

[Cite as *State v. Lambert*, 2017-Ohio-4310.]

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

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : Case No. 16CA6  
 :  
 vs. :  
 :  
 TARA J. LAMBERT, : DECISION AND JUDGMENT ENTRY  
 :  
 :  
 Defendant-Appellant. :

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APPEARANCES:

Samuel H. Shamansky, Donald L. Regensburger, and Colin E. Peters, Columbus, Ohio, for appellant.

Judy C. Wolford, Pickaway County Prosecuting Attorney, and Jayme Hartley Fountain, Pickaway County Assistant Prosecuting Attorney, Circleville, Ohio, for appellee.

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CRIMINAL CASE FROM COMMON PLEAS COURT

DATE JOURNALIZED: 6-6-17

ABELE, J.

{¶ 1} This is an appeal from a Pickaway County Common Pleas Court judgment of conviction and sentence. A jury found Tara J. Lambert, defendant below and appellant herein, guilty of conspiracy to commit aggravated murder in violation of R.C. 2923.01(A)(1).

Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

“THE INDICTMENT IS FATALLY FLAWED FOR FAILURE TO ALLEGE A SUBSTANTIAL OVERT ACT IN FURTHERANCE OF THE CONSPIRACY AS REQUIRED BY R.C. 2923.01 AND IN VIOLATION OF APPELLANT’S RIGHT

TO A GRAND JURY UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.”

SECOND ASSIGNMENT OF ERROR:

“TRIAL COUNSEL’S FAILURE TO FILE A MOTION TO DISMISS THE INDICTMENT OR RAISE ANY OBJECTION TO ITS FATAL DEFECT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF APPELLANT’S RIGHTS UNDER THE OHIO AND UNITED STATES CONSTITUTIONS.”

THIRD ASSIGNMENT OF ERROR:

“APPELLANT’S CONVICTION FOR CONSPIRACY TO COMMIT AGGRAVATED MURDER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF HER RIGHT TO DUE PROCESS AS GUARANTEED BY THE OHIO CONSTITUTION.”

{¶ 2} The present appeal arises out of appellant’s plot to murder Kellie and Shawn Cooke. On August 7, 2015, a Pickaway County grand jury returned an indictment that charged appellant with two counts of conspiracy to commit aggravated murder in violation of R.C. 2923.01. Counts one and two contained identical language and alleged:

On or about the 21<sup>st</sup> day of July, 2015 through the 28<sup>th</sup> day of July, 2015, at the County of Pickaway, or by some manner enumerated in Section 2901.12 of the Ohio Revised Code whereby proper venue is placed in the county aforementioned, Tara J. Lambert, did with purpose to commit, promote or facilitate the commission of Aggravated Murder with another person, plan or aid in planning the commission of such offense;

Contrary to and in violation of Section 2923.01(A)(1) of the Ohio Revised Code and being a Felony of the First Degree, being against the peace and dignity of the State of Ohio.

{¶ 3} The state subsequently filed a bill of particulars that alleged that with respect to count one, appellant “solicited the aid of an undercover officer in planning and promoting the murder of Kellie Cooke,” and with respect to count two, appellant “solicited the aid of an

undercover officer in planning and promoting the murder of Shawn Cooke.”

{¶ 4} At the conclusion of the jury trial on January 27, 2016, the jury found appellant guilty of the first count of conspiracy to commit murder, but not guilty of the second count. On February 24, 2016, the trial court sentenced appellant to serve seven years in prison. This appeal followed.

## I

{¶ 5} In her first assignment of error, appellant asserts that the indictment omits an essential element of a conspiracy offense and, thus, violates her right to indictment by a grand jury, as provided in Article I, Section 10 of the Ohio Constitution. In particular, appellant asserts that the commission of a substantial overt act in furtherance of the conspiracy is an essential element of a conspiracy offense that must be alleged in the indictment. Appellant claims that under *State v. Childs*, 88 Ohio St.3d 194, 724 N.E.2d 781 (2000), the indictment’s failure to allege this element renders it fatally defective and mandates a reversal of her conviction. Appellant points out that in *Childs*, the court held that a conspiracy indictment that fails to allege the defendant committed a substantial over act in furtherance of the conspiracy is fatally defective and warrants automatic reversal.

{¶ 6} In response, the state raises three basic arguments to counter appellant’s assertion that *Childs* mandates a reversal of her conviction: (1) subsequent cases have effectively overruled or limited *Childs*; (2) appellant had adequate notice of the charges; and (3) the indictment sufficiently alleged a substantial overt act by alleging that appellant planned or aided in planning the commission of aggravated murder.

