

IN THE SUPREME COURT OF OHIO

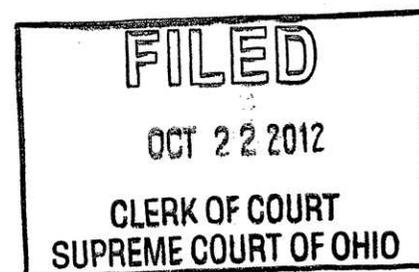
STATE OF OHIO : Case No.: 12-1611

Appellee/Cross Appellant : On Appeal from the Third District
Court of Appeals, No.: 2-12-01

vs. :

DOUGLAS J. WINE :

Appellant/Cross Appellee :



**APPELLEE/CROSS APPELLANT'S MEMORANDUM IN OPPOSITION TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION
AND
APPELLEE/CROSS APPELLANT'S MEMORANDUM IN SUPPORT OF
JURISDICTION OF CROSS APPEAL**

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**EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Appellant's Statement of Case and Propositions of Law attempt to remove from a trial court and Court of Appeals the discretion necessary for the courts to administer justice absent an abuse of discretion. Trial courts must be free in the administration of justice to reasonably instruct juries on lesser included offenses taking into consideration the facts and totality of circumstances introduced and relied upon at trial.

Courts must be free in the administration of justice and the providing of a fair trial to instruct the jury in accordance with the elements of the offense and lesser included offenses and the reasonable consideration of the evidence established at trial. The instructing of a jury must remain the province of the court based upon the evidence and not be decided based upon the trial strategy of a criminal defendant. Likewise, appellate courts must be able to consider the instructions given by a trial court and apply lesser included offenses when the lesser included offense is justified.

STATEMENT OF THE CASE AND FACTS

The Appellee/Cross Appellant, hereinafter Appellee, adopts the Statement of the Case and Facts as prepared by Appellant/Cross Appellee, hereinafter Appellant, with the following additions:

- The victim of the offense testified she awoke to yelling, realized it was her yelling, immediately observed the Appellant kneeling on the floor next to her, and instantly realized that the Appellant's hand was inside her pajama bottom and his finger inside her vagina. The victim further testified and demonstrated to the jury the Appellant's other hand was underneath her pajama top with his palm on her breast bone and fingers towards her right breast. (Trn. Pgs. 209-214)

- The victim testified that upon realizing what was happening she yelled for her husband Cecil twice and upon her yelling for a second time Appellant removed his finger from the victim's vagina and removed his other hand from underneath her pajama top; however he kept his hands underneath the blankets. Further, the victim testified Appellant continued to stare at her and she was concerned for her safety. (Trn. Pg 214, lines 10-23)

- The victim testified she never closed the bedroom door, however, when Appellant left the bedroom he had to unlatch and open the bedroom door to exit.

- Appellant, through his family, arranged prior to law enforcement involvement, an interview and polygraph of Appellant by a privately retained, non-law enforcement investigator. During this interview and investigation the Appellant admitted his involvement in the accusations of his mother-in-law. These admissions were played before the jury. No evidence or mention of a polygraph was ever referenced in front of the jury.

**APPELLANT/CROSS APPELLEE'S
PROPOSITION OF LAW I**

A COURT OF APPEALS ABUSES ITS DISCRETION AND VIOLATES A DEFENDANT'S RIGHT TO BE TRIED BY A JURY OF HIS PEERS WHEN IT REVERSES A CRIMINAL CONVICTION BASED UPON "INSUFFICIENT EVIDENCE" AND ORDERS A CONVICTION OF A LESSER-INCLUDED OFFENSE, AN OFFENSE THE JURY NEVER CONSIDERED.

The Third District Court of Appeals acted properly, subject to the determination of the cross appeal herein, when it remanded the case to the trial court to enter a judgment of guilty to the lesser offense of sexual imposition from the offense of gross sexual imposition under Ohio Revised Code §2907.05(A)(1). In comparing the elements of gross sexual imposition for which the Appellant was convicted and the offense of sexual imposition, the only distinguishing element the Court of Appeals found was not proven is the element of force. Appellee, while not conceding the non-existence of force, states the evidence presented proves the lesser included offense of sexual imposition.

