

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : CASE NO. 2012-1611
 :
 Appellee :
 : On Appeal from the Auglaize
 : County Court of Appeals,
 v. : Third Appellate District
 :
 DOUGLAS J. WINE : C.A. Case No. 2-12-01
 :
 Appellant :

REPLY BRIEF OF APPELLANT, DOUGLAS J. WINE

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
OVERVIEW REPLY TO APPELLEE & AMICUS BRIEFS.....	1
REPLY TO APPELLEE, STATE OF OHIO.....	3
REPLY TO AMICUS BRIEF, FRANKLIN COUNTY PROSECUTORS.....	5
REPLY TO AMICUS BRIEF, OHIO PROSECUTING ATTORNEYS.....	6
REPLY TO AMICUS BRIEF, OHIO ATTORNEY GENERAL.....	7
THE RIGHT TO PRESENT A DEFENSE AND TRIAL STRATEGY.....	8
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

CASES:

State v. Clayton (1980), 62 Ohio St.2d 45.....	5
State v. Evans (2009), 122 Ohio St.3d 381.....	4, 6, 8
State v. Jenks (1981), 61 Ohio St.3d 259.....	5
State v. Thomas (1988), 40 Ohio St.3d 213.....	2
State v. Wine, 2012-Ohio-2387.....	5
U.S. v. Dhinas, 243 F.3d 635, 675 (2nd Cir. 2001).....	1

STATUTES:

R.C. 2945.74.....	6
--------------------------	----------

OTHER AUTHORITIES:

Charging Lesser Included Offenses in Ohio. 14 W. Res. L. Rev. 799 (1962-1963).....	7
Peters. Thirty-One Years in the Making: Why the Texas Court of Criminal Appeals’ New Single-Method Approach to Lesser-Included Offense Analysis is a Step in the Right Direction, XX:N200 Baylor L. Rev. 101.....	1

Overview Reply to Appellee & Amicus Briefs

The consortium of Prosecutors that have filed briefs in opposition to the Appellant's proposed Proposition of Law have attempted to convince this Court that some sort of "Armageddon" would result in the legal system if the Appellant's Proposition of Law were to be adopted by this Court.

These Prosecutors speculate that they "might" have to indict on numerous, potential lesser included offenses if a Defendant has the right to object to lesser-included offense instructions. They speculate, without any supporting facts, that the result would be enormous financial "costs" to the State and "confusion" among juries.

"Indeed, in practice, many more defendants request lesser-included offenses than do prosecutors. Peters, *Thirty-One Years in the Making: Why the Texas Court of Criminal Appeals' New Single-Method Approach to Lesser-Included Offense Analysis is a Step in the Right Direction*, XX:N200 Baylor L. Rev. 101, 102, also See U.S. v. Dhinsa, 243 F.3d 635, 674 (2nd Cir. 2001).

Prosecutors have control over the pleading of the alleged crime in the charging instrument and only ask for the lesser-included offense instructions when they fail to prove their case through the testimony at trial. Peters, *id.* at 104.

And... this is a significant part of the issue. Prosecutors want to retain the ability to salvage their cases when they overcharge a Defendant and fail to achieve their burden of proof at trial. Lesser-included offense instructions given at trial can salvage their case. And.. when the lesser-included offense is insufficient of evidence, they can still have their case salvaged by the Court of Appeals with a conviction of a lesser-included offense to the insufficient of evidence conviction of the lesser-included offense by the trier-of-fact. (daisy-chaining of a conviction).

The consortium of Prosecutors, in their briefs, take issue with and misrepresent pertinent facts discussed in the Appellant's Merit Brief. At the crux of this issue is that the Prosecutors want to argue that the evidence was legally sufficient for the giving of the Gross Sexual Imposition lesser-included offense instruction in this case. They spend an inordinate amount of ink submitting that the "evidence supported" the GSI instruction. They point to the discussion by the Court of Appeals that stated the evidence was sufficient for a GSI instruction based upon the issue of "contact" versus "conduct".

The Prosecutors ignore the critical determination by the Court of Appeals that the evidence of GSI was legally insufficient. As such, the GSI instruction was not reasonable or proper and should not have been given at all. All the case law in Ohio (Federal and sister-states) states that a lesser-included offense is proper only when it "...would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas*, 40 Ohio St.3d 213 (1988) paragraph two of the syllabus. Legally insufficient evidence does not "reasonably support" a conviction.

The factual basis of this case, as discussed in the Appellant's Merit Brief, is pertinent to this Court's resolution of this Proposition of Law.

This Court could agree with this Proposition of Law and apply it "across-the-board" to all Defendants in all cases.

This Court could agree with this Proposition of Law and apply to the fact-basis of this particular case.

This Court could decide that this Proposition of Law applies to Defendants whose defense is a "complete denial".

This Court could decide this Proposition of Law applies to cases where the lesser-included offense was deemed to be insufficient of evidence.

