[Cite as *State v. Klein*, 2009-Ohio-2886.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-080470 TRIAL NO. B-9700308
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
RICHARD KLEIN,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 19, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *J. Michael Keeling*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

J. Rhett Baker, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

DINKELACKER, Judge.

I. Facts and Procedure

{¶1} In 1997, following a jury trial, defendant-appellant, Richard Klein, was found guilty of one count of involuntary manslaughter,[1] one count of felonious assault,[2] and three counts of endangering children.[3] These convictions were the result of Klein scalding to death Matthew Richmond, the 12-year-old developmentally disabled son of his girlfriend.

{¶2} The trial court merged two of the child-endangering counts for sentencing. It sentenced Klein to ten years' imprisonment for involuntary manslaughter, eight years for felonious assault, and eight years and five years, respectively, for the remaining two counts of child endangering. The court ordered these sentences to be served consecutively, for a total of 31 years in prison.

{¶3} Subsequently, this court affirmed his convictions.[4] Specifically, we rejected his argument that his convictions involved allied offenses of similar import. The Ohio Supreme Court declined to review the case.[5]

{¶4} In 2008, Klein was returned to the Hamilton County Common Pleas Court for resentencing because, at his original sentencing hearing, the court had not informed him that he would be subject to postrelease control. The trial court imposed the same 31-year sentence that had previously been imposed and properly informed Klein that he would be subject to postrelease control. This appeal followed.

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[1] Former R.C. 2903.04.
[2] Former R.C. 2903.11(A)(1).
[3] Former R.C. 2919.22(A); Former R.C. 2912.22(B)(2) and (B)(3).
[4] *State v. Klein* (Dec. 3, 1999), 1st Dist. No. C-990666.
[5] *State v. Klein*, 106 Ohio St.3d 1480, 2005-Ohio-3978, 832 N.E.2d 734; *State v. Klein* (2001), 93 Ohio St.3d 1460, 756 N.E.2d 1256.

II. Defective Indictment—State v. Colon

{¶5} Klein presents two assignments of error for review. In his first assignment of error, he contends that he was prejudiced by a structural defect in the indictment. Specifically, he argues that the indictment's failure to include the essential elements of involuntary manslaughter in count two and endangering children in count six denied him his right to a proper indictment. This assignment of error is not well taken.

{¶6} In *State v. Colon (Colon I)*,[6] the Ohio Supreme Court permitted the defendant the raise the issue of a defective indictment for the first time on appeal. It held that the absence of a mens rea in the indictment, together with significant errors throughout trial, constituted structural error that warranted a reversal of the defendant's conviction.[7]

{¶7} Subsequently, the court clarified its holding in *Colon I* on a motion for reconsideration. In *State v. Colon (Colon II)*,[8] it stated that a structural-error analysis is appropriate only in rare cases in which multiple errors at trial follow the defective indictment. Generally, where the indictment is defective because it has not included an essential element and the defendant fails to object, courts should apply a plain-error analysis.[9]

{¶8} It does not seem appropriate to allow Klein to raise this issue at this juncture, over ten years after his original conviction following resentencing. But structural errors are, by definition, prejudicial and must result in a new trial.[10] Therefore, Klein can raise the defective-indictment issue at this time.

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[6] 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.
[7] Id. at ¶44; *State v. Sandoval*, 9th Dist. No. 07CA009276, 2008-Ohio-4402, ¶19.
[8] 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169.
[9] Id. at ¶8; *Sandoval*, supra, ¶19.
[10] *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶9; *State v. Canyon*, 1st Dist. Nos. C-070729, C-070730, and C-070731, 2009-Ohio-1263, ¶10.

{¶9} Further, *Colon II* does state that the holding in *Colon I* can only be applied prospectively to cases that were pending on its announcement date and can not be applied retroactively to a conviction where the accused had exhausted all of his appellate remedies.[11] First, the hearing in this case occurred after the supreme court's decision in *Colon I*, but before *Colon II*. Second, the court's failure to inform Klein about postrelease control at his original sentencing hearing rendered his original sentence void, as if it had never existed, and, therefore, his case was still pending.[12] Consequently, we address the defective-indictment issue on the merits.