## A

## RIGHT TO GRAND JURY INDICTMENT

{¶ 7} Section 10, Article I of the Ohio Constitution provides: “[N]o person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury.” This provision “guarantees an accused that the essential facts constituting the offense for which he is tried will be found in the indictment by the grand jury.” *State v. Jackson*, 134 Ohio St.3d 184, 2012-Ohio-5561, 980 N.E.2d 1032, ¶12, quoting *State v. Pepka*, 125 Ohio St.3d 124, 2010-Ohio-1045, 926 N.E.2d 611, ¶14.

## B

## PURPOSES OF INDICTMENT

{¶ 8} “The purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident.” *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162, ¶7, citing *Weaver v. Sacks*, 173 Ohio St. 415, 417, 183 N.E.2d 373 (1962), and *State v. Sellards*, 17 Ohio St.3d 169, 170, 17 OBR 410, 478 N.E.2d 781 (1985); accord *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, ¶11. As expounded upon in *State v. Childs*, 88 Ohio St.3d 194, 198, 724 N.E.2d 781 (2000):

A criminal indictment serves several purposes. First, by identifying and defining the offenses of which the individual is accused, the indictment serves to protect the individual from future prosecutions for the same offense. *State v. Sellards* (1985), 17 Ohio St.3d 169, 170, 17 OBR 410, 411, 478 N.E.2d 781, 783–784. In addition, the indictment compels the government to aver all material facts constituting the essential elements of an offense, thus affording the accused adequate notice and an opportunity to defend. *Id.* at 170, 17 OBR at 411, 478 N.E.2d at 783.

## C

## SUFFICIENCY OF INDICTMENT

{¶ 9} “The sufficiency of an indictment is subject to the requirements of Crim.R. 7 and the constitutional protections of the Ohio and federal Constitutions.” *Buehner* at ¶8.

{¶ 10} Crim.R. 7(B) specifies the “nature and contents” of an indictment and states:

The indictment shall be signed in accordance with Crim.R. 6(C) and (F) and contain a statement that the defendant has committed a public offense specified in the indictment. \* \* \* \* The statement may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. Each count of the indictment or information shall state the numerical designation of the statute that the defendant is alleged to have violated. Error in the numerical designation or omission of the numerical designation shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant.

{¶ 11} “An indictment meets constitutional requirements if it ‘first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the

same offense.”” *State v. Childs*, 88 Ohio St.3d 558, 565, 728 N.E.2d 379 (2000), quoting *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); accord *United States v. Resendiz-Ponce*, 549 U.S. 102, 108, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007); *Jackson* at ¶13; *State v. Lynn*, 129 Ohio St.3d 146, 2011-Ohio-2722, 950 N.E.2d 931, ¶20; *Buehner* at ¶9. An indictment must charge a criminal offense ““with reasonable certainty \* \* \* so as to apprise the defendant of that which he may expect to meet and be required to answer; so that the court and jury may know what they are to try, and the court may determine without unreasonable difficulty what evidence is admissible.”” *Horner* at ¶10, quoting *Horton v. State*, 85 Ohio St. 13, 19, 96 N.E. 797 (1911).

{¶ 12} “Generally, the requirements of an indictment may be met by reciting the language of the criminal statute.” *Childs*, 88 Ohio St.3d at 199, citing *State v. Murphy*, 65 Ohio St.3d 554, 583, 605 N.E.2d 884 (1992); accord *Jackson* at ¶14. However, “if the indictment does not name the essential elements of the criminal offense charged, the indictment is insufficient to charge the defendant with that offense.” *Jackson* at ¶14, citing *State v. Jester*, 32 Ohio St.3d 147, 149, 512 N.E.2d 962 (1987). “[I]t is of utmost importance that all the statutory elements necessary to constitute a crime be averred in the criminal charge. This condition is founded upon the constitutional right of the accused to be informed of the nature and cause of the accusation against him.” *State v. Oliver*, 32 Ohio St.2d 109, 110, 61 O.O.2d 371, 290 N.E.2d 828 (1972) (citations omitted). However, an indictment is not defective for failing to omit a culpable mental state when the indictment otherwise tracks the statutory language and when the statute does not specify a culpable mental state. *Horner* at paragraph one of the syllabus (“An 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.”); accord *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶37 (failure to include mens rea in aggravated robbery indictment did not constitute plain error when indictment tracked language of statute). Additionally, an indictment is not defective for failing to recite the elements of a predicate or an underlying offense when the indictment otherwise tracks the statutory language. *Jackson* at ¶14; *Buehner* at syllabus. Instead, a bill of particulars may “elucidate or particularize the conduct of the accused.” *State v. Lawrinson*, 49 Ohio St.3d 238, 239, 551 N.E.2d 1261 (1990), quoting *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985).

