

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-1552

State of Ohio : CASE NO. _____
 :
 Plaintiff/Appellee: :
 : On Appeal from the
 v. : Cuyahoga County Court
 : of Appeals, Eighth
 : Judicial District
 :
 Logan John Edmiston :
 :
 Defendant/Appellant : Court of Appeals
 : Case No. 93397
 : 2010-Ohio-3413
 :

MEMORANDUM IN SUPPORT OF JURISDICTION
 OF APPELLANT LOGAN JOHN EDMISTON

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FILED
 SEP 03 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

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WHY THE COURT SHOULD ACCEPT THIS CASE FOR REVIEW

This case involves a felony, violations of fundamental Constitutional due process rights, and violations of well-established principles of statutory construction.

As will be discussed more fully below, in a two to one decision by Eighth District Court of Appeals, Appellant was convicted of both Pandering Obscenity, R.C.2907.32(A)(3), a felony of the fifth degree, and two counts of Public Indecency, R.C.2907.09(A)(3), misdemeanors of the third degree. One of the Public Indecency convictions involved the exact same conduct for which Appellant was convicted of Pandering Obscenity -- masturbating in an elevator in the sight of one other person.

While most Ohio courts restrict the application of Pandering Obscenity to commercial, artistic, or entertainment activities before a public audience, see e.g., *State v. Albini* (1971), 29 Ohio App.2d 227, 234, the lower courts in this case applied an expansive and liberal construction of the term "performance" under the Pandering Obscenity statute in favor of the state, rather than a liberal construction in favor of the accused, as required by law, thus denying Appellant his Constitutional rights of due process.

"The Due Process of Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship* (1972), 397 U.S. 358, 364; See also, *Mullaney v. Wilber* (1975), 421 U.S. 684. As the trial court and court of appeals misconstrued the term "performance" and found Appellant guilty with absolutely no evidence establishing any commercial, artistic, or entertainment activity, and further found Appellant guilty of a second count of Public Indecency without any evidence of Sexual Conduct as defined by statute, nor of any

masturbation, Appellant's convictions were in violation of his Constitutional rights to due process of law.

As will be discussed below, the seeming ambiguity of the definition of "performance" under the Pandering Obscenity statute must be resolved by this Court in order to establish a uniform construction and application of the statute by all courts in this state. Further, as a conviction under this statute requires imposition of a Tier I sexual offender classification and the resulting burden of reporting requirements upon one so convicted, there is great and general public concern in these issues.

STATEMENT OF THE CASE AND FACTS

Appellant Logan John Edmiston was charged by indictment and supplemental indictment in the Cuyahoga County Court of Common Pleas with twelve criminal counts, alleging inter alia burglary, kidnapping, and several counts of pandering obscenity and public indecency. After waiving jury trial, Mr. Edmiston went to trial before the bench on March 30, 2009, on all counts.

After trial, Appellant was found guilty by the trial court of only three counts of the indictment: two counts of Public Indecency, R.C.2907.09(A)(3), misdemeanors of the third degree, one occurring on May 30, 2008, as alleged in Count Four of the indictment, and the other occurring on July 5, 2008, as alleged in Count Eleven of the indictment; and also of one count of Pandering Obscenity, R.C.2907.32(A)(3), a felony of the fifth degree, occurring on May 30, 2008, as alleged in Count Five of the indictment. For all other counts of the indictment, the charges were either

dismissed for failure to prosecute, or Criminal Rule 29 motions for acquittal were granted, or verdicts of not guilty were rendered.

At the sentencing hearing held on May 4, 2009, the trial court, in lieu of a prison term, sentenced Mr. Edmiston to three years of community control, with an order of sixty hours of community service, an order to pay court costs, the supervisory fee, and a one thousand dollar (\$1000.00) fine, and an order that he continue psychological counseling. The trial court informed Mr. Edmiston that, if he violated the conditions of community control, he could face up to twelve months of incarceration. Mr. Edmiston was deemed a Tier I Sexual Offender on the basis of this conviction. Timely appeal to the Eighth District Court of Appeals was taken, and the appellate court issued its decision affirming Appellant's convictions by a two to one decision on July 22, 2010 (journalized on July 23, 2010), with Judge Kilbane writing a partial dissenting opinion.

