[Cite as *State v. Scott*, 2010-Ohio-1919.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22745
v.	:	T.C. NO. 2006 CR 02244
AARON SCOTT	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 30th day of April, 2010.

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FROELICH, J.

{¶ 1} Aaron Scott was found guilty by a jury in the Montgomery County Court of Common Pleas of murder and aggravated robbery. He was sentenced to an aggregate prison term of twenty-five years to life. Scott appeals from his conviction. For the reasons

discussed below, we will affirm Scott's conviction.

I

{¶ 2} The State's evidence established the following facts:

{¶ 3} On the evening on May 21, 2004, Chad Stapleton and Greg Credlebaugh got together to watch a Reds game on television at Credlebaugh's apartment and at the Centerville Inn, where they drank beer until about 1:00 a.m. They then walked back to Credlebaugh's nearby apartment. Credlebaugh testified that Stapleton left the apartment at 1:10 or 1:15 a.m. and that Stapleton's drive home would have taken about twelve minutes.

{¶ 4} Stapleton lived with his girlfriend, Mara Jones, at the Barclay Square apartment complex in Moraine. In the early morning hours of May 22, 2004, Jones heard Stapleton screaming her name from the parking lot of the apartment complex. Jones went outside and saw Stapleton near the parking lot, being held with his back against a wall by a man with short brown hair and wearing a red t-shirt. Stapleton told her to call the police, which she did. The man in the red t-shirt ran across Lamme Road, and Stapleton collapsed to the ground.

{¶ 5} Stapleton died a short time later. He had been stabbed several times, including a fatal wound to his chest. His wallet was not found on his body. In the nearby parking lot, the door to Stapleton's car door was open; blood was on Stapleton's car and a car parked next to it. Keys, a FILA baseball hat, a broken utility knife, money, and a pocket ripped from Stapleton's shirt were also found near his car.

{¶ 6} Jones and a neighbor who witnessed some of the events in the parking lot described the person who had held Stapleton against the wall as a white male with very short

hair, 5'9" or 5'10" tall, approximately 140 pounds, wearing a red t-shirt and jeans or dark shorts. The neighbor also saw the man drive by the complex as a passenger in a vehicle a short time later. After daybreak, a red shirt with blood on it was found on the ground at the Cobblegate Apartments, which are across Lamme Road from the Barclay Square Apartments.

{¶ 7} In May 2004, Lona Westbrook lived in the Cobblegate Apartments. She had known Aaron Scott for four years at that time. According to Westbrook, Scott came to her apartment at 1:00 or 2:00 a.m. on May 22, 2004, sweating, breathing heavily, and talking fast. Scott claimed that someone had tried to beat him up, and he asked Westbrook to walk him home. He also asked for a new shirt. Westbrook agreed to walk Scott home but, while they were walking, he disappeared shortly after they saw police cruisers nearby. Westbrook did not know where Scott had gone. After he disappeared, Westbrook continued to Scott's apartment, angry that he had awoken her. Scott's roommate and partner, John Jackson, Jr., was at the apartment, but Scott was not.

{¶ 8} Westbrook heard about the homicide the next morning, but she did not talk to the police until seventeen months later when a police officer knocked on her door to ask about it. She said that Scott did not fit the initial description that she heard of the suspect. When Westbrook initially talked to the police, she stated that Scott had been covered in blood when he came to her apartment, but at trial she testified that he had not been covered in blood. Westbrook's adult son, who was also present at the apartment in the early morning hours of May 22, 2004, testified that Scott had been "seriously covered in blood."

{¶ 9} The autopsy revealed that Stapleton had suffered four knife wounds. The

wound to his chest cut an artery and caused his death; the other wounds were superficial. Stapleton also had a bite mark on his chest. An odontologist testified that, based on Scott's dental molds, there was a "high degree of probability" that Scott had inflicted the bite mark on Stapleton's chest. A DNA expert also testified that the saliva on the shirt that Stapleton had been wearing when he was stabbed and the pocket ripped off of that shirt matched Scott. Additionally, the FILA hat found near Stapleton's car contained Scott's DNA.