## D

### CONSPIRACY INDICTMENT

{¶ 13} R.C. 2923.01(A)(1) sets forth the offense of conspiracy to commit aggravated murder, as charged in appellant’s indictment, and states:

No person, with purpose to commit or to promote or facilitate the commission of aggravated murder \* \* \* shall \* \* \*:

(1) With another person or persons, plan or aid in planning the commission of any of the specified offenses;

R.C. 2923.01(B) further provides:

(B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by the accused or a person with whom the accused conspired, subsequent to the accused’s entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of a character that manifests a purpose on the part of the

actor that the object of the conspiracy should be completed.

{¶ 14} In *Childs*, the court held that a conspiracy indictment must allege “some specific, substantial, overt act performed in furtherance of the conspiracy.” *Childs* at syllabus. In *Childs*, the indictment alleged that the defendant:

[B]etween the dates of December 2, 1993 and February 13, 1995, in the County of Montgomery, aforesaid, and State of Ohio, with purpose to commit, or to promote or facilitate the commission of Aggravated Trafficking, a violation of Section 2925.03(A)(2) of the Revised Code, did agree with another person or persons that one (1) or more of them would engage in conduct that facilitated the commission of any such offense, and that subsequent to each defendant’s entrance into said conspiracy, a substantial overt act was done by each defendant or a person with whom they conspired; contrary to the form of the statute (in violation of Section 2923.01(A)(2) of the Ohio Revised Code).

*Id.* at 197. The court recognized that the indictment included “language asserting that Childs or one of his co-conspirators performed a substantial, overt act after his or her entrance into the conspiracy.” *Id.* The court determined, however, that “merely recit[ing] the generic words of the statute” did not provide the defendant with adequate notice of the specific overt act done in furtherance of the conspiracy. *Id.* at 198. The court stated that “[t]he words of the indictment are little more than a recitation of the words of R.C. 2923.01(B), which defines the crime of conspiracy.” *Id.* The court concluded that “the plain words of the statute defining the crime of conspiracy” reveal that “an indictment for conspiracy requires more than a mere recitation of the exact wording of the statute defining the offense of conspiracy.” *Id.* at 199. The court thus held that “while the state may satisfy its burden by reciting the exact words of a criminal statute in an indictment for some offenses, an indictment for conspiracy \* \* \* must allege some specific, substantial, overt act performed in furtherance of the conspiracy.” *Id.* The court determined that “[t]he state’s failure to allege a specific, substantial, overt act committed in furtherance of



the conspiracy \* \* \* renders the indictment invalid.” *Id.*

{¶ 15} In reaching its decision, the court rejected the state’s assertion that the bill of particulars cured the lack of specificity in the indictment. The court observed that the bill of particulars did “set forth the nature of the charges” and “the specific conduct constituting the crimes with which he was charged.” *Id.* at 198. The court further pointed out, however, that Article I, Section 10 requires a grand jury indictment. The court additionally referred to its prior decision in *State v. Wozniak*, 172 Ohio St. 517, 521, 178 N.E.2d 800 (1961), quoting *Harris v. State*, 125 Ohio St. 257, 264, 181 N.E. 104 (1932), which held:

“The material and essential facts constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury.”

*Id.* at 198; accord *State v. Cimpritz*, 158 Ohio St. 490, 110 N.E.2d 416 (1953), paragraph six of the syllabus (“A judgment of conviction based on an indictment which does not charge an offense is void for lack of jurisdiction of the subject matter and may be successfully attacked either on direct appeal to a reviewing court or by a collateral proceeding”), limited as stated in *State ex rel. Bandarapalli v. Gallagher*, 128 Ohio St.3d 314, 2011-Ohio-230, 943 N.E.2d 1020, ¶1 (stating that court “clarified *Cimpritz* by holding that a defective-indictment claim could be raised only by direct challenge in the ordinary course of law rather than in a collateral attack by

extraordinary writ”); *see also* Crim.R. 12(C)(2) (stating that defendant must raise before trial “[d]efenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding)”); *State v. Wheeler*, 2<sup>nd</sup> Dist. Montgomery No. 27166, 2017-Ohio-1200, 2017 WL 1193815, ¶7 (stating that “Ohio law has consistently held that an indictment or complaint that does not set forth all of the essential elements of the crime is invalid”); *State v. Hous*, 2<sup>nd</sup> Dist. Greene No. 02CA116, 2004-Ohio-666, 2004 WL 259261, ¶17 (determining that failure to timely object to aggravated burglary indictment that omitted the element that “[t]he offender has a deadly weapon or dangerous ordnance on or about the offender’s person or under the offender’s control,” R.C. 2911.11(A)(2), did not waive this “jurisdictional defect”).

