[Cite as *State v. Girard*, 2003-Ohio-7178.]

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

ROCHE A. GIRARD

Appellant
C.A. No. 02CA0057-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 01-CR-0343

DECISION AND JOURNAL ENTRY

Dated: December 31, 2003

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Per Curiam.

{¶1} Defendant-Appellant Roche Girard has appealed from a decision of the Medina County Court of Common Pleas that convicted him of pandering obscenity involving a minor and possessing criminal tools. This Court affirms.

I

{¶2} On August 29, 2001, Appellant was indicted by the Medina County Grand Jury on one count of pandering obscenity involving a minor, in violation of R.C. 2907.321(A)(5); and one count of possessing criminal tools, in violation of R.C. 2923.24(A). Appellant entered a plea of not guilty, and the matter proceeded to a jury trial. On May 30, 2002, Appellant was found guilty on each count as charged in the indictment. Appellant was sentenced to six months imprisonment on each count, to be served concurrently. The trial court thereafter found Appellant to be a sexually oriented offender.

{¶3} Appellant has timely appealed, asserting two assignments of error. We have rearranged the assignments of error to facilitate review.

II

Assignment of Error Number Two

> "APPELLANT'S CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶4} In Appellant's second assignment of error, he has argued that there was insufficient evidence presented at trial from which the jury could find him guilty of the crimes as charged. He has further contended that his convictions were against the manifest weight of the evidence. We disagree.

{¶5} As an initial matter, this Court notes that the sufficiency and manifest weight of the evidence are legally distinct issues. *State v. Manges*, 9th Dist. No. 01CA007850, 2002-Ohio-3193, at ¶22, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency tests whether the prosecution has met its burden of production at trial, whereas a manifest weight challenge questions whether the prosecution has met its burden of persuasion. *Manges*, supra at ¶25. In reviewing whether a conviction is against the manifest weight of the evidence, this Court must:

> "[R]eview the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶6} Weight of the evidence concerns the tendency of a greater amount of credible evidence to support one side of the issue more than the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that it was against the manifest weight of the evidence, an appellate court sits as a "thirteenth juror," and disagrees with the factfinder's resolution of the conflicting testimony. Id. This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *Otten*, 33 Ohio App.3d at 340.

{¶7} This Court is not required, however, to address Appellant's argument that there was insufficient evidence to submit the matter to the jury because we have previously held that a

> "defendant who is tried before a jury and brings a Crim.R 29(A) motion for acquittal at the close of the state's case waives any error in the denial of the motion if the defendant puts on a defense and fails to renew the motion for acquittal at the close of all the evidence." *State v. Jaynes*, 9th Dist. No. 20937, 2002-Ohio-4527, at ¶7, quoting *State v. Miley* (1996), 114 Ohio App.3d 738, 742.

{¶8} Appellant brought a Crim.R. 29 motion at the close of the state's evidence, however, he failed to renew the motion at the close of all the evidence. As such, we conclude that Appellant waived any objection under Crim.R. 29 to the sufficiency of the evidence. Accordingly, we must only determine whether Appellant's convictions were against the manifest weight of the evidence.

{¶9} In the instant matter, Appellant was convicted of pandering obscenity involving a minor, a violation of R.C. 2907.321(A)(5), which provides:

> "(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
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> "***
>
> "(5) Buy, procure, possess, or control any obscene material, that has a minor as one of its participants[.]"

{¶10} The state was required to prove each element of the offense beyond a reasonable doubt. See *Jackson v. Virginia* (1979), 443 U.S. 307, 309, 99 S.Ct. 2781, 61 L.Ed.2d 560. Therefore, the state had the burden of proving beyond a reasonable doubt that Appellant: 1) knowingly, 2) possessed or controlled, 3) obscene material, 4) having a minor as a participant. Appellant has only

challenged the jury's finding that the evidence at issue was obscene and that it involved minors. Appellant has contended that:

> "[T]the stated failed to prove beyond a reasonable doubt that the persons depicted in State's Exhibit No. 7 and the 19 second clip on State's Exhibit[s] Nos. 1 and 2 were actual children, not virtual child pornography, that the persons depicted were minors and that the images depicted in said exhibits were obscene."

{¶11} Appellant's arguments are directed at State's Exhibit 7[1] and the nineteen second video clip contained on State's Exhibits 1 and 2 (Appellant's home computer and monitor). The video clip was entitled "Little girl displays her sweet young cunt to her sister. It's bedtime but who wants to sleep," and it shows two young girls laughing as they climb into bed; each child is partially clothed in a t-shirt and underwear. One of the girls is seen removing her underwear, and then helping the other girl remove hers. As the last child removes her underwear, she briefly exposes her genital area. State's Exhibit 7 is a still photograph that shows an older man kneeling down in front of a young girl, who appears to be between twelve and sixteen years of age. The man is seen removing the girl's underwear, exposing the girl's genital area.

{¶12} The record indicates that the jury's decision was based on more than the nineteen second video clip and State's Exhibit 7. It appears that there were four specific pieces of evidence that the jury could consider when it determined

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[1] State's Exhibit 7, the still photograph of a young girl and a kneeling man, was also located on State's Exhibits 1 and 2.

whether Appellant was guilty of pandering obscenity involving a minor.[2] However, Appellant has failed to present any arguments with respect to the other two pieces of evidence upon which the jury relied.

{¶13} Based on the trial court's jury instructions, the evidence not discussed by Appellant appears to have been another video clip entitled "16 year old_boyfriend having sex" and another still photograph or image contained somewhere on the hard drive of State's Exhibits 1 and 2. The trial court specifically informed the jury that it could consider these four pieces of evidence in deciding Appellant's guilt. After the jury began its deliberations, the jury foreman asked the trial court what evidence the jurors should consider in determining Appellant's guilt. The trial court instructed the jury that:

> "There are three, the only one we are to consider regarding guilt, understand that there are four. I read three but the fourth is the clip, year olds, the clip of the nine year olds, the 16 year old, and then two stills. The fourth still that was on the computer."

