**[Cite as *State v. Ramey*, 2012-Ohio-1015.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| v. | : | No. 11AP-485 (M.C. No. 2011 CR B 002644) |
| William Scot Ramey, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on March 13, 2012

*Richard C. Pfeiffer, Jr.*, City Attorney, *Lara N. Baker*, City Prosecutor, *Melanie R. Tobias* and *Orly Ahroni*, for appellee.

*Lorie L. McCaughan*, for appellant.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

**{¶ 1}** Defendant-appellant, William Scot Ramey, appeals from a judgment of the Franklin County Municipal Court finding him guilty, pursuant to a jury verdict, of public indecency in violation of R.C. 2907.09(A)(2), a third-degree misdemeanor.

**{¶ 2}** This matter concerns events that occurred at the Zodiac Bookstore on Alum Creek Drive in Columbus, Ohio. The Zodiac Bookstore is an adult bookstore that sells adult movies, magazines, novelties, and other sexually oriented materials. Access to the bookstore is limited to those individuals who are at least 18 years of age. Within the bookstore is an internet café located in the back corner. Access to the internet café is limited to patrons who pay $6 per hour to rent the use of a computer. A doorway separates the internet café from the rest of the bookstore. At the front of the internet café

sits a Plexiglas enclosure, where an attendant sits. The internet café contains 16 cubicles, 8 on each side of a center aisle. Each cubicle has its own computer that has access to the internet and an inventory of hundreds of uploaded adult movies. Each cubicle is surrounded on 3 sides by partitions reaching approximately chest height. Neither doors nor curtains completely enclose the fourth side of the cubicle. Therefore, each cubicle has an unobstructed opening to the center aisle. When facing a cubicle from the center aisle, the location of the computer is on the side, such that patrons face towards the attendant at the front of the internet café.

**{¶ 3}** On February 4, 2011, Ramey visited the Zodiac Bookstore and eventually made his way back to the internet café. He paid the attendant $6 for one hour of computer access. That same date, Detective Hicks of the vice section of the Columbus Police Department was working alongside Detective Ackley, who had received a complaint that Zodiac patrons had been engaging in acts of public indecency and masturbation in the internet café. Hicks made his way back to the internet café, where he observed Ramey and videotaped his conduct. Following this surveillance, Ramey was arrested and charged with public indecency.

**{¶ 4}** After a jury trial, Ramey was found guilty and was sentenced to a suspended 30-day jail sentence and to 2 years of community control. He was ordered to stay away from all adult bookstores, to pay a $250 fine, and to complete 30 hours of community service. Ramey appeals from his conviction and raises the following assignments of error:

> **Assignment of Error No. 1:**
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> The trial court erred to the prejudice of Appellant by denying Appellant's Rule 29(A) Motion(s) for Acquittal because the requirements of R.C. 2907.09 were not met.
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> **Assignment of Error No. 2:**
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> Appellant's conviction was against the manifest weight of the evidence because the requirements of R.C. 2907.09 were not met and the evidence was insufficient to sustain a conviction.
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> **Assignment of Error No. 3:**

> The trial court erred in ordering Appellant not to enter any Adult Bookstore as a term of his probation.
> **Assignment of Error No. 4:**
>
> The trial court erred in denying counsel for defense the opportunity to use the Charging Complaint in her closing argument.

**{¶ 5}** Because Ramey's first and second assignments of error require a review of the evidence, we will address them together.

**{¶ 6}** Under Crim.R. 29(A):

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses.

Motions filed under Crim.R. 29 are reviewed under the same standard as sufficiency of the evidence challenges. *State v. Walburg*, 10th Dist. No. 10AP-1087, 2011-Ohio-4762, ¶ 11, quoting *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶ 6.

**{¶ 7}** Challenges to the sufficiency of the evidence test whether the evidence is legally sufficient to support a verdict. *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶ 36, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In reviewing such a challenge, a court must determine "whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime proved beyond reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded by constitutional amendment on other grounds as recognized in *State v. Smith*, 80 Ohio St.3d 89, 102 (1997).

