[Cite as *State v. Dolman*, 2010-Ohio-5505.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

State of Ohio — Court of Appeals No. WM-10-007

Appellee — Trial Court No. 09 CR 142

v.

Alan D. Dolman — **DECISION AND JUDGMENT**

Appellant — Decided: November 12, 2010

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney,
for appellee.

Paul H. Duggan, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} On September 23, 2009, the Williams County Grand Jury indicted appellant, Alan D. Dolman, on (1) six counts of photographing a child, who was not his child or ward, in a state of nudity in violation of R.C. 2907.323(A)(1); and (2) five counts of possessing or viewing any material or performance showing a minor, who was not

Dolan's child or ward, in a state of nudity in violation of R.C. 2907.323(A)(3). Six of these counts were designated as felonies of the second degree and five counts as felonies of the fifth degree. The remaining two counts in the indictment alleged violations of R.C. 2919.22(B)(5), child endangering by enticing and/or encouraging a child to be photographed for the production of any material that the offender knows is "obscene, is sexually oriented matter, or is nudity-oriented matter * * *." Both of these charges are felonies of the second degree.

{¶ 2} At appellant's trial, the state of Ohio presented the following evidence material to the offenses set forth above. On May 24, 2009, Officer Gerald Collert of the Montpelier Police Department received a complaint from a group of neighbors who were concerned with the safety of young children who were being given rides by appellant on his moped. As the officer was speaking with the neighbors, a young man, who we shall call D.B.[1], came forward and stated that he had something he needed to tell Collert.

{¶ 3} D.B. then told the officer that one day he went to visit his neighbors, who had two young children, A.C., a seven-year-old girl, and her little brother, Z.C. The children asked D.B. to take them to a park that was in the neighborhood. On the way to the park, D.B. stopped at home to get his basketball. While they were at the park, they played a game of basketball with appellant, who was the father of one of D.B.'s friends. During the game, Z.C. fell and scraped his knee and arm. Appellant then took the

[1]Any children who were under the age of 18 at the time that the basis for the charges against appellant occurred shall be referenced by only his or her initials.

children to his house to take care of the little boy's scrapes. After taking care of the scrapes, the children and appellant went out into his back yard where he had a trampoline and a tree swing.

{¶ 4} Later, they went back into the house where the younger children played video games in the living room while D.B. looked around the house. After he used the bathroom, D.B. went back to the living room, but appellant and A.C. were not there. He asked Z.C., who was still playing video games, where appellant and A.C. were, and the child pointed to a bedroom door in the hallway. When the older boy tried to open the door to that room, it was locked. After "lightly" knocking on the door and receiving no response, D.B. sat in a room nearby. Appellant subsequently left the room. When D.B. went into that room, he saw A.C. dressed in only her underpants and socks. When he asked her what she was doing, A.C. told him that she was trying on costumes. The boy then told A.C. to get dressed, and appellant took them home. According to D.B., the incident occurred approximately two weeks before he spoke to the police officer.

{¶ 5} Based upon the statements made by D.B., Officer Collert began an investigation of appellant. After interviewing A.C., who gave him a more detailed statement of the incident, Collert obtained a search warrant for appellant's residence for the purpose of finding "photographs and videos," computers, digital cameras, and the "costumes and dresses" that appellant allegedly told A.C. to wear that day.

{¶ 6} On May 28, 2009, Collert and two other police officers served the search warrant on appellant. They seized his computer, computer equipment, CDs, DVDs, VHS

tapes, three or four digital cameras, a 35 millimeter camera, and three video cameras. They also seized the costumes that A.C. said she wore that day. Officer Collert took photographs of the interior of appellant's home and of the items seized. The subsequent search of appellant's computer files revealed numerous photographs and/or computer images, e.g. "Erotica," of naked or scantily clad young girls. Several of the photographs, including those in which she appeared totally nude were of A.W., an 11-year-old girl who was a friend of appellant's son.

