

[Cite as *State v. Wolfe*, 2016-Ohio-4897.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

V.

JAVELIN WOLFE

Defendant-Appellant

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Appellate Case Nos. 26681, 26729,
26983

Trial Court Case No. 1993-CR-556

(Criminal Appeal from
Common Pleas Court)

OPINION

Rendered on the 8th day of July, 2016.

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WELBAUM, J.

{¶ 1} Defendant-appellant, Javelen Wolfe, appeals from three separate decisions/entries of the Montgomery County Court of Common Pleas in Case No. 1993-CR-556, wherein a jury convicted Wolfe of murder and an attendant firearm specification. Specifically, Wolfe appeals from the trial court's: (1) decision and entry overruling his Motion to Correct Clerical Mistake; (2) nunc pro tunc termination entry journalizing his conviction and sentence; and (3) decision and entry overruling his Motion to Record Verdict. We have consolidated Wolfe's three appeals and address the arguments Wolfe raised under each appeal in this opinion. For the reasons outlined below, the judgment of the trial court will be affirmed.

Facts and Course of Proceedings

{¶ 2} On October 6, 1993, the Montgomery County Grand Jury returned an indictment charging Wolfe with one count of aggravated murder in violation of R.C. 2903.01(B), one count of aggravated robbery in violation of R.C. 2911.01(A)(1), and two firearm specifications. The charges stemmed from the February 7, 1993 shooting death of Todd Grills. Wolfe pled not guilty to the charges and the matter went to a jury trial. Wolfe's first trial ended in a hung jury, whereas his second trial resulted in his conviction for the lesser-included offense of murder with a firearm specification. The aggravated robbery charge was dismissed at the request of the State by an entry of nolle prosequi dated January 20, 1994. The entry was subsequently journalized on January 31, 1994.

{¶ 3} Immediately following trial, the trial court sentenced Wolfe to serve an indefinite prison term of 15 years to life for murder that was to be served consecutive to

a three-year prison sentence for the attendant firearm specification. On January 25, 1994, the trial court issued a judgment entry reflecting that sentence. The entry also ordered Wolfe to pay court costs and awarded him jail-time credit, but left blank the amount of court costs to be imposed and the days of jail-time credit to be awarded.

{¶ 4} Wolfe subsequently filed a direct appeal from his conviction and sentence, which we affirmed in *State v. Wolfe*, 2d Dist. Montgomery No. 14420, 1995 WL 140717 (Mar. 29, 1995). Nearly 20 years later, on June 4, 2014, Wolfe filed a pro se Motion to Re-hear and Correct Termination Entry, wherein he argued that the January 25, 1994 termination entry journalizing his conviction and sentence was defective. The trial court overruled the motion and Wolfe appealed from that decision. Upon review, we held that the trial court should have corrected the judgment entry to include, among other things, the amount of court costs imposed and a jail-time credit of 284 days.¹ See *State v. Wolfe*, 2d Dist. Montgomery No. 26313, 2015-Ohio-1585, ¶ 1, 7. We also held that the judgment entry should be corrected to reflect that the aggravated robbery charge was dismissed by nolle prosequi. *Id.* at ¶ 1, 9. Accordingly, we reversed the trial court's decision overruling Wolfe's Motion to Re-Hear and Correct Termination Entry and remanded the matter for further proceedings consistent with our opinion. *Id.* at ¶ 1, 10.

1. Motion to Correct Clerical Mistake

(App. Case No. 26681)

{¶ 5} While his second appeal was pending, Wolfe filed a pro se Motion to Correct

¹ The 284 days of jail-time credit is reflected in a jail-time credit report issued by the trial court on January 27, 1994, which Wolfe never challenged.