**{¶ 8}** Challenges to the manifest weight of the evidence test the effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 387, 2007-Ohio-2202, citing *Thompkins* at 386-87. Appellate courts must be mindful that the weight given to the evidence, as well as the credibility of the witnesses, are issues determined by the finder of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The finder of fact is responsible for weighing the evidence, adjudging the credibility of witnesses, and either believing or disbelieving all, part, or none of a witness's testimony. *State v. Hairston*, 10th

Dist. No. 05AP-366, 2006-Ohio-1644, ¶ 20, citing *DeHass*; *see also*, *State v. Antill*, 176 Ohio St. 61, 67 (1964); *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, ¶ 13. In determining whether a witness's testimony is credible, the finder of fact may consider inconsistencies in the testimony, along with the witness's demeanor and manner of testifying. *Chandler* at ¶ 9, citing *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶ 58; *State v. Stewart*, 10th Dist. No. 08AP-33, 2009-Ohio-1547, ¶ 17.

**{¶ 9}** When reviewing a manifest weight challenge, an appellate court must determine: "[W] hose evidence is more persuasive—the state's or the defendant's?" *Wilson* at ¶ 25, citing *Thompkins* at 386-87. Nevertheless, a defendant is not entitled to a reversal on manifest weight grounds simply because there was inconsistent evidence presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21; *Stewart* at ¶ 17. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Nivens*, 10th Dist. No. 95APA09-1236, 1996 Ohio App. LEXIS 2245, *7, 1996 WL 284714, *3 (May 28, 1996). Instead, " '[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, ¶ 54, quoting *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

**{¶ 10}** This court has previously held that manifest weight analyses subsume sufficiency and Crim.R. 29 analyses. *State v. Page*, 10th Dist. No. 11AP-466, 2012-Ohio-671, ¶ 5, citing *State v. McCrary*, 10th Dist. No. 10AP-881, 2011-Ohio-3161, ¶ 11, citing *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶ 15. If the weight of the evidence supports a conviction, then a conviction is necessarily also supported by sufficient evidence. *Id.* "[T]hus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id.* We,

therefore, initially direct our attention to the issue of whether Ramey's conviction is supported by the manifest weight of the evidence. *Id.*, citing *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, ¶ 46 (10th Dist.).

**{¶ 11}** In the instant matter, Ramey was convicted of public indecency, in violation of R.C. 2907.09(A), which provides in pertinent part:

> 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:
>
> * * *
>
> (2) Engage in sexual conduct or masturbation[.]

**{¶ 12}** During trial, the owner of the bookstore, Mark Wolf, testified about the bookstore, its layout, the merchandise sold there, and the internet café. He testified generally about how patrons access the bookstore in addition to the internet café. According to Mr. Wolf, the design of the internet café was fashioned after studying cubicles at a university's student union. He testified that the cubicles were supposed to hide the monitor of the computers but apparently did not do the best job at that. He indicated that the cubicles were not made as places for masturbating. Indeed, according to Mr. Wolf, the cubicles were fairly open, and: "[M]ost people wouldn't feel comfortable in an environment like that, masturbating." (Tr. 97-98.)

**{¶ 13}** Detective Hicks provided trial testimony about the specific events of February 4, 2011. According to Hicks, he was in plain clothes and in a plain car when he arrived at the bookstore at approximately 2:20 p.m. He briefly walked around before making his way back to the internet café. He paid the attendant and entered the internet café. Upon entering, he noticed multiple patrons in the cubicles. As Hicks walked down the center aisle, he saw Ramey masturbating. Hicks then positioned himself in the last cubicle on the opposite side of the aisle as Ramey. Ramey was positioned in the second-to-last cubicle across the aisle. Hicks positioned a covert video camera on his right thigh and recorded Ramey's conduct. The recording depicted the left side of Ramey's body and showed his exposed penis. It further depicted Ramey altering between typing on the

computer's keyboard and masturbating. Hicks then exited the internet café, exited the bookstore, and waited for Ramey. Eventually, Ramey came outside, was arrested, and was charged with public indecency.