{¶ 7} Both A.C. and A.W. testified at appellant's trial. A.C. testified that appellant asked her whether she would like to try on some costumes. He then took her into his daughter's bedroom and locked the door. The young girl tried on six costumes. Then appellant had A.C. pose in just her panties and took photographs of her. Two of these photographs were offered into evidence. Two other "candid" photographs of A.C. putting on her clothes were also offered into evidence.

{¶ 8} In her testimony, A.W. stated that she was a friend of appellant's 12-year-old son, and that she would play with him at appellant's home "almost every day." According to A.W., appellant would have the two children put on the costumes that were in his daughter's room and take photographs of them. Appellant also had an inflatable rubber pool that he would set up in the living room and fill with soapy water. He would then take photographs of A.W. playing in the pool in a "tank top and underwear." When she went to the bathroom to change her clothing after being in the pool, appellant would also go into the bathroom and take photographs of A.W. while she

was nude. According to the 11 year old, Dolman told her not to tell anyone about their activities or the photographs. Numerous photographs of A.W. taken by appellant that show her posing in her underwear were entered into evidence. In several other photographs taken by appellant's son, A.W. is shown posing in her underwear with appellant. Two other photographs in which A.W. posed completely naked were also placed into evidence.

{¶ 9} Based upon the foregoing, the jury found appellant guilty on all counts in the indictment. After a presentence investigation was conducted, the trial court held a sentencing hearing and imposed the following sentence on appellant. For the six violations of R.C. 2907.323(A)(1), all felonies of the second degree, the court imposed a sentence of six years in prison for each. For the five violations of R.C. 2907.323(A)(3), all felonies of the fifth degree, the trial court sentenced appellant to 11 months in prison for each. For the two violations of R.C. 2919.22(B)(5), both felonies of the second degree, the court imposed a sentence of six years in prison for each. The court ordered the prison terms to be served consecutive to each other for a total prison term of 52 years and 7 months.

{¶ 10} Appellant appeals the trial court's judgment and asserts the following assignments of error:

{¶ 11} "I. The trial court erred by admitting into evidence a judgment entry of Defendant/Appellant's alleged prior conviction.

{¶ 12} "II. The trial court erred by admitting into evidence photographs unrelated to the indictments.

{¶ 13} "III. The trial court erred in the definitions in the jury instructions.

{¶ 14} "IV. Whether the trial court erred in failing to set aside the jury verdicts and dismiss the indictment due to the failure of the indictment to include allegations of 'lewd' or graphic focus on the genitals.

{¶ 15} "V. Whether the jury lost its way and created a manifest miscarriage of justice by finding that the subject photos showed nudity that is a lewd exhibition or a graphic focus on the genitals.

{¶ 16} "VI. Whether the trial court erred in failing to excuse a prejudicial juror for cause and thereby forcing Defendant/Appellant to utilize a preemptory challenge.

{¶ 17} "VII. The trial court violated Defendant/Appellant's right against cruel and unusual punishment as guaranteed by the 8th and 14th Amendments of [sic] the U.S. Constitution in [sic] Article I, Section 9 of the Ohio Constitution by imposing a 52 year sentence when no individual was physically harmed.

{¶ 18} "VIII. The trial court erred in failing to declare a mistrial upon discovering a juror had fallen asleep."

{¶ 19} In his Assignment of Error No. I, appellant contends that the trial court erred in admitting evidence of a prior conviction for gross sexual imposition with a child under the age of 13. Prior to his trial appellant filed a motion in limine asking the trial court to exclude the evidence of this prior conviction. He asserted that the prior

conviction would prejudice him because it was so similar in nature to the charges leveled against him in the present case that it would lead the jury to believe that because he was convicted of one offense involving sexual misconduct, he must be guilty of the offenses alleged herein. The motion was again raised at trial and denied by the lower court.

