

ORIGINAL

NO. 2012-0651

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 95851

STATE OF OHIO

Plaintiff-Appellant

vs.

JAMES DZELAJLIJA

Defendant-Appellee

MERIT BRIEF OF APPELLANT

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## I. STATEMENT OF THE CASE AND FACTS

On March 21, 2006, Appellee James Dzelajlija was indicted on two counts of robbery in violation of R.C. 2911.02. On September 1, 2006, after trial by jury, he was found guilty as to both counts. He was sentenced to two concurrent seven-year terms of imprisonment. The Eighth District Court of Appeals reversed and remanded on the basis that the trial court improperly admitted opinion evidence. *State v. Dzelajlija*, 8<sup>th</sup> Dist. No. 88805, 2007-Ohio-4050 (*Dzelajlija I.*)

A second jury trial began on February 12, 2008. On February 19, 2008, Appellee was once again found guilty of both robbery charges and sentenced to concurrent five-year and seven-year prison terms. Appellee filed an appeal from his second trial, asserting two assignments of error: 1) the indictments under which he had been charged had been defective; and 2) the conviction was against the manifest weight of the evidence. *State v. Dzelajlija*, 8<sup>th</sup> Dist No. 91115, 2009-Ohio-1072. (*Dzelajlija II.*) The court found the indictments defective, citing this Court's opinion, *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, a case decided upon reconsideration. *Dzelajlija II*, 2009-Ohio-1072, at ¶ 27. Having found the indictments defective, the appellate court then found the assignment of error alleging that the convictions were against the manifest weight of the evidence to be moot. *Id.*, at ¶ 28. The appellate court vacated the convictions and remanded the matter to the trial court. It specifically stated the following in reversing the case:

Specifically, we find that the state failed to charge the appellant with the requisite mens rea of recklessness for the charged offenses, thereby rendering the indictment defective, and that this error permeated

throughout the trial. Accordingly, we vacate appellant's convictions.

\*\*\*

Accordingly, having found that all five *Colon* prongs are met in this case, we must follow the Ohio Supreme Court's direction and conclude that the defective indictment so permeated appellant's trial, resulting in structural error **and requiring reversal**.

\*\*\*

Judgment reversed and case remanded to the lower court for further proceedings consistent with this opinion.

Id., at ¶4, 27, 28. (Citations omitted.)

After the reversal of the case, the trial court received the case from the appellate court on May 21, 2009. Pretrial conferences were held on August 4, 2010 and on September 8, 2010, with trial set for September 14, 2010. On August 27, 2010, this Court decided *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26. *Horner* overruled *Colon*, holding that, “when an indictment fails to charge a mens rea element of the crime, but tracks the language of the criminal statute describing the offense, the indictment provides the defendant with adequate notice of the charges against him and is, therefore, not defective.” *Horner*, 2010-Ohio-3830, at ¶45. This decision abrogated the holding in *Dzelajlija II*, finding that *Colon* mandated reversal of the convictions.

On September 14, 2010, at hearing, the trial court determined that the decision in *Horner* constituted an extraordinary circumstance that allowed it to deviate from the Eighth District’s opinion, and therefore re-entered the journal entry of conviction, without holding another trial. Appellee filed an appeal from

that entry. Upon reconsideration of its opinion, the Eighth District held that “because this matter was no longer a pending case . . . the trial court committed reversible error in failing to follow the mandate ordering the convictions vacated.”

*State v. Dzelajlija*, 8th Dist. No. 95851, 2012-Ohio-913 at ¶15 (*Dzelajlija III.*)

## II. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law: An inferior court may deviate from the mandate of a reviewing court when an intervening decision from a superior court justifies such deviation.**

### A. Summary of Argument

Appellee was found guilty after two trials. And the appellate court reversed both, remanding the matter to the trial court the second time based upon case law that was overruled prior to the trial court acting upon the remand. However, after the trial court applied *Horner* on remand, the appellate court reversed the trial court, based on its determination that there was no case and without determining whether or not the trial court could apply superseding case law. The Eighth District now requires the State to expend valuable judicial and State resources by trying Appellee for a third time, where no error was determined to occur at the second trial. Since the sanctity of a jury verdict should not be ignored when no error has been found, the State asks this Honorable Court to adopt the following proposition of law:

An inferior court may deviate from the mandate of a reviewing court when an intervening decision from a superior court justifies such deviation.

