[Cite as *State v. Humphrey*, 2009-Ohio-6265.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NOS. 22860 22861
v.	:	T.C. NO. 08 CRB 2393 08 CRB 2705
DANNY JOE HUMPHREY	:	
Defendant-Appellant	:	(Criminal appeal from Municipal Court)
	:	

. . . . . .

O P I N I O N

Rendered on the 25th day of November, 2009.

. . . . . .

AMY B. MUSTO, Atty. Reg. No. 0071514, Assistant City Prosecutor, 335 W. Third Street, Room 372, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

PAMELA LITTLE PINCHOT, Atty. Reg. No. 0071648, 7501 Paragon Road, Lower Level, Dayton, Ohio 45459
Attorney for Defendant-Appellant

. . . . . .

FROELICH, J.

{¶ 1} Defendant-appellant Danny Joe Humphrey appeals from his conviction and sentence for four counts of Public Indecency. For the following reasons, the judgment of the trial court will be Affirmed in part and Reversed in Part.

{¶ 2} On February 17, 2008 Dayton Police Detective Phillip Olinger was dispatched to the home of S.E. on a report of a man who had exposed his genitals to two eight-year-old girls who were riding their bikes near their homes. The department had been investigating many similar complaints, mostly involving minor victims, on Dayton's east side during the same period of time. In an attempt to gain a clearer description of the perpetrator, Detective Olinger showed the victims, S.E. and B.M., a book containing well over one hundred photographs, reading the standard instructions to them before asking them to look through it. Detective Olinger advised the girls that the perpetrator may or may not be in the book. He reminded them that hair styles and facial hair are easily changed and that complexions in photographs are not always accurate. He also instructed them to ignore any markings or numbers on the photos and to ignore any differences in the style of photos. After about thirty minutes of looking through the book, the girls identified Humphrey as the man who had exposed himself to them.

{¶ 3} As a result of the identification, Detective Olinger included Humphrey's photo when he prepared computer-generated photo spreads to further his investigation of similar crimes in the area. Three other minor victims identified Humphrey from the photo spread, two of whom testified at the suppression hearing. However, the three counts pertaining to those victims were dismissed on the first day of trial.

{¶ 4} Detective Olinger next showed the photo spread to eighteen-year-old B.L. After being given the same instructions as the other victims, B.L. identified Humphrey from the photo spread. She had been victimized on two separate

occasions, February 3 and February 9, 2008. The first time, B.L. was walking home with her six-year-old brother, H.P., when a silver truck pulled up next to them. Humphrey whispered, "Hey, hey" to get their attention. When they looked at him, he was stroking his exposed penis. H.P. threw himself to the ground, crying and upset. She did not report the incident at that time.

{¶ 5} Six days later, on February 9th, B.L. was with a younger friend, M.R., who was outside talking on his cell phone. She heard him screaming and cussing, yelling, "Aw, hell no!" B.L. went out to see what was wrong. She saw Humphrey in the passenger seat of a silver truck, lifting himself up enough for them to see him touching his exposed penis. B.L. immediately called the police. M.R. threw a rock at Humphrey, as Humphrey sped away.

{¶ 6} On February 22, 2008, Detective Olinger arrested Humphrey, who consented to a search of his home. S.E., B.M., and B.L. had described Humphrey's clothing to Detective Olinger. He recovered the same type of clothing during the search. Humphrey admitted that the clothing was his. S.E., B.M., and B.L. each separately identified various articles of the seized clothing.

{¶ 7} B.L. testified at trial that she got a good look at Humphrey on both occasions because he was only a couple of feet away from her, and both incidents occurred in daylight. Additionally, the first incident lasted several minutes because H.P. threw himself to the ground, crying and upset. She positively identified Humphrey at trial as the man who had exposed himself to her on both occasions, noting that he had changed his hair and beard since that time.

{¶ 8} S.E. testified at trial that Humphrey was at most ten feet away from

her when he flashed her by pulling his penis through the open zipper of his pants. She positively identified him at trial, also noting the change in Humphrey's appearance. However, neither B.M. nor H.P. was able to identify Humphrey at trial.