Appellant claims the Appellate Court misapplies Ohio Revised Code §2945.79 and §2953.07 as the offense of sexual imposition was not considered by the jury. Appellant does not suggest in Proposition of Law I that Ohio Revised Code §2945.79 is inappropriately applied except for the argument that such application denies the Appellant his right to trial by jury. It is important to note, that neither of these two Sections limit their application to bench trials only. If an offense is a lesser included offense of another offense, it is not relevant as to whether the offenses were tried to

the bench or a jury. If an offense is a lesser included offense it is a lesser included for all purposes. Further, in the instant matter, the jury found the Appellant guilty of gross sexual imposition with the element of force. Contrary to Appellant's position, the jury herein did consider the offense of sexual imposition by considering and convicting the Appellant of gross sexual imposition which included all the elements of sexual imposition with the additional element of force.

**APPELLANT/CROSS APPELLEE'S
PROPOSITION OF LAW II**

WHEN A CRIMINAL DEFENDANT IS IMPROPERLY DENIED A CRIM. R. 29(A) JUDGMENT OF ACQUITTAL BY THE TRIAL COURT, APP.R. 12(B) MANDATES THAT THE COURT OF APPEALS MUST REVERSE THE TRIAL COURT AND RENDER THE JUDGMENT THAT THE TRIAL COURT SHOULD HAVE RENDERED.

For the reasons set forth in Proposition of Law I above, the trial court properly denied the Appellant's Criminal Rule 29 motion for acquittal. Further, without conceding the Proposition of Law on cross appeal, it is Appellee's position the Third District Court of Appeals properly remanded the matter for entry of guilty to the offense of sexual imposition.

Appellee argues that Appellant's Rule 29 motion for acquittal should have been granted by the trial court on the offense of rape as contained in the Indictment and jury trial. The trial court denied such request and instructed the jury on the offense of rape as contained in the Indictment and the lesser included offenses of sexual battery, Ohio Revised Code §2907.03, and gross sexual imposition, Ohio Revised Code §2907.05. Appellant did not argue before the trial court or the Court of Appeals, that sexual battery and gross sexual imposition were not lesser included offenses of rape, therefore such argument is waived. Appellant concedes in his Memorandum of Support of Jurisdiction that in fact gross sexual imposition is a lesser included offense of rape. The jury, after considering the evidence and

instructions, returned a verdict of guilty on gross sexual imposition in violation of Ohio Revised Code §2907.05(A)(1) finding the Appellant had engaged in sexual contact, as compared to sexual conduct, by force. On appeal, the Third District Court of Appeals found only the element of force was not proven by the Appellee. The Third District found all the other elements of the offense present thereby instructing the trial court to enter a finding of guilty to the lesser included offense of sexual imposition. Appellant argues a trial court's only conduct on considering a Rule 29 motion is to deny the motion or grant the acquittal without giving any consideration to lesser included offenses. Further, Appellant argues the only course of conduct by a court of appeals pursuant to Appellate Rule 12(B) in considering an appeal is to affirm the judgment of the trial below or reverse the judgment. Appellant's reliance on the word "shall" in both instances is misplaced.

As set forth in the argument of Proposition of Law I, in a Criminal Rule 29 motion, the court may consider potential lesser included offenses in determining its ruling on the motion and later providing instructions to the jury. To follow Appellant's line of reasoning that a trial court must only deny or grant a judgment of acquittal ignores the entire line of cases, statutory authority, and the entire *jurisprudence* of this State as it relates to "lesser included offenses". This Court and each appellate court across the State have expended considerable effort in contemplating the issue of "lesser included offenses". This is certainly much more than a deny or grant in its entirety issue as the Appellant presents.

