**[Cite as *State v. Arnold*, 2002-Ohio-4977.]**

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 02CA0002

vs. : T.C. CASE NO. 01CR407

JERRY ARNOLD : (Criminal Appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 20th day of September, 2002.

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GRADY, J.

**{¶1}** Defendant, Jerry Arnold, appeals from his conviction and sentence for illegal use of a minor in nudity oriented materials, pandering sexually oriented material involving a minor, and complicity to the illegal use of a minor in nudity oriented material.

**{¶2}** After the mother of an underage female reported to Springfield police that Defendant was taking sexually provocative photographs of her daughter and two other young girls, police

spoke with two of the females involved and then obtained a search warrant for Defendant's residence. Upon executing that search warrant police seized photographs of three underage females in various states of nudity. Police also seized several articles of women's clothing including lingerie, pornographic magazines and videos, a photo album containing photographs of Defendant in the nude engaging in sex acts with nude adult females, a vibrator, a Polaroid camera and film, and marijuana.

**{¶3}** Defendant was subsequently indicted on three counts of illegal use of a minor in nudity oriented material, R.C. 2907.323(A)(3), one count of pandering sexually oriented material involving a minor, R.C. 2907.322(A)(5), one count of complicity to the illegal use of a minor in nudity oriented material, R.C. 2923.03, R.C. 2907.323(A)(1), and three counts of attempted corruption of a minor with a specification that the offender is ten or more years older than the victim. R.C. 2923.02, R.C. 2907.04.

**{¶4}** This matter proceeded to a jury trial. At the trial all three underage females involved testified that Defendant had encouraged them to take nude photographs of one another after showing them pornographic magazines, videos and photo albums, and he gave the girls money and marijuana in exchange for the nude photographs. Defendant denied taking the nude photographs. Defendant claimed that although he allowed the young girls to come into his home to do various chores, he had no knowledge that they were taking nude photographs of each other.

**{¶5}** Pursuant to Defendant's motion for a directed verdict

of acquittal, the trial court dismissed the three counts of attempted corruption of a minor. The jury found Defendant guilty on all of the remaining charges. The trial court sentenced Defendant to concurrent prison terms totaling six years.

**{¶6}** Defendant has timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

**{¶7}** "THE COURT ERRED IN ALLOWING INTO EVIDENCE, EVIDENCE OF DEFENDANT'S OTHER CRIMES, WRONGS, OR ACTS.

**{¶8}** At the close of the State's case-in-chief, the trial court admitted into evidence over Defendant's objection State's Exhibit F, which consists of seven magazines entitled "Barely Legal" that police recovered from Defendant's home. These magazines depict young females in various states of nudity.

**{¶9}** State's Exhibit U is a photo album police recovered from Defendant's home. It contains photographs of Defendant in the nude with two nude adult females, engaging in sexual activity. Although the trial court did not permit this exhibit to go to the jury, the court nevertheless ruled, over Defendant's objection, that the prosecutor in his closing argument could make reference to these photographs, which the prosecutor did.

**{¶10}** Defendant argues that the use and introduction of State's Exhibits F and U at trial violated Evid.R. 404(B) because this inflammatory, prejudicial evidence of Defendant's bad character was used by the State to demonstrate that Defendant is the type of person who enjoys looking at photographs of nude

females, engaging in sexual activity, and thus he has the propensity to commit these types of offenses, including those charged in this case.

**{¶11}** Evid.R. 404(B) provides:

**{¶12}** "Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

**{¶13}** As a general rule, the State may not introduce in its case-in-chief evidence of a defendant's bad character for the purpose of proving that he acted in conformity with that bad character in committing the crime alleged. Evid.R. 404(A) and (B). This rule is grounded in constitutional considerations of due process and a fair trial. *State v. Savage* (Sept. 22, 2000), Clark App. No. 99CA19. Evidence probative of a person's character creates an inference of propensity, which is an inherent tendency to act in a certain way. *Id*. When the propensity involved demonstrates that a defendant may have committed the crime alleged because he has committed similar bad acts in the past, it is viewed as too speculative to be reasonable and fair. *State v. Jamison* (1990), 49 Ohio St.3d 182; *State v. Hawn* (June 30, 2000), Montgomery App. No. 17722. There are exceptions to this general rule, however.

**{¶14}** One such exception is codified in Evid.R. 404(B) which permits the State to offer evidence of a defendant's other

crimes, wrongs, or acts, notwithstanding the inference of propensity they might create, when that evidence is probative of motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident. However, before a defendant's other crimes, wrongs, or acts may be offered to prove any of those matters, it must genuinely be in issue. *State v. Smith* (1992), 84 Ohio App.3d 647; *Hawn, supra; Savage, supra*. Those matters become a fact in issue when stated or suggested by counsel's argument, or by evidence that's been introduced.

**{¶15}** The State asserts that it did not offer the pornographic magazines (State's Exhibit F) and photo album (State's Exhibit U) found in Defendant's home to prove Defendant's bad character to infer that he acted in conformity with that bad character in committing the crimes with which he was charged. Rather, the State claims it introduced the challenged evidence to prove certain matters which Evid.R. 404(B) permits: motive, preparation/plan, and the absence of mistake or accident.

**{¶16}** We reject the State's assertion that evidence of Defendant's other crimes, wrongs or acts was admissible to prove either motive or the absence of mistake or accident. Those matters were not in issue in this case. The State charged that the Defendant took the photographs. Defendant denied taking the photographs, at all. So, whether he had some motive for taking them or whether he took them by accident or mistake, were not matters put in issue by either party. We nevertheless agree with the State that the evidence was admissible to prove Defendant's

knowledge and his preparation or plan in committing these offenses.

