ORIGINAL

NO. 09-0477

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 91165

STATE OF OHIO,

Plaintiff-Appellee

-vs-

THOMAS DUNLAP,

Defendant-Appellant

# MERIT BRIEF OF APPELLEE


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## SUMMARY OF ARGUMENT

In this matter, the appellate court determined that the crime of Gross Sexual Imposition against a child under thirteen years of age in violation of R.C. 2907.05(A)(4) 2929.191 is a strict liability crime and that "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. Dunlap,* Cuyahoga App. No. 91165, 2009-Ohio-134, at ¶ 5 (Citing, *State v. Aiken* (June 10, 1993), 8th Dist. No. 64627; *State v. Laws* (Dec. 22, 1998), 10th Dist. No. 98AP-306.)

In his appeal, Appellant Thomas Dunlap has asked that this Court find that Gross Sexual Imposition requires the mens rea of recklessness as no specific mens rea is stated in R.C. 2907.05(A) and argues that because the indictment failed to include the element of recklessness, his convictions are invalid. However, there is a mens rea stated in the Revised Code for the crime of Gross Sexual Imposition, that of purpose, as found in the definition of Sexual Contact. R.C. 2907.01(B), reads, "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." Because the indictment properly stated the elements of the crime, and those elements include the culpable mental state of purpose, Appellant's proposition of law asking for this Court to read the element of recklessness into the statute should not be adopted and the State asks that Appellant's convictions be affirmed.

## STATEMENT OF THE CASE AND FACTS

Appellant Thomas Dunlap was found guilty after jury trial of two counts of gross sexual imposition involving victims under the age of 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. Appellant was charged in the indictment with two counts of gross sexual imposition with victims both under the age of 13, both of which carried sexual violent predator specifications under R.C. 2907(A)(4), R.C. 2971.01 respectively, felonies of the third degree; a 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 on the fourth degree. At trial, the jury was instructed that the gross sexual imposition count alleged the defendant had "sexual contact" with the alleged victim but did not specify an accompanying mens rea. The trial court acquitted Appellant of the kidnapping count and Appellant was found guilty on both counts of gross sexual imposition and the remaining obscene matter to juveniles (T. 434-347). The trial court sentenced Appellant to an aggregate term of imprisonment of two years; two years on each of the gross sexual impositions and 16 months on the disseminating obscene matter to juveniles, a felony of the fourth degree, the sentences to be served concurrently.

In his appeal to the Eighth Appellate District, Dunlap argued that the indictments for GSI did not include a necessary mens rea, that of recklessness. The appellate court overruled his alleged error, finding that it had held that a violation of R.C. 2907.05 (A)(4) is a strict liability offense. *Dunlap*, 2009-Ohio-134, at ¶5.

## LAW AND ARGUMENT

This Court accepted Appellant's first proposition of law, which reads, "Gross Sexual Imposition against a child under 13 is not a strict liability offense. The act of sexual contact must be recklessly performed." Appellant alleges that because the indictment in this case did not state the mens rea of recklessly, the indictment was defective and his convictions are invalid

based upon the analysis set forth in *State v. Colon*, 118 Ohio St.3d 26, 885 N.E.2d 917. Although the State argued in its Memorandum in Response to Jurisdiction filed April 13, 2009 that the appellate court was correct in finding the crime to be a strict liability offense, the State has \ adopted the position taken by several appellate districts that the offense of Gross Sexual Imposition is one with the stated mens rea of purpose and an indictment which follows the language of R.C. 2907.05 is provides notice of the elements of the offense, to include the mens rea of purpose. Because of this, there is no error in the indictments in this matter and the State asks that Appellant's convictions be affirmed and Appellant's proposition of law be rejected.

A. R.C. §2907.05(A) Contains The Mens Rea Of Purpose.

Ohio law requires that criminal intent, or mens rea, be proven in order to sustain a conviction unless strict criminal liability is imposed under statute. R.C. §2901.21 (B). The culpable mental states necessary to be proven are listed in R.C. §2901.22, and include "purposely", "knowingly", "recklessly," and "negligently." I

In examining the indictments in this case, they followed the language of

R.C. §2907.05(A)(4), which reads:

> 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:
>
> ***
>
> (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.

R.C. §2907.01(B) reads:

> (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.