{¶ 9} Humphrey testified in his own defense. He denied committing the offenses and refuted much of Detective Olinger's testimony. There was conflict regarding the extent of Humphrey's contact with the area and his access to any vehicles. Furthermore, Humphrey denied admitting that the seized clothing was his. In fact, he insisted on trying the clothes on for the jury. Humphrey admitted that he had cut his hair and trimmed his beard, which greatly altered his appearance from the time of the crimes, but he explained that he was merely presenting his best image for the court.

{¶ 10} Complaints were filed in the Dayton Municipal Court under two different case numbers. Case No. 2008-CRB-2393 alleged five counts of Public Indecency for exposing his private parts to minors, all misdemeanors of the second degree. Case No. 2008-CRB-2705 alleged three counts of Public Indecency: a misdemeanor of the second degree for exposing his private parts to a minor; a misdemeanor of the second degree for masturbating in public; and one misdemeanor of the fourth degree for exposing his private parts to an adult. Humphrey filed a motion to suppress witness identification testimony, which the trial court overruled, and the cases proceeded to trial. Three of the charges in Case No. 2008-CRB-2393 were dismissed on the morning of trial. The jury found Humphrey guilty of four of the remaining charges, including finding that three of the

victims (S.E., B.M., and H.P) were minors, while the fourth (B.L.) was an adult. The jury found him not guilty of the charge related to the alleged incident of masturbating in public on February 9th.

{¶ 11} The court sentenced Humphrey to 120 days in Case No. 2008-CRB-2705 to be served prior to a 90-day sentence in Case No. 2008-CRB-2393, for a total of 210 days. Humphrey appeals from his conviction and sentence.

II

{¶ 12} Humphrey's First Assignment of Error:

{¶ 13} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANT'S MOTION TO SUPPRESS IN REGARDS TO THE COUNTS OF PUBLIC INDECENCY INVOLVING [S.E. AND B.M.]."

{¶ 14} In his First Assignment of Error, Humphrey argues that the trial court should have suppressed the pre-trial photo identification testimony of S.E. and B.M. as having occurred in an unduly suggestive manner. When assessing a motion to suppress, the trial court is the finder of fact, judging both the credibility of witnesses and the weight of evidence. *State v. Jackson,* Butler App. No. CA2002-01-013, 2002-Ohio-5238, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. An appellate court must rely on those findings and determine whether the court has applied the appropriate legal standard. Id., quoting *State v. Anderson* (1995), 100 Ohio App.3d 688, 691. Therefore, when the trial court's ruling on a motion to suppress is supported by competent, credible evidence, an appellate court may not disturb that ruling. Id., citing *State v. Retherford* (1994), 93 Ohio App.3d 586.

{¶ 15} "To warrant the suppression of identification testimony, the accused bears the burden of showing that the identification procedure was 'so impermissibly suggestive as to give rise to a very substantial likelihood or irreparable misidentification' and that the identification itself was unreliable under the totality of the circumstances." *State v. Poindexter,* Montgomery App. No. 21036, 2007-Ohio-3461, ¶11, citing *Manson v. Braithwaite* (1977), 432 U.S. 98, 106; 97 S.Ct. 2243, 53 L.Ed.2d 140; *Neil v. Biggers* (1972), 409 U.S.188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401; *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247; *State v. Broom* (1988), 40 Ohio St.3d 277, 284; *State v. Moody* (1978), 55 Ohio St.2d 64, 67.

{¶ 16} Detective Olinger explained that when he spoke to S.E. and B.M., he used a book of well over 100 photographs, which had been complied to include many persons of interest who had been identified during investigation of similar crimes in the area over the preceding few months. He used the book primarily as a means of clarifying the girls' description of the perpetrator rather than as a traditional photo array. For that reason, and because the girls were still upset, he did allow them to look through the book together, after first reading the standard instructions to them, including the proviso that the perpetrator may or may not be in the book.