* * *

The relevant facts on appeal, based upon the two convictions at issue in this appeal, are as follow.

Suruchi Prakash was a medical student at Case Western Reserve University in Cleveland, Ohio, and was living at the Triangle apartments, near the campus. On May 30, 2008, she came home at around midnight. When she was walking from the basement garage to the elevator an unknown man "kind of out of nowhere" entered the elevator with her. She pushed the button for floor six, and the man pushed the button for floor nine. She kept her eyes looking forward; as the elevator was approaching her floor, she heard the man say "I hope you don't mind". She turned around to look at him, and she saw "that he was exposed and he was masturbating". She turned away to avoid looking at him. When the elevator reached the sixth floor, she got off of the elevator, and

the doors closed behind her, with the man staying inside . The man never touched her, nor did he follow or attempt to follow her when she exited the elevator. At trial, Prakash identified Mr. Edmiston as the man she saw in the elevator.

Based upon this incident, the trial court found Mr. Edmiston guilty of both Pandering Obscenity, R.C.2907.32(A)(4), a felony of the fifth degree, as alleged in Count Five of the indictment, as well as Public Indecency, R.C.2907.09(A)(3), a misdemeanor of the third degree, as alleged in Count Four of the indictment.

* * *

Laura Selig was a twenty-one-year-old, fourth-year nursing student from Lincoln, Nebraska. She had spent mid-May through mid-July of 2008 as an intern at the Cleveland Clinic, and was staying in the Triangle apartments on Mayfield Road near the hill of the "Little Italy" neighborhood of Cleveland.. On the evening of July 5, 2008, she spent some time working out in the second-floor gymnasium of the apartment building, and left to go to her sixth-floor apartment at about 11:00-11:30 p.m. As she was waiting for the elevator, she saw a man walk out of the stairwell and -- as the elevator doors opened -- step into the elevator in front of her.

The man was standing behind her in the elevator as Selig faced the elevator buttons. Once the doors closed, the man asked her if she "minded if he masturbated". She turned after saying "yes, I mind", and saw that the man "had pulled his penis out, and was exposing himself". In response to a series of questions intended to elicit from Selig more information as to what -- if anything -- the man was doing with his penis, Selig answered "All I saw was that his penis was erect, and that it was out in his hand", and "* * * I can't remember exactly. But I know that his hand was around his penis".

Selig became panicked by the circumstances, and got off of the elevator as soon as the doors opened on the fifth floor -- the floor that the man himself had chosen -- instead of the sixth floor, which she had chosen. Selig was afraid that the man might follow her, so she ran down the stairwell, rather than go up to the sixth floor where she was staying, and went to a nearby dormitory. While Selig had fears for her safety, she admitted that the man never touched her, nor did he follow her after she exited the elevator. After the incident, Selig identified Mr. Edmiston's picture from a police photo array, and identified him as the man in the elevator in open court .

Selig testified that she had never seen anyone engage in this type of activity before -- and that she had never before seen a man's "genitalia" outside of a "clinical setting". Over defense counsel's objection that the prosecutor was asking for a legal conclusion, the trial court allowed Selig to answer the following question: Q: [Did] The defendant's action on that date appear to be sexual conduct to you, or no? A: Yeah.

After defense counsel's cross-examination of Selig, the trial court engaged in its own questioning of Selig, as follows:

THE COURT: Ms. Selig, can you tell us, again, what he stated?

THE WITNESS: Do you mind if I masturbate.

THE COURT: And he used the word masturbate?

THE WITNESS: Yes.

THE COURT: And then, in your observance of him, no matter how quick it was, did you observe him masturbate?

THE WITNESS: From my understanding of what masturbating is, yes.

THE COURT: And since you did phrase it that way, I'm going to

have to ask you what your understanding of masturbating is.

