IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

MICHAEL J. AUSTIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D10-2308

Opinion filed August 9, 2011.

An appeal from the Circuit Court for Santa Rosa County.
Gary L. Bergosh, Judge.

Nancy A. Daniels, Public Defender, and Carl S. McGinnes, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Charlie McCoy, Senior Assistant Attorney General, Tallahassee, for Appellee.

MARSTILLER, J.

Michael J. Austin ("Appellant") appeals his conviction and probationary sentence for violating section 847.0133, Florida Statutes (2009), which makes it a third-degree felony to "knowingly sell, rent, loan, give away, distribute, transmit,

or show any obscene material to a minor."[1] Citing *Pope v. Illinois*, 481 U.S. 497 (1987), Appellant asserts the trial court should have modified the jury instruction on obscenity to include a "reasonable person" standard. He also contends the court abused its discretion by proscribing alcohol consumption as a special condition of probation. We affirm Appellant's conviction and sentence for the reasons that follow.

I. Jury Instruction

At Appellant's trial, the State presented evidence that Appellant showed a minor several movies in which fully or partially nude adults were engaging in sex acts. In giving the instruction on what is "obscene"[2] material, the trial court told the jury it must find that:

[1] A jury acquitted Appellant of a second charge, lewd or lascivious conduct.

[2] Section 847.0133, Florida Statutes, incorporates the definition of "obscene" found in section 847.001(10), Florida Statutes.

> "Obscene" means the status of material which:
>
> (a) The average person, applying contemporary standards, would find, taken as a whole, appeals to the prurient interest;
>
> (b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
>
> (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

> a. The average person applying the contemporary community standards of Santa Rosa County, Florida, would find that the material taken as a whole appeals to the prurient interest.
>
> b. The material depicts or describes sexual conduct in a patently offensive way.
>
> c. The material, taken as a whole, lacks serious literary, artistic, political or scientific value.

The instruction tracks the language in *Miller v. California*, 413 U.S. 15, 24 (1973), setting out the three-pronged test for obscenity:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual 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.

(Citations omitted). Appellant does not contend that the court's instruction violates *Miller*. He posits instead that the Supreme Court in *Pope v. Illinois*, 481 U.S. 497 (1987), modified *Miller* by adding a reasonable person standard to the third prong of the *Miller* test. Thus, he argues, omission of the standard from the jury instruction given at his trial rendered the instruction unconstitutional.

Indeed, the Court in *Pope* stated that "[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable

person would find such value in the material, taken as a whole." 481 U.S. at 500-501. But we disagree with Appellant that this statement modified *Miller*.

The jury instruction at issue in *Pope* specifically applied community standards to all three parts of the *Miller* test. Holding the instruction incorrect and unconstitutional under *Miller*, the Court in *Pope* explained:

> There is no suggestion in our cases that the question of the value of an allegedly obscene work is to be determined by reference to community standards. Indeed, our cases are to the contrary. *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977), held that, in a federal prosecution for mailing obscene materials, the first and second prongs of the *Miller* test-appeal to prurient interest and patent offensiveness-are issues of fact for the jury to determine applying contemporary community standards. The Court then observed that, unlike prurient appeal and patent offensiveness, "[l]iterary, artistic, political, or scientific value . . . is not discussed in *Miller* in terms of contemporary community standards." *Id.*, 431 U.S. at 301, 97 S.Ct., at 1763 (citing F. Schauer, The Law of Obscenity 123-124 (1976)). **This comment was not meant to point out an oversight in the *Miller* opinion, but to call attention to and approve a deliberate choice.**
>
> In *Miller* itself, the Court was careful to point out that "[t]he First Amendment protects works which, taken as a whole have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." 413 U.S., at 34, 93 S.Ct., at 2620.

481 U.S. at 500 (emphasis added). We conclude from these passages that *Miller* "deliberate[ly]," though implicitly, employs the objective reasonable person

standard in the third prong of the obscenity test, and that *Pope* clarified, but did not modify, the Court's earlier decision.

Moreover, we discern nothing in *Pope* requiring a court to include the reasonable person standard when instructing jurors on the value prong of the obscenity test. Rather, the Court suggests that "[i]n an obscenity prosecution the trial court, in its discretion, could instruct the jury to decide the value question by considering whether a reasonable person would find serious literary, artistic, political, or scientific value in the work, taken as a whole." 481 U.S. at 501 n. 3. *Accord State v. Anderson*, 366 S.E.2d 459, 471 (N.C. 1988) (recognizing that "the literary, artistic, political, or scientific value of material is to be determined based upon whether a 'reasonable person' would find such value in the material, taken as a whole," but that the Supreme Court in *Pope* "has indicated that the decision in a particular case as to whether to instruct the jury to apply the reasonable person test in this regard is a matter in the discretion of the trial court."). Appellant presents no other authority—and we have found none—mandating that the reasonable person standard be made part of a jury instruction on obscenity.[3]

