[Cite as *State v. McKinney*, 2023-Ohio-1587.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 22CA7
vs.	:	
KEITH D. MCKINNEY,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Karyn Justice, Portsmouth, Ohio, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and Andrea M. Kratzenberg, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:4-27-23
ABELE, J.

{¶1} This is an appeal from a Lawrence County Common Pleas Court judgment of conviction and sentence. A jury found Keith D. McKinney, defendant below and appellant herein, guilty of eight counts of first-degree rape, in violation of R.C. 2907.02(A)(1)(b).

{¶2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE IN HIS REPRESENTATION OF THE APPELLANT."

SECOND ASSIGNMENT OF ERROR:

"APPELLANT'S CONVICTIONS ARE NOT SUPPORTED BY THE EVIDENCE."

THIRD ASSIGNMENT OF ERROR:

"APPELLANT'S SENTENCE IS CONTRARY TO LAW."

{¶3} On June 1, 2021, a Lawrence County Grand Jury returned an indictment that charged appellant with 100 counts of first-degree rape, in violation of R.C. 2907.02(A)(1)(b). The indictment alleged that each offense involved a single victim who was less than 13 years of age.

{¶4} On April 4 and 5, 2022, the court held a jury trial, but before the trial began the state asked to amend the indictment and "nolle counts eleven through one hundred and proceed on counts one through ten." The court granted the state's request and the case proceeded to trial.

{¶5} After hearing all of the evidence, the jury deliberated and found appellant guilty of counts one through eight, and not guilty of counts nine and ten. On April 25, 2022, the court (1) sentenced appellant to serve 25 years to life in prison for each of the eight rape offenses, and (2) ordered the sentences imposed for counts one through four to be served consecutively to one another for a total minimum stated

prison term of 100 years to life in prison. The court additionally found appellant to be a Tier Three Sexual Offender. This appeal followed.

{¶6} Before we may review the merits of appellant's assignments of error, we first must determine whether we have jurisdiction to do so. *Ames v. Rootstown Twp. Bd. of Trustees*, 2022-Ohio-4605, ¶ 15, fn.1 ("a court has an independent obligation to assure itself of its authority to decide a case"). Courts of appeals have jurisdiction to "affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." Section 3(B)(2), Article IV, Ohio Constitution; *State v. Jackson*, 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.3d 414, ¶ 46; *State v. Thompson*, 141 Ohio St.3d 254, 23 N.E.3d 1096, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 37. "As a result, '[i]t is well-established that an order [or judgment] must be final before it can be reviewed by an appellate court. If an order [or judgment] is not final, then an appellate court has no jurisdiction.'" *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, 861 N.E.2d 519, ¶ 14, quoting *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989); *Jackson* at ¶ 46 (stating that courts lack "jurisdiction over orders that are not final and appealable"); *Thompson* at ¶ 37 (same). In the

event that the parties involved in an appeal do not raise this jurisdictional issue, the appellate court must raise it sua sponte. *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989), syllabus; *Whitaker-Merrell v. Geupel Co.*, 29 Ohio St.2d 184, 186, 280 N.E.2d 922 (1972).

{¶7} "'[I]n order to decide whether an order issued by a trial court in a criminal proceeding is a reviewable final order, appellate courts should apply the definitions of 'final order' contained in R.C. 2505.02.'" *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, ¶ 6, modified on other grounds in *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, quoting *State v. Muncie*, 91 Ohio St.3d 440, 444, 746 N.E.2d 1092 (2001), citing *State ex rel. Leis v. Kraft*, 10 Ohio St.3d 34, 36, 460 N.E.2d 1372 (1984). R.C. 2505.02(B) defines the characteristics of a final order and states in relevant part:

> An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment * * *

{¶8} "Undoubtedly, a judgment of conviction qualifies as an order that 'affects a substantial right' and 'determines the

action and prevents a judgment' in favor of the defendant." *Baker* at ¶ 9.