THE WITNESS: He had his hand all the way around his penis, and that's what -- that's what I saw..

Like, I guess, I can't say that he was moving his hand up and down.

THE COURT: I guess what I'm asking is, can you tell us whether he was doing anything besides just holding his penis?

THE WITNESS: I can't tell you that, because I wasn't focusing on it, I guess.

Based upon Selig's testimony, the trial court found Mr. Edmiston guilty of Public Indecency, R.C.2907.(A)(3),, without making any specific finding as to whether the defendant was engaged in either sexual conduct or masturbation.

PROPOSITION OF LAW ONE

UNDER CONSTITUTIONAL PRINCIPLES OF DUE PROCESS, A DEFENDANT CANNOT BE FOUND GUILTY OF PANDERING OBSCENITY, R.C.2907.32(A)(3), WITHOUT EVIDENCE THAT HE WAS ENGAGING IN A COMMERCIAL, ARTISTIC, OR ENTERTAINMENT ACTIVITY.

Appellant incorporates the facts relating to the May 30, 2008, incident involving Ms. Prakash as if fully rewritten herein.

Clearly, the conduct of Appellant, as alleged and described by Prakash, constituted the third-degree misdemeanor offense of Public Indecency under R.C.2907.09(A)(3), which expressly prohibits a person from engaging in "conduct that to an ordinary observer would appear to be sexual conduct or masturbation". However, the trial court found Appellant guilty not only of this specific

misdemeanor charge, but also of the felony charge of Pandering Obscenity, under R.C.2907.32(A)(4), based upon this exact same conduct.

As charged in the indictment under Count Five, R.C.2907.32, Pandering Obscenity, provides that: "(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following: (4) Advertise or promote an obscene performance for presentation, or present or participate in presenting an obscene performance, when the performance is presented publicly, or when admission is charged". Subsection (K) of R.C.2907.01 ["as used in sections 2907.01 to 2907.38 of the Revised Code"] defines "performance" as: " * * * any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience".

In his argument for Criminal Rule 29 motion for acquittal after the state's evidence, defense counsel argued that Appellant's conduct did not constitute a "performance" as defined by statute. The trial court responded: "You don't think masturbating in front of another person exhibits a performance?"; and then went on to overrule the motion.

R.C.2907.01 does not provide a definition for "pandering". However, in *State v. Albini* (1971), 29 Ohio App.2d 227, 234, the Tenth District Court of Appeals defined "pandering of obscenity" as : "the business of purveying pictorial or graphic matter openly advertised to appeal to the erotic interest of customers, or potential customers, by either blatant and explicit advertising or subtle and sophisticated advertising". This construction is supported by the legislative notes to R.C.2907.32, as enacted in 1973, which provide: "This section prohibits commercial exploitation or public dissemination of obscene matter * * * ". Unless such an element of commercial exploitation is alleged or proven, a conviction for Pandering Obscenity simply cannot stand.

It is clear that the trial court and the majority of the court of appeals seized upon the seeming

ambiguity in the phrase “ other exhibition” to broadly expand the definition of “performance” beyond its intended application, and in favor of the state. This is in complete derogation of the well-established and well-founded principle of statutory construction embodied in R.C.2901.04(A), which provides that “sections of the Revised Code defining offenses * * * shall be strictly construed against the state, and liberally construed in favor of the accused * * *. Instead, the majority of the panel in this case has turned this statutory principle on its head, and has construed the term "performance" -- liberally in favor of the state, and strictly against the accused, finding that saying “Do you mind” was an invitation for Prakash to watch, and thus constituted a “performance”.

Under a liberal construction of the phrase “ other exhibition” in favor of the defendant, it is clear that this is alluding to the enumerated examples of exhibitions stated under the definition of “performance” -- i.e., any motion picture, preview, trailer, play, show, skit, or dance. All these activities involve an element of commercial, artistic, or entertainment activity, for purposes of public exhibition. Accordingly, “other exhibition” must be construed to mean other exhibitions of the same type, such as a video or a photography exhibit at an art gallery.

