

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 2014-2028
	:	
v.	:	On appeal from the Montgomery
	:	County Court of Appeals,
Terry Lee Martin,	:	Second Appellate District
	:	Case No. 26033
Defendant-Appellant.	:	

Merit Brief of Appellant Terry Lee Martin

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Statement of the Case and Facts

Terry Lee Martin was indicted on one count of illegal use of minor in nudity-oriented material or performance, in violation of R.C. 2907.323(A)(1), and one count of possession of criminal tools, in violation of R.C. 2923.24(A). Mr. Martin waived his right to a jury trial, and stipulated to the facts in his case to the trial court. T.pp. 4-6. The State introduced into evidence a DVD of the material that led to Mr. Martin's indictment. *Id.* The video was taken from Mr. Martin's iPod and showed a minor, J.W., removing her clothing to take a shower.

The trial court found Mr. Martin guilty of both counts. November 26, 20113 Verdicts. The trial court sentenced Mr. Martin to an aggregate prison term of five-years and classified him as a Tier II sex offender, requiring in-person registration every six months for 25 years. T.pp. 23-25.

On appeal, Mr. Martin argued 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 minor in nudity-oriented material. *State v. Martin*, 2d Dist. Montgomery No. CA26033, 2014-Ohio-1599. Mr. Martin argued that the First Amendment requires the definition of nudity to be limited to nudity that "constitutes a lewd exhibition or involves a graphic focus on the genitals." *State v. Young*, 37 Ohio St.3d 249, 525 N.E.2d 1363 (1988).

Upon review, the Second District affirmed Mr. Martin's conviction and held that the narrowed definition of nudity only applied to R.C. 2907.323(A)(3), not R.C. 2907.323(A)(1). *Martin* at ¶ 19-21. The Second District distinguished between possession/viewing and creation/production of nudity-oriented material involving a minor in its analysis. *Id.* at ¶ 19. The court of appeals held that "[c]reation/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 [as] possession/viewing.” *Id.* And the court of appeals held that because R.C. 2907.323(A)(1) involves photographing, recording, or transferring the material, the First Amendment concerns are less compelling. *Id.* at ¶ 20. As a result, the court of appeals held that the statutory definition of nudity provided in R.C. 2907.01(H) applies to R.C. 2907.323(A)(1) even though it was found to be unconstitutionally overbroad when applied to R.C. 2907.323(A)(3). *Id.* at ¶ 21.

This Court certified that the Second District opinion was in conflict with the Fourth District opinion in *State v. Graves*, 184 Ohio App. 3d 39, 2009-Ohio-974, 919 N.E.2d 753 (4th Dist.), and ordered briefing on the certified conflict question:

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 (1988), which requires additional elements of “lewd depiction” and “graphic focus on the genitals”?

Summary of Argument

Without limitation on the definition of nudity, innocent conduct is criminalized by R.C. 2907.323(A)(1). Here, the State only proved that the video Terry Lee Martin made depicted a minor in a state of nudity as defined in 2907.01(H) in order to convict him of a second-degree felony and classify him as Tier II sex offender.

The criminalization of speech must be checked against the First Amendment and its protections. A law, despite its admirable intentions, cannot be so broad as to criminalize morally innocent conduct. This Court has already responded to that concern as it relates to the definition of nudity as applied to R.C. 2907.323(A)(3). *State v. Young*, 37 Ohio St.3d 249, 525 N.E.2d 1363 (1988). This Court appropriately construed the statutory exceptions to R.C. 2907.323(A)(3) to limit the definition of nudity to “lewd depiction” or “graphic focus on the genitals.” Because R.C. 2907.323(A)(1) has nearly identical statutory exceptions, and the same First Amendment implications, the same definition of nudity must apply.

Argument

Certified Conflict Issue

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 (1988), which requires additional elements of “lewd depiction” and “graphic focus on the genitals.”