**{¶ 14}** Ramey testified in his own defense. He visited the Zodiac Bookstore on February 4, 2011 because he had been battling an illness and had recently begun to feel better. According to Ramey, he visited the internet café with the intention of masturbating because he "needed some release." (Tr. 102, 112.) During his testimony, Ramey admitted to masturbating because he assumed that such conduct was permitted there. His assumption was based on the layout of the internet café, a sign asking patrons to clean up their messes, and the presence of cleaning supplies provided by the bookstore. According to Ramey, other patrons were in the internet café at the time of his conduct. One patron was in the cubicle directly across the aisle from him. Eventually, this individual left because his computer was not working properly. According to Ramey's testimony, another patron was directly behind him, and Hicks was positioned at an approximate 45 degree angle behind him and to the left.

**{¶ 15}** In his first and second assignments of error, Ramey presents three general arguments. First, he argues that the state failed to prove that his conduct was likely to be viewed by others in his physical proximity. Second, he argues that the state failed to prove that his conduct was likely to affront others in his physical proximity. Finally, he argues that the state failed to prove that he was reckless. As a result, Ramey argues that the conviction was not supported by sufficient evidence and was against the manifest weight of the evidence.

**{¶ 16}** Ramey's first argument lacks merit. 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. *State v. Henry*, 151 Ohio App.3d 128, 2002-Ohio-7180, ¶ 58 (7th Dist.), citing *State v. Johnson*, 42 Ohio App.3d 81 (5th Dist.1987), *Cleveland v. Carson*, 8th Dist. No. 68084 (July 6, 1995), *Cleveland v. Houston*, 8th Dist. No. 65897 (July 21, 1994), *State v. Laney*, 61 Ohio Misc.2d 688 (1991), and *Columbus v. Abdalla*, 10th Dist. No. 97APC08-973 (Apr. 30, 1998). It matters not whether others actually viewed the conduct but rather whether such conduct would likely have been viewed by others. *Id.*, citing *Johnson* and *Laney*.

**{¶ 17}** In this matter, Ramey admitted to masturbating inside the cubicle in the internet café. When Hicks walked down the center aisle, he saw Ramey masturbating. Ramey's counsel attempted to demonstrate an inconsistency in this portion of Hicks's testimony by asking why this was not shown on the video. In response, Hicks explained that the video had not been set up at that time because the camera was dangling at his side. Thus, no inconsistency was shown. Moreover, the video admitted into evidence depicted the conduct Ramey admittedly engaged in. Clearly, the likelihood of being viewed exists where the conduct was in fact viewed and recorded. The jury did not clearly lose its way in concluding that Ramey's conduct was likely to be viewed by others in his physical proximity. We reject Ramey's argument to the contrary.

**{¶ 18}** Ramey's second argument is that his masturbatory conduct was not likely to have affronted people in his physical proximity. Ramey notes that others in his physical proximity would have been inside an internet café of an adult bookstore. Testimony indicated that "there's no mistaking what this place is." (Tr. 25.) Adult oriented material lined the shelves of the bookstore and was in full view. Ramey notes that people in his physical proximity would have been exposed to this material prior to reaching the internet café. Therefore, he argues that it is unlikely that others in his physical proximity would have been affronted by the sight of him masturbating.

**{¶ 19}** The issue of whether a defendant's conduct will affront others is adjudged on an objective standard. *See Henry*, 151 Ohio App.3d 128, 2002-Ohio-7180, ¶ 64. That is, the issue is whether Ramey's masturbatory conduct would likely affront the sensitivities of the ordinary observer in his physical proximity upon viewing such conduct.

**{¶ 20}** In applying this standard, we find instruction from case law developed by the Second Appellate District. *See, State v. Morman*, 2d Dist. No. 19335, 2003-Ohio-1048; *State v. Wilson*, 2d Dist. No. 20949, 2005-Ohio-5004; *State v. Rupp*, 2d Dist. No. 21435, 2006-Ohio-6230. These cases concerned masturbatory conduct that occurred in McCook's Theater in Dayton, Ohio. McCook's was an adult entertainment store that was open to the public. The back of the store contained an area where patrons could pay a fee and view adult movies. The movies were shown in viewing booths, none of which had doors or curtains. Outside the viewing booths was a sign prohibiting certain activities, such as exposing one's private parts and masturbating. Each of the defendants in

*Morman*, *Wilson*, and *Rupp* was caught masturbating in a viewing booth. Each was convicted of public indecency. On appeal, each defendant argued that patrons of McCook's would likely not be affronted by the sight of someone masturbating in a viewing booth. The Second Appellate District uniformly rejected this argument. *Rupp* at ¶ 27-28, citing *Morman* and *Wilson*. The reasoning was that a patron who wished to view an adult movie would nevertheless likely be affronted by the sight of a man masturbating in a nearby booth. The Second Appellate District therefore held that the finders of fact in *Morman*, *Wilson*, and *Rupp* did not err based upon the circumstances presented therein.

**{¶ 21}** In the instant matter, we initially note that Hicks's investigation resulted from a complaint that individuals were masturbating in the internet café. The fact that such a complaint was issued indicates that others were in fact affronted upon viewing people masturbating in the internet café. While such subjective evidence is not necessary to support a public indecency conviction, it nevertheless helps illustrate the likely reactions of other patrons.

**{¶ 22}** We agree with the reasoning set forth in *Morman*, *Wilson*, and *Rupp*. In the instant matter, however, there exists one distinction. That is, there was no sign expressly prohibiting masturbation in the internet café. Rather, there was a sign asking patrons to clean up after themselves. Further, paper towels and a cleaning solution were located in the first cubicle of the internet café. Based upon these circumstances, Ramey argues that masturbation was condoned within the internet café. We disagree.

**{¶ 23}** The presence of the sign and cleaning supplies does not alter the outcome in this matter. Other patrons might not have seen the sign and cleaning supplies. More importantly, even if they had, they might not have reached the same assumptions as Ramey. That is, other patrons would not necessarily have assumed that anyone entering the internet café would be exposed to a man masturbating his exposed penis. It cannot be said that the presence of the sign and cleaning supplies provided Ramey with a license to masturbate. We refuse to make the leap that Ramey suggests based upon the record before us. Instead, we find that the jury was free to conclude that a person entering the internet café would likely be affronted upon witnessing a live person masturbating his exposed penis in a nearby cubicle. In other words, the jury was free to conclude that the sensitivities of the ordinary observer would likely be affronted upon viewing Ramey's

conduct. The jury did not clearly lose its way based upon the record before us. We reject Ramey's argument in this regard.

**{¶ 24}** Ramey's final argument in support of his first and second assignments of error is that the state failed to prove that he was reckless. He contends that he thought masturbation was permitted in the internet café. As a result, he argues that the state failed to prove that he disregarded a known risk.

**{¶ 25}** R.C. 2901.22(C) provides:

> A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his 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, he perversely disregards a known risk that such circumstances are likely to exist.

**{¶ 26}** Recklessness therefore requires an individual to recognize the risk and proceed with a perverse disregard for it. *State v. Covington*, 107 Ohio App.3d 203, 206 (1st Dist.1995). As is generally understood, culpable mental states are frequently demonstrated through circumstantial evidence. *State v. Collins*, 89 Ohio St.3d 524, 530 (2000).

**{¶ 27}** The record before us contains ample circumstantial evidence on the issue of Ramey's recklessness. As was clear, the bookstore was open to the public. Any adult could enter. Patrons sometimes accessed the internet café without having paid for time on a computer. The cubicles had no doors or curtains on them. According to the owner of the bookstore, the cubicles were fairly open and were not designed for masturbating. Patrons walking down the center aisle had an unobstructed view into each of the cubicles.

**{¶ 28}** Ramey testified that he had previously visited the internet café but decided that it was "too crowded" on that occasion, so he exited the internet café, rented a movie, and took it home. (Tr. 106.)

**{¶ 29}** With respect to the date in question, again, Ramey admitted to masturbating. Hicks saw Ramey masturbating. Hicks positioned himself behind Ramey and set up the video camera. Three separate portions of the video show Ramey looking back in Hicks's general direction as he is masturbating. Other portions of the video show

Ramey looking across the aisle, possibly at another patron, as he masturbates. The recording showed another patron walk past Ramey, at which point Ramey attempted to conceal his conduct by lifting his leg and leaning forward. Whether this individual saw Ramey's conduct is unknown. Nevertheless, based upon the recorded video evidence, Ramey continued to masturbate even though two other people were in cubicles behind him. Further, while two people remained in cubicles behind him, Ramey masturbated while leaning back in his chair. At this point in the recording, Ramey's conduct was unquestionably less concealed. The jury was free to weigh all of this evidence, discredit Ramey's explanations, and conclude that Ramey acted recklessly. We cannot say that the jury clearly lost its way in this regard. We reject Ramey's argument to the contrary.

**{¶ 30}** We next turn to Ramey's third assignment of error, which challenges the imposition of a condition of community control ordering him to stay away from all adult bookstores during his two-year probationary period. Initially, we note that the trial court imposed this condition during the sentencing hearing. Importantly, nowhere in the record did Ramey object to the condition of community control before the trial court.

**{¶ 31}** " 'An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' " *State v. Andrasak*, 194 Ohio App.3d 838, 2011-Ohio-3425, ¶ 7 (9th Dist.), quoting *State v. Williams*, 51 Ohio St.2d 112 (1977), paragraph one of the syllabus. Therefore, Ramey forfeited his arguments with respect to the conditions of community control. *Id.* Nevertheless, we may still review the record for plain error. *Id*.

**{¶ 32}** Under Crim.R. 52(B), "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." We notice plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *State v. Barnes,* 94 Ohio St.3d 21, 27 (2002), quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. "By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial." *Id*. at 27. Under the plain error standard:

> First, there must be an error, *i.e.*, a deviation from a legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

*Id.*

**{¶ 33}** In *U.S. v. Hartshorn*, 163 Fed.Appx. 325 (5th Cir.2006), a federal circuit reviewed a similar condition of supervised release, which prohibited a defendant from patronizing sexually-oriented establishments. *Id.*, citing *U.S. v. Phipps*, 319 F.3d 177, 192-193 (5th Cir.2003). After applying a commonsense construction, the court upheld the condition. *Id.* We follow this well-reasoned analysis and conclude that no plain error exists in the record before us.

**{¶ 34}** In Ramey's fourth assignment of error, he argues that the trial court erred in refusing to permit defense counsel to read the charging complaint to the jury during closing argument.

**{¶ 35}** Discretion is vested in the trial court in determining whether the permissible bounds of closing argument have been exceeded. *Pang v. Minch*, 53 Ohio St.3d 186 (1990), paragraph three of the syllabus. Thus, such a determination is subject to an abuse of discretion standard of review. *Id.* An abuse of discretion, "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151 (1980).

**{¶ 36}** It is well-settled that considerable latitude is permitted in closing arguments. *State v. Maurer*, 15 Ohio St.3d 239, 269 (1984). Nevertheless, counsel must avoid insinuations and assertions that are calculated to mislead the jury. *Berger v. United States*, 295 U.S. 78, 85, 55 S.Ct. 629, 632 (1935).

**{¶ 37}** In the instant matter, the trial court agreed with the prosecution that the wording of the charging complaint might confuse the jury. Furthermore, the court noted that the jury instructions contained language the parties had previously agreed upon. The

court therefore refused to allow defense counsel to read, word-for-word, the charging complaint to the jury. No abuse of discretion exists in the record before us.

**{¶ 38}** Based upon the foregoing, we overrule each of Ramey's four assignments of error and affirm the judgment rendered by the Franklin County Municipal Court.

*Judgment affirmed.*

BROWN, P.J., and SADLER, J., concur.

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