[Cite as *State v. Faraj*, 2010-Ohio-3719.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93491

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY FARAJ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509028

BEFORE: Jones, J., Gallagher, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: August 12, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Anthony Faraj ("Faraj"), appeals his conviction. Finding some merit to the appeal, we affirm the finding of guilt, but remand the case for a R.C. 2929.191 hearing.

{¶ 2} In 2008, Faraj was charged with two counts of aggravated murder with mass murder, felony murder, and one- and three-year gun specifications; four counts of aggravated robbery with one- and three-year gun specifications; two counts of felonious assault with one- and three-year gun specifications; and one count each of attempted murder with one- and three-year gun specifications and having a weapon while under a disability.

{¶ 3} During the pretrial process, the state dismissed the mass murder and felony murder specifications from both aggravated murder charges and moved to amend one of the aggravated murder charges to murder. The matter proceeded to trial before a jury. The following evidence was adduced at trial.

{¶ 4} On March 24, 2008, Mosa Shafik ("Shafik") and Zaki Touma ("Touma"), both 19 years of age, left their homes in Bay Village to pickup Faraj in Avon Lake. Faraj owed Shafik money for a marijuana deal, and Shafik was going to drive Faraj to get either money or marijuana to satisfy the debt. Faraj rode in the back seat of Shafik's Nissan pickup truck and offered Shafik and Touma marijuana to smoke. Both young men declined Faraj's offer.

{¶ 5} Shafik drove to a club on Clark Avenue on Cleveland's west side, but Faraj was unable to get any marijuana to give to Shafik. Faraj then told Shafik to drive to Madison Avenue to wait until he found his dealer. Shafik drove to West 83rd Street near Madison Avenue, where Faraj told him to stop and let him out. Faraj told Shafik that he would be back in a little bit and showed him where to park. He also told Shafik that he would call him and come back out.

{¶ 6} Faraj went to his friend's, Quianna Harris's ("Harris"), apartment. Harris testified that she knew Faraj, but was not expecting him that day. She was smoking pot and getting dressed to go to a bar when Faraj arrived. Then another acquaintance of Harris, 17 year-old Anthony Pollard ("Pollard"), arrived at her apartment. Pollard testified that he sat down on a dining room chair, Faraj came over, tossed a gun in Pollard's lap, and told him, "I got these dudes in the car, I

want you to go rob them." Pollard testified that Faraj told him to "get by the car and ask for a lighter because they was gon' be looking hard. Once I [Pollard] get to the car, they roll down the window, rob them." Harris also testified she heard Faraj tell Pollard that his friends were parked around the corner, had money, and that Pollard could do a robbery. Harris testified that she never saw Faraj with a gun but had seen Pollard with a gun in the past.

{¶ 7} Harris told Faraj and Pollard that she thought their plan was "dumb" and "stupid" and that she did not like the fact that the pickup truck was parked in front of her building. Faraj told her that the truck was not parked in front of her apartment, but around the corner. Harris went back into her bedroom to finish getting ready to go out.

{¶ 8} When Harris came out of her room after putting on makeup, Pollard was gone but Faraj was still in her apartment. Pollard testified that Faraj had gone outside with him and pointed out Shafik's truck to him.

{¶ 9} Touma testified that about 15 minutes after Faraj left Shafik's truck, a black male approached the passenger side of the truck and asked for a lighter. Shafik opened his window and tossed his lighter over the top of the truck towards Pollard. Pollard then said he was drunk and could not find the lighter on the ground. Touma rolled his window down to hand Pollard a lighter. Pollard dropped his cigarette into the car. Touma reached down, got the cigarette, looked up, and Pollard was holding a gun against his face.

{¶ 10} Pollard began to yell at Touma to give him money. Shafik tried to drive away and Pollard shot five times into the truck. Touma asked Shafik if he was okay and Shafik said, “No, I’ve been shot.”

{¶ 11} Shafik crashed the truck and died shortly thereafter from a gunshot wound to his lung. Touma survived with gunshot wounds to his neck, face, and leg.

{¶ 12} Harris testified that five or ten minutes after Pollard left, he returned and said, “I think I f***ed up. I think I shot someone.” Harris testified she did not believe Pollard, told him to get away from her apartment, and went across the street to a bar with Faraj. Harris testified she did not see when Faraj left but that he was acting “antsy.”

{¶ 13} Shortly after the shooting, Faraj called Shafik’s cell phone four times but never returned to the truck.

