[Cite as *State v. Robertson*, 2015-Ohio-1758.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HENRY COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 7-14-16**

v.

ROBERT E. ROBERTSON, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Henry County Common Pleas Court
Trial Court No. 13 CR 0067

Judgment Affirmed

Date of Decision: May 11, 2015

APPEARANCES:

George C. Rogers **for Appellant**

J. Hawken Flanagan **for Appellee**

PRESTON, J.

{¶1} Defendant-appellant, Robert E. Robertson ("Robertson"), appeals the October 9, 2014 judgment entry of sentence of the Henry County Court of Common Pleas. For the reasons that follow, we affirm.

{¶2} On September 17, 2013, the Henry County Grand Jury indicted Robertson on ten counts of gross sexual imposition in violation of R.C. 2907.05(A)(4), third-degree felonies. (Doc. No. 4).

{¶3} On September 24, 2013, Robertson entered a plea of not guilty to each count in the indictment. (Doc. No. 10).

{¶4} On October 21, 2013, Robertson filed a "motion for a bill of particulars or to dismiss indictment," followed, on January 17, 2014, by a "motion to dismiss indictment as per bill of particulars just filed," arguing that the indictment failed to state violations of R.C. 2907.05(A)(4). (Doc. Nos. 12, 19).[1] On January 21, 2014, plaintiff-appellee, the State of Ohio, filed a memorandum in opposition to Robertson's motion to dismiss the indictment. (Doc. No. 21). On January 28, 2014 and February 24, 2014, Robertson filed a reply memorandum and a supplemental memorandum, respectively, in support of his motion to dismiss the indictment. (Doc. Nos. 22, 25).

[1] A document purporting to be a response to Robertson's request for a bill of particulars was apparently served on Robertson's counsel and appears in the record attached to Robertson's January 17, 2014 motion; however, it appears from the certified record that the State never filed this document with the trial court. (*See* Doc. No. 19).

{¶5} On February 27, 2014, the trial court denied Robertson's motion to dismiss the indictment. (Doc. No. 27).

{¶6} On July 17, 2014, the State filed a motion to amend the indictment. (Doc. No. 34). The proposed amended indictment also contained ten counts of gross sexual imposition in violation of R.C. 2907.05(A)(4), third-degree felonies; however, the State sought in the proposed amended indictment to add to each count the language, "placing his hand upon and rubbing the vaginal area, over the clothes," to describe the sexual conduct alleged. (Emphasis sic.) (*Id.*).

{¶7} On July 21, 2014, the trial court granted the State's motion to amend the indictment and amended the indictment as requested. (Doc. No. 35).

{¶8} On July 22, 2014, Robertson filed a "notice of no objection" to the State's motion to amend the indictment. (Doc. No. 36).

{¶9} On August 14, 2014, Robertson filed a motion to dismiss the amended indictment, arguing that the amended indictment fails to state violations of R.C. 2907.05(A)(4). (Doc. No. 37).

{¶10} On August 15, 2014, the State filed a memorandum in opposition to Robertson's motion to dismiss the amended indictment. (Doc. No. 38).

{¶11} On August 20, 2014, the trial court filed an entry denying Robertson's motion to dismiss the amended indictment. (Doc. No. 39).[2]

[2] Robertson filed a reply memorandum in support of his motion to dismiss the amended indictment on August 22, 2014, after the trial court ruled on his motion. (Doc. No. 40).

{¶12} On September 10, 2014, Robertson withdrew his pleas of not guilty and pled no contest to each count of the amended indictment. (Sept. 10, 2014 Tr. at 12); (Doc. Nos. 43, 45). The trial court found Robertson guilty of each count of the amended indictment. (Sept. 10, 2014 Tr. at 15); (Doc. No. 45).

{¶13} On October 8, 2014, the trial court classified Robertson as a Tier II sex offender and sentenced him to three years imprisonment on each of the ten counts, to be served consecutively for an aggregate prison term of 30 years. (Oct. 8, 2014 Tr. at 2, 13-14); (Doc. No. 46). The trial court filed its judgment entry of sentence on October 9, 2014. (Doc. No. 46).

{¶14} On November 7, 2014, Robertson filed his notice of appeal. (Doc. No. 47). He raises one assignment of error for our review.

