

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-10-187
- vs -	:	<u>OPINION</u>
	:	9/17/2012
THOMAS A. STEFANOPOULOS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM HAMILTON MUNICIPAL COURT  
Case No. 11CRB02144

Michael D. Hon, City of Hamilton Prosecuting Attorney, 345 High Street, Hamilton, Ohio 45011, for plaintiff-appellee

Scott N. Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

**POWELL, P.J.**

{¶ 1} Defendant-appellant, Thomas A. Stefanopoulos, appeals his convictions and sentences in the Hamilton Municipal Court for indecent exposure and disorderly conduct.

{¶ 2} Appellant was arrested on June 14, 2011, after several of his neighbors at the Town and Country Mobile Home Park in St. Clair Township, Ohio reported to police that appellant was dressed in such a manner that his testicles were exposed to their view. A few other neighbors reported that similar incidents occurred in the days prior to June 14, 2011.

Appellant was ultimately charged with eight counts of indecent exposure (Counts A through H) and one count of disorderly conduct (Count I). At the conclusion of a bench trial, the trial court found appellant guilty on four counts of indecent exposure (Counts A, F, G, and H) and one count of disorderly conduct (Count I). The court nolleed Count E for indecent exposure and found appellant not guilty on the remaining three indecent exposure counts (Counts B, C, and D).

{¶ 3} After finding appellant guilty, the trial court held a sentencing hearing and imposed the following sentence: (1) as to Count A, the court sentenced appellant to 30 days in the Butler County Jail with 10 of those days suspended, ordered appellant to pay \$355 in fines and court costs, and ordered 2 years of supervised community control with no contact with any of the victims; (2) on Count F, the court sentenced appellant to 30 days in the Butler County jail with 30 days suspended and \$50 in fines and court costs; (3) on Count I, the court sentenced appellant to 30 days in the Butler County jail with 30 days suspended and \$60 in fines and court costs. The jail terms were ordered to be served consecutively. On Counts G and H, the court imposed no sentence or fine.

{¶ 4} Appellant timely appealed raising six assignments of error. For ease of discussion, we address appellant's assignments of error out of order.

#### **I. Jurisdiction of Municipal Court**

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN CONDUCTING PROCEEDINGS HEREIN WHERE IT LACKED SUBJECT MATTER JURISDICTION.

{¶ 7} Municipal courts are created by statute and the filing of a complaint invokes the jurisdiction of the municipal court. R.C. 1901.01; *State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, ¶ 12. "It follows that if a complaint is not filed in a case, the trial court has not

obtained jurisdiction over it." *City of Zanesville v. Rouse*, 126 Ohio St.3d 1, 2010-Ohio-2218, ¶ 5. In his first assignment of error, appellant argues that the trial court lacked subject matter jurisdiction to hear the case against him because the criminal complaints were not properly deposited and filed with the clerk of courts. Specifically, he argues that the record does not support a finding that the complaints were filed in this case as the complaints were not time-stamped by the clerk of court.

{¶ 8} Admittedly, the Hamilton Municipal Court Clerk failed to follow several Ohio statutes as the complaints do not contain an endorsement with the time or date of the filing. See *Rouse* at ¶ 6, citing R.C. 1901.31, R.C. 2303.08, and R.C. 2303.10. However, a file stamp or date stamp is not a jurisdictional prerequisite. *State v. Short*, 12th Dist. No. CA2010-12-322, 2011-Ohio-5744, ¶ 11. "A document is 'filed' when it is deposited properly for filing with the clerk of courts. \* \* \* Thus, a party 'files' by depositing a document with the clerk of court, and then the clerk's duty is to certify the act of filing." *Rouse* at ¶ 7. As such, the "filing of a document does not does not depend upon the performance of a clerk's duties." *Rouse* at ¶ 7. Rather, "[w]hen a paper is in good faith delivered to the proper officer to be filed, and by him received to be kept in its proper place in his office, it is 'filed.'" *Id.* at ¶ 8, quoting *King v. Penn*, 43 Ohio St. 57, 61 (1885).

{¶ 9} In *Rouse*, the Ohio Supreme Court noted that endorsement of a complaint with the date or time is only evidence of filing. *Rouse* at ¶ 8-9. The Court further explained that the time or date stamp is not the only or exclusive way to establish filing. *Rouse* at ¶ 10. See also *Short* at ¶ 12. If there is no endorsement by the clerk, the question is whether there is sufficient evidence from the record which a court may determine that the document was actually filed. *Rouse* at ¶ 10; *Short* at ¶ 12. In these situations, such as the case here, a filing may be proved by other means. *Rouse* at paragraph two of the syllabus.

