

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 11AP-865
 : (C.P.C. No. 11CR-01-564)
 Michael B. Lofton, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 7, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Law Office of Thomas F. Hayes, LLC, and *Thomas F. Hayes*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Defendant-appellant, Michael B. Lofton, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty of one count of having a weapon under disability in violation of R.C. 2929.13, a felony of the third degree.

Defendant assigns a single error:

The trial was structurally flawed because the indictment failed to alleged [sic], and the court failed to consider, whether the defendant was aware his prior juvenile adjudication prevented him from possessing a firearm.

Because defendant's awareness of his prior juvenile adjudication, the impediment that prevented him from legally possessing a firearm, was not relevant to his conviction for the indicted offense, we affirm.

I. Facts and Procedural History

{¶ 2} By indictment filed January 28, 2011, defendant was charged with one count of having a weapon under disability. According to the indictment, the disqualifying disability was defendant's adjudication as a delinquent for felonious assault in the Franklin County Court of Common Pleas, Domestic Relations Division, Juvenile Branch, in March 2003. The indicted offense was tried to the court on November 7, 2011, pursuant to defendant's written waiver of his right to a jury trial.

{¶ 3} According to the state's evidence, Officer Joseph Burkey, Columbus Division of Police, was called on January 7, 2011 to 532 Barnett Road, Apartment C. When the officer arrived, a woman and her mother were standing at the location; the woman lived there and had filed domestic violence charges against her boyfriend, resulting in an active warrant for his arrest. According to the officer, the woman wanted her boyfriend arrested, wished to retrieve some property from the apartment, or both. After the woman gave the officer the boyfriend's description, she advised he was inside the apartment. When the officer knocked on the door to the apartment, the door opened.

{¶ 4} The officer entered the room, and defendant descended the stairs. The officer explained he was looking for the woman's boyfriend who had a warrant for his arrest. Defendant advised that the suspect was not at the apartment but told the officer he was welcome to look for him. As the officer did so, he upstairs discovered "on the ledge [of a windowsill] in the left-side bedroom was a loaded gun." (Sept. 7, 2011 Tr. 11.) Defendant admitted the gun was his. The officer ejected the magazine from the gun, took down the serial number and "ran it to make sure that it wasn't stolen"; it was not. (Tr. 13.) The officer put the gun on the kitchen table and then left the residence.

{¶ 5} After leaving the apartment, the patrol officers called Detective Steve Parton, who served in the gun crimes unit of the Columbus Division of Police. They explained the handgun and their discovery that defendant probably possessed the gun illegally due to a prior juvenile adjudication. Verifying the adjudication with the juvenile prosecutor's office, Parton went to the apartment, confiscated the gun from a windowsill

in defendant's bedroom, and explained to defendant why he could not own a firearm. According to Parton, defendant stated he believed not only that the juvenile proceedings did not affect his ability to possess a gun lawfully but that the prior adjudication had been expunged or sealed.

{¶ 6} Defendant testified on his own behalf and confirmed that he believed the juvenile adjudication had either been expunged or did not "follow" him as an adult. (Tr. 65.) Defendant explained that background checks had been conducted on him for a number of employment positions he held and none revealed a problem. He further stated that, when he purchased the handgun, a background search again revealed no impediment to his owning the gun.

{¶ 7} At the conclusion of the trial, the trial court discussed with counsel whether, under R.C. 2923.13, defendant was required to be aware that his prior adjudication impeded his ability to lawfully own a firearm or, alternatively, whether the statute imposed strict liability in that respect. Clearly troubled at having to find defendant guilty in light of defendant's considerable advances following his juvenile adjudication, the trial court concluded it nonetheless was required to apply the law reflected in the Ohio Supreme Court's most recent decision, *State v. Johnson*, 128 Ohio St.3d 107, 2010-Ohio-6301. Applying *Johnson*, the court determined strict liability attached to the prior adjudication, found defendant guilty of the indicted offense, sentenced him to one year of non-reporting probation, and imposed no fine or costs.

