

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-09-018
- vs -	:	<u>OPINION</u> 5/3/2010
RICHARD T. ADAMS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 09CRI00118

David B. Bender, Fayette County Prosecuting Attorney, 110 East Court Street, 1st Floor,
Washington C.H., Ohio 43160, for plaintiff-appellee

Jeffrey A. McCormick, 1225 U.S. Highway 22 SW, Washington C.H., Ohio 43160, for
defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Richard T. Adams, appeals his conviction in the Fayette
County Court of Common Pleas for robbery. For the reasons stated herein, we reverse and
remand.

{¶2} On July 10, 2009, appellant was indicted on one count of robbery in violation of
R.C. 2911.02(A)(3), a felony of the third degree, and one count of petty theft in violation of

R.C. 2913.02(A)(1), a first-degree misdemeanor. The charges stemmed from allegations that on June 26, 2009, appellant confronted Shannon Stoops in the garage of her Washington Court House home to inquire about a debt owed by Stoops' estranged husband. Stoops claimed that appellant approached her and struck her in the chest with his fist. He also "snatched" her eyeglasses off her face and threatened to harm her and her children if she called the police. As he left, appellant took Stoops' eyeglasses, an air compressor, and approximately \$150 in cash from the garage. The items were later recovered by law enforcement authorities.

{¶13} Following a jury trial on September 18, 2009, appellant was found guilty of the robbery and theft charges. After concluding that robbery and theft were allied offenses of similar import, the trial court merged the offenses and convicted and sentenced appellant to five years in prison on the robbery charge.

{¶14} Appellant appeals his conviction for robbery, raising four assignments of error for our review.

{¶15} Assignment of Error No. 1:

{¶16} "APPELLANT'S CONVICTION FOR ROBBERY VIOLATED HIS RIGHT[] TO DUE PROCESS AS GUARANTEED BY THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶17} In his first assignment of error, appellant contends that the trial court erred in amending his indictment for robbery to remove the mens rea element of "recklessness." Appellant insists that this error was structural in nature and requires his conviction to be overturned pursuant to the Ohio Supreme Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), and reconsideration in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*).

{¶18} The statute under which appellant was indicted, R.C. 2911.02(A)(3), states that

"[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [u]se or threaten the immediate use of force against another."

Although the statute does not explicitly set forth a culpable mental state, it is well-established that "[w]hen a statute fails to specify a degree of culpability, recklessness is the 'catchall culpable mental state,' except for strict liability statutes, where the accused's mental state is irrelevant." *State v. Taylor*, Montgomery App. No. 22564, 2009-Ohio-806, ¶14, quoting *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, at ¶21.

{¶9} In *Colon I*, the Ohio Supreme Court determined that an indictment for robbery under R.C. 2911.02(A)(2) was defective because it failed to set forth the requisite mens rea of "recklessness" as an element of the offense. 2008-Ohio-1624 at ¶28. The court applied a structural error analysis and found that the defendant did not receive a constitutional indictment or trial, because the defective indictment "permeated [the] defendant's entire criminal proceeding." *Id.* at ¶32. In reaching this conclusion, the court considered the following: 1) the indictment omitted the required mens rea element of recklessness; 2) the defendant was without notice that the state was required to prove that he had acted recklessly; 3) the state did not argue at trial that the defendant had acted recklessly, nor had the trial court properly instructed the jury on the required mens rea; and 4) during closing argument, the prosecutor treated robbery as a strict liability crime. *Id.* at ¶29-31; *Ripperger*, 2009-Ohio-925 at ¶13.

{¶10} Subsequently, In *Colon II*, the court emphasized that its holding in *Colon I* was fact-specific, and that a structural error analysis is appropriate in only rare cases such as *Colon I*, where multiple errors at the trial follow the defective indictment. 2008-Ohio-3749 at ¶8.

{¶11} In this case, appellant's July 2009 indictment provided: "On or about June 26, 2009, and in Fayette County, Ohio, the [d]efendant did []recklessly, in attempting, or

committing a theft offense, * * *, or in fleeing immediately after the attempt or offense, and did use or threaten the immediate use of force against Shannon L. Stoops; in violation of Section 2911.02 of the Revised Code [sic]."

{¶12} At trial, the state moved to amend the robbery count in the indictment at the close of its case-in-chief to remove the element "recklessly." Appellant objected, arguing that the amendment would change the elements of the offense. The trial court overruled appellant's objection, stating "* * * I disagree. It was never an element anyway. It's a superfluous term in the indictment. I will permit the deletion of the term reckless in the indictment and instruct according to the essential elements as set forth in the Ohio Revised Code."

{¶13} Upon review, we conclude that the trial court incorrectly determined that the element of recklessness was "superfluous," as it was an essential element of robbery in violation of R.C. 2911.02(A)(3).¹ In order to convict appellant, the state was required to prove that appellant "recklessly used or threatened the immediate use of force" against Stoops. *Ripperger* at ¶14. We therefore find that the amended indictment was defective.

{¶14} We further find that the defect in the amended indictment permeated appellant's trial resulting in structural error. At the outset, we observe that in addition to the fact that the amended indictment failed to include all of the elements of the offense, appellant lacked complete notice of the required elements at trial. Although he was originally advised of the correct mens rea, after the indictment was amended at the close of the state's case, appellant lacked sufficient notice of the elements of the crime for purposes of presenting his defense to the charge. Furthermore, the state did not argue at trial that appellant had acted

1. Although the holdings in *Colon I* and *Colon II* were specific to violations of R.C. 2911.02(A)(2), this court has applied the same analysis to an indictment that charges a violation of R.C. 2911.02(A)(3). *State v. Ripperger*, Butler App. No. CA2007-11-304, 2009-Ohio-925, fn 1. See, also, *State v. Robertson*, 180 Ohio App.3d 365, 2008-Ohio-6909, ¶23.

recklessly in committing the crime.

{¶15} In addition, as the trial court indicated when it overruled appellant's objection to the state's motion to amend the indictment, the court did not instruct the jury on the required mens rea of recklessness. Our review of the robbery instruction yields nothing to specifically indicate that the jury considered whether appellant was reckless in using or threatening the immediate use of force against Stoops, as is necessary to convict him under R.C. 2911.02(A)(3). See *Colon I*, 2008-Ohio-1624 at ¶31.

{¶16} It is also evident from our review of the record that the state treated the robbery charge as a strict liability offense, as no references were made to appellant's mental state in its closing argument. In describing the elements of the offense, the prosecutor stated: "The defendant is charged with robbery. He used force while committing a theft." In reviewing the evidence relating to the alleged threats and acts of force, the prosecutor told the jury "* * * well, the force would be two things. It's punching her in the chest, which she testified about, her son testified about and you have the emergency room discharge report from where she had chest trauma. It's also threatening her, which is done i[n] several different fashions, the pointing of the finger, the yelling at her, the saying go ahead call the police, I'll kill you, I'll kill your family. That's the force. The theft is any one or all of the things that were taken." In addition, with regard to the alleged theft of Stoops' eyeglasses, the prosecutor stated: "The glasses were stolen, the glasses are returned, * * *. Ladies and gentlemen, that's robbery."

{¶17} Based on the foregoing, we conclude that the defect in the amended indictment resulted in multiple errors throughout appellant's trial that were inextricably linked to the flawed indictment. As a result, appellant's conviction for robbery must be reversed.

{¶18} Appellant's first assignment of error is sustained. We will address appellant's second, third and fourth assignments of error in a consolidated fashion.

{¶19} Assignment of Error No. 2:

{¶20} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY ADMITTING STATE'S EXHIBIT NUMBER TWO INTO EVIDENCE."

{¶21} Assignment of Error No. 3:

{¶22} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN CONVICTING HIM OF ROBBERY."

{¶23} Assignment of Error No. 4:

{¶24} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTIONS."

{¶25} In appellant's remaining assignments of error, he argues that his robbery conviction was against the manifest weight of the evidence, and contends that his trial counsel was ineffective for failing to effectively cross-examine a defense witness with inconsistent preliminary hearing testimony. He also challenges the trial court's admission of Shannon Stoops' emergency room discharge papers, which were introduced by the state to demonstrate the injuries she sustained during the course of the alleged robbery.

{¶26} Based on our disposition of appellant's first assignment of error, his remaining assignments of error are overruled as moot. See *State v. Summers*, 182 Ohio App.3d 139, 2009-Ohio-1883, ¶12.

{¶27} Judgment reversed and remanded.

BRESSLER, P.J., and RINGLAND, J., concur.

[Cite as *State v. Adams*, 2010-Ohio-1942.]