Ohio’s statute prohibiting the production or creation of nudity-oriented material involving a minor has numerous statutory exceptions. R.C. 2907.323(A)(1). The certified conflict question requires this Court to consider whether nudity with respect to that portion of the statute is defined broadly, as it is in R.C. 2907.01(H), or narrowly as this Court has already construed it as applied to another portion of the same statute, R.C. 2907.323(A)(3). The State argues that the prohibited conduct should be expansive, and allow for criminalization of production of morally innocent nudity-oriented material involving a minor. That is unconstitutionally overbroad and criminalizes protected, morally innocent conduct.

- I. The definition of nudity in R.C. 2907.323(A)(1) must be the same as the definition of nudity in R.C. 2907.323(A)(3).**
- A. This Court read R.C. 2907.323(A)(3) to prohibit “a lewd exhibition or graphic focus on a minor’s genitals” based on the statutory exceptions.**

The First Amendment does not prohibit the State from criminalizing private possession of child pornography. *State v. Meadows*, 28 Ohio St.3d 42, 503 N.E. 2d 697 (1968). However, this Court’s role is to “ascertain whether the state’s method of combating child pornography runs afoul of or unnecessarily intrudes on constitutionally protected First Amendment rights.”

Id. at 51.

Ohio Revised Code Section 2907.323 criminalizes the use of minors in nudity-oriented material or performances. This Court has already addressed concerns that the statutory definition of nudity, when applied to subsection (A)(3), involving possession or viewing of nudity oriented-material, may be unconstitutionally overbroad. *State v. Young*, 37 Ohio St.3d 249, 251-252, 525 N.E.2d 1363 (1988) *reversed on other grounds by Osborne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). “Nudity” is statutorily defined as:

[T]he 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. 2907.01(H). The definition, if used to describe “nudity” in R.C. 2907.323(A)(3), would criminalize morally innocent behavior, such as viewing pictures of a child merely in a state of undress.

Yet instead of striking down R.C. 2907.323(A)(3) as unconstitutionally overbroad, this 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. *Young* at 251-252. When read with those limitations, the statute was not so broad that it outlawed all depictions of minors in a state of nudity, but rather only depictions which constitute child pornography. *Id.*

This Court narrowed the definition of nudity for purposes of R.C. 2907.323(A)(3) to only non-morally innocent possession of nudity-oriented material – material that constitutes a “lewd exhibition or involves a graphic focus on the genitals.” *Id.* at 252. The United States Supreme Court agreed that by limiting the statute’s application to exclude prohibitions of protected expression, the statute is constitutional. *Osborne v. Ohio*, 495 U.S. at 112-115.

B. R.C. 2907.323(A)(1) and (A)(3) have nearly identical statutory exceptions.

Revised Code Section 2907.323(A)(1) prohibits the creation or production of nudity-oriented material involving a minor and (A)(3) prohibits the possession or viewing of that material. Each subsection has almost identical statutory exceptions. Identical language is underlined and similar language is italicized below:

2907.323(A)(1)	2907.323(A)(3)
No person shall photograph 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 both of the following apply:	No person shall possess or view any material or performance that shows a minor who is not the person’s child or ward in a state of nudity, unless one of the following applies:
(a) <u>The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance;</u>	(a) <u>The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance.</u>
(b) The minor’s <u>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.</u>	(b) The person knows that the <u>parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.</u>

C. Appellate courts have relied on the nearly identical exceptions in A(3) to inform the definition of nudity in (A)(1).

Most appellate courts, including the Second District, have held that “state of nudity” in R.C. 2907.323(A)(1) includes by definition lewdness or graphic focus on the genitals. See *State v. Videen*, 2d Dist. Montgomery No. 25183 2013-Ohio-1364 (finding one photograph was not lewd and reversed trial court), *State v. Bickel*, 5th Dist. Fairfield No. 13-CA-44, 2014-Ohio-1718 (holding that “state of nudity” includes by definition lewdness or graphic focus on genitals), *State v. Dolman*, 6th Dist. Williams No. WM-10-007, 2010-Ohio-5505 (holding that “state of nudity” includes by definition lewdness or graphic focus on genitals), *State v. Woods*, 9th Dist. Summit No. CA2008-05-045, 2009-Ohio-1168 (finding sufficient evidence of lewdness to uphold a conviction), *State v. Burrier*, 11th Dist. Geauga No. 98-G-2126, 2001-Ohio-4323 (finding sufficient evidence of lewdness to uphold a conviction), *State v. McDonald*, 12th Dist. Clermont No. CA2008-05-045, 2009-Ohio-1168 (finding sufficient evidence of lewdness to uphold a conviction).