**B. The Case Was Active and Properly Before the Trial Court to Act**

**1. The remand in this case did not dismiss the action.**

In *Dzelajlija II*, the court found the indictments defective. Having found the indictments defective, it *vacated* the convictions and *remanded* the matter to the trial court. The court stated the following in reversing and remanding:

Specifically, we find that the state failed to charge the appellant with the requisite mens rea of recklessness for the charged offenses, thereby rendering the indictment defective, and that this error permeated throughout the trial. **Accordingly, we vacate appellant's convictions.**

\*\*\*

Accordingly, having found that all five *Colon* prongs are met in this case, we must follow the Ohio Supreme Court's direction and conclude that the defective indictment so permeated appellant's trial, resulting in **structural error and requiring reversal.**

\*\*\*

**Judgment reversed and case remanded to the lower court for further proceedings consistent with this opinion.**

Id., at ¶4, 27, 28. (Emphasis added; citations omitted.)

The plain reading of the appellate order to the trial court was to vacate the convictions in the criminal case. In *Dzelajlija III*, the appellate court interpreted the prior remand as being “the court in *Dzelajlija II* determined that the robbery charges were structurally defective and it vacated the convictions. The mandate from this court ordered that the matter be remanded to the trial court ‘for the

limited purpose of vacating the convictions.” *Dzelajlija III*, at ¶ 15. However, the remand was not so stated.<sup>1</sup>

This Court has written on the meaning of what constitutes a conviction. In *State v. Whitfield*, 124 Ohio St.3d 319, 922 N.E.2d 182, 2010-Ohio-2, this Court examined the meaning of the word “conviction” under R.C. 2941.25 in determining allied offenses. In discussing the meaning, this Court stated, “Our past decisions make clear that for purposes of R.C. 2941.25 a “conviction” consists of a guilty verdict *and* the imposition of a sentence or penalty. *Id.*, at ¶ 12. Further, this Court noted that the term “conviction” was used in cases to either mean a finding of guilt, or a finding of guilt and a conviction. *Id.*, at ¶ 13. However, the term conviction has not been read to mean, and should not be read to mean, dismissal.

## **2. The trial court was left with an open case upon remand**

The remand in *Dzelajlija II* was not a dismissal of the case and the matter was properly before the trial court upon the indictment. Despite the opinion in *Dzelajlija III* that determined there was no present case before the trial court upon

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<sup>1</sup> In *Dzelajlija II*, the word “limited” appears only once in the opinion at ¶ 23 (“The trial court did define the word “knowingly” but its instruction regarding the mens rea of knowingly was **limited** to the underlying theft offense.” (Emphasis added.)) The State notes that in the vacated opinion, *State v. Dzelajlija*, 8<sup>th</sup> Dist. No. 95851, 2011-Ohio-6445, at ¶ 17 the appellate court quoted Appellee’s argument regarding the wording of the *Dzelajlija II* mandate as:

Within these assignment of error, defendant asserts that the trial court was without jurisdiction to reimpose the February 21, 2008 sentence because this court in *Dzelajlija II* vacated the convictions, and the mandate from this court ordered that the matter be remanded to the trial court “for the limited purpose of vacating the convictions.”

which it could act, the remand to the trial court to vacate the convictions left the trial court with an open case upon an indictment in which the conviction – the finding of guilt and sentence imposed – was reversed.<sup>2</sup>

Thus, in *Dzelajlija III*, the court’s finding that there was no “present case” upon which the trial court could act to apply *Horner* misread the extent of the mandate in *Dzelajlija II*. The remand was to vacate the convictions entered in the criminal case; it was not to dismiss the case. Because of this, the trial court properly had the ability to act and apply this Court’s superseding opinion in *Horner* and re-enter Appellee’s convictions.

**B. The Trial Court Properly Determined *Horner* was an Extraordinary Circumstance that Allowed it To Re-enter Appellee’s Convictions**

**1. An inferior court may deviate from the mandate of a superior court where extraordinary circumstances exist.**

In *Dzelajlija III*, the appellate court determined the criminal case was not properly before the court to act, it then found that, “because the matter was no longer a pending case, given *Dzelajlija II*’s reversal and remand for vacation of the convictions, we further conclude that the trial court committed reversible error in failing to follow the mandate ordering the convictions vacated.” *Dzelajlija III*, at ¶15. However, the appellate court approved of the trial court’s determination that *Horner* served to invalidate the holding in *Dzelajlija II*, stating, “Our opinion