II. Assignment of Error—Mental Element Applicable to Disqualifying Event

{¶ 8} Defendant's single assignment of error challenges the trial court's application of strict liability to, and the court's refusal to consider whether defendant was aware of, his prior juvenile adjudication that disqualified him from legally possessing a firearm.

{¶ 9} Defendant was indicted under R.C. 2923.13 which provides, as relevant here, that unless relieved from disability as provided in R.C. 2923.14, "no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person * * * has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence." R.C. 2923.13(A)(2). Defendant does not contest that he was adjudicated a delinquent for the

commission of an offense that, if an adult committed it, would have been a felony offense of violence. Rather, defendant contends he was unaware of the disqualifying effect of his prior adjudication and therefore cannot be convicted of violating R.C. 2923.13(A)(2).

{¶ 10} To the extent defendant challenges the indictment's failure to include a mental element with respect to the disqualifying prior adjudication, "[a]n indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state." *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, paragraph one of the syllabus. Even though an indictment may fail to charge a mens rea element of a crime, "the indictment provides the defendant with adequate notice of the charges against him and is, therefore, not defective" if it tracks the language of the criminal statute describing the offense. *Id.* at ¶ 45. Because R.C. 2923.13 does not include a mens rea element regarding the disqualifying prior adjudication, appellee's indictment, tracking the language of the statute, is sufficient.

{¶ 11} Citing R.C. 2901.21(B), defendant primarily contends that, even if the indictment were sufficient, the state was required to prove defendant acted recklessly with respect to his awareness of his prior disqualifying adjudication. R.C. 2901.21(B) provides that "[w]hen the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense." By contrast, "[w]hen the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." R.C. 2901.21(B).

{¶ 12} As a result of R.C. 2901.21(B), "recklessness is the catchall culpable mental state for criminal statutes that fail to mention any degree of culpability, except for strict liability statutes, where the accused's mental state is irrelevant." *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, ¶ 21. Defendant asserts that because R.C. 2923.13 does not include a mental element, or plainly indicate a legislative intent that he be strictly liable, regarding the disqualifying prior offense, recklessness is the appropriate mental element to be applied to that portion of the statute. Defendant thus asserts the trial court erred when it applied a strict liability analysis. The parties rely on two distinct cases to address

the issue. Defendant urges that we apply *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325; the state asserts *Johnson* controls here.

{¶ 13} In *Clay*, the defendant, under indictment for possession and trafficking of drugs, allegedly shot and wounded a victim in an altercation. As relevant here, he was indicted under R.C. 2923.13(A)(3) for having a weapon under disability, the disability being his pending indictment for possession and trafficking in drugs. Clay argued he was unaware he was under indictment at the time of the shooting and therefore could not be convicted of the indicted offense. The trial court disagreed, determined R.C. 2923.13(A)(3) did not require Clay to know of the indictment, and found Clay guilty; the court of appeals affirmed the judgment.

{¶ 14} Accepting the case on a conflict between districts and on a discretionary appeal, the Supreme Court applied R.C. 2901.21(B) and concluded the word "knowingly" in R.C. 2923.13(A) modified the provision dealing with "acquire, have, carry or use any firearm or dangerous ordnance" but did not establish the culpable mental element for the "under indictment" language in R.C. 2923.13(A)(3). *Id.* at ¶ 14. Because the "under indictment" provision had no culpable mental element, the court applied R.C. 2901.21(B), concluded the statute did not plainly indicate legislative intent that the statute create strict liability and therefore decided "the mental state of recklessness applies in determining whether the defendant was aware that he or she was 'under indictment.'" *Id.* at ¶ 28.