To characterize Appellant's act of masturbating in front of another person in a public setting as a "performance", as the trial court and the majority of the court of appeals did in this case, does nothing to establish the additional element necessary to warrant or justify a conviction for the greater degree offense of Pandering Obscenity. Instead, it is merely a grammatical parsing and/or paraphrasing of the description of Appellant's conduct. To say that "X masturbated in public view", versus saying that "X engaged in the performance of the act of masturbating in public view", are semantical distinctions absolutely without any difference.

In her partial dissenting opinion, Judge Kilbane aptly noted that:

Webster's Dictionary defines pandering as "a go-between in a sexual intrigue; esp. a procurer; pimp; a person who provides the means of helping to satisfy the ignoble ambitions or desires, vices, etc., of another." Webster's Second College Edition New World Dictionary (1970) 1024. In *State v. Albini* (1971), 29 Ohio App.2d 227, 235, 281 N.E.2d 26, pandering obscenity is defined as "the business of purveying pictorial or graphic matter openly advertised to appeal to the erotic interest of customers." Clearly, pandering obscenity is designed to address obscenity in the **commercial context**, and not an act against one individual. (Emphasis added; Journal Entry at 15).

Judge Kilbane went on to opine that Appellant's statement to Prakash, mistakenly cited as "Do you mind if I masturbate?", was insufficient to constitute a "Performance" under the statute. This statement was actually made to Selig and not to Prakash. If this statement is insufficient to establish a "performance", then Appellant's actual statement to Prakash -- "I hope you don't mind" -- is even less sufficient to establish such element.

PROPOSITION OF LAW TWO

UNDER CONSTITUTIONAL PRINCIPLES OF DUE PROCESS, A DEFENDANT CANNOT BE FOUND GUILTY OF PUBLIC INDECENCY, R.C.2907.09(A)(3), WITHOUT EVIDENCE THAT HE WAS ENGAGING IN EITHER SEXUAL CONDUCT OR MASTURBATION.

Appellant incorporates the facts relating to the July 5, 2008, incident involving Ms. Selig as if fully rewritten herein.

The evidence adduced at trial to support this conviction consisted solely of the testimony of Laura Selig. . Regardless of whether this Court reviews this evidence of either "sexual conduct"

or "masturbation", there is simply no evidence to sustain such conviction.

Over objection of trial counsel, Selig was allowed to give her completely subjective determination that Appellant was engaged in "sexual conduct" by, i.e., simply exposing his penis to her in the elevator. As relevant herein, "Sexual Conduct" under R.C.2907.01(A) is defined as: " * * * vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex * * * ". There was absolutely no such evidence presented of any such conduct by Appellant in Selig's testimony.

While Selig may have been personally and subjectively offended by Appellant's alleged conduct, the law is clear that the standard for determining criminal conduct for Public Indecency is not that of "the sensitivities of the particular complainant", but rather of the "person of common intelligence". *State v. Henry*, 151 Ohio App.3d 128, 2002-Ohio-7180.

Nor was the evidence sufficient to establish "masturbation". While there is no definition of "masturbation" in the Revised Code, it is clear that Selig had an understanding of what it entailed: "Like, I guess, I can't say that he was moving his hand up and down." As detailed in the Statement of the Facts and Case above, in response to a series of questions intended to elicit from Selig more information as to what -- if anything -- the man was doing with his penis, Selig answered "All I saw was that his penis was erect, and that it was out in his hand", and " * * * I can't remember exactly. But I know that his hand was around his penis".

Despite attempts by both the prosecutor and the trial court to elicit from Selig some -- or any -- evidence that Appellant was masturbating during this incident, as charged in the indictment, and not merely exposing his penis to her, Selig could not testify to witnessing any conduct constituting "masturbation" by Appellant.

CONCLUSION

Based upon the foregoing arguments, this Court should accept this case for review and reverse the decision of the court of appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was sent by regular U.S. Mail to: William D. Mason, Cuyahoga County Prosecutor, The Justice Center, 8th Floor, 1200 Ontario Street, Cleveland OH 44113, this 3 day of SEPTEMBER, 2010.