{¶ 20} A trial court has broad discretion in the admission or exclusion of evidence; therefore, when it exercises its discretion in conformity with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of that discretion. *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, ¶ 50. A trial court abuses its discretion only when its attitude in reaching its judgment is unreasonable, arbitrary, or unconscionable. *State v. Moreland*, 50 Ohio St.3d 58, 61.

{¶ 21} Evid.R. 402 and 403 permit the admission of relevant evidence if its probative value is not substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 404(B) states:

{¶ 22} "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." See, also, R.C. 2945.59.

{¶ 23} In the present case, the trial judge allowed the admission of appellant's prior conviction into evidence for the purpose of establishing motive or intent. Moreover, the trial court minimized any unfair prejudice to Dolman by giving a limiting instruction to

the jury before allowing it into evidence. Specifically, the court stated that it could not be used to prove the character of appellant in order to establish that he acted within that character in this case. The court also gave the limiting instruction during its general instructions to the jury. Juries are presumed to follow and obey the trial court's limiting instructions. *State v. DeMastry*, 155 Ohio App.3d 110, 2003-Ohio-5588, ¶ 84 citing *State v. Franklin* (1991), 62 Ohio St.3d 118, 127. Accordingly, we conclude that the trial court did not abuse its discretion in allowing appellant's prior conviction to be entered into evidence. Appellant's Assignment of Error No. I is found not well-taken.

{¶ 24} Appellant's Assignment of Error No. II is very similar to his first assignment of error in that Dolman argues that the trial court abused its discretion in admitting 49 photographs taken from his computer hard drive of scantily clothed or nude young girls in what only can be deemed as erotic and/or suggestive poses. Appellant filed a motion in limine to exclude these images from being offered at his trial as inadmissible "other acts." The trial court overruled appellant's motion both prior to trial and when appellant's objection to the admission of these photographs was renewed at trial. Again, the 49 photographs tend to show appellant's sexual interest in young females such as A.C. and A.W., that is, his motive, plan, or intent in photographing them in the nude or in their underwear. See *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, ¶ 18-19. For this reason, appellant's Assignment of Error No. II is found not well-taken.

{¶ 25} Assignment of Error No. III asserts that the trial court erred in the jury instructions that it provided on the terms "lewd exhibition," "prurient," and "material."

Assuming a timely objection has been made to the jury instructions pursuant to Crim.R. 30, a reviewing court will not reverse the trial court's decision not to give a requested jury instruction or to the charge actually given absent an abuse of discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68. See, also, *State v. Clark* (1994), 71 Ohio St.3d 466, 470.

{¶ 26} In the present case, appellee requested supplemental jury instructions that included the meaning of "lewd exhibition" and "prurient purposes." Appellant asked for definitions of "material," as set forth in the Ohio Jury Instructions ("OJI"), which refers not only to photographs, but also, books, newspapers, magazines, pamphlets, etc. Appellant also requested a jury instruction from OJI on the meaning of "purient [sic]."

{¶ 27} We start with the trial court's instruction as to the meaning of "prurient." Appellant asked the court to use the definition set forth in 2 Ohio Jury Instructions Section 507.31(10). This section reads: "'Prurient' means a shameful or morbid interest in nudity, sex, or excretion." The trial court agreed to use this definition, but eliminated the word "excretion" because there were no computer images/photographs offered in this case showing that appellant had a shameful or morbid interest in excretion. We agree. The same is true with regard to appellant's request for the definition of "material."

{¶ 28} Appellant requested that the trial court use the broad definition of "material" found in 2 Ohio Jury Instructions Section 507.31(5), which provides: "'Material' means any book, magazine, newspaper, pamphlet, poster, print, picture, image, description, motion picture, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound or touch." Rather than confuse the jury

by including materials, e.g., books and newspapers, that were not used in this case, the trial judge tailored his definition to the specific alleged offenses by using only the relevant definitions of "material" found in R.C. 2907.01(J). Thus, the court's jury instruction on the meaning of "material" included: "any picture, image or photograph, or other tangible thing capable of arousing interest through sight or sound and includes an image appearing on a computer monitor, or an image stored on a computer hard drive, hard disk, or similar data storage device." Consequently, we find that the court below did not abuse its discretion in overruling appellant's requested jury instructions on the terms "prurient" and "material."