{¶ 16} The *Childs* court also noted that the grand jury foreman did not sign the bill of particulars “and there is no evidence that the material contained in the bill of particulars was ever presented to the grand jury.” *Id.* at 198. The court thus disagreed with the state’s contention that the bill of particulars saved the indictment. The court ultimately concluded that the indictment “was fatally defective” and upheld the appellate court’s decision that reversed the defendant’s conspiracy conviction. *Id.* at 199.

{¶ 17} Although the *Childs* majority did not specifically point out that the defendant had failed to object to the indictment during the trial court proceedings, Justice Cook’s dissent indicates that the defendant had not timely objected to the indictment. *Id.* at 200. Justice Cook believed that the defendant’s failure to object to the indictment before trial forfeited the right to challenge it on appeal and that the defendant thus was limited to plain-error review. She

concluded:

Given that appellee neither claimed nor demonstrated any prejudice from the ambiguity, and at no time stated that he was unaware of the applicable facts, it would be unreasonable to conclude that additional information in the indictment would have resulted in his acquittal.

*Id.* (Cook, J., dissenting).

{¶ 18} In the case sub judice, appellant’s indictment not only suffers from the same defect as the indictment in *Childs* (i.e., it fails to allege a specific, substantial, overt act), but it also fails to recite “the generic words of the statute.” *Id.* at 198. Nowhere in appellant’s indictment do the words “substantial overt act in furtherance of the conspiracy” appear. Thus, appellant’s indictment is arguably more deficient than the *Childs* indictment. Furthermore, as in *Childs*, the record in the case at bar contains no evidence that the grand jury considered whether appellant performed a substantial overt act in furtherance of the conspiracy.

{¶ 19} Moreover, although appellant did not object to the indictment during the trial court proceedings, according to the *Childs* court her failure to timely object does not prevent a mandatory reversal.<sup>1</sup> Thus, under the reasoning and holding in *Childs*, appellant’s indictment is fatally defective and we must reverse her conviction. *Accord State v. Bundy*, 7<sup>th</sup> Dist. Mahoning No. 02CA211, 2005-Ohio-3310, 2005 WL 1523813, ¶38; *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85 (7<sup>th</sup> Dist.), ¶23; *State v. Smith*, 4<sup>th</sup> Dist. Scioto No. 97CA2547,

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<sup>1</sup> We observe that the Second District’s decision in *Childs* indicated that a conspiracy indictment that fails to allege a specific, substantial overt act performed in furtherance of the conspiracy means that the indictment fails to charge an offense, within the meaning of Crim.R. 12(C)(2). The Ohio Supreme Court’s *Childs* decision does not explain whether it relied upon Crim.R. 12(C)(2) (at the time, Crim.R. 12(B)(2)) to justify its decision to reverse *Childs*’ conviction.

1999 WL 150259 (Mar. 15, 1999);<sup>2</sup> see *State v. Lavery*, 9th Dist. Medina No. 10CA0062-M, 2011-Ohio-5859, 2011 WL 5515562, ¶7, quoting *State v. Snow*, 9<sup>th</sup> Dist. Summit No. 24298, 2009-Ohio-1336, ¶18 (stating that “the proper remedy for a fatally defective [indictment] is dismissal”); *State v. Pittman*, 8th Dist. Cuyahoga No. 68163, 1995 WL 680905 (Nov. 16, 1995), \*3 (noting that “[t]he constitutional right to be tried for the same offense for which one is indicted is one of our most fundamental constitutional rights of due process,” “[t]he failure to include an essential element in an indictment does adversely affect said substantial right,” and it “is presumptively prejudicial”); see generally *State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787, 905 N.E.2d 151, ¶14 (observing that “had the grand jury returned an indictment \* \* \* for theft, due process would require that the indictment contain notice of the value of the property involved or the degree of the offense alleged”); but see *United States v. Cotton*, 535 U.S. 625, 626, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), quoting *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944) (noting that right to grand jury indictment may be waived and that “a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right”).