{¶14} The jury asked the trial court whether it "[c]ould have the exact title of icon involving 16 yr. old with boyfriend tape ** and [i]s the *** title and

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[2] This Court notes that the actual computer and all of its contents (i.e., software, files, programs, etc.) were admitted into evidence as State's Exhibits 1 and 2. Although specific items of evidence were marked and admitted into evidence, without objection by the defense, because the actual computer was admitted into evidence this Court has no idea what the jury actually viewed during its deliberations. We find that the *entire* contents of the computer were evidentiary material the jury could use in determining Appellant's guilt or innocence. Moreover, the record indicates that the jury requested State's Exhibits 1 and 2 as it deliberated. A handwritten note from the jury foreman states: "We

subsequent tape evidence in this case?" The trial court responded: "16 yr. old & boyfriend having sex (home movie; mpeg; self extracting) insert xxx fuck porn sex fisting oral." The court informed the jury that the tape could be used as evidence against Appellant.

{¶15} The testimony presented at trial also indicated that the jury could consider four pieces of evidence in determining Appellant's guilt with respect to the charge of pandering obscenity. At trial, Detective James Foracker, Michael Hatton, and F.B.I. Agent Elizabeth Trotman described the other evidence the trial court informed the jury it could consider in deciding Appellant's fate. Detective Foracker discussed three items of evidence: the nineteen second video clip containing the nine year old girls, State's Exhibit 7, and another video clip of a young girl (but he did not describe the content of this video clip). Michael Hatton referred to four items of evidence: the nineteen second video tape, a video clip he referred to as "16 year old and boy friends having sex,"[3] and he discussed at least two unidentified images depicting juveniles contained on State's Exhibits 1 and 2.

{¶16} Agent Trotman gave her opinion on an unidentified "still image" apparently located on State's Exhibit 1 and 2, which showed what she believed to be a child even though the photo only showed the person from the "neck up." The

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would like to have exhibits 1 and 2 so that we might view the nineteen second tape and have it put on a loop cycle."

[3] The correct title of the video clip referred to by Michael Hatton is "16 yr old_boyfriend having sex *** incest xxx fuck porn sex fisting oral blow job pre-teen asian big tits boobs breast."

still photograph (State's Exhibit 7) contained in the appellate record showed more than the head shot of a minor child; State's Exhibit 7 showed the entire body of a young girl. Thus, Agent Trotman was discussing another still photograph that this Court was unable to locate on State's Exhibit 1 and 2.

{¶17} Additionally, during the state's closing argument, and when the state rebutted Appellant's Crim.R.29 motion, the state specifically referred to four pieces of evidence: 1) the nineteen second video clip of two nine year olds getting into bed; 2) the still photograph marked as State's Exhibit 7; 3) another "still image" contained on State's Exhibits 1 and 2, of "a girl with the glasses *** about to perform oral sex on two males"; and 4) a video clip entitled "16 [year] old girl."[4]

{¶18} After reviewing the entire record, it appears that the evidence the jury considered in determining Appellant's guilt consisted of: 1) a video clip entitled "16 yr old_boyfriend having sex,"[5] 2) the nineteen second video clip entitled "Little girl displays her sweet young cunt to her sister. It's bedtime but who wants to sleep," 3) an unidentified still photograph of a minor, and 4) State's Exhibit 7. As previously stated, Appellant has failed to present arguments with

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[4] During closing argument, the state reminded the jury that the evidence they could use to convict Appellant was "the clip, the two still images and whether the other video that you saw that was entitled 16 [year] old girl."

[5] When the video clip is opened in the Media Player software application it reads in full: "T-11450372 – 16 yr old _boyfriend having sex *** incest xxx fuck porn sex fisting oral blow job pre-teen asian big tits boobs breast." However, the

respect to the 16 year old and boyfriend video clip and the unidentified still photograph. But most importantly, this Court was unable to locate one of the two pieces of evidence ignored by Appellant, but which was thoroughly discussed by the state in its appellate brief.[6] That is, this Court was unable to find the unidentified still photograph referred to by Michael Hatton, Agent Trotman, and the trial court.

{¶19} Although the record does not adequately describe the missing evidence, we believe that the jury did in fact rely upon the missing evidence when it determined Appellant's guilt. It is Appellant who has failed to direct this Court to the evidence upon which he relies. The consequences of Appellant's failure to provide a complete appellate record falls on him because "[i]t is Appellant's responsibility to provide the reviewing court with a record of the facts, testimony, and evidentiary matters that are necessary to support his assignments of error." *City of Alliance v. Warfel* (Nov. 19, 2001), 5th Dist. No. 2001 CA 134, 2001 Ohio App. LEXIS 5486, at *6; App.R. 9(B); see, also, *Broida v. Broida* (Jan. 24, 2001),

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same video clip, when opened in the Real Player software application, is titled "T-11450372 – Girl & Boyfriend having sex."

