

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

STATE OF OHIO,	:	Case No. 16CA875
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
CHARLES WOLFE,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 6/26/2017

APPEARANCES:

James T. Boulger, Chillicothe, Ohio, for appellant.

Robert Junk, Pike County Prosecuting Attorney, and Anthony A. Moraleja, Pike County Assistant Prosecuting Attorney, Waverly, Ohio, for appellee.

Harsha, J.

{¶1} The trial court convicted Charles Wolfe of vehicular assault for an offense that occurred in a construction zone. Although Wolfe seriously injured a construction worker while speeding, there were no signs notifying motorists of the enhanced provisions set forth in the statute prohibiting the injury of any person as a proximate result of a speeding offense in the construction zone.

{¶2} Wolfe asserts that the trial court erred in denying his motion for judgment of acquittal based on the uncontroverted evidence that there were no signs of the required nature posted in the construction zone. We agree. The R.C. 2903.08(A)(3) vehicular assault offense applies only when appropriate signs are present in the construction zone in accordance with the director's guidelines. R.C. 2903.081(B). Because there were no signs notifying persons of the enhanced penalties associated with the injury of any person proximately caused by speeding in the construction zone,

there is insufficient evidence to support Wolfe's conviction. Thus the trial court erred in denying his motion for judgment of acquittal.

{¶3} We sustain Wolfe's assignment of error, reverse his conviction, and remand the cause to the trial court with instructions to enter a judgment of acquittal.

I. FACTS

{¶4} Ohio State Highway Patrol Trooper David Johnson filed a complaint in the Pike County Court charging Charles Wolfe with vehicular assault in violation of R.C. 2903.08(A)(3). (OP1) Wolfe entered a plea of not guilty to the charge and waived his right to a jury trial. (OP3, 7) At the ensuing bench trial, the state introduced the following evidence.

{¶5} In the early summer of 2015, Ohio Department of Transportation ("ODOT") workers arrived and began placing three signs on each side of State Route 220, a two-lane, undivided highway, with traffic in each lane traveling in opposite east-west directions. (Tr. 8-13, 27-30, 47-48) The construction site was in Pike County near the Lake White area. (Tr. 8) The construction project, which involved working on a bridge, was estimated to take about three days, but it was ultimately finished in two. (Tr. 8-9, 28)

{¶6} The ODOT workers set up the three signs, which were spaced 1/10 of a mile apart from each other, leading up the construction site in both directions on State Route 220. (Tr. 12-13, 19, 29-30, 42) The last sign before the construction site was 1/10 of a mile before the site. (Tr. 56) The signs were diamond-shaped, with black lettering on a bright orange background, and were clearly visible to motorists approaching the construction area. (Tr. 11-13, 29-30, 48, St. Ex. A) The first sign

alerted motorists of "ROAD WORK AHEAD," the second sign notified approaching motorists of the "ONE LANE ROAD AHEAD," and the third sign included a silhouette of a flagger. (Tr. 11-12, St. Ex. A)

{¶17} Two of the workers exited an ODOT pickup truck, which had yellow overhead strobe lights on, to prepare flagging for the construction zone. (Tr. 15, 34, 37) The ODOT workers were dressed in bright-colored safety vests. (Tr. 15, 34) The maroon Chevrolet Astro minivan that Charles Wolfe was driving traveled very fast into the construction zone, forcing one of the ODOT workers, Tre' Lykins, to jump off the road into a ditch to avoid getting hit. (Tr. 33) Wolfe hit the brakes and swerved to the left, causing damage to the left taillight of the ODOT truck; Wolfe hit ODOT worker George Chaney, who was standing to the side of the truck. (Tr. 34) The impact sent Chaney to the other side of the road, where he landed underneath a guardrail. (Tr. 35) As a result of the accident, Chaney suffered many injuries, including a broken pelvis and a brain injury, and was unconscious for eight days. (Tr. 45-46)

{¶18} Trooper Johnson arrived on the scene of the accident after Chaney had been transported to a hospital. (Tr. 49) Johnson took a short statement from Wolfe, who claimed that he had come from a mental health center and was thinking about someone, when he looked up and saw the parked ODOT truck just before he hit it and Chaney. (Tr. 49) Wolfe claimed that he was traveling about 40 to 45 miles per hour at the time, in an area that had a 55 mph speed limit. (Tr. 49, 56)

{¶19} The state's witnesses confirmed that no sign posted by ODOT workers that day contained a statement of the statutory prohibitions for causing death or injury to any person by speeding in a construction zone or the doubling of fines. (Tr. 24, 42, 57)

{¶10} At the conclusion of the state’s case Wolfe’s counsel moved for a judgment of acquittal pursuant to Crim.R. 29. (Tr. 58) He argued that there could be no vehicular assault under R.C. 2903.08(A)(3) because the uncontroverted evidence established that there was no sign posted notifying motorists of the penalties set forth in the statute for the injury of any person as a proximate result of a speeding offense in the construction zone. (*Id.*) After the state presented its argument against the motion, the trial court noted that the motion did not raise “an easy decision” and denied it. (Tr. 88-89) Wolfe’s counsel stated that he was not going to present evidence and renewed the Crim.R. 29 motion. (Tr. 90) The trial court denied the renewed motion and found Wolfe guilty of vehicular assault. (Tr. 90) It subsequently sentenced Wolfe to seven days in jail and suspended his driver’s license for five years. (OP10) This appeal followed.

II. ASSIGNMENT OF ERROR

{¶11} Wolfe assigns the following error for our review:

THE STATE HAVING FAILED TO PRESENT EVIDENCE SUFFICIENT TO PROVE A VIOLATION OF 2903.08(A)(3) R.C., THE TRIAL COURT ERRED IN DENYING THE DEFENDANT’S MOTION FOR JUDGMENT OF ACQUITTAL.

III. STANDARD OF REVIEW

{¶12} Wolfe contests the trial court’s denial of his motion for judgment of acquittal. Under Crim.R. 29(A), “[t]he court on motion of a defendant * * *, after the evidence on either side is closed, shall order the entry of acquittal * * *, if the evidence is insufficient to sustain a conviction of such offense or offenses.” “A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence.” *State v. Tenace*, 109 Ohio St.3d

255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37; *State v. Husted*, 2014-Ohio-4978, 23, 23 N.E.3d 253, ¶ 10 (4th Dist.).

{¶13} “When a court reviews a record for sufficiency, ‘[t]he 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. Maxwell*, 139 Ohio St.3d 12, 9 N.E.3d 930, 2014-Ohio-1019, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In making its ruling a court does not weigh the evidence but simply determines whether the evidence, if believed, is adequate to support a conviction. In other words, the motion does not test the rational persuasiveness of the state's case, but merely its legal adequacy. *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 17.

{¶14} This case also involves statutory construction, which raises a question of law that we review de novo. See *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 318, ¶ 25, quoting *Lang v. Ohio Dept. of Job & Family Servs.*, 134 Ohio St.3d 296, 2012-Ohio-5366, 982 N.E.2d 636, ¶ 12 (“ ‘A question of statutory construction presents an issue of law that we determine de novo on appeal’ ”); see also *Mollette v. Portsmouth City Council*, 179 Ohio App.3d 455, 2008-Ohio-6342, 902 N.E.2d 515, ¶ 20 (4th Dist.), quoting *Covert v. Ohio Aud. of State*, 4th Dist. Scioto No. 05CA3044, 2006-Ohio-2896, 2006 WL 1570598, at ¶ 18 (“ ‘Generally, statutory construction is a legal issue that appellate courts review de novo’ ”).

IV. LAW AND ANALYSIS

{¶15} In his assignment of error Wolfe asserts that the trial court erred by denying his motion for judgment of acquittal because the state failed to present evidence sufficient to establish a violation of R.C. 2903.08(A)(3), which provides:

(A) *No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in any of the following ways:*

* * *

(3) *As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a speeding offense, provided that this division applies only if the person to whom the serious physical harm is caused or to whose unborn the serious physical harm is caused is in the construction zone at the time of the offender's commission of the speeding offense in the construction zone and does not apply as described in division (E) of this section.*

(Emphasis added.)

{¶16} Our primary concern when construing statutes is legislative intent. *State v. J.M.*, — Ohio St.3d —, 2016–Ohio–2803, — N.E.3d —, ¶ 7. In determining that intent we first look to the plain language of the statute. *Id.* Terms that are undefined by statute are given their plain, common, and ordinary meaning. *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 46, citing R.C. 1.42; *State v. Erskine*, 2015-Ohio-710, 29 N.E.3d 272, ¶ 26 (4th Dist.). When a statute's language is clear and unambiguous, we apply it as written without interpreting or construing it. *J.M.* at ¶ 12.

{¶17} Wolfe does not deny that the state introduced evidence that he proximately caused serious physical harm to another person—George Chaney—in the

construction zone—the State Route 220 repair area—by speeding¹ while operating his motor vehicle in that zone. Instead, he claims that he was not guilty of the offense because by its own terms, R.C. 2903.08(A)(3) “does not apply as described in division (E)” of the statute.

{¶18} R.C. 2903.08(E) provides:

Divisions (A)(2)(a) and (3) of this section do not apply in a particular construction zone unless signs of the type described in section 2903.081 of the Revised Code are erected in that construction zone in accordance with the guidelines and design specifications established by the director of transportation under section 5501.27 of the Revised Code. The failure to erect signs of the type described in section 2903.081 of the Revised Code in a particular construction zone in accordance with those guidelines and design specifications does not limit or affect the application of division (A)(1) or (2)(b) of this section in that construction zone or the prosecution of any person who violates either of those divisions in that construction zone.

(Emphasis added.)

{¶19} Because R.C. 2903.08(E) references R.C. 2903.081 and 5501.27, these provisions must be read in pari materia. “This rule of statutory construction provides that statutes relating to the same subject matter should be construed together so that the legislature's intent can be gathered from the whole of the enactments.” *Am. Metal Works, L.L.C. v. Waverly*, 2017-Ohio-135, ___ N.E.3d ___, fn. 2; see also *Chesapeake Exploration, L.L.C. v. Oil & Gas Comm.*, 135 Ohio St.3d 204, 2013-Ohio-224, 985 N.E.2d 480, ¶ 14 (“Because these statutes relate to the same subject matter, they are considered in pari materia so as to give full effect to the provisions”).

¹ At trial, Wolfe also argued that the state presented insufficient evidence that he was speeding when the accident occurred, but he does not raise this claim on appeal and we thus do not address it.

{¶20} R.C. 2903.081(B) requires the director of transportation or agents to erect signs in construction zones notifying motorists of the prohibitions in R.C. 2903.08 for the injury of persons in the construction zone resulting from a speeding offense in that zone. It also provides that vehicular assault in violation of R.C. 2903.08(A)(3) applies only when appropriate signs are erected in that construction zone . The statute reads:

The director of transportation, board of county commissioners, or board of township trustees shall cause signs to be erected in construction zones notifying motorists of the prohibitions set forth in sections 2903.06 and 2903.08 of the Revised Code regarding the death of or injury to any person in the construction zone as a proximate result of a reckless operation offense or speeding offense in the construction zone. *The prohibitions set forth in divisions (A)(2)(b) and (3)(b) of section 2903.06 and divisions (A)(2)(a) and (3) of section 2903.08 of the Revised Code apply to persons who commit a reckless operation offense or speeding offense in a particular construction zone only when signs of that nature are erected in that construction zone in accordance with the guidelines and design specifications established by the director under section 5501.27 of the Revised Code.* The failure to erect signs of that nature in a particular construction zone in accordance with those guidelines and design specifications does not limit or affect the application of division (A)(1), (A)(2)(a), (A)(3)(a), or (A)(4) of section 2903.06 or division (A)(1) or (2)(b) of section 2903.08 of the Revised Code in that construction zone or the prosecution of any person who violates either of those divisions in that construction zone.

(Emphasis added.)

{¶21} Under R.C. 5501.27(A), “[t]he director of transportation shall adopt: * * * (2) Rules governing the posting of signs to be used pursuant to section 2903.081 of the Revised Code giving notice to motorists of the prohibitions set forth in sections 2903.06 and 2903.08 of the Revised Code ... (.)” R.C. 5501.27(B) further mandates that the director “shall include guidelines to determine which areas are appropriate to the posting of such signs”:

The rules required under divisions (A)(1) and (2) of this section shall include guidelines to determine which areas are appropriate to the posting

of such signs. The guidelines may include consideration of the following: the duration of the work on the street or highway, the proximity of workers to moving traffic, the existence of any unusual or hazardous conditions, the volume of traffic on the street or highway, and any other appropriate factors. The director shall formulate design specifications for the signs described in division (A)(1) of this section advising motorists of the increased penalties and the signs described in division (A)(2) of this section notifying motorists of the prohibitions set forth in sections 2903.06 and 2903.08 of the Revised Code regarding the death of or injury to any person in a construction zone as a proximate result of a reckless operation offense or speeding offense as described in that division. For purposes of traffic violation penalties, nothing in this section is intended to conflict with any standard set forth in the federal manual of uniform traffic control devices for streets and highways.

(Emphasis added.)

{¶22} In accordance with this statutory authority, the director of transportation promulgated Ohio Adm.Code 5501:2-10-02(A), which provides that the signs specified in these statutes are mandatory in certain construction zones and discretionary in others:

The state department of transportation, county commissioners or board of township trustees (agencies) shall authorize the posting of signs indicating that traffic fines are doubled for speeding within selected construction zones under their respective jurisdictions, and that penalties for killing or injuring any person within those construction zones are increased. This provision shall apply in any construction zone on a multi-lane divided highway where the work is expected to last thirty days or more, if the planned work length is at least one-half mile long, and if the construction zone is stationary. The signs may be erected in any other construction zone at the discretion of the director of transportation. Signs may be erected for construction zones located on other highways meeting the foregoing requirements if required by the agency's procedures adopted under paragraph (C) of this rule or at the discretion of the director of transportation.

(Emphasis added.)

{¶23} After construing these provisions in pari materia, we agree with Wolfe's interpretation of the disputed provisions. The express language of R.C. 2903.08(A)(3),

(E), and 2903.081(B) provides that vehicular assault under R.C. 2903.08(A)(3) is inapplicable in the absence of appropriate signs posted notifying motorists of the prohibition.

{¶24} The state creatively argues that the phrase in R.C. 2903.08(E) and 2903.081(B) “in accordance with the guidelines and design specifications established by the director under” R.C. 5501.27 vests the director of transportation with discretion to determine which road construction projects are required to have these signs. We are not persuaded that the phrase authorizes the director to exempt certain road construction projects from the notice requirement for criminal prosecution of vehicular assault offenses under R.C. 2903.08(A)(3). We agree that this phrase authorizes the director of transportation to issue guidelines “to determine which areas are appropriate to the posting of such signs,” including a consideration of “the duration of the work on the street or highway, the proximity of workers to moving traffic, the existence of any unusual or hazardous conditions, the volume of traffic on the street or highway, and any other appropriate factors.” R.C. 5501.27(B). But the language does not suggest, much less expressly provide, that once the director determines which road construction projects do not require these signs, prosecution under R.C. 2903.08(A)(3) is available without any notification to motorists of the prohibition.