{¶ 17} While Detective Olinger may have turned the pages, he placed no emphasis on any particular photos and only flipped past photos that were repetitive. Furthermore, both girls testified that they did not feel obligated to identify anyone in the book. S.E. testified at the suppression hearing that when she saw

Humphrey's photo, she recognized him right away. B.M. agreed with S.E.'s identification. When Detective Olinger showed the girls more of the photos, they continued to return to Humphrey's photo. Both girls felt confident of their identification of Humphrey, which occurred within a couple of hours of the incident, while their memories were still fresh.

{¶ 18} While this was not the ideal identification situation, we conclude that there was nothing impermissibly suggestive in the process Detective Olinger used with S.E. and B.M. in identifying Humphrey as the perpetrator. The trial court's decision overruling Humphrey's motion to suppress, because Humphrey failed to meet his burden of showing that the identification procedure was unduly suggestive or that the identification was unreliable, was supported by competent, credible evidence. Accordingly, Humphrey's First Assignment of Error is overruled.

III

{¶ 19} Humphrey's Second Assignment of Error:

{¶ 20} "THE DEFENDANT-APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 21} In his Second Assignment of Error, Humphrey asserts that he was denied the effective assistance of trial counsel for three reasons. He argues that counsel failed to move to sever the counts involving different victims on different days; counsel failed to object to the competency of three minor witnesses; and counsel failed to object to testimony regarding pre-trial identifications of Humphrey by two of the witnesses. Although counsel was not ineffective in regards to severance or the identification testimony, counsel was ineffective for failing to

object to the competency of eight-year-old S.E., eight-year-old B.M., and H.P., who was six years old on February 3, 2008, but who was seven years old by the time of trial.

{¶ 22} In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance, and to show deficiency the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id.

{¶ 23} Humphrey begins by arguing that counsel was ineffective in failing to move to sever the counts for each different date. Initially, we point out that "[t]he law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged 'are of the same or similar character.'" *State v. Lott* (1990), 51 Ohio St.3d 160, 163, quoting *State v. Torres* (1981), 66 Ohio St.2d 340, 343. Joinder serves to "prevent successive trials, to minimize the possibility of incongruous results in successive trials before different juries, to conserve judicial resources, and to diminish the inconvenience to witnesses." *State v. Conway,* Clark App. No. 07CA0034, 2008-Ohio-3001, ¶17, citing *State v. Schaim,* 65 Ohio St.3d 51, 58, 1992-Ohio-31; *Torres,* supra, at 343.

{¶ 24} In support of this claim, Humphrey cites to *State v. Clements* (1994), 98 Ohio App.3d 797, arguing that we have previously "ruled that severance must be granted when crimes occur on different dates and at different locations, requiring the presentation of separate evidence." However, as we recently clarified,

although under the particular facts in the *Clements* case the trial court erred in refusing to order separate trials, "we did not purport to set forth a per se rule regarding when charges must be tried separately." *State v. Montgomery,* Montgomery App. No. 22193, 2009-Ohio-1415, ¶15. To the contrary, "[t]he need for severance depends upon a defendant's affirmative showing of prejudice as a result of joinder of charges...." Id., citing *State v. Broadnax,* Montgomery App. No. 21844, 2007-Ohio-6584*,* ¶37. Thus, had Humphrey's trial counsel sought severance, Humphrey would have had the burden of demonstrating that he was prejudiced by having the counts tried together. Crim.R. 14; *Torres,* supra, at 343. Humphrey's only explanation of how he was prejudiced is that the jury may have decided that if he was guilty of one charge, he must have been guilty of the other charges.

