[Cite as *State v. Johnson*, 2011-Ohio-1133.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23508
vs.	:	T.C. CASE NO. 08CRB1951
EMARI JOHNSON	:	(Criminal Appeal From Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 11th day of March, 2011.

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GRADY, P.J.:

{¶ 1} Defendant, Emari Johnson, appeals from his conviction and sentence for criminal child enticement. R.C. 2905.05(B).

{¶ 2} In February 2008, D.W., a twelve year old girl, lived in Dayton, Ohio, with her parents and two brothers. D.W. attended

elementary school and typically was the last person to leave her home in the mornings, at around 9:00 a.m., to catch the school bus. The bus stop was located across the street from D.W.'s home.

{¶ 3} On the morning of February 11, 2008, as D.W. was walking to the bus stop to catch her school bus, Defendant yelled at D.W. from the front porch of his home. The front screen door of the house was closed but the inner door was open. Defendant was wearing a black T-shirt and no coat. Defendant motioned for D.W. to come to him and said, "come over here little girl," several times. D.W. became frightened and did not respond.

{¶ 4} D.W. used her cell phone to call her father, who told her to go home and lock the doors, which D.W. did. While D.W. was on the phone with her father, her school bus pulled up. D.W. told her father she wanted to get on her bus, which she did, while staying on the phone with her father. D.W.'s father then called D.W.'s mother, and they decided to call Dayton Police. D.W., her principal, and her parents met with Dayton Police Officers at D.W.'s school. D.W. told Officers Speelman and Malson what had happened, and described the suspect and his residence.

{¶ 5} Officers proceeded to Defendant's residence. When Officers knocked, Defendant answered the door wearing nothing but red, silky basketball shorts. Defendant appeared to be sexually aroused, and officers saw that a female, J. K., was sitting on

a couch. Officer Speelman informed Defendant that they were investigating a complaint that someone at his residence had tried to lure a twelve year old girl inside the house. Defendant stated he was unaware she was only twelve years old. Officers then arrested Defendant for criminal child enticement. Officers allowed Defendant to get dressed, and he put on a black T-shirt similar to the one D.W. described. Officer Speelman observed Defendant discard a condom in the trash.

{¶ 6} Detective Olinger created a photospread which he showed to D.W., on February 11, 2008. She immediately identified Defendant as the offender. After waiving his *Miranda* rights, Defendant spoke to Detective Olinger on that same date. Defendant said that he was trying to get D.W. to come inside his house because he wanted to have sex with her.

{¶ 7} On February 12, 2008, Defendant was charged by complaint in Dayton Municipal Court with two counts of criminal child enticement, one in violation of R.C. 2905.05(A) and the other in violation of R.C. 2905.05(B), both first degree misdemeanors. Defendant requested both competency and sanity evaluations, which the trial court ordered. After being found competent to stand trial, Defendant requested a second evaluation, which the trial court also granted.

{¶ 8} Meanwhile, on May 1, 2008, Defendant was indicted on one

count of felonious assault in an unrelated case. Defendant was found incompetent to stand trial on that felonious assault charge, and on May 22, 2008, the Common Pleas Court ordered Defendant transferred to Summit Behavioral Health Center in order to be restored to competency.

{¶ 9} In July 2008, Defendant was returned to the Montgomery County Jail, and on July 14, 2008, Defendant executed a written waiver of his speedy trial rights. After finding Defendant competent to stand trial on the criminal child enticement charges in August 2008, the trial court scheduled a jury trial for September 18, 2008. The State requested a continuance, which was granted. On September 16, 2008, Defendant withdrew his speedy trial waiver. The trial court rescheduled the jury trial for October 23, 2008.

{¶ 10} On September 26, 2008, Defendant filed a motion for discharge on the R.C. 2905.05(A) and (B) criminal child endangerment counts pursuant to R.C. 2945.73(C)(1). The State filed its response on October 22, 2008. On December 29, 2008, the trial court overruled Defendant's motion. On January 7, 2009, Defendant filed a second motion for discharge. The trial court overruled that motion on January 8, 2009. On that same date a jury trial commenced.

{¶ 11} The State dismissed the child enticement charge under

R.C. 2905.05(A) and proceeded to trial on the remaining charge under R.C. 2905.05(B). The jury found Defendant guilty. The trial court sentenced Defendant to one hundred and eighty days in the Montgomery County Jail, but gave Defendant credit for the entire one hundred and eighty day period Defendant had already served in pretrial confinement. The court also classified Defendant as a Tier I sex offender.