{¶ 10} The red t-shirt found in the Cobblegate apartment complex contained DNA from three sources. Stapleton's blood was present in multiple places, and one spot contained a mixture of Stapleton's blood and Scott's saliva. "Wearer DNA" was also found on the t-shirt's collar and underarms. The wearer DNA on the collar matched Scott, and the DNA found in the underarm area matched both Scott and his roommate, Jackson. There was no mold on the red t-shirt or the hat. Semen was found on the inside and outside of Stapleton's underwear, but it was not tested.[1]

{¶ 11} The broken utility knife found near Stapleton's car was made by Robinson Products. A witness who worked at Robinson and was familiar with its products testified that the broken utility knife was only sold in a three-knife set, with a chef's knife and a slicer knife. The State presented evidence that two other knives that, with the utility knife, would complete the set, were found at Scott's apartment.

{¶ 12} The defense presented evidence of a different version of events:

{¶ 13} Scott testified that he had met Stapleton in 2001 and had known him as

[1]Credlebaugh testified that Stapleton had been at a "gentleman's club" before coming to Credlebaugh's apartment on May 21.

"Ted." Scott testified that, on that occasion, he had had a sexual encounter with "Ted," but not sexual intercourse. Over the next several months, "Ted" had shown up at Scott's apartment with a woman and offered to pay Scott for the use of his bedroom and had also shown up at a barbeque at Scott's apartment. Sometime thereafter, Scott moved into a different apartment with Jackson.

{¶ 14} According to Scott, he ran into "Ted" again one week before "Ted's" death. During their conversation, Scott told "Ted" where he lived and described that he had a multi-colored flag on his patio. "Ted" then showed up at Scott's apartment on the night of May 21, 2004, accompanied by a man with a crew cut. "Ted" paid Scott $40 to use a spare bedroom with the man accompanying him. When the men were finished in the bedroom, Scott offered them supplies to clean up, and Scott and "Ted" ended up in an embrace. When "Ted" would not let go of Scott, Scott threatened, jokingly, to bite him on the chest, and then did so. A short time later, Scott told "Ted" to leave because Jackson would be getting home soon.

{¶ 15} To explain the FILA hat found at the scene containing his DNA and the red t-shirt containing both his and Stapleton's DNA, Scott testified that he had left some moldy clothes – including the red t-shirt – on his patio when he was having a problem with mold in his apartment. He also testified that he had owned the FILA hat at one time and did not recall whether he had left it on the patio, and that he owned more than 100 baseball hats. Scott suggested that the man who accompanied "Ted" to the apartment on May 21 could have stolen a knife from his kitchen and the clothes and hat from his patio.

{¶ 16} Jackson could not be located to testify at trial. Because he was unavailable,

the trial court permitted the defense to play his grand jury testimony for the jury. Before the grand jury, Jackson testifed that Scott had been with him throughout the time frame in which the murder occurred. Jackson said that the FILA hat looked familiar to him, but the red t-shirt did not. Jackson also described Scott as a dark-skinned black male who was bald and weighed 180 pounds.

{¶ 17} In August 2006, Scott was indicted for murder in violation of R.C. 2903.11(A)(2) and for aggravated robbery in violation of R.C. 2911.01(A)(1). He was extradited from Georgia. As he was being transported from Georgia to Ohio, Scott spontaneously stated to Detective Scott Moore that he "didn't know that man and *** never touched that man." Moore testified about this statement – which contradicted Scott's testimony – at trial.

{¶ 18} Scott was tried by a jury on April 4-16, 2008. He was found guilty of aggravated robbery and murder. He was sentenced to fifteen years to life for the murder and to ten years for the aggravated robbery, to be served consecutively.

{¶ 19} Scott raises two assignments of error on appeal.