{¶ 25} Any claim of prejudice may be negated by the State's demonstrating that the evidence of each crime is simple and direct, so that a jury can segregate the proof for each charge. *Conway,* supra, at ¶21, citing *Lott,* supra; *Torres,* supra; and *State v. Rutledge* (June 1, 2001), Montgomery App. No. 18462. The evidence in this case was simple and direct. Furthermore, joinder was appropriate because the offenses were similar in character, committed within a few weeks of each other, and involved a common scheme, plan, or course of criminal conduct. *Broadnax,* supra, at ¶34, citing Crim.R. 8(A); *State v. Glass* (March 9, 2001), Greene App. No. 2000CA74. The trial court instructed the jury that each charge, and the evidence related to that charge, must be considered separately. And, as the jury, in fact, acquitted Humphrey of one charge, it appears that the jury followed the court's

instruction. See, e.g., *State v. Ramsey,* Montgomery App. No. 21826, 2007-Ohio-6139, ¶25; *State v. Marrow,* Cuyahoga App. No. 85625, 2005-Ohio-6483, ¶34. Therefore, trial counsel was not ineffective for electing not to seek severance.

{¶ 26} Humphrey next contends that trial counsel was ineffective for failing to object to the introduction of testimony regarding the pre-trial identification by S.E. and B.M. because he claims that neither girl was able to affirmatively identify Humphrey at trial. Humphrey's argument centers upon his somewhat misplaced reliance upon *State v. Lancaster* (1971), 25 Ohio St.2d 83, wherein the Ohio Supreme Court held: "Prior identification of the accused may be shown by the testimony of the identifier, or by the testimony of a third person to whom or in whose presence the identification was made, where the identifier has testified and is available for cross-examination, not as original, independent or substantive proof of the identity of the accused as the guilty party, but as corroboration of the testimony of the identifying witness as to the identity of the accused." Id., at paragraph five of the syllabus.

{¶ 27} However, the *Lancaster* rule has since been modified by Evid.R. 801(D)(1)(c), which states: "A statement is not hearsay if: * * * The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification." See, e.g., *State v. Nevins,* 171 Ohio App.3d 97, 2007-Ohio-1511, ¶40, citing *State v. Anderson* (March 23, 1994), Montgomery App. No. 13003.

"Such statements are substantive evidence." *Anderson,* supra, citing *Giannelli,* Ohio Evidence Manual, §8.09; 1 Weissenberger, Ohio Evidence, §801.22.

{¶ 28} In this case, both S.E. and B.M. were available for cross-examination at trial. Less than an hour after the crime, the girls described the perpetrator to the police. Moreover, their photo identifications were made within a couple of hours of the crime, while the image of Humphrey was still vivid in the girls' memories. As we concluded in Humphrey's First Assignment of Error, there was nothing unduly suggestive or unreliable about the identification process. All three requirements of Evid.R. 801(D)(1)(c) having been met, testimony regarding S.E. and B.M.'s pre-trial identification of Humphrey was admissible, and any failure to object was not ineffective assistance.

{¶ 29} Finally, Humphrey argues that trial counsel was ineffective for failing to object to the competence of S.E. and B.M., each eight years old, and H.P., who was seven years old by the time of trial, to testify at trial. In support, he merely states, "Ohio R. Ev. [sic] 601(a) requires a witness to be ten years old to be competent." Although this is not an accurate statement of the rule, we agree that counsel was obligated to challenge the competence of the children to testify.

{¶ 30} "All persons are competent witnesses except * * * children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Evid.R. 601(A). "A witness under the age of ten is not presumed incompetent, but rather, the proponent of the witness's testimony bears the burden of proving that the witness is capable of receiving just impressions and relating them truthfully." *State*

v. Clark, 71 Ohio St.3d 466, 469, 1994-Ohio-43. Furthermore, it is the duty of the trial judge to conduct a voir dire examination of any child under the age of ten years, in order to establish his or her competence to testify. *State v. Wilson* (1952), 156 Ohio St. 525, 529 (applying R.C. 2317.01, which is almost identical to that of the later-adopted Evid.R. 601(A)); *State v. Frazier* (1991), 61 Ohio St.3d 247.

