[Cite as *State v. Smith*, 2009-Ohio-5047.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

SHAWN D. SMITH

Defendant-Appellant

Appellate Case Nos. 22041,
22042

Trial Court Case Nos. 06-CR-2323
06-CR-2300

(Criminal Appeal from
Common Pleas Court)

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O P I N I O N

Rendered on the 25th day of September, 2009.

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BROGAN, J.

{¶ 1} Shawn Smith appeals from his convictions of one count of robbery, three counts of aggravated robbery, one count of felonious assault, one count of receiving stolen property, and one count of engaging in a pattern of corrupt activity. Smith was sentenced to fifty-four years in prison.

{¶ 2} Smith claims in his first assignment of error that the indictment charging him with robbery was defective because it failed to charge a mens rea element for the robbery charge in the indictment and he did not waive this defect, citing *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624. In *Colon*, the supreme court held that Colon's indictment for robbery under R.C. 2911.02(A)(2) was defective because it failed to allege that the physical harm was recklessly inflicted. The court held the defect "permeated" the entire criminal proceeding and thus amounted to "structural error" which was not subject to a plain error analysis upon appellate review.

{¶ 3} The State admits that Colon's robbery indictment was defective but argues that error is subject to a plain error analysis, citing *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (*"Colon II*.") In reconsidering *Colon I*, the supreme court emphasized that a structural error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment. The court noted the defective indictment resulted in several other violations of the defendant's rights such as there was no evidence to show that Colon had notice that recklessness was an element of the crime of robbery, nor was there evidence that the State argued that the defendant's conduct was reckless. Further, the trial court did not include recklessness as an element of the crime when it instructed the jury and in closing argument, the prosecuting attorney treated robbery as a strict liability offense.

{¶ 4} In his opening statement, the prosecutor stated the following:

{¶ 5} "Moving further, the state of Ohio would indicate that on or about June 1, 2006 Shawn Smith, the defendant herein did, while attempting or committing a theft offense or in fleeing immediately after the attempt or offense, did inflict or attempt to inflict or threaten to inflict physical harm on another, to wit, one Shirley Lindsey in violation of section 2911.02A2 of the Ohio Revised Code. In that case, and we'll go further into it this afternoon, we believe the evidence will show that this Defendant appeared at Osterman's Jewelers at the Dayton Mall and inquired of the sales person, Mrs. Lindsey, about buying a time piece....

{¶ 6} "...Mrs. Lindsey then shows the defendant a $7000 ladies Rolex watch. At which point when the defendant looks at the watch he grabs it out of Mrs. Lindsey's hands and runs from the store...." (Tr. P. 104, L. 56-74.)

{¶ 7} Ms. Lindsey testified that Mr. Smith snatched the watch from her hand and ran out the door. (Tr. P. 146, L. 1111-1117.) The snatch caused her small finger to jerk back and a jerky motion in her shoulder resulting in a sore finger. (Tr. P. 146, L. 1118-1125, P. 147, L. 1126-1128.)

{¶ 8} The prosecutor stated the following during his closing statement about the robbery:

{¶ 9} "...The state has the burden of showing attempting or committing a theft offense or in fleeing immediately after the attempt offense did inflict, attempt to inflict, or threaten to inflict physical harm on another. To wit we have Ms. Shirley Lindsey...As she's holding the Rolex watch in her hand he snatched that watch out of her hand and ran. He snatched the watch so hard she said it bent her finger back. In fact, her

hands hurt – finger hurt still the next day. Clearly there was physical harm done to Ms. Lindsey...." (Tr. P. 478, L. 9423-9425, P. 479, L. 9426-9430.)

{¶ 10} Finally, the trial court instructed the jury in part as follows:

{¶ 11} "...The defendant is charged with robbery in count seven. Before you can find defendant guilty you must find beyond a reasonable doubt that Shawn D. Smith, on or about June 1, 2006, in the county of Montgomery, state of Ohio, in attempting or committing a theft offense or in fleeing after the attempt or offense did inflict, attempt to inflict, or threaten to inflict physical harm on another to wit, Shirley Lynsey [sic]...." (Jury Instructions Tr. P. 116, L. 2828-2832.)

{¶ 12} Smith argues that his prosecution is similar with respect to all the factors present in *Colon I*, where the court concluded the trial was infected with structural error. He notes that had the grand jury or the jury known that the State was required to prove he acted recklessly when he snatched the watch from Ms. Lindsey, they either would not have indicted him for the robbery and or convicted him of the offense. He argues the evidence demonstrated that he acted negligently at best in snatching Ms. Lindsey's watch from her hand.

{¶ 13} The State argues Smith's prosecution can be distinguished from *Colon I* because he cannot credibly argue that he was unaware that the State's evidence would show that he recklessly caused physical harm to Ms. Lindsey because he was provided the State's discovery packet. The State further argues that unlike *Colon I*, the prosecutor in this case did not employ language during the closing argument which suggested to the jury that robbery is a strict liability offense.

{¶ 14} The State also argues that the State's closing argument in this case is

distinguishable from the closing argument in *Colon I*. In that case, the prosecuting attorney said, "Vincent Colon robbed Samuel Woodie. He attempted to commit a theft offense, and he inflicted harm. It's simple. I ask you to keep it that simple and find him guilty." According to the Supreme Court, those words showed the prosecutor treated the robbery charge as a strict–liability offense in *Colon I.* And the prosecutor's treatment of robbery as a strict-liability offense was, in the Court's view, a problem separate from the prosecutor's failure to argue Colon's conduct in the case constituted reckless conduct.

{¶ 15} Unlike *Colon I*, the State argues the prosecutor in this case did not employ language during closing argument that suggested robbery is a strict-liability offense. In part, the State argued, "[t]his is a little bit different. This is just a regular robbery. The defendant didn't use a gun on this one, he just used his muscle, cunning, and speed * * *. As [Ms. Lindsey] was holding the Rolex watch in her hand, he snatched that watch out of her hand and ran. He snatched that watch so hard she said it bent her finger back." (Tr. 478-479) The State argues the prosecutor did not use the term recklessness when he argued the evidence proved robbery and, he likewise did not use words like those employed by the prosecutor in *Colon I* that indicated the State was treating robbery as a strict-liability offense.

{¶ 16} We disagree with the State that its discovery packet suffices to replace the notice requirement of the grand jury indictment. An indictment must, first, contain the **elements** of the offense charged and fairly inform the defendant of the charge against which he must defend. *State v. Childs* (2000), 88 Ohio St.3d 558. The prosecutor's discovery packet provides facts of the investigation but does not suffice to inform the

defendant of the specific charge the grand jury has leveled against him.

{¶ 17} We also see no material difference between the prosecutor's argument in *Colon I* and in this case. Both arguments note the jury need only find the defendant caused physical harm as a result of a theft without also requiring that the defendant cause that physical harm with the required culpability state of mind. The defects "permeated" Smith's trial as it related to the robbery charge and resulted in structural error which was not subject to the waiver rule. Smith's first assignment is Sustained.

{¶ 18} In his second assignment, Smith argues that his aggravated robbery convictions should be set aside pursuant to *Colon* as well. He contends the indictment failed to include the mens rea of recklessly displaying, brandishing or using a deadly weapon. Smith concedes we have repeatedly held that *Colon* does not apply to aggravated robbery under R.C. 2911.01(A)(1), see *State v. Carr*, Mont. App. No. 22603, 2009-Ohio-1942. He nevertheless asks us to reconsider our previous holdings because the First and Seventh Appellate Districts have held that *Colon* does apply to aggravated robbery under R.C. 2911.01(A)(1). See *State v. Lester*, Ham. App. C-070383, 2008-Ohio-3570 and *State v. Jones*, Mahoning App. No. 07-MA-200, 2008-Ohio-6971.

{¶ 19} Recently, the Eighth District Court of Appeals agreed with us that *Colon* has no application to aggravated robbery committed with a deadly weapon. See *State v. Kimbrough*, Cuyahoga App. No. 91928, 2009-Ohio-3377. We decline to reconsider our previous holding in *State v. Carr*, supra. The Appellant's second assignment is Overruled.

{¶ 20} In his final assignment of error, Smith contends the trial court abused its

discretion in imposing a fifty-four-year sentence upon him. He contends the sentence was incredibly harsh because no one was seriously injured in the course of Smith's crimes.

{¶ 21} The State argues that the trial court did not abuse its discretion because Smith went on a crime spree involving several victims and even fired his weapon at one of the victims. The State also argues the trial court could have given Smith a longer sentence for the crime of engaging in a pattern of corrupt activity because the trial court treated the violation of R.C. 2923.32(B)(1) as a second-degree felony when it was actually a first-degree felony because one of the incidents of corrupt activity was a first-degree felony, to-wit, aggravated robbery.

{¶ 22} In sentencing Smith, the trial court noted that Smith had an extensive juvenile record, six prior felonies, and had served four prior prison sentences. The trial court also noted that Smith had shown no remorse for his criminal conduct. (Tr. 508.) We cannot say that the trial court abused its discretion in imposing the 54-year sentence upon Smith. There is no evidence the trial court acted unreasonably or arbitrarily. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160. The Appellant's third assignment of error is Overruled.

{¶ 23} The judgment of the trial court is Reversed, in part, and Affirmed, in part. Smith's conviction for robbery is hereby Reversed and ordered Vacated. This matter is hereby Remanded to the trial court for re-sentencing in light of our resolution of Appellant's first assignment of error.

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DONOVAN, P.J., and GRADY, J., concur.

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