{¶ 14} Homicide detective Frank Veverka (“Veverka”) testified that Faraj gave a statement to police and told the detective that he knew that Pollard shot two people in the vicinity of where his friends were parked but that he did not find out until the next day what had happened. Faraj also told the detective that after he went to Harris’s apartment, he went to Lutheran Hospital to visit a friend.

{¶ 15} The jury convicted Faraj of aggravated robbery, but acquitted him of the gun specifications and all remaining charges. The trial court sentenced him to seven years on one count of aggravated robbery consecutive to three years on the other count, for a total of ten years in prison.

{¶ 16} Pollard was charged in juvenile court, but was bound over to adult court. He pled guilty to murder, attempted murder, and aggravated robbery and agreed to testify against Faraj. The trial court sentenced Pollard to an agreed sentence of 21 years-to-life in prison.

{¶ 17} Faraj now appeals, raising the following four assignments of error for our review:

I. "The trial court erred in permitting counts 5 and 7 of the indictment to be amended to include a mens rea requirement, an element which the grand jury had not found, in violation of defendant's right to grand jury indictment under Article 1, Section 10 of the Ohio Constitution.

II. "The defendant's conviction is against the manifest weight of the evidence.

III. "The trial court erred in its imposition of post-release [sic] control upon the defendant, resulting in a void sentence.

IV. "The trial court erred in sentencing defendant to consecutive terms of imprisonment without making the finding required under Ohio R.C. 2929.14(E)(4)."

Indictment

{¶ 18} In the first assignment of error, Faraj argues that his rights were violated when the trial court allowed the state to amend the aggravated robbery charges prior to trial by identifying the mens rea element as "reckless."

{¶ 19} Crim.R. 7(D) provides that a court may amend an indictment "at any time before, during, or after a trial * * *, provided no change is made in the name or identity of the crime charged." Faraj claims Crim.R. 7(D) does not allow amending an indictment to include an element not found by the grand jury.

{¶ 20} In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ("*Colon I*"), the Ohio Supreme Court reversed a robbery conviction, holding that the defective indictment

for violation of R.C. 2911.02(A)(2) constituted structural error.[1] The indictment was defective because it failed to charge recklessness as the mens rea, even though the mental state was an essential element of the crime. Id. Subsequently, the Ohio Supreme Court issued a clarification in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 ("*Colon II* "), in reconsideration of its holding in *Colon I*.

{¶ 21} The *Colon II* court limited the holding of *Colon I* to "rare cases, * * * in which multiple errors at the trial follow the defective indictment." Id. at ¶8, 885 N.E.2d 917. It explained, "[i]n *Colon I*, the error in the indictment led to errors that 'permeate[d] 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.'" Id., citing *Colon I*, at ¶23 and *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶17.

{¶ 22} The *Colon II* court emphasized that its reversal in *Colon I* had been premised on the following four factors: (1) the indictment did not charge the recklessness element for robbery; (2) the State did not attempt to prove the element of recklessness; (3) the trial court failed to instruct the jury on the mens rea element of recklessness; and (4) in closing arguments, the State treated robbery as a strict liability offense. Id. at ¶6, 893 N.E.2d 169, citing *Colon I*, at ¶30, 31, 893 N.E.2d 169; see, also, *State v. Williams*, Cuyahoga App. No. 91316, 2009-Ohio-2251.

{¶ 23} Faraj proposes we reject the Ohio Supreme Court's holding in *State v. O'Brien* (1987), 30 Ohio St.3d 122, 123, 508 N.E.2d 144. In *O'Brien*, the state amended the indictment to specify the mens rea element of "recklessness" in a charge of endangering children. The mens rea, which was an essential element of the offense, had been omitted in the original indictment.

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[1] Our court has extended *Colon* to include indictments pursuant to R.C. 2911.01(A)(3), the statute charged in this case.

Id. at 122-123. The *O'Brien* court held that the indictment was properly amended to include the mens rea element: "[T]he identity of this crime was not changed by the addition of 'recklessness' to the indictment. Neither the penalty nor the degree of the offense was changed as a result of the amendment. Since the addition of the culpable mental state of 'recklessness' did not change the name or identity of the crime of endangering children, the amendment was proper pursuant to Crim. R. 7(D)." Id. at 126.

