[Cite as *State v. Edmiston*, 2010-Ohio-3413.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93397

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LOGAN JOHN EDMISTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART AND REMANDED
FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521013

BEFORE: Stewart, J., Kilbane, P.J., and Dyke, J.

RELEASED: July 22, 2010

JOURNALIZED:

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MELODY J. STEWART, J.:

{¶ 1} In a 12-count indictment, defendant-appellant Logan John Edmiston was charged with the offenses of burglary, kidnapping, pandering obscenity, and public indecency. After a bench trial, appellant was found guilty of public indecency as charged in Counts 4 and 11, both third degree misdemeanors, and pandering obscenity as charged in Count 5, a fifth degree felony. The trial court sentenced him to community control sanctions. Appellant was also designated a Tier I sex offender and, as a result, is required to register for 15 years with in-person verification annually.

{¶ 2} Appellant appeals his convictions and sentence raising five assignments of errors for our review. Following a review of the record, and for the reasons stated below, we affirm the convictions but reverse the sentences on the misdemeanor convictions and remand for resentencing.

{¶ 3} The charges against appellant arose from two incidents involving female residents of the Triangle Apartments in Cleveland. Suruchi Prakash, a medical student, testified that on May 30, 2008, she came home around midnight. She walked up the stairs from the garage to the lobby to get the elevator. As she got on the elevator, appellant suddenly appeared "out of nowhere" and entered the elevator with her. He pushed the button for the ninth floor and then stood behind her. As the elevator went up, appellant said, "I hope you don't mind." Ms. Prakash turned and saw that appellant had exposed himself and was masturbating. She turned away from him and, since the elevator was almost at her floor, waited for the door to open. She got off the elevator on her floor and went to her apartment. She reported the incident to apartment management the next morning.

{¶ 4} Laura Selig, a nursing student, testified that on July 5, 2008, she came home from work and then went to exercise in the gymnasium on the second floor of the apartment building. She left the gym at approximately 11:00 p.m. to go back to her apartment on the sixth floor. As she approached the elevator, appellant suddenly walked out of the stairwell and got on the

elevator in front of her. She stood in the front of the elevator with appellant behind her. He asked her, "Do you mind if I masturbate?" She turned and responded, "Yes, I mind." She saw that appellant had exposed himself and had his erect penis in his hand. She panicked and exited the elevator on the fifth floor. As she ran down the hallway, she looked back and saw appellant standing in the elevator doorway with his hands around his penis. She fled down the stairs and went out of the building to a friend's room in a nearby dormitory.

{¶ 5} In his first assignment of error, appellant contends that it was error to allow appellant to be prosecuted under a general statute where a statute of special application specifically covers the conduct alleged to constitute the criminal offense. Appellant argues that the conduct complained of constituted the specific misdemeanor offense of public indecency under R.C. 2907.09(A)(3) and, therefore, he cannot also be convicted under the general felony statute of pandering obscenity under R.C. 2907.32(A)(4), as both offenses are based upon a single course of conduct. Appellant argues that the situation in this case is analogous to that presented in *State v. Volpe* (1988), 38 Ohio St.3d 191, 527 N.E.2d 818. We disagree.

{¶ 6} Well-established principles of statutory construction require that specific statutory provisions prevail over conflicting general statutes. R.C. 1.51 states that:

{¶ 7} "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail."

{¶ 8} In *State v. Volpe*, the Ohio Supreme Court found that R.C. 2915.02(A)(5) and 2923.24 were irreconcilable. R.C. 2923.24 generally made possession and control of criminal tools a felony of the fourth degree, whereas R.C. 2915.02(A)(5) specifically made possession and control of gambling devices a misdemeanor of the first degree. As such, the Ohio Supreme Court held that the specific statute concerning gambling devices, in particular, prevailed over the general statute that encompassed any criminal tool. The court reasoned that when the legislature makes the possession of specific items a misdemeanor, the felony criminal tools statute does not apply and, therefore, the general statute could not be used to charge and convict a person of possessing and controlling a gambling device as a criminal tool. Id. at 193-194.

{¶ 9} In this case, however, we find that R.C. 2907.32(A)(4) and R.C. 2907.09(A)(3) are not irreconcilable. R.C. 2907.09(A)(4) prohibits anyone from recklessly engaging in conduct that to an ordinary observer would

appear to be sexual conduct or masturbation "under circumstances in which the person's conduct is likely to be viewed by and affront others who are in the person's physical proximity and who are not members of the person's household." R.C. 2907.32(A)(4) prohibits a person from advertising, promoting, presenting, or participating in the presentation of an obscene performance, when the performance is presented publicly or when admission is charged, and the person has knowledge of the obscene nature of performance.

{¶ 10} Because the crimes of public indecency and pandering obscenity have different elements and proscribe different conduct under different circumstances, a conviction for public indecency would not necessarily result in a conviction for pandering obscenity. Unlike in *Volpe*, this is not a situation where a specific statute prevails over a more general one. Appellant's first assignment of error is overruled.

{¶ 11} For his second, third, and fourth assignments of error, appellant challenges both the weight and the sufficiency of the evidence supporting each of his three convictions.

{¶ 12} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. Sufficiency is a test of adequacy. Whether the evidence is

legally sufficient to sustain a verdict is a question of law. Id. at 386. Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." Id. at 387 (emphasis deleted). Weight is not a question of mathematics, but depends on its effect in inducing belief. Id.

{¶ 13} When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court examines the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 14} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten* (1986), 33 Ohio App.3d 339, 515 N.E.2d 1009, paragraph one of the syllabus. The discretionary power to

grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶ 15} We are mindful that the weight to be given the evidence and the credibility of the witnesses are matters primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.

Public Indecency

{¶ 16} Appellant was convicted in Counts 4 and 11 of public indecency, in violation of R.C. 2907.09(A)(3), which provides that "no person shall recklessly engage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation under circumstances in which the person's conduct is likely to be viewed by and to affront others who are in the person's physical proximity and who are not members of his household."

{¶ 17} Appellant challenges his conviction on Count 11, involving the incident on the elevator with Ms. Selig on July 5, 2008, and argues that the state failed to show that he was masturbating in the elevator. He claims that the witness' testimony is insufficient to demonstrate that he did anything more than merely expose himself to her. We do not agree.

{¶ 18} Masturbation has been defined to include the stimulation or the manipulation of one's genital organs. *State v. Marrero*, 9th Dist. No. 08CA009467, 2009-Ohio-2430, citing *City of Columbus v. Heck* (Nov. 9, 1999), Franklin App. No. 98AP-1384. In this case, Ms. Selig testified that appellant asked if she minded if he masturbated. When she turned to look at him, he had his penis out in his hand and was exposing himself. While Ms. Selig stated that she could not remember exactly if he was making any motion with his hands, she did testify that he had both hands around his erect penis. When asked by the court if she had observed appellant masturbating, she replied, "From my understanding of what masturbating is, yes." We find that the conduct the witness observed is such that an ordinary observer would believe that appellant had stimulated his genital organs and was, therefore, masturbating.

{¶ 19} Appellant further challenges the state's evidence and argues that the standard for determining criminal conduct for public indecency is not whether the conduct affronts a particular complainant, but rather whether it would affront the sensibilities of a "person of common intelligence." He contends that a 21-year-old nursing student who claims to have never seen male genitalia outside of a clinical setting, cannot be considered a "person of common intelligence" for determining whether his conduct "affronts." We find this argument to be completely lacking in merit. We refuse to find, as

appellant seems to suggests, that a person of common intelligence would not be affronted upon entering an elevator and discovering a man, with his penis exposed, who appeared to be masturbating. The state presented sufficient evidence that appellant committed an act of public indecency on July 5, 2008, and the conviction on that offense is not against the manifest weight of the evidence.

{¶ 20} Appellant also challenges his conviction for public indecency in Count 4 arising from the incident on the elevator on May 30, 2008 with Ms. Prakash. He argues that the trial court found him guilty of engaging in "sexual conduct," which is defined by R.C. 2907.01(A) as, "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." He contends that there is absolutely no evidence of any such conduct in the record and so the conviction must be reversed.

{¶ 21} Public indecency requires conduct that appears to be "sexual conduct or masturbation." It is clear from the record that the only conduct alleged by the state or the witnesses was masturbation. We therefore find that the court simply misspoke when it stated the elements of the crime against Ms. Prakash as sexual conduct only. It is clear from the record that

the court's verdict was based upon a finding that appellant engaged in conduct that appeared to Ms. Prakash to be masturbation. Ms. Prakash testified that she turned around after appellant said, "I hope you don't mind" and she saw that he was "exposed and he was masturbating in the elevator." Accordingly, there is sufficient evidence that appellant committed an act of public indecency on May 30, 2008, and the conviction on that offense is not against the manifest weight of the evidence.

Pandering Obscenity

{¶ 22} Appellant challenges the weight and sufficiency of the evidence supporting the conviction for pandering obscenity in Count 5. R.C. 2907.32(A)(4) provides that: "No person, with knowledge of the character of the material or performance involved, shall * * * [a]dvertise or promote an obscene performance for presentation, or present or participate in presenting an obscene performance, when the performance is presented publicly, or when admission is charged."

{¶ 23} "Performance" is defined in R.C. 2907.01(K) as, "any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience." The definition of performance includes the notion of people acting with the expectation that they are being watched. *State v. Ferris* (Nov. 17, 1998), 10th Dist. No. 98AP-24.

{¶ 24} A performance is obscene if "[i]ts dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite." R.C. 2907.01(F)(2).

{¶ 25} Black's Law Dictionary defines "publicly" as: "Openly. In public, well known, open, notorious, common, or general, as opposed to private, secluded or secret." Black's Law Dictionary (5th Ed.1979) 1107.

{¶ 26} The state contends that by stating to Ms. Prakash, "I hope you don't mind," appellant was promoting an obscene performance with an intent to engage in such conduct in front of an audience. Appellant argues that the state failed to prove the necessary element of a "performance." He contends that there is no difference between saying he "masturbated in public view" for the public indecency charges and that he "engaged in the performance of the act of masturbating in public view" for the pandering obscenity charge. We disagree.

{¶ 27} The definition of "performance" under R.C. 2907.01(F)(2) includes the notion of people acting with the expectation that they are being watched by an audience. *Ferris*. In *State v. Colegrove* (2000), 140 Ohio App.3d 306, 747 N.E.2d 303, this court found that a defendant had engaged in a "performance" when he offered two school girls money to watch him masturbate on a public street while he was in his vehicle. This court stated

that defendant "engaged in a performance by asking the girls to watch, opening the car door so that he could be watched, and then engaging in a sex act with the expectation of being watched." Id. at 313.

{¶ 28} The public indecency statute does not require a performance, only that the offender's conduct is "likely to be viewed" by others in the proximity. A defendant was found guilty of public indecency even though he tried to hide the fact that he was masturbating by placing a jacket over his lap. See *State v. Morman*, 2nd Dist. No. 19335, 2003-Ohio-1048. Another defendant was convicted after a hidden surveillance camera in a public restroom caught him appearing to masturbate, even though no one in the restroom actually saw him. *State v. Henry*, 151 Ohio App.3d 128, 2002-Ohio-7180, 783 N.E.2d 609.

{¶ 29} In the present case, the evidence shows that appellant engaged in a performance. By calling Ms. Prakash's attention to the fact that he was masturbating in the elevator, appellant invited her to watch him perform an act that by definition, is obscene. Appellant's performance was conducted openly, in a public area of the apartment building, with the expectation of being watched by an audience. Accordingly, we find the state presented sufficient evidence that appellant committed the offense of pandering obscenity on May 30, 2008, and the conviction on that offense is not against the manifest weight of the evidence.

{¶ 30} Appellant's second, third, and fourth assignments of error are overruled.

{¶ 31} In his fifth and final assignment of error, appellant asserts that the sentence imposed by the trial court is contrary to law. The judgment entry states that appellant was sentenced on Count 5, pandering obscenity, to three years of community control sanctions. On Counts 4 and 11, public indecency, the court sentenced appellant to a term of six months in county jail. The court suspended that sentence and placed appellant on three years probation to run concurrently with the community control sanctions imposed on Count 5.

{¶ 32} Counts 4 and 11 are misdemeanors of the third degree, punishable by a maximum jail term of 60 days. R.C. 2929.24(A)(3). The six-month sentence imposed by the court for these offenses is clearly contrary to law and must be reversed and the matter remanded for resentencing. The state concedes the error. Accordingly, the fifth assignment of error is sustained.

Judgment affirmed in part, reversed in part, and remanded for resentencing consistent with this opinion.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

MELODY J. STEWART, JUDGE

ANN DYKE, J., CONCURS

MARY EILEEN KILBANE, P.J.,
CONCURS IN PART AND DISSENTS
IN PART WITH SEPARATE OPINION

MARY EILEEN KILBANE, P.J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 33} I respectfully dissent from the portion of the majority's decision affirming appellant's conviction on Count 5, pandering obscenity, in violation of R.C. 2907.32(A)(4). While I agree that appellant's conduct constitutes public indecency, I would find that appellant's conduct does not meet the statutory requirements for pandering obscenity.

{¶ 34} Appellant was charged with public indecency, in violation of R.C. 2907.09(A)(3), which provides:

> **"No person shall recklessly * * * engage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation, in circumstances in which the person's conduct is likely to be viewed by or affront others who are in the person's physical proximity."**

{¶ 35} Appellant masturbated in an elevator in close physical proximity to another individual. This conduct is clearly addressed by the public indecency statute, R.C. 2907.09(A)(3). However, his conduct did not rise to the level of pandering obscenity in violation of R.C. 2907.32(A)(4), which provides:

> **"[n]o person, with knowledge of the character of the material or performance involved, shall * * * [a]dvertise or promote an obscene performance for presentation, or present or participate in presenting an obscene performance, when the performance is presented publicly, or when admission is charged."**

{¶ 36} R.C. 2907.32(A)(4) requires a public performance. R.C. 2907.01(K) defines performance as "any motion picture, preview, trailer, play, show, skit, dance, or other exhibition preformed before an audience." Appellant's conduct of masturbating in an elevator occupied by only one other individual with her back to him cannot be said to fit into any of these categories.

{¶ 37} Webster's Dictionary defines pandering as "a go-between in a sexual intrigue; esp. a procurer; pimp; a person who provides the means of helping to satisfy the ignoble ambitions or desires, vices, etc., of another." Webster's Second College Edition New World Dictionary (1970) 1024. In *State v. Albini* (1971), 29 Ohio App.2d 227, 235, 281 N.E.2d 26, pandering obscenity is defined as "the business of purveying pictorial or graphic matter openly advertised to appeal to the erotic interest of customers." Clearly,

pandering obscenity is designed to address obscenity in the commercial context, and not an act against one individual.

{¶ 38} The only case the majority cites to in support of its position that appellant's conduct constituted a public performance is *Colegrove*. Although *Colegrove* discusses the definition of a performance, it does so with respect to R.C. 2907.31, dissemination of material harmful to juveniles, which is clearly distinguishable from the instant case. In *Colegrove,* the defendant's performance was public, as it was in front of multiple children, whom he specifically called over and paid to watch him on a public street. In the instant case, the majority relies on appellant's statement, "Do you mind if I masturbate?" However, I would find this statement insufficient to constitute a performance as defined by R.C. 2907.01(K).

{¶ 39} Consequently, I would reverse appellant's conviction on Count 5, pandering obscenity.