{¶ 12} Defendant appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 13} "THE TRIAL COURT ERRED TO THE APPELLANT'S/DEFENDANT'S PREJUDICE WHEN IT OVERRULING (SIC) APPELLANT'S/DEFENDANT'S MOTION TO DISMISS PURSUANT TO R.C. 2945.73(C)(1)."

{¶ 14} Defendant does not argue that his speedy trial rights were violated because he was not brought to trial within the time required by R.C. 2945.71 and 2945.72. Rather, Defendant claims that he should have been discharged pursuant to R.C. 2945.73(C)(1), which provides:

{¶ 15} "(C) Regardless of whether a longer time limit may be provided by sections 2945.71 and 2945.72 of the Revised Code, a person charged with misdemeanor shall be discharged if he is held in jail in lieu of bond awaiting trial on the pending charge:

{¶ 16} "(1) for a total period equal to the maximum term of

imprisonment which may be imposed for the most serious misdemeanor charged."

{¶ 17} Defendant was arrested and jailed on the two R.C. 2905.05 misdemeanor charges on February 11, 2008. The trial court set a ten thousand dollar cash or surety bond. Defendant was unable to post that bond and remained in jail. On May 1, 2008, Defendant was indicted on an unrelated felony charge of felonious assault. The Common Pleas Court set a twenty-five thousand dollar cash bond on the felonious assault charge. In May 2008 Defendant was found incompetent to stand trial on the felonious assault charge and was committed by the Common Pleas Court to Summit Behavioral Health Center to be restored to competency. On July 11, 2008, Defendant was returned to the Montgomery County Jail from Summit Behavioral Health Center.

{¶ 18} On July 17, 2008, the Common Pleas Court reduced Defendant's bond on the felonious assault charge to five thousand dollars cash. On September 18, 2008, the trial court granted Defendant's request to reduce and/or release his bond, and the court amended Defendant's bond to conditional own recognizance on the misdemeanor child enticement charges. Defendant was not released from jail, however, because he was also being held on the bond on the felonious assault charge. On September 26, 2008, Defendant entered a guilty plea to the felonious assault charge.

The Common Pleas Court then reduced Defendant's bond on the misdemeanor charges to personal recognizance and Defendant was released from jail.

{¶ 19} Defendant argues that he was held in jail in lieu of bail awaiting trial on these misdemeanor charges for a total period of two hundred and twenty-four days, from February 11, 2008, when he was arrested, to September 22, 2008, when his bond on those charges was withdrawn as a condition of his release. Because the maximum term of imprisonment that could be imposed for the most serious of these first degree misdemeanors is only one hundred and eighty days, R.C. 2905.05(D), 2929.24(A)(1), Defendant claims he was entitled to be discharged on the motions he filed, pursuant to R.C. 2945.73(C)(1).

{¶ 20} The trial court overruled Defendant's motion to dismiss pursuant to R.C. 2945.73(C)(1), finding that even including in its calculations the date of Defendant's arrest, February 11, 2008, and the date the trial court released its bond on these misdemeanor charges, September 18, 2008, Defendant was held in jail in lieu of bail awaiting trial on these misdemeanor charges for only one hundred and seventy-seven days, three days short of the one hundred and eighty day maximum allowable sentence, and accordingly he was not entitled to discharge pursuant to R.C. 2945.73(C)(1).

{¶ 21} The court noted that the time Defendant spent at Summit

Behavioral Health Center in connection with the unrelated felonious assault charge was not time Defendant was being held in jail in lieu of bail awaiting trial on the two misdemeanor criminal child enticement charges, and that time therefore does not count against the State for purposes of R.C. 2945.73 (C)(1). As a result, Defendant's incarceration at the mental health facility on the unrelated felonious assault charge should not be considered time that Defendant was incarcerated on these misdemeanor charges. The court further noted that after September 18, 2008, Defendant was being held in jail in lieu of bail only on the unrelated felony charge.

