[Cite as *State v. Kopras*, 2018-Ohio-2774.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ROBERT KOPRAS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 JE 0007

Criminal Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 15 CR 127

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Dan Fry, Belmont County Prosecuting Attorney and
Atty. Helen Yonak (counsel of record), Asst. Prosecuting Attorney
Jefferson County Justice Center, 16001 State Route 7, Steubenville, Ohio 43952, for Plaintiff-Appellee

Atty. John D. Falgiani, Jr., P.O. Box 8533, Warren, Ohio 44484, for Defendant-Appellant.

Dated: June 29, 2018

WAITE, J.

{¶1} Appellant Robert Kopras challenges the validity of his guilty plea in the Jefferson County Common Pleas Court to one count of extortion in violation of R.C. 2905.11(A)(5), a felony of the third degree, and to an offense of violence pursuant to R.C. 2901.01(A)(9). In addition, Appellant raises an ineffective assistance of counsel claim, based on defense counsel's failure to argue that the allegations in the indictment constitute coercion in violation of R.C. 2905.12, a misdemeanor of the third degree, rather than extortion. Finally, Appellant argues that the extortion statute is unconstitutionally vague because it does not define the phrase "any valuable thing or valuable benefit." For the following reasons, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} Appellant was indicted on September 2, 2015 on one count of voyeurism, in violation of R.C. 2907.08(B), a misdemeanor of the second degree, and on one count of extortion. The voyeurism charge was based on a surreptitiously-recorded sex tape featuring Appellant and the mother of his child, although Appellant contends that she consented to the recording. The video found its way to no less than 27 websites on the internet.

{¶3} The crimes occurred after Appellant became embroiled in a dispute over visitation with the mother of his child, who allegedly prevented him from seeing his daughter for approximately eight months. Appellant began proceedings in the visitation dispute in the juvenile court, but when he discovered that the juvenile court proceeding would not provide immediate access to his daughter, he threatened to send links to the sex tape to various people unless the child's mother gave in to his demand for immediate visitation. Appellant's ultimatum provided the basis for the extortion charge.

{¶4} The pleading Appellant filed in juvenile court was never specifically identified in the criminal matter. At the sentencing hearing, defense counsel stated that "there is a case pending in Juvenile Court to decide [the visitation] issue." (3/14/16 Sent. Hrg., p. 6.)

{¶5} As Appellant's dispute over visitation is at the root of this criminal matter, it is important for a complete understanding to note the law regarding unmarried parents. An unmarried father of a child in Ohio has no rights with respect to the child until he has established parentage, and then takes further steps to establish parenting time rights. See R.C. 3109.042(A), 3109.12(A). R.C. 3109.12(A) captioned "Parenting time, companionship or visitation rights where mother is unmarried," provides, in pertinent part:

> If a child is born to an unmarried woman and if the father of the child has acknowledged the child and that acknowledgment has become final pursuant to section 2151.232, 3111.25, or 3111.821 of the Revised Code or has been determined in an action under Chapter 3111. of the Revised Code to be the father of the child, the father may file a complaint requesting that the court of appropriate jurisdiction of the county in which the child resides grant him reasonable parenting time rights with the child.

Consequently, based on the record in this appeal, despite the fact that the victim appears to have at least unofficially acknowledged Appellant's paternity of her child, Appellant did not have his right to parenting time established at the time he demanded immediate access to his daughter.

{¶6} On February 24, 2016, Appellant pleaded guilty to extortion. As a part of the negotiated written plea agreement, the state agreed to dismiss without prejudice the voyeurism charge, as well as a first degree misdemeanor charge involving violation of an order of temporary protection pending in county court.

{¶7} During the plea colloquy, when Appellant informed the trial court that he served in the armed forces in 1979, the trial court inquired about the possibility Appellant may suffer from post-traumatic stress disorder. Appellant responded that he did not suffer any disability as a result of his military service, but that his daughter had been in the neo-natal intensive care unit for six weeks following a traumatic birth, and the stress was so unbearable that he required professional counseling. He stated that he had resumed counseling "right in the middle of all this." (2/22/16 Plea Hrg. Tr., pp. 6-7.)

