[Cite as *State v. Ellis*, 2004-Ohio-610.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	William B. Hoffman, P.J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 02 CA 96
ALBERT JOHN ELLIS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal From Fairfield County Court Of Common Pleas Case 02 CR 313
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	February 2, 2004

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
GREGG MARX 323 E. Main Street Lancaster, OH 43130	R. C. STOUGHTON, SR. 121 North High Street Lancaster, OH 43130

Edwards, J.

{¶1} Defendant-appellant Albert John Ellis appeals from his conviction and sentence in the Fairfield County Court of Common Pleas on two counts of illegal use of

a minor in nudity-oriented material or performance, in violation of R. C. 2907.323. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 6, 2002, appellant was indicted on two counts of illegal use of a minor in nudity-oriented material or performance, in violation of R.C. 2907.323, a felony of the fifth degree. The charges arose from allegations that appellant took two photographs of a 14-year old girl in which the girl exposed her breasts and pulled down her jeans. The photos were taken by appellant while appellant and the girl were in the back of appellant's mini-van. Appellant was arraigned on September 10, 2002, at which time he entered a plea of not guilty to both counts.

{¶3} A trial commenced on November 12, 2002. On November 13, 2002, the jury returned a verdict of guilty on both counts. Appellant was then sentenced by the trial court to serve an 11 month term of imprisonment on each count. The trial court ordered the sentences to be served concurrently to each other and consecutively to a prior conviction, in which appellant's probation had been revoked. A corresponding Judgment Entry was filed on November 18, 2002.

{¶4} Thus, it is from this conviction and sentence that appellant appeals, raising the following assignments of error:

{¶5} "I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S WITNESS THE OPPORTUNITY TO TESTIFY AS TO THE STANDARDS USED BY THE PRISON FOR POSSESSION OF PHOTOS BY INMATES.

{¶6} "II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S REQUESTED JURY INSTRUCTIONS DEFINING LEWD EXHIBITION.

{¶7} "III. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION IN LIMINE & DENIED THE DEFENDANT'S RULE 29 MOTION FOR ACQUITTAL.

I

{¶8} In the first assignment of error, appellant contends that the trial court erred when it denied appellant the opportunity to present testimony that pictures such as those of the minor victim would have been permitted to be sent to a prisoner of the State of Ohio. Appellant asserts on appeal that appellant sought this testimony because his defense was to be based on the voluntary agreement of Chrystal Chevalier to have the photos taken for Chrystal's boyfriend, appellant's son, who was incarcerated at the time.

{¶9} The standard of review for the admission of evidence is abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶10} In this case, appellant presented his brother, Robert Ellis, as a witness for the defense. Robert Ellis is an employee at the Southeastern Correctional Institution, in Lancaster, Ohio. One of Robert Ellis' positions in the past had been as a worker in the prison's mailroom. At trial, appellant asserted that the prison would not allow prisoners to receive anything which was a lewd exhibition or obscene. TR. 215. It is apparent that appellant's witness would have testified that none of the photos would have violated prison regulations barring lewd or obscene material. TR. At 216. It was

appellant's intention to show that appellant sought an opinion from Robert Ellis as to whether an inmate would have been able to receive photographs such as the ones of the minor victim in this case and thereby show that appellant had not acted recklessly.

{¶11} Specifically, defense counsel asked the following question of the witness which resulted in an objection by the State:

{¶12} "Q. Okay. Prior to August of this year, did John Ellis, the Defendant here, have any conversations with you in which he asked about sending photos of a woman who is partially clothed or had breasts exposed to his son?

{¶13} However, we find that the trial court did not abuse its discretion in prohibiting the testimony because it was not relevant. "Evidence which is not relevant is not admissible." Evid. R. 402. ""'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." Evid. R. 401.

{¶14} The witness' opinion as to whether the Southeastern Correctional Institution would have allowed the photographs into the prison is not relevant to the charges against appellant. First, defense counsel asked the witness about photos of a woman. The State concedes that such photos of an adult woman would not be illegal. However, this case concerns photos of a minor. Testimony concerning photos of an adult woman have no relevancy to charges based on photos of a minor.

{¶15} In addition, the opinion of an employee of the Ohio Department of Corrections, or for that matter of the Department of Corrections itself, is not determinative of whether a photo is lewd or obscene.

{¶16} Accordingly, we find that the trial court did not abuse its discretion in denying appellant the opportunity to elicit testimony from his brother, an employee of the Southeastern Correctional Institution regarding the prison's standards for lewd or obscene photos.

