[Cite as *State v. Honaker*, 2010-Ohio-2515.]

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

STATE OF OHIO Appellee v. FRANK J. HONAKER Appellant	C.A. No. 09CA009687 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 07CR075036

DECISION AND JOURNAL ENTRY

Dated: June 7, 2010

MOORE, Judge.

{¶1} Appellant, Frank Honaker, appeals from the judgment of the Lorain County Court of Common Pleas. This court affirms.

I.

{¶2} On December 20, 2007, the Lorain County Grand Jury indicted Honaker on one count of aggravated murder in violation of R.C. 2903.01(A), one count of murder in violation of R.C. 2903.02(A), one count of murder in violation of R.C. 2903.02(B), one count of felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree, and one count of felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree. Each count included a firearm specification.

{¶3} The charges resulted from an incident on December 13, 2007, in which Honaker shot and killed Christopher Betts. Honaker's soon to be ex-wife, Lori Honaker, had been involved in an extramarital affair with Betts. Honaker had the couple's children that day and

took them to their mother's apartment. Honaker instructed his daughter to call her mother and request that she let the children in the front door. When Honaker and the children arrived at the apartment he saw Betts' truck in the parking lot. Honaker armed himself with a pistol he kept in the truck and went around to the back of the apartment while the children went to the front door. Betts was leaving from the rear door. Honaker confronted Betts and fired a single gunshot that struck and killed Betts.

{¶4} The charges were tried to a jury from July 29, 2008 to August 4, 2008. The jury found Honaker not guilty of aggravated murder and murder under R.C. 2903.02(A), but guilty of murder under R.C. 2903.02(B) and guilty of both counts of felonious assault. Honaker's case is before this Court a second time. In *State v. Honaker*, 9th Dist. No. 08CA009458, 2009-Ohio-4424, we vacated Honaker's sentence and remanded to the trial court for resentencing because Honaker's original sentence was void.

{¶5} Honaker timely filed a notice of appeal after resentencing, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "[HONAKER'S] CONVICTION FOR MURDER MUST BE REVERSED BECAUSE THE INDICTMENT FAILED TO CHARGE THE CRIME OF FELONY MURDER UNDER R.C. 2903.02(B) IN VIOLATION OF [HONAKER'S] STATE CONSTITUTIONAL RIGHT TO A GRAND JURY INDICTMENT AND HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS."

{¶6} In his first assignment of error, Honaker contends that his felony murder conviction must be reversed because the indictment failed to charge the crime of felony murder when it omitted the underlying first or second degree felony offense of violence. Honaker further contends that the defective indictment resulted in structural error.

{¶7} At the close of the State's case, Honaker's trial counsel for the first time moved to dismiss Count Three of the indictment as defective under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, ("*Colon I*"), due to its omission of the mens rea. Honaker's counsel added objections at the close of the defense case-in-chief, after the jury verdict, immediately prior to the original sentencing hearing and at the resentencing hearing. This Court reviews a motion to dismiss de novo. *State v. Whalen*, 9th Dist. No. 08CA009317, 2008-Ohio-6739, at ¶7.

{¶8} The relevant portions of the indictment are Counts Three, Four and Five, which provide as follows:

"**COUNT THREE**
Murder – 2903.02(B) - MURDER

"That FRANK J HONAKER, on or about December 13, 2007 , [sic] at Lorain County, Ohio, did cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code in violation of Section 2903.02(B) of the Ohio Revised Code contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

"SPECIFICATION ONE

"The Grand Jurors further find and specify that FRANK J HONAKER had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.

"**COUNT FOUR**
Felonious Assault – 2903.11(A)(1) – F2

"That FRANK J HONAKER, on or about December 13, 2007 , [sic] at Lorain County, Ohio, did knowingly cause serious physical harm to another or to another's unborn in violation of Section 2903.11(A)(1) of the Ohio Revised Code contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

"SPECIFICATION ONE

"The Grand Jurors further find and specify that FRANK J HONAKER had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.

"**COUNT FIVE**
Felonious Assault – 2903.11(A)(2) – F2

"That FRANK J HONAKER, on or about December 13, 2007 , [sic] at Lorain County, Ohio, did knowingly cause or attempt to cause physical harm to another or another's unborn by means of a deadly weapon or dangerous ordnance in violation of Section 2903.11(A)(2) of the Ohio Revised Code contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

"SPECIFICATION ONE

"The Grand Jurors further find and specify that FRANK J HONAKER had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense."

{¶9} The felony murder statute, R.C. 2903.02(B), provides that "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

{¶10} Article I, section 10 of the Ohio Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury[.]" Under Crim.R. 12(C)(2), defendants must object to defects in the indictment prior to trial or, under Crim.R. 12(H), the defects are waived. When an indictment fails to charge an offense, however, the court shall notice the defect "at any time during the pendency of the proceeding[.]" Crim.R. 12(C)(2). Courts, however, have held that failure to object to an indictment that fails to charge an offense prior to the close of the prosecution's case-in-chief

does not result in waiver, but instead allows an appellate court to review the matter for plain error. *State v. Frazier* (1995), 73 Ohio St.3d 323, 332; see *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, at ¶7 ("*Colon II*"); *State v. Lee*, 9th Dist. No. 08CA009504, 2009-Ohio-4617, at ¶21; *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, at ¶61 (recognizing that although every defendant has a due process right to notice of the specific charge, *Cole v. Arkansas* (1948), 333 U.S. 196, 201, a defendant who fails to raise this issue prior to the conclusion of the State's case is entitled only to review for plain error). In a plain-error analysis "the *defendant* bears the burden of demonstrating that a plain error affected his substantial rights." (Emphasis in original.) *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, at ¶14.