{¶ 22} In order to be entitled to discharge, R.C. 2945.73(C)(1) requires that Defendant be held in jail in lieu of bond awaiting trial on the pending charge for a total period equal to the maximum term of imprisonment which may be imposed for the most serious misdemeanor charged. The pivotal language in that statute, that Defendant be "held in jail in lieu of bond awaiting trial on the pending charge," has been construed in the context of the triple count provision, R.C. 2945.71(E), which employs nearly identical language, "held in jail in lieu of bail on the pending charge," to mean held in jail in lieu of bail solely on the pending charge. See: *State v. MacDonald* (1976), 48 Ohio St.2d 66, paragraph one of the Syllabus.

{¶ 23} Applying that interpretation to this case, on May 1, 2008, Defendant was indicted on an unrelated felony charge and was thereafter held pursuant to a twenty-five thousand dollar bond on that felony charge. At no time after May 1, 2008, was Defendant ever held in jail in lieu of bail solely on the pending misdemeanor charges. Even had Defendant posted the ten thousand dollar bond on the misdemeanor charges after May 1, 2008, he would have still remained in jail because of the bond on the unrelated felony charge. That is borne out by the fact that after the trial court amended Defendant's bond on the misdemeanor charges to an O.R. bond on September 18, 2008, Defendant remained in jail because he was being held on the bond on the unrelated felony charge.

{¶ 24} Defendant was held in jail in lieu of bail and awaiting trial solely on the pending misdemeanor charges from February 11, 2008 to May 1, 2008, a total of seventy-nine days. That is far short of the one hundred and eighty day maximum sentence permissible for the most serious misdemeanor charged. Defendant was not entitled to be discharged pursuant to R.C. 2945.73(C)(1), and the trial court properly overruled his motion to dismiss.

{¶ 25} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 26} "THE TRIAL COURT ERRED TO THE APPELLANT'S/DEFENDANT'S PREJUDICE IN EXCLUDING EXPERT TESTIMONY ON THE ISSUE OF RELIABILITY

AND CREDIBILITY OF STATEMENTS."

{¶ 27} Defendant argues that the trial court abused its discretion by excluding expert testimony by a psychologist, Dr. Mark Humbert, which Defendant proffered, concerning his diagnosis that Defendant suffers from paranoid schizophrenia and how that mental disease or defect might impact Defendant's ability to accurately recall and relate events and the reliability of statements he made to police. (T. 187-190). Relying upon *Crane v. Kentucky* (1986), 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636, Defendant argues that this expert evidence was relevant and admissible because it could assist the jury in evaluating the credibility and reliability of the confession Defendant made to Detective Olinger.

{¶ 28} The admission or exclusion of evidence rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. Sage* (1987), 31 Ohio St.3d 173.

{¶ 29} "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, 19 OBR 123, 126, 482 N.E.2d 1248, 1252. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or

arbitrary.

{¶ 30} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo,* would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc. V. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 31} Relevant evidence is defined in Evid.R. 401:

{¶ 32} "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

{¶ 33} The trial court excluded Dr. Humbert's proffered testimony on the basis that it goes to the voluntariness of Defendant's statements to police, which is a purely legal issue for the trial court alone to decide in the context of a motion to suppress, which Defendant did not file. T. 24. In *State v. Stringham*, Miami App. No. 2002CA9, 2003-Ohio-1100, this court recognized that *Crane* distinguishes the voluntariness of a confession from the reliability of that confession, which the trier of facts has a duty to determine. *Crane* recognized that a defendant's constitutional right to present a defense includes

the right to present competent, credible evidence that bears on the reliability of his confession. *Stringham*, at ¶28-32.

{¶ 34} Defendant sought to introduce expert testimony by Dr. Humbert on how Defendant's diagnosed mental defect, paranoid schizophrenia, might impact the reliability of the statements/confession he gave to police. That evidence would be used to assist the jury in assessing the reliability or credibility of Defendant's confession, not to challenge the voluntariness of Defendant's confession. Accordingly, the trial court erred when it excluded Dr. Humbert's proposed expert testimony solely because that evidence related to the voluntariness of Defendant's statements to police, which is instead a question of law for the trial court to decide before trial. *Stringham*, at ¶33-42.

{¶ 35} An appellate court may decide an issue on grounds different from those determined by the trial court, affirming the trial court in this process, so long as the evidentiary basis on which the court of appeals decides a legal issue was adduced before the trial court and made a part of that court's record. *State v. Peagler* (1996), 76 Ohio St.3d 496.