[3] Our decision in *Haggerty v. State*, 531 So. 2d 364 (Fla. 1st DCA 1988), as Appellant recognizes, is inapposite to the instant case. There the appellant asserted that section 847.001(7), Florida Statutes (1987), defining "obscene," was facially unconstitutional because it did not expressly apply "contemporary community standards" to the first two prongs of the *Miller* test or the reasonable person standard to the third prong. (Section 847.001(7) was renumbered to section 847.001(10), without substantive change, effective July 1, 2001. *See* ch. 2001-177,

Unlike *Pope*, where the trial court incorrectly applied community standards to part three of the *Miller* test, the court in Appellant's case correctly instructed jurors to apply contemporary community standards only to the prurient interest and patent offensiveness prongs of the test. As to the value prong, the court did not refer to community standards in explaining to jurors what to consider in determining whether the movies Appellant showed a minor had literary, artistic, political or scientific value. The trial court's decision not to add the reasonable person standard to the obscenity instruction was neither a constitutional violation nor an abuse of discretion.

II. Special Condition of Probation

The trial court sentenced Appellant to 48 months' probation and imposed, as a special condition, a requirement that Appellant "abstain entirely from the use or possession of alcohol" during the probationary period. Appellant argues the condition should be stricken because it is not reasonably related to his crime.

Trial courts have broad discretion to impose conditions of probation, but special conditions must be reasonably related to rehabilitation. *See Stephens v. State*, 659 So. 2d 1303, 1304 (Fla. 1st DCA 1995). *Biller v. State*, 618 So. 2d 734, (Fla. 1993), held that a special probation condition "'is invalid if it (1) has no

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§ 1, Laws of Fla.) We concluded that because the trial court articulated both standards when instructing the jury, the appellant could not claim violation of his constitutional rights. *Haggerty*, 531 So. 2d at 366.

relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality,'" (quoting *Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. 2d DCA 1979)). *Id.* at 734-35. All three *Rodriguez* factors must exist for an appellate court to strike a special probation condition as an abuse of discretion. *Stephens*, 659 So. 2d at 1304.

In *Biller*, the supreme court struck a condition prohibiting the petitioner from using or possessing alcohol while on probation for carrying a concealed firearm and carrying a concealed weapon. 618 So. 2d at 735. The court reasoned there was no connection between alcohol use and the petitioner's crimes, alcohol use by adults is legal, and "there was nothing in the record, such as information in a presentence investigation report, which would suggest that Biller has a propensity towards alcohol or that his judgment becomes impaired as a consequence of using it." *Id.* In the instant case, two of the *Rodriguez* factors clearly are met: nothing in the record connects Appellant's alcohol use to the crime he was convicted of, and it is legal for Appellant, who is an adult, to use alcohol. But unlike *Biller*, the record here contains information indicating Appellant's "propensity towards alcohol." Specifically, the presentence investigation report ("PSI") reveals that in Arkansas in 2005, Appellant was found guilty and convicted of DUI. He failed to complete court-ordered substance abuse

treatment. The following year, Appellant was arrested in Pensacola for DUI, pled to the lesser-included offense of reckless driving, and was ordered to attend first offender DUI school and receive substance abuse treatment. Further, the report states that Appellant admitted having used alcohol "to mask things that bothered him." Under the reasoning in *Biller*, the information in the PSI suffices to negate the third *Rodriguez* factor. Therefore, the trial court did not abuse its discretion by prohibiting Appellant from consuming or possessing alcohol as a special condition of probation.

AFFIRMED.

BENTON, C. J., CONCURS WITH OPINION; CLARK, J., CONCURS IN RESULT ONLY.

BENTON, C. J., concurring.

"'Florida law is clear that a defendant is entitled to have a jury instruction on any valid defense supported by the evidence,' but 'a trial judge is not required to give an instruction where there is no nexus between the evidence in the record and the requested instruction.' Mora v. State, 814 So. 2d 322, 330 (Fla. 2002)." Wheeler v. State, 4 So. 3d 599, 605 (Fla. 2009). In "'order to be entitled to a special jury instruction, [the defendant] must prove: (1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing.' Stephens v. State, 787 So. 2d 747, 756 (Fla. 2001) (footnotes omitted)." Id. While the special instruction here was a correct statement of the law and not misleading or confusing, appellant has not made a persuasive case that the special instruction was supported by the evidence or that the standard instruction was inadequate. See Lee v. State, 447 S.E.2d 323, 325 (Ga. Ct. App. 1994); State v. Anderson, 366 S.E.2d 459, 471 (N.C. 1988).