{¶11} In order to correct a plain error, all of the following must apply:

> "First, there must be an error, i.e., a deviation from the legal rule. *** Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. *** Third, the error must have affected 'substantial rights[ ]' [to the extent that it] *** affected the outcome of the trial.
>
> Courts are to notice plain error only to prevent a manifest miscarriage of justice." (Internal citations and quotations omitted.) *State v. Hardges*, 9th Dist. No. 24175, 2008-Ohio-5567, at ¶9.

{¶12} The language of the felony murder indictment tracks the language of the felony murder statute. Because the indictment follows the wording of the statute, the indictment is proper. See *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, at ¶29. Furthermore, the Supreme Court of Ohio has held that "when the indictment sufficiently tracks the wording of the statute of the charged offense, the omission of an underlying offense in the indictment can be remedied by identifying the underlying offense in the bill of particulars." *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, at ¶10, citing *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, at ¶30. Here, the grand jury separately indicted Honaker on two charges of felonious

assault under R.C. 2903.11(A), both felonies of the second degree. Under R.C. 2901.01(A)(9)(a), violations of R.C. 2903.11 are offenses of violence. Therefore, either felonious assault charge would serve as a proper predicate offense for the felony murder charge. The felonious assault counts properly set forth the mens rea the State was required to prove to obtain a conviction.

{¶13} In this case, Honaker on January 8, 2008 filed a request for a bill of particulars by way of a standard pretrial form. The State responded on January 31, 2008. The bill of particulars stated in pertinent part: "Once there, the defendant went around the side of the building where he confronted his soon to be ex-wife's boyfriend. The defendant shot and killed the victim, Christopher Betts. This act was done purposely and with prior calculation and design. The defendant confessed to shooting the victim."

{¶14} The bill of particulars provided by the State does not allude to any potential crimes other than those set forth in the indictment. Honaker's appellate briefs do not contain any argument suggesting he was unaware of the State's contention that felonious assault constituted the underlying felony in the felony murder indictment, nor does Honaker contend that his trial strategy would have been different had the felony murder indictment specified the predicate offense upon which it relied. While the better practice would be for the State to track the language of the statute and then provide: "to wit" and set forth the predicate offense, we cannot say that the indictment was defective or that the trial court's refusal to dismiss the indictment constituted plain error that affected the outcome of the trial and created a miscarriage of justice. *Hardges* at ¶9.

{¶15} We do not address Honaker's claims of structural error because his brief relies solely on the argument that the indictment is defective and does not direct this Court to portions

of the record demonstrating "multiple errors that are inextricably linked to the flawed indictment[.]" *Colon II* at ¶7; App.R. 16(A)(7); App.R. 12(A)(2).

{¶16} Honaker's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "[HONAKER'S] DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN THE TRIAL COURT IMPOSED A VINDICTIVE SENTENCE BASED ON FACTS KNOWN TO IT AT THE TIME OF THE ORIGINAL SENTENCE."

{¶17} In his second assignment of error, Honaker contends that the trial court violated his due process rights under the Fifth and Fourteenth Amendments when it increased his sentences on the felony assault convictions when this Court remanded this matter for resentencing in compliance with the Supreme Court's then-relevant precedent regarding the imposition of postrelease control.

{¶18} At the first sentencing hearing on August 4, 2008, the trial court sentenced Honaker to a prison term of 15 years to life on the felony murder charge, as well as a three year prison sentence on the accompanying gun specification to run consecutive to the felony murder sentence. The trial court sentenced Honaker to three years in prison on each of the felonious assault charges and ordered that these sentences run concurrent with the felony murder sentence for a total sentence of 18 years to life imprisonment. In *State v. Honaker*, supra, this Court held that Honaker's original sentence was void due to its failure to properly notify Honaker of the postrelease control sanctions applicable to him. We remanded the matter for resentencing. At the resentencing hearing held September 14, 2009, the trial court entered the same sentence on the felony murder charge and accompanying gun specification but increased the sentence on each felonious assault charge from three years to eight years, although the prison sentences on these charges were again ordered to run concurrently, for an aggregate total of 18 years to life

imprisonment. At the resentencing hearing, the trial judge stated that "[i]f counsel always says they could reduce it, I'm sure if we can reduce it that we can increase it. It's still 15 to life."

{¶19} Honaker now appeals the increased sentences on the felonious assault charges on the basis that the trial court violated his right to due process under the Fifth and Fourteenth Amendments, as stated in *North Carolina v. Pearce* (1969), 395 U.S. 711, 724. Honaker cites *Pearce*, 395 U.S. at 726, for the proposition that "a presumption of vindictiveness arises when the same judge sentences a defendant to a harsher sentence following a successful appeal." This is a correct statement of law. It belies, however, the inapplicability of *Pearce* to this case. Unlike in *Pearce*, Honaker did not successfully appeal. Instead, we held that "[b]ecause Honaker's sentence is void, this Court cannot address his assignment of error." *Honaker* at ¶8. *Pearce* is further inapposite to this case because, at the time this matter was first before us, a sentence ordered after July 11, 2006 that failed to properly impose postrelease control was considered a nullity and void. See, e.g., *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶8. Simply put, it is as if Honaker's sentence handed down on August 4, 2008, never existed. Logically speaking, Honaker's sentence from September 14, 2009, cannot, therefore, constitute an increase or a decrease from a nullity. For these reasons, Honaker has failed to demonstrate facts sufficient to invoke a presumption of vindictiveness, despite the trial judge's statement at the resentencing hearing.

{¶20} Honaker's second assignment of error is overruled.

III.

{¶21} Honaker's assignments of error are overruled. The judgment of the Lorain 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 Lorain, 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.

CARLA MOORE
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

JACK W. BRADLEY and BRIAN J. DARLING, Attorneys at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.