{¶ 10} In *Rouse*, the court determined that there was sufficient evidence that the

complaint had been filed properly. *Id.* at ¶ 11. In reaching this conclusion, the court considered "other" evidence of filing, including that it was the clerk's practice to create a new case file and corresponding electronic docket upon receipt of a complaint and that such a file and docket were created. *Id.* In *Short*, this court found that the complaint was properly deposited with the clerk of courts as several actions of the clerk of courts and the defendant's counsel indicated that a filing occurred. *Short* at ¶ 14-16. Specifically, a file was opened by the clerk of courts and several acts of the clerk were electronically docketed which related to the charge against the defendant. *Id.* at ¶ 14. Furthermore, defendant's attorney filed a jury demand and a request for bill of particulars which referenced the complaint. *Id.* at ¶ 15. Accordingly, we held that the mere fact that the complaint did not contain a timestamp did not render the filing improper or create a jurisdictional issue. Additionally, the Eighth District has held that the docketing of the case coupled with the deputy clerk's signature on a complaint shows that the clerk received the complaint. *Cleveland v. Simpkins*, 192 Ohio App.3d 808, 2011-Ohio-1249, ¶ 10 (8th Dist.).

{¶ 11} Although the clerk of court failed to certify the act of filing by either date stamping or file stamping the complaints against appellant, there is sufficient evidence in the record to demonstrate that the complaints against appellant were properly deposited and received by the clerk of courts. In the case at bar, the clerk of courts opened a file and several acts of the clerk of courts were electronically docketed specific to the charges against appellant. As indicated on the electronic docket, there are nine docket entries on June 15, 2011, entitled, "Printed the letter titled: GENERAL COMPLAINT- STATE." Appellant contends that these docket entries are insufficient to prove that the complaints were deposited with the clerk as there is nothing relating these entries to the complaints issued against him. However, there are nine entries on the docket and likewise there were nine complaints issued against appellant. The fact that these entries are entitled as "Complaint"

provides further support that the entries on the docket are for the complaints against him. Also, the docket indicates that the clerk of court entered these docket entries on June 15, 2011; the same day appellant was arraigned and signed a time waiver regarding these charges. In addition to the acts of the clerk of courts, it appears that each complaint is signed by the deputy clerk.<sup>1</sup> Accordingly, the docketing of the case coupled with the deputy clerk's signature establishes that the clerk received the complaints.

{¶ 12} Furthermore, appellant's trial counsel requested a bill of particulars which specifically referenced the complaints and requested the state to specify "the manner and/or conduct of the Defendant that is alleged to constitute the offense he is charged with \* \* \*." Such an action by defense counsel is certainly another piece of "other" evidence that counsel had reviewed the complaints deposited within the court's file.

{¶ 13} Accordingly, we find that there is sufficient evidence to establish that the complaints were deposited with the clerk of courts and thus filed. The trial court therefore had jurisdiction to hear appellant's case and his first assignment of error is overruled.

## **II. Sufficiency of the Evidence to Support the Indecent Exposure Conviction under Count A.**

{¶ 14} Assignment of Error No. 2:

{¶ 15} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN ENTERING A GUILTY VERDICT AND CONVICTION ON COUNT A.

{¶ 16} In his second assignment of error, appellant challenges his indecent exposure conviction under Count A based on the sufficiency of the evidence.

{¶ 17} When reviewing the sufficiency of the evidence to support a criminal conviction, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the

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1. Appellant contends that the deputy clerk's signature on the complaints is not controlling as the complaints were signed and sworn by the charging officer on July 12, 2011. However, as discussed above, there is more than sufficient "other" evidence to establish that the complaints were deposited and received by the clerk.

prosecution, any rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Combs*, 12th Dist. No. CA2010-12-317, 2011-Ohio-4038, ¶ 6, citing *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. The test for sufficiency focuses on whether the state met its burden of production at trial. *State v. Rigdon*, 12th Dist. No. CA2006-05-064, 2007-Ohio-2843, ¶ 30.