{¶17} Appellant's first assignment of error is overruled.

II

{¶18} In the second assignment of error, appellant contends that the trial court erred when it denied appellant's requested jury instructions defining "lewd exhibition". We disagree.

{¶19} When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. The term "abuse of discretion" implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶20} The trial court provided the jury with the following instruction:

{¶21} "The particular elements of illegal use of minor in nudity-oriented material as charged in count one and count two of the indictment are as follow: One, the Defendant, Albert John Ellis, Jr.; two, on or about the 9th day of August, 2002; three, in Fairfield County, Ohio; four, recklessly; five, possessed or viewed; six, any material showing; seven, a minor who is not the said Albert John Ellis, Jr.'s child or ward; and eight, in a state of nudity.

{¶22} "The law that applies to count one and count two of the indictment is found in Section 2907.232(A)(3) of the Ohio Revised Code and the specific statue [sic] involved in this criminal offense reads as follows:

{¶23} "Revised Code 2907.323(A)(3): (A) No person shall do any of the following: (3) Possess or view any material that shows a minor who is not the person's child or ward in a statue [sic] of nudity.

{¶24} "Requirement of notice: The State must prove the Defendant acted recklessly in that he had some notice of the nature or character of the material. The State need not prove the Defendant was aware of the actual content of the material, but only that he was on notice as to its nature or character.

{¶25} "Recklessly: A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to be of a certain nature. A person is reckless with respect to the circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

{¶26} "Risk: 'Risk' means a significant possibility, as contrasted with a remote possibility, that certain circumstances may exist.

{¶27} "Recklessly includes conduct that is knowingly or purposely performed.

{¶28} "'Material' means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture, film, phono graphic [sic] records or tape, or other tangible thing capable of arousing interest through sight, sound or touch.

{¶29} "'Minor' means a person under the age of 18.

{¶30} "'Nudity' means the showing, representation or depicition of human male or female genitals, pubic area or buttocks with less than a full, opaque covering, or of a female breast with less than full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state, so as to constitute a lewd exhibition or involve a graphic focus on the genitals.

{¶31} "'Lewd' exhibition" means an exhibition which is not morally innocent, that is, the described material that is possessed or viewed would be for prurient purposes." Transcript of Proceedings, pgs. 255-257. (Emphasis added).

{¶32} Appellant contends that the trial court should have given an instruction that defined "lewd exhibition" as "the same as an obscene exhibition. Material is obscene if to an average person, applying contemporary community standards, the dominant theme of material taken as a whole appeals to prurient interest." We find the denial of appellant's request was not an abuse of discretion.

{¶33} The trial court in this case gave a jury instruction that was essentially the same as the jury instruction provided in the Ohio Jury Instructions[1]. Upon review, the jury instruction complied with United States and Ohio Supreme Court law. The Ohio Supreme Court has construed R.C. 2907.323 to require that the statute's operation be limited to nudity that constitutes lewd exhibition or focuses on genitals. *State v. Young* (1988), 37 Ohio St.3d 249, 525 N.E.2d 1363, reversed on other grounds by *Osborne v. Ohi*o (1990), 495 U.S. 103, 110 S. Ct. 1691, 109 L.Ed.2d 98.

{¶34} The jury instruction given by the trial court complied with the law of *Young* and *Osborne*. As such, we find no abuse of discretion.

{¶35} Appellant's second assignment of error is overruled.

[1] See Ohio Jury Instructions, sec. 507.323.

III

{¶36} In the third assignment of error, appellant argues that the trial court erred when it denied appellant's motion in limine and denied appellant's Crim. R. 29 motion for acquittal. We disagree.

{¶37} First, appellant argues that the trial court erred when it denied appellant's motion in limine which requested that the State be prevented from using 116 photographs as evidence at trial. In his motion, appellant argued that the photographs, other than the two which were the basis of the charges, were not relevant. The trial court postponed any decision on the motions until there was an attempt to introduce the photographs into evidence. At trial, the State mentioned the 116 photographs as part of its presentation on how these charges came to be brought against appellant.[2] Defense counsel objected but the objection was overruled.

