[Cite as *State v. Imboden*, 2022-Ohio-4580.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. 21CA3752
v.	:	
DONALD W. IMBODEN,	:	DECISION & JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

April F. Campbell, Campbell Law, LLC, Delaware, Ohio, for appellant.[1]

Carrie Charles, Ross County Assistant Prosecutor, Chillicothe, Ohio, for appellee.

CRIMINAL APPEAL FROM MUNICIPAL COURT
DATE JOURNALIZED:12-14-22
ABELE, J.

{¶1} This is an appeal from a Chillicothe Municipal Court judgment of conviction and sentence. Donald W. Imboden, defendant below and appellant herein, assigns the following errors for review.

FIRST ASSIGNMENT OF ERROR:

"IMBODEN'S PUBLIC INDECENCY CONVICTION SHOULD BE REVERSED BECAUSE THIS STATUTE IS CONSTITUTIONALLY VAGUE AND OVERBROAD."

SECOND ASSIGNMENT OF ERROR:

"IMBODEN'S CONVICTION SHOULD BE REVERSED BECAUSE THE PUBLIC INDECENCY STATUTE IS UNCONSTITUTIONAL AS APPLIED TO HIM."

[1] Different counsel represented appellant during the trial court proceedings.

THIRD ASSIGNMENT OF ERROR:

"THE STATE'S EVIDENCE AGAINST IMBODEN WAS LEGALLY INSUFFICIENT AS A MATTER OF LAW TO CONVICT HIM OF PUBLIC INDECENCY.

FOURTH ASSIGNMENT OF ERROR:

"IMBODEN'S CONVICTION SHOULD BE REVERSED, BECAUSE COUNSEL WAS INEFFECTIVE ASSISTANCE FOR FAILING TO RENEW HIS CRIM. R. 29 MOTION, AND INEFFECTIVE FOR FAILING TO RAISE THE QUESTION OF WHETHER IMBODEN COULD EVEN BE PROSECUTED UNDER THIS STATUTE UNDER THE FIRST AMENDMENT."

FIFTH ASSIGNMENT OF ERROR:

"IMBODEN'S CONVICTION SHOULD BE REVERSED BECAUSE THE EVIDENCE WEIGHED MANIFESTLY AGAINST HIS CONVICTION."

{¶2} In light of events that occurred on November 19, 2019, the state alleged appellant recklessly exposed his private parts under circumstances likely to be viewed by and affront others in physical proximity, not members of his household, a fourth degree misdemeanor in violation of R.C. 2907.09(A)(1) (public indecency). Appellant pleaded not guilty and the matter proceeded to a jury trial.

{¶3} At trial, appellant's neighbor, Holly Burger, testified she has lived in her neighborhood for 14 years with her husband, Tom Burger. Lisa Wiseman lives next door to the Burgers and appellant lives directly across the street from

Wiseman. Holly Burger stated that on November 18, 2019, she left for work at approximately 7:30 a.m., but before that she looked from her house and observed appellant stand naked behind a front door window. The state showed Holly Burger photographs taken by Tom Burger, zoomed to 30-times magnification, and she testified the photographs accurately depict appellant unclothed inside his doorway.

{¶4} On cross-examination, Holly Burger identified (1) an aerial photograph that depicts the location of neighborhood houses, and (2) a photograph from Ross County Sheriff's Deputy Craig Montgomery's body camera, captured when Montgomery interviewed her husband, that depicts her living room and the view from her window.

{¶5} Tom Burger testified that at daybreak on the morning in question, he could see light inside appellant's house, he could see appellant stand naked inside his house near his front door, and he could see appellant's penis. Burger grabbed his camera, walked to a window and took photographs. Although Burger zoomed to 30-times magnification, he testified that he could have also seen the same image with his naked eye. Shortly thereafter, Burger contacted the Ross County Sheriff's Department and provided the photographs to Deputy Montgomery.

{¶6} On cross-examination, Tom Burger testified he honestly and accurately completed a written incident report and wrote that appellant "appeared" to be naked. When questioned more specifically about what he could actually see, Burger responded:

> Q. The reason that you got your camera that had a zoom was to see whether he was really naked because you didn't know whether he was really naked, did you?
>
> A. I knew he was naked, but that was to affirm it, in my opinion.
>
> Q. Okay. Well, let me show you your statement. I am going to hand you what has been marked for identification purposes as Defendant's Exhibit S-1, and I highlighted in green that you, I think, wrote in your own handwriting. And that says, "I then got my camera that has a zoom to see if he was really naked" – "if he really was naked." Right? That's what you said; right?
>
> A. Correct.
>
> Q. Okay.
>
> A. To affirm what I –
>
> Q. Well, you didn't say to confirm what I thought I saw. You just said "to see if he really was naked"; right?
>
> A. Yes. (Tr. 153-154)

Burger further testified that while he took photographs, he observed neighbor Lisa Wiseman drive her car down her driveway and face appellant's house.

{¶7} Lisa Wiseman testified that on the morning in

question, while she and Holly Burger texted back and forth between 7:33 a.m. and 7:55 a.m., Wiseman peeked four times through closed front window blinds and observed appellant naked inside his house near his front door. Eventually, Wiseman got into her car to go to work and stated:

> "halfway down my driveway I could see one hand rubbing his penis and the other hand he had above his head waving to me" * * *
> "by the time I got to the end of my driveway he had both hands above his head. He wasn't on the glass but he was kind of up on the glass and had both hands waving in the air to me. At that point I got to the end of my driveway and I put it in park. * * * I got out of my car. I stood in the middle of the street and I yelled at him, 'You are disgusting. Go back in your house. Nobody wants to see that.'"

Wiseman continued:

> "So I'm standing in the middle of the street * * * so I pull my cell phone up to try to take pictures and he ran back into the interior of his house."

{¶8} Later that day, Lisa Wiseman visited the Burger house to discuss the incident. Also, at approximately 7 p.m. that evening, appellant came to Wiseman's house and told her to not worry because he would never do anything like that again, that he is not that type of person, and he referred to his actions as silly.

{¶9} During cross-examination, Wiseman testified that,

although she and appellant talked for approximately 10 minutes, she only provided to the prosecution an edited, 40-second segment of her recorded conversation:[2]

> Q. And did it occur to you that he came over just to assure you that you wouldn't see him naked in his house anymore?
>
> A. No.
>
> Q. Now you're [sic] recording. Mr. Imboden was at your house a lot longer than that recording; correct?
>
> A. Correct.
>
> Q. And you edited that recording? That wasn't the entire recording of your entire conversation that you took, was it?
>
> A. That's correct.
>
> Q. So – and you didn't give the entire recording that you took to the prosecutor, did you?
>
> A. I don't believe so. That's correct.
>
> Q. And so when we asked to see the entire recording, it wasn't available because it wasn't in the possession of the State and you knew it wasn't in the possession of the State; correct?
>
> A. Correct.

{¶10} Deputy Montgomery testified that the day of the incident he spoke with Tom Burger, Lisa Wiseman and appellant. Montgomery's body camera also recorded his interaction with

[2] Wiseman recorded part of her conversation with appellant and the prosecution played an edited, incomplete recording for the jury.

appellant. When appellant invited Montgomery into his home, Montgomery explained that he had received a complaint about appellant exposing himself in the mornings. Appellant responded, "Why would someone be watching me from inside my house?" When Montgomery asked appellant several times why he stood at his front door with penis in hand, appellant denied doing so, but admitted he sometimes walks naked inside his house. After Montgomery gave appellant a *Miranda* warning, appellant agreed to answer questions and, when he asked what would be the charge, Montgomery told appellant he would not be charged. After appellant asked Montgomery several times if the reason for their discussion is to have appellant stop standing in his window, Montgomery repeatedly asked appellant why he stands in his window and exposes himself. Appellant then replied, "I don't do that, I don't walk around exposing myself." Montgomery then raised his voice and threatened to take appellant to jail.

{¶11} Eventually, Montgomery calmed down and asked, "Why are you standing in front of your door like that?" Appellant hesitated to respond, then replied, "I don't know. What I don't understand is why is someone watching me from inside my house?" and "It won't happen again." Appellant also stated "Well, I

didn't know anybody was watching. I didn't know I had an audience."

{¶12} At the close of the state's case, appellant made a Crim.R. 29 motion for a judgment of acquittal on the grounds that the state did not prove the "physical proximity" element of public indecency. In particular, appellant argued the great distances that exist between neighborhood houses, and the fact that Tom Burger used a magnification lens to confirm appellant's appearance, supported his motion. The trial court, however, denied the motion.

{¶13} For his defense, appellant called James Longerbone, a retired Columbus police officer who now is a consultant and private investigator. Longerbone testified that during his career he photographed and measured crime scenes and, at appellant's attorney's request, visited appellant's neighborhood and took measurements.[3] Longerbone identified courthouse maps, an aerial photograph, and the photographs he took of appellant's neighborhood. Longerbone photographed appellant's front door, the view north and east that shows a

[3] The testimony established that the distance from appellant's front door to the: (1) nearest side of the road 87 yards; (2) center of the road 91 yards; (3) Wiseman house 145 yards; and (4) Burger house 154 yards.

mound on the side of appellant's property, and the view from appellant's front door to the Wiseman and Burger houses.

{¶14} Longerbone further testified that he reviewed Tom Burger's magnified photographs and determined how close he had to be physically to appellant's front door to view the same depiction portrayed in the magnified images, but with unaided vision. To mimic the photos, Longerbone stated he had to be 27 yards from appellant's front door to observe the exact image depicted in the magnified photographs.

{¶15} Next, William Strickland, a digital photography expert, testified he examined the magnified photographs that included the meta data of each image. Strickland identified Burger's camera, the relevant meta data of the photographs, and the sequence of several images that Burger captured. Strickland explained that (1) meta data provides information about how the camera took the photograph, (2) Burger's camera, a Fuji FinePix HS110 HS11, has a zoom range of 24 to 720, and (3) 24 millimeter is a normal wide angle, 50 millimeter is what people can see with their eyes, and 720 millimeter is a 30X magnification factor. Stickland visited appellant's property and determined that Burger used 30-times magnification for his photographs. Strickland explained that, if a photographic image

is magnified 30 times, it means that a person sees it magnified 30 times to what it would be if not zoomed. In other words, whatever is photographed will be seen as if it is 30 times closer. Strickland prepared two exhibits to show the difference between an image magnified 30 times and an image observed by a human eye with normal vision, both looking from the edge of the road to appellant's property. When Strickland took the "normal vision" photograph, appellant stood at the door and wore a shirt with a logo and, at that distance, Strickland could not read the logo and could not determine appellant's gender. Strickland also testified that he went to great effort to present to the jury fair and accurate information, and that he offered his opinions with a reasonable degree of scientific accuracy.

{¶16} After hearing the evidence, counsels' arguments, and after deliberation, the jury found appellant guilty as charged. The trial court sentenced appellant to serve 12 months community control and pay a $100 fine. This appeal followed.

I & II

{¶17} In his first two assignments of error, appellant challenges the constitutionality of the public indecency statute as vague and overbroad, as well as unconstitutional as

applied to him. We initially note, however, appellant did not raise these challenges in the trial court.

{¶18} In general, the "Failure to raise at the trial court level the issue of the constitutionality of a statute * * *, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus. It is true, however, that courts have some "discretion to consider a forfeited constitutional challenge to a statute." *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 16; *see also In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus. "We may review the trial court decision for plain error, but we require a showing that but for a plain or obvious error, the outcome of the proceeding would have been otherwise, and reversal must be necessary to correct a manifest miscarriage of justice." (Citation omitted.) *Quarterman* at ¶ 16. "The burden of demonstrating plain error is on the party asserting it." *Id.* The Supreme Court of Ohio has also stated that "a forfeited constitutional challenge to a statute is subject to review 'where the rights and interests involved may warrant it.' " *Id.*, quoting *In re M.D.* at

syllabus.

{¶19} In the case sub judice, because appellant did not raise a constitutional challenge in the trial court, and did not suggest that this court review this issue under a plain error analysis, we decline to sua sponte conduct this analysis. *See Matter of J.A.*, 4th Dist. Scioto No. 19CA3878, 2019-Ohio-4116, ¶ 12-13; *In re K.W.*, 111 N.E.3d 368, 2018-Ohio-1933, ¶ 94 (4th Dist.).

{¶20} Moreover, we recognize that Ohio courts have determined that R.C. 2907.09 is not overbroad and does not criminalize private constitutionally protected conduct, or violate the First Amendment to the United States Constitution. See *34 N. Jefferson, LLC v. Liquor Control Commission,* 10th Dist. No. 11AP-868, 2012-Ohio-3231 and *State v. Emsuer* 12 Dist. No. CA89-12-019. Appellant's contention that the statute proscribes nudity in one's home is unfounded. Rather, the issue in the case sub judice is whether a person inside their home exposes themself to public areas, such as streets or sidewalks. See, e.g., *State v. Loudermilk,* 1st Dist. C-160487, 2017-Ohio-7378 (defendant argued location inside a house did not satisfy the statute's physical proximity element when person observed him in window from across a street - court

determined victim sufficiently close to observe private parts).

{¶21} Accordingly, based upon the foregoing reasons, we overrule appellant's first and second assignments of error.

III

{¶22} In his third assignment of error, appellant asserts the prosecution adduced insufficient evidence as a matter of law to prove, beyond a reasonable doubt, the elements of the crime of public indecency. In particular, appellant argues that he did not exhibit his unclothed body under circumstances likely to be viewed by, and in physical proximity to, others.

{¶23} "Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Therefore, an appellate court's review is de novo. *In re J.V.*, 134 Ohio St.3d 1, 2012-Ohio-4961, 979 N.E.2d 1203, ¶ 3. In reviewing a record for sufficiency of evidence, 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. Grant*, 67 Ohio

St.3d 465, 477, 620 N.E.2d 50 (1993). A reviewing court will not overturn a conviction on a sufficiency-of-the-evidence claim unless reasonable minds could not reach the conclusion that the trier of fact did. *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001). "In essence, sufficiency is a test of adequacy." *Thompkins* at 386, 678 N.E.2d 541; *see also State v. Groce,* 163 Ohio St.3d 387, 2020-Ohio-6671, 170 N.E.3d 813.

{¶24} A claim of insufficient evidence invokes a due process concern and raises the question whether the evidence is legally sufficient to support the verdict as a matter of law. *Thompkins*, 78 Ohio St.3d at 386. Once again, when reviewing the sufficiency of the evidence, an appellate court's inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *Id.* at syllabus. A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶25} The offense of public indecency is set forth in R.C.

2907.09(A)(1):

> (A) No person shall recklessly do any of the following, 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:
> (1) Expose the person's private parts; * * *.

The culpable mental state for this offense is "recklessly" and is defined in R.C. 2901.22(C):

> (C) A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

Because the term physical proximity is not defined in the statute, courts will generally apply the common, ordinary meaning:

> Revised Code Section 2907.09 does not define "physical proximity." Therefore, we apply its common, ordinary meaning. *See Cincinnati Metro. Hous. Auth. v. Edwards*, 174 Ohio App.3d 174, 2007-Ohio-6867, 881 N.E.2d 325, ¶ 19 (1st Dist.). "Physical" means "[o]f, relating to, or involving someone's body as opposed to mind" and "proximity" means "[t]he quality, state, or condition of being near in time, place, order, or relation." Black's Law Dictionary 1331 and 1421 (10th Ed. 2014). Therefore, we interpret "physical proximity," as used in R.C. 2907.09, as meaning that the victim is near enough to observe the offender's private parts.

Loudermilk at ¶ 7.

{¶26} In the case sub judice, to prove each element of the public indecency offense beyond a reasonable doubt, the state had to produce sufficient evidence to establish that appellant (1) acted recklessly; (2) exposed his private parts; (3) under circumstances likely to be viewed by others; (4) likely to affront others; and (5) in his physical proximity. After our review of the evidence adduced at trial, we first observe that the testimony reveals that the Burgers observed appellant stand naked behind a glass door window inside his house, from inside the Burgers' home at a distance of 154 yards. The witnesses maintained they could clearly see appellant. Nevertheless, although Holly and Tom Burger testified that they could see appellant's genitalia, they also reviewed the 30-times magnified images and testified that those images depict a true and accurate representation of what they observed. However, those somewhat blurry and grainy images do not appear to clearly depict appellant's private parts. Furthermore, Tom Burger conceded on cross-examination that, although he stated that he could see appellant naked, in his report he stated that appellant appeared to be naked and he needed his zoom lens to "affirm" appellant's nakedness. Therefore, even when viewed in a light most favorable to the prosecution, the Burgers'

testimony contains conflicts and inconsistencies as to whether they could actually see appellant's private parts from their house, some 154 yards away. Consequently, we question whether this testimony meets the "beyond a reasonable doubt" standard that the state must satisfy as to this element of the crime.

{¶27} However, after we construe all of the evidence adduced at trial in a light most favorable to the prosecution, it does appear that one witness actually observed, unaided and without magnification, appellant's genitalia. Lisa Wiseman stated that she first observed appellant from her house and, when she exited her car in the street at a distance of approximately 90 yards, she clearly observed appellant's private parts. Without reference to the magnified photographic images, Wiseman testified: (1) she peeked through her blinds and could see appellant's penis; and (2) when she drove from her driveway to the street, she exited her car and could see appellant's penis. Therefore, when we view this testimony most favorably to the prosecution, we believe that the state presented sufficient evidence to prove that for an extended period of time appellant exposed his genitalia from inside his house visible to anyone on the public road. Thus, the state adduced sufficient evidence that appellant exposed his private

parts. Wiseman's testimony constitutes sufficient evidence to establish physical proximity --- "near enough to observe the offender's private parts." *Loudermilk* at ¶ 7. Finally, the state satisfied the remaining elements of the statute because (1) the state presented sufficient evidence of an affront, and (2) appellant acted recklessly in the public indecency context when he disregarded a "substantial and unjustified risk" that his conduct was likely to be viewed and affront others.

{¶28} In sum, based upon our review of the evidence adduced at trial, and when the evidence is viewed in a light most favorable to the prosecution, we believe that any rational trier of fact could have found the essential elements of public indecency proven beyond a reasonable doubt. In the case sub judice, appellant's act to expose himself did not occur as a result of some accidental, momentary exposure while walking through his home, but rather occurred for a prolonged period of time (over 30 minutes) in view of anyone who may use the public roadway.

{¶29} We also again emphasize that, in a prosecution for the public indecency offense, the state must adduce sufficient evidence that a defendant's exposure is "reckless" and "under circumstances in which the person's conduct is likely to be viewed

by * * * others," but it is important to recognize that whether a person *actually* did observe a defendant's private parts is immaterial to the R.C. 2907.09 analysis. Instead, what matters is whether the exposure is *likely* to be viewed by others.

> According to the settled case law, whether an offender's conduct is actually viewed by others is immaterial to the analysis under R.C. 2907.09. It matters not whether others actually viewed the conduct but rather whether such conduct would likely have been viewed by others. (Citations omitted.)

State v. Ramey, 10th Dist. No. 11AP-485, 2012-Ohio-1015, ¶ 16 (public masturbation in cubicle at internet café likely to be viewed by others); *State v. Goldsmith*, 12th Dist. Clermont No. 83-01-002, 1983 WL 4422, *1-2, fn. 1 (person exposed penis 250 yards from public rest area, conviction for indecent exposure lacked sufficient evidence as not likely to be viewed by others even though detective testified open view from vantage points in shrubbery). "'In order to sustain a conviction for public indecency, it matters not how many people actually view the conduct but whether such conduct would likely be viewed by and affront others.'" *State v. Henry*, 2002-Ohio-7180, 151 Ohio App.3d 128, ¶ 60 (7th Dist.), quoting *Cleveland v. Houston*, 8th Dist. No. 65897, 1994 WL 385982. Thus, the prosecution has the burden to prove beyond a reasonable doubt that a defendant's conduct is likely to be viewed by others, regardless of whether any witnesses actually viewed the conduct.

{¶30} Once again, we believe that here the prosecution carried its burden. Accordingly, based upon the foregoing reasons, we overrule appellants third assignment of error.

IV

{¶31} In his fourth assignment of error, appellant asserts that he received ineffective assistance of counsel. In particular, appellant argues that his trial counsel should have: (1) renewed his Crim.R. 29 motion, and (2) raised the issue of whether prosecution under the public indecency statute is appropriate in light of First Amendment concerns.

{¶32} The Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution, provides that defendants in all criminal proceedings shall have the assistance of counsel for their defense. To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) counsel rendered a deficient performance, and (2) the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish deficient performance, a defendant must prove that counsel's performance fell below an objective level of reasonable representation. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95.

Additionally, a court need not analyze both Strickland test prongs if it can resolve the claim under one prong. *See State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000); *State v. Bowling*, 4th Dist. Jackson No. 19CA2, 2020-Ohio-813, ¶ 12-13.

{¶33} When a court examines whether counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689, 466 U.S. 668, 104 S.Ct. 2052. Moreover, because a properly licensed attorney is presumed to execute all duties ethically and competently, *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, to establish ineffectiveness, a defendant must demonstrate that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland* at 687, 466 U.S. 668, 104 S.Ct. 2052.

{¶34} In the case sub judice, appellant asserts that his trial counsel should have renewed his Crim.R. 29 motion for judgment of acquittal. However, in view of our disposition of appellant's third assignment of error regarding the sufficiency of the evidence, we find no merit in this assignment of error. Moreover, as we pointed out in our discussion of appellant's first and second assignments of error, we believe his First Amendment contention is without merit.

{¶35} Accordingly, based upon the foregoing reasons, we overrule appellant's fourth assignment of error.

V

{¶36} In his fifth assignment of error, appellant asserts that his conviction is against the manifest weight of the evidence.

{¶37} Initially, we observe that "sufficiency" and "manifest weight" present two distinct legal concepts. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 23 ("sufficiency of the evidence is quantitatively and qualitatively different from the weight of the evidence"); *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), syllabus. "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins*, 78 Ohio St.3d at 387. "The question to be answered when a manifest weight issue is raised is whether 'there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt.'" *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 81, quoting *State v. Getsy*, 84 Ohio St.3d 180, 193–194, 702 N.E.2d 866 (1998), citing *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus.

{¶38} A court that is considering a manifest weight challenge must "'review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses.'" *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 208, quoting *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 328. Reviewing courts must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Murphy*, 4th Dist. Ross No. 07CA2953, 2008-Ohio-1744, ¶ 31. "'Because the trier of fact sees and hears the witnesses and is particularly competent to decide "whether, and to what extent, to credit the testimony of particular witnesses," we must afford substantial deference to its determinations of credibility.'" *Barberton v. Jenney*, 126 Ohio St.3d 5, 2010-Ohio-2420, 929 N.E.2d 1047, ¶ 20, quoting *State v. Konya*, 2d Dist. Montgomery No. 21434, 2006-Ohio-6312, ¶ 6, quoting *State v. Lawson*, 2d Dist. Montgomery No. 16288 (Aug. 22, 1997).

{¶39} Thus, an appellate court will leave issues of weight and credibility of evidence to the fact finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer*, 4th Dist. Pickaway No. 11CA9, 2012-Ohio-1282, ¶ 24; *accord State v. Howard*, 4th Dist. Ross No. 07CA2948, 2007-Ohio-6331, ¶ 6 ("We will

not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight.").

{¶40} Accordingly, if the prosecution presented substantial credible evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. *E.g., Eley*; *accord Eastley* at ¶ 12, quoting *Thompkins*, 78 Ohio St.3d at 387, quoting Black's Law Dictionary 1594 (6th ed.1990) (judgment not against the manifest weight of evidence when "'"the greater amount of credible evidence"'" supports it). A court may reverse a judgment of conviction only if it appears that the fact-finder, when it resolved the conflicts in evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983); *accord McKelton* at ¶ 328. A reviewing court should find a conviction against the manifest weight of the evidence only in the "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin*, 20 Ohio App.3d at 175; *accord State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 166; *State v. Lindsey*, 87 Ohio St.3d

479, 483, 721 N.E.2d 995 (2000).

{¶41} We further note that "'"[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony."'" *State v. Cooper*, 170 Ohio App.3d 418, 2007–Ohio–1186, 867 N.E.2d 493, ¶ 17 (4th Dist.), quoting *State v. Mason*, 9th Dist. Summit No. 21397, 2003–Ohio–5785, ¶ 17, quoting *State v. Gilliam*, 9th Dist. Lorain No. 97CA006757, 1998 WL 487085, *4 (Aug. 12, 1998). Moreover, a conviction is not against the manifest weight of the evidence even if the "evidence is subject to different interpretations." *State v. Adams*, 2d Dist. Greene Nos. 2013CA61, 2013–CA–62, 2014–Ohio–3432, ¶ 24.

{¶42} We also observe that, when an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily includes a finding that sufficient evidence supports the conviction. *E.g., State v. Waller*, 4th Dist. Adams No. 17CA1044, 2018-Ohio-2014, ¶ 30. Thus, a determination that the weight of the evidence supports a conviction is also dispositive of the issue of sufficiency. *Id.*

{¶43} In the case sub judice, after our review of the evidence adduced at trial, we do not believe that the evidence weighs heavily

against appellant's public indecency conviction. Instead, we believe that the evidence adduced at trial, if believed by the trier of fact, established that appellant violated the essential elements of the public indecency offense beyond a reasonable doubt. Although conflicts in the evidence exist, the trier of fact did not lose its way and create a manifest miscarriage of justice. The jury sitting as the trier of fact may choose to believe all, part or none of the testimony of any witness. A conviction is not against the manifest weight of the evidence simply because the jury opted to believe the prosecution's witnesses.

{¶44} Consequently, after our review we believe that the prosecution witness testimony contains ample competent and credible evidence that appellant committed the offense of public indecency. Accordingly, based upon the foregoing reasons, we overrule appellant's fifth assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the be affirmed and that appellee recover of appellant the 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 Chillicothe Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

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

Wilkin, J.: Concurs in Judgment & Opinion
Smith, P.J.: Dissents

For the Court

BY:_____
Peter B. Abele, Judge, Judge

NOTICE TO COUNSEL

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