreme Court's recent decision in *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, finds that the evidence in a particular case is irrelevant to the determination of whether an offense, as "statutorily

defined" is "necessarily" included in a greater offense. That court went on to find that felonious assault is not a lesser included offense of attempted murder where it is possible to commit one offense without the other offense also being committed.

{¶24} The state, however, argues that gross sexual imposition has been repeatedly recognized as a lesser included offense of attempted rape. See, *In re Shubutidze* (Mar. 8, 2001), Cuyahoga App. No. 77879, 2001 WL 233400 (reversing juvenile adjudication on attempted rape and imposing finding of delinquency on "lesser included offense" of gross sexual imposition); *State v. Robinson* (Mar. 15, 1995), Lorain App. No. 94CA005788, 1995 WL 110134 (finding trial court properly instructed jury to consider gross sexual imposition as lesser included offense of attempted rape); *State v. Jones*, 93 Ohio St.3d 391, 394, 2001-Ohio-1341 (affirming conviction on gross sexual imposition as lesser included offense of attempted rape on sufficiency of the evidence); *State v. Ochoa*, Putnam App. No. 12-2006-6, 2000-Ohio-1867 (noting that, while it was undisputed that gross sexual imposition is a lesser included offense of attempted rape, facts of case did not support giving of instruction). In *Shubutidze*, the court found that the finding of delinquency on attempted rape was not supported by sufficient evidence and that the facts instead supported a finding of delinquency on the lesser included offense of gross sexual imposition. *Id.* at *9. Similarly, in *Robinson*, the court found that where the evidence presented to the jury reasonably supported a conclusion that the defendant had not attempted to rape the victim, but had, instead, engaged only in gross sexual imposition, the lesser included instruction was proper. *Robinson*, 1995 WL 110134 at *2-3.

{¶25} Despite the abstract analysis advocated by the majority opinion in *Barnes*, this fact-based approach continues to receive support in determining whether one offense is a lesser included offense of another. In *State v. Kvasne*, 169 Ohio App.3d 167, 2006-Ohio-5235, the Eighth District Appellate Court rejected the abstract analysis followed by the Ohio

Supreme Court in *Barnes*. Instead, the court advocated and applied the approach raised in Justice Lundberg-Stratton's concurring opinion in that case in which the facts and circumstances of each case are relevant to the determination of whether one offense is a lesser included offense of another. *Id.* at ¶¶51-53. The court looked to case law which predated not only *Barnes* but *Deem* and *Kidder* as well, in which the Ohio Supreme Court advocated a test which looked to both the statutory elements of offenses as well as the evidence supporting the lesser charge. *Id.* at ¶¶49, citing *State v. Wilkins* (1980), 64 Ohio St.2d 382 (finding that sexual battery may be a lesser included offense of rape where force is present). Applying such an analysis, the court went on to find that abduction was a lesser included offense of kidnapping and defendant's conviction for abduction was therefore valid.

{¶26} We find it clear that the Ohio Supreme Court requires the application of an abstract analysis of the statutory elements of the charged offenses. However, we cannot reject the necessity, reflected in case law, for the relevance of the facts of a particular case in determining whether one offense may be a lesser included offense of another. Certainly, an approach which purports to give relevance to the facts of each case renders any abstract analysis meaningless. Therefore, we seek in this case to employ an approach which utilizes both an objective and subjective analysis.

{¶27} Appellant urges this court to compare, in the abstract, the statutory elements of the offense of gross sexual imposition with the statutory elements of attempted rape. Asserting that the elements do not sufficiently align such that one may never be committed without also committing the other, appellant argues that gross sexual imposition is not a lesser included offense of attempted rape. However, a criminal attempt is not, by itself, an offense. One cannot logically align the elements of a completed offense, such as gross sexual imposition, with the elements of an inchoate offense such as attempted rape. Therefore, this court finds that in determining whether a completed offense is a lesser

included of an attempted offense, we must look to the underlying offense laying the attempt aspect aside for the analysis. In this case, that offense is rape. As stated above, it is undisputed that gross sexual imposition is a lesser included offense of rape. One cannot engage in sexual conduct, defined as penetration, without also committing sexual contact, defined as the touching of an erogenous zone for purposes of sexual gratification. R.C. 2907.02; R.C. 2907.05.

