

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-070469
	:	TRIAL NO. B-0701231
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
ANTONIO DAVIS,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Antonio Davis appeals the trial court’s judgment convicting him of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), a fourth-degree felony. For the following reasons, we affirm.

Davis was indicted for unlawful sexual conduct with a minor in violation of R.C. 2907.04(A). The caption of his indictment read, “Unlawful Sexual Conduct with Minor 2907.04(A)[F4],” and the body of the indictment alleged that Davis, when he was 18 years old, had had consensual vaginal intercourse with a minor, E.S., who was not his spouse and whom Davis knew to be between the ages of 13 and 16. A bill of particulars was made part of the record, which alleged that E.S. was 13 years old.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Davis entered a no-contest plea to the charge, but argued that the charged offense was a misdemeanor and not a fourth-degree felony. The trial court determined that the offense was a fourth-degree felony because Davis was more than four years older than E.S., found Davis guilty, and sentenced him accordingly.

In his single assignment of error, Davis now argues that the trial court erred “by finding him guilty of a felony of the fourth degree.” Davis, citing R.C. 2945.75(A) and *State v. Lewis*,² argues that because the body of the indictment did not allege that he was four or more years older than the victim, he could only have been convicted of the least degree of the offense charged, which was a first-degree misdemeanor.

R.C. 2907.04(A) provides that “no person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older, but less than sixteen years of age, or the offender is reckless in that regard.” Unlawful sexual conduct with a minor is a felony of the fourth degree if the offender is between four and ten years older than the victim.³ But if the offender is less than four years older than the victim, the offense is a misdemeanor of the first degree.⁴

R.C. 2945.75(A) provides that if the degree of an offense changes based on the presence of additional elements, then the indictment must state the degree of the offense that the accused is alleged to have committed or allege such additional elements. If the indictment fails to include such additional elements, then the indictment is “effective to charge only the least degree of the offense.”⁵

² (Feb. 7, 1994), 5th Dist. No. 9393.

³ R.C. 2907.04(B)(1).

⁴ R.C. 2907.04(B)(2).

⁵ R.C. 2945.75(A)(1).

In *Lewis*, the Fifth Appellate District, discussing R.C. 2945.75, held that where the caption of an indictment stated that the indictment was for a fourth-degree felony, but the body of the indictment did not state the degree of the offense or allege one of the additional elements that would have given rise to a charge of the higher degree, the designation “F-4” in the heading of the indictment was “insufficient standing alone” to charge the defendant with a felony violation. The *Lewis* court noted that because there was nothing in the record, including the bill of particulars, to indicate that the state had intended to try Lewis as if the charged offense was a felony, then the designation “F-4” in the heading of the indictment could have easily been a mislabeling.

Here, similar to the indictment in *Lewis*, the caption of Davis’s indictment designated the charged offense a fourth-degree felony, but the body of the indictment failed to allege the degree of the offense or to state that Davis, an 18-year-old, was four or more years older than E.S. But the bill of particulars stated that E.S. was 13 years old. We hold that this statement in the bill of particulars, in conjunction with the designation “F-4” in the indictment’s caption, put Davis on notice that the charged offense was a fourth-degree felony and that the state intended to proceed accordingly. The allegations that Davis was 18 and that E.S. was 13 put Davis on notice that the state would have to prove that Davis was four or more years older than E.S., effectively making the charged offense a fourth-degree felony. Because there was information in the bill of particulars that alleged the additional element necessary to make unlawful sexual conduct with a minor a fourth-degree felony, we hold that the trial court properly convicted and sentenced Davis for a fourth-degree felony.

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The single assignment of error is overruled, and the judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on April 23, 2008
per order of the Court _____.
Presiding Judge