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<sup>2</sup> In the court’s opinion issued prior to reconsideration, Rocco, J., concurring in part and dissenting in part, noted that the court should re-open *Dzelajlija II* in order to determine whether a third trial was necessary. *State v. Dzelajlija*, 8<sup>th</sup> Dist. No. 95851, 2011-Ohio-6445, at ¶ 30, opinion vacated and superseded (“Upon review, if this court’s decision is that the defendant’s convictions are not against the manifest weight of the evidence, then there is no need for a third trial in this case.”)

therefore reflected that the failure to include a mens rea in an indictment is no longer deemed to create structural error where it tracks the language of the criminal statute, but also reflected that we were without authority and lacked the record to determine the manifest weight of the evidence issue raised *Dzelajlija II*.” *Id.*, at ¶ 9.

The appellate court first found its mandate in *Dzelajlija II* dismissed the case; the mandate did not. The appellate court then found that the trial court erred by holding a hearing and restating the finding of guilt and sentence. *Dzelajlija III*, at ¶ 15. The trial court did not error. The doctrine of the “law of the case” provides “that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing level.” *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984.) “[T]he doctrine functions to compel trial courts to follow the mandates of reviewing courts.” *Id.*, at 3. However, it is not to “be applied so as to achieve unjust results.” *Id.* Therefore, “[a] lower court has no discretion, *absent extraordinary circumstances*, to disregard the mandate of a superior court in a prior appeal in the same case.” (Emphasis added.) *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 32, 391 N.E.2d 343 (1979.)

**2. Extraordinary Circumstances are those which render a prior mandate or unjust.**

In this matter, the *Horner* decision constituted an “extraordinary circumstance” allowing for the trial court to deviate from the Eighth District’s original mandate of vacating the convictions. This Court has never precisely

defined the term “extraordinary circumstances,” but the Eighth District Court of Appeals interpreted it to mean “something exceptional in character, amount, extent, or degree.” *State v. Carlisle*, 8th Dist. No. 93266, 2010-Ohio-3407, at ¶ 23, judgment affirmed on other grounds, *State v. Carlisle*, 131 Ohio St.3d 127, 961 N.E.2d 671, 2011 -Ohio- 6553. Where *Colon*, the basis of the vacation of the convictions, was reversed by *Horner* after only 26 months, such change in the law is exceptional in character and degree.

This Court stated that an example of an “extraordinary circumstance” would be an intervening decision by the Ohio Supreme Court. *Mathews*, 59 Ohio St.2d 29, at 32. That is exactly what occurred in this case; an intervening decision by this Court. The Eighth District’s mandate in *Dzelajlija II* was to vacate the convictions based on a finding that the indictments were defective under the now-overruled decision in *Colon*, supra. *Horner* was released after the Eighth District’s remand and it overruled *Colon* before the trial court acted on remand, setting a new standard in determining whether an indictment is sufficient. Because of this, the trial court correctly found that this Court’s intervening decision in *Horner* allowed it to determine that the indictments were sufficient and then reinstate the convictions.

This Court recognized that an inferior court may deviate from the mandate of a superior court when justified in so doing in *Nolan v. Nolan*, 11 Ohio St.3d 1, 462 N.E.2d 410 (1984). In *Nolan*, this Court examined whether a lower court could ever ignore the law of the case doctrine. Generally, an inferior court does not have the

discretion to vary from the mandate set forth by a superior court. See *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 391 N.E.2d 343 (1979). This Court explained that the doctrine makes decisions of a reviewing court binding “on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels \*\*\* [and] functions to compel trial courts to follow the mandates of reviewing courts.” *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). However, the law of the case doctrine is not a substantive rule of law and “will not be applied so as to achieve unjust results.” *Id.* This Court then held, “that absent extraordinary circumstances, such as an intervening decision by this court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.” *Id.*, at 5 (Citing, *State, ex rel. Potain, v. Mathews*. 59 Ohio St.2d 29, 32, 391 N.E.2d 343 (1979).) Therefore this Court created an exception to the law of the case doctrine, allowing trial courts to deviate from a reviewing court’s mandate only under “extraordinary circumstances.” *Id.*, at paragraph one of the syllabus.

