

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SENECA COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 13-14-39

v.

WILLIAM A. PRITT,

OPINION

DEFENDANT-APPELLANT.

Appeal from Seneca County Common Pleas Court
Trial Court No. 14CR0073

Judgment Affirmed

Date of Decision: June 8, 2015

APPEARANCES:

Gene P. Murray for Appellant

Brian O. Boos for Appellee

PRESTON, J.

{¶1} Defendant-appellant, William A. Pritt (“Pritt”), appeals the October 28, 2014 judgment entry of sentence of the Seneca County Court of Common Pleas. For the reasons that follow, we affirm.

{¶2} This case stems from a July 21, 2013 incident in which Pritt placed a video camera in the heater vent of the bathroom of his house, recorded his 13-year-old daughter, A.P., using the toilet and preparing to shower, and transferred the recording to his computer. (Feb. 4, 2014 Tr. at 103). On March 19, 2014, the Seneca County Grand Jury indicted Pritt on two counts: Count One of “illegal use of a minor in a nudity-oriented material or performance” in violation of R.C. 2907.323(A)(2), (B), a second-degree felony, and Count Two of voyeurism in violation of R.C. 2907.08(C), (E)(5), a fifth-degree felony. (Doc. No. 1).

{¶3} On April 4, 2014, Pritt appeared for arraignment and entered pleas of not guilty. (Doc. No. 10).

{¶4} On August 18, 2014, the State filed a motion to dismiss Count Two of the indictment. (Doc. No. 27). On August 19, 2014, the State filed a motion to amend Count One of the indictment to change the statement “On or about the 25th day of August, 2013” to “On or about the 21st day of July, 2013.” (Doc. No. 29).

The trial court granted the State's motions on August 19, 2014. (Doc. Nos. 30, 31).

{¶5} On August 26, 2014, Pritt filed "Defendant's Request for Jury Instruction Regarding Affirmative Defense." (Doc. No. 32).

{¶6} On August 25-26, 2014, a jury trial was held. (Aug. 25, 2014 Tr., Vol. I, at 1). The jury found Pritt guilty of Count One—the only remaining count—on August 26, 2014. (Aug. 26, 2014 Tr., Vol. II, at 356); (Doc. Nos. 33, 35). The jury further found that Pritt "did not prove, by a preponderance of the evidence, the affirmative defense of bona fide purpose." (Aug. 26, 2014 Tr., Vol. II, at 356); (Doc. Nos. 34, 35). On October 27, 2014, the trial court sentenced Pritt to five years in prison. (Doc. No. 37).

{¶7} The trial court filed its sentencing entry on October 28, 2014, and Pritt filed his notice of appeal on December 1, 2014. (Doc. Nos. 37, 39). He raises one assignment of error for our review.

Assignment of Error

In an Abuse of its Discretion, the Trial Court Reversibly Erred by Proactively Ruling that the Defense was Prohibited, Ab Initio, Under Court Order, and Under Warning of Contempt of Court Sanctions, that Defendant Pritt Could Not, and Therefore, Would Not Under Any Circumstances, Way, Shape, or Form, Raise in his Defense that the Video Recording of the Minor Child was Not for the Purpose of Sexual Gratification, and More Pointedly, that the Trial Court Would Not Allow Any Evidence in Pursuit of the Affirmative Defense, that the Video Recording was Not Initiated or Otherwise Not Motivated By a Desire for

the Sexual Gratification of Defendant Pritt, Thereby Effectually Negating the Affirmative Defense of Defendant Pritt, so Rendering it Impossible for Him to Meet His Burden to Present the Required Preponderant Threshold Evidence that His Conduct was Intended for a Bonafied [sic] Purpose that was Morally Innocent, and Therefore Denying Defendant Pritt of His Fundamental Sixth Amendment to the Constitution of the United States, Applicable to the States Through the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and Also Applicable to Defendant Pritt Under His Substantial and Fundamental Right to a Fair Trial as Guaranteed by Article I, Section 10 of the Constitution of the State of Ohio.

{¶8} In his assignment of error, Pritt argues that the trial court abused its discretion by excluding evidence that he did not video A.P. for the purpose of sexual gratification.

{¶9} Generally, the admission or exclusion of evidence lies within the trial court's discretion, and a reviewing court should not reverse absent an abuse of discretion and material prejudice. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 62, citing *State v. Issa*, 93 Ohio St.3d 49, 64 (2001). An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶10} R.C. 2907.323 sets forth the offense of the illegal use of a minor in nudity-oriented material or performance and provides: "No person shall * * * photograph the person's minor child * * * in a state of nudity * * * in any material

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or performance[.]” R.C. 2907.323(A)(2). The statute contains an exception for a proper person using the material for a proper purpose:

[It is not an offense if] 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.

Id.

{¶11} The “proper-purpose” exception is an affirmative defense within the meaning of R.C. 2901.05(C)(2). *See State v. Young*, 37 Ohio St.3d 249 (1988), paragraph four of the syllabus, *rev’d on other grounds sub nom. Osborne v. Ohio*, 495 U.S. 103 (1990). Therefore, under the proper-purpose exception, the defendant must demonstrate by a preponderance of the evidence that he or she is a proper person and is using the material for a proper purpose.

{¶12} Pritt argues that the trial court abused its discretion in prohibiting him from introducing evidence “that he was not motivated by a desire for sexual gratification, when he has [sic] the burden of proving that he had a bonafied [sic]

purpose in placing the camera in the vent of a bathroom.” (Appellant’s Brief at 9). In particular, Pritt argues that the State must prove that “the motive for committing this particular sex offense * * * is for sexual gratification” and that the trial court abused its discretion in prohibiting him from presenting evidence that he was not motivated by sexual gratification in support of his affirmative defense. (*Id.* at 9-10).

{¶13} First, Pritt’s argument that the State was required to prove that his motive for committing the underlying sex offense was for sexual gratification is meritless. Sexual-gratification motive is not an element of R.C. 2907.323(A)(2). Indeed, Pritt’s argument would insert an element into the offense that was not intended by the legislature.

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.

State v. Martin, 2d Dist. Montgomery No. 26033, 2014-Ohio-3640, ¶ 26. Therefore, there is no requirement that the State prove Pritt was motivated by sexual gratification in video recording A.P.

{¶14} Also baseless is Pritt’s argument that the trial court improperly prevented him from presenting evidence that he was not motivated by sexual gratification to establish his affirmative defense. The proper-purpose exception to R.C. 2907.323(A)(2) excuses or justifies the possession of otherwise outlawed materials under certain circumstances. *See Young*, 37 Ohio St.3d at 255. Considering the legislature’s purpose in enacting R.C. 2907.323, a defendant’s sexual-gratification motive is not a proper purpose under R.C. 2907.323(A)(2)’s proper-purpose exception. *See Martin* at ¶ 26 (“With any other holding, the ‘photographing’ of a nude 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.”). Moreover, the trial court did not prevent Pritt from introducing evidence of a proper purpose in support of his affirmative defense. Namely, in support of his affirmative defense, Pritt introduced evidence that he put the video camera in the bathroom because of his concern for A.P.—that is, he was concerned that A.P. was using drugs, stealing Pritt’s cancer medications, cutting herself, and bringing her boyfriends to the house. (*See, e.g.,*

Aug. 26, 2014 Tr. at 268-269, 324-327). Accordingly, the trial court did not abuse its discretion in prohibiting Pritt from introducing evidence that his lack of sexual-gratification motive was a proper purpose for video recording A.P.

{¶15} Pritt further argues that the trial court violated “his right to a fair and impartial jury trial, as guaranteed by the Sixth Amendment to the Constitution of the United States, applicable to the states through the due process clause of the Fourteenth Amendment to the United States Constitution, and also guaranteed by Article I, Section 10 of the Constitution of the State of Ohio” by excluding sexual-gratification evidence. However, the “[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state’s orderly procedure, and therefore need not be heard for the first time on appeal.” *State v. Awan*, 22 Ohio St.3d 120 (1986), syllabus. Pritt did not raise his constitutional argument at trial. Therefore, Pritt waived this argument, and we decline to address it. *See State v. Bagley*, 3d Dist. Allen No. 1-13-31, 2014-Ohio-1787, ¶ 71, citing *State v. Rowland*, 3d Dist. Hancock No. 5-01-28, 2002 WL 479163, *1 (Mar. 29, 2002).

{¶16} Thus, the trial court did not abuse its discretion in excluding evidence that Pritt did not video A.P. for the purpose of sexual gratification. Pritt’s assignment of error is overruled.

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{¶17} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

SHAW and WILLAMOWSKI, J.J., concur.

/jlr