II

{¶ 20} Scott's first assignment of error states:

{¶ 21} "THE TRIAL COURT ERRED WHEN IT LIMITED DEFENDANT-APPELLANT'S COUNSEL'S CROSS-EXAMINATION OF STATE WITNESSES IN VIOLATION OF THE DEFENDANT-APPELLANT'S RIGHT TO CONFRONT WITNESSES, HIS RIGHT TO PRESENT A DEFENSE, HIS RIGHT TO A FAIR TRIAL, AND TO DUE PROCESS OF LAW UNDER THE SIXTH AND

FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

{¶ 22} Scott argues that the trial court erred in limiting his cross-examination of several witnesses.

{¶ 23} The trial court has broad discretion in imposing limits on the scope of cross-examination. *State v. Green* (1993), 66 Ohio St.3d 141, 147; *State v. Cobb* (1991), 81 Ohio App.3d 179, 183. An appellate court will not interfere with a trial court's decision about the scope of cross-examination absent an abuse of discretion. *In re Fugate* (Sept. 22, 2000), Darke App. No. 1512. The term abuse of discretion "connotes more than an error in *** judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 24} Scott contends that the trial court erred in not allowing defense counsel to question Lona Westbrook about any deal she might have made with the State, because the trial court had concluded that she had not been offered a deal in exchange for her testimony. Scott asserts that "it is not up to the judge to determine whether or not there was a deal, as that is a question of fact for the jury." Scott also claims that the trial court's pretrial ruling that the defense could not ask Westbrook at trial about her subjective motivation for cooperating with the police was an unconstitutional restriction on his right to confront the witnesses against him.

{¶ 25} Westbrook did not talk with the police about Scott's actions the night of Stapleton's murder until 17 months after the crime, when a detective knocked on

her apartment door in December 2005. In the interim, in June 2005, Westbrook had been charged in an unrelated case with three counts of trafficking in drugs and two counts of witness intimidation. Her first trial on the trafficking counts resulted in a mistrial; she subsequently pled guilty to two counts of trafficking, in exchange for which the other count of trafficking was dismissed. A jury found Westbrook guilty of one count of witness intimidation and not guilty of the other. In April 2006, she was sentenced to community control for the offenses of which she was convicted. She testified against Scott in 2008.

{¶ 26} Scott anticipated questioning Westbrook about whether she had received or had hoped for favorable treatment from the State on the trafficking and witness intimidation charges when she talked to the police or testified about Scott's behavior on the night of Stapleton's murder. The trial court had held a pretrial hearing on this and other issues. At the hearing, Westbrook testified that there had been no discussions of a deal in exchange for helpful information and that she had not received any benefit from her testimony. The prosecutor in the trafficking and witness intimidation cases also stated that "there were no discussions at all about Lona Westbrook becoming a witness in the homicide case." Likewise, Westbrook's defense counsel stated that "at no point did anyone from the prosecutor's office, a police department, or any representative of the government ever approach [him] about [Westbrook] being able to help in the investigation, nor did Miss Westbrook ever communicate any knowledge to me about a homicide, her having information of a homicide or being able to help herself in any way with her cases."

{¶ 27} In light of these representations, the prosecutor in Scott's case argued that it would be improper to allow defense counsel to question Westbrook about the existence of such a deal or about her subjective hopes for favorable treatment. The trial court made a preliminary ruling in favor of the State: "I'm having trouble understanding why you [Scott] should be permitted to ask her a question [about the expectation of favorable treatment] that you know ahead of time you're not going to be able to disprove her denial from anybody else involved in the case." The court was willing, however, to allow defense counsel to voir dire Westbrook to determine whether the proposed testimony would be permitted. Although defense counsel disagreed with the court's ruling, he did not object to this examination of Westbrook. At the hearing, Westbrook denied any promises and specifically denied that she was "trying to help [her]self out by talking to the police," or that she "had any hope or reason to believe [speaking to the detective] would help [her] case." Discussions in chambers after Westbrook testified at the hearing were not transcribed, but there is no indication that the court changed its preliminary ruling that such questioning of Westbrook would not be allowed. Subsequently, new counsel became involved, and the trial was reset.

