IN THE OHIO SUPREME COURT

07-2193

STATE OF OHIO

Appellant

v.

WILLIAM C. BARTRUM

Appellee

CASE NO. _____

ON APPEAL FROM THE SUMMIT COUNTY COURT OF APPEALS, NINTH APPELLATE DISTRICT

COURT OF APPEALS CASE NO. 23549

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, STATE OF OHIO

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EXPLANATION OF WHY LEAVE TO APPEAL SHOULD BE GRANTED

The issue is whether in a prosecution under R.C. 2907.21(A)(3) the defendant must pay or agree to pay an actual minor directly or through the minor's agent so that the minor will engage in sexual activity. The Ninth District Court of Appeals held that there must be an actual minor and reversed appellee William C. Bartrum's conviction under the statute finding that there was insufficient evidence to support the conviction. *State v. Bartrum*, 2007-Ohio-5410¶, ¶25, ¶31 (*Bartrum*). The State concedes that there was not an actual minor involved in the case. Leave to appeal should be granted because the decision of the Ninth District Court of Appeals is contrary to the result reached in *State v. Goldblatt*, 8th Dist. App. Nos. 87442/87462, 2006-Ohio-5930, where the defendant was convicted of a violation of R.C. 2907.21(A)(3) where there was no actual minor involved. This issue, whether an actual minor must be involved in a prosecution under R.C. 2907.21(A)(3), is important to the prosecution of this offense statewide and should be settled by this Court.

STATEMENT OF THE CASE AND FACTS

Appellee was convicted after jury trial of compelling prostitution, R.C. 2907.21(A)(3), a felony of the third degree. He was sentenced to one year in prison, suspended, and placed on five years community control. He was adjudicated a sexually oriented offender. At trial appellee made a motion for judgment of acquittal and later renewed the motion.

In summary, the evidence at trial was that Cuyahoga Falls Detective Edward Vanadia testified that on February 18, 2006 he received a call from a confidential informant. The informant, a prostitute, told Vanadia that she had a client requesting a mother and an eleven year old girl as a mother and daughter team. T. 1, 119-120. Vanadia met with the informant and a recorded telephone call was placed to appellant. Id. 121.

Vanadia identified State Exhibit 1A as the tape of the call to appellant. State Exhibit 1B is the transcript of the taped call. T. 1, 122-126. On the tape "Clare" and "Tina" was the informant and "Kelly" was the supposed eleven year old girl. Id. 127, 157. "Kelly" was in fact a Cuyahoga Falls Police Dispatcher. Id. 129.

In the transcript, State Exhibit 1B, at about 9:15 PM the informant asks appellant if he wants company with the informant and her daughter. Appellant says yeah. The informant says she's 11, is that OK? Appellant says that is sweet. Appellant asks the informant what she and her daughter look like. Then appellant says "Well you wouldn't mind if *** they shoot me watching uh, really up close and her naked and stuff would you?" The informant says not at all then appellant says "Never know I might taste both of you." The informant asks if appellant wanted to taste both of them. Appellant says yeah. The informant says that would be great and she might like that. Appellant says

Oh, OK, Ok. Then the informant says appellant would have to come to them. Appellant asks where the informant was. The informant says north Akron area and that it would cost $500.00. Appellant says right. The informant asks if that is ok with appellant and appellant says yes it is. Appellant asks if the informant works with the woman who runs Ultimate Fantasy and the informant says she has met her a few times. The informant says she gave the informant appellant's phone number and that her and her daughter have done this before. Appellant then asks how to contact the informant when he gets in the area and gets directions to get off Route 8 at the Graham Road exit.

There is a second call on State Exhibit 1B. In it appellant says that he is coming up Graham Road driving a black Ford. The informant tells appellant she is in a room at the Economy Inn by the Pizza Hut in room 117. The informant tells appellant to turn left off the Graham Road exit and to park in front of the room. Appellant asks if both of them are there and the informant says that they are. Then appellant says he will be there in ten minutes.

Vanadia testified that there were text messages from the informant's cell phone to and from appellant's cell phone. T. 1, 130. Vanadia recovered the text messages by subpoenaing the informant's cell phone provider and copied the messages onto paper. Id. 130-131. Vanadia had the informant's cell phone and appellant's cell phone that was taken from appellant. Id. 133. Vanadia recovered the messages in the informant's phone. Id. 147. Vanadia could not recover messages from appellant's phone since appellant had destroyed the SIM chip in the phone. Id. 148. The SIM chip is a memory device in the phone. Id. 149.

