

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JULIAN J. WILSON

Defendant-Appellant

: JUDGES:

:

: Hon. Sheila G. Farmer, P.J.

: Hon. John W. Wise, J.

: Hon. Patricia A. Delaney, J.

:

: Case No. 14CA81

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: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County Court
of Common Pleas, Case No. 12-CR-761
R

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

April 9, 2015

APPEARANCES:

For Plaintiff-Appellee:

BAMBI COUCH PAGE
RICHLAND CO. PROSECUTOR
JOHN C. NIEFT
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For Defendant-Appellant:

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Delaney, J.

{¶1} Appellant Julian J. Wilson, Jr. appeals from the October 10, 2014 judgment entry of the Richland County Court of Common Pleas overruling his “Motion to Modify Verdict Pursuant Ohio Revised Code 2945.75(D)” (*sic*). Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} A statement of facts underlying appellant’s criminal convictions is not necessary to our resolution of this appeal. This case has a lengthy procedural history; the following highlights those portions of the case history relevant to the instant appeal.

{¶3} On March 25, 2013, appellant was convicted upon one count of felonious assault pursuant to R.C. 2903.11(A)(1), a felony of the second degree, and one count of assault pursuant to R.C. 2903.13(A), a misdemeanor of the first degree. Appellant was sentenced to a prison term of four years consecutive to a prison term of one year for a probation violation.

{¶4} Appellant appealed from his convictions and sentence arguing the trial court should have dismissed the indictment because appellee filed an untimely bill of particulars and failed to prove statements contained in the bill of particulars. We remanded the matter to the trial court for the limited purpose of imposing sentence on the count of misdemeanor assault and the trial court complied. We then affirmed appellant’s convictions and sentence in *State v. Wilson*, 5th Dist. Richland No. 13CA49, 2014-Ohio-41 [*Wilson I*].¹

¹ A motion for delayed appeal to the Ohio Supreme Court was denied in *State v. Wilson*, 138 Ohio St.3d 1491, 2014-Ohio-2021, 8 N.E.3d 962.

{¶5} In *Wilson I*, appellant argued, e.g., that the trial court lacked jurisdiction because venue was not specified in the individual charges in the indictment. We declined to address this argument because it was raised in the reply brief.

{¶6} Appellant also filed a motion in the trial court to dismiss the indictment for lack of jurisdiction and the motion was overruled on February 20, 2014. We affirmed that decision in *State v. Wilson*, 5th Dist. Richland No. 14CA16, 2014-Ohio-3286 [*Wilson II*], appeal not allowed, 140 Ohio St.3d 1522, 2014-Ohio-5251, 20 N.E.3d 730.

{¶7} In the meantime, appellant moved the trial court to review the jury verdict forms and filed a motion to modify verdict on September 18, 2014, now arguing the verdict forms did not comply with R.C. 2945.75. The motions were overruled on October 10, 2014.

{¶8} Appellant now appeals from the October 10, 2014 judgment entry of the trial court overruling his motion to modify the verdict.

{¶9} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶10} “I. THE TRIAL COURT ERRED BY NOT GRANTING APPELLANTS MOTION TO MODIFY THE VERDICT OF THE JURY OF THE JURY AND PASS SENTENCE OF THE, THE VERDICT FORMS VIOLATED OHIO REVISED CODE 2945.75(A)(2).” (*sic*)

{¶11} “II. THE TRIAL ERRED IN DISMISSING APPELLANT MOTION TO MODIFY THE VERDICT OF THE JURY AND PASS OF THE SAME, BECAUSE THE VERDICT FORMS ARE STRUCTURAL IN NATURE AND CAN NOR BE WAIVED IF THE DEFENDANT-APPELLANT FAILS TO RAISE THE ISSUE AT TRIAL.” (*sic*)

ANALYSIS

I., II.

{¶12} In his first and second assignments of error, appellant argues the verdict form for the count of felonious assault was defective because it did not state the degree of the offense and the trial court should have modified the verdict accordingly. We disagree.

{¶13} Appellant argues the verdict form in his case does not comply with *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, syllabus, in which the Ohio Supreme Court considered the plain language of R.C. 2945.75 and held a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense. An insufficient verdict form results in a finding of guilty on the least degree of the offense charged pursuant to R.C. 2945.75(A)(2). *Id.*

{¶14} First, the jury verdict form in appellant's case complied with *Pelfrey* and R.C. 2945.75 because the verdict form references the indictment charging him with one count of felonious assault pursuant to R.C. 2903.11(A)(1), a felony of the second degree. This is the lowest-level offense of felonious assault. R.C. 2903.11. As appellee points out, appellant seems to have confused misdemeanor assault and felonious assault; misdemeanor assault is not a lesser-included offense of Count I.

{¶15} Second, we agree the trial court properly overruled appellant's motion to modify the verdict because his *Pelfrey* argument, while misplaced, is also barred by res judicata. We have previously held the doctrine of res judicata applies to *Pelfrey*

arguments that could have been, but were not, raised upon direct appeal. *State v. Foy*, 5th Dist. Stark No. 2009-CA-00239, 2010-Ohio-2445, ¶ 9; see also, *State v. Cunningham*, 11th Dist. Lake No. 2010-L-153, 2011-Ohio-5108, ¶ 14; *State v. Hines*, 193 Ohio App.3d 660, 2011-Ohio-3125, 953 N.E.2d 387 (3rd Dist.); *State v. Thompson*, 4th Dist. Ross No. 09CA3129 and 09CA3131, 2011-Ohio-6616. “Res judicata bars the assertion of claims against a valid, final judgment of conviction that have been raised or could have been raised on appeal.” *State v. Ketterer*, 126 Ohio St.3d 448, 2010–Ohio–3831, 935 N.E.2d 9, at ¶ 59.

{¶16} Appellant argues *Pelfrey* permits an appellant to raise the sufficiency of a jury verdict form even though the issue was not raised in the trial court, but he also failed to raise the issue in *Wilson I* and *Wilson II*. Res judicata applies “in situations where the appellant has not only waived the issue at the trial court level but also failed to raise the issue in his direct appeal.” *Cunningham*, supra, 2011-Ohio-5108 at ¶ 15, citing *State v. Garner*, 11th Dist. Lake No. 2010-L-111, 2011-Ohio-3426, at ¶ 23; see, also, *State v. Evans*, 9th Dist. No. 10CA0027, 2011–Ohio–1449, at ¶ 9 (“because [the appellant] could have raised issues related to the jury verdict forms in his direct appeal, he is foreclosed from raising the issue at this time”); *State v. Martin*, 9th Dist. No. 25534, 2011–Ohio–1781, at ¶ 7 (challenge to the validity of 23–year–old conviction pursuant to *Pelfrey* barred by res judicata because the appellant could have raised R.C. 2945.75 on direct appeal).

{¶17} The trial court properly overruled appellant’s motion to modify verdict and his two assignments of error are overruled.

CONCLUSION

{¶18} Appellant's two assignments of error are overruled and the judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J. and

Farmer, P.J.

Wise, J., concur.