{¶ 29} Appellant offers no argument on the question of the lower court's definition of "lewd exhibition." Pursuant to App.R. 12(A)(2) , we may disregard those errors not argued separately. For all of the foregoing reasons, appellant's Assignment of Error No. III is found not well-taken.

{¶ 30} In his Assignment of Error No. IV, appellant claims that the trial court erred in failing to grant his motion to set aside the verdicts in this case and dismiss the indictment for failure to set forth punishable offenses by "omitting language that the nudity was a lewd exhibition or a graphic focus on the genitals." A reading of the indictment in the case under consideration reveals that Counts I through XI, which are based upon R.C. 2907.323(A)(1) or 2907.323(A)(3), of the indictment tracks the language of the cited statutes, but does not contain either of the phrases quoted by appellant.

{¶ 31} The purpose of an indictment is to give the accused adequate notice of the crime charged. *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, ¶ 7. An indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant of the charge, and enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. Id. at ¶ 9. As applied to the present case, the indictment cites to both R.C. 2907.323(A)(1) and 2907.323(A)(3) and tracks the statutory language of these charged offenses. Therefore, we are of the opinion that it gave appellant adequate notice of the crimes charged.

{¶ 32} Appellant argues, however, that in *State v. Graves*, 184 Ohio App.3d 39, 2009-Ohio-974, the Fourth District Court of Appeals found that under *State v. Young* (1988), 37 Ohio St.3d 249, and *Osborne v. Ohio* (1990), 495 U.S. 103, an indictment charging a defendant of either or both of the relevant subsections of R.C. 2907.323(A) must contain an allegation of lewd or graphic focus on the genitals. See, also, *State v. Moss* (Apr. 14, 2000), 1st Dist. No. C-990631 (Wherein the majority also found that *Young* requires an allegation of lewdness or a graphic focus on genitals in order to state an offense under the statute).

{¶ 33} In *Young*, the defendant filed a timely motion to dismiss the indictment, asserting that R.C. 2907.323(A)(1) violated the "constitutional prohibition against vagueness and overbreadth" because, inter alia, the term "nudity" in the statute could encompass "morally innocent states of nudity as well as lewd exhibitions." Id. at 251.

The Ohio Supreme Court rejected this argument, finding that the "proper purposes[2]" exceptions of the statute narrows its prohibition to "the possession or viewing of material or performance of a minor who is in a state of nudity * * * [to] a lewd exhibition or * * *graphic focus on the genitals, and where the person depicted is neither the child or ward of the state." Id. at 252. The *Graves* court interpreted *Young* as engrafting the foregoing language to R.C. 2907.323(A)(1) and (A)(3). *Graves* at ¶ 14. As to *Osborne*, the Fourth District Court of Appeals noted that the while the United States Supreme Court reversed that case on other grounds, it endorsed the "lewd" or "graphic focus on the genitals language" to avoid any issues involving the First Amendment to the Constitution of the United States, specifically noting that although child pornography is a violation of the law, the production of material depicting a child in a state of nudity is protected speech. Id. at ¶ 11.

{¶ 34} We do not agree with the Fourth District Court of Appeals' application of *Young* and *Osbourne*. Nor do we agree with the majority in the First District Court of Appeals' decision in *Moss*. In *State v. O'Connor*, 4th Dist. No. CA2001-08-195, 2002-Ohio-4122, O'Connor asked the Twelfth District Court of Appeals to apply *Moss* and determine that the allegations in the indictment were, in light of the Ohio Supreme Court's construction of that statute in *Young*, insufficient to state a violation of R.C.