[6] It is not the job of this Court to locate the evidence presented at trial. In the interests of justice, however, this Court attempted to locate the missing still photograph on State's Exhibits 1 and 2. Our search was constrained by the fact that State's Exhibit 1 and 2 contained hundreds of thumbnail images and neither party made an effort to completely describe (e.g., content of the picture, the exact name of the icon or document, or file folder in which the items were located) or separately admit each piece of evidence. The video clip entitled "16 yr old_boyfriend having sex" depicted three men having anal, vaginal, and oral

9th Dist. No. 19968, at 9; *Bond Leather Co. v. Melvin Nadler Inc.* (July 11, 1990), 1st Dist. No. C-890276, 1990 Ohio App. LEXIS 2805, at *3; *State v. Tate* (Aug. 23, 1990), 8th Dist. No. 57232, 1990 Ohio App. LEXIS 3667, at *7. Because Appellant failed to provide this Court with a complete appellate record, we must presume regularity in the proceedings. See *Broida*, supra, at 9; *Tate*, 1990 Ohio App. LEXIS 3667, at *7, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197. Therefore, even if we assume that the evidence contained in the appellate record (i.e., the video clip entitled "16 yr old_boyfriend having sex," the nineteen second video clip with the two young girls, and State's Exhibit 7) did not satisfy the elements of R.C. 2907.321, this Court must presume that the missing evidence (i.e., an unidentified still photograph) depicted minors engaged in sexual conduct, and thereby satisfied the elements of R.C. 2907.321. Consequently, we cannot conclude that the jury lost its way when it convicted Appellant of pandering obscenity involving a minor.

{¶20} Appellant has also argued that his conviction for possessing criminal tools, a violation of R.C. 2923.24(A), was against the manifest weight of the evidence. R.C. 2923.24(A) provides: "No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." Because he has failed to provide this Court with all the evidence

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intercourse with a young woman that appeared to be between the age of sixteen and twenty-five years old.

presented to the jury, this Court must presume regularity and also conclude that the jury did not lose when it convicted Appellant of possessing criminal tools.

{¶21} Since Appellant has claimed that his convictions were against the manifest weight of the evidence and the evidence to support such a claim is missing from the record, this Court finds that it must affirm the trial court's decision. *Cortell v. Koch* (Dec. 19, 1986), 11th Dist. No. 1275, 1986 Ohio App. LEXIS 9392, at *12. (holding that "[w]hen evidence of assigned errors are missing from the record, a reviewing court has no choice but to affirm the lower court's decision").

{¶22} Appellant's second assignment of error lacks merit.

Assignment of Error Number One

"THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS PURSUANT TO EVID.R. 404(B) AND R.C. 2945.59."

{¶23} In Appellant's first assignment of error, he has argued that the trial court erred when it permitted the state to introduce evidence of other wrong acts, in contravention of R.C. 2945.59 and Evid.R. 404(B). We disagree.

{¶24} A trial court has broad discretion in the admission or exclusion of evidence, and this Court will not disturb a trial court's ruling on the admission of evidence absent an abuse of discretion and material prejudice to the defendant. *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, certiorari denied (1968), 390 U.S. 1024, 88 S. Ct. 1409, 20 L.Ed.2d 281. An abuse of discretion connotes more than

a mere error in judgment; it signifies an attitude on part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶25} In the instant matter, Appellant has argued that the trial court should not have admitted testimony regarding 1) a customer order form for the purchase of a computer, in which Appellant listed his two-year-old son as a credit reference; and 2) offensive emails Appellant allegedly sent to Detective James Foracker. Such evidence, Appellant has argued, is violative of Evid.R. 404(B). He has contended that Evid.R. 404(B) prohibits the admission of "other alleged acts of Appellant which had no relation or logical connection to the offenses for which Appellant was charged." Evid.R. 404(B) states, in pertinent part:

> "(B) 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." (Alterations added).

{¶26} Appellant has further argued that the "[a]cts of an accused, which have no relation to or logical connection with and do not tend to disclose a motive or purpose for the commission of the offense for which the accused is on trial, are not admissible under R.C. 2945.59, the so-called similar acts statute." R.C. 2945.59 provides:

> "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶27} The position taken by the state is that "[e]vidence of other crimes is admissible when evidence of the other crimes is so blended, or connected, with the crime on trial that the proof of one crime incidentally involves the other crime, explains the circumstances, or tends logically to prove any element of the crime charged." The state has further argued that because Appellant's only defense to the charges was that he was working for the F.B.I., and he therefore did not have the purpose to use the computer criminally, "Appellant's credibility became intertwined with the State's ability to prove the 'specific intent' element of the crime."

{¶28} We first note that defense counsel initially objected when the state asked Mr. Richard Black, an employee at Rent-Way in Medina, Ohio, on direct examination to name the persons Appellant listed as references on the customer order form; the objection was overruled.[7] However, defense counsel did not object when the state asked Mr. Black, on re-direct, whether he was "aware that

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[7] Although the trial court overruled defense counsel's objection, the state did not question Mr. Black about Appellant's use of his two-year old son as a

the person [Appellant] listed as his brother-in-law [on the customer order form] is really his son, his two year old son?" This Court has consistently held:

> "In order to promote important concerns for judicial expediency and efficiency, a party, who fails to object to the receipt or use of evidence at the time at which alleged errors can still be remedied, waives the right to address the alleged errors on appeal." *State v. Moore* (Nov. 3, 1993), 9th Dist. No. 16227, at 8, citing *Mallin v. Mallin* (1988), 44 Ohio App.3d 53, 54-55.

{¶29} Because Appellant failed to object when the state questioned its witness about Appellant's use of his two-year old son as a credit reference, Appellant has waived that argument on appeal and this Court declines to address whether the trial court abused its discretion in admitting such evidence.

{¶30} Appellant has next argued that the trial court erred when it admitted into evidence testimony concerning inflammatory emails that Appellant allegedly sent to Detective James Foracker. Even if we assume, for the sake of argument, that the trial court erred when it allowed into evidence Detective Foracker's testimony regarding the inflammatory emails, Appellant has not demonstrated such error was prejudicial. Crim.R. 52(A) provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." A reviewing court, therefore, when determining whether an error in the admission of evidence is harmless, must find there is no reasonable probability that the evidence may have contributed to the defendant's conviction. *State v.*

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credit reference. Questions concerning Appellant's two-year old son did not occur until the state commenced redirect examination of Mr. Black.

DeMarco (1987), 31 Ohio St.3d 191, 195; see, also, *State v. Brown* (1992), 65 Ohio St. 3d 483, 485.