This Court could decide that a request for an instruction must be made by one of the parties so as to not interfere with their presentation of their case. That is, a Defendant can object and prevent a *sua sponte* instruction of a lesser-included offense instruction.

In a couple of the Amicus Briefs, there was a misrepresentation of some of the Appellant's points/discussions in his Merit Brief regarding the history of lesser-included offenses.

The Appellant was giving an *honest* overview of the history of lesser-included offenses and the various ways lesser-included offenses are implemented in the various non-Ohio jurisdictions. Some of those jurisdictions do have legal positions that "undercut" our arguments. Some of those jurisdictions have positions supportive of the Appellant.

The Appellant anticipates that this Court will look past advocacy and analyze the issue thoroughly and honestly. Some of the other misrepresentations by the Prosecutors will be addressed individually.

Reply to Appellee, State of Ohio

"A criminal defendant does not have the right to prevent or obstruct a trial court from instructing on legitimate and proper lesser included offenses"

The State complains that if the proposed Proposition of Law is accepted by this Court, Prosecutors would be forced to "consider" presenting lesser-included offenses to the Grand Jury. They should "consider" those types of things already when they are determining what charges they are seeking in an Indictment.

A Prosecutor should know what evidence he has and what he can reasonably expect to prove on any case before it is taken to the Grand Jury.

The reality is that the State generally opposes lesser-included offense instructions. In the instant case, the Prosecutor did not request nor did he formally object to the trial courts suggestion that the lesser-included offense of GSI should be included.

The Prosecutor argued against the GSI instruction initially, then acceded to the trial courts suggestion that the GSI instruction was warranted regarding “contact” versus “conduct”. The “waffling” by the State was encompassed in his statements that *if* sexual “conduct” could not be proven to the jury, then, of course, a “contact” instruction would be acceptable. Yet, he continued to argue to the jury, afterwards, that the *only* testimony and evidence was sexual “conduct”.

Twice, in its brief, pgs. 2 and 9, the State asserts that Dr. Wine might stand convicted of the rape charge if he had been allowed to refuse the lesser-included offense instructions. This assertion was also made in filed Amicus Briefs.

The *facts* are clear that Dr. Wine would stand acquitted today if he had been allowed the right to refuse the lesser-included offense instructions. This is *not* speculation.

IF Dr. Wine had been convicted by the jury of rape as charged, the same analysis of the “force” issue used by the Third District Court of Appeals regarding GSI would have resulted in a finding of insufficient evidence of “force” on the rape charge. Dr. Wine’s conviction would have been reversed if he had been convicted of the charged offense. IF Dr. Wine had exercised his right to refuse lesser-included offenses at the trial level, the Court of Appeals could not have adjudicated a lesser-included offense conviction of any type. Additionally, the law in the Third District is that sexual imposition is not a lesser-included offense to rape.

The State also asserts that the second step of the Evans test {*State v. Evans*, 122 Ohio St.3d 381 (2009)} of “determining whether a jury could reasonably find the defendant not guilty

of the charged offense but convict the defendant of the lesser included offense” is “waived” and/or “not before this Court”.

The facts of the case are an integral part of this case and this Court’s analysis. The facts of this case are such that a “reasonable” or “rational” juror could *not* have “found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Wine*, No. 2-12-02, 2012-Ohio-2387, ¶38, relying on *State v. Jenks*, 61 Ohio St.3d 259, (1981), paragraph two of the syllabus.

In looking at the *State v. Clayton* (1980), 62 Ohio St.2d 45 case and fn. 2, it is important to note that evidence was elicited in that case which was of sufficient evidence to justify the lesser-included offense instruction. This Court wrote “...the court had a duty to instruct on the lesser-included offense, but this in no way affected defendant’s concomitant right, through his counsel, to waive the instruction.”

IF the court had a duty and/or obligation to instruct on the lesser-included offense—according to the Prosecutor in the instant case—then a defendant would not be able to refuse the lesser-included offense. Yet, this Court determined the Defendant still had a concomitant right to waive that instruction. The wording, that a defendant can refuse an instruction that the court has a duty or obligation to give, supports the position that the Appellant has a right to refuse lesser-included offense instructions.

Reply to Amicus Brief—Franklin County Prosecutors

“A Criminal Defendant Cannot Prevent the Trial Court From Instructing the Jury on a Lesser Included Offense”

This Amicus Brief argues that a criminal Defendant does not have a right to object to a trial court’s decision to instruct on a lesser-included offense if the evidence at trial would support

an acquittal on the charged offense and a legally, sufficient conviction on the lesser-included offense.

This brief is silent regarding the applicable facts of this case which is that the conviction on the lesser-included offense of GSI was deemed insufficient of evidence. As the facts apply to Dr. Wine, the Franklin County Prosecutor has not taken a position on whether the Proposition of Law could be applied in cases where the evidence of the lesser-included offense is insufficient of evidence.