Clerical Mistake, wherein he argued that there was no final appealable order with respect to his conviction because the trial court failed to journalize the jury's verdict on the aggravated murder and aggravated robbery charges. Wolfe also implied that it was inappropriate for the trial court to permit the jury to consider the lesser included offense of murder as opposed to dismissing or retrying the charges. On April 14, 2015, the trial court overruled the motion and Wolfe appealed from that decision. This is the first of Wolfe's three appeals that are the subject of this opinion.

2. Nunc Pro Tunc Judgment Entry

(App. Case No. 26729)

{¶ 6} On May 21, 2015, the trial court issued a nunc pro tunc judgment entry, i.e., termination entry, which made the corrections that this court ordered on remand in *Wolfe*, 2d Dist. Montgomery No. 26313, 2015-Ohio-1585. Specifically, the nunc pro tunc entry awarded 284 days of jail-time credit, ordered the payment of court costs in the amount of \$376, and reflected that the aggravated robbery charge was dismissed by nolle prosequi. In addition to making these corrections, the nunc pro tunc entry included the following language:

WHEREFORE, it is the JUDGMENT and SENTENCE of the Court that the defendant herein be delivered to the **Correctional Reception Center** there to be imprisoned and confined for a term of:

**LESSER INCLUDED OFFENSE – MURDER – MANDATORY FIFTEEN
(15) YEARS TO LIFE**

FIREARM SPECIFICATION – MANDATORY THREE (3) YEARS

**CONSECUTIVE AND PRIOR TO MANDATORY FIFTEEN (15) YEARS TO
LIFE**

TOTAL PRISON TERM = MANDATORY 18 YEARS TO LIFE

(Emphasis sic.) Termination Entry Nunc Pro Tunc - January 25, 1994 (May 21, 2015), Montgomery County Court of Common Pleas Case No. 1993 CR 556. Wolfe appealed from the nunc pro tunc entry, claiming it was defective and that a resentencing hearing was required. This is the second appeal that is the subject of this opinion.

3. Motion to Record Verdict

(App. Case No. 26983)

{¶ 7} On September 22, 2015, Wolfe filed a pro se Motion to Record the Verdict wherein he again argued that the verdict for aggravated murder was not properly journalized. The trial court issued a decision on October 6, 2015, overruling Wolfe's motion. Wolfe appealed from that decision as well. This is the third and final appeal that is the subject of this opinion.

{¶ 8} Wolfe has assigned two errors for our review with respect to his consolidated appeals in App. Case Nos. 26681, 26729, and 26983.² At oral argument, Wolfe also attempted to raise an additional assignment of error that was not included in his appellate brief as required by App.R. 16(A). Specifically, Wolfe contended his murder conviction violated the constitutional protection against double jeopardy because he was originally indicted for murder on March 19, 1993, and that indictment was nollied and replaced by

² Although the headings used in Wolfe's merit brief indicate that he has raised three assignments of error for our review, he has in fact only raised two assignments of error, one of which includes multiple sub-issues.

the October 6, 1993 indictment for aggravated murder and aggravated robbery. Pursuant to App.R. 12(A)(2), this court may disregard errors that are not separately assigned and argued in the appellant's brief. Furthermore, it is well established that "we cannot consider the presentation of a novel argument at oral argument." *Buckingham v. Buckingham*, 2d Dist. Greene No. 2013 CA 77, 2014-Ohio-5798, ¶ 13. Accordingly, we will only review the two assignments of error that Wolfe raised in his appellate brief.

First Assignment of Error

{¶ 9} Wolfe's First Assignment of Error is as follows:

THE TRIAL COURT EXCEEDED ITS AUTHORITY AND DENIED APPELLANT'S RIGHT TO DUE PROCESS WHEN IT ISSUED A NUNC PRO TUNC ENTRY MODIFYING APPELLANT'S SENTENCE WITHOUT APPELLANT BEING PRESENT AND WITHOUT PROVIDING APPELLANT AN OPPORTUNITY TO BE HEARD.