{¶ 18} Count A charged appellant with indecent exposure, a violation of R.C. 2907.09. However, the complaint did not specify which subsection under R.C. 2907.09 appellant was alleged to have violated. The parties disagree as to the subsection appellant was charged with and subsequently convicted of. Appellant asserts that Count A charged him with violating R.C. 2907.09(B)(4). R.C. 2907.09(B)(4) states:

(B) No person shall knowingly do any of the following, under circumstances in which the person's conduct is likely to be viewed by and affront another person who is a minor, who is not the spouse of the offender, and who resides in the person's household:

\* \* \*

(4) Expose the person's private parts with the purpose of personal sexual arousal or gratification or to lure the minor into sexual activity.

{¶ 19} The state, however, asserts that the complaint charged him with a violation of subsection (A)(1) of 2907.09, which provides:

(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.

Accordingly, before reaching appellant's argument regarding the sufficiency of the evidence supporting his conviction, we must first determine what offense is alleged in Count A.

{¶ 20} At the outset, we note that appellant failed to object to the complaint or file a Crim.R. 12(C) motion alleging that the complaint was defective. According to Crim.R.

12(C)(2), a defendant must raise any defense and objection based on defects in the complaint prior to trial. The failure to raise such an objection or defense constitutes waiver of these defenses and objections. Crim.R. 12(H); See *State v. Short*, CA2010-12-322, 2011-Ohio-5744, ¶ 18-19. Therefore, appellant has waived all but plain error. An alleged error is plain error only if the error is obvious and but for the error, the outcome of the trial clearly would have been different. *State v. Blankenburg*, 197 Ohio App. 3d 201, 2012-Ohio-1289, ¶ 53 (12th Dist.), citing *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 108. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Id.* Even so, we find that the complaint sufficiently informed appellant that he was charged with a violation of R.C. 2907.09(A)(1).

{¶ 21} "[T]he purpose of a criminal complaint is to inform the accused of the identity and essential facts constituting the offense charged." *State v. Broughton*, 51 Ohio App.3d 10, 11 (12th Dist.1988). The failure to allege a specific subsection does not render the complaint against appellant defective. *State v. Doans*, 12th Dist. No. CA2007-10-258, 2008-Ohio-5423, ¶ 8. Rather, "[a] complaint is sufficient if an 'individual of ordinary intelligence would not have to guess as to the type and scope of the conduct prohibited.'" *Doans* at ¶ 8, quoting *State v. Baker*, 6th Dist. No. H-98-033, 1999 WL 75999 at \*1 (Feb. 19, 1999).

{¶ 22} Count A states:

This day came DEP TOLLEY, BUTLER COUNTY SHERIFF, who being duly sworn by me, the undersigned, of the Hamilton Municipal Court, Hamilton, Ohio, says that on or about 6-14-11, the aforesaid, THOMAS A. STEFANOPOULOS, did KNOWINGLY EXPOSE HIS PRIVATE PARTS UNDER CIRCUMSTANCES IN WHICH THE PERSON'S CONDUCT IS LIKELY TO BE VIEWED BY AND AFFRONT ANOTHER PERSON WHO IS A MINOR; To Wit: MR. STEFANOPOULOS EXPOSED HIS GENITALS TO CHILDREN AT THE TOWN AND COUNTRY MOBILE HOME PARK, Contrary to section 2907.09, Revised Code, State of Ohio, and contrary to the form of the statute to such cases made and provided, and against the peace and dignity of the State of Ohio:

{¶ 23} Based on the above language, the complaint clearly alleges that appellant knowingly exposed his private parts under circumstances which are likely to be viewed and affront another person when he exposed his genitals to children at the Town and Country Mobile Home Park. This statement informed appellant of the identity of the offense being charged, indecent exposure under R.C. 2907.09, and included all the essential facts constituting an offense under R.C. 2907.09(A)(1).

{¶ 24} Appellant argues, however, that Count A of the complaint necessarily charged him with a violation of R.C. 2907.09(B)(4) because only subsection (B)(4) specifically prohibits the exposure of one's private parts to a minor. Contrary to appellant's argument, R.C. 2907.09(C)(2) indicates that the penalty for a violation under subsection (A)(1) can be elevated due to the presence of a minor.<sup>2</sup> As such, the presence of the term "minor" in the complaint does not require a finding that appellant was charged under subsection (B)(4) of R.C. 2907.09.

{¶ 25} Furthermore, the level of offense that appellant was ultimately convicted of further supports the conclusion that appellant was charged and convicted under R.C. 2907.09(A)(1). Although the record does not contain a bill of particulars, the transcript from the sentencing hearing indicates that Count A was originally filed as a misdemeanor in the second degree but subsequently corrected by way of the bill of particulars.<sup>3</sup> The prosecutor represented to the court that she had corrected Count A to be a misdemeanor in the fourth degree. The defendant did not object to any of these representations made by the state. A

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2. However, in order for the offense under R.C. 2907.09(A)(1) to be elevated, the offender must also have one or more prior convictions for indecent exposure.

