

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Case No. 2012-1611

Plaintiff-Appellee,

-vs-

On Appeal from the
Auglaize County Court
of Appeals, Third Appellate District,

Court of Appeals
Case No. 2-12-01

DOUGLAS J. WINE,

Defendant-Appellant.

**BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON O'BRIEN
IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO**

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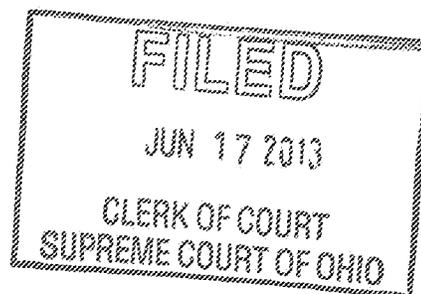


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STATEMENT OF *AMICUS* INTEREST

Franklin County Prosecutor Ron O'Brien offers this amicus brief in support of plaintiff-appellee State of Ohio. The Franklin County Prosecutor's Office prosecutes thousands of felony cases each year, many of which are resolved only after a trial by jury. Franklin County Prosecutor Ron O'Brien therefore has a strong interest in issues related to the conduct of criminal trials, and in particular, to ensuring that criminal trials are properly conducted and that juries are correctly instructed on the applicable law. In the interest of aiding this Court's review of this appeal from Auglaize County, Prosecutor Ron O'Brien offers this brief in support of the State of Ohio.

STATEMENT OF THE CASE AND FACTS

Amicus accepts the statement of the case and facts set forth in the Merit Brief of Appellee-State of Ohio.

RESPONSE TO PROPOSITION OF LAW

A CRIMINAL DEFENDANT CANNOT PREVENT THE TRIAL COURT FROM INSTRUCTING THE JURY ON A LESSER INCLUDED OFFENSE.

In *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), this Court identified three instances when a trial court must instruct a jury on lesser offenses.

1. 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. *Deem*, paragraph one of the syllabus.

The first category of offenses is self-explanatory, and *Deem* defines the second category of "inferior degree" offenses, as follows:

2. An offense is an "inferior degree" of the indicted offense where its elements are identical to or contained within the indicted offense, except for one or more

additional mitigating elements. (R.C. 2945.74 and Crim.R. 31 [C], construed.) *Deem*, paragraph two of the syllabus.

The instant case involves the third category or “lesser included” offenses, which *Deem* defines, as follows:

3. 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, 513 N.E.2d 311, modified.) *Deem*, paragraph three of the syllabus.

This Court recently modified the second prong of the *Deem* analysis in *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, “delet[ing] the word ‘ever,’ to clarify its application in future cases” and instructing trial courts to apply the second prong of the *Deem* test to each alternate method of committing a greater offense when a statute sets forth mutually exclusive ways of committing a greater offense. *Evans*, 122 Ohio St. at 383-384.

Nonetheless, even if an offense is a “lesser included” offense, an instruction will be proper on the lesser included offense only if the evidence supports giving the instruction. In *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), this Court held:

2. Even though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. (*State v. Kidder* [1987], 32 Ohio St. 3d 279; *State v. Davis* [1983], 6 Ohio St. 3d 91; *State v. Wilkins* [1980], 64 Ohio St. 2d 382, clarified.). *Thomas*, at paragraph two of the syllabus.

“If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to defendant.” *State v. Wilkins*, 64 Ohio St.2d 382, 388, 415 N.E.2d 303 (1980). Here, there is no dispute that gross sexual imposition is a lesser included offense of rape. *State v. Wine*, 3d Dist. No.

2-12-01, 2012-Ohio-2837, ¶17. Accordingly, the only issue before this Court is whether a defendant in a criminal jury trial has a right to prevent the trial court from instructing the jury on an appropriate and proper lesser included offense. The defendant's position that he has a constitutional right to veto the trial court's decision regarding whether to instruct the jury on a lesser included offense lacks merit and must be rejected.

The defendant may not control the decision whether to give the jury "lesser included" offense instructions. The first paragraph of the *Deem* syllabus states that the jury "must be charged" on lesser included offenses that are supported by the evidence. "It is the duty of the court to give, as well as that of the jury to consider, a charge on the lesser included offenses which are shown by the evidence to have been committed." *State v. Loudermill*, 2 Ohio St. 2d 79, 80, 206 N.E.2d 198 (1965). And in *State v. Muscatello*, 55 Ohio St.2d 201, 378 N.E.2d 738 (1978), this Court held that the trial court must give an instruction on a lesser included offense when there was evidence to support the instruction.