{¶25} At best, as the state appears to concede, these various statutes are ambiguous. See Appellee’s Brief, p. 12 (“The more difficult determination is what the legislative intent was regarding whether the lack of a particular sign being posted would entirely prohibit the prosecution of a driver who caused serious physical harm to another while speeding through a construction zone”).

{¶26} In fact, the state suggests that we review the legislative history to determine the General Assembly's intent in enacting these provisions. The Title to Sub. H.B. No. 52, which enacted these provisions in 2004, indicated that the legislative purpose was "to expand the offense[] of * * * vehicular assault to also prohibit causing death or serious physical harm as a proximate result of committing a reckless operation or speeding violation in a construction zone when the victim is any person in the construction zone *and notice of the prohibitions was posted.*" (Emphasis added.) 2004 Ohio Laws 86. Although the title of an act is not dispositive, it can be helpful in determining the legislative intent. See *Carter v. Reese*, 148 Ohio St.3d 226, 2016-Ohio-5569, 70 N.E.3d 478, ¶ 27.

{¶27} Moreover, insofar as the language of the pertinent statutes is reasonably susceptible of more than one interpretation on the dispositive issue, we must liberally construe it in favor of motorists accused of vehicular assault under R.C. 2903.08(A)(3). See R.C. 2901.04(A) ("sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused"); *State v. Stevens*, 139 Ohio St.3d 247, 2014-Ohio-1932, 11 N.E.3d 252, ¶ 12 (plurality decision), quoting *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 38 ("the rule of lenity requires that a court 'not interpret a criminal statute so as to increase the penalty it imposes on a defendant if the intended scope of the statute is ambiguous' "). A liberal construction of the pertinent provisions supports Wolfe's construction that a posted sign warning of the prohibition in R.C. 2903.08 is a prerequisite to the commission of vehicular assault under R.C. 2903.08(A)(3).

{¶28} Our interpretation of the second sentence in R.C. 2903.081 to limit the application of R.C. 2903.08(A)(3) only to construction zones where proper signs exists is bolstered by reading it in context with the first and third sentences in that same statute. The first sentence appears to place a mandatory duty on the director of transportation, board of county commissioners, or board of trustees to post these signs in construction zones by using the language “shall cause.” However, the third sentence notes that “[t]he failure to erect signs of that nature in a particular construction zone in accordance with the guidelines and design specifications *does not limit or affect the application of division (A)(1), (A)(2)(a), (A)(3)(a), or (A)(4) of section 2903.06 of the Revised Code or division (A)(1) or (2)(b) of section 2903.08 of the Revised Code in that construction zone or the prosecution of any person who violates either of those divisions in that construction zone.*” (Emphasis added.) The General Assembly has thus clearly and unambiguously exempted more egregious vehicular offenses, including aggravated vehicular homicide, vehicular homicide, and vehicular manslaughter prohibited by R.C. 2903.06, and vehicular assault arising from more culpable conduct prohibited by other sections of R.C 2903.08, from the sign notice requirement. If it had intended to exempt vehicular assault involving serious physical harm caused by speeding in a construction zone under R.C. 2903.08(A)(3) from this requirement, it could have easily done so with similar unambiguous language. But it did not.

{¶29} After construing the statutes in pari materia and resolving any ambiguity in these provisions in favor of motorists accused of vehicular assault under R.C. 2903.08(A)(3), we hold that in the absence of any evidence of a sign posted in the construction zone notifying motorists of the prohibition set forth in R.C. 2903.08, Wolfe

was entitled to a judgment of acquittal. Because the trial court thus erred by denying Wolfe's motion, we sustain Wolfe's sole assignment of error.

V. CONCLUSION

{¶30} Having sustained Wolfe's assignment of error, we reverse the judgment of the trial court convicting and sentencing him for vehicular assault and remand the cause to that court to enter a judgment of acquittal discharging Wolfe.

JUDGMENT REVERSED
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County 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.

For the Court

BY: _____
William H. Harsha, Judge

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.