{¶ 24} We disagree with Faraj's conclusion that *Colon* overruled *O'Brien*. In *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609, decided after *Colon I* and *Colon II*, the Ohio Supreme Court cited its decision in *O'Brien*, stating "[w]e have previously held that a particular amendment was proper when the amendment did not change the penalty or the degree of the offense. This court thus held that the amendment in *O'Brien* did not change the identity of the crime charged because it did not change the penalty or the degree of the offense." *Davis* at 240.

{¶ 25} More recently, the Ohio Supreme Court specifically applied *O'Brien* to find that "[a]s long as the state complies with Crim.R. 7(D), it may cure a defective indictment by amendment, even if the original indictment omits an essential element of the offense with which the defendant is charged." *State v. Pepka*, 125 Ohio St.3d 124, 2010-Ohio-1045, 926 N.E.2d 611, quoting *O'Brien* at 127-128.

{¶ 26} In *Pepka*, the Court found an indictment was sufficient to charge a defendant with felony child endangering even though the indictment did not include the requisite "serious physical harm" language. Id. at 128. The Court held that the trial court acted within its discretion in granting the state's motion to

amend the indictment because the original indictment provided the defendant with adequate notice of both the offenses and the degree of the offenses with which he was charged. Id. The Court noted:

{¶ 27} "The purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident." *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162, ¶7. 'An indictment meets constitutional requirements if it "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" Id. at ¶9, quoting *State v. Childs* (2000), 88 Ohio St.3d 558, 564-565, 728 N.E.2d 379, quoting *Hamling v. United States* (1974), 418 U.S. 87, 117-118, 94 S.Ct. 2887, 41 L.Ed.2d 590.

{¶ 28} To support his argument that the court erred in allowing the state to amend his indictment, Faraj cites *State v. Hamilton*, Montgomery App. No. 22895, 2009-Ohio-4602, (discretionary appeal accepted for review, *State v. Hamilton*, No. 2009-1878.) In *Hamilton*, the state moved to amend an indictment to include the mens rea element of recklessness to a charge for discharge of a firearm on or near prohibited premises. The trial court in the *Hamilton* case determined that Crim.R. 7 would permit the amendment of an indictment on which the defendant would proceed to trial because the amendment would not omit the essential mens

rea element, and the defendant would have due notice of all the elements of the offense. The defendant then pled no contest.

{¶ 29} The Second District reversed the conviction, finding that "the error in Hamilton's indictment cannot be cured by the court" and "by its error, the trial court required Hamilton to answer for the crime charged other than on 'presentment or indictment of a grand jury,' in violation of Hamilton's constitutional rights." *Hamilton* at ¶23.[2]

{¶ 30} Importantly, the *Hamilton* court noted that *Colon II* did not affect its decision because the case was not one of structural error permeating a trial as the defendant had plead no contest nor plain error because the defendant objected to the indictment prior to judgment. Id. at ¶24. Thus, the court concluded, the "amended indictment is not saved by *Colon II*'s limitations of *Colon I*." Id.

{¶ 31} Since the Ohio Supreme Court's decision in *Colon II*, this court has reversed convictions in which errors stemming from a faulty indictment permeated the trial, causing structural error. See, e.g., *State v. Briscoe*, Cuyahoga App. No. 89979, 2009-Ohio-6276*; State v. Gilbert*, Cuyahoga App. No. 90615, 2009-Ohio-463; *State v. Ginley*, Cuyahoga App. No. 90724, 2009-Ohio-30; *Williams*, supra.

{¶ 32} In *Williams*, we found that a defective indictment led to errors that permeated the trial from beginning to end because the indictment did not charge

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[2] The appellate court also found that *Colon* overruled *O'Brien.* Based on the Ohio Supreme Court's reliance on *O'Brien* in *Davis* and *Pepka*, we respectfully disagree.

recklessness as the mental element for aggravated robbery; the state did not attempt to prove the element of recklessness; the trial court never instructed the jury on the mens rea element of recklessness; and the state did not mention the mens rea of recklessness in opening or closing arguments. Id. at ¶24.

{¶ 33} But we find that the case at bar is distinguishable from both *Hamilton* and *Williams*. This case did proceed to a jury trial, unlike *Hamilton*. Therefore, we employ a structural error analysis and determine whether the error permeated the entire proceedings. We find that it did not. Unlike *Williams*, in this case, the state presented evidence on the element of recklessness, the trial court instructed the jury on the mens rea element of recklessness, and recklessness was mentioned in opening and closing arguments.