{¶ 36} Dr. Humbert testified by way of proffer that he examined Defendant on May 7 and June 30, 2008 (T. 224), and from those interviews arrived at "my diagnosis that he was suffering from a substantial disorder upon (sic) mood that was consistent with

a diagnosis from the DSM of a paranoid pschyzophrenia" (T. 226), which Dr. Humbert described as "a substantial disorder of thought and mood." (T. 232). Dr. Humbert testified that, therefore, "there would be questions about his reliability because his thinking is so fragmented and disjointed due to the pschyzophrenia." (T. 227). However, when asked whether he could determine whether Defendant was psychotic or suffering from any of these episodes in February of 2008, when Defendant made his statements to police, Dr. Humbert stated: "Not unless you saw him in February (of 2008) or unless he was seen professionally before that time." (T. 235).

{¶ 37} Defendant called Dr. Humbert to testify as an expert witness, and he was so designated by the court on the basis of his qualifications. (T. 223). Evid.R. 703 states:

{¶ 38} "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing."

{¶ 39} Facts or data perceived by an expert are those gathered through the witness's "firsthand perceptions." Weissenberger's Ohio Evidence Treatise (2010 Ed.) §703.1. Dr. Humbert's firsthand perceptions took place during his interviews of Defendant in May and June of 2008. Dr. Humbert disclaimed any knowledge of Defendant's condition in February of 2008, when Defendant made

his statements to police officers. Neither were any facts or data concerning Defendant's condition in February of 2008 in which Dr. Humbert could base an opinion otherwise admitted in evidence. Therefore, per Evid.R. 703, Dr. Humbert's opinion relevant to the reliability of the statement Defendant made to police in February was inadmissible if offered to demonstrate its unreliability, which is the purpose for which Defendant wished to offer that evidence.

{¶ 40} The trial court did not abuse its discretion in excluding Dr. Humbert's proposed expert testimony.

{¶ 41} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 42} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT OVER OBJECTION ADMITTED EVIDENCE RELATED TO MR. JOHNSON'S IMPLIED SEXUAL ACTIVITIES WITH [J. K.], A MINOR FEMALE WHO WAS NOT THE COMPLAINING WITNESS IN THIS CASE."

{¶ 43} Defendant argues that the trial court abused its discretion when it admitted, over his objection, irrelevant and unfairly prejudicial evidence relating to Defendant's implied sexual activity with another female, J. K., who was not the victim in this case, when that conduct occurred two hours after Defendant committed the instance offense.

{¶ 44} Prior to trial, Defendant filed a motion in limine asking that the State be prohibited from introducing irrelevant evidence

concerning (1) Defendant's activities with J. K., (2) Defendant's statements regarding J. K. (3) any prior similar conduct, and (4) any mention of the condom police found in Defendant's home. The trial court overruled the motion in part and sustained the motion in part. The court prohibited the State from introducing evidence regarding Defendant's statements about J. K., but allowed the State to present evidence regarding Defendant's activities with J. K. and the condom police found in Defendant's home. The court found that evidence is relevant and admissible to prove Defendant's sexual motivation in enticing D.W., which is an element of the offense charged under R.C. 2905.05(B). Accordingly, Officer Speelman testified at trial, over Defendant's objection, that when police went to Defendant's home to investigate this crime involving D.W., they found Defendant dressed only in a pair of red, silky basketball shorts. There was a large bulge in Defendant's groin area which appeared to be an erection. Defendant was not home alone but rather was in the company of a female, J. K. Officer Speelman observed Defendant discard a condom in the trash can.

{¶ 45} Defendant was charged with criminal child enticement in violation of R.C. 2905.05(B). In order to prove that offense, the State was required to prove that Defendant acted with a "sexual motivation." The State argues that Defendant's activity with J. K. was relevant and admissible, per Evid.R. 404(B), to prove

Defendant's motive in trying to lure D.W. into his home just two hours earlier.