Vanadia personally typed out the messages. He identified State Exhibit 2B as a transcript of the text messages. Id. 133-134. The messages began on February 18, 2006 and ended on February 21, 2006.

State Exhibit 2B indicates that on February 18, 2006 at 7:33 PM appellant wants to know if Kelly is "into Anal or sukn." Then at 7:38 PM appellant texts "K I don't use rubbers." Then at 8:26 PM appellant texts "Later I smell a set up."

Vanadia testified that he spoke to appellant who gave a voluntary statement on February 22, 2006. Vanadia identified State Exhibit 3 as appellant's statement. T. 1, 143, 152-154. Appellant admitted that he had made the phone calls and that he had sent the text messages. Id. 144. Defendant had paid $100 to $150 for conventional sex before. Appellant agreed to pay $500.00 in the case under investigation. Id. 145. The statement was read to the jury. Id. 146-147.

In his statement appellant said that he asked Tina, an escort that he met through a Canton newspaper, about a mother and daughter. Tina said okay and asked if a ten or eleven year old was okay. Appellant said okay but thought it was a game. Later she texted a price and let him know where and when. Appellant said that he got scared and backed out. Appellant said he thought it was a game where the woman would have a friend pretend she was her daughter. Appellant said that he got scared and nervous and destroyed the SIM card from the cell phone.

Vanadia testified that the investigation took place in Cuyahoga Falls, Ohio and that the phone calls (apart from appellant talking) were made or received in Cuyahoga Falls. T. 1, 155. The Economy Lodge referenced in the taped call is located in Cuyahoga Falls. Id. 155-156.

On appeal appellee argued in his second assignment of error that the evidence was insufficient evidence to support the conviction. In that assignment appellee concentrated on the alleged failure of the State to prove venue and stated in passing that that there was no actual minor. Brief, 10-11. Appellee also argued on appeal that the conviction was against the manifest weight of the evidence in his first assignment of error. In that assignment appellee attempted to distinguish *State v. Goldblatt*, 8th Dist. App. Nos. 87442/87462, 2006-Ohio-5930 and *State v. Adrian*, 168 Ohio App.3d 300, 2006-Ohio-4143, those cases involving convictions for compelling prostitution and attempted rape respectively where there was no actual minor.

But appellee did not argue that since there was no actual minor his conviction was against the manifest weight of the evidence; rather he argued that he was not sincere in wanting to have sexual contact with a minor, that he was merely being flip and ridiculous when talking with the confidential informant. Brief, 8-9.

The Ninth District Court of Appeals in reviewing the assignment dealing with the manifest weight of the evidence stated that before it could weigh evidence it had to determine whether there was evidence to weigh and that it had to first consider appellee's second assignment of error. *Bartrum*, ¶17. The court then went on to hold that R.C. 2907.21(A)(3) required that there be an actual minor. The court did not rule on appellee's assignments of error dealing with venue and the alleged erroneous admission of hearsay.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW

IN A PROSECUTION UNDER R.C. 2907.21(A)(3) IT IS NOT NECESSARY THAT THERE IS AN ACTUAL MINOR IN ORDER TO CONVICT THE DEFENDANT.

In *State v. Adrian*, 168 Ohio App.3d 300, 2006-Ohio-4143, the defendant was convicted of attempted rape, attempted complicity to commit kidnapping, compelling prostitution, and two counts of complicity (apparently to compel prostitution). Id. ¶1. On appeal the defendant did not challenge the conviction for compelling prostitution, Id. ¶16, as correctly noted by the Ninth District Court of Appeals. *Bartrum*, ¶23.

In *Adrian* there was a fictional eight-year-old child, Brittany, and the defendant was convicted of the attempted rape of this fictional child. On appeal the defendant challenged the sufficiency of the evidence supporting that conviction. *Adrian*, 2006-Ohio-4143, ¶16.

The rape statute, R.C. 2907.02, prohibits sexual conduct with another under certain circumstances. One circumstance is where the other person is less than thirteen years of age. R.C. 2907.02(A)(1)(b). The court in *Adrian* analyzed the sufficiency issue focusing on the attempt portion of the charge and not whether the term another in the rape statute encompassed a fictional person or whether a person less than thirteen years of age could be a fictional person.

