[Cite as *State v. Althouse*, 2018-Ohio-780.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 16CA3578
	:	
v.	:	
	:	DECISION AND
ROBERT N. ALTHOUSE,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	RELEASED 02/14/2018

APPEARANCES:

Timothy Young, Ohio Public Defender, Valerie Kunze, Assistant Ohio Public Defender, and Katherine R. Ross-Kinzie, Assistant Ohio Public Defender, Columbus, Ohio, for defendant-appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for plaintiff-appellee.

Hoover, P.J.

{¶ 1} Defendant-appellant, Robert N. Althouse ("Althouse"), appeals his conviction for the illegal use of a minor in nudity-oriented material or performance in violation of R.C. 2907.323(A)(3). On appeal, Althouse contends that the statute is unconstitutional because it violates freedom of speech rights protected by the federal and state constitutions. Althouse, however, failed to raise this issue with the trial court. Thus, if we were to consider the issue for the first time on appeal, it would be under the plain error standard. However, a First Amendment challenge requires a heightened level of scrutiny that involves burden shifting to the State. Because it is unfair to conduct an analysis that requires the State to establish the constitutionality of the statute when it had no opportunity to do so at the trial level, we decline to conduct a plain

error review. *See State v. Alexander*, 4th Dist. Adams No. 12CA945, 2013-Ohio-1913 (declining to conduct plain error review of constitutionality of statute under Second Amendment for the first time on appeal, where it would be unfair to the State especially given the heightened level of scrutiny and burden shifting to State).

{¶ 2} Althouse also contends on appeal that R.C. 2907.323(A)(3) is unconstitutionally vague as it applies to him, because this case involves the consensual exchange of pictures between an adult and a minor over 16 years of age, the age of consent in Ohio, but under 18 years of age, the age of minority in Ohio – i.e., the statute criminalizes "sexting" between two individuals able to give consent to sexual activity. Thus, Althouse alleges that the statute violates his due process rights under the federal and state constitutions. Again, Althouse failed to raise this issue with the trial court, and we decline to address the void-for-vagueness argument for the first time on appeal. *See State v. Klintworth*, 4th Dist. Washington No. 10CA40, 2011-Ohio-3553, ¶¶ 20-23 (declining to address appellant's void-for-vagueness argument when it was not raised at the trial level).

{¶ 3} The judgment of the trial court is affirmed.

I. Facts and Procedural Posture

{¶ 4} Althouse and A.B. knew each other through mutual friends and because they were neighbors; but prior to December 2015 the two did not have a significant relationship. In December 2015, when Althouse was 26 years old and A.B. was 16 years old, the two had a conversation on Facebook Messenger. A.B. sent Althouse a picture of her face at his request. Althouse told A.B. that she was "very cute." A.B. told Althouse that she had other pictures. A.B.

then sent Althouse a picture of her in a bikini bottom, and also a picture of her vagina. Althouse then asked A.B. if she could take a picture of her breasts, to which she responded "l8r lol".

{¶ 5} A.B. then said to Althouse, "i showed [sic] get a dick pic . . . bc i sent u my pussy pic." In response Althouse asked, "So u want one[?]"A.B. answered, "jus a dick pic." Althouse then sent A.B. a picture of his penis. The two then discussed the size of his penis and the possibility of dating.

{¶ 6} A.B.'s mother discovered the conversation on her cell phone, which was logged into A.B.'s Facebook account. She went to the police station and reported the conversation.

{¶ 7} Thereafter, a Ross County Grand Jury indicted Althouse for one count of disseminating matter harmful to juveniles, in violation of R.C. 2907.31, and one count of illegal use of a minor in nudity-oriented material or performance, in violation of R.C. 2907.323(A)(3). A jury trial was held and the State dismissed the dissemination count. The jury, however, found Althouse guilty of illegal use of a minor in nudity-oriented material or performance. Althouse was sentenced to community control and determined to be a Tier I sex offender.