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[Cite as *State v. Edmiston*, 2010-Ohio-3413.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93397

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LOGAN JOHN EDMISTON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART AND REMANDED
FOR RESENTENCING**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521013

BEFORE: Stewart, J., Kilbane, P.J., and Dyke, J.

RELEASED: July 22, 2010

JOURNALIZED:

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MELODY J. STEWART, J.:

{¶ 1} In a 12-count indictment, defendant-appellant Logan John Edmiston was charged with the offenses of burglary, kidnapping, pandering obscenity, and public indecency. After a bench trial, appellant was found guilty of public indecency as charged in Counts 4 and 11, both third degree misdemeanors, and pandering obscenity as charged in Count 5, a fifth degree felony. The trial court sentenced him to community control sanctions. Appellant was also designated a Tier I sex offender and, as a result, is required to register for 15 years with in-person verification annually.

{¶ 2} Appellant appeals his convictions and sentence raising five assignments of errors for our review. Following a review of the record, and for the reasons stated below, we affirm the convictions but reverse the sentences on the misdemeanor convictions and remand for resentencing.

{¶ 3} The charges against appellant arose from two incidents involving female residents of the Triangle Apartments in Cleveland. Suruchi Prakash, a medical student, testified that on May 30, 2008, she came home around midnight. She walked up the stairs from the garage to the lobby to get the elevator. As she got on the elevator, appellant suddenly appeared “out of nowhere” and entered the elevator with her. He pushed the button for the ninth floor and then stood behind her. As the elevator went up, appellant said, “I hope you don’t mind.” Ms. Prakash turned and saw that appellant had exposed himself and was masturbating. She turned away from him and, since the elevator was almost at her floor, waited for the door to open. She got off the elevator on her floor and went to her apartment. She reported the incident to apartment management the next morning.

{¶ 4} Laura Selig, a nursing student, testified that on July 5, 2008, she came home from work and then went to exercise in the gymnasium on the second floor of the apartment building. She left the gym at approximately 11:00 p.m. to go back to her apartment on the sixth floor. As she approached the elevator, appellant suddenly walked out of the stairwell and got on the

elevator in front of her. She stood in the front of the elevator with appellant behind her. He asked her, "Do you mind if I masturbate?" She turned and responded, "Yes, I mind." She saw that appellant had exposed himself and had his erect penis in his hand. She panicked and exited the elevator on the fifth floor. As she ran down the hallway, she looked back and saw appellant standing in the elevator doorway with his hands around his penis. She fled down the stairs and went out of the building to a friend's room in a nearby dormitory.

{¶ 5} In his first assignment of error, appellant contends that it was error to allow appellant to be prosecuted under a general statute where a statute of special application specifically covers the conduct alleged to constitute the criminal offense. Appellant argues that the conduct complained of constituted the specific misdemeanor offense of public indecency under R.C. 2907.09(A)(3) and, therefore, he cannot also be convicted under the general felony statute of pandering obscenity under R.C. 2907.32(A)(4), as both offenses are based upon a single course of conduct. Appellant argues that the situation in this case is analogous to that presented in *State v. Volpe* (1988), 38 Ohio St.3d 191, 527 N.E.2d 818. We disagree.

{¶ 6} Well-established principles of statutory construction require that specific statutory provisions prevail over conflicting general statutes. R.C. 1.51 states that:

{¶ 7} “If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.”

{¶ 8} In *State v. Volpe*, the Ohio Supreme Court found that R.C. 2915.02(A)(5) and 2923.24 were irreconcilable. R.C. 2923.24 generally made possession and control of criminal tools a felony of the fourth degree, whereas R.C. 2915.02(A)(5) specifically made possession and control of gambling devices a misdemeanor of the first degree. As such, the Ohio Supreme Court held that the specific statute concerning gambling devices, in particular, prevailed over the general statute that encompassed any criminal tool. The court reasoned that when the legislature makes the possession of specific items a misdemeanor, the felony criminal tools statute does not apply and, therefore, the general statute could not be used to charge and convict a person of possessing and controlling a gambling device as a criminal tool. *Id.* at 193-194.

