

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2014-1599
Plaintiff-Appellee,	:	
	:	On Appeal from the Montgomery County
	:	
vs.	:	County Court of Appeals
	:	Second District Appellate District
	:	14-2028
Terry Lee Martin Sr.	:	
	:	C.A. Case No. 26033
Defendant-Appellant.	:	

NOTICE OF CERTIFIED CONFLICT OF APPELLANT

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 Friend of the Court, on Behalf of Appellant, Mr. Martin

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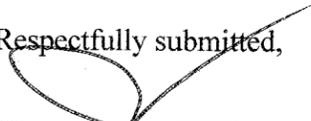
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 SUPREME COURT OF OHIO

Notice of Certified Conflict of Appellant State of Ohio

Pursuant to Section 8(A) of the Supreme Court Rules of Practice, Defendant- Appellant the State of Ohio gives this Court notice that the Montgomery County Court of Appeals, Second Appellate District has certified a conflict to this Court (copy attached). Said certification is based on the conflict between the opinions of the Second Appellate District and the Fourth Appellate District. (copies attached). The issue for review is:" With respect to R.C. 2907.323(A)(1), which proscribes the creation or production of nudity-oriented material involving a minor, which definition of nudity applies; the statutory definition (R.C. 2907.01(H)), or the narrower definition set forth in State v Young, 37 Ohio St.3d 249, 525 N.E.2d 1363, which requires additional elements of "lewd depiction" and "graphic focus on the genitals?"

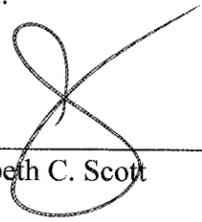
This case is one of public or great general interest.

Respectfully submitted,


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Certificate of Service

I hereby certify that a copy of the foregoing was served upon April Campbell, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422 by ordinary mail.


Elizabeth C. Scott

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 26033
v. : T.C. NO. 13CR2624
TERRY LEE MARTIN, SR. :
Defendant-Appellant :

.....
DECISION AND ENTRY

Rendered on the 4th day of November, 2014.
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Attorney for Defendant-Appellant

TERRY MARTIN, SR., #A696-606, Grafton Correctional Institute, 2500 S. Avon-Belden Rd., Grafton, Ohio 44044
Defendant-Appellant

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PER CURIAM:

This matter is before the court on Terry Martin Sr.'s motion to certify a conflict pursuant to App.R. 25(A).

Our Opinion in this case, *State v. Martin*, 2d Dist. Montgomery No. 26033, 2014-Ohio-3640, was filed on August 22, 2014, and the parties were notified by the clerk, by mail, on August 25, 2014, pursuant to App.R. 30(A). On September 4, 2014, Martin's attorney filed a motion to certify a conflict with decisions of other Ohio appellate courts. On September 11, 2014, Martin filed a pro se motion to certify a conflict. On September 15, 2014, Martin's attorney filed an amended motion to certify a conflict, which did not reference Martin's pro se motion. The State has filed a motion to strike Martin's pro se motion, because he is represented by counsel and "has no right to a 'hybrid' form of representation wherein he is represented by counsel, but also acts simultaneously as his own counsel"; the State did not otherwise respond to Martin's motion to certify a conflict. We note that Martin's pro se motion was untimely and that it does not differ, in substance, from the motion filed by his attorney. Thus, we will consider only the motions filed by Martin's attorney.

Martin was accused of (and stipulated to) using his iPod to videotape a minor in his bathroom as she undressed and toweled off before and after showering. He was convicted on illegal use of a minor in nudity-oriented material, in violation of R.C. 2907.323(A)(1).

As we discussed in our opinion, R.C. 2907.01(H) defines "nudity" as "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." R.C. 2907.323(A)(1) addresses the creation or production of

child nudity-oriented material, whereas R.C. 2907.323(A)(3) addresses the possession or viewing of child nudity-oriented material. Both R.C. 2907.323(A)(1) and (A)(3) contain exceptions where the nudity-oriented material is to be used “for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose” and by an appropriate person, and where the minor’s parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used.

The Ohio Supreme Court has addressed concerns that the statutory definition of nudity, when applied to R.C. 2907.323(A)(3), may be unconstitutionally overbroad, because it encompasses morally innocent behavior, such as pictures taken by a parent of a child in a state of undress, as well as sexualized depictions. In response to these concerns, the supreme court “interpreted the ‘proper purposes’ exceptions set forth in R.C. 2907.323(A)(3)(a) (medical, scientific, judicial purpose, etc.) and (b) (parental consent) to narrow the offense and to exclude ‘conduct that is morally innocent.’ * * * Thus, the only conduct prohibited by the statute is conduct which is *not* morally innocent, i.e., the possession or viewing of the described material for prurient purposes. So construed, the statute’s proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography.” (Emphasis sic.) *Martin* at ¶ 13, citing *State v. Young*, 37 Ohio St.3d 249, 251-252. In other words, *Young* narrowed the definition of nudity for purposes of R.C. 2907.323(A)(3) to that “constitut[ing] a lewd exhibition or involv[ing] a graphic focus on the genitals.” *Id.*

In his appeal, Martin argued that the more narrow definition of nudity set forth in