Reply to Amicus Brief---Ohio Prosecuting Attorneys

“A defendant in a criminal trial, as a matter of trial strategy, does not have a right to present an ‘all or nothing defense’ and refuse lesser-included offense instructions.”

This Amicus Brief lists several Ohio cases in support of his Proposition of Law. In all of those cases, the lesser-included offense instructions comported with the *State v. Evans*, supra, two-prong test. In particular, the second prong was satisfied in that there was a sufficient evidentiary basis to acquit of the charged offense and legally sufficient evidence to sustain a conviction of the lesser-included offense.

The facts of this case are inapposite. Dr. Wine’s conviction of the lesser-included offense of Gross Sexual Imposition was determined to be insufficient of evidence. The Prosecutors Association did not address the factual basis of this case regarding Dr. Wine’s situation. Their argument is based on the second prong of *Evans* being satisfied.

The Appellant did *not* submit that lesser-included offense instructions are now “only” intended to benefit the defendant.

A historical analysis shows that lesser-included offenses statutes were intended originally intended to benefit the Prosecution. In Ohio, “The purpose of such a statute (O.R.C. §2945.74)

is to allow the jury to rescue a prosecutor by convicting of a lesser included offense when the prosecutor fails to prove all the elements of the charged offense.”. *Charging Lesser Included Offenses in Ohio*, 14 W. Res. L. Rev. 799 (1962-1963).

This brief submits that the State cannot reasonably ascertain “precisely” what witness testimony will unfold at trial. They definitely should “reasonably” know what testimony is to be expected from their witnesses. Lesser-included offense instructions were not meant as a substitute for proper review/analysis of the evidence for potential charges and the presentation of that evidence to a grand jury. The power to criminally charge citizens is an enormous one and should not be taken lightly.

The speculation is made that the State would be forced to indict on every possible lesser-included offense for every charge. This flies in the face of the reality and history of lesser-included offenses.

An extreme, fictitious argument/scenario is made in this brief that a “confessed sex offender” could escape justice if a defendant has the right to refuse lesser-included offenses. This is a ridiculous and pandering scenario. If a Prosecutor is incapable of convicting a “confessed sex offender”, the problem is not with the defendant.

Reply to Amicus Brief--Ohio Attorney General

“Ohio law grants trial courts discretion to instruct a jury sua sponte on lesser included offenses, and a criminal defendant does not have an absolute right to present an ‘all or nothing’ defense and prevent a trial court from issuing such an instruction.”

This brief misconstrues many facts from the Appellant brief. The Appellant did not rely “primarily on *Beck* and its progeny” to argue that a criminal defendant has a constitutional right to present an all-or-nothing defense and prevent lesser-included instructions.

This brief submits that the Appellants Proposition of Law should not apply as an “absolute” right.. All of the cases cited in support rely on the second prong of *Evans*, supra, being fulfilled. This is not the factual basis of the instant case.

The argument is made that this Court has only one issue to deal with and that is the “across the board” application of the Appellant’s Proposition of Law. This Court can apply this Proposition of Law in a more limited or clarifying way.

The argument is made in this brief that Dr. Wine’s fact-specific challenges to the jury instruction should be ignored. But the facts of the case are relevant and this Courts analysis could be determined by the application of those facts.

This brief also goes into discussion of whether the trial court did (or did not) abuse its discretion in giving the lesser-included offense of Gross Sexual Imposition. While that issue is not directly an issue in the instant case, its relevance is that the State of Ohio and all the Amicus Briefs arguments/case law are predicated on the fulfillment of *Evans*, supra, second prong. It is predicated on the lesser-included offense being of sufficient evidence.

The “red herring” is that all of those parties discuss the Third District Court of Appeals resolution of the “contact” versus “conduct” issue. Yet, they ignore the clear fact that the lesser-included offense of Gross Sexual Imposition was deemed insufficient of evidence by the Court of Appeals and, thus, violative of *Evans*, supra.

The Right to Present a Defense and Trial Strategy

The underlying theme is constant. Defense counsel has consistently been deemed reasonable and effective in pursuing an “all or nothing” defense strategy in not requesting lesser-included instructions. The same theory applies in situations such as Dr. Wine’s where his

objection to lesser-included offense instructions was reasonable and part of his strategy to gain a complete acquittal.

The Prosecutors argue that a defendant's right to "waive" lesser-included offense instructions under an ineffective assistance of counsel analysis and/or a plain error analysis is "different" from being able to over-ride a *sua sponte* instruction from the trial court.

The legal principle that a defendant has a right to present a defense and determine trial strategy by refusing lesser-included offense instructions is the issue.

Dr. Wine requests that this Court determine that he had the right to object to lesser-included offenses, overturn his conviction and enter a judgment of acquittal.

Respectively submitted,



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I certify that a copy of the foregoing document will be sent by ordinary U.S. mail on this
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