{¶ 28} Before Westbrook testified at trial, the trial court reiterated its ruling, stating that "[t]here will be no questioning of Lona Westbrook regarding any plea deal because there was no deal." Scott did not object at trial to the trial court's restatement of its ruling.

{¶ 29} A ruling on a motion in limine reflects the court's "anticipatory treatment of the evidentiary issue. In virtually all circumstances finality does not

attach when the motion is granted. Therefore, should circumstances subsequently develop at trial, the trial court is certainly at liberty 'to consider the admissibility of the disputed evidence in its actual context.'" *State v. Grubb* (1986), 28 Ohio St.3d 199, 201-202, quoting *State v. White* (1982), 6 Ohio App.3d 1, 4. For those reasons, a motion in limine generally does not preserve for purposes of appeal any error in the disposition of the motion in limine. The failure to object at trial to the exclusion of evidence constitutes a waiver of the challenge. *State v. Davis*, Montgomery App. No. 2079, 2005-Ohio-5783, at ¶27.

{¶ 30} In this case, however, the matter of cross-examining Westbrook about her motivation for cooperating with the police had been thoroughly addressed at a pretrial hearing. At trial, the trial court stated its unwillingness to consider the issue further. Under these circumstances, it would put form over substance to find that Scott failed to object to the trial court's ruling. This, we conclude that this issue is adequately preserved for appeal.

{¶ 31} Evid.R. 611(B) allows cross-examination of a witness "on all relevant matters and matters affecting credibility." A cross-examiner may ask a question if he or she has a good-faith belief that a factual predicate for the question exists. *State v.Brinkley,* 105 Ohio St.3d 231, 2005-Ohio-1507, at ¶109; *State v. Gillard* (1988), 40 Ohio St.3d 226, paragraph two of the syllabus, abrogated on other grounds, *State v. McGuire,* 80 Ohio St.3d 390, 1997-Ohio-335. See, also, *State v. Lanier* (Dec. 17, 1999), Montgomery App. No. 17594. Further, Evid.R. 616(A) provides that a witness may be impeached by showing "bias, prejudice, interest, or any motive to misrepresent" through examination of the witness or by extrinsic

evidence. "A questioner must have a reasonable basis for asking any question pertaining to impeachment that implies the existence of an impeaching fact." Evid.R. 607(B).

{¶ 32} Westbrook first talked with the police in December 2005, 17 months after the crime, about Scott's actions the night of Stapleton's murder. Although she did not initiate this conversation, charges were pending against her at that time. In light of the testimony and representations by counsel at the pretrial hearing, Scott's attorney did not have a good faith basis to believe that Westbrook had made a deal with the police to obtain a benefit in her own criminal cases in exchange for her cooperation. See *Brinkley* at ¶110. However, the fact that charges were pending at the time of Westbrook's conversation with the police did give counsel a good faith basis to ask whether Westbrook had subjectively hoped for favorable treatment when she cooperated with police, which was relevant to bias, prejudice, and motive. Evid.R. 611(B); Evid.R. 616(A). If, in response to such questioning, Westbrook had denied that she was motivated by a desire for favorable treatment, the defense would not have been able to refute this answer or, later, argue the point, but the jury, at least, would have been able to assess Westbrook's credibility on this point. Thus, the trial court should have permitted limited cross-examination of Westbrook about her reasons for cooperating with the police.

{¶ 33} Scott contends that there were three additional instances in which the trial court improperly curtailed his cross-examination of a State's witness. First, Scott sought to question Detective Moore about Mara Jones' divorce to uncover

"what leads he might have failed to pursue while choosing to focus" his investigation on Scott. Specifically, Scott's attorney asked Moore whether "there had been some contentiousness in [Jones'] divorce." The State objected to this question, and the trial court sustained the objection, stating: "[Y]ou're not able to, as a general proposition, have this detective share with the jury the results of the investigation which is basically conveying hearsay to the jury ***. If you want to establish a contentious divorce, then there should be participants in the divorce testifying ***."