{¶ 46} **Evid.R. 404(B) provides:**

{¶ 47} **"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 action 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."**

{¶ 48} **In *State v. Nucklos*, 171 Ohio App.3d 38, 2007-Ohio-1025, we observed:**

{¶ 49} **"{¶78} Evid.R. 404(B) and its companion statutory provision, R.C. 2945.59, are concerned with extrinsic acts. 'An extrinsic act is simply any act which is not part of the operative facts or episode of the case; i.e., it is "extrinsic" usually because of a separation of time, space, or both.' Weissenberger's Ohio Evidence Treatise (2006), Section 402.21. 'Generally, extrinsic acts may not be used to suggest that the accused has the propensity to act in a certain manner.' *State v. Crotts,* 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 18.**

{¶ 50} **"* * ***

{¶ 51} **"{¶84} Per the first sentence of the rule, '[e]vidence of the 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.' The provision extends the exclusionary principle of Evid.R. 404(A) to extrinsic evidence offered for a purpose that Evid.R. 404(A) prohibits. Thus, '[g]enerally, extrinsic acts may not be used to suggest that the accused has the propensity to act in a certain manner.' *State v. Crotts,* 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 18.

{¶ 52} "* * *

{¶ 53} "{¶ 89} It is fundamental to any of the matters in Evid.R. 404(B) and R.C. 2945.59 that in order for other-act evidence to be admissible to prove it, the matter must be relevant to a question 'at issue' in the litigation. *State v. Smith* (1992), 84 Ohio App.3d 647, 617 N.E.2d 1160. Because both the rule and statute codify an exception to the common law, they must be strictly construed against admissibility of other-act evidence. *State v. Burson* (1974), 38 Ohio St.2d 157, 67 O.O.2d 174, 311 N.E.2d 526.

{¶ 54} "{¶ 90} To be admissible, the other-act evidence must tend to show by substantial proof one or more of the things the rule or statute enumerates. *State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682. Such evidence is never admissible when its sole purpose is to establish that the defendant committed the act alleged in the indictment. *State v. Flonnory* (1972), 31 Ohio St.2d 124, 60 O.O.2d 95, 285 N.E.2d 726. Rather, the evidence must tend

to prove one or more of the matters in Evid.R. 404(B), which in turn is itself relevant to prove the criminal offenses alleged. *State v. Crotts*."

{¶ 55} Where an extrinsic act is used to establish motive, the act should demonstrate that the accused possesses a specific reason to commit the crime alleged. Eq., *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266. Extrinsic act evidence of motive may be admissible in cases in which it is highly probative. *State v. Wilson*, 74 Ohio St.3d 381. 1996-Ohio-103.

{¶ 56} The fact that, two hours after he had asked D.W., a twelve-year old girl, to "come here, little girl," while standing on the porch of his house, Defendant was found inside the house with another young female and in a state of sexual arousal, is probative of the allegation that Defendant acted with a sexual motivation in his encounter with D.W. Any dissimilarities in the two episodes goes to the weight of the other act evidence admitted, not its admissibility. Further, Officer Olinger testified that Defendant admitted to him that "I'm horny and . . . wanted to have sex with that girl." (T. 152). The circumstances in which Defendant was found with J. K. corroborates Defendant's admission of the sexual motivation or violation of R.C. 2905.05(B) requires.

{¶ 57} Defendant's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 58} "THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION FOR CRIMINAL CHILD ENTICEMENT."

{¶ 59} Defendant argues that his conviction for criminal child enticement in violation of R.C. 2905.05(B) is not supported by legally sufficient evidence.

{¶ 60} A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins,* (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 61} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶ 62} R.C. 2905.05, criminal child enticement, states:

{¶ 63} "(A) No person, by any means and without privilege to

do so, shall knowingly solicit, coax, entice, or lure any child under fourteen years of age to accompany the person in any manner, including entering into any vehicle or onto any vessel, whether or not the offender knows the age of the child, if both of the following apply:

{¶ 64} "(1) The actor does not have the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity.

{¶ 65} "(2) The actor is not a law enforcement officer, medic, firefighter, or other person who regularly provides emergency services, and is not an employee or agent of, or a volunteer acting under the direction of, any board of education, or the actor is any of such persons, but, at the time the actor undertakes the activity, the actor is not acting within the scope of the actor's lawful duties in that capacity.

{¶ 66} "(B) No person, with a sexual motivation, shall violate division (A) of this section.

{¶ 67} "(C) It is an affirmative defense to a charge under division (A) of this section that the actor undertook the activity in response to a bona fide emergency situation or that the actor undertook the activity in a reasonable belief that it was necessary to preserve the health, safety, or welfare of the child.