Young with respect to R.C. 2907.323(A)(3) also applied to R.C. 2907.323(A)(1), where the creation or production of nudity-oriented material is at issue. He further argued that the video recording he made did not depict a lewd exhibition or involve graphic focus on the genitals of the minor, notwithstanding her nudity, and therefore he should not have been found guilty of illegal use of a minor in nudity-oriented material in violation of R.C. 2907.323(A)(1). We rejected his argument, stating:

In our view, the difference between possession/viewing and creation/production of nudity-oriented material involving a minor, without parental consent, is significant. Creation/production, because it involves direct contact with a minor and the creation of child nudity material, involves different State and personal interests and is not entitled to the same First Amendment protection. * * *

The State's interests are compelling when a child is depicted. The State has compelling interests in protecting the child and in limiting the availability of depictions of nude children. Moreover, R.C. 2907.323(A)(1) involves photographing, recording, or transferring a material or performance involving a nude child; when such a case is compared to a case in which only possession of a picture of a nude child is at issue, the First Amendment concerns are less compelling. Thus, R.C. 2907.323(A)(1) does not present the need for a narrower construction of the term "nudity" that R.C. 2907.323(A)(3) arguably does.

Martin at ¶¶ 19-20. In sum, we held that the State was not required to prove that *Martin's* video was lewd or included a graphic focus on the genitals in order to convict him of a

violation of R.C. 2907.323(A)(1).

Martin argues in his motion to certify a conflict that our judgment is in conflict with *State v. Graves*, 184 Ohio App.3d 39, 2009-Ohio-974, 919 N.E.2d 753, ¶ 9 (4th Dist.) and *State v. Moss*, 1st Dist. Hamilton No. C-990631, 2000 WL 376434 (Apr. 14, 2000). We cited these cases in our Opinion.

In *Graves*, the Fourth Appellate District applied the definition of nudity set forth in *Young* to R.C. 2907.323(A)(1), finding that “the same ‘lewd’ or ‘graphic focus on the genitals’ that * * * applied to an (A)(3) offense applies equally to an (A)(1) offense.” *Id.* at ¶ 9. See also *State v. Walker*, 134 Ohio App.3d 89, 94, 730 N.E.2d 419 (4th Dist.1999); *State v. Steele*, 4th Dist. Vinton No. 99CA530, 2001 WL 898748 (Aug. 21, 2001). *Graves* further held that the “lewd exhibition” and “graphic focus on the genitals” definition of nudity constituted an element of the offense which must be included in the indictment.

Moss mirrored *Graves* in that it held that the “lewd exhibition” and “graphic focus on the genitals” definition of nudity had to be included in the indictment to adequately charge the offense. (We did not reach this question in *Martin* because Martin had not challenged his indictment.) However, *Moss* involved an offense charged under R.C. 2907.323(A)(3) (possession/viewing), not R.C. 2907.323(A)(1) (creation/production), and therefore does not present the issue raised in *Martin* and *Graves* for which certification of a conflict is requested.

In *State v. O'Connor*, 12th Dist. Butler No. CA2001-08-195, 2002-Ohio-4122, also cited by Martin, the Twelfth District rejected the Fourth District’s view that an indictment must include the definition of nudity set forth in *Young* to adequately charge an offense under R.C. 2907.323(A). In addressing this issue, the Twelfth District implicitly assumed,

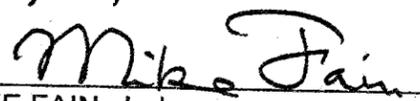
without discussion, that the *Young* definition of nudity applied to R.C. 2907.323(A)(1) and (A)(3). O'Connor was convicted under R.C. 2907.323(A)(1).

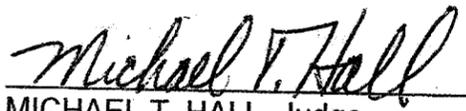
Thus, as noted in our Opinion, our Opinion is in conflict with that of the Fourth Appellate District in *Graves* with respect to the definition of nudity that applies to R.C. 2907.323(A)(1). We therefore certify the following question for review by the supreme court:

With respect to R.C. 2907.323(A)(1), which proscribes the creation or production of nudity-oriented material involving a minor, which definition of nudity applies: the statutory definition (R.C. 2907.01(H)), or the narrower definition set forth in *State v. Young*, 37 Ohio St.3d 249, 525 N.E.2d 1363, which requires additional elements of "lewd depiction" and "graphic focus on the genitals?"

IT IS SO ORDERED.


JEFFREY E. FROELICH, Presiding Judge


MIKE FAIN, Judge


MICHAEL T. HALL, Judge

Copies mailed to:

April F. Campbell
Elizabeth C. Scott
Terry Martin, Sr.
Hon. Frances E. McGee

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 26033
v. : T.C. NO. 13CR2624
TERRY LEE MARTIN, SR. : (Criminal Appeal from
Defendant-Appellant : Common Pleas Court)

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OPINION

Rendered on the 22nd day of August, 2014.
.....

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ELIZABETH C. SCOTT, Atty. Reg. No. 0076045, 120 W. Second Street, Suite 603,
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FROELICH, P.J.

{¶ 1} Terry Lee Martin, Sr., appeals from a judgment of the Montgomery County
Court of Common Pleas, which found him guilty of one count of illegal use of a minor in

nudity-oriented material and one count of possession of criminal tools. Martin was sentenced to five years and to nine months, respectively, to be served concurrently, for an aggregate term of five years. He was also designated as a Tier II sex offender.

{¶ 2} For the following reasons, the judgment of the trial court will be affirmed.

{¶ 3} The facts of the case are as follows. Martin, age 51, positioned and hid his iPod in such a way that he was able to record the minor victim in the bathroom of Martin's home when she undressed to take a shower. On the video, Martin talked with the girl as she entered the bathroom, complimented her appearance, and stated that she would look "cute" in some sexy "Daisy Dukes" (short shorts) that he had seen at the store. He then left the bathroom, and the victim undressed in preparation for a shower. Her breasts, pubic area, and buttocks were visible in the video as she undressed before the shower and as she dried herself after the shower. When the victim left the bathroom, Martin immediately reentered and retrieved the iPod.

{¶ 4} The video was discovered when Martin lent his iPod to the victim's brother and the victim's mother perused its contents. The victim stated in a victim impact statement that Martin had "treated [her] as his own daughter," but the precise nature of their relationship is unclear from the record.

{¶ 5} Martin was indicted for illegal use of a minor in nudity-oriented material, in violation of R.C. 2907.323(A)(1), and with possession of criminal tools (the iPod), in violation of R.C. 2923.24(A). He waived his right to a jury trial.

{¶ 6} At trial, the parties' stipulated to the date and location of the offense, that the victim was 11 years old at the time, that Martin had recorded the victim by use of his iPod, which was hidden in some towels, and that the victim had not been aware of the device or

that she was being recorded. They also stipulated that the video was not "for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose" and that the victim's parents had not consented in writing to the creation of the video. R.C. 2907.323(A)(1)(a) and (b). The only evidence presented at trial was the video recording and the list of the stipulations; the parties agreed that "we're not really here to determine [any] factual issue but rather a legal issue." The legal dispute focused on whether the victim was shown in a state of nudity, as that term is used in R.C. 2907.323(A)(1) and as defined in R.C. 2907.01(H) and *State v. Young*, 37 Ohio St.3d 249, 525 N.E.2d 1363 (1988).

{¶ 7} Martin was convicted after the bench trial, and he was sentenced as described above.

{¶ 8} Martin appeals from his conviction, raising one assignment of error, in which he contends that his conviction was contrary to law because, if the proper definition of nudity were applied, the State failed to prove the offense of illegal use of a minor in nudity-oriented material. In convicting Martin, the trial court did not specifically discuss the definition of nudity that it applied. Martin does not raise any argument regarding his conviction for possession of criminal tools or regarding the sentencing.

{¶ 9} Illegal use of a minor in nudity-oriented material or performance, in violation of R.C. 2907.323(A)(1), is defined as follows: "No person shall * * * [p]hotograph any minor who is not the person's child or ward in a state of nudity, or *create, direct, produce, or transfer* any material or performance that shows the minor in a state of nudity," unless the material is to be used "for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose" and by an appropriate person, and the

minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used. (Emphasis added.) Similarly, R.C. 2907.323(A)(3), which is not at issue in this case, prohibits the *possession or viewing* of any material or performance of a child who is not the person's child or ward in a state of nudity, subject to the same exceptions. (Emphasis added.)

{¶ 10} R.C. 2907.01(H) defines nudity as "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."

{¶ 11} The United States Supreme Court has held that private possession of obscene material, without more, is constitutionally protected; however, possession of child pornography may be prohibited. *Osborne v. Ohio*, 495 U.S. 103, 110-111, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), reversed on other grounds; *New York v. Ferber*, 458 U.S. 747, 764-765, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). The value of permitting child pornography is "exceedingly modest, if not de minimis," and legislatures and others have found that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child; these determinations "easily [pass] muster" under the First Amendment. *Osborne* at 110, quoting *Ferber*. Both *Osborne* and *Ferber* upheld prohibitions of even the private possession of child pornography out of concern for the minor children involved and recognition of the State's interest in eradicating child sexual abuse. *Osborne* at 109-111; *Ferber* at 764; see also *State v. Dalton*, 153 Ohio

App.3d 286, 2003-Ohio-3813, 793 N.E.2d 509, ¶ 23 (10th Dist.). The Ohio Supreme Court has also held that prohibitions against the private possession of child pornography are constitutional. *State v. Meadows*, 28 Ohio St.3d 43, 51, 503 N.E.2d 697, syllabus (1986).

{¶ 12} Martin contends that a series of cases from the U.S. and Ohio Supreme Courts, including *Young* and *Osborne*, has narrowed the definition such that the nudity must constitute “a lewd exhibition or involv[e] * * * a graphic focus on the genitals” in order for the material to be prohibited. He further argues that the recording at issue in this case contained nudity under the wording of R.C. 2907.01(H), but that the nudity was not lewd or did not include any graphic focus on the genitals.

{¶ 13} *Young* and *Osborne* address R.C. 2907.323(A)(3), which deals with the possession or viewing of child nudity-oriented material, rather than the creation or production of child nudity-oriented material, as charged in this case and addressed in R.C. 2907.323(A)(1). Those cases responded to arguments that the use of the term “nudity” in R.C. 2907.323(A)(3) was overbroad and violated the Constitution by unconstitutionally encompassing morally innocent behavior as well as lewd behavior. See *Osborne* at 112; *Young* at 251-252. In response to such concerns, the Ohio Supreme Court in *Young* interpreted the “proper purposes” exceptions set forth in R.C. 2907.323(A)(3)(a) (medical, scientific, judicial purpose, etc.) and (b) (parental consent) to narrow the offense and to exclude “conduct that is morally innocent.” *Young* at 251-252. “Thus, the only conduct prohibited by the statute is conduct which is *not* morally innocent, *i.e.*, the possession or viewing of the described material for prurient purposes. So construed, the statute’s proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography.” (Emphasis sic.) *Id.* In

Ferber, the U.S. Supreme Court required that prohibited conduct in the “sensitive area” of child pornography be “adequately defined by the applicable state law, as written or authoritatively construed.” (Emphasis added in *Young*.) *Id.* at 252, quoting *Ferber* at 764. Accordingly, the Ohio Supreme Court in *Young* construed R.C. 2907.323(A)(3) to prohibit “the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.” (Emphasis added.) *Young* at 252.

{¶ 14} The U.S. Supreme Court agreed that, as interpreted by the Ohio Supreme Court in *Young*, R.C. 2907.323(A)(3) did not violate the First Amendment and was not overbroad. *Osborne* at 107-111.

{¶ 15} Martin argues that the more narrow definition of nudity applied in *Young* and approved in *Osborne* also applies to R.C. 2907.323(A)(1), where the creation or production of nudity-oriented material is at issue. He further argues that, although the recording he made contained nudity of a minor, it did not depict a lewd exhibition or involve graphic focus on the genitals of the minor, and therefore he should not have been found guilty of illegal use of a minor in nudity-oriented material in violation of R.C. 2907.323(A)(1).

{¶ 16} We acknowledge that, in two prior cases from this district cited by the State, this court has implicitly accepted the applicability of the “lewd exhibition” or “graphic focus on the genitals” definition of nudity in a case involving R.C. 2907.323(A)(1). See *State v. Stoner*, 2d Dist. Miami No. 2003 CA 6, 2003-Ohio-5745; *State v. Powell*, 2d Dist. Montgomery No. 18095, 2000 WL 1838716 (Dec. 15, 2000). In *Stoner*, the defendant-appellant’s argument accepted that lewdness had to be shown and we affirmed the trial

court's finding of "a lewd exhibition" without any discussion of *Young*. In *Powell*, we affirmed the trial court's finding, when addressing the sufficiency of the evidence, that reasonable minds could find a lewd exhibition in the victim's raising of her buttocks to the camera. Our opinion mentioned *Young* (as had the trial court), but we did not discuss the fact that *Young* dealt with a different subsection of the statute defining illegal use of a minor in nudity-oriented material or the cases' different postures with respect to First Amendment interests. Insofar as neither *Stoner* nor *Powell* contained a detailed discussion of *Young* or acknowledged that the holding in *Young* involved a different subsection of R.C. 2907.323(A), they do not compel our application of *Young's* narrow definition of nudity to R.C. 2907.323(A)(1) in Martin's case.

{¶ 17} Other Ohio courts have split on the question of whether the definition of "nudity" set forth in *Young* applies to R.C. 2907.323(A)(1), as well as to R.C. 2907.323(A)(3). Several cases have addressed the issue in terms of whether the narrowed "lewd exhibition" and "graphic focus on genitals" definition of nudity constitutes an element of the offense which must be included in an indictment. The Fourth Appellate District has concluded that there is "no difference" between subsections R.C. 2907.323(A)(1) and (3) with respect to the definition of "nudity," that the "lewd exhibition" or "graphic focus on the genitals" interpretation applies equally to both subsections, and that such language must be included in an indictment charging an offense under either section. *State v. Graves*, 184 Ohio App.3d 39, 2009-Ohio-974, 919 N.E.2d 753, ¶ 9 (4th Dist.). See also *State v. Moss*, 1st Dist. Hamilton No. C-990631, 2000 WL 376434 (Apr. 14, 2000). The Twelfth District, on the other hand, has rejected the argument that the "judicially engrafted element" (the more narrow definition of nudity set forth in *Young*) must

be included in an indictment; it concluded that the statutory language was sufficient to charge an offense under R.C. 2907.323(A)(1) and that the narrower definition did not apply to R.C. 2907.323(A)(1). *State v. O'Connor*, 12th Dist. Butler No. CA2001-08-195, 2002-Ohio-4122, ¶ 28-30. *O'Connor* held that, “[w]hile *Osborne* may limit the proof of ‘a state of nudity’ to lewdness or graphic focus on the genitals, in order to meet a constitutional objective, it does not alter the elements of R.C. 2907.323(A)(1).” *Id.* at ¶ 31.

{¶ 18} We need not consider whether the definition of nudity set forth in *Young* is an “element” of the offense of illegal use of a minor in nudity-oriented material that must be included in an indictment. Martin has not challenged his indictment on appeal or in the trial court and, regardless, any such argument is moot as a result of our holding in this case. The question before us is whether, for a violation of R.C. 2907.323(A)(1) involving use of a minor in the creation or production of nudity-oriented material, the State must prove at trial that the nudity was a “lewd exhibition” or included “graphic focus on the genitals.”

{¶ 19} In our view, the difference between possession/viewing and creation/production of nudity-oriented material involving a minor, without parental consent, is significant. Creation/production, because it involves direct contact with a minor and the creation of child nudity material, involves different State and personal interests and is not entitled to the same First Amendment protection. The dissent in *Graves* aptly describes the distinction:

This court has applied the requirement of *State v. Young* * * * and *Osborne v. Ohio* * * * of a “lewd” or “graphic focus on the genitals” to an R.C. 2907.323(A)(1) offense. * * * I disagree with this view, however. The Ohio

Supreme Court employed the "lewd exhibition" or "graphic focus on the genitals" requirement in *Young* to avoid First Amendment problems that arise with criminalizing possession of nude child photographs with nothing more.

*** The United States Supreme Court endorsed that interpretation, although the case was reversed on other grounds. See *Osborne*, 495 U.S. at 112-113, 110 S.Ct. 1691, 109 L.Ed.2d 98. The *Young* and *Osborne* cases involved only (A)(3) offenses under R.C. 2907.323. Neither involved a violation of subsection (A)(1). The gist of *Young* and *Osborne* is that the mere possession of nude child photographs, without more, raises a First Amendment issue. I note, however, that subsection (A)(1) prohibits taking nude pictures of someone else's children, and that is a different issue than the mere possession of such pictures. Does taking a nude picture of someone else's child deserve the same level of First Amendment protection?

I believe that the better approach is the Massachusetts Supreme Court's view in *Commonwealth v. Oakes* (1990), 407 Mass. 92, 551 N.E.2d 910, 912, which held that photographing nude, underage children combined elements of both speech and conduct. When speech and nonspeech elements are both involved, a "sufficiently important governmental interest" for regulating the nonspeech element can justify an incidental limitation on First Amendment freedoms. *Id.*, citing *United States v. O'Brien* (1968), 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (holding that government can criminalize the burning of draft cards notwithstanding the First Amendment

symbolism connected therewith). The "important governmental interest" at issue in the case sub judice is obvious. R.C. 2907.323(A)(1) prohibits a person from taking nude photographs of someone else's children. Except in limited circumstances, such as an abuse, dependency, or neglect proceeding, parents have the right to know who is taking nude pictures of their children and a right to refuse permission to take those pictures. Both the Ohio and United States Supreme Courts have long held that parents have a fundamental liberty interest in the custody and control of their own children. * * * Prohibiting someone else from taking nude photographs of one's child is a common-sense extension of that right and is an area that the Ohio General Assembly can legitimately legislate.

Therefore, I do not believe that the Ohio Supreme Court's limited construction of R.C. 2907.323(A)(3) in *Young*, affirmed by the United States Supreme Court in *Osborne*, applies with regard to a subsection (A)(1) charge. Rather, the state may constitutionally prohibit strangers from taking nude photographs of someone else's child, without permission, even if there is no "lewd" or graphic focus on that child's genitals. * * *.

(Some internal citations omitted.) *Graves*, 184 Ohio App.3d 39, 2009-Ohio-974, 919 N.E.2d 753, ¶ 17-19 (4th Dist.) (Abele, J., dissenting).

{¶ 20} The State's interests are compelling when a child is depicted. The State has compelling interests in protecting the child and in limiting the availability of depictions of nude children. Moreover, R.C. 2907.323(A)(1) involves photographing, recording, or transferring a material or performance involving a nude child; when such a case is

compared to a case in which only possession of a picture of a nude child is at issue, the First Amendment concerns are less compelling. Thus, R.C. 2907.323(A)(1) does not present the need for a narrower construction of the term "nudity" that R.C. 2907.323(A)(3) arguably does.

{¶ 21} Nudity is statutorily defined, and, with respect to R.C. 2907.323(A)(1), there is no constitutional interest that requires a more narrow construction of the statutory term. Thus, the statutory definition should be applied, and we reject Martin's argument that the definition of nudity set forth in *Young* is applicable to R.C. 2907.323(A)(1). The statutory definition does not require that the nudity be shown to be a lewd exhibition or that it involve graphic depiction of the genitals. R.C. 2907.01(H). The statutory definition requires "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 * * *." The nudity depicted in Martin's recording, which depicted the victim's breasts, pubic area, and buttocks, satisfied the statutory definition of nudity.

{¶ 22} In its brief, the State seems to concede the applicability of the *Young* definition of nudity, a conclusion with which we do not agree, for the reasons stated above. The State contends that, accepting this definition, the video was indisputably "lewd," notwithstanding the fact that it does not contain a graphic focus on the genitals.

{¶ 23} The term "lewd" is not a legal term of art, but a word of common usage. *State, ex rel. Rear Door Bookstore v. Tenth Dist. Ct. of Appeals*, 63 Ohio St.3d 354, 358, 588 N.E.2d 116 (1992). "Webster defines 'lewd' as: ' * * * sexually unchaste or licentious * * * lascivious * * * inciting to sensual desire or imagination * * *.' Webster's Third New

International Dictionary (1986) 1301. The Oxford English Dictionary gives a similar definition and cites Chaucer for first using the word in popular literature as early as 1386. 'Lascivious' is defined by Webster as: ' * * * inclined to lechery: lewd, lustful * * * tending to arouse sexual desire * * *.' Webster's, *supra*, at 1274. The Oxford dictionary defines 'lascivious' as: '[i]nclined to lust, lewd, wanton.' The Oxford English Dictionary (1989) 666." *Rear Door Bookstore* at 358. Black's Law Dictionary defines "lewd" as "[o]bscene or indecent; tending to moral impurity or wantonness[.]" Black's Law Dictionary (7th Ed. 1999) 919.¹

{¶ 24} Based on the Ohio Supreme Court's holding in *Young*, this court has held that it is the character of the material or performance, not the purpose of the person possessing or viewing it, that determines whether it involves a lewd exhibition or a graphic focus on the genitals. *State v. Kerrigan*, 168 Ohio App.3d 455, 2006-Ohio-4279, 860 N.E.2d 816, ¶ 22 (2d Dist.). Therefore, Martin's motivations are not relevant. We need not reach the issue whether the video was lewd, since we hold that this does not have to be proved for a conviction of R.C. 2907.323(A)(1).

{¶ 25} Finally, we note that secretly videotaping a naked person without consent is a crime when committed (with a specific mens rea) against an adult as well as against a child. R.C. 2907.08(B) (voyeurism) provides that "[n]o person, for the purpose of sexually arousing or gratifying the person's self, shall commit trespass or otherwise surreptitiously

¹It is, no doubt, definitions such as these that occasioned Justice Stewart's famous aphorism about obscenity, "I know it when I see it." See *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring).

invade the privacy of another to videotape, file, photograph, or otherwise record the other person in a state of nudity." The same statutory definition of nudity applies to this section. Voyeurism in violation of R.C. 2907.08(B) is a misdemeanor of the second degree, whereas illegal use of a minor in nudity-oriented material in violation of R.C. 2907.323(A)(1) is a felony of the second degree, and voyeurism is not a lesser included offense. See *Stoner*, 2d Dist. Miami No. 2003-CA-6, 2003-Ohio-5745, ¶ 25.

{¶ 26} With any other holding, the "photographing" of a nude² minor without the purpose of sexually arousing the "photographer," e.g., for the purpose of embarrassing the minor or the purely pecuniary purpose of selling the image to a child pornographer, arguably would not be against the criminal law. Because of the State interests involved in preventing the exploitation of children through the creation of nudity-oriented materials in which they are depicted, the legislature reasonably chose to define the offense more broadly (i.e., not requiring a trespass or a purpose of sexual gratification) and to punish the secret imaging of a nude minor more severely, regardless of the purpose of the offender or the lewdness of the subject.

{¶ 27} The assignment of error is overruled.

{¶ 28} The judgment of the trial court will be affirmed.

.....
FAIN, J. and HALL, J., concur.

²In this context, we assume the nudity is not obscene under R.C. 2907.322 or lewd under R.C. 2907.323(A)(3).

Copies mailed to:

April F. Campbell
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Hon. Frances E. McGee

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

The STATE OF OHIO, :
Appellant, : Case No. 07CA2994
v. :
GRAVES, : DECISION AND JUDGMENT ENTRY
Appellee. :

APPEARANCES:

Michael M. Ater, Ross County Prosecuting Attorney, and Richard Clagg, Assistant Prosecuting Attorney, for appellant.

Biddlestone & Winkelmann Co., L.P.A., and David J. Winkelmann, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-3-09

Per Curiam.

{¶1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. Ryan Graves, defendant-appellee, pleaded guilty to gross sexual imposition in violation of R.C. 2907.05. Appellee was also charged with three counts of illegal use of a minor in nudity-oriented material in violation of R.C. 2907.323, but the trial court dismissed those charges for lack of jurisdiction. The state of Ohio, plaintiff-appellant, appeals and assigns the following errors for review:

First Assignment of Error:

The trial court erred when it dismissed counts two, three, and four of the indictment where the requirement of a lewd exhibition or of a graphic focus on genitals is interpreted as part of the definition of "nudity" and is not a judicially engrafted element of Ohio Revised Code Section 2907.323(A)(3).

Second Assignment of Error:

The trial court erred when it denied the state of Ohio leave to amend its indictment, where the name and identity of the crime would not change as a result of the amendment and the defendant would not be misled.

{¶12} In August 2006, appellant engaged in sexual conduct with a 12-year-old girl. Police investigated and found nude photographs of other minor females on appellant's computer discs. The Ross County Grand Jury returned an indictment charging appellee with gross sexual imposition and three counts of violations of R.C. 2907.323, illegal use of a minor in nudity-oriented material, that stem from images on appellee's computer discs. Appellee pleaded not guilty to all charges.

{¶13} Subsequently, appellee requested that the trial court dismiss counts two, three, and four because the indictment failed to include language from *State v. Young* (1988), 37 Ohio St.3d 249, 525 N.E.2d 1363, at paragraph one of the syllabus. *Young* held that nudity, for purposes of R.C. 2907.323(A)(3), must mean "a lewd exhibition" or "a graphic focus on the genitals." *Id.* In that way, the court reasoned, the statute may be interpreted to circumvent the First Amendment problems that attach to an attempt to ban "morally innocent" photographs of child nudity. *Id.* at 251.

{¶14} The trial court agreed with appellee. Appellant then requested to amend the indictments, but the trial court denied the request. The court explained that the grand jury did not have an opportunity to consider "whether there was a lewd or graphic depiction of

genitalia in [those] pictures." The court opined that it could not "allow an amendment of the indictment to permit inclusion of [an] omitted element."

{¶15} Appellee then pleaded guilty to count one of the indictment. The trial court sentenced appellee to serve two years in prison and designated him a sexual predator. This appeal followed.¹

{¶16} In its first assignment of error, appellant asserts that the trial court erred by dismissing counts two, three, and four of the indictment. We disagree.

{¶17} R.C. 2907.323(A)(1) states that no person may photograph any minor, who is not the person's child or ward, in a state of nudity. Likewise, subsection (A)(3) bans the possession of material that depicts a minor, who is not that person's ward or child, in a state of nudity. Although the indictment in the case sub judice is somewhat vague and does not specify a specific subsection for each count, it appears that counts two and three allege a violation of subsection (A)(3) and count four alleges a violation of subsection (A)(1).²

{¶18} The pivotal issue for all three counts is the impact of *Young*. In *Young*, the Ohio Supreme Court held that nudity, for purposes of R.C. 2907.323(A)(3), means a "lewd exhibition" or "a graphic focus on the genitals." 37 Ohio St.3d 249, at paragraph one of the syllabus. *Young* construed the statute to avoid First Amendment issues that could arise

¹ We note that on the same day, a judgment was filed, separate and distinct from the conviction and sentencing entry, that dismissed counts two, three, and four of the indictment. We also note that although the prosecution is generally required to seek leave of court to appeal, R.C. 2945.67(A) allows the state an appeal as of right when part of the indictment is dismissed.

² Counts two and three of the indictment charge reckless possession or viewing of material, whereas count four charges that appellant "recklessly photograph[ed] a minor." A more specific indictment that set out the individual subsections of the statute would have aided this process.

with criminalizing the possession of nude child photographs with nothing more. *Id.* at 251. The United States Supreme Court endorsed this interpretation, although the case was reversed on other grounds. See *Osborne v. Ohio* (1990), 495 U.S. 103, 112-113, 110 S.Ct. 1691, 109 L.Ed.2d 98.

{¶9} Before we go further, we point out that both *Young* and *Osborne* involved R.C. 2907.323(A)(3), not subsection (A)(1). However, this fact makes no difference for purposes of our analysis. This court has previously held that the same "lewd" or "graphic focus on the genitals" that both Supreme Courts applied to an (A)(3) offense applies equally to an (A)(1) offense. See *State v. Walker* (1999), 134 Ohio App.3d 89, 94, 730 N.E.2d 419; *State v. Steele* (Aug. 21, 2001), Vinton App. No. 99CA530.

{¶10} We now consider the impact that *Young* and *Osborne* have on R.C. 2907.323(A)(1) and (3) offenses. The only case we have found on point is *State v. Moss* (Apr. 14, 2000), Hamilton App. No. C-990631, in which our First District colleagues held that an indictment that charges the possession of photographs of nude children under R.C. 2907.323(A), but fails to include the allegation of "lewd" or graphic focus on the genitals, fails to set forth a punishable offense. As the trial court did in the case at bar, we find this reasoning persuasive.

{¶11} The United States Supreme Court has held that although child pornography may be a violation of the law, a depiction of child nudity, without more, is protected speech. *Osborne* at 112; *New York v. Ferber* (1982), 458 U.S. 747, 765, 102 S.Ct. 3348, 73 L.Ed.2d 1113, at fn. 18. R.C. 2907.323(A)(1) and (3) ban the possession or production of material that depicts a child in a state of nudity and, in essence, punishes what the United States Supreme Court has determined to be "protected speech" under the First

Amendment. Thus, we agree with the trial court that dismissal of counts two, three, and four of the indictment is appropriate. Accordingly, the first assignment of error is hereby overruled.

II

{¶12} Appellant argues in its second assignment of error that the trial court erred by denying it the opportunity to amend the indictment to include the language concerning lewd and graphic focus on the genitals.³ The trial court ruled that it could not, and we agree with the court's reasoning.

{¶13} First, as we point out above, counts two and three failed to set forth a criminal offense. This is not a situation that involves some minor defect or misnumbered statutory subsection. Here, appellee was charged with the possession of photographs of nude children, which, in itself, is constitutionally protected and cannot be criminalized. Second, we agree completely with the trial court's cogent observations when it explained its denial of appellee's motion:

The other concern that I have * * * is whether the Grand Jury, which returned the indictment in this case, had an opportunity to consider whether there was a lewd or graphic depiction of genitalia in these pictures. I've not seen them so I don't know, but regardless, I don't know what the Grand Jury did or didn't - was or was not told. In light of that, I don't feel like I can allow an amendment of the indictment to permit inclusion of the omitted element.

{¶14} Generally, felony offenses are prosecuted by indictments handed down by grand juries. See Crim.R. 6 and 7(A). The grand jury is a shield against government tyranny, and this is why the grand jury is vested with the decision concerning whether a crime has been committed. *State v. Grewell* (1989), 45 Ohio St.3d 4, 7, 543 N.E.2d 93. As we pointed out, the taking of nude photographs or the mere possession of nude

pictures of children is not a crime. Rather, a crime occurs if the photographs depict a lewd and graphic focus on the genitals. Because this is a material element of the offense, the grand jury must determine its presence or absence from a photograph, not a prosecutor. We agree with the trial court that to allow the indictment to be amended to include that element is tantamount to circumventing the process entirely and allowing a prosecutor, rather than a grand jury, to determine if a crime has been committed. *State v. Kittle*, Athens App. No. 04CA41, 2005-Ohio-3198, ¶10, citing *State v. Headley* (1983), 6 Ohio St.3d 475. This authority would violate our Constitution, which prevents trial for infamous crimes except upon indictment by grand jury. See Section 10, Article I, Ohio Constitution; *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, at ¶17. For these reasons, we hereby overrule appellant's second assignment of error.

{¶15} Having reviewed all errors assigned and argued by the state in its brief, and having found merit in none of them, we affirm the judgment of the trial court.

Judgment affirmed.

KLINE, P.J., concurs.

ABELE, J., concurs in part and dissents in part.

McFARLAND, J., concurs in judgment only.

ABELE, Judge, concurring in part and dissenting in part.

{¶16} I agree that the second assignment of error and the first assignment of error, insofar as it concerns the dismissal of counts two and three of the indictment, should be overruled. I, however, respectfully disagree as to dismissal of count four and would sustain

³Insofar as count four of the indictment goes, this issue is moot.

the appellant's assignment of error for the following reasons.

¶17 This court has applied the requirement of *State v. Young* (1988), 37 Ohio St.3d 249, 525 N.E.2d 1363, and *Osborne v. Ohio* (1990), 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98, of a "lewd" or "graphic focus on the genitals" to an R.C. 2907.323(A)(1) offense. See *State v. Walker* (1999), 134 Ohio App.3d 89, 730 N.E.2d 419; *State v. Steele* (Aug. 21, 2001), Vinton App. No. 99CA530. I disagree with this view, however. The Ohio Supreme Court employed the "lewd exhibition" or "graphic focus on the genitals" requirement in *Young* to avoid First Amendment problems that arise with criminalizing possession of nude child photographs with nothing more. 37 Ohio St.3d at 251. The United States Supreme Court endorsed that interpretation, although the case was reversed on other grounds. See *Osborne*, 495 U.S. at 112-113. The *Young* and *Osborne* cases involved only (A)(3) offenses under R.C. 2907.323. Neither involved a violation of subsection (A)(1). The gist of *Young* and *Osborne* is that the mere possession of nude child photographs, without more, raises a First Amendment issue. I note, however, that subsection (A)(1) prohibits taking nude pictures of someone else's children, and that is a different issue than the mere possession of such pictures. Does taking a nude picture of someone else's child deserve the same level of First Amendment protection? The *Walker* and *Steele* cases assume that taking a photograph is protected speech, but does not provide much discussion about the issue. The only case that directly addresses the question is *State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, 789 N.E.2d 696, at ¶20, but that case dealt with R.C. 2927.01(B), which prohibits treating a corpse in a way that outrages community sensibilities. In any event, the court's ruling on that point was obiter dictum.

{¶18} I believe that the better approach is the Massachusetts Supreme Court's view in *Commonwealth v. Oakes* (Ma.1990), 551 N.E.2d 910, 912, which held that photographing nude, underage children combined elements of both speech and conduct. When speech and nonspeech elements are both involved, a "sufficiently important governmental interest" for regulating the nonspeech element can justify an incidental limitation on First Amendment freedoms. *Id.*, citing *United States v. O'Brien* (1968), 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (holding that government can criminalize the burning of draft cards notwithstanding the First Amendment symbolism connected therewith). The "important governmental interest" at issue in the case sub judice is obvious. R.C. 2907.323(A)(1) prohibits a person from taking nude photographs of someone else's children. Except in limited circumstances, such as an abuse, dependency, or neglect proceeding, parents have the right to know who is taking nude pictures of their children and a right to refuse permission to take those pictures. Both the Ohio and United States Supreme Courts have long held that parents have a fundamental liberty interest in the custody and control of their own children. See, e.g., *In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238, 875 N.E.2d 582, at ¶32; *In re Murray* (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169; *Troxel v. Granville* (2000), 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49; *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599. Prohibiting someone else from taking nude photographs of one's child is a common-sense extension of that right and is an area that the Ohio General Assembly can legitimately legislate.

{¶19} Therefore, I do not believe that the Ohio Supreme Court's limited construction of R.C. 2907.323(A)(3) in *Young*, affirmed by the United States Supreme Court in *Osborne*,

applies with regard to a subsection (A)(1) charge. Rather, the state may constitutionally prohibit strangers from taking nude photographs of someone else's child, without permission, even if there is no "lewd" or graphic focus on that child's genitals. Thus, I agree with the appellant that the trial court erred in dismissing count four of the indictment.