{¶31} After examining the record, we cannot find that any error is prejudicial because the appellate record is incomplete as discussed in Appellant's second assignment of error. The missing evidence could, by itself, prove Appellant's guilt beyond a reasonable doubt and render Detective Foracker's testimony regarding the harassing emails inconsequential, and thus not prejudicial. Therefore, this Court cannot say that the trial court abused its discretion in admitting Detective Foracker's testimony. Consequently, Appellant's first assignment of error is not well taken.

III

{¶32} Appellant's assignments of error are overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

WILLIAM R. BAIRD
FOR THE COURT

BAIRD, P.J.
CONCURS

CARR, J.
CONCURS, SAYING:

{¶33} Although I feel that Appellant's convictions should be affirmed, I agree with Judge Whitmore's analysis regarding Ohio's obscenity law.

WHITMORE, J.
DISSENTS SAYING:

{¶34} I respectfully dissent from the majority's holding that this Court cannot address the merits of Appellant's argument because the appellate record is incomplete. What is painfully obvious when reading the transcript of the trial court proceedings is that much of the so-called evidence regarding the charge of pandering obscenity involving a minor was never identified by an exhibit number and never actually admitted into evidence. In fact it is not even clear that this so called evidence was ever actually shown to the jury during the trial. Witnesses testify as to the titles of certain video clips and still photographs allegedly on the computer's hard drive. But the transcript of such testimony does not reflect that once the title was noted by the witness the file was ever shown on the computer monitor or other video display for the jury.

{¶35} Moreover, neither the attorneys nor the court are clear about the evidence that could be legitimately considered by the jury. I agree that the state's witnesses refer to other evidence and that the trial court indicated that the jury could consider four pieces of evidence. However, three of the items sent to the jury as evidence[8] were never given separate exhibit numbers for the purpose of identification. Of those three, one was described by witnesses as a nineteen second video clip showing two young girls in bed, naked from the waist down.

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[8] The three items not specifically marked as evidence are: 1) a nineteen second video clip depicting two young girls in a state of undress; 2) an unidentified still photograph; and 3) a video clip entitled "16 yr old _boyfriend having sex."

Though not given an exhibit number, the nineteen second video of these two girls was titled: "Little girl displays her sweet young cunt to her sister." It was offered and admitted into evidence without objection. It was not, however, copied onto a separate disc or marked with an exhibit number. The other two items of evidence were never copied onto a separate disc, never given an exhibit number, and never offered into evidence. Thus, the only evidence relevant to the charge of pandering obscenity involving a minor that was actually marked separately as an exhibit and properly admitted into evidence was State's Exhibit 7, a still photograph of a male touching the upper thighs of a young girl as he pulled down her underwear.

{¶36} The state marked Appellant's computer and monitor as State's Exhibits 1 and 2, and these were admitted into evidence without objection. However, the hard drive on the computer contained a great deal of irrelevant and prejudicial information, including a "snuff film" (a depiction of a female being shot in the head) and other material that could be classified as obscenity depicting adults.

{¶37} I further note that while there was specific testimony describing the conduct contained in the nineteen second video clip and the still photograph marked as State's Exhibit 7, there was no testimony describing the actual conduct depicted on the remaining so-called evidence. While State's Exhibit 7 was a hard copy of a still photograph also on the computer hard drive, it was the only data separately reduced to hard copy and marked with an exhibit number. It strains credulity to believe that if the other so-called evidence actually contained

depictions of the conduct required for a conviction under the jury charge in this case, the witnesses would have testified as to the specific activity, it would have been reduced to a hard copy, marked as an exhibit and offered into evidence. Moreover, the prosecutor would have argued such specific evidence at closing, rather than just referring to the titles. I note also that the prosecutor did not argue that State's Exhibit 7 actually satisfied the essential elements of the charge of pandering obscenity involving a minor as that offense was explained to the jury.

{¶38} I submit that the appellate record is complete and that this Court can properly review the merits of Appellant's arguments in his second assignment of error. For reasons that follow, I would reverse Appellant's conviction on the pandering charge as against the manifest weight of the evidence under the specific jury charge as given. Having reversed the pandering conviction, I would find that the conviction of possession of criminal tools must also be reversed.

{¶39} This case presents itself as does a wolf in sheep's clothing.

{¶40} Relying on our prior decision in *State v. Ward* (1993), 85 Ohio App.3d 378[9], Appellant has contended that the jury verdict convicting him of a violation of R.C. 2907.321(A)(5) is, among other asserted errors, against the manifest weight of the evidence. Appellee counters by reciting the provisions of R.C. 2907.321(A)(5) (possession of obscene material depicting children) and R.C.

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[9] In *Ward*, this Court relied on our prior holding in *State v. Radey* (1989), 54 Ohio App.3d 18, in concluding that the materials at issue were not obscene. See discussion infra.

2907.01(F) (definition of obscene). There is no dispute over the controlling statutory provisions. It is the application of these provisions under the facts of this case that is at issue.

{¶41} Ohio Jury Instructions ("OJI"), specifically section 507.321, provides an accurate and complete jury charge relevant to prosecution under R.C. 2907.321. But the jury was not instructed under OJI 507.321. Moreover, neither party preserved by objection or assigned any error regarding the actual jury charge in this case. Accordingly, my initial review focused on an analysis of the law as set forth in *State v. Radey* (1989), 54 Ohio App.3d 18, appeal dismissed (1990), 52 Ohio St.3d 87, and *Ward* as applied to the facts of this case. For the reasons that follow, had the jury been instructed under OJI 507.321, I would have affirmed the verdict and urged my brethren to overrule *Radey* and *Ward* on the grounds that both cases misread the requirements of *Miller v. California* (1973), 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, and *State v. Burgun* (1978), 56 Ohio St.2d 354, and misinterpreted Ohio's legislative scheme for the protection of children from sexual exploitation.

