[Cite as *State v. Souris*, 2010-Ohio-423.]

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

STATE OF OHIO	C. A. No. 24513
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MANUEL STEVE SOURIS	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 06 2044

DECISION AND JOURNAL ENTRY

Dated: February 10, 2010

MOORE, Presiding Judge.

{¶1} Appellant, Manuel Souris, appeals from the judgment of the Summit County Court of Common Pleas. We affirm.

I.

{¶2} On July 1, 2008, the Summit County Grand Jury indicted Souris on one count of endangering children in violation of R.C. 2919.22(B)(2)/(3)/(4), a felony of the second degree, and three counts of domestic violence in violation of R.C. 2919.25(A), felonies of the fourth degree. On October 15, 2008, a jury found Souris guilty of endangering children, a felony of the third degree. The jury also found Souris guilty of two counts of domestic violence, misdemeanors of the first degree.

{¶3} Souris timely filed a notice of appeal and has raised two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND [SOURIS] GUILTY OF ENDANGERING CHILDREN ON THE GROUNDS THAT THE INDICTMENT WAS FATALLY DEFECTIVE UNDER STATE V. COLON, 2008-OHIO-1624, BECAUSE THE INDICTMENT DID NOT CHARGE THE MENS REA ELEMENT FOR THAT OFFENSE[.]"

{¶4} In his first assignment of error, Souris contends that because the indictment did not charge the mens rea for endangering children the indictment was fatally defective and his conviction should be overturned due to structural error under *State v. Colon*. 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"). We disagree.

{¶5} If a defective indictment "result[s] in multiple errors that are inextricably linked to the flawed indictment," a structural error analysis is appropriate. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, at ¶7 ("*Colon II*"). "[S]tructural errors permeate the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence." *Colon I* at ¶23. In *Colon I*, the Supreme Court concluded that structural error existed where Colon's indictment and the court's jury instructions omitted the mens rea of recklessness for the crime of robbery and the State treated robbery as a strict-liability offense in closing argument. Id. at ¶29-31.

{¶6} However, when a defendant fails to object to a flawed indictment but the flawed indictment does not lead to multiple errors, structural-error analysis is not appropriate. *Colon II*, at ¶7. Instead, a reviewing court should apply a plain-error analysis. Id.

> "Crim.R. 52(B) permits a reviewing court to take notice of [p]lain errors or defects affecting substantial rights even if a party forfeits an error by failing to object to the error at trial. To correct a plain error, all of the following elements 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.

{¶7} In this case, Souris was charged with endangering children in violation of R.C. 2919.22(B)(2)/(3)/(4). "The required mental state for R.C. 2919.22(B) offenses is recklessness." *State v. Powe*, 9th Dist. No. 21026, 2002-Ohio-6034, at ¶27. One acts recklessly when:

> "with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

{¶8} There is no question that Souris' indictment omitted the culpable mental state. Accordingly, an error occurred.

{¶9} However, the error did not affect Souris' substantial rights to the extent that it affected the outcome of the trial. The instant case is distinguishable from *Colon I*, where:

> "there was no evidence to show that the defendant had notice that recklessness was an element of the crime of robbery, nor was there evidence that the state argued that the defendant's conduct was reckless. Further, the trial court did not include recklessness as an element of the crime when it instructed the jury. In closing argument, the prosecuting attorney treated robbery as a strict-liability offense." (Internal citations omitted.) *Colon II*, at ¶6.

{¶10} In this case, although the initial jury instructions made no mention of "recklessly," the State noted in its opening statement that it would have to prove that Souris "recklessly administer[ed] corporal punishment" or "recklessly[] physically restrain[ed] the child[.]" In its closing argument, rather than treat the charge of endangering children as a strict-liability offense, the State argued several times that it proved Souris acted with the necessary culpable mental

state, recklessly. Further, although the initial jury instructions did not include any reference to a culpable mental state, the State brought this matter to the trial court's attention. Prior to any deliberation or the release of the alternate jurors, the trial court re-instructed the jurors regarding the endangering children charge, the definition of recklessness and several other general instructions. For these reasons, Souris cannot demonstrate that the defective indictment created a manifest miscarriage of justice.

{¶11} To the extent Souris argues that the court committed plain error, his first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "[SOURIS'] COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO NUMMEROUS [SIC] INSTANCES OF INADMISSIBLE HEARSAY THROUGHOUT THE TRIAL AND BY FAILING TO PROFFER EVIDENCE DEFENDANT INTENDED TO INTRODUCE WITH REGARD TO PRIOR CSB INVOLVEMENT WITH THE VICTIM."

{¶12} In his second assignment of error, Souris contends that his trial counsel was ineffective in failing to object to numerous instances of inadmissible hearsay and by failing to proffer evidence regarding records from the interactions the victim's mother had with the Children Services Board (CSB). We disagree.

{¶13} To show ineffective assistance of counsel, Souris must satisfy a two-prong test. *Strickland v. Washington* (1984), 466 U.S. 668, 669. First, he must show that his trial counsel engaged in a "'substantial violation of any *** essential duties to his client.'" *State v. Bradley* (1989), 42 Ohio St.3d 136, 141, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Second, he must show that his trial counsel's ineffectiveness resulted in prejudice. *Bradley*, 42 Ohio St.3d at 141-142, quoting *Lytle*, 48 Ohio St.2d at 396-397. "Prejudice exists where there is a reasonable probability that the trial result would have been different but for the alleged

deficiencies of counsel." *State v. Velez*, 9th Dist. No. 06CA008997, 2007-Ohio-5122, at ¶37, citing *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. This Court need not address both *Strickland* prongs if Souris fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶14} With regard to the contention that his trial counsel failed to object to numerous instances of inadmissible hearsay, Souris fails to establish a substantial violation of any duty. Souris' brief does not cite to any specific testimony in the record to support his argument or elaborate as to why the testimony was inadmissible. As we have repeatedly held, "[i]f an argument exists that can support this assignment of error, it is not this court's duty to root it out." *Cardone v. Cardone*, (May 6, 1998), 9th Dist. No. 18349, at *8. We "will not guess at undeveloped claims on appeal." *State v. Wharton*, 9th Dist. No. 23300, 2007-Ohio-1817, at ¶42.

{¶15} Souris' contention that his trial counsel's failure to proffer the CSB records with respect to the victim's mother constituted ineffective assistance is equally unpersuasive because it does not establish prejudice. Souris correctly observes that a defendant who is restricted from introducing evidence at trial via a motion in limine must "seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal." *State v. Grubb* (1986), 28 Ohio St.3d 199, 203. However, because Souris' trial counsel did not proffer the records at trial, this Court has no way of knowing what impact the records may have had on the trial's outcome. *State v. Mitchell*, 9th Dist. No. 24730, 2009-Ohio-6950, at ¶20, citing *State v. Ushry*, 1st Dist. No. C-050740, 2006-Ohio-6287, at ¶43. "In any event, a direct appeal is not the appropriate context to present evidence outside the record." *Mitchell*, at ¶20, citing *State v. Siders*, 4th Dist. No. 07CA10, 2008-Ohio-2712, at ¶19. Rather, Souris' "claim is more suitable

to postconviction relief, where this additional evidence could be presented." *Ushry*, at ¶43. Accordingly, Souris cannot establish prejudice. Id.

{¶16} Souris' second assignment of error is overruled.

III.

{¶17} Souris' assignments of error are overruled. The judgment of the Summit 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 Summit, 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

DICKINSON, J.
BELFANCE, J.
CONCUR

APPEARANCES:

JILL R. FLAGG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.