Some appellate courts, including the Fourth District, have also held that lewdness or graphic focus on the genitals must be indicted and treated as an element of R.C. 2907.323(A)(1). *State v. Moss*, 1st Dist. Hamilton No. C-990631, 2000 Ohio App. LEXIS 1639 (April 14, 2000), *State v. Graves*, 184 Ohio App. 3d 39, 2009-Ohio-974, 919 N.E.2d 753 (4th Dist.).

D. This Court should similarly find that the appropriate definition of nudity in A(1) has the same limitation read into (A)(3) and as explained in *State v. Young*.

The nearly identical “proper purposes” exceptions set forth in R.C. 2907.323(A)(1)(a) and (b) should be similarly construed and limit the definition of nudity in both parts of the statute. In *Young*, this Court held that when the “proper purposes” exceptions set forth in R.C.

2907.323(A)(3)(a) and (b) are considered, the scope of the prohibited conduct narrows significantly. *State v. Young*, 37 Ohio St.3d at 251-252. Further, “the clear purpose of these exceptions” is to allow morally innocent possession or viewing of minors in nudity-oriented material. *Id.* at 252. The United States Supreme Court agreed and held “the statute is not unconstitutionally overbroad, since, in light of its specific exceptions, it must be read as only applying to depictions of nudity involving a lewd exhibition or graphic focus on the minor’s genitals.” *Osborne* at syllabus.

II. A person’s First Amendment rights must be the same when taking a morally innocent nude picture of another’s child as possessing that same picture.

Depictions of nudity, without more, even if the subject is a minor, are protected expression. *New York v. Farber*, 458 U.S. 747, 765, 102 S. Ct. 3348, 73 L.Ed.2d 113 (1982). This Court protected possession or viewing of such depictions of nude minors where that conduct is “morally innocent.” *Young* at 251-252. The focus of the analysis is not whether the criminalized use of minor in nudity-oriented material is conduct or speech, but whether the act was morally innocent or immoral.

Despite this, the lower court in the present case focused on whether R.C. 2907.323(A)(1) involved conduct or speech in order to distinguish between possession/viewing and creation/production of nudity-oriented material. *Martin* at ¶¶ 19-20. The court of appeals held that the possession/viewing of nudity-oriented material under R.C. 2907.323(A)(3) is significantly different from the creation/production of the same nudity-oriented material under R.C. 2907.323(A)(1). *Id.* And because creation/production “involves direct contact with a minor and creation of child nudity material,” it involves different State and personal interests and is not entitled to the same First Amendment protection as possession/viewing. *Id.* Thus, the court of appeals defined creation/production as conduct that does not implicate the same First

Amendment protections as possession/viewing. The lower court relied on the dissent in *Graves*, where the dissenting judge asked “[d]oes taking a nude picture of someone else’s child deserve the same level First Amendment protection as possession of that same picture?” and answered no. *Id.* at ¶ 19.

The answer, however, is yes. Just as there are morally innocent depictions of nude minors to possess and view, there are morally innocent depictions of nude minors to create and produce. It is morally innocent for a babysitter to take a picture of a child in the bathtub and to send it to friends or family. It is morally innocent for a preschool teacher to take a picture of a child finger-painting with her shirt off. It is morally innocent to photograph topless or bare-bottomed children at the beach.

The lower court offered hypotheticals in favor of its ruling: “With any other holding, the ‘photographing’ of a nude [presumed not obscene or lewd] 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.” *Id.* at ¶ 26. Yet a statute should not be interpreted to broadly criminalize conduct otherwise protected by the First Amendment because construing it with limitation might make some arguably indefensible conduct legal. The prospect of crime, by itself does not justify laws suppressing protected speech. *See Kingsley Int'l Pictures Corp. v. Regents of Univ. of N. Y.*, 360 U.S. 684, 689, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (1959).

If the purpose were to embarrass the minor, as in the first hypothetical, the conduct is outside what is intended to be punished by R.C. 2907.322, Ohio’s statutory criminalization of child pornography. Other criminal statutes are used to criminalize that kind of harassment such as prohibitions of telecommunications harassment and menacing by stalking. R.C. 2917.21 and

2903.211. The General Assembly has also responded to cyberbullying through enactment of the “Jessica Logan Act” that imposes several requirements on school districts to prevent bullying. 2012 Am.Sub.H.B. No. 116.

If the purpose were to sell the image to a child pornographer, as in the second hypothetical, the production of the nudity-oriented material still should not be criminalized based solely on its eventual use. An end-user’s potentially immoral use of a production cannot bar First Amendment protection. The government may not prohibit speech because it increases the chance an unlawful act will be committed “at some indefinite future time.” *Hess v. Indiana*, 414 U.S. 105, 108, 38 L.Ed.2d 303, 94 S.Ct. 326 (1973) (per curium). And even if such acts should be criminalized it is for the General Assembly, not this Court, to remedy by legislation.

III. Without narrowing the definition of nudity in R.C. 2907.323(A)(1), the statute is overbroad because it is not narrowly tailored to allow the production or creation of morally innocent depictions.

It is undeniable that protecting children is a legitimate, substantial government interest and child pornography can be criminalized to protect that interest. *Meadows*. But a statute that defines criminal conduct should not include what is constitutionally protected activity. *State v. Romage*, 138 Ohio St.3d 390, 2014-Ohio-783, 7 N.E.3d 1156. In *Romage*, this Court found Ohio’s child enticement statute was overbroad because it failed to require that solicitation, coaxing, enticing, or luring occur with the intent to commit any unlawful act and thus it criminalized association protected by the First Amendment. *Id.* at 394. This Court held that “a statute intended to promote legitimate goals that can be regularly and improperly applied to prohibit protected expression and activity is unconstitutionally overbroad.” *Id.* at 393. If otherwise, innocent scenarios where an adult “merely asks” a child if they need a ride home would be a crime.

Here also, constitutionally protected activity such as a babysitter taking a morally-innocent picture of a naked child would be a second-degree felony offense. The State may not suppress lawful speech as the means to suppress unlawful speech. “Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

Conclusion

This Court should find that R.C. 2907.323(A)(1) must be read with the same narrowed definition of nudity as construed by this Court in *Young* for R.C. 2907.323(A)(3) because they each have nearly identical statutory exceptions. A conviction for illegal creation or production of minor in oriented-material must be limited to immoral and not constitutionally protected conduct. Mr. Martin asks this court to reverse and remand his case to the trial court for the application of the narrowed definition of nudity.

Respectfully submitted,

/s/ Valerie Kunze

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Certificate of Service

I certify that a copy of this document was sent by regular U.S. mail to April Campbell, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, P.O. Box 972, Dayton, Ohio 45422-0972, this 23rd day of April, 2015.

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IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 2014-2028
	:	
v.	:	On appeal from the Montgomery
	:	County Court of Appeals,
Terry Lee Martin,	:	Second Appellate District
	:	Case No. 26033
Defendant-Appellant.	:	

Appendix to

Merit Brief of Appellant Terry Lee Martin

ORIGINAL

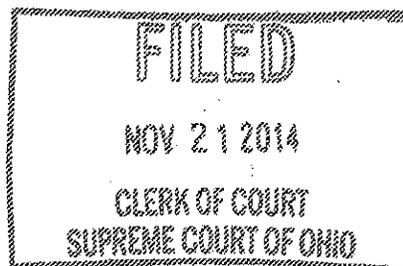
IN THE SUPREME COURT OF OHIO

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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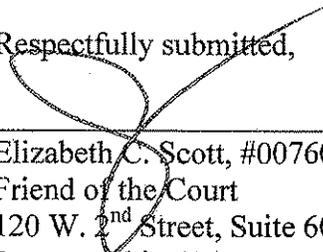


Notice of Certified Conflict of Appellant State of Ohio

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?"

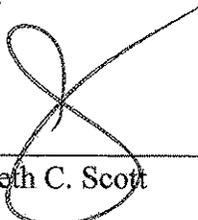
This case is one of public or great general interest.

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

FILED
COURT OF APPEALS

2014 NOV -4 PM 12: 05

GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
36

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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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 Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 22nd day of August, 2014.

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Attorney for Plaintiff-Appellee

ELIZABETH C. SCOTT, Atty. Reg. No. 0076045, 120 W. Second Street, Suite 603, Dayton, Ohio 45402
Attorney for Defendant-Appellant

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).

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.

{¶2} 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.

{¶3} 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.

{¶4} 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.

²Counts 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.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or other press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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Title 29: Crimes -- Procedure
Chapter 2903: Homicide and Assault
Stalking

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ORC Ann. 2903.211 (2014)

§ 2903.211 Menacing by stalking.

(A) (1) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person. In addition to any other basis for the other person's belief that the offender will cause physical harm to the other person or the other person's mental distress, the other person's belief or mental distress may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

(2) No person, through the use of any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, or computer system, shall post a message with purpose to urge or incite another to commit a violation of division (A)(1) of this section.

(3) No person, with a sexual motivation, shall violate division (A)(1) or (2) of this section.

(B) Whoever violates this section is guilty of menacing by stalking.

(1) Except as otherwise provided in divisions (B)(2) and (3) of this section, menacing by stalking is a misdemeanor of the first degree.

(2) Menacing by stalking is a felony of the fourth degree if any of the following applies:

(a) The offender previously has been convicted of or pleaded guilty to a violation of this section or a violation of *section 2911.211 of the Revised Code*.

(b) In committing the offense under division (A)(1), (2), or (3) of this section, the offender made a threat of physical harm to or against the victim, or as a result of an offense committed under division (A)(2) or (3) of this section, a third person induced by the offender's posted message made a threat of physical harm to or against the victim.

(c) In committing the offense under division (A)(1), (2), or (3) of this section, the offender trespassed on the land or premises where the victim lives, is employed, or attends school, or

as a result of an offense committed under division (A)(2) or (3) of this section, a third person induced by the offender's posted message trespassed on the land or premises where the victim lives, is employed, or attends school.

(d) The victim of the offense is a minor.

(e) The offender has a history of violence toward the victim or any other person or a history of other violent acts toward the victim or any other person.

(f) While committing the offense under division (A)(1) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(1) of this section, the offender had a deadly weapon on or about the offender's person or under the offender's control. Division (B)(2)(f) of this section does not apply in determining the penalty for a violation of division (A)(2) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(2) of this section.

(g) At the time of the commission of the offense, the offender was the subject of a protection order issued under *section 2903.213 or 2903.214 of the Revised Code*, regardless of whether the person to be protected under the order is the victim of the offense or another person.

(h) In committing the offense under division (A)(1), (2), or (3) of this section, the offender caused serious physical harm to the premises at which the victim resides, to the real property on which that premises is located, or to any personal property located on that premises, or, as a result of an offense committed under division (A)(2) of this section or an offense committed under division (A)(3) of this section based on a violation of division (A)(2) of this section, a third person induced by the offender's posted message caused serious physical harm to that premises, that real property, or any personal property on that premises.

(i) Prior to committing the offense, the offender had been determined to represent a substantial risk of physical harm to others as manifested by evidence of then-recent homicidal or other violent behavior, evidence of then-recent threats that placed another in reasonable fear of violent behavior and serious physical harm, or other evidence of then-present dangerousness.