{¶ 9} In this case, however, we find that R.C. 2907.32(A)(4) and R.C. 2907.09(A)(3) are not irreconcilable. R.C. 2907.09(A)(4) prohibits anyone from recklessly engaging in conduct that to an ordinary observer would

appear to be sexual conduct or masturbation “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.” R.C. 2907.32(A)(4) prohibits a person from advertising, promoting, presenting, or participating in the presentation of an obscene performance, when the performance is presented publicly or when admission is charged, and the person has knowledge of the obscene nature of performance.

{¶ 10} Because the crimes of public indecency and pandering obscenity have different elements and proscribe different conduct under different circumstances, a conviction for public indecency would not necessarily result in a conviction for pandering obscenity. Unlike in *Volpe*, this is not a situation where a specific statute prevails over a more general one. Appellant’s first assignment of error is overruled.

{¶ 11} For his second, third, and fourth assignments of error, appellant challenges both the weight and the sufficiency of the evidence supporting each of his three convictions.

{¶ 12} “The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different.” *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. Sufficiency is a test of adequacy. Whether the evidence is

legally sufficient to sustain a verdict is a question of law. *Id.* at 386. Weight of the evidence 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.” *Id.* at 387 (emphasis deleted). Weight is not a question of mathematics, but depends on its effect in inducing belief. *Id.*

{¶ 13} When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court examines 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 14} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten* (1986), 33 Ohio App.3d 339, 515 N.E.2d 1009, paragraph one of the syllabus. The discretionary power to

grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶ 15} We are mindful that the weight to be given the evidence and the credibility of the witnesses are matters primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact has the authority to “believe or disbelieve any witness or accept part of what a witness says and reject the rest.” *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.

Public Indecency

{¶ 16} Appellant was convicted in Counts 4 and 11 of public indecency, in violation of R.C. 2907.09(A)(3), which provides that “no person shall recklessly engage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation 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.”

{¶ 17} Appellant challenges his conviction on Count 11, involving the incident on the elevator with Ms. Selig on July 5, 2008, and argues that the state failed to show that he was masturbating in the elevator. He claims that the witness’ testimony is insufficient to demonstrate that he did anything more than merely expose himself to her. We do not agree.

{¶ 18} Masturbation has been defined to include the stimulation or the manipulation of one's genital organs. *State v. Marrero*, 9th Dist. No. 08CA009467, 2009-Ohio-2430, citing *City of Columbus v. Heck* (Nov. 9, 1999), Franklin App. No. 98AP-1384. In this case, Ms. Selig testified that appellant asked if she minded if he masturbated. When she turned to look at him, he had his penis out in his hand and was exposing himself. While Ms. Selig stated that she could not remember exactly if he was making any motion with his hands, she did testify that he had both hands around his erect penis. When asked by the court if she had observed appellant masturbating, she replied, "From my understanding of what masturbating is, yes." We find that the conduct the witness observed is such that an ordinary observer would believe that appellant had stimulated his genital organs and was, therefore, masturbating.

{¶ 19} Appellant further challenges the state's evidence and argues that the standard for determining criminal conduct for public indecency is not whether the conduct affronts a particular complainant, but rather whether it would affront the sensibilities of a "person of common intelligence." He contends that a 21-year-old nursing student who claims to have never seen male genitalia outside of a clinical setting, cannot be considered a "person of common intelligence" for determining whether his conduct "affronts." We find this argument to be completely lacking in merit. We refuse to find, as

appellant seems to suggest, that a person of common intelligence would not be affronted upon entering an elevator and discovering a man, with his penis exposed, who appeared to be masturbating. The state presented sufficient evidence that appellant committed an act of public indecency on July 5, 2008, and the conviction on that offense is not against the manifest weight of the evidence.