{¶ 68} "(D) Whoever violates this section is guilty of criminal

child enticement, a misdemeanor of the first degree. If the offender previously has been convicted of a violation of this section, section 2907.02 or 2907.03 or former section 2907.12 of the Revised Code, or section 2905.01 or 2907.05 of the Revised Code when the victim of that prior offense was under seventeen years of age at the time of the offense, criminal child enticement is a felony of the fifth degree.

{¶ 69} "(E) As used in this section:

{¶ 70} "(1) 'Sexual motivation' has the same meaning as in section 2971.01 of the Revised Code.

{¶ 71} "(2) 'Vehicle' has the same meaning as in section 4501.01 of the Revised Code.

{¶ 72} "(3) 'Vessel' has the same meaning as in section 1547.01 of the Revised Code."

{¶ 73} Defendant was convicted of a violation of R.C. 2905.05(B), in that he engaged in conduct in violation of division (A) of that section while acting with a sexual motivation. R.C. 2971.01(J) states: "'Sexual motivation' means a purpose to gratify the sexual needs of the offender."

{¶ 74} Defendant does not argue that the State's evidence, which includes Defendant's admissions to Detective Olinger, was insufficient to prove that he acted with a sexual motivation per R.C. 2905.05(B) when he called to D.W. from his front porch.

Rather, Defendant argues that the State's evidence was insufficient to prove a violation of R.C. 2905.05(A), that he knowingly solicited D.W. to accompany him.

{¶ 75} Knowingly is defined in R.C. 2901.22(B):

{¶ 76} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 77} Prior to April 9, 2001, R.C. 2905.05(A) provided: "No person, by means and without privilege to do so, shall knowingly solicit, coax, entice, or lure any child under fourteen years of age to enter into any vehicle . . ." That version of the statue contained no sexual motivation element.

{¶ 78} Effective April 9, 2001, R.C. 2905.05(A) was amended to provide: "No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice, or lure any child under fourteen years of age <u>to accompany the person in any manner, including entering into any vehicle . . .</u>" (Emphasis supplied.)

{¶ 79} Effective April 11, 2005, R.C. 2905.05(A) was amended to provide: "No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice, or lure any child under fourteen years of age to accompany the person in any manner,

including entering into any vehicle or onto any vessel . . ." (Emphasis supplied.)

{¶ 80} Effective January 1, 2008, R.C. 2905.05 was amended to add current division (B), which provides: "No person, with a sexual motivation, shall violate division (A) of this section." That amendment corrected the defect in prior version of R.C. 2905.05, which we have held rendered that section unconstitutional for being overly broad because "[t]he potential applications of R.C. 2905.05(A) to entirely innocent solicitations are endless, largely because the statute fails to require the solicitor to have any illicit intent and fails to distinguish between solicitations made by other children and adults." *State v. Chapple*, 175 Ohio App.3d 658, 2008-Ohio-1157, ¶18.

{¶ 81} Defendant relies on two cases that were decided prior to the most recent amendment adding the sexual motivation element in R.C. 2905.05. In *State v. Clark*, Hamilton App. No. C-040329, 2005-Ohio-1324, the defendant several times told a thirteen year old girl she was pretty and "threw kisses" at her. He also told the girl several times to "come here." The defendant was working at a hair salon when he did that. The First District held that the defendant's conduct was insufficient to show that he intended to lure the girl away with him. The court contrasted the facts of that case with an earlier case, *State v. Goerner* (Nov. 26, 1999),

Hamilton App. Nos. C-990206, C-990207, C-990208, in which the defendant drove two girls to a store in his vehicle.

{¶ 82} Defendant also relies on *State v. Carle*, Ashtabula App. No. 2007-A-0008, 2007-Ohio-5376. In that case the defendant approached the victim, who was on foot, in his van and asked "if she needed a ride and if she needed help with anything." *Id.*, at ¶4. The victim ran off. Relying on *Clark*, the defendant argued that a more overt act was necessary to show that he violated R.C. 2905.05(A). That argument was rejected by the Eleventh District, which reasoned that the defendant "attempted to induce (the victim) to enter his vehicle" when "[t]here were no circumstances to support a reasonable belief that (the victim) was in need of any help." *Id.*, at ¶22, 23.