Appellant's argument on the use of "shall" as it relates to Appellate Rule 12(B) is also misplaced. Appellate Rule 12(B) reads as follows:

Judgment as a matter of law. When the court of appeals determines that the trial court committed no error prejudicial to the Appellant in any of the particulars assigned and argued in Appellant's brief and that the Appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly. When the court of appeals determines that the trial court committed error prejudicial to the Appellant and that the Appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly. (emphasis added)

Appellant seems to ignore the provisions of Appellate Rule 12(B) which states "... The court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly." Remand with instruction to enter judgment on a lesser included offense have been found to be authorized and proper. See generally, State v. Bettis, (2007) 2007-Ohio-1724 (1st Dist. Ct. App.) and State v. Davis, (2006) 2006-Ohio-4599 (1st Dist. Ct. App.)

In the instant appeal, the Third District Court of Appeals did what is authorized under the law and has been done by appellate courts across the State for

years. Again, while the Appellee does not concede the remand by the Third District Court of Appeals was necessary or proper as set forth in the cross appeal, absent the issue raised on cross appeal, the action of the Third District Court of Appeals was authorized and proper.

**APPELLANT/CROSS APPELLEE'S
PROPOSITION OF LAW III**

A DEFENDANT IN A CRIMINAL TRIAL, AS A MATTER OF TRIAL STRATEGY, HAS A RIGHT TO PRESENT AN "ALL OR NOTHING DEFENSE" AND REFUSE ANY LESSER-INCLUDED OFFENSES INSTRUCTIONS.

A defendant in a criminal trial, does not, as a matter of trial strategy, have an absolute right to present an "all or nothing defense" and refuse any lesser included offenses instructions. Appellant's argument centers around Footnote 2 in State v. Clayton, (1980) 62 Ohio St. 2d 45 citing State v. Muscatelo, (1978) 55 Ohio St. 2d 201. Reliance on Clayton is not relevant in this matter as the Clayton decision involves a questions of ineffective assistance of counsel under dissimilar circumstances. The Footnote in Clayton should only be read in the context of ineffective assistance of counsel as suggested in that case. Clayton cites to Paragraph 4 of the Syllabus of Muscatelo, however, Muscatelo stands and holds for the opposite conclusion presented by Appellant herein. Muscatelo holds as follows:

Where in prosecution for aggravated murder, the defendant produces or elicits some evidence of the mitigating circumstances of extreme emotional stress described in R.C. §2903.03, the question of his having committed the lesser included offense of voluntary manslaughter must be submitted to the jury under proper instructions from the court. (emphasis added)

Conspicuously, missing from Paragraph 4 of the Muscatelo Syllabus are the additional words contained in the Clayton Footnote of, "...but this in no way affected defendant's concomitant right, through his counsel, to waive instruction." Reliance on the Footnote of Clayton is not applicable herein. More importantly, this particular issue has been addressed on point in State v. Kuhn, 1996 Ohio App. LEXIS 1358

(1996)(4th Dist. Ct. App) and State v. Schmidt, (1995) 100 Ohio App. 3d 167 (3rd Dist. Ct. App), citing State v. Thomas, (1988) 40 Ohio St. 3d 213, with both Kuhn and Schmidt holding that Clayton should not be interpreted and does not mean, a criminal defendant can prevent an instruction on a lesser included offense. Both courts stated, “A trial court’s instruction on a lesser included offense over the objection of the defendant does not threaten the defendant’s constitutional right to have notice of the charges against him because where one crime is a lesser included offense of another crime, such notice constitutes sufficient notice of not only the crime charged, but also that a defendant can be convicted of any of the lesser included offenses of the crime charged.” (citations omitted) Schmidt concludes by stating, “Thus, despite Appellant’s protestations, permitting a trial court to give a jury instruction on a lesser included offense protects, not prejudices, the rights of a defendant.” (emphasis added)

In the jurisdictional issue before this Court, it is important to remember the Appellant has not objected that gross sexual imposition is and was a lesser included of rape, and has conceded such in his Memorandum before this Court. Further, as the Court of Appeals found in its decision below, based upon the testimony, “A rational juror could have concluded that penetration required for rape conviction, did not occur, but sexual contact did occur sufficient for a gross sexual imposition conviction.”

