ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2009-0477

STATE OF OHIO	:	
Appellee	:	
-vs-	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals
THOMAS DUNLAP	:	
Appellant	:	CA: 91165

MERIT BRIEF OF APPELLANT THOMAS DUNLAP

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SUMMARY OF ARGUMENT

Proposition of Law I in this case presents this Court with an important constitutional issue which lower courts have incorrectly decided: Is there a mens rea attendant to the offense of gross sexual imposition against a child under 13? Lower courts that have decided this issue have held that this is a strict liability offense. It is not. To the contrary, a correct interpretation of R.C. 2907.05 should make clear that there is no mens rea required with respect to the victim's age, i.e., the offender need not know that the victim is under 13, but there is a reckless mens rea with respect to the sexual contact, itself.

STATEMENT OF THE CASE AND FACTS

Thomas Dunlap, the Defendant-Appellant, preceded to trial on his indictment for allegations of two counts of gross sexual imposition with victims both of whom were less than 13 years of age during the commission of the act, and both of which carried sexual violent predator specifications under R.C 2907.05(A)(4) and R.C. 2971.01 respectively, felonies of the third degree; one count of kidnapping with sexual motivation and sexually violent predator specifications, R. C . 2905.01(A)(2), 2941,147 and 2971.01 respectively, a felony of the first degree; and one count of disseminating obscene matter to juveniles under R. C 2907.31, a felony of the fourth degree. Indictment.

The gross sexual imposition counts merely alleged that the defendant "had sexual contact" with the alleged victim, without an accompanying mens rea. Indictment, Counts 1 and 3. The jury was similarly instructed that it need find that the defendant engaged in sexual contact, which was further defined consistently with R.C. 2901.01.(T. 325-26). At no time was the jury instructed that the act of sexual contact had to be recklessly performed. (T. passim).

The trial court acquitted Mr.. Dunlap of the kidnapping count upon the defense's Crim. R. 29(A) motion. (T. 278-300). The jury convicted Mr. Dunlap of both counts of gross sexual imposition and the remaining count of disseminating obscene matter to juveniles. (T. 343-347). Mr. Dunlap waived a jury hearing on the determination of the verdicts for the sexually violent predator specifications and had the same tried to the bench which resulted in a finding of not guilty on said specifications. (T. 347-352, 362).

The court found Mr. Dunlap to be a Tier III offender. Mr. Dunlap was sentenced to a total of two years as follows: two years on each of the gross sexual impositions, felonies of the third degree; and 16 months on the disseminating obscene matter to juveniles, a the felony of the fourth degree, with credit for time served (T. 374-376).

On appeal, the Eighth District affirmed the convictions. *State v. Dunlap,* Cuyahoga App. No. 91165, 2009-Ohio-134. In its fifth and sixth paragraphs, the Eighth District rejected the argument now presented to this Court in Proposition of Law I. The Eighth District did so because it believed that gross sexual imposition against a child under 13 is a strict liability offense. Id., at pars. 5-6.

Upon timely appeal, this Court accepted Proposition of Law I, post, for briefing on the merits. Two other propositions of law (relating to the Adam Walsh Act) were accepted but briefing was stayed pending the Court's consideration of *State v. Bodyke,* Case No. 2008-2502.

ARGUMENT

***Proposition of Law I:* Gross sexual imposition against a child under 13 is not a strict liability offense. The act of sexual contact must be recklessly performed.**

The trial of the Appellant on the gross sexual imposition counts was structurally flawed because, throughout the proceedings, the essential mens rea of "recklessness," attendant to the act of sexual contact was omitted. This occurred in both the indictment and the jury instruction.

As a result, the error is structural and the convictions must be reversed. *State v. Colon,* 118 Ohio St.3d 26, 2008-Ohio-1624, clarified, 119 Ohio St.3d 204, 2008-Ohio-3748.

Analysis of this Proposition is two-fold. First, the Court should determine that the element of sexual contact carries with it a mens rea of recklessness. Second, the Court should determine that the failure to either allege or instruct the jury regarding this element constitutes a structural error that requires reversal.