{¶9} Crim.R. 32(C) outlines the elements that a final, appealable judgment of conviction must contain. *Jackson* at ¶ 47; *Thompson* at ¶ 38. Crim.R. 32(C) states:

> A judgment of conviction shall set forth the fact of conviction and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

{¶10} Thus, "a judgment of conviction is a final order subject to appeal under R.C. 2505.02 when the judgment entry sets forth (1) the fact of conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk." *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 14; *accord Jackson* at ¶ 47; *Thompson* at ¶ 38. Furthermore, "[a]s a general matter, '[o]nly one document can constitute a final appealable order,' meaning that a single entry must satisfy the requirements of Crim.R. 32(C)." *Jackson* at ¶ 48, quoting *Baker* at ¶ 17; *State ex rel. McIntyre v. Summit Cty. Court of Common Pleas*, 144 Ohio St.3d 589, 45 N.E.3d 1003, 2015-Ohio-5343, 45 N.E.3d 1003, ¶ 8;

Thompson at ¶ 39; *State v. Adkins*, 4th Dist. Lawrence No. 14CA29, 2015-Ohio-2830, ¶ 22.

{¶11} This court consistently has stated that a trial court's judgment of conviction is not final and appealable if any counts of the indictment remain unresolved. *State v. Geisler*, 4th Dist. Athens No. 07CA35, 2008-Ohio-4836, ¶ 13, quoting *State v. Brooks*, 8th Dist. Cuyahoga No. 58548 (May 16, 1991), citing *State v. Brown*, 59 Ohio App.3d 1, 2, 569 N.E.2d 1068 (8th Dist.1989) (trial court possesses "'a mandatory duty to deal with each and every charge prosecuted against a defendant,'" and "'[t]he failure of a trial court to comply renders the judgment of the trial court substantively deficient under Crim.R. 32 [(C)]'"); *e.g., State v. Gillian*, 4th Dist. Gallia No. 15CA3, 2016-Ohio-3232, ¶ 6; *State v. Johnson*, 4th Dist. Scioto No. 14CA3660, 2015-Ohio-3370, ¶ 11; *In re B.J.G.*, 4th Dist. Adams No. 10CA894, 2010-Ohio-5195, ¶ 7; *State v. Wyant*, 4th Dist. Scioto No. 08CA3264, 2009-Ohio-5200, ¶ 10; *accord State v. Pippin*, 1st Dist. Hamilton No. C-150061, 2016-Ohio-312, ¶ 5 ("An order in a criminal case is not final where the court fails to dispose of all the charges that are brought against a criminal defendant in an action."). To be final, a court's judgment need not, however, reiterate counts that "'"were resolved in other ways, such as dismissals, nolled

counts, or not guilty findings."'" *State ex rel. Rose v. McGinty*, 128 Ohio St.3d 371, 2011-Ohio-761, 944 N.E.2d 672, ¶ 3, quoting *State ex rel. Davis v. Cuyahoga Cty. Court of Common Pleas*, 127 Ohio St.3d 29, 2010-Ohio-4728, 936 N.E.2d 41, ¶ 2, quoting *State ex rel. Davis v. Cuyahoga Cty. Court of Common Pleas*, 8th Dist. Cuyahoga No. 93814, 2010-Ohio-1066, ¶8. Instead, the court's judgment must fully resolve "'"those counts for which there were convictions."'" (Emphasis sic.) *Id.*, quoting *State ex rel. Davis*, 127 Ohio St.3d 29 at ¶ 2, 936 N.E.2d 41, quoting *State ex rel. Davis*, 2010-Ohio-1066 at ¶ 8; *accord State ex rel. Snead v. Ferenc*, 138 Ohio St.3d 136, 2014-Ohio-43, 4 N.E.3d 1013, 4, ¶ 13 ("[n]othing in Crim.R. 32(C) or [the supreme] court's jurisprudence requires a trial court to include as part of its sentencing entry the disposition of charges that were previously dismissed by the prosecution"). For example, in *Rose*, the court held that the "sentencing entry did not need to include the dispositions of the counts that Rose was originally charged with but that were not the basis for his convictions and sentence" when "[t]hose counts were nolled." Id.