3. Although there is a request for a bill of particulars by appellant's trial counsel, a bill of particulars was not found within the file. Additionally, appellant does not contend here, nor did he contend before the trial court, that he did not receive notice from the prosecutor of the corrected charge being a fourth-degree misdemeanor by way of the bill of particulars.

violation of R.C. 2907.09(A)(1) can be either a second-degree misdemeanor or a fourth-degree misdemeanor. R.C. 2907.09(C)(2). Whereas, a violation of R.C. 2907.09(B)(4) is a first-degree misdemeanor or a fifth-degree felony. R.C. 2907.09(C)(5). Accordingly, we find that the inclusion of any surplus language did not affect the offense charged in the complaint.

{¶ 26} In further support of his argument, appellant argues Count A charged him with a violation of R.C. 2907.09(B)(4) because it uses the mental state "knowingly" rather than "recklessly." Although appellant is correct that the complaint alleges he acted "knowingly," we find that appellant suffered no prejudice from the state's use of the mental state "knowingly" rather than "recklessly."

{¶ 27} Appellant never argued that he did not possess the requisite mental state, either "knowingly" or "recklessly." Rather, his defense was that the alleged acts of indecent exposure never occurred. It is clear from several witnesses' testimony, that if the acts did occur, they were done "knowingly." Two neighbors, Thomas Reid and Shannon Davis, both testified that this was an ongoing problem and they had informed appellant on multiple occasions that his genitals were showing and requested him to put clothes on. Such testimony, if believed, leads to no other conclusion, but that appellant acted "knowingly." "Knowingly" is a higher degree of culpability than "recklessly." *State v. Ullman*, 12th Dist. No. CA2002-10-110, 2003-Ohio-4003, ¶ 23. It was beneficial to defendant that he was alleged to have acted "knowingly" as it required the state to prove a higher degree of culpability. Furthermore, "[w]hen recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element." *State v. Simmons*, 12th Dist. No. CA2001-01-004, 2001 WL 611177, \*2 (June 4, 2011), quoting R.C. 2901.22(E). The fact that the state proved a higher mental state, "knowingly," rather than the required mental state, under R.C. 2907.09(A)(1) of "recklessly" did not prejudice appellant as a finding that a person acted "knowingly" necessarily includes a finding of "recklessly." Accordingly,

the use of "knowingly" in the indictment does not rise to plain error.

{¶ 28} As the complaint alleged a violation of R.C. 2907.09(A)(1), we must now determine whether there was sufficient evidence to support a conviction under that section. As stated above, under R.C. 2907.09(A)(1), the state was required to prove that appellant recklessly exposed his private parts, 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. The prosecutor stated that the testimony of Chad Murrell supported Count A. Murrell testified that he and his one-year-old son were walking down the street when they saw appellant, walking towards them, in what looked like speedos or shorts. Murrell testified that he saw the side of appellant's testicles hanging out of his speedos and that such conduct offended him. This testimony, if believed, would support a finding on each of the essential elements found in R.C. 2907.09(A)(1). Because it is apparent that the judge, as the trier of fact, believed Murrell and the other neighbor's testimony regarding appellant's mental state, we find no miscarriage of justice. Further, there is no indication that the result of the trial would have been different had the complaint used the mental state "recklessly."

{¶ 29} Appellant's second assignment of error is overruled.

### **III. Disorderly Conduct**

{¶ 30} Assignment of Error No. 4:

{¶ 31} THE TRIAL COURT COMMITTED PLAIN ERROR TO THE PRJUDICE OF APPELLANT IN THE SENTENCE IMPOSED FOR COUNT I, WHICH SENTENCE WAS CONTRARY TO LAW.

{¶ 32} Appellant argues that the imposition of a jail term as well as community control supervision on Count I, for disorderly conduct, was contrary to law as Count I "makes out only a minor misdemeanor" rather than a fourth-degree misdemeanor. The state, however,

argues that appellant was charged with and convicted of fourth-degree misdemeanor disorderly conduct.