{¶42} As previously discussed, the trial court did not charge the jury using OJI 507.321. Instead, it gave an instruction that on its face appears to have been

expressly written to meet the holdings of *Radey* and *Ward*. The trial court instructed the jury as follows:[10]

> "Before you can find [Appellant] guilty you must find beyond a reasonable doubt that on or about the 10th day of August, year 2001, Medina County Ohio [Appellant], with knowledge of the character of the material bought, procured, possessed, controlled obscene material that had a minor as one of its participants. That's the charge. Now let's define some of those terms for you.
>
> "***
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> "The following three-part test is to be used to determine whether the work is obscene. A, whether the average person applying contemporary community standards would find that the work taken as a whole appeals to prurient interest.
>
> "And B, whether or not the work depicts or describes in a patently offensive way *** [s]exual conduct specifically defined by the applicable state law. And C, whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.
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> "Prurient interest is a shameful or morbid interest in nudity, sex or excretion which goes substantially beyond customary limits of candor in description or representation of such matters. Whether a work appeals to the prurient interest or depicts sexual conduct in a patently offensive way is governed by contemporary community standards. In [contrast], the reasonable person standard is used to determine whether a work has literary, artistic, political, or scientific value. To be patently offensive, a work must depict or describe hard core sexual conduct.
>
> "What is sexual conduct? Sexual conduct means vaginal intercourse between a male and female, anal intercourse, fellatio, cunnilingus between persons regardless of sex without privilege to do so, the insertion, however slight, of any part of the body, instrument, apparatus, object into the vagina or anus. Penetration, however slight, is sufficient to complete vaginal, anal intercourse.

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[10] For ease of reference we shall refer to this charge as the *Radey*/*Ward* instruction.

> "Fellatio means a sexual act committed with the penis and the mouth.
>
> "Cunnilingus means sexual act committed with the mouth and the female sex organ."

{¶43} Thus, under the *Radey*/*Ward* instruction the jury could only convict if it was convinced beyond a reasonable doubt that the materials possessed by Appellant depicted a minor engaged in vaginal intercourse, anal intercourse, fellatio and/or cunnilingus. My review of the properly admitted evidence is that there is no evidence of these four specific sex acts. Thus on the record before me I have no alternative but to reverse Appellant's convictions on the ground that the verdict is against the manifest weight of the evidence under the actual jury charge given.

{¶44} However, I cannot stop there. I am required by the compelling state interest so clearly presented in *New York v. Ferber* (1982), 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113, to lift the sheep's clothing and expose the wolf inside. What follows is dicta only, but I cannot in good conscience remain silent or further perpetuate the misunderstanding of *Miller* inherent in *Radey*[11] and

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[11] *Radey* was a prosecution under R.C. 2907.32(A)(2), pandering obscenity where the material depicted adults. Purporting to apply the *Miller* test, the *Radey* court limited the behavior that could be proscribed to depictions of adults engaged in patently offensive "hard core" sexual conduct. *Radey*, 54 Ohio App.3d at 21. It further limited sexual conduct to the four ultimate sex acts: vaginal intercourse, anal intercourse, fellatio and cunnilingus. In reaching this conclusion the *Radey* court relied upon a change in Ohio's definition of sexual conduct after *Miller*. Before *Miller*, R.C. 2905.34(D) defined "sexual conduct" to include "masturbation, homosexuality, lesbianism, sadism, masochism, natural or

Ward.[12] To do so would be to leave vulnerable children exposed to forms of sexual exploitation that fall short of vaginal intercourse, anal intercourse, fellatio and/or cunnilingus – a result surely not intended by the General Assembly. Nor should this appellate court turn its back and wring its hands helplessly under the guise of stare decisis. It is not a little ironic that my view of *Miller* in the case sub judice was previously set forth, in part, in 1987 (two years before *Radey*) by the Tenth District Court of Appeals in *State v. Wolfe* (1987), 41 Ohio App.3d 119, a prosecution under R.C 2907.32 involving obscene depictions of adults. The *Radey* court certified a conflict with *Wolfe*, but the certification was dismissed by the Ohio Supreme Court. See *Radey* (1987), 52 Ohio St.3d 87. I act now to reject what I perceive to be most unfortunate precedent in Ninth District obscenity law.

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unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast." *Radey*, 54 Ohio App.3d at 20. I note that such a definition incorporated post-*Miller* sexual behaviors as defined in R.C. 2907.01(A) *and* R.C. 2907.01(B). After *Miller*, Ohio defined sexual conduct in R.C. 2907.01(A) as "vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex[.]" As more fully set forth infra, I submit that the *Radey* court ignored the post-*Miller* definition of sexual expressions defined in R.C. 2907.01(B) as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttocks, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person[]" in the mistaken belief that *Miller's* use of the phrase "sexual conduct" in part (b) of its test, meant only the four ultimate sex acts set forth in R.C. 2907.01(A).

[12] *Ward* was a prosecution under R.C. 2907.321, pandering obscenity where the material depicted minors. Relying on *Radey*, the *Ward* court again limited the behavior that could be proscribed to the four ultimate sex acts set forth in 2907.01(A).

{¶45} I begin at the beginning with *Miller* – the supposed genesis of the "hard core/sexual conduct" limitation first engrafted into Ninth District law by *Radey*. *Miller* articulated a three-part test for judging whether material is obscene. See *Miller*, 413 U.S. at 24. The first and third prongs of that test are not relevant to the case sub judice. But, it is worth noting that the issue before *Miller* was the third prong – the so-called "social utility prong." *Miller* abandoned the "utterly without redeeming social value" test set forth in *Memoirs v. Massachusetts* (1966), 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1, for the " [without] serious literary, artistic, political, or scientific value" approach that remains the law. *Miller*, 413 U.S. at 24.

{¶46} *Miller* declared the constitutionality of California Penal Code Section 311(a) which prohibited obscenity defined as follows:[13]

> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e. a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." *Miller*, 413 U.S. at 18, n.1.

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[13] Such language is virtually identical to the language employed by the Ohio Supreme Court when construing the word "prurient" as used in R. C. 2907.01(F) and does not limit its application to behavior depicting any particular sexual expression, let alone to vaginal intercourse, anal intercourse, fellatio or cunnilingus – or other supposedly "hard core" depictions of sexuality. "Prurient interest" is defined in Ohio as "not the same as a candid, normal or healthy interest in sex, rather it is a 'shameful or morbid interest in nudity, sex, or excretion *** [which] goes substantially beyond limits of candor in description or representation of such matters ***.'" (Alterations sic.) *Urbana ex rel. Newlin v. Downing* (1989), 43 Ohio St. 3d 109, 116, quoting *Roth*, 354 U.S. at 487, n.1.

{¶47} *Miller* is replete with analysis of the history of obscenity law and makes it clear that the constitutional reach of such laws permits state regulation of more than just explicit sexual behavior as defined in R.C. Section 2907.01(A) (vaginal intercourse, anal intercourse, fellatio and/or cunnilingus). For example, *Miller* endorsed the broader scope of such regulation permitted in *Roth v. United States* (1957), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, when it noted the following:

> "We note, therefore, that the words 'obscene material,' as used in this case, have a specific judicial meaning which derives from the Roth case, i.e., obscene material 'which deals with sex.'" (Citations omitted.) *Miller*, 413 U.S. at 18, n. 2.

{¶48} Citing to *Roth*, the *Miller* court further noted that: "This Court has defined 'obscene material' as 'material which deals with sex in a manner appealing to prurient interest[.]'" *Miller*, 413 U.S. at 18, n.2.

{¶49} The materials at issue in *Miller* were sexually explicit depictions of adults "engaging in a variety of sexual activities, with genitals often prominently displayed." *Miller*, 413 U.S. at 18. The opinion does not make clear the precise nature of the sexual behaviors depicted, but neither does it preclude the criminalization of a broader range of sexual expressions than that encompassed in Ohio's definitions of sexual conduct in R.C. 2907.01(A).[14] To the contrary, in the

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[14] *Miller's* use of the phrase "sexual activity" is, I believe, only a generic description of sexual behavior or sexual expressions. However, if construed literally (as did *Radey* when construing the phrase "sexual conduct" as limited to sexual expressions defined in R.C. 2907.01(A)(1)), "sexual activity" as defined in

second prong of its test the *Miller* court leaves it up to the states to define the specific sexual behavior proscribed. The court goes on to note as follows:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion[:]
>
> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations of descriptions of masturbation, excretory functions, and lewd depiction of the genitals." *Miller*, 413 U.S. at 25.

{¶50} While *Miller* does say that "for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment[]" it does not define that term in a restrictive way. *Miller*, 413 U.S. at 29. In fact, later in the opinion the court impliedly gives "hard core" an expansive and general definition consistent with *Roth's* definition of obscene materials as those dealing with sex in a prurient way. The court notes: "But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter." *Miller*, 413 U.S. at 35.

{¶51} Footnote 15 further provides:

R.C. 2907.01(C) would mean both "sexual conduct" (R.C. 2907.01(A)) and "sexual contact" (R.C. 2907.01(B)). Thus under the *Radey* framework the materials that could be regulated would not be limited to just "sexual conduct" (R.C. 2907.01(A)) but would also include "sexual contact" (R.C. 2907.01(B)).

> "In the apt words of Mr. Chief Justice Warren, appellant in this case was 'plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. ***'"*Miller*, 413 U.S. at 35, n.15.

{¶52} It is significant that *Miller* gives a non-exhaustive list of examples. I submit that the Ohio Legislative scheme regarding obscenity regulates sexual expressions which portray the so called "ultimate sex acts"[15] of vaginal intercourse, anal intercourse, fellatio and cunnilingus as well as other less "ultimate" sexual expressions such as the touching of another's erogenous zone and other conduct more generically described as "sexual contact" in R.C. 2907.01(B). I also submit that a full reading of R.C. 2907.01(F) (provision defining the obscene) also makes it clear that Ohio has specifically regulated not only the conduct which might also fall within the definitions of "Sexual Conduct" (R.C. 2907.01(A)) and "Sexual Contact" (R.C. 2907.01(B)) but also other lesser expressions, including those that are the functional equivalent of *Miller's* second example of material that may properly be regulated, i.e., masturbation, excretory functions, and lewd exhibition of the genitals.

{¶53} It is indeed perplexing to read *Radey's* conclusion that obscenity is restricted to only those sexual expressions set forth in R.C. 2907.01(A), i.e., "sexual conduct" - vaginal intercourse, anal intercourse, fellatio, and/or cunnilingus. Had *Miller* intended such an aberration it would not have given as

permissible examples behaviors which so clearly fall outside of Ohio's definition of "sexual conduct."

{¶54} Perhaps the *Radey* court was mislead by the fact that *Miller* used the phrase "hard core sexual conduct" in its opinion. I submit that the term "hard core sexual conduct" does not limit the examples provided in *Miller*. Rather, as set forth in *Wolfe*, the examples give meaning to the court's use of the words "hard core sexual conduct." I submit that R.C. 2907.321 and R.C. 2907.01(F) in their entirety is the applicable law in Ohio – referred to in *Miller* prong (b) it is the "hard core sexual conduct" as set forth in state law.

{¶55} Moreover, had *Miller* been somehow prescient enough to know that Ohio had an express definition of "sexual conduct" for use in many criminal statutes,[16] still the argument cannot be successfully made that Ohio intended to limit its regulation of obscenity to only that which it defined as "sexual conduct" in R.C. 2907.01(A). The Ohio statute defining obscenity, R.C. 2907.01(F), applies equally to depictions of adults and minors and is implemented through R.C. 2907.32 (provision applying to the depiction of adults) and 2907.321(provision applying to the depictions of minors).[17] R.C. 2907.01(F) clearly includes all forms

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[15] *Miller's* first example of what may be regulated makes express reference to "ultimate sex acts." See *Miller*, 413 U.S. at 25.

[16] R.C.2907.322 is but one such example where the proscribed conduct is "sexual activity" with a minor. Sexual activity is then further limited by R.C. 2907.01(A)("sexual conduct") and R.C. 2907.01(B)("sexual contact").

[17] The only difference between these two statutes is the punishment imposed. A violation of R.C. 2907.32 is punishable as a fifth degree felony and

of obscene expression including activity ranging from "ultimate sex acts" such as vaginal intercourse, anal intercourse, fellatio and cunnilingus to other behaviors, including nudity, sexual excitement, masturbation, bestiality, lust, scatological displays, etc., provided the material otherwise satisfies prongs (a) and (c) of the *Miller* test.[18]

{¶56} If the *Radey*/*Ward* instruction were to be viewed as correct law it would wipe out, rather than implement, the full range of conduct that can be regulated according to *Miller* prong (b). The Ohio Supreme Court in *Burgun* did not intend to so decimate Ohio obscenity law when it held that Ohio obscenity provisions were to be read in pari materia with *Miller*. To the contrary, *Burgun* commented upon the specificity with which R.C. 2907.01(F) met the standards in *Miller* noting that "a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited." *Burgun*, 56 Ohio St.2d at 361. *Burgun* further noted that the United States Supreme Court did not intend for every state legislature to rewrite its

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enhanced to a fourth degree felony if there is a prior conviction. R.C. 2907.321(A)(5) *possession* of obscene material involving a minor is punishable as a fourth degree felony, with an enhancement to a third degree felony.

[18] R.C. 2907.01(F) provides that depictions (whether of adults or children) must meet such prongs of the *Miller* test. It imposes a community standard, which requires that the material be considered as a whole, and that its dominant appeal be to the prurient or scatological interest. It also provides that such an interest be primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral or artistic purpose. R.C. 2907.01(F)(1)-(5). In addition, R.C. 2907.321(B)(1) provides for a proper purpose exception as an affirmative defense.

obscenity provisions as a result of *Miller*, and further reinforced the importance of *Roth* to the General Assembly by reference to committee notes which provide:

> "The definition of obscenity [in 2907.01(F)] is designed to meet the requirements of *Roth v. United States* ***, and cases following in its wake. It spells out what is 'obscene' in much greater detail than existing case law, in order to increase the utility of the definition for law enforcement purposes." *Burgun*, 56 Ohio St.2d at 360, n2.

{¶57} *Burgun* held that 2907.01(F) was not unconstitutionally overbroad nor void for vagueness when read in pari materia with *Miller*. *Burgun*, 56 Ohio St.2d at paragraph one of the syllabus. If presented with the restrictive interpretation of Ohio obscenity law adopted by *Radey*/*Ward* it is my opinion that the *Burgun* court would not have concluded that only depictions of vaginal intercourse, anal intercourse, fellatio and/or cunnilingus could be regulated in the context of *Miller*.

{¶58} Lest there be any doubt about the continuing viability of the *Miller* examples of conduct that may be regulated, I have reviewed United States Supreme Court decisions subsequent to *Miller*. One year after *Miller*, *Jenkins v Georgia* (1974), 418 U.S. 153, 160, 94 S.Ct. 2750, 41 L.Ed.2d 642, referred to *Miller's* examples of "hard core sexual conduct" and noted that in *Miller* it took pains to give examples of what a state could define for regulation under part (b) of *Miller*, i.e., what would be considered as "hard core sexual conduct." The *Jenkins* Court explained *Miller's* examples this way:

> "These examples included 'representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,' and 'representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.' *** While this did not purport to be an exhaustive catalogue of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations *** on the type of material subject to such a determination. It would be wholly at odds with this aspect of Miller to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty." *Jenkins*, 418 U.S. at 160-161.

{¶59} In 1977, in *Smith v. United States* (1977), 431 U.S. 291, 301, 97 S.Ct. 1756, 52 L.Ed.2d 324, the Court again endorsed the *Miller* examples and referred to them as "hard core." *Smith* recognized that the states have great leeway in what they may regulate. Id. at 302. The *Smith* court noted that at the time of *Miller*, Iowa had no obscenity law that would criminalize any adult conduct. Id. At the other extreme, *Smith* recognized that a state might seek to regulate all the hard-core pornography that it constitutionally could, further noting that the new Iowa law which regulated only material "depicting a sex act involving sado-masochistic abuse, excretory functions, a child, or bestiality" provided an example of an intermediate approach. Id. at 303.

{¶60} I come, now to the case of *Ferber*, which lays down important new law regarding the protection of children from sexual exploitation. *Ferber* framed the issue as follows: "We believe our inquiry should begin with the question of whether a State has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children." *Ferber*, 458 U.S. at 753.

{¶61} For important public policy reasons, the *Ferber* court rejected the application of *Miller* prongs (a) and (c) to statutes which criminalize the distribution of material depicting children engaged in sexual conduct. *Ferber*, 458 U.S. at 764-765. The *Ferber* court used the phrase "sexual conduct" in a generic way and not as limited by R.C. 2907.01(A). *Ferber* required that the sexual conduct proscribed must be suitably limited and described, but emphasized that the test for child pornography is separate from the obscenity standard in *Miller*. *Ferber*, 458 U.S. at 761. The court in *Ferber* upheld a New York statute which prohibited depictions of children engaged in actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals. Moreover, the court in *Ferber* noted that *Miller* expressly included lewd depiction of genitalia as the kind of conduct that could be proscribed.

{¶62} In the course of its analysis the United States Supreme Court in *Ferber* noted that "[the] prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber*, 458 U.S. at 757. It further indicated that it would not second guess the intent of the New York legislature when it enacted the provision at issue. It opined that the *Miller* standard, "like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children." *Ferber*, 458 U.S. at 761.

{¶63} Accordingly, I submit that even if *Radey* and *Ward* are viewed as viable interpretation of Ohio obscenity law when viewed in pari materia with *Miller* (an interpretation I reject), such an interpretation cannot survive *Ferber.* I submit that if *Miller* could be read into R.C. 2907.321 and R.C. 2907.01(F) it can just as easily be read out of these provisions and *Ferber* substituted in its place. Were we to substitute *Ferber* for *Miller* in our interpretation of R.C. 2907.321 and R.C. 2907.01(F) our only inquiry would be whether the conduct proscribed was sufficiently specific and not void for vagueness. Any language in R.C. 2907.01(F) invoking prongs (a) and (c) of the *Miller* three prong test would be disregarded, leaving a proscription against less egregious (but nonetheless equally damaging to child victims) depictions of specific conduct not set forth or otherwise proscribed in R.C. 2907.322 or R.C. 2907.323. While such an interpretation does not on its face look tidy, nothing in *Miller* or *Ferber* require that the specific conduct be set forth all in one statute or one paragraph within a single statute. Without *Miller,* R.C. 2907.321 and R.C. 2907.01(F) would be judged solely by the requirements in *Ferber*. I submit that the specific conduct proscribed therein is well within the contemplation of *Ferber*. While it might be tidier for the General Assembly to re-write its statutes protecting the sexual exploitation of children (R.C. 2907.321, R.C. 2907.322, and R.C. 2907.323) *Burgun* indicates a rewrite is not necessary. *Burgun*, 56 Ohio St.2d at 358. After replacing *Miller* with *Ferber,* R.C. 2907.321 and R.C. 2907.01(F) become hybrids more appropriately described as prohibiting the possession or distribution of child pornography and not a traditional obscenity

statute. To what extent the courts might interpret and apply the language remaining in R.C. 2907.321 and 2907.01(F), formerly implicating prongs (a) and (c) of the *Miller* test, remains to be seen. In his concurring opinion in *State v. Meadows* (1986) 28 Ohio St.3d 43, (affirming the constitutionality of R.C. 2907.322 which prohibited the mere possession of prohibited materials depicting a minor), Justice Douglas compared R.C. 2907.321(A)(5) and R.C. 2907.322(A)(5) and noted the latter prohibits depictions of minors involved in specific acts without the qualification that such acts be obscene. Thus R.C. 2907.321(A)(5) which prohibits a broader range of material depicting minors and which requires that prongs (a) and (c) of the *Miller* test be satisfied thereby requiring that the conduct depicted be obscene could be preserved as a separate offense with different elements of proof.

{¶64} In *Osborne v Ohio* (1990), 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98, paragraph one of the syllabus, the court reviewed and upheld as constitutional R.C. 2907.323(A) which prohibited the possession of material depicting a child "in a state of nudity." "Nudity" as defined in R.C. 2907.01(H) had previously been constitutionally construed by the Ohio Supreme Court in *State v Young* (1988), 37 Ohio St. 3d 249, paragraph one of the syllabus, as including only depictions involving a "lewd exhibition or involves a graphic focus on [a minor's] genitals." Such an interpretation of "nudity" as applied to prosecutions under R.C. 2907.323 informs us on the meaning of "nudity" as used in Ohio's obscenity provisions, R.C. 2907.321 and R.C. 2907.01(F). However

conceptualized, whether under R.C. 2907.323, R.C. 2907.321, or R.C. 2907.01(F), the Ohio provisions for protection of children from sexual exploitation include a range of proscribed activity, including nudity as construed by the Ohio Supreme court in *Young*. The *Young* construction of "nudity" is expressly incorporated into OJI 507.321.

{¶65} Even if the *Miller* test remains incorporated into R.C. 2907.321 and R.C. 2907.01(F), properly construed it is no impediment to a conviction of Appellant under R.C. 2907.321 had the complete jury instruction set for in OJI 507.321 been given to the jury. R.C. 2907.01(F) expressly proscribes "sexual activity" and "nudity." "Sexual activity" is defined as including "sexual conduct" (R.C. 2907.01(A) – the four ultimate sex acts) and "sexual contact" (R.C. 2907.01(B) – sexual touching with or without nudity). The separately marked and properly admitted evidence includes State's Exhibit 7, a photograph of an adult male touching the thighs of a young girl as he pulls down her underwear exposing her pubic area. The man's face is shown in the photograph near the child's pubic area. Given this evidence, a reasonable jury instructed under OJI 507.321 could have found the defendant guilty under R.C. 2907.321 (applying the definitions of "nudity" and/or "sexual contact") had it also found the material to make a dominant appeal to the prurient/scatological interest (*Miller* prong (a)) and to be without serious artistic scientific, educational, sociological, moral or artistic purpose (*Miller* prong (c)).

{¶66} The foregoing analysis makes it clear that if we look only at the sheep's clothing (*Radey*/*Ward*'s simplistic adoption of a limiting definition of "sexual conduct") we miss the wolf inside. *Wolfe* got it right and *Ferber* and *Osborne* only reinforce that conclusion. Had the jury been properly instructed using OJI 507.321, I would have affirmed the verdict and overruled *Radey* and *Ward*.

APPEARANCES:

ERIC D. HALL, Attorney at Law, 412 North Court Street, Medina, Ohio 44256, for Appellant.

DEAN HOLMAN, Medina County Prosecuting Attorney, and ABIGAIL L. HURWITZ and SCOTT G. SALISBURY, Assistant Prosecuting Attorneys, 72 Public Square, Medina, Ohio 44256, for Appellee.