[Cite as *State v. Downs*, 2017-Ohio-1014.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 15 MA 0170
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
KEVIN DOWNS,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 2013 CR 229

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 13, 2017

[Cite as *State v. Downs*, 2017-Ohio-1014.]
ROBB, P.J.

{¶1} Defendant-Appellant Kevin Downs appeals his conviction and sentence entered in Mahoning County Common Pleas Court. The jury found him guilty of second-degree misdemeanor public indecency in violation of R.C. 2907.09(A)(1)(C)(2). Appellant was sentenced to 60 days in jail and fined $1,000.00. Appellant argues his speedy trial rights were violated, the conviction is against the sufficiency of the evidence, the statute of limitations expired, the trial court abused its discretion in failing to review the transcript of the grand jury proceedings prior to denying Appellant's motion to inspect the grand jury proceedings, and the trial court did not comply with the misdemeanor sentencing statutes.

{¶2} For the reasons expressed below, the evidence was not sufficient to elevate the public indecency conviction to a second-degree misdemeanor. However, the evidence was sufficient to convict Appellant of fourth-degree misdemeanor public indecency. Thus, the conviction for second-degree misdemeanor public indecency is modified to a fourth-degree misdemeanor public indecency conviction and the matter remanded for sentencing.

Statement of the Facts and Case

{¶3} The victim in this case was a minor, Appellant's band student, who took private music lessons from Appellant.

{¶4} On December 19, 2012, victim was at Appellant's residence for her private lesson; his music studio was located in the basement of his house. Following the lesson, Appellant gave her a small bottle of Coach perfume as a gift for Christmas.

{¶5} Two days later, on the evening of December 21, 2012, the victim was at Appellant's house earning extra money by helping Appellant organize his music studio. After working for approximately an hour, Appellant asked the victim if she would like to take a break. When the victim turned around Appellant's fly was open and he had his penis exposed. She picked up her purse and phone, and proceeded to leave the house. Victim claimed Appellant tried to keep her from leaving by grabbing her wrists. Tr. 184. She testified he grabbed her wrists two or three times in the basement and once on the first floor. Tr. 184. She eventually got to the front

door, called her father to pick her up, and left the house. Tr. 184. During that time, Appellant was telling victim she should wait for her parents inside the house because it was too cold outside. Tr. 184. She proceeded to leave the house and ran down the street, waiting there until her father arrived.

{¶6} Once her father arrived, she told him Appellant was a jerk, he exposed himself to her, and they needed to call the police. Father drove back to Appellant's house, banged on the door, and yelled at Appellant.

{¶7} While that was occurring victim called her mother. When mother arrived she too banged on the door and yelled at Appellant.

{¶8} The police were called and arrived shortly thereafter. They took a statement from the victim and questioned Appellant.

{¶9} Appellant was arrested and originally indicted for abduction in violation of R.C. 2905.02(A)(2)(C), a third-degree felony and public indecency in violation of R.C. 2907.09(A)(1)(C)(2), a second-degree misdemeanor. 2/28/13 Indictment.

{¶10} Appellant entered a not guilty plea and executed a speedy trial waiver. 3/4/13 Written Not Guilty Plea and Speedy Trial Waiver.

{¶11} Eleven days prior to trial, the state obtained a superceding indictment. 1/15/15 Superceding indictment. The charges remained abduction and public indecency. However, the superceding indictment added division (B) to the abduction charge; this element provided the abduction was sexually motivated. The sexual motivation language was also added to the text of that charge. As to the public indecency charge, the only addition was language that the victim was a minor.

{¶12} Due to the superceding indictment, the trial was postponed. Appellant moved to inspect the grand jury proceeding and moved to dismiss the indictment. 4/13/15 Motions. Appellant contended the speedy trial waiver did not apply to the superceding indictment, and the speedy trial times had run. The state filed motions in opposition. 5/19/15 Motions. The trial court denied both of Appellant's motions. 5/20/15 Judgment Entries. As to the motion to dismiss the indictment, the trial court reasoned, the superceding indictment did not require a different defense or trial strategy.