In this case, there was an extraordinary circumstance, this Court reversed its holding in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, after only 26 months. Based on *Horner*, the trial court restated the original verdict and sentence. Whether this Court’s decision in *Horner* constituted an “extraordinary circumstance” which had allowed for the trial court to deviate from original mandate was not determined by the appellate court in this case. The Eighth

District never addressed this issue, avoiding this issue by its adherence to its reading of its mandate in *Dzelajlija II*. However, that reading and failure to address the issue amounted to an improper invasion of the jury's verdict, especially in light of the appellate court's admission that there was no error in the indictments.

Based on this Court's precedent, and in conjunction with the inappropriate invasion of a jury verdict based, this Court's decision that overruled the basis of the mandate to vacate the convictions constituted an extraordinary circumstance. Such extraordinary circumstance allowed the trial court to deviate from the prior mandate, and in so doing, avoided an unjust result. The trial court's decision to reimpose the convictions in this case and respect the jury's verdict based on the intervening *Horner* decision served to avoid an unjust result. As such, the appellate court's failure to properly read its prior mandate and not address the issue of whether the vacation of the jury's verdicts in the second trial was a mandate that had to be followed was error.

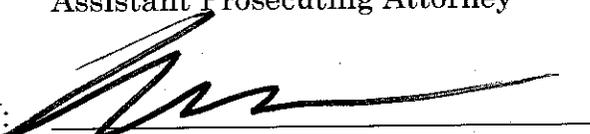
### CONCLUSION

The Eighth District Court of Appeal's determination forces the trial court to hold a third trial, despite the fact there was no legal error found in the second trial. The appellate court dictated blind adherence to procedure; a dictate that mandates a waste of judicial resources, but; more importantly, it disregards the sanctity of a jury verdict. It is unjust to disregard a jury verdict based upon a technicality in timing of appellate court procedure. This case exemplifies the necessity to define under what circumstances an inferior court may deviate from a mandate; the State

posits that such action is to do so where justice so requires. Because of this, the State asks that this Court adopt its proposition of law and reverse the appellate decision.

Respectfully submitted,

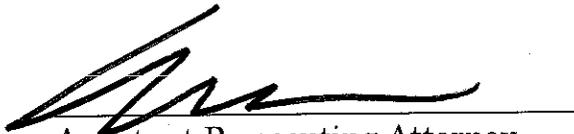
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**SERVICE**

A copy of the foregoing Merit Brief of Appellant has been mailed this 31<sup>st</sup> day of August, 2012, to Cullen Sweeney, 310 Lakeside Avenue, 2<sup>nd</sup> Floor, Cleveland, Ohio 44113.

  
Assistant Prosecuting Attorney

CASE NO.

IN THE SUPREME COURT OF OHIO

12-0651

APPEAL FROM  
THE EIGHTH DISTRICT COURT OF APPEALS  
CUYAHOGA COUNTY, OHIO  
CA 95851

**STATE OF OHIO**  
Plaintiff/Appellant

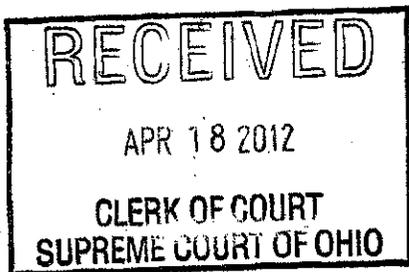
vs.

**JAMES DZELAJLIJA**  
Defendant/Appellee

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**NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO**

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**Counsel for Plaintiff/Appellant**

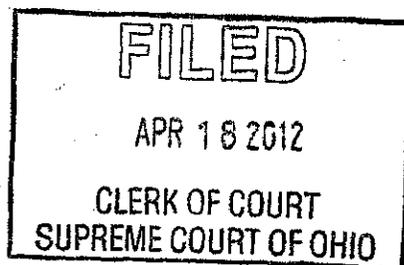
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CASE NO.

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE EIGHTH DISTRICT COURT OF APPEALS  
CUYAHOGA COUNTY, OHIO  
CA 95851

**STATE OF OHIO**  
Plaintiff/Appellant

vs.

**JAMES DZELAJLIJA**  
Defendant/Appellee

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**NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO**

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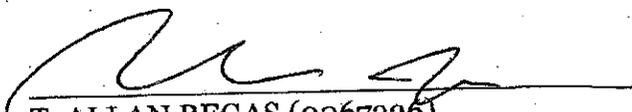
Now comes the State of Ohio and hereby give Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, and journalized March 8, 2012. The State filed a timely motion for reconsideration on December 23, 2011. On March 8, 2012, the Eighth District granted the State's Motion for Reconsideration. The State is appealing the opinion and judgment entry announced on March 8, 2012 in which the Eighth District granted the State's Motion to Reconsider but reversed the Trial Court's Decision and vacated Convictions and Sentence. S.Ct. Prac. R. II, §2(A)(5)(a).

