

[Cite as *State v. Bethay*, 2009-Ohio-2569.]

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

STATE OF OHIO,	:	APPEAL NOS. C-080264
		C080265
Plaintiff-Appellee,	:	TRIAL NOS. B-0702712
		B-0704543
vs.	:	
		<i>DECISION.</i>
DERICK L. BETHAY,	:	
Defendant-Appellant.	:	

**Criminal Appeal From: Hamilton County Court of Common Pleas**

**Judgments Appealed From Are: Affirmed**

**Date of Judgment Entry on Appeal: June 5, 2009**

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Ronald W. Springman, Jr.*, Assistant Prosecuting Attorney, for Appellee,

*Michaela M. Stagnaro*, for Appellant.

**Please note: This case has been removed from the accelerated calendar.**

**HILDEBRANDT, Presiding Judge.**

{¶1} Defendant-appellant, Derick L. Bethay, appeals the judgments of the Hamilton County Court of Common Pleas convicting him of aggravated murder, aggravated robbery, and tampering with evidence, with firearm specifications. He was convicted after a jury trial.

**The Robbery and the Shooting**

{¶2} Bethay and Kenneth Scott were longtime friends. Scott testified that, one afternoon, Bethay had called and asked him if he wanted to participate in a “powerball lick,” which is a slang term for a large-scale robbery often perpetrated against a drug dealer. Scott testified that he had declined to participate in the robbery.

{¶3} According to Scott, Bethay had called again that same night. Bethay asked Scott for a ride and told him that he and his companions had committed the robbery. Bethay also told Scott that he believed he had killed someone and that, after firing three shots, his gun had jammed.

{¶4} Meanwhile, residents at an apartment complex heard gunshots and saw a person running toward a wooded area. The police were notified, and when they arrived, they found David Sullivan lying on the parking lot with a gunshot wound. Drugs and a large amount of cash were found in the area where Sullivan had been found.

{¶5} Police found three shell casings from a 9-mm firearm in the parking lot. They also discovered a 9-mm weapon that had been discarded near the wooded area. The gun appeared to have been jammed. A surveillance camera at a nearby gas station depicted Bethay using an employee’s cellular telephone shortly after the robbery.

{¶6} Sullivan died approximately two months after the robbery from a wound inflicted by a .38-caliber gun. Although it was alleged that Bethay had possessed the

discarded 9-mm gun and not a .38-caliber weapon, the state proceeded on the theory that Bethay had been an accomplice in the aggravated murder and the aggravated robbery.

{¶7} In his defense, Bethay presented the testimony of an investigator from the Hamilton County Public Defender's office. The investigator testified that, in an interview conducted at the Hamilton County Justice Center, Scott had stated that Bethay had not admitted to the crimes.

{¶8} The jury found Bethay guilty, and the trial court sentenced him to an aggregate term of 23 years' imprisonment.

#### **Batson**

{¶9} In his first assignment of error, Bethay now contends that the trial court erred in allowing the state to use a peremptory challenge to remove a prospective African-American juror from the venire.<sup>1</sup> We find no merit in the assignment.

{¶10} After the defendant has made a prima facie case of discrimination in the selection of a jury, the state must then provide a race-neutral explanation for its use of a peremptory challenge.<sup>2</sup> To shift the burden of persuasion back to the defendant, the explanation offered by the state need not be persuasive, or even plausible; unless a discriminatory intent is inherent in the prosecution's explanation, the reason offered will be deemed race-neutral.<sup>3</sup> A trial court's finding of no discriminatory intent will not be disturbed unless it is clearly erroneous.<sup>4</sup>

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<sup>1</sup> See *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712.

<sup>2</sup> *State v. Hill* (1995), 73 Ohio St.3d 433, 445, 1995-Ohio-287, 653 N.E.2d 271.

<sup>3</sup> *Purkett v. Elem* (1995), 514 U.S. 765, 767-768, 115 S.Ct. 1769, quoting *Hernandez v. New York* (1991), 500 U.S. 352, 360, 111 S.Ct. 1859.

<sup>4</sup> *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583, 589 N.E.2d 1310.

{¶11} In this case, the trial court did not err in permitting the peremptory challenge. The prosecutor explained the challenge by stating that a member of the prospective juror's family had been charged with murder and that the prospective juror had "made faces" when informed that it was an aggravated-murder trial. Although the juror had also stated that she could have rendered an impartial verdict, we cannot say that the trial court's finding of no discriminatory intent was clearly erroneous. Therefore, we overrule the first assignment of error.

#### The Prosecutor's Closing Argument

{¶12} In his second assignment of error, Bethay argues that he was deprived of a fair trial as a result of improper remarks made by the prosecutor during closing argument.

{¶13} To obtain a reversal on the ground of improper remarks made during closing argument, the defendant must demonstrate not only that the comments were improper, but also that they deprived the defendant of a fair trial.<sup>5</sup>

{¶14} Bethay argues that the prosecutor improperly commented on matters not in evidence when she stated that Scott had received Bethay's calls at his home on a "land line" rather than on a cellular telephone; that she incorrectly stated that deoxyribonucleic-acid ("DNA") evidence on the 9-mm gun had implicated Bethay; and that she wrongly informed the jury that it had to "assume" that Bethay's purpose had been to kill Sullivan when he fired a gun at him.

{¶15} The assignment of error is not well taken. First, the statement about the telephone call was simply inconsequential in the context of the trial as a whole. Second, the prosecutor did not state that the DNA evidence had implicated Bethay; she merely summarized the testimony of the serologist, who testified that the DNA

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<sup>5</sup> *State v. Pearson* (Dec. 1, 2000), 1st Dist. No. C-990860.

sample did not exclude Bethay as a person who may have handled the gun. That statement was a fair comment on the evidence.

{¶16} Finally, Bethay did not object to the statement about the jury being able to assume a purpose to kill by Bethay's firing a gun at Sullivan. Accordingly, we apply a plain-error standard to the remark. Under the plain-error standard, an appellate court will reverse a judgment only where the outcome clearly would have been different absent the alleged error.<sup>6</sup>

{¶17} In this instance, there was no plain error. The jury was instructed on the state's burden of proof and how purpose could be determined. Moreover, there was ample evidence that Bethay had acted purposely in committing the offenses. And though "infer" would arguably have been a better choice of words than "assume," Bethay was not deprived of a fair trial by the comment.

#### The Indictment and Colon II

{¶18} In his third assignment of error, Bethay argues that the absence of mens rea allegations in the indictment for aggravated robbery rendered the conviction for that offense improper. He further argues that, because aggravated robbery was the predicate offense for aggravated murder, the conviction for the latter offense was also invalid. Bethay did not object to the alleged defect.

{¶19} In *State v. Colon (Colon I)*, the Supreme Court of Ohio held that the omission of a mens rea allegation in the indictment was a structural defect that rendered the conviction improper.<sup>7</sup> But in *State v. Colon (Colon II)*, the court held that the holding in *Colon I* was confined to its specific facts, noting that rarely will the absence of a mens rea allegation in the indictment permeate the proceedings to

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<sup>6</sup> *State v. Miller*, 1st Dist. No. C-070691, 2008-Ohio-5899, ¶22.

<sup>7</sup> 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶38.

such an extent that a conviction would be invalid.<sup>8</sup> Moreover, if the defect in the indictment does not permeate the proceedings and the defendant fails to object to the alleged defect, an appellate court is to review the proceedings for plain error.<sup>9</sup>

{¶20} In this case, the absence of mens rea allegations in the indictment did not result in a structural defect, and the trial court did not commit plain error in convicting Bethay of aggravated robbery and aggravated murder. In light of Bethay's statements establishing that he had planned the robbery, the state presented ample evidence that he had committed the crime purposely, a greater degree of culpability than the recklessness required for robbery by the holding in *Colon I*.<sup>10</sup> Moreover, unlike the prosecutor in *Colon I*,<sup>11</sup> the prosecutor in this case did not inform the jury that aggravated robbery was a strict-liability offense. Although the better practice would be for the state to include the element of recklessness in the indictment—and for the trial court to instruct the jury on the element—the asserted defect in this case was harmless. We overrule the first assignment of error.

#### Sufficiency and Weight of the Evidence

{¶21} In his fourth and final assignment of error, Bethay argues that his convictions were based on insufficient evidence and were against the manifest weight of the evidence.

{¶22} In the review of the sufficiency of the evidence to support a conviction, the relevant inquiry for the appellate court “is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

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<sup>8</sup> 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, ¶8.

<sup>9</sup> Id. at ¶7.

<sup>10</sup> *Colon I*, supra, at ¶14.

<sup>11</sup> See id. at ¶31.

doubt.”<sup>12</sup> To reverse a conviction on the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that, in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice.<sup>13</sup>

{¶23} The aggravated-murder statute, R.C. 2903.01(B), provides that “[n]o person shall purposely cause the death of another \* \* \* while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit \* \* \* aggravated robbery \* \* \*.” R.C. 2911.01(A)(1), governing aggravated robbery, provides that “[n]o person, in attempting or committing a theft offense \* \* \* or in fleeing immediately after the attempt or offense \* \* \* shall \* \* \* [h]ave a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.” The statute governing tampering with evidence, R.C. 2921.12(A)(1), states that “[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted \* \* \* shall \* \* \* [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation.”

{¶24} Bethay’s convictions were in accordance with the evidence. The state presented evidence that Bethay had told Scott of his plan to rob Sullivan and that he had described the offenses after the fact. The physical evidence closely matched Bethay’s description, and the evidence placed him near the scene of the crimes shortly after they had been committed. Although the state did not establish that Bethay had actually stolen any property, there was compelling evidence that he and

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<sup>12</sup> *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819.

<sup>13</sup> *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

his accomplices had at least attempted a theft offense and that they had killed Sullivan in the process. The evidence also indicated that Bethay had fired the 9-mm weapon and that he had discarded it shortly after the robbery.

{¶25} In asserting his innocence, Bethay emphasizes certain discrepancies between his alleged statements and the facts of the crimes, and he points to the testimony of the investigator who attempted to discredit Scott. Despite those circumstances, we cannot say that the jury lost its way in finding Bethay guilty, and we overrule the fourth assignment of error.

{¶26} The judgments of the trial court are affirmed.

**Judgments affirmed.**

**PAINTER and SUNDERMANN, JJ., concur.**

Please Note:

The court has recorded its own entry on the date of the release of this decision.