{¶12} Accordingly, a proper Crim.R. 32(C) judgment of conviction need not reiterate charges that "were resolved in other ways." Before the judgment of conviction may become final

and appealable, however, the record must reflect that all counts of the indictment actually were resolved in some manner. *State v. Craig*, 159 Ohio St.3d 398, 2020-Ohio-455, 151 N.E.3d 574, ¶ 21 ("a conviction on one count of a multicount indictment is not a final, appealable order when other counts remain pending"); *State v. Marcum*, 4th Dist. Hocking Nos. 11CA8 and 11CA10, 2012-Ohio-572, ¶ 6; *accord State v. Brewer*, 4th Dist. Meigs No. 12CA9, 2013-Ohio-5118, ¶ 6; *State v. Pruitt*, 8th Dist. Cuyahoga No. 96852, 2012-Ohio-1535, ¶ 5. A failure to properly terminate these so-called "'hanging charges' prevents the conviction from being a final order under R.C. 2505.02(B) because it does not determine the action, i.e., resolve the case." *Marcum* at ¶ 6, citing Painter and Pollis, Ohio Appellate Practice (2011-2012 Ed.), Section 2.9; *accord State v. Goodwin*, 9th Dist. Summit No. 23337, 2007-Ohio-2343, ¶ 7 ("'a trial court's failure to dispose of any of the charges against a defendant in a single case renders the trial court's journal entry non-final in regard to all of the charges against him'"); *State v. Allman*, 2d Dist. Montgomery No. 24693, 2012-Ohio-413, ¶ 6 ("when the trial court fails to dispose of each charge in the defendant's case, the trial court's sentencing entry as to some charges is merely interlocutory"); *State v. Heavilin*, 9th Dist. Medina No. 15CA0034-M, 2016-Ohio-1284, ¶ 9, quoting *State v. Roberson*, 9th

Dist. Lorain No. 09CA0099555, 2009-Ohio-6369, ¶ 6, quoting *Goodwin* at ¶ 13 (a court "'"must dispose of all charges brought in a single case against a defendant in order to be final"'"). "'Allowing, or indeed requiring, a criminal defendant who wishes to appeal to appeal on some charges before all charges against him or her in a case have been disposed of would potentially result in multiple appeals from the same case, each appeal addressing less than all the issues.'" *Goodwin* at ¶ 11, quoting *Wilcox v. Nick's L.A. Prod.*, 9th Dist. No. 15064, 1991 WL 168593 (Aug. 28, 1991).

{¶13} In the case sub judice, it appears that none of the trial court's journal entries disposes of counts 11 through 100. Although the court had mentioned the dismissal of the counts before trial began, "[i]t is axiomatic that a court speaks only through its journal entries." *State v. Payton*, 4th Dist. Scioto No. 14CA3628, 2015-Ohio-1796, ¶ 7, quoting *State ex rel. Collier v. Farley*, 4th Dist. Lawrence No. 05CA4, 2005-Ohio-4204, ¶ 18. Consequently, "[t]he oral announcement of a judgment or decree binds no one." *State v. Grube*, 4th Dist. Gallia No. 10CA16, 2012-Ohio-2180, ¶ 7, quoting *In re Adoptions of Gibson*, 23 Ohio St.3d 170, 492 N.E.2d 146, (1986), at fn. 3. Here, counts 11 through 100 remain "hanging charges" and prevent the trial court's judgment from attaining the status of a final order.

State v. Stevens, 4th Dist. Lawrence No. 21CA15, 2022-Ohio-2518, ¶ 10 (dismissing appeal for lack of final order when trial court orally granted state's motion to nolle prosequi count before the trial began, but did not journalize the dismissal).

{¶14} Accordingly, based upon the foregoing reasons we lack jurisdiction to review appellant's assignments of error, and, therefore, we dismiss this appeal.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the appeal be dismissed and that appellee recover of appellant 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 Lawrence County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

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

Smith, P.J. & Hess, 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.