{¶ 8} Althouse filed a timely notice of appeal.

II. Assignments of Error

{¶ 9} On appeal, Althouse assigns the following errors for our review:

First Assignment of Error:

> Robert Althouse's indictment and conviction under R.C. 2907.323(A)(3) violate the freedom of speech protected by the First and Fourteenth Amendments of the United States Constitution and Article I, Section 11 of the Ohio Constitution.

Second Assignment of Error:

> Robert Althouse's indictment and conviction under R.C. 2907.323(A)(3) violate his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

III. Law and Analysis

{¶ 10} In his first assignment of error, Althouse contends that "[t]he trial court erred when it allowed [his] freedom of speech to be violated by allowing his indictment and conviction for a violation of R.C. 2907.323(A)(3)." [Appellant's Brief at 3.] The gist of Althouse's argument seems to be that because A.B. was 16 years old at the time the picture was sent, the legal age of consent in Ohio, and therefore could legally consent to sexual relations with Althouse, he should not be prosecuted for possessing a nude photograph of A.B. He contends that the exchange of photographs in this case is "speech related to a lawful act" and does not survive strict constitutional scrutiny. As previously noted, Althouse failed to raise these issues with the trial court.

{¶ 11} It is well-established that 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, 489 N.E.2d 277 (1986), syllabus. However, the Supreme Court of Ohio has also held that "the waiver doctrine announced in *Awan* is discretionary." *In re M.D.,* 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988). "Even where waiver is clear, [a reviewing court may] consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it." *Id.* at syllabus. *Accord Alexander*, *supra*, at ¶ 9.

{¶ 12} Under Crim.R. 52(B) "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Thus, there are 'three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." [Courts] have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.' " *State v. Lynn*, 129 Ohio St.3d 146, 2011–Ohio–2722, 950 N.E.2d 931, ¶ 13, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). *Accord Alexander* at ¶ 10.

{¶ 13} "Even when all three prongs are satisfied, a court still has discretion whether or not to correct the error." *Lynn* at ¶ 14. The Supreme Court of Ohio has acknowledged the discretionary aspect of Crim.R. 52(B) by cautioning courts to notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. *Accord Alexander* at ¶ 11.

{¶ 14} In the case sub judice, it is undisputed that Althouse failed to raise any constitutional argument regarding R.C. 2907.323(A)(3) at the trial court level. Because the issue of constitutionality was apparent and available at the time of his trial, we will not address the issue for the first time on appeal. *Alexander* at ¶ 12, citing *State v. Klintsworth*, 4th Dist. Washington No. 10CA40, 2011-Ohio-3553, ¶ 23. A significant factor of our decision to not address Althouse's claim of the unconstitutionality of R.C. 2907.323(A)(3) is based on the analytic structure of the issue he raises. *Id.*

{¶ 15} In his first assignment of error, Althouse attacks the constitutionality of the statute under the First Amendment. Normally, all statutes enjoy a strong presumption of constitutionality. *State v. Williams,* 126 Ohio St.3d 65, 2010–Ohio–2453, 930 N.E.2d 770, ¶ 20. To overcome the presumption, the party challenging the law must prove beyond a reasonable doubt that the statute is unconstitutional. *Id.* However, this presumption applies when the State restriction on constitutional rights is subject to the lowest level of judicial scrutiny, i.e. the rational basis test. When a more rigorous level of inquiry replaces minimum scrutiny, the presumption of constitutionality disappears and is replaced by shifting the burden to the State of justifying the intrusion. *Accord Alexander, supra,* at ¶ 15; *see also Ezell v. City of Chicago,* 651 F.3d 684, 706 (7th Cir.2011).