{¶ 33} As to Count I, the complaint states:

This day came DEP TOLLEY, BUTLER COUNTY SHERIFF, who being duly sworn by me, the undersigned, of the Hamilton Municipal Court, Hamilton Ohio, says that on or about 6-14-11, the aforesaid, THOMAS A. STEFANOPOULOS, did RECKLESSLY CAUSE INCONVENIENCE ANNOYANCE OR ALARM TO ANOTHER BY CREATING A CONDITION THAT IS PHYSICALLY OFFENSIVE TO PERSONS OR THAT PRESENTS A RISK OF PHYSICAL HARM TO PERSONS OR PROPERTY BY ANY ACT THAT SERVES NO LAWFUL AND REASONABLE PURPOSE OF THE OFFENDER, ; To Wit: MR. STEFANOPOULOS WAS AT THE TOWN AND COUNTRY MOBILE HOME PARK EXPOSING HIMSELF, Contrary to section 2917.11, Revised Code, State of Ohio, and contrary to the form of the statute to such cases made and provided, and against the peace and dignity of the State of Ohio:

{¶ 34} Based on this language, it is clear that appellant was generally charged with violating R.C. 2917.11. The complaint does not contain any specific subsection of R.C. 2917.11. Yet, a complaint is not defective based on the failure to allege a specific statutory subsection, as long as the substance of the complaint is sufficient to inform the accused of the charges against him. *State v. Doans*, 12th Dist. No. CA2007-10-258, 2008-Ohio-5423, ¶ 8. In *Doans*, this court found a complaint was sufficient to inform the appellant that he was charged with violating R.C. 2917.11(B)(1), a minor misdemeanor, even though the complaint did not cite to any specific subsection of R.C. 2917.11 as it contained a general charge notifying the accused of a violation of R.C 2917.11 and recited the exact language found in R.C. 2917.11(B)(1). *Doans* at ¶ 23.

{¶ 35} Here, the complaint contains a general charge notifying appellant of a violation of R.C. 2917.11 and then recites the precise language of R.C. 2917.11(A)(5), which states:

(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following:

\* \* \*

(5) Creating a condition that is physically offensive to persons or that presents a risk of physical harm to persons or property, by any act that serves no lawful and reasonable purpose of the offender.

{¶ 36} However, a violation of R.C. 2917.11(A)(5) is only a minor misdemeanor. R.C. 2917.11(E)(2). It may be elevated to a fourth-degree misdemeanor, under R.C. 2917.11(E)(3)(a)-(d), only if one of the following applies:

(a) The offender persists in disorderly conduct after reasonable warning or request to desist.

(b) The offense is committed in the vicinity of a school or in a school safety zone.

(c) The offense is committed in the presence of any law enforcement officer, firefighter, rescuer, medical person, emergency medical services person, or other authorized person who is engaged in the person's duties at the scene of a fire, accident, disaster, riot, or emergency of any kind.

(d) The offense is committed in the presence of any emergency facility person who is engaged in the person's duties in an emergency facility.

{¶ 37} In the case at bar, the complaint does not contain any of the elevating language to inform appellant that he was charged with a fourth-degree misdemeanor for violating R.C. 2917.11(E)(3)(a)-(d). See *State v. Doans*, 12th Dist. No. CA2007-10-258, 2008-Ohio-5423, ¶ 22. Thus, the trial court erred in convicting appellant of disorderly conduct as a fourth-degree misdemeanor.

{¶ 38} However, this does not render the complaint completely devoid of any substance notifying appellant of the charge filed against him such that his conviction must be reversed. Rather, as discussed above, the complaint sufficiently provided appellant with notice that he was charged with violating R.C. 2917.11(A)(5), a minor misdemeanor as it contained a general charge of a violation of R.C. 2917.11, as well as a recitation of the language found in R.C. 2917.11(A)(5). Furthermore, the evidence at trial was sufficient to

sustain the trial court's finding of guilt of disorderly conduct under R.C. 2917.11(A)(5).

{¶ 39} At trial, the state called several of appellant's neighbors as witnesses. Each testified that on one or more occasions they saw appellant's genitals hanging out of his clothing and that such a sight offended them. Specifically, Shannon Davis testified that one morning she observed appellant's genitals hanging out of his robe. She told appellant to put some clothes on, he "flipped [her] off" and then went back into his house. Davis explained that appellant's behavior of walking around in clothes which exposed his genitals was an ongoing problem. There was also testimony that on the day of appellant's arrest, several neighbors were "upset" by appellant's behavior and some of the employees of the trailer park monitored the situation until the police arrived. Based on such testimony and other evidence adduced at trial, there was sufficient evidence to find appellant guilty of disorderly conduct under R.C. 2917.11(A)(5), a minor misdemeanor.