A. The Mens Rea for Sexual Contact is Recklessness.

1. Plain Meaning of the Statute

The Eighth District erroneously concluded that the gross sexual imposition counts were strict liability offenses. In so doing, the Eighth District ran afoul of the plain language of the Revised Code.

> As in any case involving a statute, we must begin our analysis by examining the language of the statute. "The polestar of statutory interpretation is legislative intent, which a court best gleans from the words the General Assembly used and the purpose it sought to accomplish." *State v. Elam* (1994), 68 Ohio St. 3d 585, 587, 629 N.E.2d 442, 444, citing *State v. Davis* (1985), 16 Ohio St. 3d 34, 35, 16 Ohio B. Rep. 449, 450, 476 N.E.2d 655, 656. Thus, "where the wording of a statute is clear and unambiguous, this court's only task is to give effect to the words used." *Id.*

State v. Hanning, 89 Ohio St.3d 86, 2000-Ohio-436.

R.C. 2901.21(B) states that [w]hen the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a per son to be guilty of the offense.. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." Here, R.C. 2907.05(A)(4) does not plainly express a purpose to impose strict liability as to the element of sexual contact.

Accordingly, the mens rea for R.C. 2907.05(A)(4) violations must be "reckless."

2. Constitutional Considerations Weigh Against Strict Liability

It is axiomatic that this Court will interpret statutes to sustain their constitutionality. *See, State v. Dorso* (1983), 4 Ohio St.3d 60. There is a constitutionally-based presumption that criminal offenses, particularly ones where punishment can include imprisonment, are not strict liability offenses. See, *Liparota v. United States* (1985), 471 U.S. 419; U.S. Const. Amend. XIV.

In order to comply with this presumption, this Court should interpret R.C. 2907.05 to require a mens rea of reckless regarding the element of sexual contact.

3. Rule of Lenity

Moreover, as a criminal statute, R.C. 2907.05, must be "strictly construed against the state, and liberally construed in favor of the accused." R.C. 2901.04. This "rule of lenity" is both statutorily required, id., and constitutionally based on principles of due process: "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota* 471 U.S. at 428 (collecting cases).

Accordingly, even if there were any ambiguity in this regard, this Court should conclude that the mens rea of recklessness applies to the element of sexual contact.

4. Statutory Construction Principle: Expressio unius est exclusion alterius

Other language in R.C. 2907.05 also demonstrates that the General Assembly did not intend for R.C., 2907.05(A)(4) to be a strict liability offense with respect to the sexual contract. In contrast to its silence regarding the mental state attendant to the imposition of sexual contact, the General Assembly explicitly stated that there would be no mens rea attendant to the element *of the victim's age*. Id. By singling out the age element as being strict liability while making no

similar statement regarding the element of sexual contact, the General Assembly was demonstrating that it wanted one element to be strict liability while the other element carried a mens rea requirement.

> as this court stated in *Myers v. Toledo*, 110 Ohio St. 3d 218, 2006 Ohio 4353, 852 N.E.2d 1176, P 24, "[t]he canon expressio unius est exclusio alterius tells us that the express inclusion of one thing implies the exclusion of the other.

Crawford-Cole v. Lucas County Dep't of Job & Family Services, 121 Ohio St.3d 560, 2009-Ohio-1355, par. 42.

Accordingly, under this well-established canon of statutory construction, this Court should conclude that the mens rea of "recklessness" applies to the element of sexual contact.

5. Statutory Construction Principle: Presumption Against Absurd Results

It is a principle of statutory construction that this Court will interpret statutes so as to avoid absurd consequences. E.g., *State ex rel. Sinay v. Sodders* (1997), 80 Ohio St.3d 224, 232; *In re Sanders* (1996), 110 Ohio App.3d 199, appeal not allowed, 77 Ohio St.3d 1416 (strong presumption that General Assembly does not intend absurd results.).

Under the Eighth District's reading of the statute, a hug between two twelve year olds who are in puppy love can become a felony juvenile offense if, while both are fully clothed, any portion of the boy's body grazes against the girl's breast – because the hug was for purposes of sexual gratification and the incidental touching is a question of strict liability. While, to be sure, many of us would prefer not to see our 12-year old children engage in any romantic activity; but would any of us really consider the innocent hug to be a crime?

Moreover, there is nothing in R.C. 2907.05 that makes the "sexual contact" of a victim under 13 any different than the "sexual contact" in adult-victim cases. Once again, clumsy romance can morph into a criminal offense – without any criminal intent.

In this case, the defendant was not a juvenile. To the contrary, the evidence at trial proved that the adult defendant fondled the victim who was under the age of 13. But, in determining the correct interpretation of the statute, the individual facts of this case are irrelevant.

Accordingly, this canon of statutory interpretation also supports the determination that the mens rea of recklessness must apply to the element of sexual contact.

6. Secondary Source: Model Penal Code

Interpreting R.C. 2907.05 as to require a mens rea of recklessness regarding the element of sexual contact is also in keeping with the Model Penal Code (on which the Ohio Revised Code was based). The Model Penal Code creates strict liability in certain sex offenses – but only regarding the age of certain child victims. American Law Institute, Model Penal Code, Official Draft, 1962, Section 213.6(1) (establishing strict liability regarding knowledge of victim's age when statute requires that victim be less than 10 years of age).

7. "Purpose of Sexual Gratification" Does Not Establish a Mens Rea for Sexual Contact

Nor is this analysis affected by the fact that sexual contact, as defined in R.C. 290101, occurs for purposes of sexual gratification. The "purpose" referenced in R.C. 2901.01 is actually a motive. It does not describe the mental state attendant to the action.

Thus, for example, a caning of the buttocks, while an intentional contact with that portion of another's body, would not be gross sexual imposition if it were done for purposes of discipline, and not for sexual gratification.[1] Conversely, a person who makes contact with another for purposes of sexual gratification but does not touch a portion of the body prohibited

[1] This is not to suggest that such activity is not criminal. Rather, it is prohibited as an assault or a felonious assault. R.C. 2903.11, R.C. 2903.13.

under the definition of sexual contact (e.g., the hand or the foot), does not commit gross sexual imposition.

Conclusion as to Mens Rea

For these reasons, this Court should conclude that the mens rea of reckless applies to the element of sexual contact in R.C. 2907.05.

B. Failure to Allege Mens Rea or Instruct the Jury Accordingly is Structural Error

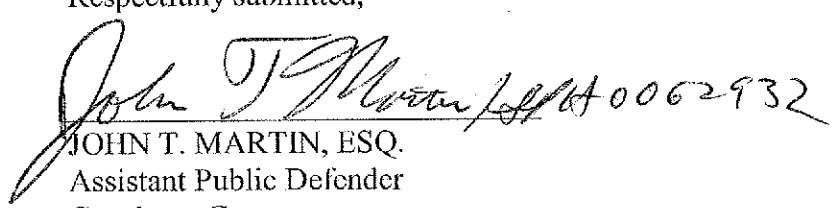
Having established that the mens rea of recklessly should apply, this Court must then determine what is the consequence of the omission of that mens rea from the indictment and the subsequent failure to instruct the jury on the mens rea.

This Court should conclude that the error is structural because it has permeated the proceedings. *State v. Colon,* 118 Ohio St.3d 26, 2008-Ohio-1624, clarified, 119 Ohio St.3d 204, 2008-Ohio-3748. As such, the Defendant need not show any prejudice – reversal is automatic because the proceedings themselves are inherently flawed. Id.

CONCLUSION

Wherefore, the convictions for gross sexual imposition should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant Thomas Dunlap was sent via U.S. mail to the Hon. William D. Mason, Cuyahoga County Prosecutor, and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 31st day of August, 2009.

JOHN T. MARTIN, ESQ.

IN THE SUPREME COURT OF OHIO

09-0477

STATE OF OHIO	:	
Appellee	:	
-vs-	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals
THOMAS DUNLAP	:	
Appellant	:	CA: 91165

NOTICE OF APPEAL OF THOMAS DUNLAP

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FILED
MAR 12 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant THOMAS DUNLAP

Appellant THOMAS DUNLAP hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 901165, and journalized on January 26, 2009.

This felony case raises substantial constitutional questions and is one of public and great general interest.

Respectfully submitted,

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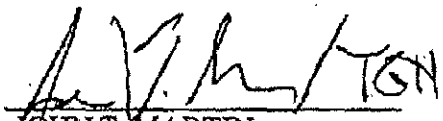
CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was sent via U.S. mail upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 12th day of March, 2009.



