[Cite as *State v. Mullens*, 2018-Ohio-1594.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 17CA7
	:	
vs.	:	
	:	
MATTHEW J. MULLENS[1]	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	**Released: 04/18/18**

APPEARANCES:

Warren N. Morford, Jr., Ironton, Ohio, for Appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, Jeffrey M. Smith, Assistant Lawrence County Prosecuting Attorney, Ironton, Ohio, for Appellee.

McFarland, J.

{¶1} Matthew J. Mullens was convicted by a jury of one count of rape, R.C. 2907.02(A)(1)(b). Appellant appeals the trial court's May 15, 2017 "Judgment Entry, Final Appealable Order" and sets forth six assignments of error challenging his conviction. Having reviewed the record, we find the judgment appealed from is not, in actuality, a final appealable order and we have no jurisdiction to consider his appeal. Accordingly, the appeal is hereby dismissed.

[1] Here, as well as in the underlying pleadings and on the Ohio Department of Corrections website, Appellant's name is spelled "Mullins." However, on the notice of appeal and in the appellate briefs it is sometimes spelled "Mullens," as set forth above. It appears that when Appellant spelled his name for Detective Aaron Bollinger and signed a waiver of Miranda rights during the initial investigation, Appellant spelled his name "Mullens."

FACTS

{¶2} On March 29, 2016, Appellant was indicted on two counts of rape, R.C. 2907.02(A)(1)(B), a felony of the first degree, and gross sexual imposition, R.C. 2907.05(A)(4), a felony of the third degree. The counts stemmed from allegations that between November 1, 2015 and December 27, 2015, Appellant engaged in sexual conduct and sexual contact with his nephew, N.P., a child less than thirteen years old. After Appellant's statement was obtained by Detective Aaron Bollinger of the Lawrence County Sheriff's Department and Detective Bollinger filed a criminal affidavit, the indictment followed, and a warrant to arrest was issued for Appellant.

{¶3} Appellant was arraigned on April 5, 2016 and counsel was appointed to represent him. During the trial court proceedings, Appellant's counsel filed, along with discovery requests, a motion to suppress Appellant's recorded statement given to Detective Bollinger. After a hearing, the trial court overruled Appellant's motion.

{¶4} Appellant's counsel also filed a request for a competency evaluation, which was granted. Appellant subsequently filed a written plea of "Not Guilty by Reason of Insanity" ("NGRI") pursuant to Crim.R. 11(A). On October 5, 2016, the matter came on for hearing and the NGRI evaluation and competency

evaluation were admitted into evidence. The court's judgment entry of that date found that Appellant was competent to stand trial.

{¶5} On March 22, 2017, the State filed a motion pursuant to Ohio Evid.R. 807, requesting an order that the court admit the out-of-court recorded forensic interview of the four-year-old victim, N.P. After conducting a hearing on the motion and preparing a detailed decision, the trial court sustained the State's motion and issued a determination that the interview would be admissible at trial. The parties filed additional motions in preparation for the approaching jury trial.[2]

{¶6} Appellant's trial began on May 1, 2017. The State presented testimony from Jason Parsons, the victim's father; Tina Craft, a child abuse and neglect investigator with the Lawrence County Department of Job and Family Services; Deanna Ramey, a forensic interviewer for Hope's Place Child Advocacy Center; and Detective Aaron Bollinger. The trial court admitted State's Exhibits 1-8, although only 2-7 were to be submitted to the jury for deliberations. The State then rested.

{¶7} At this point, Appellant's counsel made a Crim.R. 29 motion which the trial court overruled. Appellant chose to testify and presented no other evidence. Upon the conclusion of trial, the jury returned a verdict of guilty of rape. The trial

[2] The State filed a motion requesting for an order in limine that Appellant be prevented from revealing the NGRI plea to the jury, or commenting or otherwise referring to his mental status as being a defense to the indictment or in the alternative, instructing the jury on all aspects of the NGRI plea. Appellant's counsel filed a motion in limine to prohibit the State from introducing the un-redacted audio or written transcript of Appellant's initial interview with Detective Bollinger at trial. At a final pretrial hearing, the parties agreed to redaction of the statement. Also, the State's motion became moot as Appellant agreed to withdraw his NGRI plea.

court subsequently imposed a sentence of fifteen years to life in the appropriate state penal institution and ordered that Appellant register as a Tier III sex offender.[3] This timely appeal followed.

ASSIGNMENTS OF ERROR

"I. THE JURY'S VERDICT OF GUILTY IS NOT SUPPORTED BY THE SUFFICIENT WEIGHT OF THE EVIDENCE.

II. THE JURY'S VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. THE STATE FAILED TO PROVE EACH AND EVERY ELEMENT OF THE OFFENSES CHARGED BY THE INDICTMENT.

IV. SHOULD THE BOLSTERING OF THE VICTIM'S STATEMENTS DURING A FORENSIC INTERVIEW AT HOPE'S PLACE BY THE STATE'S WITNESS, DETECTIVE SARGENT AARON BOLLINGER HAVE BEEN KEPT OUT OF TESTIMONY AS INVADING THE PROVINCE OF THE JURY?

V. THE APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESS(ES) AGAINST HIM IN OPEN COURT WAS VIOLATED, TO HIS MATERIAL DETRIMENT.

VI. THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT GIVEN TO DETECTIVE SARGENT AARON BOLLINGER."

JURISDICTION

{¶8} The Ohio Constitution limits an appellate court's jurisdiction to the

[3] The front page of the sentencing transcript reflects a date of May 9, 2017. However, the trial court opens the sentencing hearing by stating the date as May 10, 2017.

review of "final orders" of lower courts. *State v. Ellison,* 4th Dist. Highland No. 16CA16, 2017-Ohio-284, ¶ 20. Ohio Constitution, Article IV, Section 3(B)(2). In accordance with this constitutional directive, we " 'must sua sponte dismiss an appeal that is not from a final appealable order.' " *State v. Brewer*, 4th Dist. Meigs No. 12CA9, 2013-Ohio-5118, ¶ 5, quoting *State v. Marcum*, 4th Dist. Hocking Nos. 11CA8 and 11CA10, 2012-Ohio-572, ¶ 6.

{¶9} The General Assembly has enacted R.C. 2505.02 to specify which orders are final. *Ellison*, *supra,* at ¶ 21; *Smith v. Chen,* 142 Ohio St.3d 411, 2015-Ohio-1480, 31 N.E.3d 633, ¶ 8. To constitute a final appealable order under R.C. 2505.02, a judgment of conviction and sentence must satisfy the substantive provisions of Crim.R. 32(C) and include: (1) the fact of conviction; (2) the sentence; (3) the judge's signature; and (4) the time stamp indicating the entry upon the journal by the clerk. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph one of the syllabus.

{¶10} In this case, Appellant was indicted on two counts: rape and gross sexual imposition. The record reflects at his arraignment on April 5, 2016, the assistant prosecuting attorney made a motion to nolle count two, gross sexual imposition.[4] The trial court stated:

[4] It appears that count two listed Appellant's name correctly at first, but then later in the count referenced the wrong name twice. Count two also listed the victim by the incorrect initials.

> "Without objection, count two, at the request of counsel, subject to order of nolle prosequi, dismissed without prejudice. There's only a single count remaining then * * *."

{¶11} "It is axiomatic that a court speaks only through its journal entries." *State v. Payton*, 4th Dist. Scioto No. 14CA3628, 2015-Ohio-1796, ¶ 7, quoting *State ex rel. Collier v. Farley*, 4th Dist. Lawrence No. 05CA4, 2005–Ohio–4204, ¶ 18. "The oral announcement of a judgment or decree binds no one." *State v. Grube*, 4th Dist. Gallia No. 10CA16, 2012-Ohio-2180, ¶ 7, quoting *In re Adoptions of Gibson*, 23 Ohio St.3d 170, 492 N.E.2d 146, (1986), at fn. 3. The Supreme Court of Ohio has held that in criminal cases involving multiple counts, a final order need not contain a reiteration of those counts that were resolved on the record in other ways, such as dismissal, nolled counts, or not guilty findings. *Ellison, supra*, at ¶ 22; *State ex rel. Rose v. McGinty*, 128 Ohio St.3d 371, 2011-Ohio-761, 944 N.E.2d 672, ¶ 3. But unless the charges that do not result in conviction have been terminated by a journal entry, the hanging charges prevent the conviction from being a final order under R.C. 2505.02(B) because it does not determine the action by resolving the entire case. *See State v. Gillian*, 4th Dist. Gallia No. 15CA3, 2016-Ohio-3232, ¶ 6.

{¶12} In this case, we have reviewed the pleadings and have discovered that despite the discussion at arraignment, the second count of the indictment is repeatedly referenced in the documentation of the trial court proceedings. More

importantly, the record is devoid of any journal entry disposing of the second count. Therefore, the second count is a hanging charge which technically remains pending and thus, prevents the appealed from judgment entry from being a final order under R.C. 2505.02(B). Accordingly we have no jurisdiction to review Appellant's assignments of error and we dismiss the instant appeal.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

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

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.