In examining the culpable mental state in the crime of Gross Sexual Imposition against a child less than 13 years of age, there is no question that as to the element of age of the victim there is no culpable mental state required. However, the statute contains a stated element of culpable mental liability.[1] Several appellate courts have found that the mens rea of purpose is contained within the statute wherein sexual contact specifically requires such culpable mental state. Although the Sixth, Eighth, and Tenth Appellate districts have held that R.C. §2907.05(A)(4) is a strict liability offense[2], the First, Second, third, Fourth, Fifth, Seventh, Ninth, and Twelfth Appellate districts have concluded that a violation of R.C. §2907.05(A)(4) is not a strict liability offense, but that it requires the State to prove the mens rea of purpose.

The Second District Court of Appeals held that, "Because sexual contact includes an express culpability requirement, "purpose," which is defined in R.C. §2901.22(A), pursuant to R.C. §2901.21(A) the state *is* required to prove that a defendant charged with gross sexual imposition acted with the required purpose. *State v. Mundy* (1994), 99 Ohio App.3d 275, 295 650 N.E.2d 502, 514. (Emphasis in original.) The Fifth District Court of Appeals has held that

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[1] Appellant argues within his brief that the definition of sexual contact does not state a mens rea, but rather indicates only a "motive. " Appellant's Merit Brief, at p. 6. The mens rea is the culpable mental state required to sustain a conviction; in short it is criminal intention. Appellant's a argument is not persuasive, especially wherein the common definition of motive found in *Webster's New World College Dictionary*, Fourth Edition, reads, "some inner drive, impulse, **intention**, etc. that causes a person to do something or act in a certain way; incentive, goal." (Emphasis added.)

[2] In addition to this case the Tenth Appellate District has held that a violation of R.C. §2907.05(A)(4) is a strict liability offense. *State v. Astley,* 36 Ohio App.3d 247, 523 N.E.2d 322. The Sixth District Court has stated R.C. §2907.05(A)(4) to be a strict liability offense *State v. Duszynski*, Lucas App. No. L-08-1215, 2009-Ohio-2284, at ¶ 7. (Citing cases from the Eighth and Tenth Appellate Districts.)

because R.C. §2907.01(B) includes the element of purpose, "We agree that gross sexual imposition requires proof that the sexual contact be done with purpose of sexual arousal or gratification and, therefore, that it is not a strict liability offense." *State v. Howdyshell*, Muskingum App. No. CT 2008-0040, 2009-Ohio-4328, at ¶ 17. See, also, *State v. Smith*, Stark App. No. 2008CA00097, 2009-Ohio-1759, at ¶ *State v. Ashcraft* (Oct. 3, 2000), Licking App. No. 00-CA-00021, unreported.

In *State v. Grigson* (Apr. 15, 1991), Scioto App. No. 1881, unreported, the Fourth Appellate District held that, "Appellee's assertion that there is no mens rea element in proving sexual contact is misplaced based upon the clear language of R.C. §2907.01(B) which requires that the 'touching' be done for the proscribed '*purpose* of sexually arousing or gratifying either person.'" (Emphasis in opinion.) The Third Appellate District Court has held that the crime of Gross Sexual Imposition in violation of R.C. §2907.05(A)(4) has a stated and defined mens rea where the definition of sexual contact supplies the necessary element. *State v. Harrold*, Seneca App. No. 13-2000-02, 2000-Ohio-1782. The First Appellate District has likewise found that the mens rea is purposely under a charge of R.C. §2907.05(A)(4). *In Re Williams* (Dec. 22, 2000) Hamilton App. Nos. C-990841, C-990842, unreported. Similarly, the Seventh, Ninth, and Twelfth Appellate District has found that the mens rea of purpose, as contained in the definition of sexual contact is necessary to sustain a conviction under R.C. §2907.04(A)(4). *Starcher v. Eberlin*, Belmont App. No. 08 BE 19, 2008-Ohio-5042, at ¶ 17, *State v. Ralston,* Lorain App. No. 08CA009384, 2008-Ohio-6347, at ¶ 17, *In Re Anderson* (1996), 116 Ohio App.3d 441, 444, 688 N.E.2d 545, 546-47.

These appellate districts have recognized that R.C. §2907.05 contains the element of purpose as a required mens rea and have declined to find that the offense is one of strict liability.