{¶ 34} Recently the First Appellate District found no structural error when the state amended the indictment pursuant to Crim.R. 7(D) to include the mens rea element. *State v. Seay*, Hamilton App. No. C-090233, 2010-Ohio-896. The court found, "in this case, the absence of mens rea allegations in the original indictment did not permeate the proceedings. Prior to trial, the state amended the indictment to include the mens rea allegations, and that amendment was proper under Crim.R. 7(D). * * * [T]he jury instructions also included the correct mens rea allegations and definitions." Id. at ¶14.

{¶ 35} Based on the facts of this case, we conclude that the trial court acted within its discretion in allowing the state to amend Faraj's indictment to include the mens rea of recklessness.

{¶ 36} Accordingly, the first assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 37} In the second assignment of error, Faraj argues that his convictions for aggravated robbery were against the manifest weight of the evidence.

{¶ 38} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229.

{¶ 39} Faraj argues that Harris's testimony was inconsistent with the statements she gave to police and that she lied about Faraj's involvement so the police would not think she was a suspect. Faraj also claims that Pollard's testimony was contradictory and inconsistent, that he lied to help himself, and that his story does not match the story Harris told to the police.

{¶ 40} We disagree. Despite some discrepancies in witness testimony, we find that other aspects of the witnesses' descriptions were consistent. It was within the province of the jury to determine whether the witness testimony was sufficiently reliable and accurate to be worthy of belief. Although there were

minor inconsistencies in Harris's and Faraj's statements to police and testimony, those inconsistencies do not lead to the conclusion that Faraj's conviction is against the manifest weight of the evidence. On the contrary, the evidence presented at trial established that Faraj owed money to Shafik, led him and Touma to West 84th Street, conspired with Pollard to rob Shafik and Touma, and informed Pollard of Shafik and Touma's location; thereby, participating in the aggravated robbery.

{¶ 41} Therefore, the second assignment of error is overruled.

Postrelease Control

{¶ 42} In the third assignment of error, Faraj argues that the trial court failed to properly impose postrelease control because it failed to advise him of the ramifications if he violated postrelease control. Specifically, he argues that the court failed to comply with R.C. 2929.19(B)(3) and inform him that the parole board may impose a prison term for as much as one-half of his stated prison term originally imposed if he violated a condition of postrelease control. The state concedes the error.

{¶ 43} The Ohio Supreme Court recently held that for "sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191." *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus. Here, Faraj was sentenced in May 2009; he

therefore is subject to the "sentence-correction mechanism of R.C. 2929.191." Id. at ¶27. Notably, in *Singleton*, the court specifically recognized that R.C. 2929.191 does not afford a defendant a de novo sentencing hearing:

{¶ 44} "The hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of postrelease control. R.C. 2929.191 does not address the remainder of an offender's sentence. Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court's failure to properly impose postrelease control at the original sentencing." Id. at ¶24.

{¶ 45} Therefore, we sustain Faraj's third assignment of error in part and remand the case for a R.C. 2929.191 hearing.

Consecutive Sentences

{¶ 46} In his fourth assignment of error, Faraj argues that the sentence is contrary to law because the trial court imposed consecutive sentences without making the findings required by R.C. 2929.14(E)(4). He acknowledges that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, specifically held that such findings were not required, but he relies on *Oregon v. Ice* (2009), 129 U.S. 711, 129 S.Ct. 711, 172 L.Ed.2d 517, for the proposition that Foster was wrongly decided and should be overturned.[3]

[3]We note that the Ohio Supreme Court has accepted jurisdiction to decide this exact issue and that the case is currently pending before the court in *State v. Hodge*, Case No. 2009-1997.

{¶ 47} This court, however, has previously addressed this argument many times and consistently rejected it. See, e.g., *State v. Storey*, Cuyahoga App. No. 92946, 2010-Ohio-1664; *State v. Moore*, Cuyahoga App. No. 92654, 2010-Ohio-770; *State v. Woodson*, Cuyahoga App. No. 92315, 2009-Ohio-5558.

{¶ 48} Indeed, "[t]his court has repeatedly chosen to apply the holding in *Foster* rather than the holding in *Ice* and reserve any reconsideration for the Ohio Supreme Court. * * * As the high court in this state, the Ohio Supreme Court's decision in *Foster* is binding on lower courts. Accordingly, it is not within our purview to step into the Supreme Court's shoes and reconsider *Foster* in light of the decision in Ice." *Moore* at ¶14.

{¶ 49} Therefore, we overrule the fourth assignment of error.

{¶ 50} Judgment affirmed in part, reversed in part, and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee split the 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR