

**IN THE SUPREME COURT OF OHIO**  
**Supreme Court Case Number 07-2193**

**STATE OF OHIO**  
**Appellant**

**On Appeal From The Summit  
County Court of Appeals  
Ninth Appellate District  
Court Of Appeals Case No. 23549**

v.

**WILLIAM C. BARTRUM**  
**Appellee**

**MERIT BRIEF OF APPELLANT**  
**STATE OF OHIO**

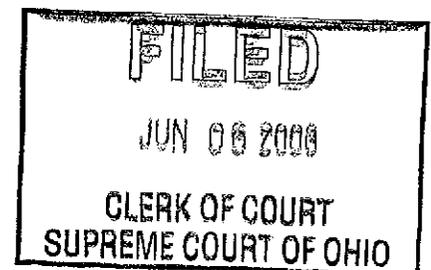
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## STATEMENT OF FACTS

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*, 9<sup>th</sup> Dist. App. No. 23549, 2007-Ohio-5410, ¶25, ¶31. The State concedes that there was no actual minor involved in the case.

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; R. 10. Vanadia met with the informant and a recorded telephone call was placed to Bartrum. Id. 121.

Vanadia identified State Exhibit 1A, R. 12, as the tape of the call to Bartrum. 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, R. 13, at about 9:15 PM the informant asks Bartrum if he wants company with the informant and her daughter. Bartrum says yeah. The informant says she's 11, is that OK? Bartrum says that is sweet. Bartrum asks the informant what she and her daughter look like. Then Bartrum 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 Bartrum says "Never know I might taste both

of you.” The informant asks if Bartrum wanted to taste both of them. Bartrum says yeah. The informant says that would be great and she might like that. Bartrum says Oh, OK, Ok. Then the informant says Bartrum would have to come to them. Bartrum asks where the informant was. The informant says north Akron area and that it would cost \$500.00. Bartrum says right. The informant asks if that is ok with Bartrum and he says yes it is. Bartrum 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 has Bartrum’s phone number and that her and her daughter did this before. Bartrum 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 Bartrum says that he is coming up Graham Road driving a black Ford. The informant tells Bartrum she is in a room at the Economy Inn by the Pizza Hut in room 117. The informant tells Bartrum to turn left off the Graham Road exit and to park in front of the room. Bartrum asks if both of them are there and the informant says that they are. Then Bartrum 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 Bartrum’s cell phone that was taken from Bartrum. Id. 133. Vanadia recovered the messages in the informant’s phone. Id. 147. Vanadia could not recover messages from Bartrum’s phone since Bartrum 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, R. 15, 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 Bartrum wanted to know if Kelly is “into Anal or sukkn.” Then at 7:38 PM Bartrum texts “K I don’t use rubbers.” Then at 8:26 PM Bartrum texts “Later I smell a set up.”

Vanadia testified that he spoke to Bartrum who gave a voluntary statement on February 22, 2006. Vanadia identified State Exhibit 3, R. 16, as the statement. T. 1, 143, 152-154. In the statement Bartrum admitted that he had made the phone calls and that he had sent the text messages. Id. 144. Bartrum had paid \$100 to \$150 for conventional sex before. Bartrum 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 Bartrum 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. Bartrum said okay but thought it was a game. Later she texted a price and let him know where and when. Bartrum said that he got scared and backed out. Bartrum said he thought it was a game where the woman would have a friend who pretended that she was the woman’s daughter. Bartrum 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 Bartrum 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 Bartrum argued in his second assignment of error that the evidence was insufficient evidence to support the conviction. In that assignment Bartrum 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; R. 26. Bartrum also argued on appeal in the first assignment of error that the conviction was against the manifest weight of the evidence. In that assignment Bartrum attempted to distinguish *State v. Goldblatt*, 8<sup>th</sup> Dist. App. Nos. 87442/87462, 2006-Ohio-5930 and *State v. Adrian*, 168 Ohio App.3d 300, 2006-Ohio-4143, cases involving convictions for compelling prostitution and attempted rape respectively where there was no actual minor.

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*, supra ¶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 the assignments of error dealing with venue and the alleged erroneous admission of hearsay.

## 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.**

## LAW AND ARGUMENT

R.C. 2907.21(A)(3) provides:

\*\*\*

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

(3) Pay or agree to pay a minor, either directly or indirectly 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 \*\*\*

Sexual activity includes cunnilingus and touching the erogenous zone of another for the purpose of the sexual gratification of the defendant. R.C. 2907.01(A)-(C).

The mental element of knowingly requires that the defendant be "aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

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 conceded that the result in *Adrian* could 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*, 8<sup>th</sup> 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* supra, 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. It is impossible to know whether the court in *Goldblatt* would have reached the same result absent the apparent precedent of *Adrian* supra, but *Goldblatt* is in the State's view still legitimate precedent for the proposition that no actual minor is necessary in a prosecution under R.C. 2907.21(A)(3).

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, *Bartrum* wanted to meet a naked eleven-year-old child so he could taste the child; *Bartrum* wanted to know if the child were into "anal or suk'n" and stated that he did not use rubbers. He 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 *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, and *Goldblatt* this evidence is sufficient to support the conviction, assuming that no actual minor is required. The State requests that this Court rule that *Goldblatt* is correct. The State has not found any case ruling on this issue, whether an actual minor is required under R.C. 2907.21(A)(3) other than *Adrian*, *Goldblatt* and *Bartrum*.

The Ninth District Court of Appeals majority buttressed its holding by two lines of reasoning. First, the court pointed out that the legislature enacted the importuning statute, R.C. 2907.07(C)(2) which allows a law enforcement officer to pose as a person less than thirteen years of age. The same statute allows a law enforcement officer to pose as a person thirteen years or older but less than sixteen years of age. R.C. 2907.07(D)(2). There is no doubt that R.C. 2907.21 does not contain similar language. There is also no doubt that the legislature could have added similar language to R.C. 2907.21. If the absence of such language is deemed to be an indication of legislative intent that an actual minor is required, then the inquiry would be at and end. *Davis v. Davis*, 115 Ohio St.3d 180, 873 N.E.2d 1305, 2007-Ohio-5049, ¶20.

Second, the Ninth District majority pointed out that “there can be no such thing as an agent without a principal.” *Bartrum*, ¶28, citing *Chicago Cottage Organ Co. v. Rishforth* (1903), 14 Ohio C.D. 660, \*2. That may be taken as a given in the context of business relationships. *Chicago Cottage* involved a dispute over payment for a commodity and whether the organ company was bound by the representations of its agents or alleged agents. The court also stated that “The *indicia* of authority must be at least by the permission of the principal.” *Id.* \*2. In *John Hancock Mut. Life Ins. Co. v.*

*Luzio* (1931), 123 Ohio St.616, 176 N.E. 446, 9 Oho Law Abs. 702 this Court held in the fourth paragraph of the syllabus:

In the absence of statutory definition, the term 'agent,' employed in section 9301, General Code, should be given its legal meaning, as being one who is acting within the scope of his authority in the business entrusted to him by his principal.

The State does not believe that such a definition of agent can be engrafted onto R.C. 2907.21(A)(3) for that would mean that if there were an actual minor then the agent would have to be acting with the minor's authority in dealing with the offender and accepting money or agreeing that the offender could engage in sexual activity with the minor.

In other words R.C. 2907.21(A)(3) would concern willing underage prostitutes, See *State v. Gann*, 154 Ohio App.3d 170, 2003-Ohio-4000, ¶36 (evidence insufficient where the minors showed no willingness to engage in sexual activity), who have 'agents' acting on the minor's authority but not a situation where the 'agent' such as a parent or guardian offers a minor who may or may not be willing, for sex to the offender or the offender wants to pay the 'agent' to have sex with an unwilling minor. The former situation was present in *Goldblatt*, supra 2006-Ohio-5930, ¶18, ¶49, where the defendant was prepared to pay the erstwhile agent \$200.00 to have oral sex with the erstwhile minor. The latter situation was apparently present in *State v. Epstein* (Nov. 15, 2000), 9<sup>th</sup> Dist. App. No. 99CA007362, 2000 WL 1706414 where the defendant wanted to pay the parent to have sex with the minor daughter of the parent (and told the parent that the parent would be killed if she disclosed defendant's offer).

The term agent is not defined in Chapter 2907 or in R.C. 2901.01. For that reason it must be afforded its usual, normal or customary meaning. *Chari v. Vore*, 91

Ohio St.3d 323, 744 N.E.2d 763, 2001-Ohio-49, \*327; *Davis v. Davis*, supra 2007-Ohio-5049, ¶14. Putting aside definitions applicable to business relationships, such as in *John Hancock Mut. Life Ins. Co. v. Luzio*, supra the word agent may be defined simply as a person who acts. Dictionary.com, "Agent" pg. 1, No. 2; American Heritage College Dictionary (3<sup>rd</sup> ed. 1993), pg. 25. Under that definition there need not be an actual person, a principal, on whose behalf the agent is acting.

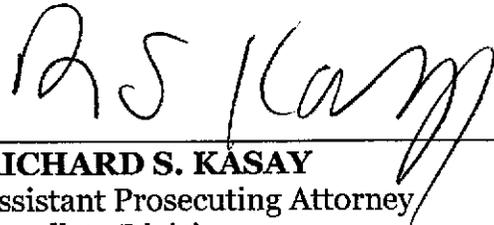
The State believes that here as in *Goldblatt Bartrum* plainly indicated his purpose to engage in and pay for sexual activity with a minor girl. This conduct is prohibited by R.C. 2907.21(A)(3) since the statute does not require that any sexual activity ultimately occurs. There was no actual minor but that is immaterial to Bartrum's words, actions and clear intentions. The State believes Judge Slaby was correct in his dissent and that his view should be accepted.

**CONCLUSION**

Based on the foregoing arguments, Appellant State of Ohio respectfully requests that the judgment of the Ninth District Court of Appeals be reversed, that it be determined that the conviction is supported by sufficient evidence, and the cause be remanded to the Ninth District Court of Appeals for further proceedings on the remaining assignments of error.

Respectfully submitted,

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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief was sent by regular U.S. Mail to Attorney Christopher P. Muntean, 333 South Main Street, Suite 702, Akron, Ohio 44308, on the 5th day of June, 2008.



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**APPENDIX**

IN THE OHIO SUPREME COURT

07-2193

STATE OF OHIO

CASE NO. \_\_\_\_\_

Appellant

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

v.

WILLIAM C. BARTRUM

COURT OF APPEALS  
CASE NO. 23549

Appellee

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NOTICE OF APPEAL OF APPELLANT, STATE OF OHIO

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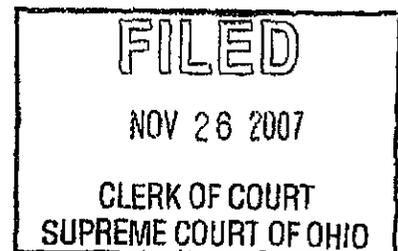
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**IN THE OHIO SUPREME COURT**

**STATE OF OHIO**

**Appellant**

**vi.**

**WILLIAM C. BARTRUM**

**Appellee**

**CASE NO. \_\_\_\_\_**

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

**COURT OF APPEALS  
CASE NO. 23549**

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**NOTICE OF APPEAL OF APPELLANT, STATE OF OHIO**

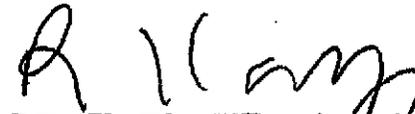
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Now comes the State of Ohio, as Appellant, and hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals case number 23549 on October 10, 2007.

This case involves a felony and is of public or great general interest. The case did not originate in the Court of Appeals.

Respectfully submitted,

**SHERRI BEVAN WALSH**  
Summit County Prosecutor

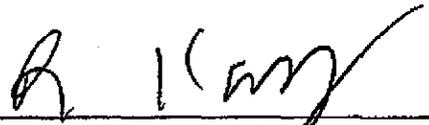


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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Appeal 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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STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No.    23549

Appellee

v.

WILLIAM C. BARTRUM

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.   CR 06 03 0903

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:

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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 sukñ," 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 20<sup>th</sup>, 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*, 9<sup>th</sup> 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 suk'n," 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*, 8<sup>th</sup> 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

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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.

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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:

CHRISTOPHER P. MUNTEAN, Attorney at Law, for appellant.

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

R.C. § 2901.01

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

▣ Chapter 2901. General Provisions

▣ General Provisions

➔ **2901.01 Definitions**

(A) As used in the Revised Code:

(1) "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

(2) "Deadly force" means any force that carries a substantial risk that it will proximately result in the death of any person.

(3) "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

(4) "Physical harm to property" means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment. "Physical harm to property" does not include wear and tear occasioned by normal use.

(5) "Serious physical harm to persons" means any of the following:

(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

(6) "Serious physical harm to property" means any physical harm to property that does either of the following:

(a) Results in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace;

(b) Temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time.

(7) "Risk" means a significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist.

(8) "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.

(9) "Offense of violence" means any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.21, 2903.211, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2909.24, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.04, 2921.34, or 2923.161, of division (A)(1), (2), or (3) of section 2911.12, or of division (B)(1), (2), (3), or (4) of section 2919.22 of the Revised Code or felonious sexual penetration in violation of former section 2907.12 of the Revised Code;

(b) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section, division, or offense listed in division (A)(9)(a) of this section;

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(d) A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section.

(10)(a) "Property" means any property, real or personal, tangible or intangible, and any interest or license in that property. "Property" includes, but is not limited to, cable television service, other telecommunications service, telecommunications devices, information service, computers, data, computer software, financial instruments associated with computers, other documents associated with computers, or copies of the documents, whether in machine or human readable form, trade secrets, trademarks, copyrights, patents, and property protected by a trademark, copyright, or patent. "Financial instruments associated with computers" include, but are not limited to, checks, drafts, warrants, money orders, notes of indebtedness, certificates of deposit, letters of credit, bills of credit or debit cards, financial transaction authorization mechanisms, marketable securities, or any computer system representations of any of them.

(b) As used in division (A)(10) of this section, "trade secret" has the same meaning as in section 1333.61 of the Revised Code, and "telecommunications service" and "information service" have the same meanings as in section 2913.01 of the Revised Code.

(c) As used in divisions (A)(10) and (13) of this section, "cable television service," "computer," "computer software," "computer system," "computer network," "data," and "telecommunications device" have the same meanings as in section 2913.01 of the Revised Code.

(11) "Law enforcement officer" means any of the following:

(a) A sheriff, deputy sheriff, constable, police officer of a township or joint township police district, marshal, deputy marshal, municipal police officer, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code, or state highway patrol trooper;

(b) An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of that statutory duty and authority;

(c) A mayor, in the mayor's capacity as chief conservator of the peace within the mayor's municipal corporation;

(d) A member of an auxiliary police force organized by county, township, or municipal law enforcement authorities, within the scope of the member's appointment or commission;

(e) A person lawfully called pursuant to section 311.07 of the Revised Code to aid a sheriff in keeping the peace, for the purposes and during the time when the person is called;

(f) A person appointed by a mayor pursuant to section 737.01 of the Revised Code as a special patrolling officer during riot or emergency, for the purposes and during the time when the person is appointed;

(g) A member of the organized militia of this state or the armed forces of the United States, lawfully called to duty to aid civil authorities in keeping the peace or protect against domestic violence;

(h) A prosecuting attorney, assistant prosecuting attorney, secret service officer, or municipal prosecutor;

(i) A veterans' home police officer appointed under section 5907.02 of the Revised Code;

(j) A member of a police force employed by a regional transit authority under division (Y) of section 306.35 of the Revised Code;

(k) A special police officer employed by a port authority under section 4582.04 or 4582.28 of the Revised Code;

(l) The house of representatives sergeant at arms if the house of representatives sergeant at arms has arrest authority pursuant to division (E)(1) of section 101.311 of the Revised Code and an assistant house of representatives sergeant at arms;

(m) A special police officer employed by a municipal corporation at a municipal airport, or other municipal air navigation facility, that has scheduled operations, as defined in section 119.3 of Title 14 of the Code of Federal Regulations, 14 C.F.R. 119.3, as amended, and that is required to be under a security program and is governed by aviation security rules of the transportation security administration of the United States department of transportation as provided in Parts 1542. and 1544. of Title 49 of the Code of Federal Regulations, as amended.

(12) "Privilege" means an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.

(13) "Contraband" means any property that is illegal for a person to acquire or possess under a statute, ordinance, or rule, or that a trier of fact lawfully determines to be illegal to possess by reason of the property's involvement in an offense. "Contraband" includes, but is not limited to, all of the following:

(a) Any controlled substance, as defined in section 3719.01 of the Revised Code, or any device or paraphernalia;

(b) Any unlawful gambling device or paraphernalia;

(c) Any dangerous ordnance or obscene material.

(14) A person is "not guilty by reason of insanity" relative to a charge of an offense only if the person proves, in the manner specified in section 2901.05 of the Revised Code, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts.

(B)(1)(a) Subject to division (B)(2) of this section, as used in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense, "person" includes all of the following:

(i) An individual, corporation, business trust, estate, trust, partnership, and association;

(ii) An unborn human who is viable.

(b) As used in any section contained in Title XXIX of the Revised Code that does not set forth a criminal offense, "person" includes an individual, corporation, business trust, estate, trust, partnership, and association.

(c) As used in division (B)(1)(a) of this section:

(i) "Unborn human" means an individual organism of the species Homo sapiens from fertilization until live birth.

(ii) "Viable" means the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support.

(2) Notwithstanding division (B)(1)(a) of this section, in no case shall the portion of the definition of the term "person" that is set forth in division (B)(1)(a)(ii) of this section be applied or construed in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense in any of the following manners:

(a) Except as otherwise provided in division (B)(2)(a) of this section, in a manner so that the offense prohibits or is construed as prohibiting any pregnant woman or her physician from performing an abortion with the consent of the pregnant woman, with the consent of the pregnant woman implied by law in a medical emergency, or with the approval of one otherwise authorized by law to consent to medical treatment on behalf of the pregnant woman. An abortion that violates the conditions described in the immediately preceding sentence may be punished as a violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.05, 2903.06, 2903.08, 2903.11, 2903.12, 2903.13, 2903.14, 2903.21, or 2903.22 of the Revised Code, as applicable. An abortion that does not violate the conditions described in the second immediately preceding sentence, but that does violate section 2919.12, division (B) of section 2919.13, or section 2919.151, 2919.17, or 2919.18 of the Revised Code, may be punished as a violation of section 2919.12, division (B) of section 2919.13, or section 2919.151, 2919.17, or 2919.18 of the Revised Code, as applicable. Consent is sufficient under this division if it is of the type otherwise adequate to permit medical treatment to the pregnant woman, even if it does not comply with section 2919.12 of the Revised Code.

(b) In a manner so that the offense is applied or is construed as applying to a woman based on an act or omission of the woman that occurs while she is or was pregnant and that results in any of the following:

(i) Her delivery of a stillborn baby;

(ii) Her causing, in any other manner, the death in utero of a viable, unborn human that she is carrying;

(iii) Her causing the death of her child who is born alive but who dies from one or more injuries that are sustained while the child is a viable, unborn human;

(iv) Her causing her child who is born alive to sustain one or more injuries while the child is a viable, unborn human;

(v) Her causing, threatening to cause, or attempting to cause, in any other manner, an injury, illness, or other physiological impairment, regardless of its duration or gravity,

or a mental illness or condition, regardless of its duration or gravity, to a viable, unborn human that she is carrying.

(C) As used in Title XXIX of the Revised Code:

(1) "School safety zone" consists of a school, school building, school premises, school activity, and school bus.

(2) "School," "school building," and "school premises" have the same meanings as in section 2925.01 of the Revised Code.

(3) "School activity" means any activity held under the auspices of a board of education of a city, local, exempted village, joint vocational, or cooperative education school district; a governing authority of a community school established under Chapter 3314. of the Revised Code; a governing board of an educational service center; or the governing body of a nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code.

(4) "School bus" has the same meaning as in section 4511.01 of the Revised Code.

(2006 H 241, eff. 7-1-07; 2002 H 675, eff. 3-14-03; 2002 H 364, eff 4- 8-03; 2002 H 545, eff. 3-19-03; 2002 S 184, eff. 5-15-02; 2000 S 317, eff. 3-22-01; 2000 H 351, eff. 8-18-00; 2000 S 137, eff. 5-17- 00; 1999 S 107, eff. 3-23-00; 1999 H 162, eff. 8-25-99; 1999 S 1, eff. 8-6-99; 1998 H 565, eff. 3-30-99; 1996 S 277, eff. 3-31-97; 1996 S 269, eff. 7-1-96; 1996 S 239, eff. 9-6-96; 1996 H 445, eff. 9-3-96; 1995 S 2, eff. 7-1-96; 1991 S 144, eff. 8-8-91; 1991 H 77; 1990 S 24; 1988 H 708, § 1)

R.C. § 2901.22

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

▣ Chapter 2901. General Provisions

▣ Criminal Liability

➤ **2901.22 Culpable mental states**

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

(1972 H 511, eff. 1-1-74)

R.C. § 2907.01

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure

Chapter 2907. Sex Offenses (Refs & Annos)

Definitions

➔**2907.01 Definitions**

As used in sections **2907.01** to 2907.38 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) "Harmful to juveniles" means that quality of any material or performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply:

(1) The material or performance, when considered as a whole, appeals to the prurient interest in sex of juveniles.

(2) The material or performance is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.

(3) The material or performance, when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch and includes an image or text appearing on a computer monitor, television screen, liquid crystal display, or similar display device or an image or text recorded on a computer hard disk, computer floppy disk, compact disk, magnetic tape, or similar data storage device.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

(L) "Spouse" means a person married to an offender at the time of an alleged offense, except that such person shall not be considered the spouse when any of the following apply:

(1) When the parties have entered into a written separation agreement authorized by section 3103.06 of the Revised Code;

(2) During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or legal separation;

(3) In the case of an action for legal separation, after the effective date of the judgment for legal separation.

(M) "Minor" means a person under the age of eighteen.

(N) "Mental health client or patient" has the same meaning as in section 2305.51 of the Revised Code.

(O) "Mental health professional" has the same meaning as in section 2305.115 of the Revised Code.

(P) "Sado-masochistic abuse" means flagellation or torture by or upon a person or the condition of being fettered, bound, or otherwise physically restrained.

(2006 H 23, eff. 8-17-06; 2006 H 95, eff. 8-3-06; 2002 H 490, eff. 1-1-04; 2002 H 8, eff. 8-5-02; 2002 S 9, eff. 5-14-02; 1997 H 32, eff. 3-10-98; 1996 H 445, eff. 9-3-96; 1990 H 514, eff. 1-1-91; 1988 H 51; 1975 S 144; 1972 H 511)

BALDWIN'S OHIO REVISED CODE ANNOTATED  
TITLE XXIX. CRIMES--PROCEDURE  
CHAPTER 2907. SEX OFFENSES  
SEXUAL ASSAULTS

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**2907.02 RAPE; EVIDENCE; MARRIAGE OR COHABITATION NOT DEFENSES TO RAPE CHARGES**