Nevertheless, the court's result indicates that a fictional person can fit the bill under the rape statute: "[t]he state's evidence reasonably supported the conclusion that Adrian's actions constituted a substantial step in a course of conduct planned to culminate in the rape of Brittany, an eight-year-old child." Id. ¶24. It must be pointed out that the result in *Adrian* might be explained by the attempt statute, R.C.

2923.02(B), making factual or legal impossibility no defense if the offense "could have been committed had the attendant circumstances been as the actor believed them to be." The *Adrian* court does not cite that statute however.

In *State v. Goldblatt*, 8th Dist. App. Nos. 87422, 87462, 2006-Ohio-5930, the defendant was convicted of compelling prostitution, R.C. 2907.21(A)(3). The defendant spoke to a law enforcement officer and asked to meet a young girl to play with, touch, lick or "stick it in her." Id. ¶11, ¶17. On appeal the defendant argued that the conviction was not supported by sufficient evidence, arguing that there was not an actual minor involved. Id. ¶37, ¶43. The Eighth District found that the conviction was supported by sufficient evidence relying on the decision in *Adrian*.

In *Goldblatt* the court erroneously stated that the *Adrian* court had upheld the conviction for compelling prostitution as supported by sufficient evidence. *Goldblatt*, 2006-Ohio-5930, ¶46. In fact, as stated above, the *Adrian* court did not address the conviction for compelling prostitution. *Adrian*, 2006-Ohio-4143, ¶16, ¶24. Nevertheless, the *Goldblatt* court stated:

> The Ohio Second Appellate District's reasoning with regard to whether The evidence proved the necessary elements of the crime is sound. In this case, as in *Adrian*, appellant spoke with a person who played the role of a child's agent; although no actual child existed, the tape recordings showed a plan for the agent to bring the child to him for him to engage in sexual activity with her.

Goldblatt, 2006-Ohio-5930, ¶47.

The above statement appears to be the sole response by the court to the defendant's argument that the conviction was not supported by sufficient evidence due to the lack of an actual minor.

In *Bartrum* dissenting Judge Slaby relied upon both *Adrian* and *Goldblatt*. Citing *Adrian* Judge Slaby stated that appellee explicitly propositioned a person who he believed to be a child for sexual acts in exchange for money. *Bartrum*, ¶36. Judge Slaby then cited *Goldblatt* as quoted immediately above. *Bartrum*, ¶37.

Under *Adrian* a prosecution for attempted rape does not require an actual minor. Under *Goldblatt* a prosecution for compelling prosecution under R.C. 2907.21(A)(3) does not require an actual minor.

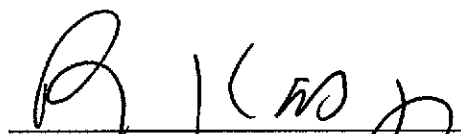
Here, appellant wanted to meet a naked eleven-year-old child so he could taste the child; appellee wanted to know if the child were into "anal or sukn" and stated that he did not use rubbers. Appellee agreed to pay $500.00 for the encounter and, believing that the child was waiting at a motel in Cuyahoga Falls, Ohio off the Graham Road exit on Route 8, drove onto Graham Road telling the informant that he would arrive in ten minutes. Under *Goldblatt* this evidence is sufficient to support the conviction. The State requests that this Court rule that *Goldblatt* is correct.

CONCLUSION

Based upon the foregoing argument, the State respectfully submits that the Ninth District Court of Appeals erred in reversing the conviction of appellee Bartrum. The State requests that this Court take jurisdiction, reverse the judgment of the Ninth District Court of Appeals, and remand the case to that court for further proceedings.

Respectfully submitted,

SHERRI BEVAN WALSH
Summit County Prosecutor



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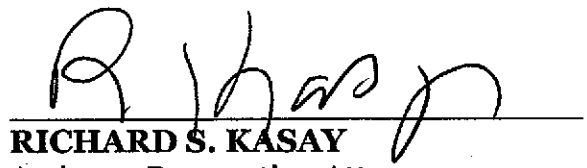
PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum In Support of Jurisdiction was forwarded by regular U.S. First Class mail to Attorney Christopher P. Muntean, 333 South Main Street, Suite 702, Akron, Ohio 44308, on this 21st day of November, 2007.