{¶ 40} We find the trial court's finding of disorderly conduct as a fourth-degree misdemeanor was error. However, the evidence does support a guilty finding on the lesser offense of disorderly conduct as a minor misdemeanor. Consequently, we modify appellant's conviction to reflect a guilty finding of disorderly conduct as a minor misdemeanor. The trial court's imposition of a 30-day suspended jail sentence is contrary to law, and hereby vacated. See R.C. 2929.21(D). Furthermore, the \$60 assessment in fines and costs under Count I is vacated, and this matter is remanded to the trial court to determine the amount of fines and costs to assess for the minor misdemeanor disorderly conduct conviction, should the state elect to proceed with sentencing for this offense in conjunction with Section IV of this opinion as detailed below.

{¶ 41} Appellant's fourth assignment of error is overruled in part and sustained in part.

#### **IV. Allied Offenses of Similar Import**

{¶ 42} Assignment of Error No. 3:

{¶ 43} THE TRIAL COURT COMMITTED PLAIN ERROR TO THE PREJUDICE OF APPELLANT IN IMPOSING MULTIPLE SENTENCES FOR ALLIED OFFENSES.

{¶ 44} Appellant argues in his third assignment of error that the trial court erred in failing to merge Counts G and H for indecent exposure after it found these offenses were allied offenses of similar import to Count A for indecent exposure. At sentencing, the court found that A, G, and H were the "same or similar" offenses and therefore constituted allied offenses of similar import. The state concedes this point. Yet, appellant argues that the trial court should have merged Counts G and H at sentencing. Implicit in this argument is the suggestion that the trial court did not merge Counts G and H. However, appellant does not elaborate or point to any specific evidence in the record to support such a contention. It is not the duty of an appellate court to search the record for evidence to support an appellant's argument as to any alleged error. *State v. McGuire*, 12th Dist. No. CA95-01-001, 1996 WL 174609, \*14 (Apr. 15, 1996). Accordingly, for purposes of this appeal, we only determine whether appellant's convictions complied with the allied offense statute pursuant to R.C. 2941.25(A).

{¶ 45} R.C. 2941.25(A) provides that there may be only one conviction for allied offenses of similar import.<sup>4</sup> For purposes of R.C. 2941.25, a "conviction" consists of a guilty verdict *and* the imposition of a sentence or penalty. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶ 12. "Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing." *Whitfield* at ¶ 27. Furthermore, the sentencing court has a duty, once it determines the

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4. R.C. 2941.25(A) states: "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

offenses are allied, to convict the defendant of only one offense. *Id.* at ¶ 18; *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 29. The trial court's duty to merge these counts is mandatory, not discretionary. *Underwood* at ¶ 26.

{¶ 46} Here, the court entered a separate entry for each count against appellant. As to Counts G and H, the entries are entitled "Judgment Entry of Conviction" and include a finding of guilt. However, no sentence or penalty was imposed on either count. Additionally, we note that although the entries for Counts G and H are entitled "Judgment Entry of Conviction" we find that this is merely a misnomer as the entry on each count was not in fact a final judgment of conviction as it does not include the sentence. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, syllabus (finding that a judgment of conviction is a final appealable order when the judgment contains: "(1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court"). Accordingly, we find appellant was not "convicted" of Counts G and H for purposes of R.C. 2941.25. The court instead only imposed a sentence on Count A. Therefore, appellant properly received only one conviction for the allied offenses of similar import under Counts A, G, and H.

{¶ 47} Also in his third assignment of error, appellant argues that the trial court erred in imposing multiple sentences on Counts A and F for indecent exposure and on Count I for disorderly conduct as Count I is an allied offense of similar import to Counts A and F.

{¶ 48} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court established a new two-part test to determine whether offenses are allied offenses of similar import under R.C. 2941.25. *Id.* at ¶ 46-52. Under this new test, courts must first determine "whether it is possible to commit one offense *and* commit the other with the same conduct." (Emphasis sic.) *Johnson* at ¶ 48; *State v. McCullough*, 12th Dist. Nos. CA2010-04-006 and CA2010-04-008, 2011-Ohio-992, ¶ 14. In making this determination, it is not

necessary that the commission of one offense would always result in the commission of the other, but instead, the question is simply whether it is possible for both offenses to be committed with the same conduct. *State v. Craycraft*, 193 Ohio App.3d 594, 2011-Ohio-413, ¶ 11 (12th Dist.), citing *Johnson* at ¶ 48.