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section 3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not less than five years. If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force or threat of force or if the victim under division (A)(1)(b) of this section is less than ten years of age, whoever violates division (A)(1)(b) of this section shall be imprisoned for life. If the offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of this section or to violating a law of another state or the United States that is substantially similar to division (A)(1)(b) of this section or if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, whoever violates division (A)(1)(b) of this section shall be imprisoned for life or life without parole.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not

be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

#### CREDIT(S)

(2002 H 485, eff. 6-13-02; 1997 H 32, eff. 3-10-98; 1995 S 2, eff. 7-1-96; 1993 S 31, eff. 9-27-93; 1985 H 475; 1982 H 269, § 4, S 199; 1975 S 144; 1972 H 511)

R.C. § 2907.07

BALDWIN'S OHIO REVISED CODE ANNOTATED  
TITLE XXIX. CRIMES--PROCEDURE  
CHAPTER 2907. SEX OFFENSES  
SEXUAL ASSAULTS

**2907.07 Importuning**

(A) No person shall solicit a person who is less than thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person.

(B) No person shall solicit another, not the spouse of the offender, to engage in sexual conduct with the offender, when the offender is eighteen years of age or older and four or more years older than the other person, and the other person is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of the other person.

(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:

(1) The other person is less than thirteen years of age, and the offender knows that the other person is less than thirteen years of age or is reckless in that regard.

(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.

(D) 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:

(1) The other person is thirteen years of age or older but less than sixteen years of age, the offender knows that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the other person.

(2) The other person is a law enforcement officer posing as a person who is thirteen years of age or older but less than sixteen years of age, the offender believes that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the age the law enforcement officer assumes in posing as the person who is thirteen years of age or older but less than sixteen years of age.

(E) Divisions (C) and (D) of this section apply to any solicitation that is contained in a transmission via a telecommunications device that either originates in this state or is received in this state.

(F) Whoever violates this section is guilty of importuning. A violation of division (A) or (C) of this section is a felony of the fourth degree on a first offense and a felony of the third degree on each subsequent offense. A violation of division (B) or (D) of this section is a felony of the fifth degree on a first offense and a felony of the fourth degree on each subsequent offense.

(2003 S 5, eff. 7-31-03; 2002 S 175, eff. 5-7-02; 2000 H 724, eff. 3-22-01; 1972 H 511, eff. 1-1-74)

R.C. § 2907.21

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure

Chapter 2907. Sex Offenses (Refs & Annos)

Prostitution

**2907.21 Compelling prostitution**

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

- (1) Compel another to engage in sexual activity for hire;
- (2) Induce, procure, encourage, solicit, request, or otherwise facilitate a minor to engage in sexual activity for hire, whether or not the offender knows the age of the minor;
- (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;
- (4) Pay a minor, either directly or through the minor's agent, for the minor having engaged in sexual activity, pursuant to a prior agreement, whether or not the offender knows the age of the minor;
- (5) Allow a minor to engage in sexual activity for hire if the person allowing the child to engage in sexual activity for hire is the parent, guardian, custodian, person having custody or control, or person in loco parentis of the minor.

(B) Whoever violates this section is guilty of compelling prostitution. Except as otherwise provided in this division, compelling prostitution is a felony of the third degree. If the offender commits a violation of division (A)(1) of this section and the person compelled to engage in sexual activity for hire in violation of that division is less than sixteen years of age, compelling prostitution is a felony of the second degree.

(1995 S 2, eff. 7-1-96; 1988 H 51, eff. 3-17-89; 1972 H 511)

R.C. § 2923.02

BALDWIN'S OHIO REVISED CODE ANNOTATED  
TITLE XXIX. CRIMES--PROCEDURE  
CHAPTER 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL  
CONSPIRACY, ATTEMPT, AND COMPLICITY

**2923.02 Attempt**

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of an offense, or of conspiracy to commit an offense shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose.

(E) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder, murder, or an offense for which the maximum penalty is imprisonment for life is a felony of the first degree. An attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense is an offense of the same degree as the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

(F) As used in this section, "drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(1999 S 107, eff. 3-23-00; 1995 S 2, eff. 7-1-96; 1991 H 225, eff. 10-23-91; 1984 H 651; 1983 S 210; 1972 H 511)