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APPENDIX

[Cite as *State v. Bartrum*, 2007-Ohio-5410.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 23549
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 06 03 0903
WILLIAM C. BARTRUM	
Appellant	

DECISION AND JOURNAL ENTRY

Dated: October 10, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

DICKINSON, Judge.

{¶1} On February 18, 2006, defendant William Bartrum, through text messages and telephone conversations with a prostitute, agreed to pay $500 for a sexual encounter with a mother and her eleven-year-old daughter. Unbeknownst to Mr. Bartrum, the prostitute was serving as a confidential informant for the Cuyahoga Falls Police Department and the mother and daughter were non-existent. He was arrested, tried before a jury in Summit County Common Pleas Court, and convicted of violating Section 2907.21(A)(3) of the Ohio Revised Code by agreeing to pay a minor to engage in sexual activity. He has argued on appeal: (1) that his conviction was against the manifest weight of the evidence; (2) that his

conviction was not supported by sufficient evidence; (3) that the trial court incorrectly received hearsay statements into evidence; and (4) that venue was not appropriate in Summit County. This Court reverses Mr. Bartrum's conviction because, in order to obtain a conviction for violating Section 2907.21(A)(3), the State must prove that a defendant agreed to pay an actual minor to engage in sexual activity. Mr. Bartrum's conviction, therefore, is not supported by sufficient evidence. Mr. Bartrum's remaining assignments of error are moot and are overruled on that basis.

I.

{¶2} During February 2006, a prostitute placed an advertisement in the Canton Repository consisting of two words, "Ultimate Fantasy," followed by a telephone number. William Bartrum placed a call to the number and arranged for the prostitute, who identified herself as "Tina," to visit him at his apartment in Wayne County, Ohio. He paid her $150 for an hour during which she performed fellatio on him and engaged in sexual intercourse with him. During her visit, she mentioned to Mr. Bartrum, either in response to a question or without prompting, that she did "fetishes and fantasies" and could arrange an encounter for him with a "mother/daughter team." She told him that, if he wanted such an encounter, he should send her a text message or call her "in the next day or so."

{¶3} Mr. Bartrum testified that he telephoned the prostitute about a week later to see if she was available to visit him again. The idea of a "mother/daughter

team" came up again during that conversation. According to Mr. Bartrum, he believed that the prostitute brought it up, asking whether he was ready for the "fetish or fantasy" they had talked about. He testified that he believed he said yes, although he was not serious.

{¶4} At 10:00 a.m. on February 18, 2006, Mr. Bartrum sent the prostitute a text message in which he asked whether she had a daughter. Apparently, instead of responding, she telephoned a Cuyahoga Falls police detective and informed him that she had a client who was attempting to arrange a sexual encounter with an eleven-year-old girl. The detective met with her and placed a voice recorder on her telephone.

{¶5} At 4:47 p.m. that same day, Mr. Bartrum again sent a text message to the prostitute, this time asking whether any of her "girls" would "let there dau[ghter] se[e]." In response, she asked, "[h]ow old?" After again asking whether she was a mother and her responding no, he asked: "Any with a 10yr or older?"

{¶6} Over the next three and three-quarter hours, Mr. Bartrum and the prostitute exchanged numerous text messages and had two telephone conversations. A Cuyahoga Falls Police dispatcher, pretending to be an eleven-year-old girl, also had a telephone conversation with Mr. Bartrum. The Cuyahoga Falls Police Department was able to retrieve the text messages from the prostitute's telephone, and a transcript of them was received in evidence at Mr.

Bartrum's trial. A transcript of the telephone conversations between Mr. Bartrum and the prostitute was also received in evidence. Although there was no transcript of the conversation between Mr. Bartrum and the police dispatcher, the dispatcher testified at trial regarding the contents of that conversation.

{¶7} Through the text messages, Mr. Bartrum indicated that he wanted the daughter to "see all 3 of us nud[e]" and, possibly, to "join in." The prostitute responded that she could arrange it, but that it would "cost." Between 5:33 p.m. and 6:07 p.m., Mr. Bartrum sent three messages asking about the price, and the prostitute finally responded: "500." Between 6:12 p.m. and 6:23 p.m., he asked the ages of the mother and daughter three times. The prostitute finally responded that the daughter was eleven years old, and he immediately asked whether he could talk to her. The prostitute responded that she did not see why not.

{¶8} It is not clear whether the conversation between the dispatcher and Mr. Bartrum took place immediately after Mr. Bartrum's request to talk to the daughter, but, at some point, she spoke to him, pretending to be the daughter. She testified that the conversation was "very short." According to her, Mr. Bartrum asked if she was 11, and she replied that she was. He asked what kinds of things she did, and she said she would not talk about it over the telephone. He asked if she was a police officer, and she said she was not. Finally, he said he might not show up, and she said that she and her mother would be waiting for him.

{¶9} In response to a text message asking the names of the mother and daughter, the prostitute told Mr. Bartrum that the mother's name was Clare and the daughter's name was Kelly. He asked if he could talk to Clare. Again, it is not clear whether it was immediately after Mr. Bartrum's request, but at some point the prostitute telephoned Mr. Bartrum, pretending to be "Clare."

{¶10} After identifying herself as "Clare," she asked his name, and he told her "Tony." She asked if he wanted "some company" with her and her daughter, and he replied that he did. She said that the daughter was 11, and he responded "that is sweet." He then asked her to describe herself and her daughter, which she did. He asked if she would mind if "they shoot me watching uh, really up close and her naked and stuff," and she responded that she would not. He then said: "Ah, sweet. Never know I might taste both of you." She told him that he would have to come to them in the "north Akron area," and he said "OK." She then said it was going to cost $500, and he said that was "OK." He asked how to get hold of her once he got in the area, and she gave him directions and told him to call her as he was getting off Route 8 at the Graham Road exit. He said "OK."

{¶11} In a text message at 7:33 p.m., Mr. Bartrum asked "Tina" whether Kelly was "into Anal and sukn," and she responded that she was very open minded. He then said that he did not use "rubbers," and she responded that they would discuss that when she saw him. He then again asked if he could talk to Clare. The prostitute, again pretending to be "Clare," telephoned Mr. Bartrum,

and he told her that he was "coming up on Graham Road." He told her what kind of car he was driving, and she directed him to a room at an Economy Inn. He said he would probably see her "in about 10 minutes." At 8:26 p.m., he sent a text message that said: "Later I smell a set up." He did not show up at the motel.

{¶12} On the afternoon of the following day, Mr. Bartrum again sent the prostitute a text message, asking whether Kelly was really eleven years old and how he could contact Clare and Kelly. He then asked if she had ever engaged in sex with a dog. Ignoring his question about the dog, she responded that Clare and Kelly would be available early the following week. He then asked how much she would charge to have sex with a "rottie," and whether there would be any way to get Kelly alone. She did not respond.

{¶13} The following day, February 20th,. Mr. Bartrum again sent the prostitute a text message, this time asking how much it would be for Kelly alone. She responded that it would be $500. He then again asked a number of questions about whether she would engage in sex with a dog.

{¶14} As mentioned above, during one of his conversations with the prostitute, Mr. Bartrum said that his name was "Tony." The cellular telephone that he was using during his text messaging and conversations with the prostitute had apparently originally belonged to and was still listed as belonging to Mr. Bartrum's brother, Tony Bartrum. The Cuyahoga Falls Police Department showed the prostitute a photo array that included a photograph of Tony Bartrum, and she

mistakenly identified him as the person she had met at the Wayne County apartment. The police arrested him for compelling prostitution.

{¶15} When Mr. Bartrum learned that his brother had been arrested, he informed police that he was the person sending the text messages and speaking with the prostitute. He prepared a written statement that was received in evidence at trial in which he said he had asked the prostitute about a mother and daughter and she had said "OK," but that he thought "it was a game." He further wrote that the prostitute had told him where and when, but that he got scared and backed out. He wrote that he thought it was a game in which the prostitute was going to have another prostitute pretend to be her daughter. In his trial testimony, Mr. Bartrum pointed to his questions to the prostitute about bestiality as support for the idea that he was engaging in fantasy.

{¶16} Mr. Bartrum's brother was released from custody, and Mr. Bartrum was arrested and charged with compelling prostitution. He was tried before a jury, which found him guilty. The trial court adjudicated him a sexually-oriented offender and sentenced him to one year in prison. It suspended his sentence on condition that he complete five years of community control. He has assigned four errors on appeal.

II.