## E

*CHILDS HAS NOT BEEN OVERRULED*

{¶ 20} Although we believe that a straight reading of *Childs* mandates a reversal of

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<sup>2</sup> We note that the state contends that our decision in *Smith* is “not controlling precedent in this matter.” In *Smith*, we relied upon the Second District’s decision in *Childs* and concluded that the defendant’s conspiracy indictment was defective for failing to allege a substantial overt act. The Ohio Supreme Court ultimately upheld this part of the appellate court’s decision in *Childs*. Thus, so long as the Ohio Supreme Court’s *Childs* decision remains valid, we fail to see how our holding in *Smith* on this particular issue is not controlling precedent. To the extent a conflict exists between our *Smith* decision and the Supreme Court’s *Childs* decision, *Childs* controls.

appellant's conviction in the case sub judice, we do recognize the state's argument that the legal landscape has changed since the Ohio Supreme Court decided *Childs*, and that an indictment that fails to allege an essential element no longer mandates an automatic reversal.

{¶ 21} The state contends that two months after *Childs*, the court issued a decision in a companion case that upheld a similar conspiracy indictment. *State v. Childs*, 88 Ohio St.3d 558, 728 N.E.2d 379 (2000) (*Childs II*). The state claims that it is "impossible to read these two cases in conjunction with one another" and conclude "that the indictment in Appellant's case was an insufficient charging instrument.

{¶ 22} The state further asserts that in *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, the court held that a bill of particulars could cure the omission of an underlying felony in an indictment, and that this holding also means that a bill of particulars can cure a conspiracy indictment that fails to allege a substantial overt act in furtherance of a conspiracy.

{¶ 23} In *Childs II*, Dineah Childs was indicted as a co-conspirator, along with her husband, Charles F. Childs (the subject of the *Childs I* decision). Count Fourteen of Mrs. Childs' indictment alleged that she

with purpose to commit or to promote or facilitate the commission of Aggravated Trafficking, a violation of Section 2925.03(A)(2) of the Revised Code, did agree with another person or persons that one (1) or more of them would engage in conduct that facilitated the commission of any such offense; and that subsequent to each defendant's entrance into said conspiracy, a substantial overt act was done by each defendant or a person with whom they conspired in that Dineah Childs and Sean Pauley engaged in a series of telephone conversations in which Dineah Childs and Sean Pauley coordinated arrangements for the transferring of narcotics from Charles Childs to Sean Pauley and in which the availability, the nature and the need for the immediate transfer of the narcotics was discussed; these conversations also entailed the need to transfer the financial proceeds of these

transactions from Sean Pauley to Charles Childs; contrary to the form of the statute (in violation of Section 2923.01(A)(1) of the Ohio Revised Code) in such case made and provided, against the peace and dignity of the State of Ohio.

*State v. Childs*, 2nd Dist. Montgomery No. 16580, 1998 WL 801326 (May 31, 2000), \*4, *aff'd in part, rev'd in part*, 88 Ohio St.3d 558, 728 N.E.2d 379 (2000).

{¶ 24} Count Fifteen alleged that Mrs. Childs

with purpose to commit or promote or facilitate the commission of Aggravated Trafficking, a violation of Section 2925.03(A)(7) of the Revised Code, did agree with another person or persons that one (1) or more of them would engage in conduct that facilitated the commission any such offense; and that subsequent to each defendant's entrance into said conspiracy, a substantial overt act was done by each defendant or a person with whom he conspired in that Dineah Childs and Sean Pauley engaged in a telephone conversation in which Dineah Childs and Sean Pauley coordinated the transferring of four (4) ounces of Cocaine for Seven Hundred and Fifty Dollars (\$750.00) from Charles Childs and Sean Pauley for delivery to an unnamed customer; contrary to the form of the statute (in violation of Section 2923.01(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

*Id.*

{¶ 25} The Second District Court of Appeals invalidated Mrs. Childs' indictment due to its failures to specify the type of drug involved and the severity of the offense charged. The court rejected her argument that the indictment failed to specify a substantial overt act in furtherance of the conspiracy.

{¶ 26} On appeal to the Supreme Court, the court observed that Mrs. Childs did "not contend that any of the statutory elements of the conspiracy were insufficiently or incompletely set forth in the indictment." *Childs II*, 88 Ohio St.3d at 565. Instead, Mrs. Childs asserted that her indictment was invalid for failing to specify the drug involved and for failing to inform her of the severity of the offense charged. The court disagreed with these two arguments. The court

determined that “[a] conspiracy charge need not include the specific controlled substance involved in the underlying offense.” *Id.* at paragraph one of the syllabus. The court further rejected Mrs. Childs’ assertion that the indictment was invalid for failing to advise her of the severity of the offense. Instead, the court determined that the indictment contained sufficient information to enable her to deduce the severity of the offense. *Id.* at 566. The court thus upheld Mrs. Childs’ indictment.