{¶ 31} The preferred method of establishing a child's competence to testify is to conduct a competency hearing before allowing the child to take the stand; however, that is not the only acceptable method. *State v. Montgomery* (June 13, 1988), Montgomery App. No. 10495, citing *Wilson,* supra, at 529; *State v. Holland,* Cuyahoga App. No. 91249, 2008-Ohio-3450, ¶13, citing *State v. Morgan* (1985), 31 Ohio App.3d 152 (holding that the defendant was not prejudiced when the eight-year-old victim testified after the prosecutor conducted what amounted to a voir dire at the beginning of the child's testimony); *State v. Hendrix* (Aug. 26, 1993), Cuyahoga App. No. 63566 (both the prosecutor and the judge asked questions amounting to voir dire at the outset of the minor victim's testimony). See, also, *State v. Morgan* (Dec. 10, 1986), Hamilton App. No. C-850795, syllabus. Any deficiency in establishing competence prior to the child's testimony may be cured if the witness's subsequent trial testimony establishes the child's competence to testify. See, e.g., *Montgomery,* supra; *State v. Schmidt,* Franklin App. No. 08AP-348, 2009-Ohio-1548, ¶22, citations omitted.

{¶ 32} In this case, there is no evidence in the record that the trial court considered the competence of S.E., B.M., or H.P. prior to their testimony.

Furthermore, the sparse questioning in the record does not rise to the level of demonstrating their ability to receive just impressions or to relate them truthfully.

{¶ 33} When eight-year-old S.E. testified, the prosecutor merely asked her to state her name and age before moving directly to the details of the events of February 17, 2008, and her subsequent identification of Humphrey and his clothing. On re-direct examination, the extent of the inquiry regarding S.E.'s understanding of the difference between truth and lie and the importance of telling the truth is as follows:

{¶ 34} "Q: [S.E.] before you came here today we talked about telling the truth and telling a lie right?

{¶ 35} "A: Yeah.

{¶ 36} "Q: Okay. And I asked you to come and tell the truth today.

{¶ 37} "A: Yeah."

{¶ 38} Similarly, when eight-year-old B.M. testified, the prosecutor began by asking for her name, age, and grade, before moving into the events of February 17, 2008, including her identifications of Humphrey and his clothing. There was no testimony regarding her understanding of the difference between truth and lie, the importance of telling the truth, or her ability to receive just impressions.

{¶ 39} When seven-year-old H.P. testified, the prosecutor only asked for his name prior to asking him about the events of February 3, 2008. On re-direct, the prosecutor asked, "Before you came in here today you and I talked about telling the truth. Is that right? And I asked you to tell the truth about what happened. Okay. Did you tell the truth today when you pointed to that man?" At the end of this

multiple-part question, H.P. indicated that he had told the truth.

{¶ 40} Although the testimony implies that the State had questioned the children to some extent regarding their competence to testify prior to trial, the State failed to meet its burden, as the proponent of the testimony, to demonstrate the children's competence. Moreover, there is insufficient evidence on the record from which the trial court could have made any such ruling. Counsel was deficient in failing to challenge the competence of these witnesses to testify.

{¶ 41} Because the two convictions based upon the events of February 17, 2008, were dependent almost entirely upon the testimony of the two eight-year-old witnesses, Humphrey was prejudiced by counsel's failure to challenge the children's competence to testify. Accordingly, those two convictions must be vacated. On the other hand, the February 3, 2008, conviction regarding H.P. was supported, not only by H.P's testimony, but also by the testimony of his adult sister, and it need not, therefore, be reversed.

{¶ 42} Humphrey's Second Assignment of Error is overruled in part and sustained in part.

IV

{¶ 43} Humphrey's Third Assignment of Error:

{¶ 44} "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S CRIMINAL RULE 29 MOTION FOR ACQUITTAL REGARDING THE COUNTS OF PUBLIC INDECENCY INVOLVING [H.P., S.E., AND B.M.]."

{¶ 45} Humphrey's Fourth Assignment of Error:

{¶ 46} "THE VERDICTS RETURNED BY THE JURY OF GUILTY ON THE

COUNTS OF PUBLIC INDECENCY INVOLVING [H.P., S.E., AND B.M.] WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 47} In his Third Assignment of Error, Humphrey argues that the trial court should have granted his Crim.R. 29 motion for acquittal regarding the charges pertaining to H.P, S.E., and B.M. In his Fourth Assignment of Error, he claims that those convictions are against the manifest weight of the evidence. In light of our ruling in regard to Humphrey's Second Assignment of Error, the arguments in regard to the two February 17, 2008, convictions are moot. In regard to the February 3, 2008 incident, witnessed by both H.P. and his eighteen-year-old sister, we conclude both that there was sufficient evidence to warrant submitting the matter to the jury, and the convictions based on those events were not against the manifest weight of the evidence.