{¶ 10} Under his First Assignment of Error, Wolfe contends the trial court erred by improperly modifying his January 25, 1994 sentence using a nunc pro tunc entry as opposed to holding a resentencing hearing. Specifically, Wolfe claims the nunc pro tunc entry at issue modified and effectively vacated his original sentence by imposing: (1) mandatory prison terms for his murder conviction and the attendant firearm specification; (2) 284 days of jail-time credit; and (3) \$376 in court costs. We disagree.

{¶ 11} "Crim.R. 36(A) permits trial courts to correct clerical mistakes in judgments or orders arising from oversight or omissions, using a nunc pro tunc entry." (Citation omitted.) *State v. Roach*, 2d Dist. Montgomery No. 23317, 2010-Ohio-566, ¶ 3. The

use of a nunc pro tunc entry is limited to reflecting what the court actually decided but failed to properly include in its judgment. (Citations omitted.) *State v. Ritchie*, 2d Dist. Montgomery No. 24088, 2011-Ohio-2566, ¶ 8. Its sole function is to correct a clerical mistake in the execution of a ministerial act. (Citations omitted.) *Id.* “ ‘The term “clerical mistake” refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.’ ” *State v. Arnold*, 2d Dist. Montgomery No. 22856, 2009-Ohio-3636, ¶ 57, quoting *State v. Brown*, 136 Ohio App.3d 816, 820, 737 N.E.2d 1057 (3d Dist.2000). Therefore, “ ‘[t]he function of nunc pro tunc [entries] is not to change, modify, or correct erroneous judgments, but merely to have the record speak the truth.’ ” *Ritchie* at ¶ 10, quoting *Ruby v. Wolf*, 39 Ohio App. 144, 147, 177 N.E. 240 (8th Dist.1931). “A nunc pro tunc entry cannot be used to change something that was deliberately done.” (Citation omitted.) *Id.*

{¶ 12} We will first address Wolfe’s claim that the nunc pro tunc entry modified his sentence by making his prison terms for murder and the attendant firearm specification mandatory. At the time Wolfe was sentenced in 1994, R.C. 2929.02(B) provided that “[w]hoever is convicted of * * * murder in violation of section 2903.02 of the Revised Code *shall* be imprisoned for an indefinite term of fifteen years to life.” (Emphasis added.) 1981 S.B. No. 1; *In re Forfeiture of One 1986 Buick Somerset Auto.*, 91 Ohio App.3d 558, 562, 632 N.E.2d 1351 (3d Dist.1993); *State v. Lowry*, 4th Dist. Ross No. 94CA2061, 1995 WL 232693, *3 (Apr. 6, 1995). With respect to the firearm specification, former R.C. 2929.71(A) provided that “[t]he court *shall* impose a term of actual incarceration of three years in addition to imposing a life sentence pursuant to section * * * 2929.02 of the Revised Code if * * * [t]he offender is convicted of * * * any felony [and] * * * [t]he offender

also is convicted of * * * a specification charging him with having a firearm on or about his person or under his control while committing the felony * * *.” (Emphasis added.) 1990 S.B. No 258, 1990 Ohio Laws File 277; *State v. Stallings*, 9th Dist. Summit No. 16437, 1994 WL 362108 (July 13, 1994). R.C. 2929.71 further provided that “[t]he three-year term of actual incarceration imposed * * * *shall* be served consecutively with, and prior to * * * the indefinite term of imprisonment.” (Emphasis added.) *Id.*

{¶ 13} It is well established that the prison terms set forth in R.C. 2929.02(B) and R.C. 2929.71(A) are mandatory in nature. See *State v. Arendt*, 8th Dist. Cuyahoga No. 40985, 1980 WL 354799, *4 (Apr. 24, 1980) (“Ohio law imposes a mandatory sentence for murder, fifteen years to life (R.C. 2929.02(B))”; *State v. Davis*, 8th Dist. Cuyahoga No. 102204, 2015-Ohio-3141, fn. 1 (“15 years to life is the mandatory sentence for a conviction of murder, see R.C. 2929.02(B)(1); therefore, the court had no discretion to impose a lesser sentence”); *State v. Wills*, 69 Ohio St.3d 690, 691, 635 N.E.2d 370 (1994) (“When it enacted R.C. 2929.71, the General Assembly intended to separately punish each criminal transaction committed with the assistance of firearms. Each separate criminal transaction performed with the assistance of a firearm is punishable by a mandatory three-year sentence.”).

{¶ 14} In this case, the trial court imposed the mandatory prison terms under R.C. 2929.02(B) and R.C. 2929.71(A) when it sentenced Wolfe in 1994, as it imposed an indefinite term of 15 years to life in prison for his murder conviction and a prior, consecutive three-year prison term for the firearm specification. Therefore, the inclusion of the word “mandatory” in the nunc pro tunc entry did not change or modify Wolfe’s sentence. Rather, the nunc pro tunc entry reflected the exact same sentence that the

trial court had previously imposed, albeit using different language. Simply stated, under both the original and nunc pro tunc entry, Wolfe must serve a total of 18 years in prison before he can be considered for parole. Furthermore, the fact that the nunc pro tunc entry omitted the word “indefinite,” with respect to the prison term for murder does not modify the sentence, as the indefinite nature of the 15-year-to-life prison term is apparent since the term is not a specific number of years.

{¶ 15} Wolfe’s sentence was also not modified by the nunc pro tunc entry’s reference to 284 days of jail-time credit or \$376 in court costs. The original judgment entry ordered Wolfe to pay court costs and allowed for jail-time credit, but simply left blank spaces where the amount of costs and days of jail-time credit were to be specified on the entry.³ Therefore, the nunc pro tunc entry did not add those terms to the sentence, but merely clarified the amount of costs to be paid and the days to be credited.

{¶ 16} In so holding, we note that this court previously remanded this matter to the trial court so that the original judgment entry could be amended to reference, among other things, jail-time credit in the amount of 284 days and the specific amount of court costs to be paid. *Wolfe*, 2d Dist. Montgomery No. 26313, 2015-Ohio-1585 at ¶ 7, 11. “ ‘The law-of-the-case doctrine holds that the decision of the reviewing court in a case remains the law of that case on the questions of law involved for all subsequent proceedings at the trial and appellate levels.’ ” *State v. Ulery*, 2d Dist. Clark No. 2010 CA 89, 2011-Ohio-4549, ¶ 12, quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). “The

³ A trial court is not required by law to recite the amount of jail-time credit in its sentencing entry, although that is the preferred practice. *State v. Sears*, 2d Dist. Montgomery No. 20330, 2005-Ohio-1593, ¶ 6-7, citing *State v. Reichelderfer*, 2d Dist. Montgomery No. 17445, 1999 WL 252798, * 3 (Apr. 30, 1999).

doctrine functions to compel trial courts to follow the mandates of reviewing courts.” (Citation omitted.) *Blust v. Lamar Advertising of Mobile, Inc.*, 183 Ohio App.3d 478, 2009-Ohio-3947, 917 N.E.2d 373, ¶ 10 (2d Dist.). In following our mandate, the trial court properly amended the original judgment entry in order to include the amount of court costs and days of jail-time credit. Therefore, we do not find that the trial court erred in following our prior decision, as it was the law of the case.

{¶ 17} Wolfe’s First Assignment of Error is overruled.

Second Assignment of Error

{¶ 18} Wolfe’s Second Assignment of Error is as follows:

THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT’S MOTION TO CORRECT CLERICAL MISTAKE PURSUANT TO CRIM.R. 36(A) AND HIS MOTION TO RECORD THE VERDICT PURSUANT TO R.C. 2945.78.