[2]Both R.C. 2907.323(A)(1)(a) and (b) and 2907.323(A)(1)(a) and (b) allow the creation, transfer, production, and direction of photographs of a minor in a state of nudity who is not the person's child or ward for, among other things, scientific or educational purposes, and if the parents, guardian, or custodian of the minor child consent to the photographing of the minor child or ward for such purposes.

2907.323(A)(1). Id. at ¶ 28. The *O'Connor* court found, however, that Moss's interpretation of *Young* was invalid because "it is only the legislature, not the judiciary," that "has the power to engraft or enact additional elements" of an offense. Id. at ¶ 30. See, also, *Moss*, Hildebrandt, P.J., dissenting. Thus, the Twelfth Appellate District concluded that, under Crim.R. 7(B), the indictment must charge the offense either in the words of the applicable section of the statute or "'in words sufficient to give the defendant notice of all the *elements* of the offense with which the defendant is charged.'" (Emphasis in the original.) We agree with the rationale and holding in *O'Connor*; therefore, we find appellant's Assignment of Error No. IV not well-taken.

{¶ 35} Assignment of Error No. V argues that an examination of the photographs of young girls denoted as Exhibits 1 through 11 demonstrates that the jury clearly lost its way and created a manifest miscarriage of justice as to appellant's convictions on Counts I through XI of the indictment. In other words, appellant contends that the trial court's judgment on Counts I through XI, which allege violations of R.C. 2907.323(A)(1) and (A)(3) are against the manifest weight of the evidence. "When reviewing a case to determine whether trial court's judgment is against the manifest weight of the evidence, a court of appeals views that evidence as a "thirteenth juror." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In the present case, our review of photographs 1 through 11 are, contrary to appellant's allegation, photographs of A.W. totally nude, A.C. clad only in her underpants, and photographs of unnamed young girls totally nude. Accordingly, in reviewing the entire record, weighing the evidence and all reasonable inferences and

considering the credibility of A.W. and A.C, as well as Exhibits 1-11, we cannot say that the jury clearly lost its way. Appellant's Assignment of Error No. V is found not well-taken.

{¶ 36} In his Assignment of Error No. VI, Dolman asserts that the trial court erred in failing to excuse a prejudicial juror for cause thereby improperly forcing appellant to use a preemptory challenge to remove that juror.

{¶ 37} A prospective juror may be challenged for cause if there is a demonstration of bias toward the defendant. Crim.R. 24(C)(9); R.C. 2945.25(B). Nonetheless, the trial court has the broad discretion to determine whether a juror has the ability to be impartial. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, ¶ 73. Thus, the trial court's determination will not be overturned on appeal unless the trial court's attitude in reaching that decision is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 38} Here, Gary Mohre, who is the chief of police in the village of Blakeslee, Ohio, was one of the members of the jury pool. When questioned as to whether he could presume appellant's innocence, Mohre admitted that due to the fact that he is in law enforcement, he is "pretty biased" or "very biased" in favor of the police. Specifically, he stated that if law enforcement officials had "enough evidence to bring [a case] to court, then I feel that he's probably guilty."

{¶ 39} The prosecutor then asked Mohre whether he understood that it is the obligation of the state of Ohio to prove appellant's guilt. Mohre replied, "Yes sir." When

queried as to the issue of whether, after hearing all the evidence he could go to the jury room and decide whether the prosecution proved appellant's guilt beyond a reasonable doubt, Mohre answered: "I would be a very good candidate for that, sir; I'm just telling you going into it I'm very biased. I'm not saying I wouldn't make the determination at the end, * * *." Mohre also stated that once the case was presented, he would go forward "on even grounds." Additionally, he explained that any bias that he had due to his employment existed only at the inception of this cause. When appellant's trial counsel questioned Mohre, he also asked questions concerning the officer's bias at the outset of the trial. Mohre again replied that once the trial started, and "the evidence is brought in then it's a clean slate for [the defendant]." Finally, the court asked Mohre whether he could decide appellant's guilt based upon the evidence offered at trial and the instructions of law presented by the judge. Mohre replied, "Without a doubt, sir."