{¶ 15} Two years later, the Supreme Court addressed R.C. 2923.13(A) in *Johnson*, on appeal from the appellate court that had reviewed Johnson's conviction under R.C. 2923.13(A) for having a weapon under the disability of a prior disqualifying conviction. The appellate court had applied the "recklessness" mens rea specified in *Clay* to Johnson's prior disqualifying conviction and reversed Johnson's subsequent weapon under disability conviction because the state failed to prove recklessness. The state appealed, and the question before the Supreme Court was "whether R.C. 2923.13(A)(3) requires proof of the mens rea of recklessness with respect to a defendant's prior conviction." *Id.* at ¶ 1. The Supreme Court concluded that, for a conviction under R.C. 2923.13(A)(3), "the state need not prove a culpable mental state for the element" of the statute requiring proof of the disqualifying indictment or conviction, in that case a

conviction "involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse." *Id.*

{¶ 16} R.C. 2901.21(B) again was at the heart of the controversy in *Johnson*, and the Supreme Court explained that in prior cases the court "focused on whether the statute in question plainly indicated a purpose to impose strict liability." *Id.* at ¶ 20. The court concluded R.C. 2923.13 presents a category of offenses in which the legislature specified the mens rea for one element but not for the other elements in the section defining the offense. The court decided that, "[f]or these offenses, if the General Assembly intends for the additional elements to carry their own mens rea, it must say so. Otherwise, no culpable mental state need be proved for those elements." *Id.* at ¶ 38. Acknowledging it recently examined R.C. 2923.13(A)(3) in *Clay*, the court said "a fresh look at R.C. 2923.13(A)(3) is necessary because our use of R.C. 2901.21(B) has been imprecise." *Id.* at ¶ 40. *See also State v. Johnson*, 8th Dist. No. 91701, 2011-Ohio-2142, ¶ 3 (noting on remand that the Supreme Court "rethought its position in *Clay*").

{¶ 17} Addressing specifically R.C. 2923.13(A)(3), the Supreme Court in *Johnson*, 128 Ohio St.3d 107, 2010-Ohio-6301, noted "the General Assembly chose to specify a culpable mental state for the element of possession of a weapon, but it did not assign an additional mens rea for the additional elements of being under indictment or having been convicted." *Id.* at ¶ 42. The court concluded, "[b]ecause R.C. 2923.13(A), which is part of the definition of the offense, already contains the mens rea of 'knowingly,' R.C. 2901.21(B) does not apply. We therefore need not determine whether there is a plain indication of purpose to impose strict liability for these additional elements." *Id.* The court added that, "because R.C. 2901.21(B) does not apply, there is no statutory provision that allows us to insert the mens rea recklessness into the statute." *Id.* In the end, the court determined that, "for the offense of having weapons while under disability defined by R.C. 2923.13(A)(3), the state is not required to prove a culpable mental state for the element that a defendant is under indictment for or has been convicted of any offense involving a drug of abuse." *Id.*

{¶ 18} Defendant urges that *Johnson* does not apply because he was not charged with having a weapon while he had a disqualifying conviction under R.C. 2923.13(A)(3), but rather a disqualifying conviction under R.C. 2923.13(A)(2). Defendant's contention is

unpersuasive. *Johnson* established the analysis applicable to statutes, such as R.C. 2923.13, that specify a culpable mental state for one element of the offense but do not include an additional mens rea for additional elements, such as a prior disqualifying event that includes but is not necessarily limited to a pending indictment or a prior conviction for any offense involving a drug of abuse. *State v. Harper*, 5th Dist. No. 2010-CA-44, 2011-Ohio-4568 (noting nothing was found to substantiate Harper's contention that the conviction had been expunged or sealed and concluding "the same analysis applies to a violation of R.C. 29[2]3.13(A)(2)" as to R.C. 2923.13(A)(3)). *Johnson* being the most recent Supreme Court pronouncement addressing the mental element of R.C. 2923.13(A), we, like the trial court, are constrained to apply it and conclude the state was not required to prove defendant was aware of his prior disqualifying adjudication. Accordingly, defendant's single assignment of error is overruled.

III. Disposition

{¶ 19} Having overruled defendant's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