{¶ 19} Under his Second Assignment of Error, Wolfe raises multiple arguments that were contained in his Motion to Correct Clerical Mistake and Motion to Record the Verdict. Wolfe first contends that the hung-jury charge of aggravated robbery remains pending because the trial court erred in failing to submit a journal entry dismissing the charge. As a result, Wolfe claims there was no final appealable order entered against him, thus depriving this court of jurisdiction to hear his 1995 appeal from his conviction and sentence.

{¶ 20} Wolfe raised the exact same argument in his appeal from the trial court’s decision overruling his Motion to Re-hear and Correct Termination Entry for which we

stated the following in response:

In his reply brief, Wolfe argues that the Aggravated Robbery charge remained pending when the judgment entry was filed, which deprived it of the status of a final appealable order. Of course, the judgment became final when the nolle prosequi of the Aggravated Robbery charge was entered on January 31, 1994. However, “[o]nly one document can constitute a final appealable order.” *State v. Baker*, [119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163], ¶ 17. We conclude, therefore, that when the trial court corrects its judgment entry herein, it should include in the corrected judgment entry a reference to the nollied Aggravated Robbery charge.

Wolfe, 2d Dist. Montgomery No. 26313, 2015-Ohio-1585, ¶ 9.

{¶ 21} In following our decision in *Wolfe*, the trial court included the following statement in its nunc pro tunc entry: “**INDICTED CHARGE COUNT 2: AGGRAVATED ROBBERY, 2911.01(A)(1) (Aggravated Felony 1) DISMISSED BY NOLLE PROSEQUI[.]**” (Emphasis sic.) Termination Entry Nunc Pro Tunc – January 25, 1994 (May 21, 2015), Montgomery County Court of Common Pleas Case No. 1993 CR 556. Because the aggravated robbery charge was dismissed nolle prosequi during the lower court proceedings, and that fact is now properly reflected in the nunc pro tunc entry, Wolfe’s argument concerning the aggravated robbery charge lacks merit.

{¶ 22} Wolfe also argues that the trial court’s decisions overruling his Motion to Correct Clerical Mistake and Motion to Record the Verdict improperly state that he was acquitted for aggravated murder and that the trial court improperly journalized an acquittal

for aggravated murder when in actuality, the jury could not reach a verdict on that charge and instead convicted him of the lesser-included offense of murder. We first note that the record does not indicate that the trial court journalized an acquittal for aggravated murder. However, even if it had, the Supreme Court of Ohio and the United States Supreme Court have both noted that a finding of guilt on lesser-included offenses operates as an acquittal of the greater offenses. See, e.g., *State v. Edmondson*, 92 Ohio St.3d 393, 395-396, 750 N.E.2d 587 (2001) (“the trial court’s finding of guilt on the lesser-included offenses operated as an acquittal of the greater offenses”); *Green v. United States*, 355 U.S. 184, 190, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) (finding that a “great majority of cases in this country” have regarded a conviction of the lesser included offense as “an implicit acquittal” of the greater included offense). Therefore, we fail to see any error, as the jury’s finding of guilt on the lesser-included offense of murder implicitly acquitted Wolfe of the aggravated murder charge.

{¶ 23} Finally, Wolfe contends the trial court erred in permitting the jury to consider the lesser-included offense of murder and that the evidence adduced at trial did not support his murder conviction. These claims are clearly barred by the doctrine of res judicata. “Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. In this case, Wolfe could have challenged the trial court’s instructions to the jury during his direct

appeal in 1995, and he actually did raise sufficiency of the evidence and manifest weight claims, both of which this court denied. Accordingly, res judicata bars Wolfe from raising those claims again in the present appeal.

{¶ 24} Wolfe's Second Assignment of Error is overruled.

Conclusion

{¶ 25} Having overruled both of Wolfe's assignments of error, the judgment of the trial court is affirmed in Montgomery Cty. App. Case Nos. 26681, 26729, and 26983.

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FAIN, J. and FROELICH, J., concur.

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