{¶ 48} Criminal Rule 29(A) requires a trial court to enter a judgment of acquittal "if the evidence is insufficient to sustain a conviction of such an offense...." A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52. The proper test to apply to the inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259: "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is

whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶ 49} In contrast, when reviewing a judgment under a manifest weight standard of review "[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 [factfinder] 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 evidence weighs heavily against the conviction." *Thompkins,* supra, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 50} Humphrey was convicted of Public Indecency, in violation of R.C. 2907.09(A)(1), which states: No person shall recklessly expose his private parts under circumstances in which the person's conduct is likely to be viewed by and to affront others who are in the person's physical proximity and who are not members of his household. Humphrey does not deny that the crimes occurred, rather he claims that he was not the perpetrator. In regard to the crimes committed on February 3, 2008, against B.L. and H.P., Humphrey argues that the identification testimony was insufficient because H.P. could not identify him. Although we have concluded that H.P.'s competence to testify should have been addressed prior to his testimony, when considering Humphrey's arguments, we must take into account all of the evidence that was admitted, and not only the evidence that should have

been admitted. *State v. Blanton,* Franklin App. No. 08AP-844, 2009-Ohio-5334, ¶¶51-52, citing *State v. Brewer,* 121 Ohio St.3d 202, 2009-Ohio-593.

{¶ 51} Contrary to Humphrey's assertion, H.P. did make a tentative identification of Humphrey at trial. When H.P. was, at first, unable to identify Humphrey, the prosecutor asked the child to come down from the witness stand so that he could see everyone in the courtroom, at which time H.P. immediately pointed to Humphrey. On cross-examination H.P. agreed that he did not remember what the perpetrator looked like. On re-direct, H.P. said that he had told the truth when he pointed to Humphrey. Further questioning revealed that H.P. recognized Humphrey as the perpetrator, despite the changes that Humphrey admitted to making to his appearance. When the State asked, "Does he look a little different to you but you think it's the same person?" H.P. answered, "Yes." Although the identification was far from definitive, the jury was in the position to see and hear H.P. and to best evaluate the accuracy of his testimony, including the identification.

{¶ 52} Furthermore, Humphrey's argument ignores the value of B.L.'s testimony. Both prior to and at trial, she identified Humphrey, whom she had seen on two occasions, and she recognized the changes to Humphrey's appearance that had taken place in the months between the incidents and the trial. Additionally, both prior to and at trial, she was also able to identify some of the clothing taken from Humphrey's home. Thus, completely independent of H.P.'s testimony, B.L.'s testimony was sufficient to support the charges stemming from the incident on February 3, 2008.

{¶ 53} The State's evidence was more than sufficient to warrant submitting the charges of Public Indecency that occurred on February 3, 2008, to the jury. Nor were those convictions against the manifest weight of the evidence. Accordingly, Humphrey's Third and Fourth Assignments of Error are overruled.

VI

{¶ 54} Humphrey's Fifth Assignment of Error:

{¶ 55} "THE TRIAL COURT ERRED IN NOT MERGING THE OFFENSES OF PUBLIC INDECENCY OCCURRING ON FEBRUARY 3, 2008 AND NOT MERGING THE OFFENSES OF FEBRUARY 17, 2008 AS ALLIED OFFENSES OF SIMILAR IMPORT FOR PURPOSES OF CONVICTION AND/OR SENTENCING."

{¶ 56} Finally, Humphrey maintains that the two counts from February 3, 2008, should have been merged, and the two counts from February 17, 2008, should have been merged, because they were allied offenses of similar import, committed with the same animus. In light of our disposition of Humphrey's Second Assignment of Error, his argument pertaining to the counts from February 17, 2008, is moot. In regard to the counts from February 3, 2008, we agree that the convictions and sentences should have been merged.