{¶38} Appellant specifically seeks a reversal based upon his motion in limine. The granting or denial of a motion in limine is a tentative, interlocutory, precautionary ruling reflecting the trial court's anticipatory treatment of an evidentiary issue. *State v.*

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[2] The prosecutor made the following statements during opening arguments: "[Chrystal Chevalier, the girl in the photos, allowed appellant to take the photos] because she thought he'd leave her alone; that after this happened, she wouldn't have to do anything more. As it turned out, she was right with respect to the photos. But it all came back to haunt her in August of this year. You see, on August the 9th of this year, Angel Hartley was at the residence of the Defendant at 234 Slocum Street, Apartment 5, here in the City of Lancaster. And while Ms. Hartley was there, she discovered 116 photographs - - - … Ms. Hartley inquired of the Defendant specifically about two of the photographs, "Who is this person?" The Defendant claimed he didn't know. So Mrs. Hartley tried to find out who was in the picture - - in the pictures. And she was able to determine that the person in the two photographs you're going to see today was an individual by the name of Crystal Chevalier. And Ms. Hartley reported that to the Lancaster Police Department on August the 20th of this year.
"As a result of that, Detective Brian Lowe of the Lancaster Police Department began an investigation and he was able to track down Crystal. And he talked to Crystal the first time on August the 23rd about this and Crystal told him "Yes, I had posed for the pictures…." TR 139-141.

Grubb (1986), 28 Ohio St.3d 199, 201, 503 N.E.2d 142. A motion in limine does not preserve an issue for appeal. Id. However, although appellant's assignment of error is phrased in terms of the motion in limine, defense counsel objected at trial to the State's reference to the 116 photographs. As such, we will consider appellant's assignment of error in terms of whether the trial court committed reversible error when it overruled appellant's objection to the mention of the 116 photographs.

{¶39} It is important to note that the 116 photographs were not admitted into evidence. They were merely mentioned in the State's opening statement while the State was telling the jury how it came to be that appellant was charged with the pending counts. The opening statement, as well as the testimony and evidence that followed, made it clear that the charges faced by appellant were based solely upon two of the photographs.

{¶40} In addition, the jury was given an instruction before retiring that explained that opening statements were not evidence. A jury is presumed to have followed the instructions given it by the trial court. *State v. Jones*, 90 Ohio St.3d 403, 414, 2000-Ohio-187, 739 N.E.2d 300.

{¶41} Accordingly, we find no reversible error.

{¶42} In this same assignment of error, appellant presents an additional issue. Appellant contends that the trial court erred when it denied appellant's Crim. R. 29 motion for acquittal.[3] We disagree.

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[3] Criminal Rule 29 states the following in relevant part: "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case" Crim. R. 29(A).

{¶43} The standard of review under Crim. R. 29(A) is sufficiency of the evidence. Our standard of review on the issue of sufficiency is established in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, to which the court held as follows: "The relevant inquiry is whether, after reviewing 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 * * * " Id. at paragraph 2 of the syllabus.

{¶44} In the case sub judice, appellant was convicted of two counts of Illegal Use of Minor in Nudity-Oriented Material or Performance, in violation of R.C. 2907.323(A)(3). Revised Code 2907.323(A)(3) states as follows:

{¶45} "No person shall . . . Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

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

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

{¶48} In *State v. Young,* the Ohio Supreme construed R.C. 2907.323 to prohibit "the possession or viewing of material or performance of a minor who is in a state of

nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals…." *State v. Young (1988)*, 37 Ohio St.3d 249, 252, 525 N.E.2d 1363. This aspect of the *Young* court's decision was affirmed in *Osborne v. Ohio* (1990), 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98. (*Osborne* reversed *Young* on other grounds, see *Osborne*, 495 U.S. at 122-126, 110 S.Ct. 1691, 109 L.Ed.2d 98).

{¶49} In this case, the jury had before it two photographs of a 14-year old girl in which the girl had exposed her breasts and pulled her jeans down. The girl testified that, in 2001, she agreed to let appellant take the photos because appellant had been "pestering" her for about two years. Appellant took the photos while they were in the back of appellant's mini-van. A detective from the Lancaster Police Department testified that appellant admitted to being the photographer and to possessing the photos. In August, 2002, the photos were found in appellant's bedroom, sealed in a bank zipper bag. It was stipulated that appellant was not the girl's father or guardian.

{¶50} From this evidence, when reviewed in a light most favorable to the prosecution, the jury could have found the essential elements of the crimes proven beyond a reasonable doubt. Therefore, the trial court did not abuse its discretion in denying appellant's motion for acquittal.

{¶51} Appellant's third assignment of error is overruled.

{¶52} The judgment of Fairfield County Court of Common Pleas is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Farmer, J. concur