"The rule regarding jury instructions is that requested instructions in a criminal case must be given when they are correct, pertinent, and timely presented." *State v. Joy*, 74 Ohio St.3d 178, 181, 657 N.E.2d 503 (1995). "In a criminal case, if requested special instructions to the jury are correct, pertinent and timely presented, they must be included, at least in substance, in the general charge." *Cincinnati v. Epperson*, 20 Ohio St.2d 59, 253 N.E.2d 785 (1969), paragraph one of the syllabus, overruled on other grounds, *State v. Carter*, 72 Ohio St.3d 545, 651 N.E.2d 965 (1995). "After arguments are completed, a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. *See also Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591 & n. 3, 575 N.E.2d 828 (1991). In

light of this Court's precedent imposing on Ohio trial courts the duty to determine what jury instructions to give, defendant's position is untenable.

In *State v. Schmidt*, 100 Ohio App.3d 167, 171, 652 N.E.2d 254 (3d Dist. 1995), the court concluded that simply because the defendant could waive the reading of an instruction on a lesser included offense did not provide him with authority to veto an instruction, stating:

In *State v. Thomas* (1988), 40 Ohio St.3d 213, the Ohio Supreme Court stated that a jury instruction on a lesser included offense is required when the evidence presented at trial supports an acquittal on the crime charged and a conviction on a lesser included offense of the crime charged. In *Clayton*, the Ohio Supreme Court stated in footnote two of the opinion that the defendant, charged with attempted murder, had the right to waive an instruction on the lesser included offense of attempted voluntary manslaughter. While we accept that as a correct interpretation of the law regarding jury instructions on lesser included offenses, we agree with the Fourth District Court of Appeals' opinion in *Seymour* that the *Clayton* decision should be interpreted to mean that although a defendant can waive a jury instruction on a lesser included offense, that does not mean that a defendant can prevent an instruction on a lesser included offense. *Seymour* at 25. As stated above, the Ohio Supreme Court has stated that in certain situations a jury instruction is required. *Thomas, supra*.

See also *State v. Kuhn*, 4th Dist. No. 94CA24, 1996 WL 140197 (Mar. 25, 1996) (defendant did not have authority to prohibit or prevent instruction on lesser included offense); *State v. Stricker*, 10th Dist. No. 03AP-746, 2004-Ohio-3557, ¶26 (same) (citations omitted).

The *Loudermill* Court recognized the importance of providing the jury with lesser included offense instructions that are supported by the evidence:

'We are mindful of the difficulty confronting the trial judge in ascertaining and delineating the lesser included offense to be charged, but it is incumbent under the evidence and the law and his duty to do so, recognizing that the jury may believe all, part or none of the state's evidence. The dangerous alternative arises and is of concern not only to the accused but to the state, that a man guilty of only the lesser crime may be convicted of the higher on insufficient evidence, or result in a murderer being acquitted because the state has failed to prove an element of the higher crime. The jury should not be denied its right to pass upon the credibility and weight of the evidence by failing to charge a lesser included offense where there is evidence tending to support a charge of a lesser included offense.' *Loudermill*, 2 Ohio St.2d at 82-83 (quoting lower court dissent).

Requiring that the trial court determine whether the evidence warrants instructing the jury on any lesser included offenses effectuates the clear statutory requirements and prevents both jury speculation and compromise verdicts. *Id.* at 80-81.

As the United States Supreme Court has recognized, the right to counsel “has never been understood to confer upon defense counsel the power to veto the wholly permissible actions of the trial judge. It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial. ‘[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.’” *Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978) (citation omitted). Accordingly, it is the trial court’s duty and responsibility to determine what instructions to provide to the jury, including whether to instruct on any lesser included offenses.

Finally, defendant’s claim that he would have been acquitted of the charges had the jury not been instructed on any lesser included offenses is purely speculative. “Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.” *Keeble v. United States*, 412 U.S. 205, 213, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). *See also Loudermill*, 2 Ohio St.2d at 81. Here, the defendant’s reliance upon the appellate court’s subsequent legal determination regarding the element of force used against a sleeping adult victim, *Wine*, 2012-Ohio-2837, at ¶¶39-52, is misplaced, and his argument in this regard must be rejected.

A criminal defendant has no right to override the trial court’s determination that a lesser included offense instruction is proper and warranted. It is the trial court’s duty to determine what instructions are necessary for the jury to decide the case based on the evidence and the law, including what lesser included offense instructions are required. The court of appeals’ decision

rejecting the defendant's claim that he alone had the right to decide whether the jury should be instructed on any lesser included offenses must therefore be affirmed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, June 17th, 2013, to LORIN J. ZANER, 545 Spitzer Building, Toledo, Ohio 43604; Counsel for Defendant-Appellant, and to Edwin A. Pierce, Auglaize County Prosecuting Attorney, at P.O. Box 1992, Wapakoneta, Ohio, 45895, counsel for Plaintiff-Appellee.



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