{¶ 83} We addressed the same issue more recently in *State v. Brown*, 183 Ohio App.3d 643, 2009-Ohio-4314. In that case the defendant twice approached an eleven year old girl as she was walking home. On the first occasion, the defendant stopped his car and asked the girl if she would help him find his dog. The girl refused. On the second occasion the defendant was also on foot. He approached the same girl and asked if she would help him find his ring. She again said "no," and ran home. The defendant was subsequently charged with a violation of R.C. 2905.05(B), in that he violated division (A) of that section with

a sexual motivation, when, on the second occasion, he asked the victim to help him find his ring.

{¶ 84} On appeal, Brown challenged the sufficiency of the State's evidence, relying on the holding in *Clark* to argue that to "solicit" another to accompany the offender in violation of R.C. 2905.05(A) requires more than just asking. We rejected that argument, holding "that the word 'solicit' encompasses merely asking." *Id.*, at ¶11. We also noted that inasmuch as Brown was not on his hands and knees searching for his ring when he made the request, "the search was more than likely to take place elsewhere, requiring (the victim) to accompany Brown." *Id.*, at ¶21. That inference was consistent with the intention behind the child enticement statute "to prevent child abductions or the commission of lewd acts with children." *Id.*, at ¶12, quoting *Chapple*, at ¶17.

{¶ 85} Addition of the sexual motivation element in R.C. 2905.05(B) cured the unconstitutionality of former R.C. 2905.05 by specifying an illicit purpose for the conduct that section prohibited. The circumstances which demonstrate the illicit purpose permit inferences to be drawn regarding an accused's conduct that inform the findings required by R.C. 2905.05(A), as we recognized in *Brown*.

{¶ 86} Unlike in *Brown*, where both solicitation to accompany

the perpetrator and a sexual motivation were inferred from the request he made, in the present case there is direct evidence of both. Defendant's admission to Detective Olinger that he engaged in that conduct with a purpose to gratify his sexual needs, R.C. 2971.01(J), is sufficient to permit a finding of sexual motivation in violation of R.C. 2905.05(B). Accompany means "to go with or attend as an associate or companion." Webster's Third New International Dictionary. Evidence that Defendant called out to D.W. to "come here, little girl" is sufficient to permit a finding that Defendant knowingly asked D.W. to attend him as an associate or companion and therefore to "accompany" him in violation of R.C. 2905.05(A). The prior finding of an illicit purpose avoids the criminalization of entirely innocent conduct that a violation of R.C. 2905.05(A) might otherwise permit. *Chapple*.

{¶ 87} Defendant's fourth assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, J., concurs.

FAIN, J., dissents.

FAIN, J., dissenting:

{¶ 88} I would sustain Johnson's Fourth Assignment of Error, and reverse his conviction. I reach this result reluctantly, because Johnson's vile purposes are evident in this case. But

the offense for which he has been convicted requires both an intent to commit an act, and the commission of the act, itself.

{¶ 89} **Johnson was alleged to have knowingly solicited his victim, a girl under the age of fourteen, "to accompany [him] in any manner." R.C. 2905.05(A). I am not persuaded that a mere request to an under-age person to "come here," without more, constitutes a request to accompany the solicitor. Again, and I want to make this as clear as possible, I have no doubt that Johnson uttered his request to the victim to "come here," with the purpose to then ask her to come into his house, in order that he might have sexual relations with her. Possibly, he was guilty of an attempt to commit a violation of R.C. 2905.05(B), since his request to "come here" was an overt act in his plan to violate the statute.**

{¶ 90} **In order to convict Johnson, the State was required to prove two things: first, that Johnson solicited his victim to accompany him; and second, that he had a sexual motivation for having done so. In other words, the State was required to prove both an act – a solicitation to an under-age child to accompany Johnson – and an underlying motivation. The underlying motivation, alone, is insufficient without the act.**

{¶ 91} **I do not construe the verb "to accompany," in R.C. 2905.05, so broadly as to include a mere request to "come here," without more. That is an expansive construction, and criminal**

statutes are to be construed strictly against the State. R.C. 2901.04(A).

{¶ 92} "To accompany" is defined in Webster's Third New International Dictionary, at 12:

{¶ 93} "1 : to go with or attend as an associate or companion : go along with <will you do me the honor to ~ me home for supper? - Laura Krey> <servants came to ~ us to the nobleman's house - Heinrich Harrer>"

{¶ 94} The mere request to "come here" is not a request to go with or to go along with. In my view, it would be an expansive interpretation of "to attend as an associate or companion" to include within its scope the act of simply coming to where another person is, at that person's request. Johnson's victim was not being asked to be his associate or companion (although such a request would most likely have soon followed) when she was asked to "come here."