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Judge J. Sutula

M(MACI)

Court of Appeals of Ohio

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EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
No. 91165

CA08091165
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STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

THOMAS DUNLAP

A 543 390

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499122

BEFORE: McMonagle, P.J., Stewart, J., and Celebrezze, J.

RELEASED: January 15, 2009

JOURNALIZED: JAN 2 6 2009

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FILED AND JOURNALIZED
PER APP. R. 22(E)

JAN 26 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

JAN 16 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

CHRISTINE T. McMONAGLE, P.J.:

Defendant-appellant, Thomas Dunlap, appeals from the trial court's judgment, rendered after a jury verdict, finding him guilty of two counts of gross sexual imposition involving victims under the age of 13 at the time of the offenses, in violation of R.C. 2907.05(A)(4), and one count of disseminating obscene matter to juveniles, in violation of R.C. 2907.31. Dunlap asserts four assignments of error.

Dunlap first contends that the journal entry of sentencing did not correctly reflect his convictions. This assignment of error is overruled as moot, as the docket indicates the trial court corrected the journal entry to properly reflect the convictions.

Next, Dunlap argues that counts one and three of the indictment, which charged him with gross sexual imposition in violation of R.C. 2907.05(A)(4), were defective, because they did not include the mens rea element of recklessness. Dunlap bases this argument on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, in which the Ohio Supreme Court found an indictment that failed to include the mens rea of the offense, one of the essential elements of the crime, to be defective, and held that such error may be raised for the first time on appeal.

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With respect to what mental state must be included in the indictment, the Supreme Court concluded in *Colon* that recklessness is the "catchall culpable mental state for criminal statutes that fail to mention any degree of culpability ***." Id., ¶13. The court reasoned, "the mental state of the offender is a part of every criminal offense in Ohio, except those that plainly impose strict liability. *** '[W]hen the [statutory] section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.'" Id. at ¶¶11-12, quoting *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, ¶19.

In light of *Colon*, Dunlap argues that the indictment in his case was defective, because it did not include recklessness as the mens rea element. However, this court, and others, have repeatedly held that R.C. 2907.05, gross sexual imposition involving a victim under the age of 13, is a strict liability offense and requires no precise culpable state of mind. All that is required is a showing of the proscribed sexual contact. *State v. Aiken* (June 10, 1993), 8th Dist. No. 64627; *State v. Laws* (Dec. 22, 1998), 10th Dist. No. 98AP-306.

The Ohio Supreme Court expressly stated in *Colon* that the mens rea element need not be included in an indictment charging a strict liability offense. Accordingly, Dunlap's argument has no merit and his second assignment of error is overruled.

Dunlap next raises two constitutional challenges to Senate Bill 10. The Ohio General Assembly recently enacted Senate Bill 10, which amended numerous sections of Ohio's Revised Code, including R.C. Chapter 2950, which contains the sexual offender classification system used in Ohio. Senate Bill 10 modified R.C. Chapter 2950 so that it would be in conformity with the federal Adam Walsh Child Protection and Safety Act (the "Adam Walsh Act.") Under Senate Bill 10, labels such as sexually oriented offender, habitual sex offender, or sexual predator are no longer used. An offender who commits a sexually oriented offense is found to be either a "sex offender" or a "child-victim offender" and depending on the crime, is placed in Tier I, Tier II, or Tier III, which dictate the registration and notification requirements.

At sentencing, the trial court informed Dunlap that he would be subject to the notification and registration requirements set forth in Senate Bill 10. In his third and fourth assignments of error, Dunlap argues that Senate Bill 10 (which he calls "Ohio's Adam Walsh Act") violates the ex post facto clause of the

United States Constitution and the retroactivity clause of Section 28, Article II of the Ohio Constitution.

We reject Dunlap's ex post facto challenge on the basis of this court's holding in *State v. Holloman-Cross*, 8th Dist. No. 90351, 2008-Ohio-2189, in which this court considered and rejected the same argument.