{¶8} During the colloquy, Appellant agreed that his attorney had explained the terms of the plea agreement and that Appellant was satisfied with his advice and counsel. (2/22/16 Plea Hrg. Tr., pp. 8, 10-11.) The trial court specifically inquired, "[h]as [defense counsel] done everything you think should be done, file motions, talk to the prosecutor, talk to you, whatever it is you think should be done, has he done it?" Appellant replied, "[h]e's done even more, yes." (2/22/16 Plea Hrg. Tr., p. 10.)

{¶9} The trial court further inquired, "you understand that if you plead guilty to [extortion], you're making a complete admission that you committed that crime?" Appellant responded, "[y]es." (2/22/16 Plea Hrg. Tr., p. 11.) The trial court later observed that Appellant understood the nature of the charge against him. (2/22/16 Plea Hrg. Tr., p. 21.)

{¶10} Less than two weeks later, on March 8, 2016, Appellant filed a *pro se* motion to withdraw his guilty plea. Appellant claimed that he was experiencing "extremely high levels of anxiety" in the days preceding his plea hearing, exacerbated by his inability to see his daughter. (3/8/16 Motion, p. 1.) He alleged in his motions several claims, some of which appear somewhat dubious. He stated that he was unaware at the time of plea that the "state" would continue to gather evidence "by having the alleged victim's 'new friend' continue to 'troll', stalk, and print out his social media pages dating back years before the alleged crimes occurred." He expressed concern for his daughter's safety based on the content of electronic mail messages exchanged with the child's mother. He asserted that he was forced to destroy "exculpatory evidence" when he was ordered to remove the offending video from the internet. Finally, he claimed that he was coerced into entering his plea with the constant threat of bond revocation, and now claimed that his counsel did not actively pursue a defense, for example "subpoena[ing] witnesses, of [sic] alleged victim's and 'new friend's' phone records, discussion of various methods of defense." (3/8/16 Motion, p. 2.) However, two days later, on March 10, 2016, Appellant filed a copy of the *pro se* motion to withdraw his guilty plea with a handwritten and signed notation at the bottom, reading "I, Robert A Kopras, hereby wish to cancel my withdraw [sic] of guilty plea to extortion this tenth day of March, 2016." (3/10/16 Motion, p. 1.)

{¶11} At the sentencing hearing four days later, on March 14, 2016, Appellant stated that he had never recovered fully from the anxiety that he developed following the birth of his daughter in 2011. He testified that he resumed counseling in December of 2015, and that he also sought spiritual counseling from the pastor of his church and

from his brother-in-law, who is also a pastor. (3/14/16 Sent. Hrg. Tr., p. 11.) He testified that he had made an emergency appointment the week prior to his sentencing and had been prescribed Zoloft.

{¶12} After taking Zoloft for three days, Appellant reviewed the emails he complained of and, finding no evidence of threat to his daughter's welfare, he withdrew the motion to withdraw his plea. He characterized his emails to the victim as "a bunch of rants that seemed like a crazy person was writing them, a lot of really vulgar comments." (3/14/16 Sent. Hrg. Tr., p. 12.)

{¶13} With regard to the charges involved in his plea, Appellant testified that he posted the videos on the internet "because they were on [his] cell phone and [he] hit the wrong button and sent one to somebody and [he] just wanted to get them off [his] phone and without losing them." When he discovered that his visitation proceedings in juvenile court would not be resolved for six months, he "kind of freaked out." He used the video that he knew was on the internet to "bully" the victim and he "threatened to send the links to people." He admitted that he had no right to use the videos "to help [him] see [his] daughter." (3/14/16 Sent. Hrg. Tr., p. 13.)

{¶14} With respect to his mental state at sentencing, Appellant testified that he was able to sleep the night before the hearing, while in the past he would be restless for three nights before a hearing "arguing the case in his head." He testified that he regretted not getting help sooner. (3/14/16 Sent. Hrg. Tr., pp. 13-14.)

{¶15} The state informed the trial court that Appellant did not remove the offending video from the internet until several months after he was ordered to do so, and that he finally removed the video from all but one of the twenty-seven websites on

which it was posted only because the state informed him it would seek bond revocation. The video is still posted on a Russian website to which Appellant has no access. (3/14/16 Sent. Hrg. Tr., p. 14.)

{¶16} Prior to imposing sentence, the trial court acknowledged that the crime committed by Appellant was "not extortion for purposes of monetary gain." The trial court observed that "this type of extortion is worse using a child and knowing exactly going [sic] to the heart of a parent. I find that that is even worse than monetary gain." (3/14/16 Sent. Hrg. Tr., p. 19.) The trial court imposed a five-year sentence of community control with the first six months to be served at the Eastern Ohio Correction Center, pending a vacancy at the facility.

{¶17} On August 25, 2016, Appellant's community control was revoked and he was sentenced to an eighteen-month term of imprisonment after he admitted to violating the terms of his community control. Specifically, Appellant was prohibited from using social media, but he created a new Facebook account under an alias, then reactivated his old account and used both of them to continue to harass his child's mother. A *nunc pro tunc* order entered on March 28, 2017 corrected the felony level from five to three, and correcting Appellant's sentence from eighteen months to nine months.

{¶18} On November 23, 2016, Appellant filed a second *pro se* motion to withdraw his plea, citing ineffective assistance of counsel, conflict of interest, and coercive and possibly criminal behavior on the part of his court-appointed counsel. In an affidavit attached to the motion, Appellant claimed that he was suffering from severe mental deficiencies due to stress and anxiety, and from a sleep disorder, when he entered his plea. Appellant stated that he had recently stopped taking Zoloft, which

caused him to be passive and apathetic, because it caused confusion and an inability to concentrate. He argued that defense counsel coerced him into withdrawing his first *pro se* motion to withdraw guilty plea with threats to withdraw as his counsel. Finally, he alleged that he had recently discovered he did not commit the crime to which he entered a guilty plea because the description of extortion that was provided by his defense counsel was completely different from the actual statute.

{¶19} The trial court overruled the motion on March 3, 2017, finding that Appellant was fully apprised of his rights at the plea hearing and had the benefit of two experienced court-appointed attorneys. (3/3/17 J.E., p. 1.) The trial court characterized Appellant's ineffective assistance of counsel claims as unsubstantiated and self-serving, and also relied on the fact that Appellant "failed to address issues raised in [the] motion by way of appeal." (3/3/17 J.E., p. 2.)

<u>Law</u>

{¶20} Each of Appellant's assignments of error is based, either in whole or in part, on the legal distinction between the crimes of extortion and coercion. Appellant contends that he cannot be guilty of extortion because he did not act with the purpose to obtain any thing or benefit of pecuniary value or to coerce another in order to obtain something to which he had no right.

{¶21} R.C. 2905.11, captioned "Extortion," provides, in pertinent part:

> (A) No person, with purpose to obtain any valuable thing or valuable benefit or to induce another to do an unlawful act, shall do any of the following:
>
> * * *

(5) Expose or threaten to expose any matter tending to subject any person to hatred, contempt, or ridicule, or to damage any person's personal or business repute, or to impair any person's credit.

(B) Whoever violates this section is guilty of extortion, a felony of the third degree.

{¶22} R.C. 2905.12, captioned "Coercion," reads, in pertinent part:

(A) No person, with purpose to coerce another into taking or refraining from action concerning which the other person has a legal freedom of choice, shall do any of the following:

* * *

(3) Expose or threaten to expose any matter tending to subject any person to hatred, contempt, or ridicule, to damage any person's personal or business repute, or to impair any person's credit;

* * *

(D) Whoever violates this section is guilty of coercion, a misdemeanor of the second degree.

Analysis

ASSIGNMENT OF ERROR NO. 1

APPELLANT'S PLEA WAS NOT GIVEN KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY AS REQUIRED BY CRIMINAL RULE 11 AND IS THEREFORE VOID.

{¶23} A plea of guilty must be made knowingly, intelligently and voluntarily in order for it to be deemed valid and enforceable. *State v. Clark*, 119 Ohio St.3d 239,

2008-Ohio-3748, 893 N.E.2d 462, ¶ 25. Crim.R. 11(C)(2) requires the trial judge to address the defendant personally to review the rights that defendant is waiving and to discuss the consequences of the plea.

{¶24} A plea may be involuntary if the accused " 'has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.' " *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 42, quoting *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976), fn. 13. "Thus, 'a plea does not qualify as intelligent unless a criminal defendant first receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." ' " *Montgomery* at ¶ 42, quoting *Bousley v. United States*, 523 U.S. 614, 618, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S.Ct. 572, 85 L.Ed. 859 (1941).

{¶25} However, a recitation of the elements of the offense at the plea hearing is not one of the defendant's constitutional rights. *State v. Rowbotham*, 7th Dist. No. 12 MA 152, 2013-Ohio-2286, ¶ 26, citing *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 19-27. Civ.R. 11(C)(2)(a) provides only that the court shall determine that the defendant has an understanding of the nature of the charges. It does not require a verbal explanation by the court, but merely for the court to be satisfied that the defendant in fact understands the charges. *Id.*

{¶26} This non-constitutional provision requires substantial rather than strict compliance by a trial court. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). Substantial compliance means that, under the totality of the circumstances, the defendant subjectively understands the subject at issue. *Id.* "In determining whether a

defendant understood the charge, a court should examine the totality of the circumstances." *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 56.

{¶27} Likewise, a defendant is unable to knowingly, intelligently and voluntarily plead guilty to an offense if he lacks the capacity to understand the nature and object of the proceedings against him. *State v. Davis*, 7th Dist. No. 00 CO 61, 2002-Ohio-3853, ¶ 13. However, a defendant's plea is not void solely because he may be taking medication. R.C. 2945.37(F). A defendant is presumed to be competent and has the burden of rebutting that presumption. *State v. Filiaggi*, 86 Ohio St.3d 230, 236, 714 N.E.2d 867 (1999); R.C. 2945.37(G).

{¶28} Appellant challenges the voluntary nature of his plea because he claims that the actions for which he pleaded guilty do not constitute extortion. When interpreting a statute, we must give effect to the legislature's intended meaning. *State v. Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69, 880 N.E.2d 896. "When confronted with allegations of ambiguity a court is [first] to objectively and thoroughly examine the [statute] to attempt to ascertain its meaning." *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, at ¶ 11. "Only when a definitive meaning proves elusive should rules for construing ambiguous language be employed." *Id.* Thus, there is no need to invoke the rules of statutory construction to interpret words or phrases when meanings are clear on their face; the statute need only be applied. See *Sherwin–Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, 858 N.E.2d 324, at ¶ 15.

{¶29} Appellant relies on the holding in *State v. Stone*, 4th Dist. No. 90CA23, 1992 WL 56778, for the proposition that the extortion statute applies solely to an act aimed at obtaining something of pecuniary value. Stone anonymously demanded the body measurements and undergarment sizes of a female instructor at his trade school. When she did not comply, he threatened to hang posters on the campus accusing her of being a "hore" [sic]. *Id.* at *2.

{¶30} The Fourth District reversed Stone's extortion conviction for plain error because "the measurements [Stone] demanded do not constitute valuable things or valuable benefits." *Id.* at *6. However, rather than limiting its holding to the facts in the case, the Fourth District announced that the phrase "valuable thing or valuable benefit" was interpreted to include only things or benefits that have a monetary value; otherwise, there would be no distinction between the extortion statute and the coercion statute. *Id.*

{¶31} The statutory interpretation of the phrase "any valuable thing or valuable benefit" was revisited sixteen years later by the Second District in *State v. Cunningham*, 178 Ohio App.3d 558, 2008-Ohio-5164, 899 N.E.3d 171. Cunningham attempted to induce the child victim from his previous gross sexual imposition conviction to recant her testimony. The *Cunningham* panel specifically rejected the holding in *Stone*, reasoning that although coercive conduct may underlie both extortion and coercion, the purpose and effect of the conduct differs. The Second District wrote:

> On the one hand, coercion requires proof of a "purpose to coerce another into taking or refraining from action concerning which the other person has a legal freedom of choice." R.C. 2905.12(A). The effect is to deprive another of the freedom to act. Extortion, on the other hand, requires proof

> of a "purpose to obtain any valuable thing or valuable benefit or to induce another to do an unlawful act." R.C. 2905.11(A). The effect of extortion is to coerce another in order to obtain something to which the extorter has no right. The important distinction, then, is extortion's additional evidentiary requirement of an intent to obtain something. It matters not that the thing sought is intangible.

Id. at ¶ 17.

{¶32} Based on the foregoing analysis, the Second District concluded that the victim's recantation would bestow valuable benefits upon Cunningham, such as the restoration of his reputation and grounds to overturn his conviction. Hence, the court concluded that the evidence in support of the value element of the extortion claim was legally sufficient.

{¶33} Similarly, the Sixth District in *State v. Akers*, 6th Dist. No. S-99-035, 2000 WL 706795, relying on the common meanings of "value" and "benefit", found that coercing a person to post bail results in a valuable benefit, freedom from jail, and that Akers' conviction on the extortion charge was based on sufficient evidence and was not against the manifest weight of the evidence. *Id.* at *4. See also *State v. Lutz*, 8th Dist. No. 80241, 2003-Ohio-275, ¶ 66 ("The jury could rationally conclude that the filing was intended to motivate the illegal release of the defendant.")

{¶34} As a threshold matter in our review, we must note that the foregoing caselaw is distinguishable in this case because Appellant pleaded guilty to extortion. Not only does this constitute an admission to the elements of the crime, but during the plea colloquy, Appellant attested that he was satisfied with the legal representation

provided by defense counsel and that he understood the terms of the charges against him and of the plea agreement.

{¶35} Appellant now argues that his counsel failed to explain the essential elements of the extortion charge. However, there is no evidence in the record that Appellant failed to understand the nature of the charges against him. In fact, there is evidence to the contrary, in that Appellant agreed to the state's recitation of the facts of his case. In the absence of evidence in the record, Appellant cannot overcome the presumption of regularity which attaches to all court proceedings. *State v. Stewart*, 7th Dist. No. 11 MA 195, 2013-Ohio-753, ¶ 28, citing *Yarbrough v. Maxwell*, 174 Ohio St. 287, 288, 189 N.E.2d 136 (1963).

{¶36} Further, the extortion statute criminalizes action undertaken to obtain a valuable thing or valuable benefit. This is the element Appellant now claims does not apply to the facts of his case. Based on the plain meaning of those words, however, the application of the extortion statute is clearly not limited to the effort to obtain only things and benefits having a pecuniary value. It is apparent that if the legislature intended to limit the statute in such a manner, it could have easily used the terms "monetary value" or "pecuniary value" in describing the object of the crime. Instead, the general assembly chose broader terms, subject to a wider interpretation. Courts are obligated to strictly construe a criminal statute, but are under no obligation to re-write criminal statutes in order to narrow their construction.

{¶37} Like *Cunningham*, *Akers*, and *Lutz*, Appellant sought to obtain an intangible benefit flowing from the victim's action: immediate access to his daughter. Unlike Stone, where the benefit was the victim's body measurements and undergarment

sizes, the benefit obtained here is something on which society places considerable value.

{¶38} The relationship between parent and child is constitutionally protected. "[T]he right to raise one's children is an 'essential' and 'basic civil right.' " *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990), quoting *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), and *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). "Parents have a 'fundamental liberty interest' in the care, custody, and management of the child." *In re Murray* at 157, quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). The permanent termination of parental rights has been described as, "the family law equivalent of the death penalty in a criminal case." *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45 (1991). Because of the hallowed nature of the parent-child relationship, the record reflects that Appellant acted with the purpose to obtain a valuable benefit in the eyes of society, that is, immediate access to his child.

{¶39} Appellant nonetheless contends that he should not have been convicted of extortion based on *dicta* in *Cunningham* because he did not seek "to obtain something to which [he] ha[d] no right." *Cunningham, supra*, at ¶ 17. Appellant asserts that he had a right to visitation with his daughter.

{¶40} The evidence in this record shows that Appellant did not have a court-ordered right to parental time when he committed his crime. Instead, he had filed a pleading in juvenile court seeking to establish his right to parental time. He conceded that he "kind of freaked out" when he learned that he would have to wait six months for the resolution of the juvenile court motion, so he threatened to send links to the sex

tapes in order to get immediate access to his daughter. The fact that it appears the victim and Appellant may have agreed that he was the child's father is irrelevant to this matter because Appellant had no legal right to the benefit he sought to obtain at the time he sought to obtain it.

{¶41} Based on the foregoing analysis, the record reflects that Appellant's guilty plea was voluntary. There is no evidence in the record to establish that he was unaware of the nature of the extortion charge. Appellant admits, in fact, that he acted with the purpose to coerce the victim into providing a valuable benefit, that is, immediate access to his child, to which he had no right. While he now claims the extortion statute is limited to only pecuniary benefit, the record shows his plea was not involuntary due to a misinterpretation or misapplication of the extortion statute. Appellant stated on the record that he had been explained the nature of the charges and that he understood the explanation at the time he entered his plea. Therefore, Appellant's first assignment of error, as it relates to the essential elements of the crime of extortion, is without merit.

{¶42} Appellant next contends that his plea was not knowingly made because he was suffering from an anxiety disorder and had been placed on newly prescribed medication at the time it was entered. Appellant urges that:

> Based upon Appellant's mental condition at the time he entered his initial plea and his aborted effort to withdraw his plea, as well as the court's failure to engage in a meaningful colloquy regarding the plea to extortion or the cancellation of the motion to withdraw guilty plea, it is clear that Appellant [ ] did not knowingly enter his plea at the sentencing hearing on March14, [sic] 2017.

(Appellant's Brf., p. 13.)

{¶43} To the contrary, this record reveals the trial court engaged in a detailed colloquy with Appellant at the sentencing hearing regarding his first *pro se* motion to withdraw his guilty plea. Appellant admitted that he was anxious and upset regarding his email exchanges with the victim when he filed the motion to withdraw. Appellant was so concerned he made an emergency appointment the week prior to the sentencing with his doctor and had been prescribed Zoloft.

{¶44} After taking Zoloft for three days, Appellant reviewed the emails, and, in a calmer state of mind, found no evidence of threat to his daughter, so he withdrew the motion. He conceded that his emails to the victim were "a bunch of rants that seemed like a crazy person was writing them, a lot of really vulgar comments." He also admitted that he was able to sleep the night before the hearing. (3/14/16 Sent. Hrg. Tr., p. 12.)

{¶45} Clearly, the trial court did engage in a colloquy about his first motion to withdraw his guilty plea. Appellant testified that after his counseling session, he realized that his email contained irrational, vulgar rants and that the victim's responses did not establish any threat to his daughter. He also recognized that his decision to leverage the sex tape was a mistake and had the exact opposite result than intended. Appellant's statements at the sentencing hearing were coherent and self-aware, and there is no indication that he was suffering from extreme anxiety. The trial court correctly concluded that the statements in Appellant's later affidavit are self-serving and provide no basis for the withdrawal of his plea. Accordingly, Appellant's first assignment of error, as it relates to his mental state at the plea hearing, is without merit and is affirmed.

ASSIGNMENT OF ERROR NO. 2

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; SECTION 10, ARTICLE I, OHIO CONSTITUTION.

{¶46} Ineffective assistance of counsel arguments are evaluated in light of the two-pronged analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under that analysis, to reverse a conviction based on ineffective assistance of counsel, a defendant must not only demonstrate that counsel's performance was deficient and fell below an objective standard of reasonable representation, but also that the defendant was prejudiced by counsel's performance. *Id.* at 668, 104 S.Ct. 2052; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). To succeed on such a claim, there must be a reasonable probability that, but for counsel's unprofessional errors, the result of the defendant's trial would have been different. *Id.*

{¶47} By entering a guilty plea, Appellant waived the right to allege ineffective assistance of counsel, except to the extent he asserts that his plea was not knowing and voluntary. *State v. Kelly*, 7th Dist. No. 08CO23, 2009-Ohio-1509, ¶ 11. His claims of deficiency are that counsel allowed him to plead guilty to extortion when, at best, he may have committed coercion. Appellant contends in this matter that his plea was invalid because his actions did not legally constitute extortion as that term is defined in R.C. 2905.11. We have already determined that the extortion charge was valid in this case and that this record shows Appellant had been explained and understood the

charges to which he entered a guilty plea. Based on our analysis in Appellant's first assignment of error, his second assignment is moot.

ASSIGNMENT OF ERROR NO. 3

O.R.C. §2905.11(A)(5) IS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE FOURTEENTH AMENDMENT AS APPLIED IN THIS CASE.

{¶48} The interpretation of a statute is a question of law that this Court reviews *de novo*. *Washington Cty. Home v. Ohio Dept. of Health*, 178 Ohio App.3d 78, 2008-Ohio-4342, 896 N.E.2d 1011, ¶ 27. All legislative enactments have a strong presumption of constitutionality. *State v. Anderson*, 57 Ohio St.3d 168, 171, 566 N.E.2d 1224 (1991). The "void for vagueness" doctrine emanates from the due process provision of the Fourteenth Amendment, and bars enforcement of a law that is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

{¶49} Standards for vagueness require more precision in the criminal context than, for example, in the regulatory context. *State v. Bielski*, 7th Dist. No. 12 MA 0217, ¶ 11, 2013-Ohio-5771. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed .2d 903 (1983).

{¶50} A legislative enactment may be unconstitutional on its face, or as applied in a specific circumstance. A facial challenge requires that "the challenging party * * * show that the statute is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' " *State v. Anderson*, 57 Ohio St.3d 168, 171, 566 N.E.2d 1224 (1991), quoting *Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). If the statute is being challenged only as applied to the circumstances of the case, the challenger "contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, [is] unconstitutional." *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 17.

{¶51} Because the phrase "any valuable thing or valuable benefit" was interpreted to include more than just things or benefits having actual pecuniary value, Appellant contends that the extortion statute is void for vagueness. The brief in this matter is somewhat confused as to which challenge Appellant makes to this statute. It appears that Appellant is arguing that, while the statute says "valuable," because it does not define this word, it is vague on its face. Appellant also argues in his brief, however, that the word "valuable" can only mean "pecuniary value," and so cannot be applied to the facts of his crime. At oral argument, counsel for Appellant stated that Appellant sought to raise both a "facial" and an "as applied" challenge.

{¶52} Both Appellant's facial challenge and as applied challenges are wholly misplaced. Again, in his brief he argues that application of the extortion statute should be limited to objects and benefits having pecuniary value. In other words, he does not

argue that no standard of conduct at all is enunciated in the statute, but instead, that the specific conduct in this case does not fulfill the "value" element. Therefore, it would appear that Appellant advances an "as applied" argument.

{¶53} Part of the confusion in his constitutional argument is that Appellant is mistaken in the manner in which the statute is to be interpreted. Appellant argues, "[a]ny indiscretion, no matter how slight, could be considered valuable to the victim." (Appellant's Brf., p. 17.) Appellant overlooks that the standard advanced by statute must be read objectively: the thing or benefit to be obtained must have value to the general public. In order to fulfill this standard, the benefit need not have solely a monetary benefit. The value attached to the object or benefit sought to be obtained can be those things society as a whole has determined to have value, but not necessary price.

{¶54} There are two tests used to assess the constitutionality of a statute under the Due Process Clause: strict scrutiny or rational-basis scrutiny. When the law restricts the exercise of a fundamental right, the strict-scrutiny test is used. See *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). A statute survives strict scrutiny if it is narrowly tailored to serve a compelling state interest. *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 423, 633 N.E.2d 504 (1994).

{¶55} Where there is no fundamental right at issue, a rational-basis test is used to protect liberty interests. *Glucksberg* at 722. Under the rational-basis test, a statute survives if it is reasonably related to a legitimate government interest. *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 57, 717 N.E.2d 286 (1999).

{¶56} Again, Appellant had not established a right to visitation and was using his threat to release a sex tape in order to avoid the time and procedure to legally obtain this right and to, instead, gain immediate access to the child. Appellant does not discuss whether he believes the extortion statute is subject to strict scrutiny or only to a rational basis test. Regardless, the State of Ohio has a legitimate interest in prohibiting its citizens from using extortion in lieu of the judicial system to establish parenting time. As the statute adequately describes the prohibited conduct so that people "of common intelligence" understand the action being criminalized, the statute is not vague on its face. As applied to the facts of this case, the extortion statute is not unconstitutionally vague because Appellant admits he intended to obtain a valuable benefit for which he had not yet established a right. Appellant's third assignment of error is without merit and is overruled.

Conclusion

{¶57} In summary, the record is devoid of evidence that Appellant did not understand the nature of the charges against him. Appellant has failed to demonstrate that his mental state at the plea hearing prevented him from entering a voluntary plea. The plain language of the phrase "any valuable thing or valuable benefit" in R.C. 2905.11 includes parenting time with a minor child to which a defendant has no right. Hence, Appellant's plea was voluntarily entered and the statute is not unconstitutionally vague. Appellant's claim that he received ineffective assistance of counsel is moot because it was based on his claims that he could not have violated the statute forming the basis for his plea. Accordingly, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first and third assignments of error are overruled and his second assignment is moot. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.