{¶ 40} Based upon the fact that the parties and the trial court extensively questioned Mohre about his "bias" as a police officer and Mohre's understanding of his role as a juror, we cannot say that the trial court abused its discretion in denying appellant's request to excuse Mohre for cause. Appellant's Assignment of Error No. VI is found not well-taken.

{¶ 41} Assignment of Error No. VII claims that the 52 year sentence imposed by the trial court violated appellant's constitutional right against cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I, Ohio Constitution. The language in the Eighth

Amendment to the Constitution of the United States and the Ohio Constitution are identical and provide: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In a relatively recent decision, the Supreme Court of Ohio held:

{¶ 42} "Where none of the individual sentences imposed on an offender are not grossly disproportionate to their respective offenses, an aggregated prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment." *State v. Hairston*, 118 Ohio St.3d 290, 2008-Ohio-2338, at the syllabus.

{¶ 43} As set forth infra, appellant was found guilty of six violations of R.C. 2907.323(A)(1), all felonies of the second degree. The range of prison terms for a second degree felony is from two to eight years. R.C. 2929.14(A)(2). The trial court sentenced appellant to six years each for these violations. Therefore, each sentence is within the statutory range. Thus, we cannot say that each of these sentences was grossly disproportionate for this offense of illegally using a minor who is not the person's child or ward showing that child in a state of nudity. That is, considering the extent of child pornography on appellant's computer, the sanctions imposed upon appellant for these violations are not so disproportionate that they can be deemed shocking either to a reasonable person or to the community's sense of justice. *Hairston* at ¶ 13-14. (Citation omitted.) The same is true for the five violations of R.C. 2907.323(A)(3), all felonies of the fifth degree, for which the trial court sentenced appellant to 11 months in prison on each conviction; and for the two violations of R.C. 2919.22(B)(5), both felonies of the

second degree, for which the court imposed a sentence of six years in prison on each conviction. All are within the statutory range and not grossly disproportionate to their respective offenses. Therefore, the trial court's imposition of a 52 year aggregated prison term resulting from consecutive impostion of those sentences does not constitute cruel and unusual punishment. Appellant's Assignment of Error No. VII is found not well-taken.

{¶ 44} In his Assignment of Error No. VIII, appellant complains that the trial judge erred in failing to declare a mistrial after observing a juror who had fallen asleep. Sleeping is a form of juror misconduct. *United States v. Sherrill* (C.A. 6, 2004), 388 F.3d 535, 537. "[A] trial judge is in the best position to determine the nature of the alleged jury misconduct and the appropriate remedies for any demonstrated misconduct." *State v. Jaryga*, 11th Dist. No. 2003-L-023, 2005-Ohio-352, ¶ 75. (Citation omitted.) Furthermore, it is within that trial judge's considerable discretion in determining how to deal with a juror who is allegedly sleeping. *State v. Sanders* (2001), 92 Ohio St.3d 245, 253.

{¶ 45} During the testimony of Deputy Steven Mueller, a specialist in computer forensics, the trial judge noticed that one of the jurors appeared to be sleeping. The court then decided to take a 15 minute recess. During that time, the judge, in the presence of the prosecutor and appellant's trial counsel, spoke with the juror in the judge's chambers. The judge first told the juror that he noticed that the juror's eyes were "shut a considerable amount" and that he wanted "to make sure you are listening and * * * not

sleeping." While admitting that he "worked third shift last night" and that he was sleepy, the juror also stated that he was listening and had heard the testimony "so far." When asked whether he could "go another hour or so," the juror replied that he could. Based upon this colloquy, we cannot say that the trial court's decision was arbitrary, unreasonable, or unconscionable; therefore, appellant's Assignment of Error No. VIII is found not well-taken.

{¶ 46} The judgment of the Williams County Court of Common pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A)

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE