[Cite as *State v. Evans*, 2008-Ohio-139.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89057

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY EVANS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-477160

BEFORE: McMonagle, J., Rocco, P.J., and Boyle, J.

RELEASED: January 17, 2008

JOURNALIZED:

[Cite as *State v. Evans*, 2008-Ohio-139.]

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[Cite as *State v. Evans*, 2008-Ohio-139.]

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Timothy Evans, appeals from his conviction after a bench trial for robbery. Evans presents one assignment of error, asserting that the trial court violated his constitutional rights by improperly convicting him of an offense that was not a lesser included offense of the indicted charge. This court is constrained to agree.

{¶ 2} The incident that led to Evans' conviction occurred on the evening of November 18, 2005. According to her testimony, the victim had parked her vehicle and was preparing to enter a food store when she felt something pull on her purse. The purse strap was looped over her shoulder, so she reacted by holding tightly to the purse itself, and moving with the force of the pull, which spun her around.

{¶ 3} The victim found herself facing a man, whom she later identified as Evans. Evans demanded that she give him her purse. When she resisted, he stated, "I've got a gun." The victim indicated that she saw no weapon, but Evans moved his free hand toward his belt area. Rather than frightening the victim, the gesture served to embolden her. She told him, "Well, you know what? You're going to have to use it," and began to kick and fight.

{¶ 4} Her efforts to free her purse soon attracted the attention of another driver in the parking lot. The driver began to sound her vehicle's horn. The noise, coupled with the victim's resistance, apparently caused the assailant to abandon the struggle and he ran away.

{¶ 5} Although police officers responded to the scene, the man could not be located. Approximately two months later, the victim spotted appellant walking on the street and identified him as the man who had attempted to take her purse.

{¶ 6} Evans was subsequently indicted on one count of aggravated robbery in violation of R.C. 2911.01(A)(1), i.e., that "in attempting or committing a theft offense," he had "a deadly weapon to wit: gun, *on or about his person* or under his control *and* either displayed the weapon, brandished it, indicated he possessed it, or used it." (Emphasis added.)

{¶ 7} Evans' case proceeded to a trial before the bench. At the conclusion of the evidence, the court granted Evans' motion for acquittal with respect to the charge as indicted, but found him guilty of robbery, in violation of R.C. 2911.02(A)(2), i.e., that in attempting or committing a theft offense, he "did threaten to inflict physical harm" on the victim. The trial court held that this was a "lesser included offense" of the indicted offense.

{¶ 8} Evans was sentenced to a prison term of two years for his conviction. He now challenges that conviction with the following assignment of error:

{¶ 9} "By finding Mr. Evans guilty of a crime for which he had not been indicted and which was not a lesser included offense of the crime charged in the indictment, the trial court denied Mr. Evans of his right to be indicted by a grand jury."

{¶ 10} Evans argues that his conviction for robbery pursuant to R.C. 2911.02(A)(2) is improper, because it is not a lesser included offense of R.C. 2911.01(A)(1), the aggravated robbery charge set forth in the indictment.

{¶ 11} Evans failed to raise this argument in the trial court and thus has waived all but plain error. *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43. Plain error is an obvious error or defect in the trial court proceeding that affects a substantial right. See, generally, *State v. Long* (1978), 53 Ohio St.2d 91, 94; see, also, Crim.R. 52(B). An alleged error is plain error if the error is "obvious" and "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Barnes*, 94 Ohio St.3d 21, 28, 2002-Ohio-68; *Long*, supra. Considering Evans' argument in light of this standard, this court is constrained to agree.

{¶ 12} In *State v. Deem* (1988), 40 Ohio St.3d 205, the Ohio Supreme Court set forth the test for determining whether an offense is a "lesser included" offense of another. "An offense may be a lesser included offense of another if: 1) the offense carries a lesser penalty than the other; 2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and 3) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Accord*, Fayette App. No. CA2005-05-019, 2006-Ohio-2250, at ¶5, citing *Deem*, supra, paragraph three of the syllabus.

{¶ 13} Clearly, the verdict reached by the trial court in this case meets the first requirement of the *Deem* test, since R.C. 2911.01(A)(1) (aggravated robbery) is a first-degree felony, and R.C. 2911.02(A)(2) (robbery) is a felony of the third degree. The second requirement is not met, however.