Said cause did not originate in the Court of Appeals, is a felony, involves a substantial constitutional question, and is of great general and public interest.

Respectfully submitted,

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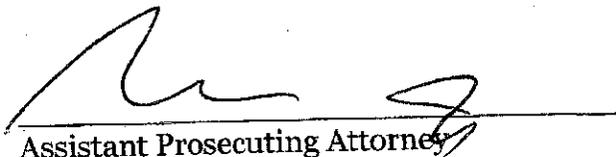
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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 95851

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JAMES DZELAJLIJA**

DEFENDANT-APPELLANT

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**JUDGMENT:  
REVERSED; CONVICTIONS AND SENTENCE  
VACATED**

---

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-478630

**BEFORE:** Kilbane, P.J., Boyle, J., and Rocco, J.

**RELEASED AND JOURNALIZED:** March 8, 2012

VOLO 748 PB0815



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FILED AND JOURNALIZED  
PER APP.R. 22(C)

**MAR 08 2012**

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS



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ALL PARTIES. COPIES TAKEN

VOL 0748 P00816

ON RECONSIDERATION

MARY EILEEN KILBANE, P.J.:

{¶1} The plaintiff-appellee, the state of Ohio has asked this court to reconsider its December 15, 2011 decision in which we concluded that due to recent changes in the controlling case law, defendant-appellant, James Dzelajlija, was not entitled to a new trial due to structural error caused by his indictment. That opinion recognized, however, that in defendant's prior appeal on the merits, his challenge to the manifest weight of the evidence supporting his robbery convictions was deemed moot and was not addressed. Consequently, this court determined that the trial court committed reversible error and acted beyond its mandate in reinstating Dzelajlija's sentences for those convictions.

{¶2} Since the release of the December 15, 2011 opinion, the panel that heard defendant's prior appeal has denied the State's motion to reopen the appeal in order to weigh the evidence supporting defendant's 2008 robbery convictions.<sup>1</sup> Therefore, upon reconsideration, we note that despite the change in controlling case law, the record of this particular matter compels us to apply the structural error analysis herein. Under that structural error analysis,

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<sup>1</sup>In this connection, we note that App.R. 26(B) states that "A *defendant* in a criminal case may apply for reopening[.]" (Emphasis added.)

defendant's 2008 robbery conviction and sentence must be vacated due to defective indictments.<sup>2</sup>

{¶3} On March 23, 2006, defendant was indicted on two counts of robbery and receiving stolen property, in connection with the September 30, 2005 robbery of a furniture store employee who was making a night deposit. Defendant was convicted of the robbery charges and sentenced to concurrent seven-year terms of imprisonment, plus five years of postrelease control. This court determined that the trial court admitted inadmissible and prejudicial opinion evidence as to a witness's truthfulness and reversed and remanded for a new trial. *State v. Dzelajlija*, Cuyahoga App. No. 88805, 2007-Ohio-4050, 2007 WL 2269464 ("*Dzelajlija I*").

{¶4} Defendant was again convicted of both robbery charges following the retrial, and on February 21, 2008, he was sentenced to a seven-year term of imprisonment and a concurrent five-year term of imprisonment, plus three years of postrelease control. The court additionally ordered this sentence to be served consecutively to an unrelated conviction in Case No. CR-475938.

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<sup>2</sup>The original decision in this appeal, *State v. Dzelajlija*, 8th Dist. No. 95851, 2011-Ohio-6445, 2011 WL 6314200, released December 15, 2011, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see also S.Ct.Prac.R. 2.2(A)(1).

{¶5} Defendant appealed to this court. This court concluded that the indictments were defective under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ("*Colon I*") and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 ("*Colon II*"), for failing to charge defendant with the requisite mens rea of recklessness. This court therefore again reversed defendant's convictions, stated that they were "vacated," and remanded the matter to the trial court. This court additionally determined that since the defective indictments constituted structural error, defendant's additional challenge to the weight of the evidence supporting his convictions was moot. *State v. Dzelajlija*, 8th Dist. No. 91115, 2009-Ohio-1072, 2009 WL 626326 ("*Dzelajlija II*").