{¶ 57} "In Ohio, R.C. 2941.25 is the basis for determining whether cumulative punishments imposed in a single trial for more than one offense arising out of the same criminal conduct violate the federal and state constitutional provisions against double jeopardy. *State v. Rance*, 85 Ohio St.3d 632, ***, 1999-Ohio-291." *State v. Brown*, Montgomery App. No. 19113, 2002-Ohio-6370. Revised Code Section 2941.25 provides: "(A) 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.

{¶ 58} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 59} In applying R.C. 2941.25, the Ohio Supreme Court established a two-part test for determining whether multiple offenses are allied offenses of similar import. First, the court must compare the elements of the offenses in the abstract to determine whether the elements correspond to such a degree that the commission of one crime will necessarily result in the commission of the other. *Rance*, supra, at 636, 1999-Ohio-291, citation omitted. If the elements do so correspond, the offenses are allied offenses of similar import, and the defendant may only be convicted of and sentenced for both offenses if he committed the crimes separately or with a separate animus. Id. at 638-39, citations omitted.

{¶ 60} Humphrey was charged with and convicted of two counts of Public Indecency occurring on February 3, 2008, in violation of R.C. 2907.09(A)(1), which states: No person shall recklessly expose his private parts under circumstances in which the person's conduct is likely to be viewed by and to affront others, who are in the person's physical proximity, and who are not members of his household. One of those convictions involved a minor victim, elevating the offense from a

fourth-degree misdemeanor to a second-degree misdemeanor. That is the only difference between the charges. Neither party disputes that the first prong is met.

{¶ 61} As to the second prong, Humphrey argues that there was a single incident that happened to involve two victims, but that there was no separate animus. The State argues that there was a separate animus, as he intentionally exposed his genitals to both victims.

{¶ 62} Although not cited by Humphrey, the State properly directs our attention to two cases that are directly on point. In *State v. Harden* (Oct. 8, 1991), Montgomery App. No. 12507, the defendant exposed his penis to two girls at the same time while they were in a field. He was convicted and sentenced on two separate charges, one for each girl. We reversed, holding that "the double punishment imposed herein for only a single crime does invoke the spirit, if not the letter, of R.C. 2941.25(A). Manifestly, the penalty for a single violation of R.C. 2907.09 * * * is not controlled by the number of affronted spectators-whether they are three or thirty-three-who view the act of public indecency." Following our reasoning in *Harden,* the Ninth District Court of Appeals came to the same conclusion in *State v. Miller* (April 8, 1998), Summit App. No. 18555 (also involving a defendant who exposed his genitals to two young girls at the same time, when the girls visited his home).

{¶ 63} The State argues, however, that a different outcome is warranted in light of the revision to R.C. 2907.09(A)(1) that occurred in 2005, wherein the legislature added the words "who are in the person's physical proximity." The State insists that this language "changed the nature of this crime from one against

the general public to one against individual victims." We are unpersuaded by the State's position. The additional statutory language provides us with no reason to differ from our earlier conclusion in *Harden,* supra.

{¶ 64} In accord with *Harden* and *Williams,* we conclude that the two convictions from February 3, 2008, should have been merged, resulting in a single sentence for the single instance of conduct. Therefore, we must remand the case to the trial court for re-sentencing to reflect a single incident rather than two separate crimes.

{¶ 65} Accordingly, Humphrey's Fifth Assignment of Error is sustained.

V

{¶ 66} Having sustained Humphrey's Fifth Assignment of Error and part of his Second Assignment of Error, the trial court's judgment in case number 2008-CRB-2393, involving S.E. and B.M. on February 17, 2008, is Reversed, while the judgment of conviction in case number 2008-CRB-2705, involving B.L. and H.P. on February 3, 2008, is Affirmed, but the sentence is Reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

. . . . . .

FAIN, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Amy B. Musto
Pamela Little Pinchot
Hon. Deidre Logan