{¶10} Klein argues that the indictment was defective because the involuntary-manslaughter count omitted an essential element of the offense, the predicate offense. Count two of the indictment stated that Klein had "caused the death of Matthew Richmond as a proximate result" of "committing or attempting to commit a felony, to wit: Endangering Children." He argues that he was also charged in the indictment with three counts of endangering children under different subsections of the statute, and that the indictment failed to specify the appropriate subsections. He points out that the prosecutor stated at a pretrial hearing and at trial that any of the three different counts of child endangering could serve as the predicate offense for the involuntary manslaughter. Thus, he contends, the failure to include the specific subsection of the predicate offense constituted structural error under *Colon I*. We disagree.

{¶11} Courts have held that an indictment for involuntary manslaughter need not specify the specific felony or misdemeanor forming the basis for the

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[11] *Colon II*, supra, at ¶3-4; *State v. Perry*, 11th Dist. No. 2008-T-0127, 2009-Ohio-1320, ¶9; *State v. Newbern*, 10th Dist. No. 08AP-768, 2009-Ohio-816, ¶12.
[12] *State v. Boswell*, ___ Ohio St.3d ___, 2009-Ohio-1577, ___ N.E.2d ___, ¶8; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, syllabus; *State v. Hampton*, 1st Dist. No. C-080187, 2008-Ohio-6088, ¶23-24.

charge.[13] Further, no authority exists for the proposition that the state may not offer more than one factual basis for an involuntary-manslaughter charge.[14] Consequently, the indictment in this case was not defective for failing to specify the subsection of the predicate offense.

{¶12} Klein also argues that count six failed to specify the mens rea for endangering children under R.C. 2919.22(A). The culpable mental state of recklessness is an essential element of endangering children under R.C. 2919.22(A).[15] Since the indictment failed to specify the mental state on that count, it was defective.

{¶13} Nevertheless, Klein never objected to the indictment or raised the issue in any way. The record shows that he had notice of the offenses with which he was charged. The trial court properly instructed the jury that it had to find that he had acted recklessly to find him guilty of count six. Despite Klein's claim to the contrary, the state never contended that mens rea was not a necessary element of the offense.

{¶14} Klein claims that the prosecutor told the jury that endangering children was a strict-liability offense when he stated in closing argument that "anyone in that custody who creates a substantial risk to health or safety of the child by violating a duty of care, protection or support is guilty." But Klein has taken the statement out of context. At the time he made that statement, the prosecutor was discussing the issue whether Klein had acted in loco parentis. He was not arguing that endangering children was a strict-liability offense.

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[13] *State v. Gibson*, 12th Dist. No. CA2007-08-187, 2008-Ohio-5932, ¶17; *State v. Davis*, 2nd Dist. No. 2002-CA-43, 2003-Ohio-4839, ¶69; *State v. Elam*, 129 Ohio Misc.2d 26, 2004-Ohio-7328, 821 N.E.2d 622, ¶8.
[14] *Gibson*, supra, at ¶17; *Elam*, supra, at ¶13.
[15] *State v. McGee*, 79 Ohio St.3d 193, 195, 1997-Ohio-156, 680 N.E.2d 975; *Massey v. State*, 1st Dist. No. C-010325, 2002-Ohio-718.

{¶15} The record does not show that Klein was prejudiced by the defect in the indictment or that the defect permeated the entire proceedings. Thus, this case is not that rare case that involves a structural defect.

{¶16} We must, therefore, apply a plain-error analysis. We cannot hold that, but for the error, the results of the proceeding would have been otherwise, or that we must reverse Klein's convictions to prevent a manifest miscarriage of justice. Consequently, the error did not rise to the level of plain error.[16] We overrule Klein's first assignment of error.

III. Allied Offenses of Similar Import

{¶17} In his second assignment of error, Klein contends that the trial court erred in failing to merge his convictions for felonious assault, involuntary manslaughter, and child endangering under subsection (B)(3). He argues that they were allied offenses of similar import. This assignment of error is not well taken.

{¶18} The state argues that we held in Klein's previous appeal that the same three offenses were not allied offenses of similar import. Therefore, the state contends, the law-of-the-case doctrine applies. It provides that "a decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both trial and reviewing court levels."[17] Thus, a trial court confronted with substantially the same facts and issues involved in a prior appeal is bound by the appellate court's determination of those issues.[18]

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[16] See *State v. Wickline* (1990), 50 Ohio St.3d 114, 119-120, 552 N.E.2d 913; *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 227, 448 N.E.2d 452; *State v. Brundage*, 1st Dist. No. C-030632, 2004-Ohio-6436, ¶15.
[17] *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410; *State v. Akemon*, 173 Ohio App.3d 709, 2007-Ohio-6217, 880 N.E.2d 143, ¶10.
[18] *Akemon*, supra, at ¶10.

{¶19} But as we have indicated under the previous assignment of error, because the court did not inform Klein about postrelease control, his original sentences were void, as if they never existed, and the court was required to sentence him anew.[19] Therefore, the issues and facts were not the same as in the prior appeal, and the law-of-the-case doctrine does not apply or prevent this court from deciding the issue. The Ohio Supreme Court has changed the analysis related to allied offenses, and our previous decision on the issue does not bar reconsideration.

A. The Test

{¶20} In *State v. Cabrales*,[20] the Ohio Supreme Court clarified the law of allied offenses. It began by stating that "[t]his court has recognized that R.C. 2941.25 requires a two-step analysis."[21]

{¶21} The first step requires a comparison of the elements of the offenses. If the elements correspond to such a degree that commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import.[22] The court in *Cabrales* clarified its previous decision in *State v. Rance*.[23] It stated, "It is clear that interpreting *Rance* to require a strict textual comparison under R.C. 2941.25(A) conflicts with legislative intent and causes inconsistent results. Accordingly, we clarify that in determining whether the offenses are allied offenses of similar import under R.C. 2941.25(A), *Rance* requires courts to compare the elements of the offenses in the abstract, i.e., without considering the evidence in the case, but does not require an exact alignment of the elements."[24]

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[19] See *Boswell*, supra, at ¶8; *Simpkins*, supra, at syllabus.
[20] 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.
[21] Id. at ¶14.
[22] Id.; *State v. Love*, 1st Dist. Nos. C-070782 and C-080078, 2009-Ohio-1079, ¶17.
[23] 85 Ohio St.3d 632, 1999-Ohio-291, 701 N.E.2d 699.
[24] *Cabrales*, supra, at ¶27.

{¶22} If the court finds that the offenses are allied offenses of similar import, it must proceed to the second step, which involves a review of the defendant's conduct to determine whether the offenses were committed separately or with a separate animus as to each. If the court determines that the offenses were committed separately, the defendant may be convicted of both offenses.[25]

{¶23} Subsequently, in *State v. Brown*,[26] the supreme court expanded the allied-offenses analysis.[27] It developed a preemptive exception, holding that resort to the two-tiered test is unnecessary when the legislature's intent is clear from the statutory language.[28] Under *Brown*, even if the offenses are not allied offenses of similar import under the two-part *Cabrales* test, the court must still determine whether the societal interests protected by the statutes are the same or distinct. Where the legislature has manifested an intent to protect separate and distinct societal interests in enacting two statutes, a defendant may be punished for both offenses.[29]

B. The Offenses

{¶24} We begin by noting that the offenses in this case occurred on January 1, 1997. Consequently, we discuss the versions of the statutes in effect at that time, although the language defining the offenses is the same in the current versions.

{¶25} Count two charged involuntary manslaughter. Former R.C. 2903.04(A) provided that "[n]o person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony." The predicate felony was endangering children under R.C. 2919.22, although the

[25] Id. at ¶14.
[26] 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149.
[27] *Love*, supra, at ¶21.
[28] *State v. Johnson*, 1st Dist. Nos. C-080156 and C-080158, 2009-Ohio-2568, ¶82.
[29] *Brown*, supra, at ¶35-40; *Love*, supra, at ¶21.

subsection was never specified. We note that the offenses of child endangering and involuntary manslaughter did not have to be merged simply because child endangering was the predicate offense for the involuntary-manslaughter conviction.[30]

{¶26} Klein acknowledges that count six, child endangering under former R.C. 2919.22(A), involved separate conduct, and he could, therefore, have been convicted and sentenced for that offense. Count five, endangering children under former R.C. 2919.22(B)(2), was merged with count four for sentencing. Consequently, the only conviction remaining to argue about is count four, endangering children under former R.C. 2919.22(B)(3). It provided that '[n]o person shall do any of the following to a child under eighteen years of age * * *: Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child[.]"

{¶27} Count three was felonious assault under former R.C. 2903.11(A)(1). It stated that "[n]o person shall knowingly * * * cause serious physical harm to another[.]"

C. Child Endangering—Unique Societal Interest

{¶28} This court recently decided *State v. Johnson*, in which the defendant was convicted of felony murder under R.C. 2903.02(B), with a predicate offense of child endangering under R.C. 2919.22(B)(1), and child endangering under the same subsection. We acknowledged that the two offenses were based on the same

[30] See *State v. Finley*, 1st Dist. No. C-061052, 2008-Ohio-4904, ¶43; *State v. Carroll*, 12th Dist. Nos. CA2007-02-030 and CA2007-03-041, 2007-Ohio-7075, ¶101-105.

conduct.[31] But we went on to hold that they were not allied offenses of similar import.

{¶29} We stated, "As we have mentioned earlier, in *Brown*, the Ohio Supreme Court developed a preemptive exception to the two-tiered test in *Rance*. The court held that resort to the two-tiered test 'is not necessary when the legislature's intent is clear from the language of the statute.' In determining legislative intent, the court compared the societal interests protected by the two statutes. It held that if the societal interests are similar, then the crimes are allied offenses of similar import. If, however, the societal interests are different, then the crimes are not allied offenses of similar import, and the court's analysis ends."[32]

{¶30} In *Johnson*, we relied on a case from the Fifth Appellate District, *State v. Morin*.[33] In that case, the court held that felonious assault and child endangering are offenses of dissimilar import because they protect different societal interests.[34] Citing *Morin*, we stated, "Central to its analysis was the recognition that the legislature intended to 'bestow special protection upon children' when 'crafting' the offense of child endangering."[35]

{¶31} We went on to hold in *Johnson* that "[i]n comparing the unique societal interest protected by the child-endangering statute to the societal interest protected by the felony-murder statute, which is to protect human life, we likewise conclude that the General Assembly intended to distinguish these offenses and to permit separate punishments for the commission of these two crimes. As a result, we

[31] *Johnson*, supra, at ¶93.
[32] Id. at ¶94, quoting *Brown*, supra, at ¶37.
[33] 5th Dist. No. 2008-CA-10, 2008-Ohio-6707.
[34] *Morin*, supra, at ¶43-58.
[35] *Johnson*, supra, at ¶95, quoting *Morin*, supra, at ¶57.

hold that the offense of felony murder and the offense of endangering children are not allied offenses of similar import."[36]

{¶32} The logic of *Johnson* applies to involuntary manslaughter and child endangering. The purpose of the involuntary-manslaughter statute, like the felony-murder statute, is to protect human life. Comparing the unique societal interest of the child-endangering statute to the societal interest protected by the involuntary-manslaughter statute, we hold that the General Assembly intended to distinguish these two offenses and to permit separate punishments for them. Therefore, they are not allied offenses of similar import.

{¶33} The same logic also applies to felonious assault. The purpose of the felonious-assault statute is to prevent physical harm to all persons.[37] A person of any age may be the victim of felonious assault, while a victim of child endangering must be under the age of 18.[38] The societal interests protected by the felonious-assault and child-endangering statutes differ. We hold that the General Assembly intended to distinguish the offenses and allow separate punishments for them. Therefore, they are not allied offenses of similar import.[39]

D. Involuntary Manslaughter and Felonious Assault

{¶34} Next, we must determine if felonious assault under former R.C. 2903.11(A)(1) and involuntary manslaughter are allied offenses of similar import. This court has held that felony murder and felonious assault are not allied offenses of similar import. We stated that "the legislature has manifested different intents with respect to felony murder and felonious assault. While the felonious-assault statute

[36] Id. at ¶96.
[37] *State v. Nesbitt*, 1st Dist. No. C-080010, 2009-Ohio-972, ¶32.
[38] *Morin*, supra, at ¶56.
[39] Id. at ¶58.

was designed to prevent physical harm to persons, the felony-murder statute was designed to protect human life."[40] The same logic applies to involuntary manslaughter and felonious assault. They protect different societal interests, and, therefore, they are not allied offenses of similar import.

{¶35} Accordingly, we hold that none of the offenses of which Klein complains are allied offenses of similar import, and that the trial court did not err in sentencing Klein to consecutive terms of imprisonment for involuntary manslaughter, felonious assault, and child endangering. We overrule his second assignment of error.

IV. Summary

{¶36} We find no merit in Klein's two assignments of error. Consequently, we affirm his convictions.

Judgment affirmed.

HILDEBRANDT, P.J., and **SUNDERMANN, J.,** concur.

Please Note:

The court has recorded its own entry this date.

[40] *Nesbitt*, supra, at ¶32.