{¶ 49} If it is found that the offenses can be committed by the same conduct, courts must then determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Johnson* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50. If both questions are answered in the affirmative, the offenses are allied offenses of similar import and must be merged. *Johnson* at ¶ 50. However, if the commission of one offense will never result in the commission of the other, "or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *State v. Standifer*, 12th Dist. No. CA2011-07-071, 2012-Ohio-3132, ¶ 66, quoting *Johnson* at ¶ 51.

{¶ 50} Applying *Johnson* to the facts of this case, we must first determine whether it is possible to commit the offenses of indecent exposure and disorderly conduct with the same conduct. *Id.* at ¶ 48. As charged in Count I of this case, appellant committed disorderly conduct by creating a condition that was physically offensive to persons, by "exposing himself." Further, appellant was charged under Counts A and F with indecent exposure by exposing his private parts which was likely to be viewed by and affront another person. It is certainly possible that both offenses can be committed by the same conduct.

{¶ 51} Next, we must determine whether the offenses were in fact committed by the same conduct. A review of the testimony at trial indicates that the indecent exposure contained in Count F occurred on a different day than Counts A and I. Shannon Davis, the witness as to Count F, stated that she observed appellant's genitals hanging out of his robe

sometime in June, but prior June 14, 2011. In fact, the trial court specifically found that Count F occurred on June 11, 2011. The testimony as to Count I for disorderly conduct and Count A for indecent exposure indicated that appellant's conduct occurred on June 14, 2011. Accordingly, it is clear that appellant did not commit Count F and Counts A and I with the same conduct, as the conduct occurred on two different days. The trial court properly found that Count F was not an allied offense of similar import to Counts A and I, but its entry erroneously lists Count F as occurring on June 14, 2011, the same date on which Counts A and I occurred. This is clearly a clerical error, and we hereby remand this matter for the trial court to issue a nunc pro tunc entry to correct the date as to when Count F occurred so to reflect an offense date of June 11, 2011.

{¶ 52} As to Counts A and I, both offenses occurred on June 14, 2011. From the testimony at trial, it is clear that both offenses were based upon appellant's conduct of exposing his genitals in the trailer park on June 14, 2011. In fact when the court asked the prosecutor which witnesses' testimony related to Count I for disorderly conduct, the prosecutor stated, "actually that would be more than that would just be any of them but were they on June 14th that's the Disorderly. It's obviously disruptive behavior." Clearly, the state relied on the same conduct of appellant exposing his genitals on June 14, 2011, to support the convictions for both offenses. See *State v. Craycraft*, 193 Ohio App.3d 594, 2011-Ohio-413, ¶ 20 (finding offenses were allied and must be merged where state relied upon the same conduct to support convictions for two offenses). Consequently, Counts A and I are allied offenses of similar import and the trial court erred by convicting and sentencing appellant on both offenses. On remand, the state will have the right to elect which allied offense of similar import it wishes to pursue at sentencing, i.e. indecent exposure or disorderly conduct, as modified above. See *State v. Snyder*, 12th Dist. No. CA2011-02-018, 2011-Ohio-6346, ¶ 33, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-1,

paragraphs one, two and three of the syllabus. The court will be bound by the state's election. *Id.*

{¶ 53} Appellant's third assignment of error is overruled in part and sustained in part.

#### **V. Jail Time Credit**

{¶ 54} Assignment of Error No. 5:

{¶ 55} THE TRIAL COURT COMMITTED PLAIN ERROR TO THE PREJUDICE OF APPELLANT WHEN IT FAILED TO CALCULATE AND GRANT A REDUCTION IN THE SENTENCE OF CONFINEMENT IMPOSED FOR TIME SERVED IN PRETRIAL CONFINEMENT.

{¶ 56} In his fifth assignment of error, appellant contends that the trial court erred by failing to calculate and grant jail time credit at sentencing.<sup>5</sup> He asserts that he is entitled to a one day reduction in his jail sentence as he served one day in pretrial confinement. The state agrees that he should be given credit for one day "if appellant served one day in jail."

{¶ 57} We note that appellant failed to file a motion for jail time credit or object to the trial court's failure to calculate and include jail time credit in any of the sentencing judgments. Accordingly, he has waived all but plain error. *E.g. State v. McClellan*, 7th Dist. No. 10 MA 181, 2011-Ohio-4557, ¶ 39 (appellant waived all but plain error as he failed to file a motion for jail time credit or object to the trial court's failure to consider jail time credit at sentencing hearing). Several of our sister courts have determined that a trial court's failure to properly calculate an offender's jail-time credit and to include the amount of jail time credit in the body of the offender's sentencing judgment amounts to plain error. *McClellan* at ¶ 7; *State v.*

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<sup>5</sup> "The term 'jail-time credit' is used as shorthand for custody credit. A prisoner receives credit for any time spent in confinement, including 'confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, and confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term.'" *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, fn. 1, quoting R.C. 2967.191.