{¶17} Mr. Bartrum's first assignment of error is that his conviction is against the manifest weight of the evidence. Inasmuch as a court cannot weigh the evidence unless there is evidence to weigh, this Court will first consider Mr. Bartrum's second assignment of error, that his conviction is not supported by sufficient evidence. See *Chicago Ornamental Iron Co. v. Rook*, 93 Ohio St. 152, 156 (1915).

A.

{¶18} An argument that a conviction is not supported by sufficient evidence presents a question of law, which this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it would have convinced an average juror of Mr. Bartrum's guilt:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, 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, paragraph two of the syllabus (1991).

{¶19} Mr. Bartrum was convicted of violating Section 2907.21(A)(3) of the Ohio Revised Code:

> (A) No person shall knowingly do any of the following:

. . . .

> (3) Pay or agree to pay a minor, either directly or through the minor's agent, so that the minor will engage in sexual activity, whether or not the offender knows the age of the minor. . . .

In order to violate this section, Mr. Bartrum would have had to agree to pay a minor, either directly or through the minor's agent, to engage in sexual activity. Sexual activity, for purposes of Section 2907.21(A)(3), includes, among other things, cunnilingus or any touching of an erogenous zone of another for the purpose of sexually arousing or gratifying either person. R.C. 2907.01(A)-(C). Mr. Bartrum has argued that the State failed to present evidence that, if believed, would have proven that he agreed to pay a minor to engage in sexual activity.

{¶20} In his text messages to the prostitute, Mr. Bartrum wrote, among other things, that maybe the daughter could "join in" and, when told that the price would be $500, responded "OK." He also asked whether the daughter was "into Anal or sukn," and, when the prostitute responded that she was very open minded, wrote that he does not use "rubbers." Similarly, during his telephone conversation with the prostitute, who at the time was pretending to be the eleven-year-old girl's mother, Mr. Bartrum stated that he "might taste" both the mother and the daughter. When reminded that it was going to cost him $500, he stated that that was "OK." When asked when he would be to the Graham Road exit off Route 8, he indicated that he would be there around 8:30 p.m.

{¶21} The evidence presented by the State, viewed in a light most favorable to the State, proved that Mr. Bartrum thought he had reached an agreement to pay $500 in order for an eleven-year-old girl to engage in sexual activity. The issue presented by this case is whether the State can obtain a conviction for violating Section 2907.21(A)(3) if the minor about whom the defendant believes he has reached an agreement is non-existent.

{¶22} In *State v. Goldblatt*, 8th Dist. Nos. 87442, 87462, 2006-Ohio-5930, the defendant told an FBI agent who was pretending to be a "pimp" that he would pay $200 to engage in sexual activity with a ten- or eleven-year-old girl. The Eighth District Court of Appeals affirmed his conviction for violating Section 2907.21(A)(3), despite the fact that no actual minor was involved in the alleged crime. In doing so, it wrote that it was relying on the reasoning of the Second District Court of Appeals in *State v. Adrian*, 2d Dist. No. 2005 CA 23, 2006-Ohio-4143:

> Although[, in *Adrian*,] no actual young girl either existed or was at the location upon [the defendant's] arrival, the appellate court determined [the defendant's] convictions for both compelling prostitution and attempted rape were supported by sufficient evidence and by the weight of the evidence. . . .
>
> The Ohio Second District's reasoning with regard to whether the evidence proved the necessary elements of the crime is sound. In this case, as in *Adrian*, appellant spoke with a person who played the role of a child's agent; although no actual child existed, the tape recordings showed a plan for the agent to bring the child to him for him to engage in sexual activity with her.

Goldblatt at ¶¶46-47.

{¶23} The problem with the Eighth District's reliance on the Second District's opinion in *Adrian* is that the Second District did not determine that the defendant's conviction for compelling prostitution in that case was supported by sufficient evidence or not against the manifest weight of the evidence. The defendant in *Adrian* was convicted of one count each of attempted rape, attempted complicity to commit kidnapping, and compelling prostitution and two counts of complicity to prostitution. It is not clear from the Second District's opinion whether the defendant's compelling prostitution conviction was based on subparagraph (3) of Section 2907.21(A) or another subparagraph of that section. Regardless of which subparagraph the defendant's conviction was based on, however, he did not attack that conviction on appeal. While he argued that his attempted rape and attempted complicity to commit kidnapping convictions were not supported by sufficient evidence and were against the manifest weight of the evidence, he did not argue that his compelling prostitution conviction was not supported by sufficient evidence or was against the manifest weight of the evidence. *State v. Adrian*, 2d Dist. No. 2005CA23, 2006-Ohio-4143, at ¶¶2-3.