{¶ 34} Scott was permitted to ask whether Detective Moore had talked with Jones' ex-husband, James Jones ("James"), and how he had been excluded as a suspect. Detective Moore testified that he had driven by James' residence looking for a car fitting the description of one identified by witnesses during the course of the investigation. He did not see a car matching that description at James' residence, even though people did seem to be home at the time. He also testified that he had stopped investigating James when he learned where James had been at the time of the crime.

{¶ 35} The trial court correctly determined that Moore's knowledge of Jones' divorce was inadmissible because it was offered for the truth of the matter asserted (the nature of the divorce). Detective Moore did not have first hand knowledge of the contentiousness of Jones' divorce; rather, he would be repeating information obtained from Jones. Moreover, Scott was permitted to thoroughly cross-examine Detective Moore about his investigation of James. The trial court did not err in sustaining the State's objection to Scott's question, of Detective Moore, about

Jones' divorce.

{¶ 36} Scott also contends that he was prejudiced when the trial court required him to "cross-examine Jones about her ex-husband's precarious relationship with the victim outside the presence of the jury" before he could do it in front of the jury because Jones "had the benefit of a *** 'trial run' or rehearsal of defense counsel's questioning," eliminating the element of surprise.

{¶ 37} When defense counsel was questioning Jones about her ex-husband's relationship with Stapleton, the State objected to one of the questions. At sidebar, defense counsel explained that he wanted to establish that there was animosity between James and Stapleton such that James might have hired someone to kill Stapleton. (James presumably did not do it himself because Jones saw the perpetrator and did not identify that person as James.) The prosecutor challenged this line of questioning, arguing that there was no good faith basis for such questions. After a lengthy discussion, the court stated that it would allow the defense to pursue this line of questioning outside the presence of the jury before making its decision about whether such evidence could be presented to the jury. Defense counsel did not object to this resolution of the issue.

{¶ 38} When she was questioned outside the presence of the jury, Jones testified that James had not been jealous of Stapleton, but had been concerned that their son was calling Stapleton "dad." She did not recall telling detectives that the men had had words in the past, but that "it was just a whole lot of chest puffing and posturing," but she allowed for the possibility that she had made such a statement. Jones recalled that Stapleton had taken her and James' daughter to a

father-daughter dance shortly before Stapleton's death, but she did not recall whether she and James had ever talked about it.

{¶ 39} After this questioning of Jones, the trial court ruled that defense counsel's questions were not offered for the truth of the matter asserted or to "dirty up the victim," as the prosecutor had alleged, but "to show that there was somebody else out there who had a reason to be angry" with Stapleton. The defense was then permitted to pursue this line of questioning in front of the jury.

{¶ 40} The trial court questioned Jones outside the presence of the jury in response to an objection to defense counsel's questioning of Jones, a State's witness. Defense counsel did not object to this manner of resolving the dispute, and Scott ultimately prevailed on the objection and was allowed to present the testimony in question. Scott cannot now be heard to argue that he was prejudiced. He waived any error in these proceedings by failing to object, and the trial court's consideration of the proposed testimony outside the presence of the jury was not plain error. Moreover, there is no suggestion by Scott how this "dry run" prejudiced him or what "surprise" would have been otherwise present and how that would have benefitted Scott.

{¶ 41} Finally, Scott contends that he should have been allowed to cross-examine Amy Rismiller about contamination of DNA samples. Rismiller testified about the collection of blood, saliva, and sweat from items found at or near the crime scene and from the victim's clothing, but she had not performed the DNA analysis in this case. Scott sought to question Rismiller about a memorandum from her technical leader at the Miami Valley Regional Crime Lab to a supervisor

about prior, unrelated contamination of DNA evidence during analysis, a matter for which she had apparently been disciplined in the past. The State argued that Rismiller was called as a serology expert, not a DNA analyst, in Scott's case, and that the alleged errors did not affect Rismiller's qualifications as an expert. The trial court ruled that Rismiller's qualifications as a DNA analyst were not relevant because she was not called to testify about DNA.[2]