{¶ 14} The offense of aggravated robbery, as defined in R.C. 2911.01(A)(1), contains the element that the offender have a deadly weapon and display it, brandish it, indicate that he possesses it, or use it. The offense is phrased in the conjunctive: the offender must both possess the gun and act in one of the aforementioned ways.

{¶ 15} Robbery, on the other hand, as defined in R.C. 2911.02(A)(2), is committed by an offender who either inflicts, attempts to inflict, or threatens to inflict physical harm. The reality or threat of physical harm is an element of robbery which is not contained in aggravated robbery. Robbery under R.C. 2911.02(A)(2) is therefore not a lesser included offense of aggravated robbery under R.C. 2911.01(A)(1). *State v. Smith*, 11th Dist. No. 2005-T-0080, 2006-Ohio-4669, at ¶34.[1]

{¶ 16} Here, although the trial court concluded that Evans could not be guilty of aggravated robbery in violation of R.C. 2911.01(A)(1), because it found insufficient evidence that he actually had a deadly weapon, the trial court found him guilty of

[1]There are several cases that hold that R.C. 2911.02*(A)(1)* (emphasis added) is a lesser included offense of R.C. 2911.01(A)(1). See, e.g., *State v. Nelson*, 2007-Ohio-22904; *State v. Taylor*, 2006-Ohio-2655; *State v. Schoonover* (Sept. 21, 1998), 4th Dist. No. 97 CA 647.

robbery in violation of R.C. 2911.02(A)(2), an uncharged offense. As this court observed when presented with a similar situation:

{¶ 17} "Section 10, Article I, of the Ohio Constitution provides that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury ***.' *** [T]his provides an inalienable protection to the defendant that he will be tried on the same essential facts on which the grand jury found probable cause." *State v. Robertson,* Cuyahoga App. No. 80910, 2002-Ohio-6814, at ¶13, citing *State v. Vitale* (1994), 96 Ohio App.3d 695, 645 N.E.2d 1277.

{¶ 18} Because the facts supporting an indictment on robbery in violation of R.C. 2911.02(A)(2) were not presented to the grand jury, the trial court improperly convicted Evans of a charge for which he had not been indicted. *Robertson*, supra.

{¶ 19} Accordingly, the assignment of error is sustained. We reverse the trial court's judgment and remand with instructions to vacate Evans' conviction.

Reversed and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

MARY J. BOYLE, J., CONCURS
KENNETH A. ROCCO, P.J., CONCURS WITH SEPARATE CONCURRING OPINION

KENNETH A. ROCCO, J., CONCURRING:

{¶ 20} Although I am constrained to agree with the majority opinion's disposition of this appeal, I write separately to express my unhappiness with the state of the law, since, as it stands, it prohibits what the trial judge sought to do in this case, viz., hold the defendant accountable for committing a criminal act by finding him guilty of the crime of robbery, an offense that should, in all logic, be considered a lesser-included one of the indicted offense of aggravated robbery.

{¶ 21} This case presents another situation like the one I previously addressed in *State v. Kvasne*, 169 Ohio App.3d 167, 2006-Ohio-5235. Therein, I noted that the test set forth in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-29, which addressed R.C. 2941.25, became conflated with the test set forth in *State v. Deem* (1988), 40 Ohio St.3d 205, which addressed R.C. 2945.74. The former is concerned with "allied offenses." Its intent is to prevent multiple punishments for the same offense, whereas R.C. 2945.74 is intended to hold a defendant accountable for his criminal acts.

{¶ 22} With this in mind, I now quote extensively from *Kvasne* in order to reiterate what I believe is the distinction to be made in cases that raise the issue of lesser included offenses.

{¶ 23} "In *Deem*, the supreme court set forth the definitive test for determining whether, in the context of Crim.R. 31(C) and R.C. 2945.74, an offense was a 'lesser included' offense of another. As set forth in *Deem*, an offense 'may be a lesser included offense of another' if the following requirements are met: 1) the offense carries a lesser penalty than the indicted offense; 2) the 'greater' offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and, 3) some element of the greater offense is not required to prove the commission of the lesser offense. Id., paragraph three of the syllabus. (Emphasis added.)