Assignment of Error

> **The trial court erred in failing to grant defendant's motion to dismiss the amended indictment for failure on its face to state violations of R.C. 2907.05(A)(4) in each of its ten counts, and for failure to find defendant not guilty upon a plea of no contest thereto.**

{¶15} In his assignment of error, Robertson argues that the trial court erred by denying his motion to dismiss the amended indictment because R.C. 2907.05(B), a statutory subsection of R.C. 2907.05 under which Robertson was *not* charged, specifically limits itself to criminalizing the actual touching of the genitalia of another, when the touching is not through clothing. Therefore,

Robertson argues, by enacting R.C. 2907.05(B), the General Assembly clarified its intention that a violation of R.C. 2907.05(A)(4) *not* be through clothing, notwithstanding prior case law concluding that a violation of R.C. 2907.05(A)(4) could occur even if the touching was through clothing. Robertson argues that we should apply the rule of lenity, codified in R.C. 2901.04(A), to the ambiguity and conclude that R.C. 2907.05(A)(4) does not criminalize touching that is through clothing.

{¶16} "A motion to dismiss charges in an indictment tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced by either the State or the defendant." *State v. Balo*, 3d Dist. Allen No. 1-10-48, 2011-Ohio-3341, ¶ 35, citing *State v. Eppinger*, 162 Ohio App.3d 795, 2005-Ohio-4155, ¶ 37 (8th Dist.). *See also State v. Thornsbury*, 4th Dist. Lawrence No. 12CA9, 2013-Ohio-1914, ¶ 6, citing *State v. Evans*, 4th Dist. Scioto No. 08CA3268, 2010-Ohio-2554, ¶ 18. "A reviewing court must examine the face of the charging instrument to determine its sufficiency." *Balo* at ¶ 35, citing *State v. Egler*, 3d Dist. Defiance No. 4-07-22, 2008-Ohio-4053, ¶ 14, *State v. Desote*, 3d Dist. Putnam Nos. 12-03-05 and 12-03-09, 2003-Ohio-6311, ¶ 8, and *Eppinger* at ¶ 37. "In determining whether an indictment is valid on its face, the proper inquiry is whether the allegations contained in the indictment constitute an offense

under Ohio law." *Egler* at ¶ 14. "A motion to dismiss an indictment cannot properly be granted where the indictment is valid on its face." *Id.*

{¶17} An appellate court reviews de novo a trial court's denial of a motion to dismiss an indictment. *State v. Tayse*, 9th Dist. Summit No. 23978, 2009-Ohio-1209, ¶ 28, citing *State v. Whalen*, 9th Dist. Lorain No. 08CA009317, 2008-Ohio-6739, ¶ 7; *Whitehall v. Khoury*, 10th Dist. Franklin No. 07AP-711, 2008-Ohio-1376, ¶ 7, citing *Akron v. Molyneaux*, 144 Ohio App.3d 421, 426 (9th Dist.2001). *See also Balo* at ¶ 35 ("'The [sufficiency] of an indictment is a question of law, requiring a de novo review.'"), quoting *State v. Reinhart*, 3d Dist. Van Wert No. 15-06-07, 2007-Ohio-2284, ¶ 12; *Thornsbury* at ¶ 6 ("The sufficiency of an indictment is a question of law that we review de novo."), citing *Evans* at ¶ 18. Moreover, interpretation of a statute is an issue of law that we review de novo. *State v. Brennco, Inc.*, 3d Dist. Allen No. 1-14-24, 2015-Ohio-467, ¶ 6, citing *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, ¶ 9 and *State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, ¶ 9; *Thornsbury* at ¶ 8. "De novo review is independent, without deference to the lower court's decision." *State v. Hudson*, 3d Dist. Marion No. 9-12-38, 2013-Ohio-647, ¶ 27.

{¶18} "'The primary goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute.'" *Thornsbury* at ¶ 8, quoting *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 9. *See also*

Brennco, Inc. at ¶ 6. "To determine the legislative intent, we first look at the language of the statute itself and if the language is clear and unambiguous, we apply it as written and no further construction is required." *Brennco, Inc.* at ¶ 6, citing *Straley* at ¶ 9 and *Pariag* at ¶ 11. "Words and phrases must be read in context and given their usual, normal, and customary meanings." *State v. Phillips*, 3d Dist. Van Wert No. 15-12-02, 2012-Ohio-5950, ¶ 12, citing R.C. 1.42 and *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶ 12. "A statute is ambiguous if its language is susceptible to more than one reasonable interpretation." *Thornsbury* at ¶ 8, citing *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513 (1996). "Only if a statute is unclear and ambiguous, may we interpret it to determine the legislature's intent." *Id.*, citing *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, ¶ 16. "In the absence of statutory ambiguity, however, we may not resort to rules of statutory interpretation," such as in pari materia. *Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, ¶ 34, citing *State ex rel. Wolfe v. Delaware Cty. Bd. of Elections*, 88 Ohio St.3d 182, 186 (2000) and *State v. Krutz*, 28 Ohio St.3d 36, 37-38 (1986).