(3) If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, menacing by stalking is either a felony of the fifth degree or, if the offender previously has been convicted of or pleaded guilty to an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

(C) *Section 2919.271 of the Revised Code* applies in relation to a defendant charged with a violation of this section.

(D) As used in this section:

(1) "Pattern of conduct" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents, or two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents, directed at one or more persons employed by or belonging to the same corporation, association, or other organization. Actions or incidents that prevent,

obstruct, or delay the performance by a public official, firefighter, rescuer, emergency medical services person, or emergency facility person of any authorized act within the public official's, firefighter's, rescuer's, emergency medical services person's, or emergency facility person's official capacity, or the posting of messages or receipt of information or data through the use of an electronic method of remotely transferring information, including, but not limited to, a computer, computer network, computer program, computer system, or telecommunications device, may constitute a "pattern of conduct."

(2) "Mental distress" means any of the following:

(a) Any mental illness or condition that involves some temporary substantial incapacity;

(b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

(3) "Emergency medical services person" is the singular of "emergency medical services personnel" as defined in *section 2133.21 of the Revised Code*.

(4) "Emergency facility person" is the singular of "emergency facility personnel" as defined in *section 2909.04 of the Revised Code*.

(5) "Public official" has the same meaning as in *section 2921.01 of the Revised Code*.

(6) "Computer," "computer network," "computer program," "computer system," and "telecommunications device" have the same meanings as in *section 2913.01 of the Revised Code*.

(7) "Post a message" means transferring, sending, posting, publishing, disseminating, or otherwise communicating, or attempting to transfer, send, post, publish, disseminate, or otherwise communicate, any message or information, whether truthful or untruthful, about an individual, and whether done under one's own name, under the name of another, or while impersonating another.

(8) "Third person" means, in relation to conduct as described in division (A)(2) of this section, an individual who is neither the offender nor the victim of the conduct.

(9) "Sexual motivation" has the same meaning as in *section 2971.01 of the Revised Code*.

(10) "Organization" includes an entity that is a governmental employer.

(E) The state does not need to prove in a prosecution under this section that a person requested or received psychiatric treatment, psychological treatment, or other mental health services in order to show that the person was caused mental distress as described in division (D)(2)(b) of this section.

(F) (1) This section does not apply to a person solely because the person provided access or connection to or from an electronic method of remotely transferring information not under that person's control, including having provided capabilities that are incidental to providing access or connection to or from the electronic method of remotely transferring the information, and that do not include the creation of the content of the material that is the subject of the access or connection. In addition, any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control shall not be liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any information that it believes is, or will be sent, in violation of this section.

(2) Division (F)(1) of this section does not create an affirmative duty for any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control to block the receipt or transmission through its service of any information that it believes is, or will be sent, in violation of this section except as otherwise provided by law.

(3) Division (F)(1) of this section does not apply to a person who conspires with a person actively involved in the creation or knowing distribution of material in violation of this section or who knowingly advertises the availability of material of that nature.

HISTORY: 144 v H 536 (Eff 11-5-92); 146 v S 2 (Eff 7-1-96); 147 v S 215 (Eff 3-30-99); 148 v H 137 (Eff 3-10-2000); 148 v H 202, § 3 (Eff 3-10-2000); 148 v H 412 (Eff 4-10-2001); 149 v S 40. Eff 1-25-2002; 150 v S 8, § 1, eff. 8-29-03; 150 v S 47, § 1, eff. 8-29-03; 152 v S 10, § 1, eff. 1-1-08; 2014 HB 129, § 1, eff. Sept. 17, 2014.

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Title 29: Crimes -- Procedure
 Chapter 2907: Sex Offenses
 In General

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ORC Ann. 2907.01 (2014)

§ 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:

(1) Its dominant appeal is to prurient interest;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HISTORY: 134 v H 511 (Eff 1-1-74); 136 v S 144 (Eff 8-27-75); 142 v H 51 (Eff 3-17-89); 143 v H 514 (Eff 1-1-91); 146 v H 445 (Eff 9-3-96); 147 v H 32 (Eff 3-10-98); 149 v S 9 (Eff 5-14-2002); 149 v H 8, Eff 8-5-2002; 149 v H 490, § 1, eff. 1-1-04; 151 v H 95, § 1, eff. 8-3-06; 151 v H 23, § 1, eff. 8-17-06; 152 v S 10, § 1, eff. 1-1-08.