{¶ 42} In our view, the defense, in an attempt to impeach an expert opinion, should have been permitted to cross-examine Rismiller about any documented issues concerning her handling of specimens, even if her specific role in the prior case were different from the her role in Scott's case (i.e., the collection v. the analysis of DNA evidence). The State certainly could have, if necessary, rehabilitated Rismiller on re-direct examination by showing that the alleged previous errors were unrelated to the collecting, testing, and opinion in this case. Thus, the trial court erred in preventing the defense from pursuing this line of cross-examination.

{¶ 43} Although we have concluded that the trial court unduly restricted the cross-examination of Westbrook and Rismiller, on the whole, the evidence against Scott was quite strong. His DNA and the victim's blood were found on a red t-shirt discarded in Scott's apartment complex. Scott claimed that he had left this t-shirt on his patio, where it could have been stolen, because it was moldy, but the DNA analyst testified that there was no mold on the t-shirt. Scott's saliva was also found

[2]The record does not contain the MVRCL memorandum in question, nor was the content of the memorandum proffered.

on Stapleton's shirt. A knife that matched a set at Scott's apartment was found at the murder scene. Westbrook and her son testified that Scott came to their apartment around the time of the murder, breathless and sweaty, and asked for a new shirt. According to the son, Scott was also covered in blood. A short time later, when the police responded to the scene, Scott suddenly disappeared while walking in the apartment complex with Westbrook. Due to the strength of this evidence, the errors in limiting cross-examination were harmless beyond a reasonable doubt, and Scott was not unfairly prejudiced by the trial court's limitations on his cross-examination.

{¶ 44} The first assignment of error is overruled.

III

{¶ 45} Scott's second assignment of error states:

{¶ 46} "THE INDICTMENT ON THE AGGRAVATED ROBBERY COUNT IS DEFECTIVE BECAUSE IT DOES NOT IDENTIFY A SPECIFIC PREDICATE THEFT OFFENSE AND THE COURT ERRED IN PERMITTING IT TO BE AMENDED TO INCLUDE THE SUPERFLUOUS MENS REA ELEMENT OF 'RECKLESSNESS' IN VIOLATION OF SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶ 47} Scott contends that his charge of aggravated robbery was not properly presented to the grand jury and that he was not given adequate notice of the predicate theft offense, the commission or attempted commission of which is an element of aggravated robbery. He also argues that the trial court erred in

permitting the State to amend the indictment to include the mens rea for aggravated robbery "when the trial was practically over" and in giving confusing jury instructions regarding the mens rea for aggravated robbery. Scott objected to the amendment of the indictment, but he did not object to the jury instructions. We have specifically addressed and rejected Scott's argument that an aggravated robbery indictment is defective if it fails to specify the predicate theft offense. "Because a bill of particulars is available if the defendant requires more specific notice of the charge against him, an indictment is sufficient, under Crim R. 7(B), if it alleges an offense using the words of the statute specifying the offense." *State v. Landgraf*, Montgomery App. No. 21141, 2006-Ohio-838, at ¶11, citing *State v. Landrum* (1990), 53 Ohio St.3d 107, 119. See, also, *State v. Smith* (Feb. 28, 2003), Montgomery App. No. 19370. Scott did not ask for a bill of particulars to clarify the alleged uncertainty about the predicate offense. The fact that the indictment did not name the particular theft offense did not render the indictment fatally defective. *Smith* at ¶16.

{¶ 48} Scott also argues that the trial court erred in permitting the State to amend the indictment to include the term "recklessly," when, as a matter of law, aggravated robbery with a deadly weapon under R.C. 2911.01(A)(1) is a strict liability offense.