{¶6} On May 20, 2009, the matter was returned to the docket of the trial judge. At this time, however, defendant was imprisoned in connection with Case No. CR-475938. Retrial was scheduled for September 14, 2010. On August 27, 2010, however, the Ohio Supreme Court decided *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26. In *Horner*, the court overruled *Colon I* and *Colon II*, and held that where an indictment charges an offense by tracking the language of the criminal statute, it is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state.

{¶7} On September 14, 2010, the trial court held a hearing in this matter to determine the effect of the *Horner* decision in relation to our prior mandate in *Dzelajlija II*. Thereafter, the trial court concluded that defendant was not prejudiced by the delay in scheduling a retrial, and that the *Horner* decision constituted extraordinary circumstances that justified the reimposition of the sentence that had been imposed on February 21, 2008, without holding another trial. The court then reimposed two concurrent seven-year sentences.

{¶8} On appeal to this court, defendant maintained that this court's prior mandate and principles of res judicata barred further proceedings on the original indictment, and that the trial court acted without jurisdiction and in derogation of his right to due process in reimposing sentence without a valid finding of guilt. This court concluded that due to recent changes in the controlling case law, the original indictment could no longer be deemed structurally defective, but because the challenge to the manifest weight of the evidence supporting his conviction had not been decided, the trial court committed reversible error and acted beyond its mandate in reinstating Dzelajlija's sentences.

{¶9} Our opinion therefore reflected that the failure to include a mens rea in an indictment is no longer deemed to create structural error where it tracks the language language of the criminal statute, but also reflected that we were without authority and lacked the record to determine the manifest weight of the

evidence issue raised *Dzelajlija II*. Following release of our December 15, 2011 opinion, the panel that heard *Dzelajlija II* declined to reopen the appeal for consideration of that issue.

{¶10} Moreover, indictments that track the relevant statutory provisions are now generally reviewed for plain error, rather than structural error. *State v. Andera*, 8th Dist. No. 92306, 2010-Ohio-3304, 2010 WL 2783688; *State v. Segines*, 191 Ohio App.3d 60, 2010-Ohio-5112, 944 N.E.2d 1186 (8th Dist.); *State v. Dunlap*, 129 Ohio St.3d 461, 2011-Ohio-4111, 953 N.E.2d 816. However, we believe that the unresolved issue regarding the evidentiary support for defendant's convictions renders the plain error analysis inappropriate to this matter. Therefore, due to the unique procedural posture of this matter, we again apply the structural error analysis set forth in *Colon I*, in order to address defendant's assignments of error.

{¶11} Defendant's second, third, and fourth assignments of error are interrelated and state:

- II. The trial court lacked jurisdiction to affect this court's judgment in *Dzelajlija II*.
- III. Res judicata and collateral estoppel preclude the State from relitigating the validity of *Dzelajlija*'s indictment when it failed to appeal that issue to the Ohio Supreme Court.

IV. The state failed to present extraordinary circumstances to justify the trial court's deviation from the mandate of *Dzelajlija II*.

{¶12} In *Hedgpeth v. Pulido*, 555 U.S. 57, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008), the United States Supreme Court noted that where error is structural, the verdict must be set aside without regard as to whether it prejudiced the defendant.

{¶13} In addition, a trial court must follow a mandate from a reviewing court. *State v. Gates*, 8th Dist. No. 82385, 2004-Ohio-1453, 2004 WL 584004. In *State v. Carlisle*, 8th Dist. No. 93266, 2010-Ohio-3407, 2010 WL 2857806, we explained the appellate mandate as follows:

An appellate mandate works in two ways: it vests the lower court on remand with jurisdiction and it gives the lower court on remand the authority to render judgment consistent with the appellate court's judgment. Under the "mandate rule," a lower court must "carry the mandate of the upper court into execution and not consider the questions which the mandate laid at rest."

{¶14} New judicial rulings may be applied to cases if they are pending on the announcement date. *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687; *State v. Lynn*, 5 Ohio St.2d 106, 108, 214 N.E.2d 226 (1966). However, there is no authority to extend or vary the mandate of the appellate court. *State v. Bell*, 8th Dist. No. 92037, 2009-Ohio-2138, 2009 WL 1243769.