The affirmance by the Court of Appeals of the trial court's instruction on gross sexual imposition was proper and necessary, subject to the cross appeal herein, based upon the law and evidence before the court.

**APPELLANT/CROSS APPELLEE'S
PROPOSITION OF LAW IV**

SEXUAL IMPOSITION IS NOT A LESSER-INCLUDED OFFENSE TO RAPE AND A DEFENDANT CANNOT BE CONVICTED OF SEXUAL IMPOSITION IF CHARGED AND TRIED ON A CHARGE OF RAPE AS R.C. 2945.74 ALLOWS THAT A PERSON CAN ONLY BE CONVICTED OF A LESSER-INCLUDED CHARGE TO THE CHARGE IN THE INDICTMENT.

Appellant's Proposition of Law IV is without merit and contrary to law for all the reasons stated above.

Appellant has conceded that gross sexual imposition is a lesser included offense of rape. Further, based upon the testimony provided before the trial court, it is clear that if "force" was not proven, which the State does not concede, sexual imposition is likewise a lesser included offense of gross sexual imposition. Therefore, pursuant to Ohio Revised Code §2945.79 and §2953.07, the Court of Appeals, absent the element of force, was properly following the law and acted properly "subject to the cross appeal" when it remanded the matter to the trial court with instruction to enter a finding of guilty to the offense of sexual imposition.

**EXPLANATION OF WHY APPELLEE/CROSS APPELLANT'S CASE IS A
CASE OF PUBLIC OR GREAT GENERAL INTEREST,
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION,
AND INVOLVES A FELONY**

By accepting this cross appeal, the Supreme Court has the opportunity to state clearly and succinctly the definition of force concerning elderly adult victims and establish a clear line of whether force is accomplished on a non-consensual sleeping victim or upon such victim shortly after awakening. As evidenced by the *jurisprudence* established in Ohio the definition of force relating to adult victims, especially elderly adult victims has become blurred. This case is important as it relates to sexual assault victims, particularly elderly sexual assault victims, and the level of force necessary to complete the criminal offense.

Additionally, this felony case is of public or great general interest as it gives this Court the ability to correct the Appellate Court's clear misunderstanding and misapplication of the evidence relating to a Criminal Rule 29 motion for acquittal.

APPELLEE/CROSS APPELLANT'S

PROPOSITION OF LAW I

SEXUAL CONTACT BY FORCE INCLUDES, BUT IS NOT LIMITED TO, THE CONTINUATION OF TOUCHING THE VAGINA OF AN AWAKENED ELDERLY VICTIM UNDER FEAR OF DURESS, WHEN THE TOUCHING (SEXUAL CONDUCT/CONTACT) WAS INITIATED UPON THE NON-CONSENSUAL ELDERLY VICTIM WHILE SLEEPING.

The Third District Court of Appeals reversed the conviction of the Appellant for one count of gross sexual imposition, finding that the trial court should have granted Appellant's Criminal Rule 29 motion for acquittal at the close of the State's case for failure to prove the element of force. A Criminal Rule 29 motion for acquittal is guided by the same standard as a claim of insufficiency of evidence. Under a Criminal Rule 29 motion the standard is "The relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." State v. Jenks, 61 Ohio St. 3d 259 (1981). It is the definition of "force" which must be considered under the standard established by Jenks.