{¶ 16} Here, consideration of the constitutionality of R.C. 2907.323(A)(3) under the First Amendment is subject to heightened constitutional scrutiny. *See Reed v. Town of Gilbert,* ––– U.S. ––––, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.") Under this heightened scrutiny the State bears the burden of proving the statute's constitutionality. *Id.*; *Alexander* at ¶ 16. Furthermore, proving that a statute comports with heightened scrutiny is exceedingly complex. It is simply not fair to place this burden at the appellate level on the State without having afforded it the opportunity to present evidence to the trial court. *Alexander* at ¶¶ 16-17. Accordingly, we deem Althouse's first assignment of error forfeited and decline to address these constitutional issues under a plain error standard.

{¶ 17} In his second assignment of error, Althouse argues that R.C. 2907.323(A)(3) is unconstitutionally vague as applied to him.

{¶ 18} "The void-for-vagueness doctrine is a component of the right to due process and is rooted in concerns that laws provide fair notice and prevent arbitrary enforcement." *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012–Ohio–5690, 983 N.E.2d 276, ¶ 20. However, impossible standards of specificity are not required. *State v. Carrick*, 131 Ohio St.3d 340, 2012–Ohio–608, 965 N.E.2d 264, ¶ 14. As already indicated, statutes generally enjoy a strong presumption of constitutionality, so to overcome the presumption, the party challenging the law must prove beyond a reasonable doubt that the statute is unconstitutional. *Williams*, 126 Ohio St.3d 65, 2010–Ohio–2453, 930 N.E.2d 770, at ¶ 20. *Accord Alexander* at ¶ 19.

{¶ 19} Althouse claims that the application of R.C. 2907.323(A)(3) in the particular context of his conduct is unconstitutional. Specifically, Althouse argues that the statute is unconstitutionally vague because it fails to provide "fair warning to the ordinary citizen who exchanges nude photographs on social media" that their conduct might be criminal in nature; and because "[t]here is no distinction or clarification in the law that a consensual communication, conducted between two individuals able to give consent to sexual activity, are still liable for criminal activity at the felony level." [Appellant's Brief at p. 6.] Althouse suggests this is especially concerning given the prevalence of "sexting" among teenagers and young adults.[1] Althouse also contends that enforcement of the law "in these situations" will always be arbitrary and discriminatory because the discretion of local prosecutors drives a range of different outcomes in sexting cases. Finally, Althouse argues that R.C. 2907.323(A)(3) unreasonably inhibits the fundamental constitutionally protected right to freedom of speech.

[1] "Sexting" means "the practice of sending nude or sexually suggestive digital photographs via text/image messaging." *In re J.P.*, 11th Dist. Geauga No. 2011-G-3023, 2012-Ohio-1451, ¶ 22. Courts have noted that sexting is widespread among American teenagers. *Id.*; *see also United States v. Nash*, 1 F.Supp.3d 1240, 1244 (N.D. Ala.2014) ("Sexting is a widespread phenomena among teenagers and young adults.")

{¶ 20} Again, Althouse failed to raise this constitutional argument with the trial court and therefore it is within our discretion not to address it as plain error on appeal. In the past, this Court has wavered as to whether it should exercise its discretion to review an appellant's void-for-vagueness argument under plain error review for the first time on appeal. *Compare Alexander*, *supra*, at ¶ 18 (exercising discretion to address void-for-vagueness argument for the first time on appeal), *with Klintworth*, *supra*, at ¶ 23 (declining to exercise discretion to address void-for-vagueness argument for the first time on appeal). Here, under the present circumstances, we believe it is unfair to make the State defend this claim for the first time on appeal, especially since the issues involved are complex and the record has not been developed on the issue of vagueness. Thus, we follow the precedent established in *Klintworth* and decline to address Althouse's void-for-vagueness argument for the first time on appeal.

IV. Conclusion

{¶ 21} In light of Althouse's failure to raise the constitutional issues involved in his first and second assignments of error at the trial court level, we decline to address them for the first time on appeal. Accordingly, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

By:_____
Marie Hoover, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.