{¶19} Robertson argues that the allegations contained in each count of the amended indictment do not constitute an offense under Ohio law. The counts of the amended indictment, though they varied as to the dates and the victims, alleged:

> [Robertson] did knowingly have sexual contact (placing his hand upon and rubbing the vaginal area, *over the clothes*) with another, to wit: [the alleged victim], not the spouse of the said [Robertson], and the said [alleged victim] was less than thirteen years of age, whether or not [Robertson] knew the age of [the alleged victim]. In violation of [R.C.] 2907.05(A)(4), GROSS SEXUAL IMPOSITION, and against the peace and dignity of the State of Ohio, the same being a felony of the third degree.

(Underline emphasis sic; italics emphasis added.) (Doc. No. 35).[3] R.C. 2907.05(A)(4), the statute under which Robertson was charged, provides:

> No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> * * *

[3] In *State v. Dunlap*, the Supreme Court of Ohio clarified the culpability requirement of R.C. 2907.05(A)(4), "hold[ing] that the statute establishes strict liability as to the defendant's knowledge of the age of the victim and a mens rea of purpose in regard to the sexual contact between the defendant and the victim." 129 Ohio St.3d 461, 2011-Ohio-4111, ¶ 1. *See also id.* at ¶ 23 ("[T]he mens rea of purpose applies to the whole of R.C. 2907.01(B), and thus to the sexual-contact element of R.C. 2907.05(A)(4)."). Robertson does not take issue with the amended indictment containing the culpability of "knowingly" as to each count; therefore, we do not address that issue.

> (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

"'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶20} In his brief, Robertson does not argue that R.C. 2907.05(A)(4), by itself, is unclear and ambiguous, such that it is susceptible to more than one reasonable interpretation. Rather, Robertson's argument that "sexual contact" under R.C. 2907.05(A)(4) does not include touching through clothing is based on the language of another statutory subsection, R.C. 2907.05(B), that does not contain the term "sexual contact." The offense of gross sexual imposition under R.C. 2907.05(B), which was added to the statute effective January 1, 2008, provides:

> No person shall knowingly touch the genitalia of another, when the touching is not through clothing, the other person is less than twelve years of age, whether or not the offender knows the age of that person, and the touching is done with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

See Am.Sub.S.B. No. 10, 2007 Ohio Laws File 10; *State v. Campbell*, 1st Dist. Hamilton No. C-110627, 2013-Ohio-1569, ¶ 1 ("In 2007, the General Assembly enacted Am.Sub.S.B. No. 10 * * * to implement the federal Adam Walsh Child Protection and Safety Act."). Before applying rules of statutory interpretation, such as in pari materia and lenity, to interpret R.C. 2907.05(A)(4)—the subsection under which Robertson was charged—we must determine whether that subsection is clear and unambiguous. *See Scott* at ¶ 34; *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 40; *State v. Fetter*, 3d Dist. Auglaize No. 2-13-12, 2013-Ohio-4640, ¶ 22.

{¶21} R.C. 2907.05(A)(4) clearly and unambiguously prohibits a person from having sexual contact with another person, who is not the spouse of the offender, if the other person is less than thirteen years of age. *See State v. Harrold*, 3d Dist. Seneca No. 13-2000-02, 2000 WL 1634509, *4 (Oct. 31, 2000) ("[T]he elements of the crime of gross sexual imposition under R.C. 2907.05(A)(4) are clearly 'apparent from the language' of the statutes," R.C. 2907.05(A)(4) and 2907.01(B).), quoting *State v. Ross*, 12 Ohio St.2d 37, 38 (1967). Similarly, as discussed below, the definition of "sexual contact," which "means *any* touching of an erogenous zone of another * * * for the purpose of sexually arousing or gratifying either person," clearly and unambiguously encompasses a touching through clothing. (Emphasis added.) R.C. 2907.01(B).