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Title 29: Crimes -- Procedure
Chapter 2907: Sex Offenses
Obscenity

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ORC Ann. 2907.323 (2014)

§ 2907.323 Illegal use of minor in nudity-oriented material or performance.

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

(1) Photograph 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 both of the following apply:

(a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance;

(b) 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.

(2) Consent to the photographing of the person's minor child or ward, or photograph the person's minor child or ward, in a state of nudity or consent to the use of the person's minor child or ward in a state of nudity in any material or performance, or use or transfer a material or performance of that nature, unless the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance;

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

(B) Whoever violates this section is guilty of illegal use of a minor in a nudity-oriented material or performance. Whoever violates division (A)(1) or (2) of this section is guilty of a felony of the second degree. Except as otherwise provided in this division, whoever violates division (A)(3) of this section is guilty of a felony of the fifth degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section or *section 2907.321 or 2907.322 of the Revised Code*, illegal use of a minor in a nudity-oriented material or performance in violation of division (A)(3) of this section is a felony of the fourth degree. If the offender who violates division (A)(1) or (2) of this section 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 sentence the offender to a mandatory prison term as provided in division (B)(7) of *section 2929.14 of the Revised Code* and shall order the offender to make restitution as provided in division (B)(8) of *section 2929.18 of the Revised Code*.

HISTORY: 140 v H 44 (Eff 9-27-84); 140 v S 321 (Eff 4-9-85); 142 v H 51 (Eff 3-17-89); 146 v S 2. Eff 7-1-96; 152 v H 280, § 1, eff. 4-7-09; 2011 HB 86, § 1, eff. Sept. 30, 2011.

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Title 29: Crimes -- Procedure
Chapter 2917: Offenses Against the Public Peace
Harassment

Go to the Ohio Code Archive Directory

ORC Ann. 2917.21 (2014)

§ 2917.21 Telecommunications harassment.

(A) No person shall knowingly make or cause to be made a telecommunication, or knowingly permit a telecommunication to be made from a telecommunications device under the person's control, to another, if the caller does any of the following:

(1) Fails to identify the caller to the recipient of the telecommunication and makes the telecommunication with purpose to harass or abuse any person at the premises to which the telecommunication is made, whether or not actual communication takes place between the caller and a recipient;

(2) Describes, suggests, requests, or proposes that the caller, the recipient of the telecommunication, or any other person engage in sexual activity, and the recipient or another person at the premises to which the telecommunication is made has requested, in a previous telecommunication or in the immediate telecommunication, that the caller not make a telecommunication to the recipient or to the premises to which the telecommunication is made;

(3) During the telecommunication, violates *section 2903.21 of the Revised Code*;

(4) Knowingly states to the recipient of the telecommunication that the caller intends to cause damage to or destroy public or private property, and the recipient, any member of the recipient's family, or any other person who resides at the premises to which the telecommunication is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged;

(5) Knowingly makes the telecommunication to the recipient of the telecommunication, to another person at the premises to which the telecommunication is made, or to those premises, and the recipient or another person at those premises previously has told the caller not to make a telecommunication to those premises or to any persons at those premises.

(B) No person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person's control, with purpose to abuse, threaten, or harass another person.

(C) (1) Whoever violates this section is guilty of telecommunications harassment.

(2) A violation of division (A)(1), (2), (3), or (5) or (B) of this section is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense.