{¶13} The case proceeded to a jury trial. At trial, in addition to the above statements, the victim testified she perceived Appellant's exposure of his penis as a solicitation for sexual activity. Tr. 183.

{¶14} Appellant testified on his own behalf. He claimed the fly of his sweatpants, which had a button closure, puckered open and the victim may have seen his underwear. He denied exposing his penis. He denied grabbing the victim's wrists in the basement. He admitted at the front door he touched her arm and asked her to stay in the house until her father got there. He also admitted that when the victim turned to look at him while they were in the basement she had a shocked look on her face, and she was staring at his groin area. This led him to conclude she saw his underwear. He said he was immediately embarrassed and put his hands in front of his groin area.

{¶15} After hearing the evidence, the jury found Appellant not guilty of abduction, not guilty of the lesser included offense of unlawful restraint, and guilty of public indecency. The public indecency verdict form stated, "We, the jury, find the Defendant, Kevin Downs, Guilty of public indecency, in violation of R.C. 2907.09(A)(1)(C)(2)." 8/4/15 Jury Verdict Form. A second form to the public indecency charge provided, "We, the jury, find that the person likely to view Kevin Downs private parts when he committed the offense of public indecency was a minor." 8/4/15 Jury Verdict Form.

{¶16} Appellant was sentenced to 60 days in jail for the conviction of a second-degree misdemeanor. 8/26/15 J.E. He was also fined $1,000.00. 8/26/15 J.E.

{¶17} Appellant timely appeals from his conviction and sentence.

Second Assignment of Error

{¶18} For ease of discussion, the second assignment of error will be addressed first. It provides:

"The Appellant's conviction for public indecency must be vacated as being unsupported by constitutionally sufficient evidence."

{¶19} Sufficiency of the evidence is a question of law dealing with legal adequacy of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d

541 (1997). It is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In viewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on grounds of sufficiency unless the reviewing court determines no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id*.

{¶20} Appellant argues the indictment does not charge an offense. He contends subsection (C)(2) of R.C. 2907.09 are sentencing requirements, not elements of the offense. Accordingly, including that subsection in the indictment does not charge Appellant with an offense. Next, he asserts, even if the indictment does charge him with an offense, the state did not prove the necessary elements to convict Appellant of a second-degree misdemeanor. He argues a second-degree misdemeanor requires the state to prove he had a prior public indecency conviction **and** the victim was a minor.

{¶21} The state asserts the indictment does charge Appellant with an offense. It contends that it did prove a second-degree misdemeanor because the statute requires it to either prove a prior public indecency conviction **or** that the victim was a minor, not both.

{¶22} Appellant's argument regarding the indictment not charging him with an offense fails. The original and superceding indictment charged him with a violation of R.C. 2907.09(A)(1)(C)(2). Those sections provide:

> (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;
>
> * * *

> (C)(1) Whoever violates this section is guilty of public indecency and shall be punished as provided in divisions (C)(2), (3), (4), and (5) of this section.
>
> (2) Except as otherwise provided in division (C)(2) of this section, a violation of division (A)(1) of this section is a misdemeanor of the fourth degree. If the offender previously has been convicted of or pleaded guilty to one violation of this section, a violation of division (A)(1) of this section is a misdemeanor of the third degree or, if any person who was likely to view and be affronted by the offender's conduct was a minor, a misdemeanor of the second degree. If the offender previously has been convicted of or pleaded guilty to two violations of this section, a violation of division (A)(1) of this section is a misdemeanor of the second degree or, if any person who was likely to view and be affronted by the offender's conduct was a minor, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to three or more violations of this section, a violation of division (A)(1) of this section is a misdemeanor of the first degree or, if any person who was likely to view and be affronted by the offender's conduct was a minor, a felony of the fifth degree.

R.C. 2907.09(A)(1)(C)(2).

