[Cite as *State v. Mackie*, 2011-Ohio-2102.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-08-080
	:	O P I N I O N
- vs -		5/2/2011
	:	
NATHAN J. MACKIE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT
Case No. 2004CRB01400

David Fornshell, Warren County Prosecuting Attorney, Stacy Brown, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Jeffrey W. Stueve, 12 West South Street, Lebanon, Ohio 45036, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Nathan J. Mackie, appeals his conviction for public indecency in the Warren County Court. For the reasons that follow, we reverse the decision of the trial court.

{¶2} The relevant facts of the case are as follows. On June 4, 2004, appellant entered Flamingo Joe's Tanning Salon in Waynesville, Ohio, and sought to use a tanning booth. According to the testimony of the complaining witness and store manager, Brhianon

Johnson, appellant paid for a tanning session and subsequently entered a designated tanning room. The witness testified appellant then exited the room, claiming the tanning bed was not working, at which time appellant was not dressed "at all." The witness further testified she saw appellant's "pubic hair, [and] completely bare chest. I believe [appellant] was holding his items * * * I averted my eyes at that point, once I'd, you know, seen pubic hair * * * So, I didn't look any further, but [sic] I am sure he was not wearing any undergarments." At this time, the witness directed appellant to a different room, where he apparently used the tanning bed and left the facility without further incident.

{¶3} The complaining witness testified she encountered appellant a second time on August 27, 2004. The witness testified appellant entered the tanning salon and "specifically said that he'd never been in there before * * * and I was very nervous because I'd recognized him." On this occasion, appellant again exited the tanning room, claiming the bed was not working. When the witness went to check the status of the "broken" tanning bed, she passed appellant's tanning room, where "he still had the door open and I think was undressed at that point. That's when I [saw] a bare hip."

{¶4} Following the second encounter, the complaining witness notified the police and identified appellant from a photo lineup. Pursuant to the witness' claims, appellant was charged with two counts of public indecency in violation of R.C. 2907.09(A)(1).

{¶5} During trial, defense counsel moved for acquittal of all charges, arguing the state presented no evidence rising to the level of "exposure" required by the statute. Crim.R. 29; R.C. 2907.09(A)(1). The trial court overruled the motion regarding the June 4, 2004 incident, but granted the motion regarding the August 27, 2004 incident after finding the evidence was insufficient to support a conviction under R.C. 2907.09(A)(1).

{¶6} At the close of all evidence, the trial court found appellant guilty on the remaining count of public indecency in violation of R.C. 2907.09(A)(1).

{¶7} Appellant timely appeals, raising two assignments of error for review.

{¶8} Assignment of Error No. 1:

{¶9} "THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION AND THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶10} In his first assignment of error, appellant argues the state provided insufficient evidence to support his conviction, and that his conviction was against the manifest weight of the evidence. Specifically, appellant argues that "private parts" under R.C. 2907.09(A)(1) means "genitals," thus his conviction cannot stand when "no evidence [was] submitted that [appellant] recklessly exposed his genitals."

{¶11} Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Moshos*, Clinton App. No. CA2009-06-008, 2010-Ohio-735, ¶27. After examining the evidence in a light most favorable to the prosecution, the appellate court must then determine if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(E).

{¶12} Unlike a sufficiency of the evidence challenge, a manifest weight challenge concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other. *Moshos*, 2010-Ohio-735 at ¶28. An appellate court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Under a manifest weight challenge, the

question is 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. Id. This discretionary power would be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

{¶13} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." Id. at ¶29, quoting *State v. Smith*, Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶73. As a result, a determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *Moshos*, 2010-Ohio-735 at ¶29.

{¶14} As previously discussed, appellant was convicted of public indecency in violation of R.C. 2907.09(A)(1). R.C. 2907.09(A)(1), a fourth-degree misdemeanor, states:

{¶15} "(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:

{¶16} "(1) Expose the person's private parts[.]"

{¶17} "Recklessly" is defined under R.C. 2901.22(C) as follows:

{¶18} "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."

{¶19} Appellant correctly notes the Revised Code does not specifically define the term "private parts." In such a case, the interpretation of a statute is a question of law, which is subject to de novo review. *Columbus v. Breer*, Franklin App. No. 02AP-952, 2003-Ohio-

2479, ¶12. "In construing a statute, a court's paramount concern is the legislative intent in enacting the statute." Id., quoting *State v. S.R.* (1992), 63 Ohio St.3d 590, 594. To determine legislative intent, a court must look to the language of the statute. *Breer* at ¶12. "Words used in a statute are to be taken in their usual, normal, and customary meaning," and unless a statute is ambiguous, the court must give effect to the plain meaning of a statute. Id., quoting *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 173, 1996-Ohio-161. Moreover, when interpreting a criminal statute that defines offenses or penalties, the language should be strictly construed against the state and liberally construed in favor of the accused. R.C. 2901.04(A).

{¶20} In construing the offense of public indecency strictly against the state and liberally in favor of appellant, we find as a matter of law that the current definition of "private parts" does not include the situation in the case at bar. We reach our conclusion in light of our review of pertinent case law and various related sources, including the Ohio Jury Instructions, which define "private parts" to mean strictly "genitals." 2 Ohio Jury Instructions (2007), Section 507.09. See, also, *State v. Borchard* (1970), 24 Ohio App.2d 95, 100; *State v. Jetter* (1991), 74 Ohio App.3d 535, 536 (female breasts not "private parts" within meaning of R.C. 2907.09[A][1]); *Commonwealth v. Arthur* (1995), 420 Mass. 535, 537, 650 N.E. 2d 787 (defendant could not be convicted of indecent exposure when witnesses only saw defendant's pubic hair and not his "genitalia or buttocks"). See, also, *State v. Gilreath* (June 19, 1992), Greene App. No. 91 CA 37, 1992 WL 141894.

{¶21} In *Gilreath*, the defendant was charged with public indecency in violation of R.C. 2907.09. At trial, four witnesses testified that while the defendant appeared to be masturbating, they did not specifically see defendant's genitals, but that "there was obviously something under his hand and it wasn't a schoolbook." Id. at *1. The Second District Court of Appeals held this evidence was insufficient to support a finding that the defendant

"exposed his *private parts*." Id. at *2 (Emphasis added.)

{¶22} Thus, while it appears that the term "private parts" lacks a commonly understood meaning when considered with respect to certain body parts, it is clear that the term has not been construed to apply to the simple exposure of pubic hair, without additional evidence of exposure of "genitalia." See, e.g., *State v. MacNellis*, Medina App. No. 07CA0103-M, 2008-Ohio-3207 (R.C. 2907.09[A][1] conviction not against manifest weight where witness testified she saw defendant wearing "no clothing" and her view was "not obscured in any way"); *State v. Todaro*, Ashtabula App. No. 2004-A-0002, 2005-Ohio-3400 (evidence sufficient to support R.C. 2907.09[A][1] conviction where witnesses testified appellant was "completely naked" and turned towards where he knew witnesses were standing); *State v. Morman*, Montgomery App. No. 19335, 2003-Ohio-1048 (R.C. 2907.09[A][1] conviction not against manifest weight of evidence where testimony established that while defendant was seated, a jacket covered his private parts, but when he stood up, "his private parts were *fully exposed*"). (Emphasis added.)

{¶23} In the case at bar, while the point is arguably close, we agree with appellant's contention that the evidence did not warrant the conclusion that he exposed his "private parts," or genitals, to the complaining witness. As previously discussed, the witness testified that on June 4, 2004, appellant exited the tanning room while not "wearing any undergarments," but further testified she only saw appellant's pubic hair while he held his clothing and entered a different tanning room. We do not deem this testimony sufficient to support an inference beyond a reasonable doubt that appellant's conduct necessarily exposed some portion of his genitalia, as required by R.C. 2907.09(A)(1).[1]

1. Our agreement with appellant's argument concerning the sufficiency of the evidence will not benefit the individual whose conduct is sufficiently offensive that his victims turn away prior to his or her completion of an act of public indecency. There may be evidence sufficient to prove that exposure of "private parts," or genitalia, occurred even when a victim has averted his or her eyes. However, such evidence is lacking in this case.

{¶24} Accordingly, on the issue of whether the state proved appellant showed his "private parts" to the complaining witness on June 4, 2004, we are constrained to find that this element was not sufficiently proven. R.C. 2907.09(A)(1). As such, we find that the evidence was not sufficient to support the conviction.

{¶25} Appellant's first assignment of error is sustained.

{¶26} Assignment of Error No. 2:

{¶27} "THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL."

{¶28} In his remaining assignment of error, appellant argues he was denied the effective assistance of counsel when his trial counsel failed to move for dismissal based upon a violation of appellant's right to a speedy trial. See. R.C. 2945.71 et seq.

{¶29} However, based on our disposition of appellant's first assignment of error, his remaining assignment of error is overruled as moot. See, e.g., *State v. Adams*, Fayette App. No. CA2009-09-018, 2010-Ohio-1942, ¶26.

{¶30} Judgment reversed and appellant discharged.

POWELL, P.J., and RINGLAND, J., concur.

[Cite as *State v. Mackie*, 2011-Ohio-2102.]