{¶ 27} In the case at bar, the state asserts that Mr. Childs’ and Mrs. Childs’ indictments are essentially the same, and thus, because the court upheld Mrs. Childs’ indictment, its decision concerning Mr. Childs’ indictment must no longer be valid. We do not agree. A comparison of the indictments shows that they are not, in fact, the same. While Mr. Childs’ indictment simply recited “the generic words of the statute,” *Childs I*, 88 Ohio St.3d at 198, Mrs. Childs’ indictment contained some specific, substantial overt act performed in furtherance of the conspiracy, i.e., she engaged in telephone conversations with her alleged co-conspirators. We therefore disagree with the state that the two *Childs* decisions are irreconcilable or that *Childs II* implicitly overruled *Childs I*.

{¶ 28} We also disagree with the state that *Skatzes* suggests that *Childs I* is no longer valid precedent. In *Skatzes*, the defendant asserted that his indictment was defective for failing to identify the felony underlying his kidnapping offense. The defendant cited *Childs I* to support his argument. The Supreme Court found the defendant’s reliance upon *Childs I* to be “misplaced.” *Id.* at ¶30. The court explained:

In *Childs*, we held that an indictment’s failure to allege an overt act in furtherance of an alleged conspiracy was a fatal defect. Here, the omission of the underlying felony in the indictment was remedied because the bill of particulars identified the

underlying felony, as is permitted where the indictment sufficiently tracked the wording of the kidnapping statute. In addition, there is no requirement that the indictment demonstrate the basis for the grand jury's findings. The bill of particulars serves this function.

*Id.* (citation omitted).

{¶ 29} Contrary to the state's belief, the court's language does not "indicat[e] a switch" and suggest that it overruled or limited *Childs I*. Instead, *Skatzes* appears to have distinguished *Childs I* by observing that *Childs I* involved a conspiracy indictment that failed to allege a substantial overt act in furtherance of a conspiracy, while *Skatzes*' indictment involved a kidnapping offense that tracked the language of the kidnapping statute but omitted the underlying offense. *Id.* at ¶26; accord *Buehner* at ¶10 (explaining that *Skatzes* court "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"). *Skatzes* did not hold that a bill of particulars can cure a conspiracy indictment that fails to allege a substantial overt act. We also point out that a conspiracy indictment that fails to allege a substantial overt act committed in furtherance of the conspiracy does not track the language of R.C. 2923.01(B). *Skatzes* seems to indicate that a bill of particulars can cure an indictment that tracks the language of the criminal statute at issue. It does not specifically determine whether a bill of particulars can cure an indictment that fails to track the language of the statute. We therefore disagree with the state that *Skatzes* illustrates that *Childs II* represents "a switch in the Court's analysis."

{¶ 30} We also observe that none of the Ohio Supreme Court's decisions issued after *Childs I* explicitly overruled it. While we might question whether later cases have called the



validity of *Childs I* into question,<sup>3</sup> we lack authority to simply disregard the plain holding of *Childs I* and determine that the Ohio Supreme Court's later cases effectively overruled it. Instead, that is a matter reserved to the Supreme Court. We also recognize the appeal of upholding appellant's conviction due to her failure to timely object to the indictment's deficiency.<sup>4</sup> However, we again simply cannot choose to disregard *Childs I* based upon what

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<sup>3</sup> *Horner* at ¶45 (overruling *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, which held that a robbery indictment that omits mens rea is defective and constitutes structural error that mandates reversal, even though the statute does not specify a mens rea and even though the defendant did not timely object; and also overruling *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, to the extent it held that a robbery indictment is defective if it omits mens rea); see *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶24, citing *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643 (stating that the court has “never recognized the hybrid type of plain error applied by the en banc court in this case, forfeited error that is presumptively prejudicial and is reversible error per se” and that court has “rejected the notion that there is any category of forfeited error that is not subject to the plain error rule’s requirement of prejudicial effect on the outcome”); *Horner* at paragraph three of the syllabus (“By failing to timely object to a defect in an indictment, a defendant waives all but plain error on appeal”); *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, ¶30 (explaining that “structural errors do not preclude an appellate court from applying the plain-error standard when the defendant has failed to object”); *Perry* at ¶23 (explaining that determining automatic reversal mandated for error to which defendant did not object “would be to encourage defendants to remain silent at trial only later to raise the error on appeal where the conviction would be automatically reversed”); *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶10 (indicating that a claim that an error is “per se prejudicial” involves an inquiry into whether the error is “structural”); *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶61 (rejecting argument that felony-murder death penalty specification fatally deficient for failing to allege that defendant was the principal offender and instead reviewing for plain error); *State v. Carter*, 89 Ohio St.3d 593, 598-599, 734 N.E.2d 345, (2000) (concluding that omitting “engage in sexual conduct” element from rape count not plain error); see also *State ex rel. Rackley v. Sloan*, — Ohio St.3d —, 2016-Ohio-3416, — N.E.3d —, ¶9, quoting *State ex rel. Raglin v. Brigano*, 82 Ohio St.3d 410, 696 N.E.2d 585 (1998) (noting that “the validity or sufficiency of an indictment” is “nonjurisdictional in nature, and should [be] raised in an appeal of [a] criminal conviction rather than in habeas corpus”); *United States v. Cotton*, 535 U.S. at 631 (rejecting assertion that indictment that fails to charge an offense deprives court of jurisdiction and instead reviewing for plain error); Fed.R. Crim.P. 12(b)(3)(B), 2014 Amendment Advisory Committee Notes (pointing out that the rule has been “amended to remove language that allowed the court at any time while the case is pending to hear a claim that the ‘indictment or information fails \* \* \* to state an offense’”). We further note that some of these cases may be factually distinguishable from *Childs I*.

