[Cite as *State v. Wooden*, 2015-Ohio-2633.]

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

STATE OF OHIO Appellee v. TRACY L. WOODEN Appellant	C.A. No. 27250 APPEAL FROM JUDGMENT ENTERED IN THE AKRON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO CASE No. 13CRB7385

DECISION AND JOURNAL ENTRY

Dated: June 30, 2015

CARR, Judge.

{¶1} Appellant, Tracy Wooden, appeals his convictions by the Akron Municipal Court. This Court affirms in part, reverses in part, and vacates the lower court's decision in part.

I.

{¶2} After some of Wooden's neighbors informed police that they had not seen his elderly uncle for some time, Akron police officers performed a welfare check at Wooden's residence. The inside of the house was filthy and smelled of human waste, and a search led them to discover Wooden's uncle, J.W., locked in a small bedroom at the back of the residence. He was emaciated, unclothed except for a soiled adult diaper, and riddled with bed sores. The police did not identify any clothing, medicine, or other supplies in the house necessary for J.W.'s care. They removed J.W. from the residence, and Wooden was charged with separate violations of R.C. 2903.16(A)/(B), which prohibit knowingly and recklessly failing to provide for a

functionally impaired person. Both violations are fourth-degree felonies if they result in serious physical harm to the victim.

{¶3} Immediately before the jury trial started, the State moved to amend the charges to eliminate the reference to serious physical harm in each and, according to the State's representations, leave the trial court to consider two misdemeanor charges within the jurisdiction of the Municipal Court. Wooden agreed, and the trial court amended the charges as requested. The jury found Wooden guilty of both charges. Immediately after the jury rendered its verdict, the trial court ordered a presentence investigation and scheduled a sentencing hearing for the next day. For reasons that are not apparent from the record, however, the trial court made notations regarding Wooden's sentence on the case file jacket, which was then time stamped on the day that the verdict was announced. The following day, the trial court conducted a sentencing hearing, and seven days later, issued a journal entry imposing essentially the same sentence that is reflected on the file jacket. Wooden filed this appeal, which is timely from both the entry on the file jacket and the later journal entry.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR WHEN IT FOUND WOODEN GUILTY OF RECKLESSLY FAILING TO PROVIDE FOR A FUNCTIONALLY IMPAIRED PERSON BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT SUCH FINDINGS.

{¶4} In his first assignment of error, Wooden has argued that the trial court erred by finding him guilty of violating R.C. 2903.16(B) without requiring evidence of serious physical harm. Although framed in terms of sufficiency, the substance of Wooden's argument is that R.C. 2903.16(B) can only be violated upon a demonstration of serious physical harm and,

consequently, it was error for the trial court to find him guilty of that offense when the charge was amended to eliminate that requirement.

{¶5} Wooden's observation raises a more fundamental issue, however. The offense of recklessly failing to provide care for a functionally impaired person that results in serious physical harm is a fourth-degree felony and as such, it is outside the subject matter jurisdiction of the municipal court. *See* R.C. 1901.20(B). If R.C. 2903.16(B) does not provide for a misdemeanor violation, then the trial court did not have subject matter jurisdiction over Wooden's case to the extent that a violation of R.C. 2903.16(B) was charged. Although Wooden has not framed the issue in these terms, we proceed according to the well-established principal that subject matter jurisdiction may be raised sua sponte at any stage in the proceedings. *Summit Cty. Bd. of Health v. Pearson*, 9th Dist. Summit No. 22194, 2005-Ohio-2964, ¶ 6, citing *State v. Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, ¶ 17.

{¶6} R.C. 2903.16(B) provides that "[n]o caretaker shall recklessly fail to provide a functionally impaired person under the caretaker's care with any treatment, care, goods, or service that is necessary to maintain the health or safety of the functionally impaired person *when this failure results in serious physical harm to the functionally impaired person*." (Emphasis added.) Under R.C. 2903.16(C)(2), "[w]hoever violates division (B) of this section is guilty of recklessly failing to provide for a functionally impaired person, a misdemeanor of the second degree. *If the functionally impaired person under the offender's care suffers serious physical harm* as a result of the violation of this section, a violation of division (B) of this section is a felony of the fourth degree." (Emphasis added.) As the parties acknowledge, the language of these provisions, when considered together, is problematic. On its face, R.C. 2903.16(B) only prohibits recklessly failing to provide for a functionally impaired person when serious physical

harm results. According to the plain terms of R.C. 2903.16(C)(2), this constitutes a felony. Thus, although the penalty section of the statute refers to a misdemeanor violation, R.C. 2903.16(B) does not prohibit recklessly failing to provide for a functionally impaired person without *serious* physical harm to the victim.

{¶7} In contrast, R.C. 2903.16(A) prohibits knowingly failing to provide for a functionally impaired person when *either* physical harm or serious physical harm results, and R.C. 2903.16(C)(1) differentiates between a misdemeanor and felony offense on that basis. For this reason, the City urges us to read similar language into R.C. 2903.16(B) – in essence, to presume that the legislature's intention was to create offenses for reckless conduct that parallel the prohibitions for knowing conduct. It is possible that this is the case. We cannot presume it to be so, however, because it is equally possible that given the lower mens rea required by R.C. 2903.16(B), the legislature intended to only punish such conduct when serious physical harm results. Put simply, we cannot presume to know the legislature's intention on this point and, consequently, we cannot read terms into R.C. 2903.16(B) that do not appear there.

{¶8} This leaves us to apply the statute as written to this case. The terms of R.C. 2903.16(B) prohibit recklessly failing to provide for a functionally impaired person that results in serious physical harm, and violations are punishable as a fourth-degree felony under R.C. 2903.16(C)(2). The trial court did not have subject matter jurisdiction to proceed with the case to the extent that Wooden was charged with this felony, and the terms of R.C. 2903.16(B) do not set forth a misdemeanor offense. Wooden's conviction and sentence on the charge of violating R.C. 2903.16(B) must be vacated.

ASSIGNMENT OF ERROR II

THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR BY ADMITTING THE VICTIM'S MEDICAL RECORDS INTO EVIDENCE.

{¶9} Wooden's second assignment of error is that the trial court erred by admitting Wooden's medical records without requiring witness testimony in violation of his right to confront witnesses against him. We disagree.

{¶10} We review the admission of J.W.'s medical records for an abuse of discretion. *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus ("The admission or exclusion of relevant evidence rests within the sound discretion of the trial court."). Under Evid.R. 901(B)(10), evidence may be authenticated by "[a]ny method of authentication or identification provided by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio or by other rules prescribed by the Supreme Court." R.C. 2317.422(A) provides a procedure for the authentication of medical records:

> [T]he records, or copies or photographs of the records, of a hospital * * * in lieu of the testimony in open court of their custodian, person who made them, or person under whose supervision they were made, may be qualified as authentic evidence if any such person endorses thereon the person's verified certification identifying such records, giving the mode and time of their preparation, and stating that they were prepared in the usual course of the business of the institution.

To be authenticated under R.C. 2317.422(A), medical records must be provided to the adverse party at least five days before trial. *Id.* This Court has recently concluded that the admission of records under R.C. 2317.422(A) does not implicate the Confrontation Clause when the records are kept in the ordinary course of business, properly certified pursuant to R.C. 2317.422, and not prepared specifically for use at trial. *State v. Tolbert*, 9th Dist. Summit No. 24958, 2010-Ohio-2864, ¶ 12.

{¶11} In this case, the custodian of medical records for Akron General Medical Center averred that the documents contained in State's Exhibit 29 were photostatic copies of J.W.'s medical record made under her supervision from medical records prepared in the normal course

of business from July 20, 2013, through July 23, 2013. Wooden's attorney acknowledged that he received copies of the records approximately four months before trial. Because the medical records were properly certified under R.C. 2317.422, the trial court did not abuse its discretion by admitting them on the strength of the affidavit, and the Confrontation Clause was not implicated by their admission.

{¶12} Wooden has also argued that even if the records were properly authenticated without testimony under R.C. 2317.422, the trial court erred by failing to exclude portions that set forth a medical diagnosis. Wooden did not raise this objection in the trial court, so our review is limited to plain error:

> By its very terms, [Crim.R. 52(B)] places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a 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 * * * the outcome of the trial.

State v. Barnes, 94 Ohio St.3d 21, 27 (2002). This Court notices plain error only in exceptional circumstances to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶13} With respect to plain error, Wooden has argued that without the medical records, there was no evidence that J.W. was "functionally impaired" or that he was denied treatment or care by Wooden. This is not the case. In fact, numerous witnesses described J.W.'s physical condition at the time that police removed him from the home, the lack of appropriate care evident from his surroundings, and the condition of the home itself. Witnesses also described J.W.'s level of impairment based on their observations and interactions with him. Consequently, assuming, without deciding, that the trial court erred in admitting the medical records, we do not recognize plain error in this case because the outcome of the trial was not affected.

{¶14} Wooden's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR BY HOLDING A SENTENCING HEARING WHEN IT HAD ALREADY IMPOSED SENTENCE ONE DAY EARLIER.

{¶15} Wooden's third assignment of error is that the trial court erred by sentencing him in a journal entry without having conducted a sentencing hearing in his presence. We agree.

{¶16} Crim.R. 43(A) requires the presence of a criminal defendant at every stage in the proceedings, including sentencing. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, ¶ 22. When a trial court sentences a defendant by journal entry without a hearing at which the defendant is present, this Court must reverse. *State v. McMillan*, 9th Dist. Summit No. 21425, 2003-Ohio-5786, ¶ 36. *See also State v. Mullens*, 9th Dist. Summit No. 23758, 2007-Ohio-5678, ¶ 8; *State v. Johnson*, 9th Dist. Summit No. 21665, 2004-Ohio-1231, ¶ 7.

{¶17} In this case, the trial court scheduled a sentencing hearing for the day after trial concluded and ordered a presentence investigation. On the day before the sentencing hearing, however, a sentencing entry was written, signed by the trial court judge, and time stamped on the file jacket. The scheduled hearing proceeded the following day and, one week later, a separate sentencing entry was journalized. These facts are unique, but the import of the sequence of events is clear. The time stamped entry on the file jacket was a judgment that concluded Wooden's case. That sentencing entry was entered in error under Crim.R. 43(A). Nonetheless, once the trial court entered that judgment, it did not have jurisdiction to conduct a sentencing hearing after the fact in order to enter judgment again. *See State v. Simin*, 9th Dist. Summit No. 25309, 2011-Ohio-3198, ¶ 10.

{¶18} Contrary to the City's position, R.C. 2929.24(H) does not create a broad exception to this general rule. That statute provides:

> If a court sentences an offender to a jail term under this section, the sentencing court retains jurisdiction over the offender and the jail term. Upon motion of either party or upon the court's own motion, the court, in the court's sole discretion and as the circumstances warrant, may substitute one or more community control sanctions under section 2929.26 or 2929.27 of the Revised Code for any jail days that are not mandatory jail days.

The plain terms of the statute permit a court that sentences a misdemeanant to exercise continuing jurisdiction for a particular purpose: to "substitute one or more community control sanctions * * * for any jail days that are not mandatory jail days." It does not grant trial courts continuing jurisdiction to revisit sentencing in every circumstance in which a defendant has been sentenced to jail time for the commission of a misdemeanor.

{¶19} Accordingly, the January 24, 2014, sentencing order must be vacated because the trial court lacked jurisdiction after entering judgment on January 16, 2014. The trial court's January 16, 2014, sentencing entry on the file jacket was entered in error, and must also be vacated. Wooden is entitled to a de novo sentencing hearing prior to sentence being imposed.

{¶20} Wooden's third assignment of error is sustained.

ASSIGNMENT OF ERROR IV

> THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR BY IMPOSING A FINE OF $150 WHEN IT DID NOT DO SO IN OPEN COURT.

ASSIGNMENT OF ERROR V

> THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR IN ASSESSING COURT COSTS AGAINST WOODEN WITHOUT COMPLYING WITH R.C. 2947.23(A)(1)(A).

ASSIGNMENT OF ERROR VI

> DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN HIS TRIAL

COUNSEL FAILED TO ARGUE THAT THE TIRAL COURT'S IMPOSITION OF COURT COSTS UNDER R.C. 2947.23(A)(1)(A) WAS DEFECTIVE.

{¶21} Wooden's remaining three assignments of error argue that the trial court erred with respect to imposing sentence and that his trial counsel provided ineffective assistance in connection with sentencing. In light of our disposition of Wooden's other assignments of error, these assignments of error are moot. *See* App.R. 12(A)(1)(c).

III.

{¶22} Wooden's first assignment of error is sustained, and his conviction for recklessly failing to provide care for a functionally impaired person in violation of R.C. 2903.16(B) is vacated. His third assignment of error is also sustained. As a result, the trial court's January 16, 2014, and January 24, 2014, sentencing orders are vacated, and this case is remanded to the trial court for sentencing on Wooden's remaining conviction. Wooden's second assignment of error is overruled. His fourth, fifth, and sixth assignments of error are moot.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, 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(C). 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 equally to both parties.

DONNA J. CARR
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

NEIL AGARWAL, Attorney at Law, for Appellant.

CHERI CUNNINGHAM, Law Director, GERTRUDE WILMS, Prosecuting Attorney, and THOMAS D. BOWN, Assistant Prosecuting Attorney, for Appellee.