{¶24} Further, while the defendant's attempted rape and attempted complicity to commit kidnapping convictions in *Adrian* were based on his attempt to engage in sexual activity with a non-existent eight-year-old girl, it is not clear that his compelling prostitution conviction was based on his attempt to have a non-

existent minor engage in sexual activity. In addition to attempting, through one acquaintance, to arrange to engage in sexual activity with two non-existent minors, he had also asked a second acquaintance to obtain young girls to have sex with him. This second acquaintance had solicited an actual sixteen-year-old girl on the defendant's behalf. His conviction for compelling prostitution may have been based on the solicitation of that actual sixteen-year-old girl rather than his agreement to pay money to engage in sexual activity with the non-existent minor. See Section 2907.21(A)(2) of the Ohio Revised Code. Whether his conviction for compelling prostitution was based upon an actual or a non-existent minor is not clear from the Second District's opinion.

{¶25} The Eighth District's reliance on *Adrian* as support for its conclusion that an actual minor is not necessary for a conviction under Section 2907.21(A)(3), therefore, was misplaced. This Court has concluded that, in order to obtain a conviction for violating Section 2907.21(A)(3), the State must present evidence that, if believed, would prove that the defendant paid or agreed to pay an actual minor to engage in sexual activity.

{¶26} Section 2907.21(A)(3), on its face, prohibits agreements with a "minor." It does not prohibit agreements "believed to be with a minor." When the legislature has determined that an actual minor need not be involved in order for there to be a crime, it has said so in the statute defining that crime. For example, some forms of importuning do not require an actual minor:

> (C) No person shall solicit another by means of a telecommunications device, as defined in section 2913.01 of the Revised Code, to engage in sexual activity with the offender when the offender is eighteen years of age or older and either of the following applies:
>
> . . . .
>
> (2) The other person is a law enforcement officer posing as a person who is less than thirteen years of age, and the offender believes that the other person is less than thirteen years of age or is reckless in that regard.

Section 2907.07(C) of the Ohio Revised Code. Section 2907.21(A)(3) has no similar provision.

{¶27} While acknowledging that the Second District's opinion in *Adrian* did not determine that "Adrian's convictions for *both* compelling prostitution and attempted rape were supported by sufficient evidence and by the weight of the evidence," the dissent has suggested that "the Eighth District Court of Appeals correctly applied the logic of *Adrian* to facts that are precisely on-point with this case." (Emphasis added by dissent.) The defendant in *Adrian*, however, was convicted of attempted rape, not rape. The logic of *Adrian*, therefore, might have supported a conviction in *Goldblatt* or this case for an attempt to compel prostitution. Neither the defendant in *Goldblatt* nor Mr. Bartrum, however, was indicted for or convicted of attempting to compel prostitution. They were convicted of compelling prostitution. There was insufficient evidence to support that conviction.

{¶28} In this case, Mr. Bartrum thought he was dealing with an agent for a minor. Actually, the person he was dealing with was only pretending to be an agent for a non-existent minor. "It must never be forgotten that there can be no such thing as an agent without a principal." *Chicago Cottage Organ Co. v. Rishforth*, 14 Ohio C.D. 660 at *2 (1903). Since there was no minor, the prostitute with whom Mr. Bartrum agreed to pay $500 was not "the minor's agent."

{¶29} The issue of whether Mr. Bartrum committed any crime is not before this Court. As mentioned above, Mr. Bartrum was not indicted for attempting to compel prostitution. Further, on facts similar to the facts in this case, the Second District, in *Adrian*, affirmed the defendant's conviction for attempted rape. Mr. Bartrum, however, was also not indicted for attempted rape. The only issue before this Court is whether the State presented sufficient evidence to support Mr. Bartrum's conviction for violating Section 2907.21(A)(3). It did not. Mr. Bartrum's second assignment of error is sustained.

B.

{¶30} In view of this Court's ruling on Mr. Bartrum's second assignment of error, his remaining assignments of error are moot. Accordingly, they are overruled on that basis.

III.