<sup>4</sup> “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Johnson v. United States*, 520 U.S. 461, 470, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), quoting R. Traynor, *The Riddle of Harmless Error* 50 (1970); accord *Cotton*, 535 U.S. at 634 (stating that “[t]he real threat \* \* \* to the ‘fairness, integrity, and public reputation of judicial proceedings’ would be if” defendants were to have convictions reversed “despite the overwhelming and uncontroverted evidence”

could be a mistaken belief that the supreme court's later cases implicitly overruled *Childs I* to the extent that it holds that a failure to allege a specific, substantial overt act in a conspiracy indictment constitutes a fatal defect that mandates a reversal, even when the defendant failed to timely object and when the defendant fails to show a prejudicial effect.

## F

## ADEQUATE NOTICE

{¶ 31} The state further asserts that we can uphold appellant's conviction because it did not violate the core principle of providing an accused with adequate notice of the charges. The state contends that it provided appellant with adequate notice of the charges by providing a bill of particulars and "open file discovery." However, even if we were to agree with the state that appellant had adequate notice of all of the factual underpinnings for the charges, *Childs I* nevertheless indicates that a conspiracy indictment that fails to allege some specific, substantial overt act creates the danger that the grand jury may have indicted a defendant on facts not presented to it, in violation of Article I, Section 10. Thus, even if the state's bill of particulars and open file discovery alleviated notice concerns, it does not alleviate the concern, expressed in *Childs I*, that the grand jury may have indicted appellant on facts not presented to it. We therefore do not believe that the *Childs I* decision endorses the state's view that a bill of particulars and open file discovery cures a conspiracy indictment that fails to allege some specific, substantial overt act.

## G

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of their guilt); *Perry* at ¶23 (stating that appellate decisions "should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the trial court—where, in many cases, such errors can be easily corrected").

## PLAN OR AID IN PLANNING

{¶ 32} The state alternatively asserts that the indictment alleged “an overt act \* \* \* because it charged Appellant with planning or aiding in planning the commission of aggravated murder.” The state argues that “planning or aiding in planning” constitutes an overt act. We do not agree.

{¶ 33} R.C. 2923.01(B) specifies that “an overt act is substantial when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed.” “[A]n overt act is an open act, done outwardly, without attempt at concealment, and performed pursuant to and manifesting a specific intent or design.” *State v. Papp*, 68 Ohio App.2d 21, 23, 426 N.E.2d 518 (10th Dist.1980).

{¶ 34} Courts have found the following types of conduct sufficient to satisfy the substantial-overt-act standard: (1) a conversation between the defendant and an undercover agent during which the defendant indicates “how much he would pay for the murder, how and where the murder should take place, and how [to] dispose of the body,” *State v. Ayers*, 6th Dist. Erie No. E-99-066, 2001 WL 256093 (Mar. 16, 2001), \*7; (2) participating in drug transactions, *State v. Yeager*, 9<sup>th</sup> Dist. Summit No. 19593, 2000 WL 1257801 (Sept. 6, 2000), \*8; (3) attempt to purchase a firearm, acceptance of money as compensation for murder, and identification of “target,” *State v. Kenney*, 5<sup>th</sup> Dist. Holmes No. CA93-4801A, 2000 WL 699673 (May 10, 2000), \*23; (4) payment of money as compensation for murder, *State v. Fink*, 12<sup>th</sup> Dist. Fayette No. CA92-01-001 (Dec. 21, 1992), \*6; and (5) writing letters regarding murder-for-hire, *Papp*, 68 Ohio App.2d at 22.

