[Cite as *State v. Marzolf*, 2009-Ohio-3001.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 24459
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ROBERT S. MARZOLF	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 07 2224

DECISION AND JOURNAL ENTRY

Dated: June 24, 2009

WHITMORE, Judge,

{¶1} Defendant-Appellant, Robert Marzolf, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} In the early days of July 2008, several residents of Fairbanks Place witnessed an elderly man, later identified as Marzolf, interact with several small children on the street. One resident witnessed Marzolf walking a puppy up and down the street several times until he attracted the attention of her five-year-old son and his friend, a five-year-old girl. The resident, Stephanie Brown, indicated that she had to stop the children from leaving the street with Marzolf, who was leading the children away and telling them to "come on." Another resident witnessed Marzolf grab her eight-year-old step-brother at the park and tell the eight-year-old to come with him. These incidents caused the residents of Fairbanks Place to notify the police of Marzolf's actions.

{¶3} From July 1, 2008 to July 3, 2008, several officers interviewed Marzolf at his residence. Marzolf admitted that he had asked the two five-year-old children to come with him, but said that he only wanted them to come to his house to play slot machines. Marzolf stated that he did not say anything to the children about sex, but told the police that he thought sex with children should be legalized. He also told officers that he had been convicted of gross sexual imposition thirty years earlier for an incident involving a five-year-old girl. Marzolf admitted that he was still attracted to young girls, but told officers that he had great self-restraint.

{¶4} On July 21, 2008, the grand jury indicted Marzolf on three counts of criminal child enticement, all fifth-degree felonies based on Marzolf's prior gross sexual imposition offense. The matter proceeded to a jury trial on September 22, 2008. The jury found Marzolf guilty on all three counts, and the trial court sentenced him to a total of three years in prison and classified him as a Tier I sex offender/child-victim offender.

{¶5} Marzolf now appeals from his convictions and raises three assignments of error for our review.

II

Assignment of Error Number One

> "APPELLANT MARZOLF'S CONVICTIONS FOR THREE COUNTS OF CRIMINAL CHILD ENTICEMENT ARE VOID AS A MATTER OF LAW, AS THE INDICTMENT FAILED TO CHARGE AN OFFENSE ON ANY AND ALL OF THE THREE COUNTS ALLEGED, AND THEREFORE THE TRIAL COURT WAS WITHOUT SUBJECT MATTER JURISDICTION TO ENTER JUDGMENTS OF CONVICTION ON THESE CHARGES."

{¶6} In his first assignment of error, Marzolf argues that his convictions are void because the State indicted him and the jury convicted him under the version of R.C. 2905.05 that is no longer in effect. Marzolf further argues that even if the State properly indicted him under a

former version of R.C. 2905.05, his convictions are still void because the indictment and the State's evidence omitted essential elements of the crime of child enticement.

{¶7} "A judgment of conviction based on an indictment which does not charge an offense is void[able] for lack of jurisdiction of the subject matter[.]" *State v. Cimpritz* (1953), 158 Ohio St. 490, paragraph six of the syllabus, modified by *Midling v. Perrini* (1968), 14 Ohio St.2d 106, syllabus. Jurisdiction is a question of law, which this Court reviews de novo. *CommuniCare Health Servs., Inc. v. Murvine*, 9th Dist. No. 23557, 2007-Ohio-4651, at ¶13, citing *State v. Wells* (Dec. 11, 2000), 12th Dist. No. CA99-10-174, at *2.

{¶8} R.C. 2905.05 provides, in relevant part, as follows:

> "(A) No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice, or lure any child under fourteen years of age to accompany the person in any manner ***, whether or not the offender knows the age of the child, if both of the following apply:
>
> "(1) The actor does not have the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity.
>
> "(2) The actor is not a law enforcement officer, medic, firefighter, or other person who regularly provides emergency services, and is not an employee or agent of, or a volunteer acting under the direction of, any board of education ***.
>
> "(B) No person, with a sexual motivation, shall violate division (A) of this section.
>
> "(C) It is an affirmative defense to a charge under division (A) of this section that the actor undertook the activity in response to a bona fide emergency situation or that the actor undertook the activity in a reasonable belief that it was necessary to preserve the health, safety, or welfare of the child.
>
> "(D) *** If the offender previously has been convicted of a violation of this section, section 2907.02 or 2907.03 or former section 2907.12 of the Revised Code, or section 2905.01 or 2907.05 of the Revised Code when the victim of that prior offense was under seventeen years of age at the time of the offense, criminal child enticement is a felony of the fifth degree."