{¶ 49} We note that *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*") was decided during the course of Scott's trial. *Colon I* held that the omission of the mens rea element of recklessness in a robbery indictment under R.C. 2911.01(A)(2) was constitutional error when it permeated the defendant's

entire trial. The ramifications of that decision were unclear for some time thereafter.[3] See *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"). However, *Colon I* dealt with aggravated robbery causing physical harm under R.C. 2911.02(A)(2), which is not the section under which Scott was indicted.

{¶ 50} Aggravated robbery with a deadly weapon is, indeed, a strict liability offense. *State v. Lester,* 123 Ohio St.3d 396, 2009-Ohio-4225, at ¶1. "[T]he General Assembly, by not specifying a mens rea in R.C. 2911.01(A)(1), plainly indicated its purpose to impose strict liability as to the element of displaying, brandishing, indicating possession of, or using a deadly weapon." Id. at ¶32. Thus, the amendment arguably *increased* the State's burden of proof. Moreover, defense counsel conceded at trial that he would not have asked different questions of the witnesses or otherwise adjusted his trial strategy if the indictment had originally included the element of recklessness. Although, in hindsight, the amendment to include "recklessness" was erroneous, it was not prejudicial to Scott under the facts presented here.

{¶ 51} Finally, Scott argues that the trial court's jury instructions incorporating the element of recklessness for aggravated robbery confused the jury as to the State's burden of proof on the predicate theft offense. The pertinent instructions were:

{¶ 52} "Count One of the indictment charges Aaron Scott with Aggravated Robbery. Before you can find him guilty of Aggravated Robbery, you must find

[3]The ramifications of *Colon I* and its progeny are arguably still unclear.

beyond a reasonable doubt that on or about the 22nd day of May, 2004, and in Montgomery County, Ohio, that Aaron Scott, in recklessly attempting or committing a theft offense, did have a deadly weapon on or about his person or under his control and displayed the weapon, brandished it, indicated that he possessed it, or used it.

{¶ 53} "An essential element of aggravated robbery is proof that the defendant *recklessly* committed or attempted to commit a theft offense. A person acts '**recklessly**' when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. ***

{¶ 54} "To '**attempt**' to commit a theft offense is to purposely – that is, with specific intention – to do anything which is an act constituting a substantial step in the course of conduct planned to culminate in the commission of the crime of theft. ***

{¶ 55} "What must be committed or attempted is a 'theft offense.' The term '**theft offense**' is defined as knowingly obtaining or exerting control over the property owned by another, without his consent, with purpose to deprive him of that property. You will notice that to constitute a theft offense, there must be a **'knowing'** obtaining, or exerting of control over a person's property. A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result. Knowingly means that a person is aware of the existence of the facts and that his acts will probably cause a certain result. ***"

{¶ 56} Scott claims that "recklessness" should have modified, if anything,

the possession of the deadly weapon and that, the way the instruction was given, the jury could have concluded that reckless, rather than knowing and purposeful, conduct was required to commit the theft offense.

{¶ 57} Although the element of recklessness was inartfully inserted into the jury instructions on aggravated robbery, the trial court did specifically instruct the jury that the mens rea for the underlying theft offense was knowingly and purposefully, and it defined these terms. We are unpersuaded that the improper aggravated robbery instruction led the jury to believe that Scott could be found guilty if he committed the theft offense recklessly.

{¶ 58} Moreover, because Scott did not object to the jury instruction, he has waived all but plain error. Crim.R. 30(A). Plain error may be noticed if a manifest injustice is demonstrated. Crim.R. 52(B); *State v. Herrera*, Ottawa App. No. OT-05-039, 2006-Ohio-3053. In order to find a manifest miscarriage of justice, it must appear from the record as a whole that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91. The disputed issue in the case was who killed Stapleton and under what circumstances, and there was more than sufficient evidence for the jury to have made the decision it did. The jury instructions given by the trial court did not create a manifest miscarriage of justice.

{¶ 59} The second assignment of error is overruled.

IV

{¶ 60} The judgment of the trial court will be affirmed.. . . . . .

FAIN, J. and GRADY, J., concur.

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