The reasoning employed by these courts is consistent with a plain reading of the offense and its statutory definitions. Appellant's argument that a mens rea is not included in R.C. §2907.05 and as such the default mens rea of recklessness needs to be read into the statute would torture such plain reading. Appellant's reading of the statute is unnecessary and would serve only to cause confusion to a jury to determine whether or not an actor was reckless in purposely committing the act of sexual contact.

R.C. §2907.05(A) has a defined and stated element of mental culpability. There is no need to apply R.C. §2901.21(B) and insert the element of recklessness and this Court should reject Appellant's proposition of law and hold that R.C. §2907.05 has a stated, defined culpable mental state (or mens rea), and affirm Appellant's convictions.

B. *Colon* Is Inapplicable To An Indictment Alleging A Violation Of R.C. §2907.05(A)(4).

Appellant has brought his argument that there was error in the proceedings based upon *State v. Colon*, 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-Ohio-1624. In *Colon*, this Court determined that error occurs where an element of the offense is not charged in the indictment because the criminal defendant is not provided sufficient notice of the offenses charged. Id., 2008-Ohio-1624, at ¶ 16-17. However, the crime of Gross Sexual Imposition contains notice of a mens rea, that of purpose. As such, the analysis set forth in *Colon* is inapplicable to an indictment alleging a violation of R.C. §2907.05(A)(4) that tracks the language of the statute.

In *State v. Buehner*, this Court determined what must be contained in indictment, stating:

> {¶ 7} The purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future**1164 prosecutions for the same incident. *Weaver v. Sacks* (1962), 173 Ohio St. 415, 417, 20 O.O.2d 43, 183 N.E.2d 373; *State v. Sellards* (1985), 17 Ohio St.3d 169, 170, 17 OBR 410, 478 N.E.2d 781. This court has held:
>
> > {¶ 8} "The sufficiency of an indictment is subject to the requirements of Crim.R. 7 and the constitutional protections of the Ohio and federal Constitutions. Under Crim.R. 7(B), an indictment 'may be made in ordinary and concise language without technical averments or allegations

> not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged.'

110 Ohio St.3d 403, 853 N.E.2d 1162, 2006-Ohio-4707, at ¶ 7-8.

In this case, the indictments alleging a violation of R.C. §2907.05(A)(4) mirror the language of the Revised Code, specifically alleging that Appellant engaged in "sexual contact" with the victims. The issue of the sufficiency of an indictment alleging a violation of R.C. 2907.05(A) that tracks the language of the Revised code was addressed in *State v. Harrold, supra*. That court first rejected the argument that R.C. §2907.05(A)(4) did not contain a mens rea and found that it contained the element of purpose. *Id.* In so holding, it found that, "the gross sexual imposition statute directly states that "sexual contact" is an element of the offense, and "sexual contact" is specifically defined in R.C. §2907.01. Therefore, unlike the situation faced by the Supreme Court in *Ross*, the elements of the crime of gross sexual imposition under R.C. §2907.05(A)(4) are clearly "apparent from the language" of the statutes. "

The reasoning supporting that holding is in accord with this Court's opinion in *Buehner, supra*, in which this Court held that an indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute need not also include each element of the predicate offense in the indictment. The import of that holding is clear, where there is a statutorily defined element within a statute, a defendant has fair notice of the elements of the offense the State must prove in order to sustain a conviction. Because R.C. §2907.05(A) and the indictments in this matter alleged that Appellant committed sexual contact and as sexual contact is defined within the Revised Code, there is no need to restate the statutory definition of sexual contact within the indictment. The error identified in *Colon, supra* and the reasoning in that case upon which Appellant places his argument is not implicated in this case.

An indictment that uses the statutory language to charge an offense under R.C. §2907.05(A) does state the mens rea that needs to be proven in order to sustain a conviction. Such indictment does not contain the error upon which Appellant has based his argument. Accordingly, the reasoning and analysis underlying this Court's decision in Colon is not applicable to the indictment s in this matter.

## CONCLUSION

This Court should reject Appellant's proposition of law. The crime of Gross Sexual Imposition under R.C. 2907.05(A)(4) contains the mens rea of purpose. Appellant's convictions should be affirmed, as there was no error in the indictments in this case where they tracked the language of the Revised Code.

Respectfully submitted,

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## SERVICE

A copy of the foregoing Merit Brief of Appellee has been mailed this 19th day of October, 2009, to John T. Martin, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, OH 44113.