(3) Except as otherwise provided in division (C)(3) of this section, a violation of division (A)(4) of this section is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense. If a violation of division (A)(4) of this section results in economic harm of one thousand dollars or more but less than seven thousand five hundred dollars, telecommunications harassment is a felony of the fifth degree. If a violation of division (A)(4) of this section results in economic harm of seven thousand five hundred dollars or more but less than one hundred fifty thousand dollars, telecommunications harassment is a felony of the fourth degree. If a violation of division (A)(4) of this section results in economic harm of one hundred fifty thousand dollars or more, telecommunications harassment is a felony of the third degree.

(D) No cause of action may be asserted in any court of this state against any provider of a telecommunications service or information service, or against any officer, employee, or agent of a telecommunication service or information service, for any injury, death, or loss to person or property that allegedly arises out of the provider's, officer's, employee's, or agent's provision of information, facilities, or assistance in accordance with the terms of a court order that is issued in relation to the investigation or prosecution of an alleged violation of this section. A provider of a telecommunications service or information service, or an officer, employee, or agent of a telecommunications service or information service, is immune from any civil or criminal liability for injury, death, or loss to person or property that allegedly arises out of the provider's, officer's, employee's, or agent's provision of information, facilities, or assistance in accordance with the terms of a court order that is issued in relation to the investigation or prosecution of an alleged violation of this section.

(E) As used in this section:

(1) "Economic harm" means all direct, incidental, and consequential pecuniary harm suffered by a victim as a result of criminal conduct. "Economic harm" includes, but is not limited to, all of the following:

(a) All wages, salaries, or other compensation lost as a result of the criminal conduct;

(b) The cost of all wages, salaries, or other compensation paid to employees for time those employees are prevented from working as a result of the criminal conduct;

(c) The overhead costs incurred for the time that a business is shut down as a result of the criminal conduct;

(d) The loss of value to tangible or intangible property that was damaged as a result of the criminal conduct.

(2) "Caller" means the person described in division (A) of this section who makes or causes to be made a telecommunication or who permits a telecommunication to be made from a telecommunications device under that person's control.

(3) "Telecommunication" and "telecommunications device" have the same meanings as in *section 2913.01 of the Revised Code*.

(4) "Sexual activity" has the same meaning as in *section 2907.01 of the Revised Code*.

(F) Nothing in this section prohibits a person from making a telecommunication to a debtor that is in compliance with the "Fair Debt Collection Practices Act," *91 Stat. 874 (1977), 15 U.S.C. 1692*, as amended, or the "Telephone Consumer Protection Act," *105 Stat. 2395 (1991), 47 U.S.C. 227*, as amended.

HISTORY: 134 v H 511 (Eff 1-1-74); 138 v H 164 (Eff 4-9-81); 146 v S 2 (Eff 7-1-96); 147 v H 182 (Eff 10-1-97); 147 v S 215 (Eff 3-30-99); 147 v H 565. Eff 3-30-99; 153 v S 162, § 1, eff. 9-13-10; 2011 HB 86, § 1, eff. Sept. 30, 2011.

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Title 29: Crimes -- Procedure
Chapter 2923: Conspiracy, Attempt, and Complicity; Weapons Control; Corrupt Activity
Miscellaneous

Go to the Ohio Code Archive Directory

ORC Ann. 2923.24 (2014)

§ 2923.24 Possessing criminal tools.

(A) No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally.

(B) Each of the following constitutes prima-facie evidence of criminal purpose:

(1) Possession or control of any dangerous ordnance, or the materials or parts for making dangerous ordnance, in the absence of circumstances indicating the dangerous ordnance, materials, or parts are intended for legitimate use;

(2) Possession or control of any substance, device, instrument, or article designed or specially adapted for criminal use;

(3) Possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating the item is intended for criminal use.

(C) Whoever violates this section is guilty of possessing criminal tools. Except as otherwise provided in this division, possessing criminal tools is a misdemeanor of the first degree. If the circumstances indicate that the substance, device, instrument, or article involved in the offense was intended for use in the commission of a felony, possessing criminal tools is a felony of the fifth degree.

HISTORY: 134 v H 511 (Eff 1-1-74); 146 v S 2. Eff 7-1-96.

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