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State of Ohio APPELLEE -vs- David Allen Kimbrell Appellant

NO. L-81-062

COURT OF APPEALS, SIXTH DISTRICT, LUCAS COUNTY, OHIO

September 25, 1981

PRIOR HISTORY: [*1]

APPEAL FROM Common Pleas COURT NO. CR-80-6765

JUDGES:

John W. Potter, Andy Douglas and John H. Barber, JJ., Concur.

OPINION:

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

DECISION & JOURNAL ENTRY

Appellant, David A. Kimbrell, was indicted and tried on a charge of rape in violation of R.C. 2907.02. The trial court, over appellant's objection, instructed the jury as to the lesser included offense of attempted rape. The jury returned a verdict of guilty of attempted rape and the trial court entered judgment thereon. Appellant was sentenced and thereafter brought this appeal, presenting, as his sole assignment of error, the following: $"I. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE LESSER INCLUDED OFFENSE OF ATTEMPTED RAPE."

In State v. Wilkins (1980), 64 Ohio St. 2d 382, the Ohio Supreme Court restated and clarified its rule with respect to when instructions on lesser included offenses may be properly given, holding at 388, that:

"If the evidence adduced on behalf of the defense is such that if accepted by the trier of fact [*2] it would constitute a complete defense to all substantive elements of the crime charged, the trier of fact will not be permitted to consider a lesser included offense unless the trier of fact 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.

"The persuasiveness of the evidence regarding the lesser included offense is irrelevant. 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."

Our review of the record reveals that, under any reasonable view, the evidence presented in this case would not sustain a finding of not guilty of rape but guilty of attempted rape. The testimony in this case presented the jury with two accounts of the incident from which this case arose. On account described events tending to show all [*3] the elements of rape; the other account described events tending to show that no coercion was involved and that penetration did not occur. Further, the record reveals no evidence tending to show attempted rape.

Thus, applying the rule set forth in Wilkins, supra to the facts in this case, we find that the trial court erred in instructing the jury as to the lesser offense of attempted rape. We, therefore, find appellant's assignment of error well taken.

On consideration whereof, the court finds that the appellant was prejudiced and prevented from having a fair trial, and judgment of the Lucas County Court of Common Pleas is reversed.

This cause is remanded to said court for further proceedings according to law. Costs to abide final determination.

A certified copy of this entry shall constitute the mandate pursuant to rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.