_____
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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.

CREDIT(S)

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

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Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2905. Kidnapping and Extortion
Kidnapping and Related Offenses
→ **2905.01 Kidnapping**

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

(1) To hold for ransom, or as a shield or hostage;

(2) To facilitate the commission of any felony or flight thereafter;

(3) To terrorize, or to inflict serious physical harm on the victim or another;

(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will;

(5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority.

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

(1) Remove another from the place where the other person is found;

(2) Restrain another of the other person's liberty;

(3) Hold another in a condition of involuntary servitude.

(C)(1) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division or division (C)(2) or (3) of this section, kidnapping is a felony of the first degree. Except as otherwise provided in this division or division (C)(2) or (3) of this section, if the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.

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(2) If the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code and, except as otherwise provided in division (C)(3) of this section, shall sentence the offender to a mandatory prison term as provided in division (D)(7) of section 2929.14 of the Revised Code.

(3) If the victim of the offense is less than thirteen years of age and if the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, kidnapping is a felony of the first degree, and, notwithstanding the definite sentence provided for a felony of the first degree in section 2929.14 of the Revised Code, the offender shall be sentenced pursuant to section 2971.03 of the Revised Code as follows:

(a) Except as otherwise provided in division (C)(3)(b) of this section, the offender shall be sentenced pursuant to that section to an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.

(b) If the offender releases the victim in a safe place unharmed, the offender shall be sentenced pursuant to that section to an indefinite term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(D) As used in this section, "sexual motivation specification" has the same meaning as in section 2971.01 of the Revised Code.

CREDIT(S)

(2008 H 280, eff. 4-7-09; 2007 S 10, eff. 1-1-08; 1995 S 2, eff. 7-1-96; 1982 H 269, § 4, eff. 7-1-83; 1982 S 199; 1972 H 511)

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Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
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 of juveniles in sex.

(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:

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(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

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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.

CREDIT(S)

(2007 S 10, eff. 1-1-08; 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)

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Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2907. Sex Offenses (Refs & Annos)
Obscenity
→ **2907.31 Disseminating matter harmful to juveniles**

(A) No person, with knowledge of its character or content, shall recklessly do any of the following:

(1) Directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles;

(2) Directly offer or agree to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles;

(3) While in the physical proximity of the juvenile or law enforcement officer posing as a juvenile, allow any juvenile or law enforcement officer posing as a juvenile to review or peruse any material or view any live performance that is harmful to juveniles.

(B) The following are affirmative defenses to a charge under this section that involves material or a performance that is harmful to juveniles but not obscene:

(1) The defendant is the parent, guardian, or spouse of the juvenile involved.

(2) The juvenile involved, at the time of the conduct in question, was accompanied by the juvenile's parent or guardian who, with knowledge of its character, consented to the material or performance being furnished or presented to the juvenile.

(3) The juvenile exhibited to the defendant or to the defendant's agent or employee a draft card, driver's license, birth record, marriage license, or other official or apparently official document purporting to show that the juvenile was eighteen years of age or over or married, and the person to whom that document was exhibited did not otherwise have reasonable cause to believe that the juvenile was under the age of eighteen and unmarried.

(C)(1) It is an affirmative defense to a charge under this section, involving material or a performance that is obscene or harmful to juveniles, that the material or performance was furnished or

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presented for a bona fide medical, scientific, educational, governmental, judicial, or other proper purpose, by a physician, psychologist, sociologist, scientist, teacher, librarian, clergyman, prosecutor, judge, or other proper person.

(2) Except as provided in division (B)(3) of this section, mistake of age is not a defense to a charge under this section.

(D)(1) A person directly sells, delivers, furnishes, disseminates, provides, exhibits, rents, or presents or directly offers or agrees to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present material or a performance to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles in violation of this section by means of an electronic method of remotely transmitting information if the person knows or has reason to believe that the person receiving the information is a juvenile or the group of persons receiving the information are juveniles.

(2) A person remotely transmitting information by means of a method of mass distribution does not directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present or directly offer or agree to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present the material or performance in question to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles in violation of this section if either of the following applies:

(a) The person has inadequate information to know or have reason to believe that a particular recipient of the information or offer is a juvenile.

(b) The method of mass distribution does not provide the person the ability to prevent a particular recipient from receiving the information.