Subsection (A) of the former version of R.C. 2905.05 is identical to subsection (A) of the current version of R.C. 2905.05. Furthermore, the content of both the affirmative defense and penalty

section portions of the statutes are nearly identical. Current R.C. 2905.05's addition of subsection (B), involving an offender's sexual motivation, represents the key difference between the former and current versions of the statute. Before the sexual motivation subsection of the statute existed, the affirmative defense and penalty section portions of the statute were contained in subsections (B) and (C) respectively.

{¶9} Marzolf's indictment provided, in relevant part, as follows:

> "ROBERT S. MARZOLF *** did commit the crime of CRIMINAL CHILD ENTICEMENT, in that he did by any means and without privilege to do so, knowingly did solicit, coax, entice, or lure *** a child under fourteen years of age *** to accompany ROBERT S. MARZOLF in any manner *** whether or not the offender knows the age of the child when the offender does not have the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity, and ROBERT S. MARZOLF has been convicted previously of a violation of this Section, Section 2907.02, 2907.03, or 2907.12 of the Revised Code, or Section 2905.01 or 2907.05 of the Revised Code when the victim of that prior offense was under seventeen years of age at the time of the offense, in violation of Section 2905.05(A)(1)/(C) of the Ohio Revised Code, A FELONY OF THE FIFTH DEGREE[.]"

Marzolf points to the language "in violation of Section 2905.05(A)(1)/(C)" as evidence that the State indicted him under the former version of R.C. 2905.05. Marzolf argues that because the current version of R.C. 2905.05(C) sets forth an affirmative defense to criminal child enticement, the State must have indicted him under the former version of the statute, whose subsection (C) contained the statute's penalty section. The State concedes that Marzolf's indictment charged him with a "violation of Section 2905.05(A)(1)/(C)," but argues that the reference to subsection (C) was a typographical error. According to the State, Marzolf's indictment should have read "in violation of Section 2905.05(A)(1)/(D)." As previously noted, subsection (D) of the current version of R.C. 2905.05 contains the statute's penalty section and specifies that the crime of criminal child enticement is a felony, rather than a misdemeanor, when an offender previously committed one of the enumerated offenses.

{¶10} A typographical error in an indictment, even if carried through to the trial court's journal entry, will not affect the validity of a conviction unless it misleads or prejudices a defendant. *State v. Rosak* (Mar. 31, 1993), 9th Dist. No. 15851, at *7-8, citing *State v. Zucallo* (Aug. 24, 1988), 9th Dist. No. 13493, at *3. Based on our review of the record, however, we cannot conclude that the State's reference to subsection (C) was only a typographical error. Marzolf's indictment and the trial court's judgment entry refer to subsection (C) in the context of discussing the penalty applicable to the offense. Subsection (C) of former R.C. 2905.05, not current R.C. 2905.05, contained the statute's penalty section. Moreover, in describing the penalty, Marzolf's indictment provided: "ROBERT S. MARZOLF has been convicted previously of a violation of this Section, Section 2907.02, 2907.03, or 2907.12 of the Revised Code, or Section 2905.01 or 2907.05 of the Revised Code[.]" The foregoing language tracks the former version of R.C. 2905.05. The current version of R.C. 2905.05 contains the following language: "has been convicted of a violation of this section, section 2907.02 *or* 2907.03 or *former* section 2907.12 of the Revised Code, or section 2905.01 or 2907.05 of the Revised Code[.]" (Emphasis added.) Marzolf's indictment omits the word "or" before "2907.03" and the word "former" before "section 2907.12." Those omissions are consistent with the former, not the current version of the statute. Accordingly, it would appear that the State relied upon former R.C. 2905.05 in indicting Marzolf on three counts of criminal child enticement.

{¶11} This conclusion, however, does not equate to a conclusion that Marzolf's convictions are voidable because his indictment "[did] not charge an offense." *Cimpritz*, 158 Ohio St. at paragraph six of the syllabus, modified by *Midling*, 14 Ohio St.2d at syllabus. "Although the statute cited in the charging documents was no longer in effect, the criminal offense of [criminal child enticement] was still embodied in the [Revised] Code." *People v.*

Melton (1996), 282 Ill.App.3d 408, 415. The subsection of criminal child enticement with which the State charged Marzolf, subsection (A), did not change from the former to the current version of the statute. Subsection (A) is identical in both versions. Moreover, the references to subsection (C) in Marzolf's indictment were harmless as it would have been impossible for the State to charge Marzolf with an affirmative defense. Rather than misleading him, the references to subsection (C) in Marzolf's indictment should have put him on notice that his indictment contained an error. Marzolf has not demonstrated that the State's citation to former R.C. 2905.05 affected his substantial rights. Id. (concluding that defendant was not prejudiced by State's reliance on former statute when defendant was still apprised of the elements of the offense); *People v. Dearmin* (May 11, 2006), Mich.App. No. 259432, at *1-3 (applying the test of whether two versions of a statute were substantially different so as to effect the defendant's substantial rights where the State charged the defendant under the statute's former version). See, also, *Daker v. Williams* (2005), 279 Ga. 782, 785 (noting that even though a defendant was indicted under a statute repealed before his conviction, "[a] conviction may stand if it was authorized under both the original definition of the crime and the revised definition contained in the statutory amendment").

{¶12} Similarly, Marzolf has not demonstrated prejudice as a result of the State's failure to include subsection (A)(2) in his indictment. Crim.R. 7(B) provides, in relevant part, that:

> "Each count of the indictment *** shall state the numerical designation of the statute that the defendant is alleged to have violated. Error in the *** omission of the numerical designation shall not be ground for *** reversal of a conviction, if the error or omission did not prejudicially mislead the defendant."

R.C. 2905.05(A) provides that an individual is guilty of criminal child enticement if both subsections (A)(1) and (2) apply. Marzolf was indicted under subsection (A). Even if his indictment only listed subsection (A)(1), a plain language reading of R.C. 2905.05 would have

notified him that subsection (A)(2) was also applicable. See *State v. Salupo*, 9th Dist No. 07CA009233, 2008-Ohio-3721, at ¶15 (concluding that indictment was sufficient to put defendant on notice of the elements of the offense of telecommunications harassment). Accordingly, there is no indication that the omission in Marzolf's indictment was misleading.

{¶13} Furthermore, the evidence at trial sufficed to demonstrate that (A)(2) applied in this case. To be guilty of criminal child enticement, an individual must not be "a law enforcement officer, medic, firefighter, or other person who regularly provides emergency services, [or] an employee or agent of, or a volunteer acting under the direction of, any board of education" who is acting within the scope of his duties. R.C. 2905.05(A)(2). Several neighbors testified that Marzolf was an elderly man who walked over to their neighborhood from his nearby street. All of the parents or guardians of the children that Marzolf approached testified that he did not have permission to interact with their child. In one instance, Marzolf approached two children with a puppy, allowed the children to pet the puppy, and then tried to get the children to follow him to his home. Marzolf's own explanation was that he wanted "to bring the children to his house to play slot machines." In the other instance, Marzolf grabbed a child by "some bushes" at the park and told the child: "Come with me. Come talk in private." There is not a scintilla of evidence in the record to suggest that Marzolf was one of the individuals listed in R.C. 2905.05(A)(2). Indeed, the foregoing evidence demonstrates that Marzolf was not one of these individuals. See *State v. Smith* (Apr. 15, 2002), 12th Dist. No. CA2001-01-009, at *2. As such, Marzolf was not prejudiced as a result of the State's failure to include subsection (A)(2) in his indictment. Crim.R. 7(B).

{¶14} Finally, Marzolf argues that his convictions are voidable because his indictment failed to specify that he acted with sexual motivation under subsection (B) of the current version

of R.C. 2905.05. The current version of R.C. 2905.05 does not appear to include sexual motivation as an element that the State is required to prove in order to obtain a conviction under R.C. 2905.05(A). R.C. 2905.05(A) does not refer to R.C. 2905.05(B). R.C. 2905.05(B) only provides that: "No person, with a sexual motivation, shall violate division (A) of this section." The statute in no way links subsections (A) and (B) together. While it appears that the State could charge an individual with violating both R.C. 2905.05(A) and (B), the current version of the statute does not require that result. As such, Marzolf's argument that the State was required to indict him under R.C. 2905.05(B) lacks merit.

{¶15} Marzolf's argument that his convictions are voidable lacks merit. Despite its reliance upon former R.C. 2905.05, Marzolf's indictment charged an offense. Moreover, the evidence presented at trial supports a conviction for criminal child enticement under the current version of R.C. 2905.05. Much like Marzolf's indictment, however, the trial court's journal entry incorrectly refers to Marzolf's crime as being a violation of "Ohio Revised Code Section 2905.05(A)(1)/(C)." App.R. 12(B) provides that "where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly." Here, the trial court's judgment entry should be modified to replace reference to subsection (C) of R.C. 2905.05 with a reference to subsection (D) of R.C. 2905.05. See *Rosak*, at *8. To the extent that Marzolf's assignment of error seeks other relief, it is overruled.

Assignment of Error Number Two

> "THE FAILURE OF THE TRIAL COURT TO FIND AND RULE THAT R.C.2905.05 IS UNCONSTITUTIONAL ON ITS FACE AND/OR AS APPLIED TO APPELLANT MARZOLF IN THE PRESENT CASE CONSTITUTED PLAIN ERROR, WHICH REQUIRES REVERSAL OF APPELLANT MARZOLF'S CONVICTIONS."

{¶16} In his second assignment of error, Marzolf argues that R.C. 2905.05 is unconstitutional on its face and as applied to him. While Marzolf's captioned assignment of error challenges R.C. 2905.05, his argument only addresses the constitutionality of former R.C. 2905.05. Generally, an appellant's assignment of error provides this Court with a roadmap on appeal and directs this Court's analysis. See *Strickler v. First Ohio Banc & Lending, Inc.*, 9th Dist. Nos. 08CA009416 & 08CA009460, 2009-Ohio-1422, at ¶6. It is also an appellant's duty, however, to support his assignment of error with an argument, which includes citations to legal authority. App.R. 16(A)(7). Even if Marzolf's captioned assignment of error could be construed as challenging either the former or the current version of R.C. 2905.05, his argument only addresses former R.C. 2905.05. His argument specifically provides that "[t]he question of the constitutionality of the current version of R.C. 2905.05 is not at issue in this case[.]" Accordingly, even if Marzolf's captioned assignment of error could be construed as challenging the constitutionality of the current version of R.C. 2905.05, it would lack merit as Marzolf has not supported it with an argument. Id. Moreover, the argument that Marzolf does present, challenging the constitutionality of former R.C. 2905.05, is moot as this Court has already upheld his convictions under the current version of the statute and ordered that his judgment entry be modified accordingly.

Assignment of Error Number Three

"THE TRIAL COURT ERRED IN CLASSIFYING APPELLANT MARZOLF AS A TIER I SEX OFFENDER/CHILD-VICTIM OFFENDER."

{¶17} In his third assignment of error, Marzolf argues that the trial court erred in classifying him as a Tier I offender based on void convictions. Specifically, Marzolf argues that once this Court vacates his convictions for child enticement, his Tier I offender classification

also must be vacated. Because we have already determined that Marzolf's convictions need not be vacated, this assignment of error is also moot. App.R. 12(A)(1)(c).

III

{¶18} Marzolf's first assignment of error is overruled, and his remaining assignments of error are moot. The trial court's judgment entry is modified to remove any reference to subsection (C) of R.C. 2905.05 and to substitute, in its place, a reference to subsection (D) of R.C. 2905.05. As so modified, the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶19} While I concur in this Court's resolution of the appeal, I concur in judgment only with regard to the disposition of Marzolf's first assignment of error. Once it had been established that the indictment charged Marzolf with a crime, any issues relating to jurisdiction were subsumed and no additional analysis was necessary. Crim.R. 12(C)(2) requires that any objections based on defects in the indictment, other than objections alleging failure to show jurisdiction or failure to charge an offense, must be raised prior to trial. Failure to raise an objection in the proper timeframe constitutes forfeiture of the objection. Crim.R. 12(H). As the majority correctly explained, the indictment charged Marzolf with a crime. The record indicates that Marzolf did not raise any objections to the indictment pursuant to Crim.R. 12(C)(2). Therefore, any further discussion of defects with the indictment was unnecessary because Marzolf did not preserve those matters for appeal.

APPEARANCES:

NICHOLAS SWYRYDENKO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.