{¶ 95} It might well be argued that an expansive definition of "to accompany" in the context of R.C. 2905.05 does no real harm, since, as a result of *State v. Chapple*, 175 Ohio App.3d 658, 2008-Ohio-1157, a person cannot be convicted merely for violating division (A) of the statute, unless division (B), which requires a sexual motivation, is also violated. But not every sexual motivation is worthy of criminalization.

{¶ 96} Suppose that a twenty-year-old man sees a female, unknown to him, in the far distance, make sexually suggestive gestures toward him. The man shouts to the female, "come here and do that." The man's purpose in shouting to the female is to seek to gratify himself sexually with her. As the female approaches, the man can see that it is possible, even likely, that she is under the age of fourteen. (In fact, she is under the age of fourteen.) The man says to the girl, "never mind, go home to your momma," turns, and leaves. As I understand our holding in this case, he has violated R.C. 2905.05(B), because he solicited a person under the age of fourteen to "come here," which constitutes a solicitation to accompany him, and he did it with a sexual motivation. Upon conviction, he will be guilty of a first-degree misdemeanor, and will be subject to sexual offender registration requirements as a Tier I offender. I doubt that this result was intended by the General Assembly in its enactment of R.C. 2905.05, especially since one of the purposes of the man in asking the female to "come here" may have been to see whether she is clearly of age.

{¶ 97} I would adopt a less expansive construction of R.C. 2905.05(A), under which a violation requires proof that the defendant solicited an under-age person not merely to "come here," but to come with the defendant, or to go with the defendant, to

some other place.[1]

{¶ 98} **Next, I must distinguish *State v. Brown*, 183 Ohio App.3d 643, 2009-Ohio-4314, a task made difficult, but not impossible, by some loose language in that opinion. To begin with, in that case, as in the case before us, the issue of the defendant's sexual motivation for his act was not a problem. ("We note that Brown does not raise any issues regarding his motivation." Id., ¶ 21.)**

{¶ 99} **The defendant in *Brown* asked his under-age victim if she "would help him find a ring." The essence of our holding in *State v. Brown*, supra, is set forth in the last substantive paragraph:**

{¶ 100} **"Brown was walking toward her before he approached and asked her to help him find a ring. As he was not on his hands and knees searching, the search was more than likely to take place elsewhere, requiring A.A. to accompany Brown. The evidence, therefore, is sufficient to prove that Brown violated the statute by soliciting A.A. to accompany him." Id., ¶ 21.**

{¶ 101} **In the context in which the solicitation in *Brown* was uttered, it was more than a solicitation to the victim to "come**

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[1]**Unless, of course, the request is to enter into a vehicle or onto a vessel, which are separately proscribed solicitations under R.C. 2905.05. The General Assembly might wish to consider adding a solicitation to a child under fourteen to come onto the solicitor's residential property, or into the solicitor's residence, as an additional proscription.**

here"; it was a solicitation to come with the solicitor on a search for the ring; i.e., to accompany the solicitor on a search for the ring. The utterance itself, as opposed to the motivation for the utterance, would be construed by the victim as a request to accompany the speaker on a search for the missing ring.

{¶ 102} In the case before us, Johnson merely requested his victim to "come here." Of course, given the evidence in the record of Johnson's underlying purpose in making this request, his victim is to be commended for having intuited that he was dangerous, and taking steps to protect herself.

{¶ 103} Because it is clear from this record that Johnson's purpose was to take sexual advantage of his under-age victim, I take no comfort in reaching the conclusion that his Fourth Assignment of Error should be sustained, and his conviction reversed. But I am unwilling to adopt a broad construction of "to accompany," as that verb is used in this statute, just so that this defendant can receive his just desserts.

{¶ 104} I concur with Judge Grady's opinion for this court in its disposition of Johnson's First and Third Assignments of Error. In view of my conclusion with respect to Johnson's Fourth Assignment of Error, I find it unnecessary to consider his Second Assignment of Error, which involves a close question requiring a careful examination of Johnson's proffer of Dr. Humbert's

testimony.

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