We likewise reject Dunlap's retroactivity challenge. In *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, the Ohio Supreme Court addressed whether R.C. Chapter 2950 et seq., Ohio's sex offender statutes prior to Senate Bill 10, violated the retroactivity clause of the Ohio Constitution. The court reasoned that the registration and address verification provisions of R.C. Chapter 2950 were de minimis procedural requirements that were necessary to achieve the goals of R.C. Chapter 2950. The court explained that if the law did not apply to previously-convicted offenders, "'notification would provide practically no protection now, and relatively little in the near future. *** Had the Legislature chosen to exempt previously-convicted offenders, the notification provision of the law would have provided absolutely no protection whatsoever on the day it became law, for it would have applied to no one. The Legislature concluded that there was no justification for protecting only children of the future from the risk of reoffense by future offenders, and not today's children from the risk of reoffense by previously-convicted offenders, when the nature of those risks were

identical and presently arose almost exclusively from previously-convicted offenders ***.'" Id., at 412-413, quoting *Doe v. Portiz* (1995), 142 N.J. 1, 662 A.2d 367. Consequently, the Ohio Supreme Court found that the provisions of R.C. Chapter 2950 were remedial in nature and did not violate the ban on retroactive laws set forth in Section 28, Article II of the Ohio Constitution.

Although there are some differences between R.C. Chapter 2950 and Senate Bill 10, we are not persuaded that the Ohio Supreme Court would view the retroactivity issue as applied to R.C. Chapter 2950 in the *Cook* decision any differently with regard to the provisions of Senate Bill 10. Accordingly, applying the reasoning set forth in *Cook*, we hold that Senate Bill 10 does not violate the retroactivity clause of Ohio's Constitution. Accord *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051; *State v. Gooding*, 5th Dist. No. 08 CA 5, 2008-Ohio-5954; *In re Smith*, 3rd Dist. No. 1-07-58, 2008-Ohio-3234; *In re Gant*, 3rd Dist. No. 1-08-11, 2008-Ohio-5198.

Appellant's third and fourth assignment of error are overruled.

Affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

MELODY J. STEWART, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

2901.01 General provisions 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 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.

Effective Date: 04-08-2003; 07-01-2007

2901.04 Rules of construction for statutes and rules of procedure.

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

Effective Date: 03-23-2000; 09-23-2004

2901.21 Criminal liability, culpability.

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing;

(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

(B) When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

(C) Voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. Voluntary intoxication does not relieve a person of a duty to act if failure to act constitutes a criminal offense. Evidence that a person was voluntarily intoxicated may be admissible to show whether or not the person was physically capable of performing the act with which the person is charged.

(D) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for a sufficient time to have ended possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

(4) "Intoxication" includes, but is not limited to, intoxication resulting from the ingestion of alcohol, a drug, or alcohol and a drug.

Effective Date: 10-27-2000

2907.05 Gross sexual imposition.

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

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

(3) The offender knows that the judgment or control of the other person or of one of the other persons is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person's consent for the purpose of any kind of medical or dental examination, treatment, or surgery.

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

(5) The ability of the other person to resist or consent or the ability of one of the other persons 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 ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.

(B) No person shall knowingly touch the genitalia of another, when the touching is not through clothing, the other person is less than twelve years of age, whether or not the offender knows the age of that person, and the touching is done with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(C) Whoever violates this section is guilty of gross sexual imposition.

(1) Except as otherwise provided in this section, gross sexual imposition committed in violation of division (A)(1), (2), (3), or (5) of this section is a felony of the fourth degree. If the offender under division (A)(2) of this section substantially impairs the judgment or control of the other person or one of the other persons by administering any controlled substance described in section 3719.41 of the Revised Code to the person surreptitiously or by force, threat of force, or deception, gross sexual imposition committed in violation of division (A)(2) of this section is a felony of the third degree.

(2) Gross sexual imposition committed in violation of division (A)(4) or (B) of this section is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposition committed in violation of division (A)(4) or (B) of this section there is a presumption that a prison term shall be imposed for the offense. The court shall impose on an offender convicted of gross sexual imposition in violation of division (A)(4) or (B) of this section a mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree if either of the following applies:

(a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation;

(b) The offender previously was convicted of or pleaded guilty to a violation of this section, rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.

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

(E) 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.

(F) 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.

(G) 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.

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