The Third District Court of Appeals concluded the Appellee had not proven the essential element of "force" because the touching initiated and occurred while the victim was asleep. The Appellate Court stating at Page 27 of its opinion as follows:

Rather, the State was required to prove beyond a reasonable doubt that Wine used physical force against S.D. (the victim), or creating the belief some physical force would be used if S.D. did not submit to establish the element of force. *Id* at 55. The evidence presented at trial demonstrated that S.D. was sleeping and unaware of the sexual contact, and as soon as she awoke, Wine withdrew his hand from her body, ending the sexual contact. Significantly, no sexual contact occurred after S.D. was awoke and aware of the sexual contact. (emphasis added)

Unfortunately, this recitation of the evidence is not supported by the record. The record is clear that the victim awoke to her own yelling, discovered that the Appellant's hand was underneath her pajama bottoms with his finger in her vagina and Appellant's other hand on her chest (all of which under bedding and clothing), immediately observed that it was the Appellant kneeling on the floor next to the bed in which she had been sleeping, that it was the Appellant who was having sexual conduct/contact with her, the touching was non-consensual, and that she did yell (now a second time of yelling) "Cecil, Cecil" (her husband sleeping across the hallway). It was upon the victim yelling for her husband that Appellant removed his finger from her vagina and his other hand from underneath her pajama top, but still under the covers, staring at the victim. The victim further testified during this time she was concerned for her own safety stating, "I'm not going to get out of this. I'm not going to get out of this." It was after the victim told Appellant that it was Appellant's minor son in bed with her that the Appellant removed his hands out from underneath the blankets and left the room. The victim testified she observed the Appellant open the closed bedroom door which had previously been open and leave. (See Trial Trn. Pgs. 210-214)

Therefore, the Court of Appeals decision concerning the force was thus determined upon an incorrect misunderstanding of the testimony and that there was, in fact, a period of time in which the Appellant had non-consensual contact with the awakened victim's vagina under circumstances of force. Force is generally defined as "any violence, compulsion, or constraint exerted by any means upon a person or thing" Ohio Revised Code §2929.01(A)(1) (emphasis added) A victim is not required to prove physical resistance for the offender to be guilty of gross sexual imposition. Ohio Revised Code §2907.05(B). In State v. Eskridge, 38 Ohio St. 3d 56 (1988), the Ohio Supreme Court held evidence in the element of force is whether the "victim's will was overcome by fear or duress". Eskridge also held for the proposition that in cases of parental/minor child cases, the force may be subtle and psychological; however, Appellee concedes the "subtle and psychological" force standard is inapplicable herein.

In State v. Schaim, 65 Ohio St. 3d 51, the court held in that case, the Eskridge's subtle and psychological force test did not apply; however, stated the State was required to prove physical force or create the belief that physical force would be used.

In the issue before this Court, the Court of Appeals decision may have been correct if, and only if, the facts were as the Appellate Court recited; however, under the testimony presented the sexual contact continued after the victim awoke, saw the Appellant staring at her, the victim yelling for her husband, and then and only then did he remove his finger from her vagina but continued to touch her vagina and chest. Based upon this testimony, the issue for this Court is whether after, viewing the

evidence in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential element of force had been proven beyond a reasonable doubt.

Whether force is present on a sleeping adult victim (as compared to a awakened adult victim) or by the manipulation of clothing, both being present in this case, may be an issue for another day; however, under the totality of the circumstances present in this particular case force or creating in the victim's mind the belief of force is clearly present and the misapplication of the evidence justifies a finding of force. Therefore, based upon the reasons set forth above, the decision of the Third District Court of Appeals reversing the conviction of the Appellant for gross sexual imposition should be reversed and said conviction reinstated.

CONCLUSION

The Court should not accept Appellant's appeal as it does not raise issues of public or great general interest and does not involve substantial constitutional questions.

This Court, however, should accept Appellee's cross appeal as it does raise issues of public or great general interest and to correct the decision of the Third District Court of Appeals based in part on its misapplication of the evidence.



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I hereby certify that a copy of the foregoing was sent by regular U. S. Mail this 22nd day of October, 2012 to attorney for Appellant/Cross Appellee, Lorin Zaner, 545 Spitzer Building, Toledo, OH 43604.



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