{¶31} A defendant cannot be convicted of violating Section 2907.21(A)(3) of the Ohio Revised Code unless he pays or agrees to pay an actual minor to engage in sexual activity. Mr. Bartrum's second assignment of error is sustained. His other assignments of error are moot and are overruled on that basis. The judgment of the Summit County Common Pleas Court is reversed.

Judgment reversed
and cause remanded

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

BAIRD, J.
CONCURS

SLABY, P. J.
DISSENTS, SAYING:

{¶32} I respectfully dissent. I would affirm Defendant's conviction for compelling prostitution for the reasons set forth in *State v. Goldblatt*, 8th Dist. No. 87442, 87462, 2006-Ohio-5930.

{¶33} As the majority opinion notes, *Goldblatt* involved a conviction under the same statute at issue in this case, R.C. 2907.21(A)(3). The majority rejects the outcome reached by the 8th District, finding fault with its reliance upon *State v. Adrian*, 168 Ohio App.3d 300, 2006-Ohio-4143. I believe, however, that the *Adrian* court's analysis supports the conclusion that R.C. 2907.21(A)(3) permits a conviction under the circumstances of this case. Consequently, further analysis of *Adrian* is warranted.

{¶34} In *Adrian*, the defendant was convicted of attempted rape, attempted complicity to commit kidnapping, compelling prostitution, and complicity to prostitution. These convictions arose from the defendant's interactions with a former lover, Meera Good. After encountering Ms. Good in a grocery store with her seven-year-old daughter and two of her daughter's young friends, the

defendant contacted Ms. Good. At that time, he described a past incident in which he engaged in sexual conduct with a drugged child and asked whether Ms. Good could provide an eight-year-old and a ten-year-old girl for his sexual gratification. Ms. Good contacted law enforcement and agreed to assist in gathering evidence that might lead to the defendant's arrest. Ms. Good participated in numerous telephone calls with the defendant, and ultimately agreed to provide him with a fictional eight-year-old girl named "Brittany" in exchange for $200. The defendant was arrested when Ms. Good urged him to come to her van, maintaining that the non-existent Brittany was secured inside the vehicle.

{¶35} The defendant was convicted of the attempted rape of this fictional "Brittany." The Second District Court of Appeals affirmed this conviction, noting that the defendant's progressively more explicit interactions with Ms. Good, the payment of $200, and the defendant's approach of the vehicle alleged to contain "Brittany" constituted substantial steps toward the commission of the rape of an eight-year-old, regardless of the fact that the prospective victim was a fictional child. Id. at ¶23-24. The court concluded, therefore, that a defendant could be found guilty of attempted rape even where there was no actual victim who was a person "less than thirteen years of age." R.C. 2907.02(A)(1)(b).

{¶36} The analysis espoused by the Second District with respect to the crime of attempted rape in *Adrian* is instructive in analyzing charges under R.C. 2907.21(A)(3) as well. In both scenarios, we are presented with a defendant who

manifests the clear intention to commit a crime against a child of tender years and, in both instances, such conduct is explicitly forbidden by statute. The defendant in *Adrian* took as many steps as possible toward the rape of a child that could be taken outside the presence of the victim. As the Second District made clear, the fact that the defendant was mistaken as to the existence of the child victim was immaterial. The defendant in the case before this court explicitly propositioned a person who he believed to be a potential child victim for sexual acts in exchange for money. I find no distinction worthy of a different outcome.

{¶37} This result is further bolstered by the Eighth District's decision in *Goldblatt*, supra. While mistaken in its assertion that the Second District "determined Adrian's convictions for *both* compelling prostitution and attempted rape were supported by sufficient evidence and by the weight of the evidence," (emphasis added), *Goldblatt* at ¶6, the Eighth District Court of Appeals correctly applied the logic of *Adrian* to facts that are precisely on-point with this case:

> "The Ohio Second Appellate District's reasoning with regard to whether the evidence proved the necessary elements of the crime is sound. In this case, as in *Adrian*, appellant spoke with a person who played the role of a child's agent; although no actual child existed, the tape recordings showed a plan for the agent to bring the child to him for him to engage in sexual activity with her." *Goldblatt* at ¶47.

{¶38} For the same reasons, I would affirm the defendant's conviction for violating R.C. 2907.21(A)(3) in this case.

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

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SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for appellee.