{¶ 20} Appellant also challenges his conviction for public indecency in Count 4 arising from the incident on the elevator on May 30, 2008 with Ms. Prakash. He argues that the trial court found him guilty of engaging in “sexual conduct,” which is defined by R.C. 2907.01(A) as, “vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another.” He contends that there is absolutely no evidence of any such conduct in the record and so the conviction must be reversed.

{¶ 21} Public indecency requires conduct that appears to be “sexual conduct or masturbation.” It is clear from the record that the only conduct alleged by the state or the witnesses was masturbation. We therefore find that the court simply misspoke when it stated the elements of the crime against Ms. Prakash as sexual conduct only. It is clear from the record that

the court's verdict was based upon a finding that appellant engaged in conduct that appeared to Ms. Prakash to be masturbation. Ms. Prakash testified that she turned around after appellant said, "I hope you don't mind" and she saw that he was "exposed and he was masturbating in the elevator." Accordingly, there is sufficient evidence that appellant committed an act of public indecency on May 30, 2008, and the conviction on that offense is not against the manifest weight of the evidence.

Pandering Obscenity

{¶ 22} Appellant challenges the weight and sufficiency of the evidence supporting the conviction for pandering obscenity in Count 5. R.C. 2907.32(A)(4) provides that: "No person, with knowledge of the character of the material or performance involved, shall * * * [a]dvertise or promote an obscene performance for presentation, or present or participate in presenting an obscene performance, when the performance is presented publicly, or when admission is charged."

{¶ 23} "Performance" is defined in R.C. 2907.01(K) as, "any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience." The definition of performance includes the notion of people acting with the expectation that they are being watched. *State v. Ferris* (Nov. 17, 1998), 10th Dist. No. 98AP-24.

{¶ 24} A performance is obscene if “[i]ts dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite.” R.C. 2907.01(F)(2).

{¶ 25} Black’s Law Dictionary defines “publicly” as: “Openly. In public, well known, open, notorious, common, or general, as opposed to private, secluded or secret.” Black’s Law Dictionary (5th Ed.1979) 1107.

{¶ 26} The state contends that by stating to Ms. Prakash, “I hope you don’t mind,” appellant was promoting an obscene performance with an intent to engage in such conduct in front of an audience. Appellant argues that the state failed to prove the necessary element of a “performance.” He contends that there is no difference between saying he “masturbated in public view” for the public indecency charges and that he “engaged in the performance of the act of masturbating in public view” for the pandering obscenity charge. We disagree.

{¶ 27} The definition of “performance” under R.C. 2907.01(F)(2) includes the notion of people acting with the expectation that they are being watched by an audience. *Ferris*. In *State v. Colegrove* (2000), 140 Ohio App.3d 306, 747 N.E.2d 303, this court found that a defendant had engaged in a “performance” when he offered two school girls money to watch him masturbate on a public street while he was in his vehicle. This court stated

that defendant “engaged in a performance by asking the girls to watch, opening the car door so that he could be watched, and then engaging in a sex act with the expectation of being watched.” *Id.* at 313.

{¶ 28} The public indecency statute does not require a performance, only that the offender’s conduct is “likely to be viewed” by others in the proximity. A defendant was found guilty of public indecency even though he tried to hide the fact that he was masturbating by placing a jacket over his lap. See *State v. Morman*, 2nd Dist. No. 19335, 2003-Ohio-1048. Another defendant was convicted after a hidden surveillance camera in a public restroom caught him appearing to masturbate, even though no one in the restroom actually saw him. *State v. Henry*, 151 Ohio App.3d 128, 2002-Ohio-7180, 783 N.E.2d 609.

{¶ 29} In the present case, the evidence shows that appellant engaged in a performance. By calling Ms. Prakash’s attention to the fact that he was masturbating in the elevator, appellant invited her to watch him perform an act that by definition, is obscene. Appellant’s performance was conducted openly, in a public area of the apartment building, with the expectation of being watched by an audience. Accordingly, we find the state presented sufficient evidence that appellant committed the offense of pandering obscenity on May 30, 2008, and the conviction on that offense is not against the manifest weight of the evidence.