{¶28} While we acknowledge that this approach is novel, we find support in the purpose behind the test designed to determine lesser included offenses. The adoption of a test "which looks to both the statutory elements of the offenses involved and the evidence supporting such lesser offenses as presented at trial is grounded primarily in the need for clarity in meeting the constitutional requirement that an accused have notice of the offenses charged against him." *State v. Deem*, 40 Ohio St.3d at 210. In adopting an approach which incorporates the abstract analysis advocated in *Barnes* as to the underlying offense, as well as giving relevance to the facts of the actual case at hand, this purpose is furthered.

{¶29} Additionally, the legislative notes to the attempt statute, R.C. 2923.02, explain that an attempt to commit an offense is an offense in itself. The statute goes on to define exceptions to that rule and notes that one cannot attempt to commit any offense which in itself is defined as an attempt. This language makes it clear that the word "attempt" acts to modify an underlying offense, as one cannot attempt to attempt to commit a crime. We find this language to be further support for our position that any abstract determination of what may constitute a lesser included offenses to an attempt offense requires that we look only to the elements of the underlying offense.

{¶30} We recognize that cases exist in which Ohio courts have reached different conclusions. See *State v. Johnson* (1988), Franklin App. No. 85AP-868, 1988 WL 24407 (felonious assault was not a lesser included offense of attempted murder, despite noting that

it was a lesser included offense of murder). Admittedly, had the *Barnes* court engaged in the analysis we advocate here, felonious assault would be found to be a lesser included offense of attempted murder because felonious assault is, in fact, a lesser included offense of the underlying offense of murder. It is statutorily impossible to cause the death of another (murder) without causing serious physical harm to another (felonious assault). R.C. 2903.02; R.C. 2903.11(A). However, finding no cases which sufficiently analyze the basis for their conclusion or justify a disregard for the analysis we advocate here, we find those cases distinguishable.¹

{¶31} Applying our analysis, and finding that gross sexual imposition is a lesser included offense of the underlying crime of rape, we turn to appellant's second argument under this assignment of error and look to the facts of the case at bar to determine whether an instruction on gross sexual imposition as a lesser included offense of attempted rape was warranted in this case. An instruction on a lesser included offense is warranted if, after examining the facts of the case, the jury could reasonably conclude that the evidence supports a conviction for the lesser offense and not the greater. See *State v. Johnson* (1988), 36 Ohio St.3d 224, 226.

{¶32} Appellant was charged with attempting to anally penetrate his minor victim, S.K.. S.K. testified that appellant "tried to stick his [penis] in my bottom." However, S.K. also testified that appellant did not actually make contact with his body. S.K. testified that he believed appellant was attempting to penetrate him because he saw appellant unbuckling his belt while he was held against the wall. Another witness and participant in the assault, A.W.,

1. Although this court previously applied the *Barnes* abstract analysis to find that aggravated assault is not a lesser included offense of attempted murder in *State v. Eldridge*, Brown App. No. CA2002-10-021, 2003-Ohio-7002, we note that that our decision in that case is not affected by our analysis today as aggravated assault would not be a lesser included offense of the underlying offense of attempted murder. It is statutorily possible to cause the death of another without being under the passion or rage of provocation. R.C. 2903.12(A); R.C. 2903.02.

testified that at the time S.K. was pushed against the wall, appellant's pants were down and he was grinding his pelvis against S.K.'s bare backside. A.W. testified that appellant was, in fact, making contact with S.K.'s body and that appellant made the comment that, "if [he] had some Vaseline, it would slide right in." Appellant argues that a jury could not logically disbelieve the testimony that appellant was attempting to penetrate the victim, and yet believe testimony that he made sexual contact with the victim's body. Citing *Johnson*, appellant contends that because he asserted a complete defense, that is, a total denial of the allegations of any contact, the jury could not logically dissect the evidence supporting attempted rape from that of gross sexual imposition. We disagree.

{¶33} Initially, we note that it is well-settled that a jury may choose to believe all or part of the testimony of a witness. *State v. Nichols* (1993), 85 Ohio App.3d 65, 76. Further, the case cited by appellant is distinguishable on its facts. The defendant in *Johnson* was charged with rape, not attempted rape. In that case, the Ohio Supreme Court explained that, under no reasonable view of the evidence could the jury have disbelieved the testimony alleging appellant had penetrated the victim and then use the same testimony to support a conviction for sexual contact. *Johnson*, 36 Ohio St.3d at 226. Because the victims in that case testified that appellant had raped them, a jury's disregard of the only evidence of sexual conduct left nothing to support a conviction for sexual contact. See, *id.*

{¶34} However, in the case at bar, the jury was free to disbelieve the state's contention that appellant was attempting to actually penetrate the victim and still believe that appellant had made sexual contact with an erogenous zone for purposes of sexual gratification. As state above, the jury was free to believe or disbelieve all or part of the testimony presented and could reasonably choose to believe that the sexual contact occurred while simultaneously disbelieving that appellant's intent was to penetrate. We therefore find that the trial court properly instructed the jury that it could consider gross sexual imposition as

a lesser included offense of attempted rape in this case. Accordingly, appellant's first assignment of error is overruled.

{¶35} Assignment of Error No. 2:

{¶36} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO GIVE A LIMITING INSTRUCTION PRECLUDING THE JURY FROM CONSIDERING THE MALE BREAST TO BE AN EROGENOUS ZONE WHEN CONSIDERING A 'LESSER CHARGE' OF GROSS SEXUAL IMPOSITION."

{¶37} In his second assignment of error, appellant argues that the trial court improperly refused to issue a limiting instruction clarifying its response to the jury's questions regarding the definition of "sexual contact." Appellant goes on to argue that the court also specifically instructed the jury that they could consider "sexual contact" unrelated to the charge of attempted rape. However, a review of the record demonstrates that appellant did not request a limiting instruction. Further, the court did not give any instruction regarding unrelated evidence of sexual contact.

{¶38} "Where, during the course of its deliberations, a jury requests further instruction, or clarification of instructions previously given, a trial court has discretion to determine its response to that request." *Sabina v. Kress*, Clinton App. No. CA2006-01-001, 2007-Ohio-1224, ¶14, citing *State v. Carter*, 72 Ohio St.3d 545, 553, 1995-Ohio-104. Accordingly, "reversal of a conviction based upon a trial court's response to such a request requires a showing that the trial court abused its discretion." See *Carter*. "An abuse of discretion connotes more than an error in law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Id.*

{¶39} In making this determination, "the jury instruction as a whole must be considered to determine if there was prejudicial error." *Id.* at ¶15, citing *State v. Noggle*, 140 Ohio App.3d 733, 750, 2000-Ohio-1927. "The trial court's response, when viewed in its

entirety, must constitute a correct statement of the law, consistent with or properly supplementing the jury instructions that have previously been given." *Id.* However, "an appellate court will only find reversible error where a jury instruction has, in effect, misled the jury." *Id.*, citing *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 1995-Ohio-224.

{¶40} While it is clear appellant disagreed with the court's response, arguing that it had the potential to confuse the jury, appellant never requested or proposed any limiting instruction. Further, appellant did not object to the victim's testimony regarding appellant grabbing his chest when it was given nor to the testimony that appellant wanted to "suck his tee tees." Therefore, we review the court's failure to issue a limiting instruction for plain error only. Recognition of plain error "is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *State v. Payne* 114 Ohio St.3d 502, 2007-Ohio-4642, ¶16.

{¶41} We do not find plain error in this case. We find no error in the court's response to the jury's question regarding what constituted "sexual contact." In responding to the question, the court merely restated the definition of sexual contact for the jury and clarified that the definition did, in fact, include more body parts than those listed within the definition. The court then called upon the jury to use the judgment of a reasonable person in determining whether an area of the body may be perceived as sexually stimulating or gratifying. When responding to the jury's specific question of whether a male breast may be considered an erogenous zone, the court responded that the jury would have to determine that within the context of the case. Appellant did not object to the court's instructions or definitions when they were originally given and we do not find the court's recitation of those definitions for the jury to be misleading or prejudicial.

{¶42} While appellant argues that any evidence regarding appellant's grabbing of the victim's chest is irrelevant to the charge of attempted rape or the lesser included offense of

gross sexual imposition, he did not object to this testimony from the victim when it was given. The victim testified that the grabbing of his chest occurred during the course of the sexual assault while he was being held against the concrete wall. Such evidence was properly presented to and considered by the jury.

{¶43} Finally, we note that appellant summarily argues that he was not afforded an opportunity to be heard prior to the court's response to the jury's question. However, while appellant relies on cases which prohibit a court's ex parte communications with the jury during deliberations, such is not the case here. It is clear that appellant was both present and given an opportunity to be heard following the court's response. Additionally, any error in the court's course of conduct would be harmless, as we find no error in the court's instructions.

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

{¶45} Assignment of Error No. 3:

{¶46} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE JURY THAT IT COULD CONVICT [APPELLANT] ON THE BASIS OF CONDUCT NOT CHARGED IN THE INDICTMENT."

{¶47} In his final assignment of error, appellant argues that the trial court's failure to issue the limiting instruction allowed the jury to convict appellant of a crime not charged in the indictment and that his conviction therefore violates his constitutional right to due process. Appellant contends that the court's response to the question by the jury constituted a de facto amendment of the indictment to a charge of gross sexual imposition for conduct unrelated to the attempted rape. We disagree.

{¶48} The indictment in this case charged appellant with attempted rape pursuant to "R.C. 2907.02(A)(1)(b), to wit: engage in sexual conduct with another * * * when the person is less than thirteen years of age, whether or not the offender knows the age of the other person * * *." A bill of particulars was neither requested nor provided.

{¶49} When responding to the jury's question as to whether a male breast may be considered an erogenous zone, the court instructed the jury that they must answer that within the context of the case. The court then re-read the definition of sexual contact and called upon the jury to employ the judgment of a reasonable person in determining whether someone may consider a certain body part to be sexually gratifying or stimulating.

{¶50} As stated above, we do not find the court's response to the jury's question to be misleading or to imply that the jury could convict appellant based on any specific evidence alone. Additionally, we decline to presume to know on what evidence the jury based their verdict. See *Sabina v. Kress*, 2007-Ohio-1224 at ¶¶19-20 (declining to apply appellant's speculative interpretation that court's response to jury question resulted in conviction on evidence outside the indictment). It is clear that the testimony presented at trial included testimony that appellant, with his own pants down, grinded his pelvis against the victim's backside, commenting that, if he had a lubricant, he could penetrate the victim. This evidence is sufficient to establish that appellant engaged in sexual contact with an erogenous zone for purposes of sexual gratification. We decline appellant's invitation to disregard the jury's consideration of that evidence.

{¶51} Further, appellant cites *State v. Johnson*, 36 Ohio St.3d 224, for the proposition that any grabbing of the victim's chest would be unrelated to the charged offense of attempted rape. However, it is clear that in that case, the court specifically found that the incidents of "sexual contact" occurred at "various times" and were never sufficiently connected with any of the specific acts of penetration testified to by the victims. As stated above, the testimony of the victim in this case makes it clear that the grabbing or groping of the victim's chest occurred during the course of conduct charged as attempted rape. The charged offense would therefore necessarily include any conduct related to the lesser included offense of gross sexual imposition. See *State v. Melchoir* (Jan. 23, 1997), Cuyahoga App. No. 70338.

{¶52} Appellant's conviction for gross sexual imposition does not amount to a conviction for conduct outside the scope of the indictment and his third assignment of error is overruled.

{¶53} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

Appendix "D"
Judgment of Conviction of the Butler County
Court of Common Pleas (January 8, 2007)

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO

Plaintiff

v.

ROBERT LAWRENCE

Defendant

FILED BUTLER CO.
COURT OF COMMON PLEAS

JAN 08 2007

CINLEY WARDEN
CLERK OF COURTS

Case No. CR2006-09-1738

Sage, J.

ORDER DENYING DEFENDANT'S
MOTION FOR POST-CONVICTION
RELIEF OR, IN THE
ALTERNATIVE, A NEW TRIAL

This matter came before the Court, on January 03, 2007, upon Defendant's Motion for Post-Conviction Relief or, in the Alternative, a New Trial. After due consideration thereof, the Court finds that said motion is not well taken.

It is, **THEREFORE, ORDERED, ADJUDGED AND DECREED** that Defendant's Motion for Post-Conviction Relief or, in the Alternative, a New Trial is hereby denied.

Sage, J.

APPROVED AS TO FORM:

ROBIN PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

GSS/ljm
January 5, 2007

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO

CASE NO. CR2006-09-1738

Plaintiff

FILED BUTLER CO.
COURT OF COMMON PLEAS

SAGE, J.

vs.

JAN 03 2007

JUDGMENT OF CONVICTION ENTRY

ROBERT LAWRENCE

CINDY CHRISTENSEN
CLERK OF COURTS

Defendant

On January 03, 2007 defendant's sentencing hearing was held pursuant to Ohio Revised Code Section 2929.19. Defense attorney, John Forg and the defendant were present and defendant was advised of and afforded all rights pursuant to Crim. R. 32. The Court has considered the record, the charges, the defendant's Guilty Finding by Jury, and findings as set forth on the record and herein, oral statements, any victim impact statement and pre-sentence report, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code Section 2929.12 and whether or not community control is appropriate pursuant to Ohio Revised Code Section 2929.13, and finds that the defendant is not amenable to an available community control sanction. Further, the Court has considered the defendant's present and future ability to pay the amount of any sanction, fine or attorney's fees.

The defendant has been found to be a **Sexual Predator**.

The Court finds that the defendant has been found guilty of:

GROSS SEXUAL IMPOSITION as to Count One, a violation of Revised Code Section 2907.05(A)(4) a third degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 2 years.

Credit for 85 days served is granted as of this date.

As to Count(s) One:

The Court has notified the defendant that post release control is mandatory in this case up to a maximum of three (3) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control. The defendant is therefore ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Correction.

Defendant is ORDERED to pay:

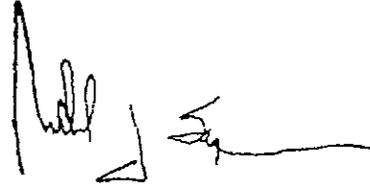
Costs of prosecution, supervision and any supervision fees permitted pursuant to Revised Code Section 2929.18(A)(4).

The Court further advised the defendant of all of his/her rights pursuant to Criminal Rule 32, including his/her right to appeal the judgment, his/her right to appointed counsel at no cost, his/her right to have court documents provided to him/her at no costs, and his / her right to have notice of appeal filed on his behalf.

Directive to Ohio Department of Rehabilitation and Correction: Please notify the Butler County Court of Common Pleas of any major changes of incarceration status including but not limited to release, transfer, execution or death of the defendant.

APPROVED AS TO FORM:

ENTER



ROBIN N. PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

SAGE, J.



JMM/ljm
January 4, 2007

Appendix "E"
OHIO CONSTITUTION, SEC. 10, ART. I

§ 10**CONSTITUTION OF THE STATE OF OHIO****Article I - Bill of Rights****§ 10 Trial for crimes; witness**

§ 10 Trial for crimes; witness

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(As amended September 3, 1912.)

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Appendix "F"
U.S. CONSTITUTION, AMEND. XIV

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any

United States and of the State wherein they reside. No State

office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.