{¶ 35} In contrast, an indictment that does not contain either a “generic allegation of an

overt act or [a] description of the overt act” fails to comply with the requirement that a conspiracy indictment allege a substantial overt act in furtherance of the conspiracy. In *State v. Pittman*, 8th Dist. Cuyahoga No. 68163, 1995 WL 680905 (Nov. 16, 1995), \*2, for instance, the court held the following language insufficient to sustain a conspiracy conviction: The defendant “unlawfully and with the purpose to commit or to promote or facilitate the commission of Aggravated Murder R.C. 2903.01, did with another person or persons, to wit: Holly Miller and Michelle Albert, plan or aid in planning the commission of Aggravated Murder R.C. 2901.01.” The court explained that “[b]oth the planning and the overt act are essential elements of the crime which must be alleged in the indictment,” and stated that “simply alleging the conspiracy itself, ‘namely, the discussion and planning of the conspiracy’ is not sufficient to satisfy the requirement that a substantial overt act also be alleged in the indictment.” *Id.*, quoting *Papp*, 68 Ohio App.2d at 23.

{¶ 36} In *Papp*, the court determined that although parts of the indictment alleged substantial overt acts, the paragraph alleging that the defendant “discussed and planned with [another] \* \* \* the commission of \* \* \* Aggravated Murder,” failed to allege a substantial overt act. The court explained that this allegation, “rather than alleging acts in furtherance of the conspiracy, appears to allege the conspiracy itself, namely, the discussion and planning of the conspiracy \* \* \*, which constitutes the offense of conspiracy in accordance with R.C. 2923.01(A)(1).” *Id.* at 23.

{¶ 37} The indictment in the case sub judice bears more similarity to *Pittman* and *Papp* (at least partially) than to *Ayers*, *Kenney*, and *Fink*. Appellant’s indictment does not allege that she discussed murder-for-hire with anyone, that she paid anyone money to commit murder, or

that she sent any letters regarding murder-for-hire. Instead, just as in *Pittman* and *Papp*, appellant's indictment simply alleges the "generic" "plan or aid in planning" language contained in R.C. 2923.01(A)(1), without any allegation that she engaged in a substantial overt act in furtherance of the conspiracy. As the *Pittman* court explained, a conspiracy indictment must allege both the planning (under R.C. 2923.01(A)(1)) and the substantial overt act (under R.C. 2923.01(B)). We therefore disagree with the state that the allegation that appellant planned or aided in planning the commission of aggravated murder satisfies the substantial-overt-act requirement.

{¶ 38} Accordingly, based upon the foregoing reasons, we sustain appellant's first assignment of error.

## II

{¶ 39} Our disposition of appellant's first assignment of error renders her remaining assignments of error moot. *See State ex rel. Cincinnati Enquirer v. Hunter*, 141 Ohio St.3d 419, 2014-Ohio-5457, 24 N.E.3d 1170, ¶4 (internal quotations omitted) (explaining that issues are moot "when they are or have become fictitious, colorable, hypothetical, academic or dead"); *State v. Hudnall*, 4th Dist. Lawrence No. 15CA8, 2015-Ohio-3939, 2015 WL 5676859, ¶7 ("A[n issue] is moot when a court's determination on a particular subject matter will have no practical effect on an existing controversy."); *State v. Moore*, 4th Dist. Adams No. 13CA987, 2015-Ohio-2090, 2015 WL 3452607, ¶¶6 and 7 ("The principle of "judicial restraint" mandates that Ohio courts should not exercise jurisdiction over questions of law that have been rendered moot"; and "an issue is moot when it has no practical significance and, instead, presents a hypothetical or academic question."); *Schwab v. Lattimore*, 166 Ohio App.3d 12,

2006-Ohio-1372, 848 N.E.2d 912, ¶10 (1st Dist.) (“The duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect, and the court need not render an advisory opinion on a moot question or a question of law that cannot affect the issues in a case.”). We therefore need not address appellant’s second and third assignments of error. App.R. 12(A)(1)(c).

{¶ 40} Accordingly, based upon the foregoing reasons, we reverse the trial court’s judgment of conviction and sentence.<sup>5</sup>

JUDGMENT REVERSED.

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<sup>5</sup> We point out that nothing appears to prevent the state from seeking to re-indict appellant. See Crim.R. 12(J)(“If the court grants a motion to dismiss based on a defect \* \* \* in the indictment \* \* \*, it may also order that the defendant be held in custody or that the defendant’s bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint.”); *State v. Bundy*, 7<sup>th</sup> Dist. Mahoning No. 02CA211, 2005-Ohio-3310, 2005 WL 1523813, ¶40.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and that appellant recover of appellee the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY: \_\_\_\_\_  
Peter B. Abele, 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.