(E) If any provision of this section, or the application of any provision of this section to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of this section or related sections that can be given effect without the invalid provision or application. To this end, the provisions are severable.

(F) Whoever violates this section is guilty of disseminating matter harmful to juveniles. If the material or performance involved is harmful to juveniles, except as otherwise provided in this division, a violation of this section is a misdemeanor of the first degree. If the material or performance involved is obscene, except as otherwise provided in this division, a violation of this section is a felony of the fifth degree. If the material or performance involved is obscene and the juvenile to whom it is sold, delivered, furnished, disseminated, provided, exhibited, rented, or presented, the juvenile to whom the offer is made or who is the subject of the agreement, or the juvenile who is allowed to review, peruse, or view it is under thirteen years of age, violation of this section is a felony of the fourth degree.

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(2002 H 490, eff. 1-1-04; 1995 S 2, eff. 7-1-96; 1988 H 790, eff. 3-16-89; 1988 H 51; 1972 H 511)

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Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2971. Sexually Violent Predators (Refs & Annos)
**→ 2971.01 Definitions**

As used in this chapter:

(A) "Mandatory prison term" has the same meaning as in section 2929.01 of the Revised Code.

(B) "Designated homicide, assault, or kidnapping offense" means any of the following:

(1) A violation of section 2903.01, 2903.02, 2903.11, or 2905.01 of the Revised Code or a violation of division (A) of section 2903.04 of the Revised Code;

(2) An attempt to commit or complicity in committing a violation listed in division (B)(1) of this section, if the attempt or complicity is a felony.

(C) "Examiner" has the same meaning as in section 2945.371 of the Revised Code.

(D) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(E) "Prosecuting attorney" means the prosecuting attorney who prosecuted the case of the offender in question or the successor in office to that prosecuting attorney.

(F) "Sexually oriented offense" and "child-victim oriented offense" have the same meanings as in section 2950.01 of the Revised Code.

(G) "Sexually violent offense" means any of the following:

(1) A violent sex offense;

(2) A designated homicide, assault, or kidnapping offense that the offender commits with a sexual motivation.

(H)(1) "Sexually violent predator" means a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses.

(2) For purposes of division (H)(1) of this section, any of the following factors may be consid-

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ered as evidence tending to indicate that there is a likelihood that the person will engage in the future in one or more sexually violent offenses:

(a) The person has been convicted two or more times, in separate criminal actions, of a sexually oriented offense or a child-victim oriented offense. For purposes of this division, convictions that result from or are connected with the same act or result from offenses committed at the same time are one conviction, and a conviction set aside pursuant to law is not a conviction.

(b) The person has a documented history from childhood, into the juvenile developmental years, that exhibits sexually deviant behavior.

(c) Available information or evidence suggests that the person chronically commits offenses with a sexual motivation.

(d) The person has committed one or more offenses in which the person has tortured or engaged in ritualistic acts with one or more victims.

(e) The person has committed one or more offenses in which one or more victims were physically harmed to the degree that the particular victim's life was in jeopardy.

(f) Any other relevant evidence.

(I) "Sexually violent predator specification" means a specification, as described in section 2941.148 of the Revised Code, that charges that a person charged with a violent sex offense, or a person charged with a designated homicide, assault, or kidnapping offense and a sexual motivation specification, is a sexually violent predator.

(J) "Sexual motivation" means a purpose to gratify the sexual needs or desires of the offender.

(K) "Sexual motivation specification" means a specification, as described in section 2941.147 of the Revised Code, that charges that a person charged with a designated homicide, assault, or kidnapping offense committed the offense with a sexual motivation.

(L) "Violent sex offense" means any of the following:

(1) A violation of section 2907.02, 2907.03, or 2907.12 or of division (A)(4) or (B) of section 2907.05 of the Revised Code;

(2) A felony violation of a former law of this state that is substantially equivalent to a violation listed in division (L)(1) of this section or of an existing or former law of the United States or of another state that is substantially equivalent to a violation listed in division (L)(1) of this section;

(3) An attempt to commit or complicity in committing a violation listed in division (L)(1) or (2)

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of this section if the attempt or complicity is a felony.

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(2007 S 10, eff. 1-1-08; 2004 H 473, eff. 4-29-05; 2003 S 5, eff. 7-31-03; 1996 H 180, eff. 1-1-97)

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