{¶15} In this matter, the court in *Dzelajlija II* determined that the robbery charges were structurally defective and it vacated the convictions. The mandate from this court ordered that the matter be remanded to the trial court “for the limited purpose of vacating the convictions.” The State did not appeal this decision and it became final. The matter was not reindicted and the matter was no longer a pending case at the time the *Horner* decision was announced. Therefore, we conclude that the trial court erred in considering the matter as pending under the original indictment and in applying *Horner* rather than *Colon* herein. Moreover, because the matter was no longer a pending case, given *Dzelajlija II*'s reversal and remand for vacation of the convictions, we further conclude that the trial court committed reversible error in failing to follow the mandate ordering the convictions vacated.

{¶16} The second, third, and fourth assignments of error are well taken.

{¶17} Defendant's first assignment of error states:

I. The trial court erred and violated Dzelajlija's state and federal due process rights when it imposed a sentence without a valid finding of guilt.

{¶18} Within this assignment of error, defendant asserts that the trial court erred in reimposing the February 21, 2008 sentence in the absence of a determination that defendant was guilty of robbery.

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{¶19} The mandate in *Dzelajlija II* ordered that the matter be remanded to the trial court “for the limited purpose of vacating the convictions.” This court did not authorize the trial court to resentence defendant on those charges. The prior appeal of this matter did not address the manifest weight argument raised by defendant, so this challenge has not been resolved and the conviction has not become final. Therefore, the trial court erred in reimposing the sentence announced on February 21, 2008.

{¶20} The first assignment of error is well taken.

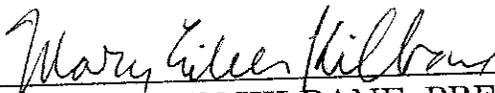
{¶21} The matter is reversed; convictions and sentence are vacated.

It is ordered that appellant recover from appellee 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 common pleas court to carry this judgment into execution.

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

  
\_\_\_\_\_  
MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., CONCURS  
KENNETH A. ROCCO, J., CONCURS (SEE SEPARATE CONCURRING  
OPINION)

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KENNETH A. ROCCO, J., CONCURRING:

{¶22} Although I fully concur with the majority, I write separately to state once again that based upon *Horner* and this court's inherent authority, I believe that the panel of *Dzelajlija II*, 8th Dist. No. 91115, 2009-Ohio-1072, should sua sponte reconsider its decision in order to review the appellant's manifest weight of the evidence issue.

YOL0748 PG0825

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.  
95851

LOWER COURT NO.  
CP CR-478630

COMMON PLEAS COURT

-vs-

JAMES DZELAJLIJA

Appellant

MOTION NO. 450699

Date 03/08/12

Journal Entry

Motion by Appellee for reconsideration is granted. The Journal Entry and Opinion released on December 15, 2011 (2011-Ohio-6445) is hereby vacated and substituted with the Journal Entry and Opinion issued March 8, 2012.

COPIES MAILED TO COUNSEL FOR  
ALL PARTIES. COSTS TAKEN

FILED AND JOURNALIZED  
PER APP.R. 22(C)

MAR X 8 2012

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY SMW DEP.

Judge MARY J. BOYLE, Concur

Judge KENNETH A. ROCCO, Concur

*Mary Eileen Kilbane*  
Presiding Judge  
MARY EILEEN KILBANE

VOL 0748 PG 0802



Baldwin's Ohio Revised Code Annotated Currentness  
Title XXIX. Crimes--Procedure (Refs & Annos)  
    ▣ Chapter 2911. Robbery, Burglary, and Trespass (Refs & Annos)  
        ▣ Robbery  
            →→ 2911.02 Robbery

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control;
- (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
- (3) Use or threaten the immediate use of force against another.

(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(C) As used in this section:

- (1) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.
- (2) "Theft offense" has the same meaning as in section 2913.01 of the Revised Code.

CREDIT(S)

(1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1982 H 269, § 4, eff. 7-1-83; 1982 S 199; 1972 H 511)

Current through all 2011 laws and statewide issues and 2012 Files 70 through 127, 130, 132 to 137 and 139 to 142 of the 129th GA (2011-2012).

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Baldwin's Ohio Revised Code Annotated Currentness  
Title XXIX. Crimes--Procedure (Refs & Annos)  
    Chapter 2941. Indictment  
        Pleading, Averments, and Allegations  
            → → 2941.25 Multiple counts

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

CREDIT(S)

(1972 H 511, eff. 1-1-74)

Current through all 2011 laws and statewide issues and 2012 Files 70 through 127, 130, 132 to 137 and 139 to 142 of the 129th GA (2011-2012).

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