{¶ 24} "Despite the wording emphasized above, it must be noted that *Deem* specifically adopted the test set forth earlier in *State v. Wilkens* (1980), 64 Ohio St.2d 382. The language of *Wilkens* indicates that, with respect to a 'lesser included offense' determination, statutory definitions aside, the analysis must include a consideration of the facts of the case.

{¶ 25} "Indeed, the supreme court indicated in both *Deem* and *Wilkens* that in making a decision as to whether an offense constitutes a lesser included offense of the offense for which the defendant was indicted, a consideration of the evidence presented in the case is crucial. Id. at 388. The aim, according to *Deem*, was stated

as follows: 'Our 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.' Id. at 210. (Emphasis added.)

{¶ 26} "The foregoing quote is significant. Although the tests presented in *Rance* and *Deem* seem alike, the aims of the two statutes the opinions considered are different. Preventing multiple punishments for the same offense clearly is a separate statutory issue than the issue of whether the offense gives notice to the accused and is counted a 'lesser included offense' of the indicted offense.

{¶ 27} "This court is cognizant that the Ohio Supreme Court has expressed a contrary viewpoint in *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68. In *Barnes*, at 26, the majority opinion adhered to the position that the evidence presented in a particular case is 'irrelevant' to the determination of whether an offense, as 'statutorily defined,' is 'necessarily' included in a greater offense. However, in her concurring opinion in *Barnes,* Justice Lundberg-Stratton recognized the problems inherent in the majority opinion's analysis of lesser included offenses, i.e., when the analysis focuses strictly on the statutory definitions involved, 'confusion and inconsistency result[]***.' Id. at 29.

{¶ 28} "Furthermore, a method of analysis which divorces 'the underlying facts of the crimes' in 'completing' the analysis 'beget[s] illogical results***. Decision making in the abstract leaves trial courts to struggle with a test that allows criminal defendants to walk away from their crimes, despite the fact that they fit all the elements of the lesser included offense, unless the state indicts them separately on each potential offense.' Id., at 30-31. (Emphasis added.) In other words, it negates any accountability; the result is opposite to the aim of R.C. 2945.74.

{¶ 29} "Justice Lundberg-Stratton provided a logical solution to the dilemma caused by too strict an application of the second step of the *Deem* test: return to the basic premise. Rather than 'continue on the path of examining cases in a vacuum,' an offense should be considered a lesser included offense, 'depending on the facts and circumstances of each case.' Id. Thus, 'in determining whether one offense is a lesser included offense of the charges offense, the potential relationship of the two offenses must be considered not only in the abstract terms of the defining statutes, but must also be considered in light of the *particular facts* of each case.' Id. (Italics in original)." Id., ¶¶46-52.

{¶ 30} As I previously stated in *Kvasne* at ¶55, to solve the problem created by the conflation of *Rance* and *Deem*, justice might better be served by a return to the beginning; to the "New Ohio Criminal code," as it was called when enacted by Am. Sub. House Bill 511. With respect to the instant case, it is clear from the legislative

commission's commentary published in 1974 that " [s]ince robbery shares a number of common elements with aggravated robbery, it is a lesser included offense to aggravated robbery." The crimes thus are distinguished mainly by the lesser degree of potential harm to the victim, rather than by a literal application of the elements of the respective subsections.

{¶ 31} It is worth noting that, since *Barnes* was decided, it has been cited by the supreme court as authority almost exclusively with reference to Crim.R. 52, viz., "plain error;" the *Barnes* majority was reluctant to permit the defendant to escape criminal accountability. In this case, neither appellant nor his attorney raised any objection to the trial court's decision to acquit the defendant of the more serious offense, but find him guilty of attempting to commit a theft offense by threatening the use of physical harm, i.e., robbery.

{¶ 32} Thus, although I agree that the elements of R.C. 2911.01(A)(1) and R.C. 2911.02(A)(2), as "statutorily defined," do not strictly meet the conflated interpretation of the *Deem* test, nevertheless, I am unconvinced plain error occurred in this case. Moreover, I am uncomfortable with the fact that the present state of the law prevents appellant from being held accountable for his criminal act, and, therefore, I concur with the majority opinion only with great reluctance.