{¶22} Standing alone, the word "any" has many meanings. *See Cales v. Armstrong World Industries, Inc.*, 4th Dist. Scioto No. 02CA2851, 2003-Ohio-1776, ¶ 17, fn. 8; *West v. Bd. of Rev., Bur. of Emp. Servs.*, 9th Dist. Lorain No. 3383, 1983 WL 3992, *2 (Feb. 23, 1983). However, reading the word "any" in context in R.C. 2907.01(B)'s definition of "sexual contact," it is clear that the General Assembly intended to encompass every touching and all touchings of an erogenous zone of another for the purpose of sexually arousing or gratifying either person. *See State v. Lillard*, 8th Dist. Cuyahoga No. 69242, 1996 WL 273781, *6 (May 23, 1996) (noting that the legislature's "insertion of the word 'any' into the definition of 'force,' [under R.C. 2901.01(A),] recognizes that different degrees and manners of force are used in various crimes with various victims"), citing *State v. Sullivan*, 8th Dist. Cuyahoga No. 63818, 1993 WL 398551 (Oct. 7, 1993). *See also State v. Burton*, 4th Dist. Gallia No. 05CA3, 2007-Ohio-1660, ¶ 37, citing *Sullivan*. As Ohio courts, including this court, have long concluded, touching an erogenous zone through clothing is nevertheless a touching and therefore encompassed within the phrase "*any* touching" under R.C. 2907.01(B)'s definition of sexual contact. *State v. Goodwin*, 3d Dist. Marion No. 10-93-23, 1994 WL 202828, *2 (May 19, 1994) ("R.C. 2907.01(B) does not state that the sexual contact has to be with the bare thigh, genital, buttock, pubic region, or breast. Rather, the statute refers to the 'erogenous zone' of another; thereby, not limiting

the contact to the bare skin of another."); *State v. Crosky*, 10th Dist. Franklin No. 06AP-655, 2008-Ohio-145, ¶ 50 ("Sexual contact includes any physical touching, even through clothing, of an erogenous zone of another."), citing *State v. West*, 10th Dist. Franklin No. 06AP-11, 2006-Ohio-6259, ¶ 20, *State v. Jones*, 8th Dist. Cuyahoga No. 87411, 2006-Ohio-5249, ¶ 15, and *State v. Young*, 4th Dist. Athens No. 96 CA 1780, 1997 WL 522808 (Aug. 15, 1997); *State v. Barnes*, 2d Dist. Montgomery No. 25517, 2014-Ohio-47, ¶ 19 ("'Sexual contact does not require that the offender have skin-to-skin contact with an erogenous zone of the victim; a touching of an erogenous zone covered by the victim's clothing is sufficient.'"), quoting *State v. Jones*, 2d Dist. Clark No. 2012-CA-95, 2013-Ohio-3760, ¶ 21, citing *In re A.L.*, 12th Dist. Butler No. CA2005-12-520, 2006-Ohio-4329, ¶ 23, fn. 1; *State v. Goins*, 12th Dist. Butler No. CA2000-09-190, 2001 WL 1525298, *8 (Dec. 3, 2001) ("Several courts have found that 'sexual contact' is sufficiently demonstrated by showing that a defendant touched an erogenous zone covered by clothing. * * * We agree with the conclusion of these courts that 'sexual contact' as defined by R.C. 2907.01(B) includes touching of erogenous zones covered by clothing."), citing *Young*, *State v. Gonzalez*, 8th Dist. Cuyahoga No. 64777, 1994 WL 144535 (Apr. 21, 1994), *State v. Curry*, 9th Dist. Lorain No. 90CA004862, 1991 WL 24975 (Feb. 27, 1991), and *State v. Litton*, 9th Dist. Wayne No. 2087, 1985 WL 4381 (Dec. 11, 1985). Consistent with our precedent and these cases,

we hold that the definition of "sexual contact" under R.C. 2907.01(B) clearly and unambiguously encompasses a touching through clothing of the erogenous zone of another for the purpose of sexually arousing or gratifying either person.

{¶23} Having concluded that the definition of "sexual contact" clearly and unambiguously encompasses a touching through clothing, we need not and do not resort to rules of statutory interpretation, such as in pari materia and lenity, as Robertson urges us. *Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, at ¶ 34; *Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, at ¶ 40; *Fetter*, 2013-Ohio-4640, at ¶ 22. Even were we to apply rules of statutory interpretation to interpret R.C. 2907.05(A)(4), we disagree with Robertson that R.C. 2907.05(B), which does not contain the phrase "sexual contact," bears on whether a touching through clothing can constitute "sexual contact" under R.C. 2907.05(A)(4).

{¶24} For the reasons above, we hold that the allegations contained in the amended indictment constitute the offense of gross sexual imposition under R.C. 2907.05(A)(4). Therefore, the trial court did not err in denying Robertson's motion to dismiss the amended indictment or in finding Robertson guilty after he pled no contest to the amended indictment. *See State v. Bird*, 81 Ohio St.3d 582 (1998), syllabus.

{¶25} Robertson's assignment of error is overruled.

{¶26} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

ROGERS, P.J. and SHAW, J., concur.

/jlr