*Collier*, 10th Dist. No. 08AP-1099, 2009-Ohio-4652, ¶ 18, *State v. Miller*, 8th Dist. No. 84540, 2005-Ohio-1300, ¶ 10. We agree.

{¶ 58} The Supreme Court of Ohio has indicated, based on the Equal Protection Clause, that defendants must be credited for eligible jail time credit. *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, ¶ 7. Likewise, R.C. 2949.08 indicates there is a right to jail time credit:

If the person is sentenced to a jail for a felony or a misdemeanor, the jailer in charge of a jail shall reduce the sentence of a person delivered into the jailer's custody pursuant to division (A) of this section by the total number of days the person was confined for any reason arising out of the offense for which the person was convicted and sentenced \* \* \*.

See also R.C. 2967.191 (discussing the Department of Rehabilitation and Correction reducing terms). The trial court makes the factual determination as to the number of days of confinement that a defendant is entitled to have credited toward his sentence. *State v. Campbell*, 12th Dist. No. CA2009-12-162, 2010-Ohio-3812, ¶ 9, citing *State ex rel. Rankin v. Ohio Adult Parole Auth.*, 98 Ohio St.3d 476, 2003-Ohio-2061, ¶ 7. See also Ohio Adm.Code 5120-2-04(B). This information is required to be included within the sentence and entry. *State v. Mills*, 10th Dist. No. 09AP-198, 2009-Ohio-6273, ¶ 7, citing R.C. 2949.12 and Ohio Adm.Code 5120-2-04(B).

{¶ 59} The trial court's entries do not mention jail time credit. Likewise, at the sentencing hearing there was no mention of jail time credit. Therefore, from the record, it is unclear whether the trial court considered jail time credit. Accordingly, we find this matter should be remanded to the trial court so that it can properly determine the amount of jail time credit, if any, appellant should be afforded. See *State v. Hargrove*, 12th Dist. No. CA2009-08-218, 2010-Ohio-2305, ¶ 22, citing *Mills* at ¶ 7. See also R.C. 2967.191; R.C. 2949.12; Ohio Adm.Code 5120-2-04(B). Therefore, appellant's fifth assignment of error is sustained,

and this matter is remanded to the trial court to make a factual determination regarding the calculation and application of jail time credit.

#### **VI. Ineffective Assistance of Counsel**

{¶ 60} Assignment of Error No. 6:

{¶ 61} APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, WHICH DENIAL RESULTED IN PREJUDICE.

{¶ 62} Appellant argues in his sixth and final assignment of error that he received ineffective assistance of counsel due to trial counsel's failure to tender objections to his sentence under Count I or to the trial court's failure to calculate and grant jail time credit. Essentially, appellant reasserts the arguments made in his fourth and fifth assignments of error. As we disposed of those assignments of error above, we find appellant's sixth assignment of error has been rendered moot. Consequently, we need not address it. See App.R. 12(A)(1)(c).

#### **VII. Conclusion**

{¶ 63} In sum, we find that the municipal court had jurisdiction to hear appellant's case. Appellant's conviction for indecent exposure under Count A is affirmed as there was sufficient evidence to support the conviction. Appellant's conviction for disorderly conduct under Count I, as modified to a conviction for disorderly conduct as a minor misdemeanor, is affirmed, but the 30-day jail sentence and the \$60 assessment in fines and costs under Count I is vacated. However, we reverse and remand the judgments under Counts A and I solely for the purposes of resentencing, as Counts A and I represent allied offenses of similar import. Upon remand, the state can elect which of those allied offenses to pursue, which election the trial court must accept and then merge the crimes for resentencing. Additionally,

on remand, the trial court is instructed to issue a nunc pro tunc entry to correct the date as to when Count F occurred so to reflect an offense date of June 11, 2011. Finally, this matter is remanded for the trial court to calculate how much, if any, jail time credit appellant should receive.

{¶ 64} Judgment affirmed in part, reversed in part, and cause remanded to the trial court for further proceedings according to law and consistent with this opinion.

RINGLAND and PIPER, JJ., concur.