{¶23} Appellant's insistence that subsection (C)(2) provides sentencing requirements, and not elements, is incorrect. The factors listed in subsection (C)(2) are enhancing elements. R.C. 2945.75 specifically indicates factors that enhance the degree of the offense are "elements." However, when the presence of one or more additional elements makes an offense a more serious degree, the indictment shall either state the degree of the offense or shall allege the additional elements. R.C. 2945.75(A)(1). Thus, the indictment was not required to list the enhancing elements, as long as the degree of the offense was stated. *State v. Fields*, 4th Dist. No. 06CA3080, 2007-Ohio-4191, ¶ 18 (When Crim.R. 7(B) is read in conjunction with R.C. 2945.75(A)(1), it appears the legislature intended for the "degree of the offense"

to adequately give notice to a defendant of the enhancement element contained within the statute.). Thus, when considering the original and the superceding indictment in conjunction with R.C. 2907.09(A)(1)(C)(2) it is clear the indictment charged Appellant with the offense of second-degree misdemeanor public indecency. Appellant's assertion that the indictment does not charge him with an offense fails.

{¶24} Next, Appellant alternatively argues, even if the indictment does charge him with an offense, the state did not prove the necessary elements to convict Appellant of a second-degree misdemeanor. He argues a second-degree misdemeanor requires the state to prove he had a prior public indecency conviction **and** the victim was a minor.

{¶25} The state disagrees and contends the statute requires it to either prove a prior public indecency conviction **or** that the victim was a minor, not both. The state focuses on the second sentence in R.C. 2907.09(C)(2). This sentence states, "If the offender previously has been convicted of or pleaded guilty to one violation of this section, a violation of division (A)(1) of this section is a misdemeanor of the third degree or, if any person who was likely to view and be affronted by the offender's conduct was a minor, a misdemeanor of the second degree." The state reads the "or" in this sentence to be a conjunction separating two independent sentences.

{¶26} We disagree with the state's reading of this statute. In order for the "or" to be a conjunction, grammar rules dictate that a comma would precede it, not follow it. Thus, it cannot be concluded that "or" is a conjunction in this instance. Furthermore, in reading subsection (C)(2) as a whole it cannot be concluded the state's interpretation of the second sentence is correct. If we read the second sentence in the manner suggested by the state it is confusing as to what degree offense an offender who exposes himself or herself to a minor could be charged with when the offender has no prior public indecency charges. The third sentence of subsection (C)(2) states, "If the offender previously has been convicted of or pleaded guilty to two violations of this section, a violation of division (A)(1) of this section is a misdemeanor of the second degree or, if any person who was likely to view and be affronted by the offender's conduct was a minor, a misdemeanor of the first degree." This sentence is grammatically similar to the second sentence. If we read it in the

same manner the state suggest we read the second sentence, then a first time public indecency offender exposing himself to a minor could be charged with a first-degree misdemeanor. The fourth sentence is also grammatically similar to the second and third sentences. It provides, "If the offender previously has been convicted of or pleaded guilty to three or more violations of this section, a violation of division (A)(1) of this section is a misdemeanor of the first degree or, if any person who was likely to view and be affronted by the offender's conduct was a minor, a felony of the fifth degree." This sentence, if read as the state wants us to read the second sentence, means a first time public indecency offender exposing himself to a minor could be charged with a fifth-degree felony. Thus, under the state's interpretation a first time public indecency offender who exposes himself to a minor could be charged with a second-degree misdemeanor, first-degree misdemeanor, or a fifth-degree felony.

{¶27} Consequently, for those reasons we disagree with the state's reading of R.C. 2907.09(C)(2). We hold the statute is clearly written. In order for the offense to be elevated due to the presence of a minor, the offender must also have one or more prior convictions for public indecency. Our sister district agrees. *State v. Stefanopoulos*, 12th Dist. No. CA2011-10-187, 2012-Ohio-4220, ¶ 24, fn. 2.

{¶28} Here, the state offered no evidence of prior convictions. Thus, there is insufficient evidence to support the conviction for second-degree misdemeanor public indecency.

{¶29} Although there is not sufficient evidence to support a second-degree misdemeanor public indecency conviction, there is sufficient evidence to support a fourth-degree public indecency conviction. The first sentence of R.C. 2907.09(C)(2) provides, "Except as otherwise provided in division (C)(2) of this section, a violation of division (A)(1) of this section is a misdemeanor of the fourth degree." Thus, if none of the enhancing elements of (C)(2) were proven, Appellant could still be guilty of fourth-degree misdemeanor public indecency. The elements of public indecency are no person shall recklessly expose their private parts under circumstances where the exposure 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. 2907.09(A)(1). The victim testified Appellant exposed his private parts. Tr. 182. Her testimony

suggests he did this on purpose; she testified he did this to solicit sexual activity. Tr. 183. Purposely is a greater culpable mental state than the required reckless mental state. R.C. 2901.22. She also testified she was in the same room, feet away from him, when this exposure occurred. Tr. 179-180, 182. Thus, there was sufficient evidence to support a fourth-degree misdemeanor public indecency conviction.

{¶30} When the evidence shows a defendant was not guilty of the crime for which he was convicted, but was guilty of a lesser degree of that crime, an appellate court can modify the verdict accordingly, and remand the case for resentencing. *State v. Kozic*, 7th Dist. No. 11 MA 160, 2014-Ohio-3788, ¶ 53 (A sufficiency of the evidence review. Enhancing element bulk amount not proven.).

{¶31} In conclusion, this assignment has merit. The conviction for second-degree misdemeanor public indecency is not supported by legally sufficient evidence. However, there is legally sufficient evidence to support the lesser degree offense of fourth-degree misdemeanor public indecency. Thus, the conviction is modified and the matter remanded for sentencing on fourth-degree misdemeanor public indecency.

First Assignment of Error

{¶32} Appellant's first assignment of error asserts his speedy trial rights were violated and provides:

"The trial court erred when it denied Appellant's motion of discharge due to failure to afford a speedy trial."

{¶33} A trial court's decision regarding a motion to dismiss based upon a violation of the speedy trial provisions involves a mixed question of law and fact. *State v. High*, 143 Ohio App.3d 232, 242, 2001-Ohio-3530, 757 N.E.2d 1176 (7th Dist.). Due deference is given to the trial court's findings of fact if those findings are supported by competent credible evidence. *Id*. However, we must independently review whether the trial court properly applied the law to the facts of the case. *Id*. In reviewing the legal issues presented in a speedy trial claim, we must strictly construe the relevant statutes against the state. *Id*.

{¶34} A person charged with both a misdemeanor and a felony must be brought to trial within 270 days unless the right to a speedy trial is waived. R.C. 2945.71(C)(D)(2). Pursuant to R.C. 2945.73, a person who is not brought to trial

within the proscribed time periods found in R.C. 2945.71 and R.C. 2945.72 "shall be discharged" and further criminal proceedings based on the same conduct are barred.

{¶35} Appellant acknowledges he executed a speedy trial waiver shortly after the original indictment. He contends the waiver does not apply to the superceding indictment. The superceding indictment was issued almost two years after the original indictment and 11 days prior to the scheduled trial.

{¶36} The Ohio Supreme Court has held, "[w]hen an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver." *State v. Adams*, 43 Ohio St.3d 67, 538 N.E.2d 1025 (1989). In *Adams*, the defendant was initially charged with a violation of R.C. 4511.19(A)(3) for having a specified amount of alcohol concentration on his breath. *Id*. Adams signed a speedy trial waiver. Later, a superceding indictment was issued against Adams charging him under R.C. 4511.19(A)(1), operating a motor vehicle while under the influence of alcohol, based on the same facts and circumstances. The trial court found the speedy trial waiver extended to the superceding indictment. The court of appeals agreed. The Ohio Supreme Court disagreed and found the waiver could not be construed as a knowing and intelligent waiver of such a right as to the superceding indictment:

> While it is true that in the case before us both charges stem from R.C. 4511.19, they nevertheless are distinct charges, which could involve different defenses at time of trial. As seen here, the fact that appellant was not driving on a public road proved to be an effective defense as to the original charge of a violation of R.C. 4511.19(A)(3). In that instance it may have been appropriate to waive the right to a speedy trial, but the accused may not desire to waive the right to a speedy trial as to a charge under R.C. 4511.19(A)(1) since his defense could be different. Indeed, a defendant, for tactical reasons may choose to waive the right to a speedy trial as to an initial charge, but if a nolle prosequi is entered as to that charge, other defense considerations may arise which will affect his decision whether to waive the right to a speedy trial as to any

> subsequent charges stemming from the same set of circumstances. Thus, a knowing and intelligent waiver cannot be made until all the facts are known by the accused, which includes knowing the exact nature of the crime he is charged with.

Id. at 69-70.

{¶37} We have, in multiple instances, held *Adams* to be distinguishable where the superceding indictment does not change the nature of the offense charged or add any additional charges. *State v. Williams*, 7th Dist. No. 11 MA 131, 2012-Ohio-6277, ¶ 33; *State v. Sloane*, 7th Dist. No. 06 MA 144, 2010-Ohio-612, ¶ 17; *State v. Clark*, 7th Dist. No. 04 MA 246, 2006–Ohio–1155, ¶ 16–20. In *Williams*, the charges in the superceding indictment were identical to the original indictment; the only change was that a codefendant, who had previously been labeled "John Doe," was identified by name in the superceding indictment. *Williams* at ¶ 5. Consequently, we held the waiver extended to the superceding indictment because the superceding indictment did not change the nature of the offense or add any additional charges. *Id*. at ¶ 33. In *Sloane*, the original indictment charged Appellant with rape and gross sexual imposition. *Sloane*. The original indictment did not include the language that Appellant was not the spouse of the victims. *Id*. We found, the omission of that element from the original indictment did not change the name or the identity of the crime charged. *Id*. In *Clark*, the offender was originally indicted on rape R.C. 2907.02(A)(1)(b)(B) and gross sexual imposition R.C. 2907.05(A)(4)(B). *Clark* at ¶ 6. The indictment included two sexual predator specifications and indicated the rape offense was "punishable by life imprisonment." *Id*. The superceding indictment charged him with the same two counts and the sexual predator specifications. *Id*. at ¶ 8. However, this indictment added the required language that Appellant, "purposely compelled [the minor victim] to submit by force or threat of force." *Id*. Consequently, we concluded Clark was fully aware of the charged offense when he executed the waiver and the superceding indictment did not alter or add charges. *Id*. at ¶ 20.

{¶38} Our sister districts also have found *Adams* to be distinguishable where the superceding indictment does not change the nature of the defense or add any additional charges. *State v. Johnson*, 12th Dist. No. 2011-09-169, 2013-Ohio-856, ¶

28; *State v. Sain*, 2d Dist. No. 13493, 1993 WL 323539 (Aug. 23, 1993); *State v. Luff*, 85 Ohio App.3d 785, 621 N.E.2d 493 (6th Dist.1993). In *Luff*, the offender was initially indicted on five counts of aggravated murder, each with two death penalty specifications, and five counts of kidnapping. *Luff*. Luff executed a speedy trial waiver. *Id*. A superceding indictment was issued against him; he was again indicted on five counts of aggravated murder and five counts of kidnapping. *Id*. This indictment, however, also included an additional death penalty specification and added a count of aggravated robbery. *Id*. Luff asked the trial court to dismiss the indictment asserting his constitutional and statutory speedy trial rights were violated. *Id*. The trial court agreed in part, and dismissed the additional death specification and the aggravated robbery charge. *Id*. Thus, the remaining indictment was identical to the original indictment. *Id*. On appeal, he argued the entire indictment should have been dismissed. *Id*. The appellate court agreed with the trial court's decision and allowed the original charges to remain pending. *Id*. It distinguished the *Adams* decision finding that, "Luff's ability to defend himself was not impaired through the application of his previous speedy trial waiver as he remained fully apprised of the charges against him." *Id*. In *Johnson*, the appellate court held when charges in the original and superceding indictment are identical the speedy trial waiver applies to the superceding indictment. *Johnson*. Lastly, in *Sain*, the Second District explained, a "fitting corollary" to the *Adams* rule "is that where the charges in the second indictment are identical to * * * the initial indictment, then it is not unfair to apply a defendant's waiver of his speedy trial rights in the initial indictment to the subsequent indictment." *Sain*.

{¶39} Considering the above case law, the question is whether the superceding indictment changed the identity of the public indecency charge, changed the nature of the defense to the public indecency charge, or added additional charges.

{¶40} The original indictment charged Appellant with public indecency in violation of R.C. 2907.09(A)(1)(C)(2), a second degree misdemeanor. It stated:

> KEVIN DOWNS did recklessly and under circumstances in which his conduct is likely to be viewed by and affront others, who are in KEVIN

> DOWNS physical proximity and not members of his household, did expose his private parts, in violation of Section 2907.09(A)(1)(C)(2) of the Revised Code, a Misdemeanor of the Second Degree, against the peace and dignity of the State of Ohio.

2/28/13 Indictment.

{¶41} The superceding indictment was nearly identical. However, added to the indictment was the phrase that the person likely to view Appellant's private parts was a minor:

> KEVIN DOWNS did recklessly and under circumstances in which his conduct was likely to be viewed by and affront others, who were in KEVIN DOWN's physical proximity, not members of KEVIN DOWN's household, did expose his private parts, and further, that the person likely to view was a minor, in violation of Section 2907.09(A)(1)(C)(2) of the Revised Code, a Misdemeanor of the Second Degree, against the peace and dignity of the State of Ohio.

1/15/15 Superceding Indictment.

{¶42} The state added the minor language because it believed that in order to elevate the offense to a second-degree misdemeanor it needed to solely prove the victim was a minor. As explained above, that belief is incorrect.

{¶43} Regardless, the state's addition of the viewer being a minor in the superceding indictment does not alter the identity of the offense or add a charge. Crim.R. 7(B) provides an indictment must give the defendant notice of all the elements of the offense. R.C. 2945.75(A)(1) states that when the presence of one or more additional elements makes an offense a more serious degree, the indictment shall either state the degree of the offense or shall allege the additional element or elements. Thus, when Crim.R. 7(B) is read in conjunction with R.C. 2945.75(A)(1), it appears the legislature intended for the "degree of the offense" to adequately give notice to a defendant of the enhancement element contained within the statute. *State v. Fields*, 4th Dist. No. 06CA3080, 2007-Ohio-4191, ¶ 18. Consequently, in stating the degree of the offense, Appellant was given notice of all elements of the

offense. The superceding indictment which alleged the same offense did not alter the identity of the offense or change the nature or the defense. Thus, the speedy trial waiver was applicable to the public indecency charge in the superceding indictment.

{¶44} Consequently, this assignment of error is meritless.

Third Assignment of Error

{¶45} Appellant's third assignment of error provides:

"The statute of limitations on count two had expired, and though the issue was not raised below it is plain error."

{¶46} Appellant argues the statute of limitations had expired when the superceding indictment charged him with public indecency in violation of R.C. 2907.09(A)(1)(C)(2). Appellant admits this argument was not presented to the trial court and thus, he waives all but plain error. However, he contends the expiration of the statute of limitations constitutes plain error.

{¶47} The state disagrees. It contends the superceding indictment did not "broaden or substantially amend the original charges," and thus, plain error did not result from the superceding indictment.

{¶48} The state is correct. The Ninth Appellate District has recently addressed this issue, and it has explained:

> We agree with the State that the Eleventh Circuit's discussion of tolling with respect to superseding indictments is persuasive. In *United States v. Italiano*, 894 F.2d 1280 (11th Cir.1990), the Eleventh Circuit held:
>
> A superseding indictment brought after the statute of limitations has expired is valid so long as the original indictment is still pending and was timely and the superseding indictment does not broaden or substantially amend the original charges. For purposes of the statute of limitations, the "charges" in the superseding indictment are defined not simply by the statute under which the defendant is indicted, but also by the factual allegations that the government relies on to show a violation of the statute.

> Notice to the defendant is the central policy underlying the statutes of limitation. If the allegations and charges are substantially the same in the old and new indictments, the assumption is that the defendant has been placed on notice of the charges against him. That is, he knows that he will be called to account for certain activities and should prepare a defense.
>
> (Internal citations omitted.) *Italiano* at 1282–1283. The record reflects that Ross had notice of the allegations against him and that his timely-filed 1999 indictments were still pending at the time the 2011 indictment was filed. Felonious assault was not specifically charged in the 1999 indictments, but its addition in 2011 did not "broaden or substantially amend the original charges." *Id*. at 1282. The felonious assault charge was premised upon the "same conduct" as the pending prosecution against Ross. R.C. 2901.13(H). *Compare Mruk* at *4–5. Consequently, the statute of limitations was tolled as to that charge, and the trial court did not err by refusing to dismiss it. Nor did it err by refusing to dismiss the felony murder count in the 2011 indictment.

State v. Ross, 2014-Ohio-2867, 15 N.E.3d 1213, ¶ 42 (9th Dist.).

{¶49} This reasoning is persuasive. In the matter at hand, Appellant was undisputedly timely charged with public indecency in violation of R.C. 2907.09(A)(1)(C)(2). The original indictment indicated the violation constituted a second-degree misdemeanor. The superceding indictment did not alter the name or statutory number of the offense. The superceding indictment merely added language that the victim was a minor. The state mistakenly believed this element was by itself sufficient to elevate the offense from a fourth-degree misdemeanor to a second-degree misdemeanor. It appears the state's reasoning for seeking the superceding indictment as to the public indecency count was to notify Appellant of the specific enhancing element the state wanted to prove. This "alteration" to the indictment language was premised on the same conduct as the original indictment that did not use the viewer being a minor language. Furthermore, the indictment when read as a

whole clearly indicated who the victim was and Appellant was aware of her minor status. Thus, the superceding indictment did not broaden the public indecency charge brought in the original indictment, and there is no statute of limitations issue.

{¶50} This assignment of error lacks merit. There was no error, plain or otherwise.

Fourth Assignment of Error

{¶51} Appellant's fourth assignment of error provides:

"The trial court erred and abused its discretion when it failed to review the transcript of grand jury proceedings."

{¶52} Appellant argues the trial court should have reviewed the transcript of the grand jury proceedings in camera prior to denying his motion to inspect the grand jury proceedings. Attached to Appellant's motion to inspect the grand jury proceedings is an affidavit from Appellant's trial counsel. In that affidavit, counsel avers the state sought the superceding indictment because it did not believe the original indictment would allow the state, if Appellant was convicted, to require Appellant to register as a sex offender for 15 years. Juhasz Affidavit ¶ 4. It appears the appellate argument is that the superceding indictment was based on prosecutorial misconduct.

{¶53} The state asserts the trial court did not abuse its discretion when it did not review the grand jury transcript in camera or in denying the motion to inspect the grand jury proceedings. It contends the superceding indictment was issued to correct the omission of language; it was sought to correct a clerical error in the original indictment. The phrases did not broaden or substantially amend the original charges. Furthermore, it contends any error is harmless because the jury found Appellant not guilty of the charge that would have required registration.

{¶54} The decision of whether to release grand jury testimony is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Greer*, 66 Ohio St.2d 139, 420 N.E.2d 982 (1981), paragraph one of the syllabus. An abuse of discretion is more than a mere error in judgment; it suggests that a decision is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157–158, 404 N.E.2d 144 (1980).

{¶55} "Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." *Greer* at paragraph two of the syllabus. Whether an accused has shown a particularized need for disclosure of grand jury testimony is a question of fact. *Id*., paragraph three of the syllabus.

{¶56} A particularized need is established "'when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial.'" *State v. Fry*, 125 Ohio St.3d 163, 2010–Ohio–1017, ¶ 66, quoting *State v. Sellards*, 17 Ohio St.3d 169, 173 (1985). In considering the basis of the particularized need, the trial court may perform an in camera inspection of the grand jury minutes assisted by counsel. *Greer* at 150. However, there is no requirement the trial court must perform an in camera inspection. The trial court is within its right to find a particularized need was not shown without doing an in camera review of the grand jury transcripts.

{¶57} In this case, the trial court did not abuse its discretion in failing to do an in camera review. As the state points out, Appellant's claim of particularized need is based on allegations of prosecutorial misconduct. Specifically, the state was seeking a superceding indictment to allege additional elements to the abduction offense so that Appellant, if convicted, would be required to register as a sex offender.

{¶58} The federal court in many instances has found there is no particularized need on claims of prosecutorial misconduct when it is based on mere speculation. *State v. Richardson*, 2014-Ohio-3541, 17 N.E.3d 644, ¶ 26 (3d Dist.), citing *United States v. Wilson*, 565 F.Supp. 1416, 1437 (S.D.N.Y.1983) (a defendant cannot rely on speculation and surmise of prosecutorial abuse to obtain access to grand jury transcripts); *United States v. Canino*, 949 F.2d 928, 943 (7th Cir.1991) (the mere unsupported speculation of possible prosecutorial abuse does not meet the particularized need standard); *United States v. Best*, N.D.Ind. No. 2:00–CR–171, 2007 WL 1058231 (Apr. 4, 2007) (argument that "there is no way a Grand Jury should have indicted [the defendant] * * * without some kind of prosecutor misconduct * * * " is fishing for anything helpful to a defendant's cause and does not demonstrate

a particularized need to inspect grand jury transcripts), citing *In re Grand Jury Proceedings*, 942 F.2d 1195, 1199 (7th Cir.1991) ("The secrecy of a grand jury proceeding is not to be pierced by such a slender reed: a mere possibility of benefit does not satisfy the required showing of a particularized need.").

{¶59} In this instance, as discussed in the previous assignments of error, the superceding indictment did not broaden or substantially amend the indictment as to the public indecency charge. Admittedly, as to the abduction charge, the superceding indictment added an additional subsection. There is a potential argument that the additional element broadened the original indictment. It might even demonstrate a particularized need to inspect the grand jury proceedings. However, we do not need to reach a conclusion on that issue because, as the state points out, any error amounts to harmless error. Appellant was found not guilty of abduction. Thus, it cannot be determined he was deprived of a fair determination on the issue of guilt:

> These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

United States v. Mechanik, 475 U.S. 66, 72, 106 S.Ct. 938 (1986).

{¶60} Consequently, this assignment of error is meritless.

Fifth Assignment of Error

{¶61} Appellant's fifth assignment of error raises sentencing errors and provides:

"The trial court erred when it failed to consider the statutory factors contained within Ohio Rev. Code Ann. §2929.22 before imposing the jail sentence, when mitigating factors were presented at the sentencing hearing."

{¶62} Under the second assignment of error, this court modified the conviction for public indecency from a second-degree misdemeanor to a fourth-

degree misdemeanor and remanded the matter for sentencing. Therefore, this assignment of error is moot.

Conclusion

{¶63} The first, third, and fourth assignments of error lack merit. The second assignment of error has merit. The conviction for public indecency is modified from a second-degree misdemeanor to a fourth-degree misdemeanor, and the matter is remanded for sentencing. Our resolution of the second assignment of error renders the fifth assignment of error moot.

Donofrio, J., concurs.

DeGenaro, J., concurs.