**{¶17}** In his opening statement defense counsel set out for the jury what the defense would be in this case: that Defendant was not present when these three underage girls took nude photographs of one another, that Defendant neither suggested nor encouraged the girls to do that, and that Defendant had no knowledge the girls were engaging in this conduct. Clearly, Defendant's knowledge, or lack thereof, was a genuine matter in issue at this trial.

**{¶18}** Furthermore, the three underage females involved in this case testified at trial that Defendant suggested what he wanted them to do. For instance, they said that Defendant showed them the pornographic magazines, videos, and a photo album that depicted nude females, sometimes engaging in sexual activity, that the State offered in evidence. At times Defendant would point out particular poses that he liked. The girls viewed this pornography before they took nude photographs of one another, and the materials guided them in deciding what types of photographs they should take of each other. The girls attempted to mimic some of the poses depicted in the pornographic materials that Defendant had indicated he liked. Defendant's preparation or plan in committing these offenses was thus also put in issue at trial by the girl's testimony. Because Defendant's knowledge and preparation/plan were genuine facts in issue, the State was entitled to offer evidence of Defendant's other acts pursuant to Evid.R. 404(B) to prove those matters. *Savage, supra*.

**{¶19}** To the extent the evidence demonstrates that Defendant showed the pornographic magazines (State's Exhibit F) and the photo album (State's Exhibit U) to these underage females in order to prompt, entice, or encourage them to take nude photographs of one another, imitating the poses they saw depicted in the pornographic materials, that evidence was relevant, probative and admissible to prove Defendant's preparation or plan for committing the charged offenses. That same evidence was also admissible to prove that Defendant had knowledge of the activity, rebutting his claim that he had no knowledge the girls were engaged in such conduct. The trial court did not abuse its discretion in admitting this evidence.

**{¶20}** The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

**{¶21}** "THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE BY SENTENCING APPELLANT TO A TERM OF IMPRISONMENT OVER AND ABOVE THE STATUTORILY PRESCRIBED MINIMUM SENTENCE."

**{¶22}** Defendant argues that the trial court failed to make the findings required by R.C. 2929.14(B) in order to impose more than just the minimum sentence. The record before us refutes this contention.

**{¶23}** Pursuant to R.C. 2929.14(B), when a court imposes sentence for a felony upon an offender who has not previously served a prison term, the court must impose the shortest prison term authorized for the offense unless the court finds on the record that the shortest prison term will demean the seriousness

of the offender's conduct, or will not adequately protect the public from future crime by the offender. The trial court is not required to give its reasons for these findings. *State v. Edmonson,* 86 Ohio St.3d 324, 1999-Ohio-110.

**{¶24}** In this case the trial court made the findings that R.C. 2929.14(B) requires, both in open court at the time of sentencing and in its judgment/sentence entry. Thus, a sentence greater than the statutory minimum was permissible.

**{¶25}** The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

**{¶26}** "THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE BY FAILING TO ADVISE DEFENDANT AS TO POSSIBLE DEPORTATION AS REQUIRED BY REVISED CODE 2943.031."

**{¶27}** Defendant complains because the trial court failed to give him the advice about possible deportation consequences set forth in R.C. 2943.031(A). By its explicit terms, however, that provision only applies to cases where the trial court accepts a defendant's plea of guilty or no contest. The provision has no application when the defendant pleads not guilty and is found guilty following a jury trial, as Defendant was.

**{¶28}** The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

**{¶29}** "THE TRIAL COURT ERRED TO DEFENDANT'S PREJUDICE BY FAILING TO MAKE THE DETERMINATION AS REQUIRED BY REVISED CODE 2929.14(K)."

**{¶30}** Defendant complains because the trial court failed to

determine at the time of sentencing, as R.C. 2929.14(K) requires, whether he was eligible for either placement in a program of shock incarceration or an intensive program prison. The statute further provides, however, that if the trial court fails to make any eligibility assessment and recommendation, the Department of Rehabilitation and Correction shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited.

**{¶31}** Where, as here, the trial court does not make the eligibility determination that R.C. 2929.14(K) requires, the defendant may yet be screened for eligibility by the Department of Corrections after arriving at the prison. The availability of this alternative avoids any prejudice to Defendant in the trial court's failure to screen Defendant for eligibility, rendering any error in that regard harmless. *State v. Leonard Dixon* (Dec. 28, 2001), Clark App. No. 01CA17, 2001-Ohio-7075.

**{¶32}** The fourth assignment of error is overruled.

FIFTH ASSIGNMENT OF ERROR

**{¶33}** "THE TRIAL COURT ERRED TO DEFENDANT'S PREJUDICE BY FAILING TO IMPOSE THE REQUIREMENT SET FORTH IN REVISED CODE 2929.19(B)(3)(f)."

**{¶34}** Defendant complains because the trial court did not comply with R.C. 2929.19(B)(3)(f) which provides:

**{¶35}** "[I]f the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

**{¶36}** "Require that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in section 341.26, 753.33, or 5120.63 of the Revised Code, whichever is applicable to the offender who is serving a prison term, and require that the results of the drug test administered under any of those sections indicate that the offender did not ingest or was not injected with a drug of abuse."

**{¶37}** R.C. 5120.63 requires the Department of Rehabilitation and Correction to administer a statewide random drug testing program in state correctional institutions. The requirements which R.C. 2929.19(B)(3)(f) impose on the trial court were not intended to benefit a defendant, but to facilitate drug testing of prisoners in state institutions by discouraging defendants who are sentenced to prison from using drugs. Therefore, the trial court's failure to comply with this statutory requirement is harmless error because Defendant suffered no prejudice as a result.

**{¶38}** The fifth assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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