{¶ 30} Appellant's second, third, and fourth assignments of error are overruled.

{¶ 31} In his fifth and final assignment of error, appellant asserts that the sentence imposed by the trial court is contrary to law. The judgment entry states that appellant was sentenced on Count 5, pandering obscenity, to three years of community control sanctions. On Counts 4 and 11, public indecency, the court sentenced appellant to a term of six months in county jail. The court suspended that sentence and placed appellant on three years probation to run concurrently with the community control sanctions imposed on Count 5.

{¶ 32} Counts 4 and 11 are misdemeanors of the third degree, punishable by a maximum jail term of 60 days. R.C. 2929.24(A)(3). The six-month sentence imposed by the court for these offenses is clearly contrary to law and must be reversed and the matter remanded for resentencing. The state concedes the error. Accordingly, the fifth assignment of error is sustained.

Judgment affirmed in part, reversed in part, and remanded for resentencing consistent with this opinion.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

ANN DYKE, J., CONCURS

MARY EILEEN KILBANE, P.J.,
CONCURS IN PART AND DISSENTS
IN PART WITH SEPARATE OPINION

MARY EILEEN KILBANE, P.J., CONCURRING IN PART AND
DISSENTING IN PART:

{¶ 33} I respectfully dissent from the portion of the majority's decision affirming appellant's conviction on Count 5, pandering obscenity, in violation of R.C. 2907.32(A)(4). While I agree that appellant's conduct constitutes public indecency, I would find that appellant's conduct does not meet the statutory requirements for pandering obscenity.

{¶ 34} Appellant was charged with public indecency, in violation of R.C. 2907.09(A)(3), which provides:

"No person shall recklessly * * * engage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation, in circumstances in which the person's conduct is likely to be viewed by or affront others who are in the person's physical proximity."

{¶ 35} Appellant masturbated in an elevator in close physical proximity to another individual. This conduct is clearly addressed by the public indecency statute, R.C. 2907.09(A)(3). However, his conduct did not rise to the level of pandering obscenity in violation of R.C. 2907.32(A)(4), which provides:

“[n]o person, with knowledge of the character of the material or performance involved, shall * * * [a]dvertise or promote an obscene performance for presentation, or present or participate in presenting an obscene performance, when the performance is presented publicly, or when admission is charged.”

{¶ 36} R.C. 2907.32(A)(4) requires a public performance. R.C. 2907.01(K) defines performance as “any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.” Appellant’s conduct of masturbating in an elevator occupied by only one other individual with her back to him cannot be said to fit into any of these categories.

{¶ 37} Webster’s Dictionary defines pandering as “a go-between in a sexual intrigue; esp. a procurer; pimp; a person who provides the means of helping to satisfy the ignoble ambitions or desires, vices, etc., of another.” Webster’s Second College Edition New World Dictionary (1970) 1024. In *State v. Albini* (1971), 29 Ohio App.2d 227, 235, 281 N.E.2d 26, pandering obscenity is defined as “the business of purveying pictorial or graphic matter openly advertised to appeal to the erotic interest of customers.” Clearly,

pandering obscenity is designed to address obscenity in the commercial context, and not an act against one individual.

{¶ 38} The only case the majority cites to in support of its position that appellant's conduct constituted a public performance is *Colegrove*. Although *Colegrove* discusses the definition of a performance, it does so with respect to R.C. 2907.31, dissemination of material harmful to juveniles, which is clearly distinguishable from the instant case. In *Colegrove*, the defendant's performance was public, as it was in front of multiple children, whom he specifically called over and paid to watch him on a public street. In the instant case, the majority relies on appellant's statement, "Do you mind if I masturbate?" However, I would find this statement insufficient to constitute a performance as defined by R.C. 2907.01(K).

{¶ 39} Consequently, I would reverse appellant's conviction on Count 5, pandering obscenity.