[Cite as *State v. Lieser*, 2009-Ohio-2502.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
ERIC WILLIAM LIESER	:	Case No. 2008CA00202
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	On Appeal from the Stark County Court of Common Pleas, Case No. 2007CR1646
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	May 26, 2009

APPEARANCES:

For Plaintiff-Appellee

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Delaney, J.

{¶1} Defendant-Appellant, Eric William Lieser, appeals his conviction and sentence for robbery, a second degree felony in violation of R.C. 2911.02(A)(2). Plaintiff-Appellee is the State of Ohio. The facts giving rise to this appeal are as follows.

{¶2} On October 16, 2007, the Stark County Grand Jury indicted Appellant on one count of robbery, in violation of R.C. 2911.02(A)(2). The indictment stated that on or about July 7, 2007, Appellant "did, in attempting, or committing a theft offense, or in fleeing immediately after the attempt or offense, inflict, attempt to inflict, or threaten to inflict physical harm on Sally Taylor." According the stipulated facts, on July 7, 2007, Appellant approached Ms. Taylor, age 65, in the parking lot of a Fishers grocery store. As Ms. Taylor was getting into her vehicle, Appellant pulled her out, grabbed her purse and threatened her with physical harm. Ms. Taylor managed to get her purse back, but Appellant pushed her away and fled in Ms. Taylor's vehicle. Several hours later, Appellant was arrested in the stolen vehicle. Ms. Taylor later identified Appellant from a photo array.

{¶3} Appellant was arraigned on October 19, 2007 and he pleaded not guilty to the charge. On November 19, 2007, Appellant filed a motion for determination of his mental competence. The trial court ordered an evaluation of Appellant's competence and evaluation of his mental condition at the time of the offense. On November 16, 2006, Appellant was in an automobile accident wherein he suffered a traumatic brain injury. He also had a history of substance abuse, including alcohol and drugs. The trial court, upon the receipt of the results of the examination, found Appellant incompetent to

stand trial. The trial court ordered Appellant to enter Heartland Behavioral Healthcare Center for treatment for purposes of restoring Appellant to competency.

{¶4} Three months later, the trial court held a hearing to determine Appellant's competence to stand trial. Heartland Behavioral Healthcare submitted a competency restoration report to the trial court. Appellee stipulated to the report, but Appellant objected to the "contents" of the report. The trial court overruled Appellant's objection and the trial court admitted the report. The trial court then found Appellant competent to stand trial.

{¶5} On March 7, 2008, Appellant changed his plea from "not guilty" to "not guilty by reason of insanity."

{¶6} Appellant then waived his right to trial by jury and stipulated to the facts of the robbery offense. On August 18, 2008, he proceeded to a trial to the court only on the affirmative defense of not guilty by reason of insanity. Following the presentation of witnesses and arguments to the trial court, the trial court found Appellant guilty of robbery, as set forth in R.C. 2911.02(A)(2). The trial court sentenced Appellant to four years in prison.

{¶7} It is from this conviction and sentence Appellant now appeals. Appellant raises three Assignments of Error:

{¶8} "I. THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS UNDER THE OHIO AND U. S. CONSTITUTIONS BECAUSE THE INDICTMENT FAILED TO CHARGE A MENS REA ELEMENT OF THE OFFENSE OF ROBBERY.

{¶9} "II. THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶10} "III. THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS UNDER THE OHIO AND U.S. CONSTITUTIONS BECAUSE THE TRIAL COURT IMPROPERLY ADMITTED THE EXPERT REPORT WHEN IT FOUND THE DEFENDANT COMPETENT TO STAND TRIAL."

I.

{¶11} Appellant argues in his first Assignment of Error that the indictment in this case failed to charge all the essential elements of the offense of robber and resulted in a lack of notice to him of the *mens rea* required to commit the offense. He further argues this defect permeated the entire criminal proceeding, therefore resulting in a structural error. We disagree.

{¶12} Appellant's argument concerns the application of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ("*Colon I*") to his indictment for robbery in violation of R.C. 2911.02(A)(2). R.C. 2911.02(A)(2) provides in part:

{¶13} "No person, in attempting or committing a theft offense * * * shall do any of the following: * * *

{¶14} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm."

{¶15} This Court recently discussed the application of *Colon I* to an indictment for R.C. 2911.02(A)(2) in *State v. Gray*, Richland App. No. 2007-CA-0064, 2009-Ohio-455. We stated, "[t]he *Colon I* court held:

{¶16} "R.C. 2911.02(A)(2) does not specify a particular degree of culpability for the act of 'inflict[ing], attempt[ing] to inflict, or threaten [ing] to inflict physical harm,' nor

does the statute plainly indicate that strict liability is the mental standard. As a result, [pursuant to R.C. 2901.21(B),] the state was required to prove, beyond a reasonable doubt, that the defendant recklessly inflicted, attempted to inflict, or threatened to inflict physical harm. *Colon,* 2008-Ohio-1624, ¶14, 118 Ohio St. 3d 26, 885 N.E.2d 917." Id. at ¶12-13.

{¶17} Appellant argues that because the indictment lacked the necessary mental element of recklessness resulting in a defective indictment that led to multiple errors at trial, we should apply a structural-error analysis to the defective indictment. As this Court noted in *State v. Vance*, Ashland App. No. 2007-COA-035, 2008-Ohio-4763, the Ohio Supreme Court reconsidered *Colon I* in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 ("*Colon II*").

{¶18} "In *Colon,* the Ohio Supreme Court held that an indictment for robbery in violation of R.C. 2911.02(A)(2) omitted an essential element of the crime by failing to charge a mens rea, i.e., that the defendant *recklessly* inflicted, attempted to inflict, or threatened to inflict physical harm. The court determined that the indictment failed to charge an offense, a constitutional, structural error not waived by failing to raise that issue in the trial court. However, the Supreme Court reconsidered this position. *State v. Colon ("Colon II"),* 119 Ohio St.3d 204, 893 N.E.2d 169, 2008-Ohio-3749. In *Colon II,* the Court held:

{¶19} "'Applying 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. In *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.* at ¶ 23, 885 N.E.2d 917, citing *State v. Perry,* 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶ 17. Seldom will a defective indictment have this effect, and therefore, in most defective indictment cases, the court may analyze the error pursuant to Crim.R. 52(B) plain-error analysis." *Id.* at ¶ 8, 802 N.E.2d 643.' The Court noted the multiple errors that occurred in *Colon I:*

{¶20} "'As we stated in *Colon I,* the defect in the defendant's indictment was not the only error that had occurred: the defective indictment resulted in several other violations of the defendant's rights. 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶ 29. In *Colon I,* we concluded that there was no evidence to show that the defendant 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. *Id.* at ¶ 30, 885 N.E.2d 917. Further, the trial court did not include recklessness as an element of the crime when it instructed the jury. *Id.* at ¶ 31, 885 N.E.2d 917. In closing argument, the prosecuting attorney treated robbery as a strict-liability offense. *Id.*' *Colon II* at ¶6." *Vance*, supra at ¶51-53.

{¶21} Appellee does not dispute the application of *Colon I* to the present case, but argues that according to *Colon II*, this Court should utilize a plain-error analysis under Crim.R. 52(B) rather than structural-error. Upon a review the record, we agree a plain-error analysis is appropriate. We cannot say that in this case, the omission in the indictment permeated 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.

{¶22} First, Appellant stipulated to the facts of the indictment. The case proceeded to a bench trial only on Appellant's affirmative defense of not guilty by reason of insanity. Second, the trial court stated in its judgment entry issued on August 22, 2008 that it "found that the State of Ohio proved beyond a reasonable doubt all of the essential elements of the offense of Robbery, as set forth in R.C. §2911.02(A)(2), a felony of the second degree."

{¶23} A reviewing court must presume that the trial court applied the law correctly. *State v. Coombs* (1985), 18 Ohio St.3d 123, 125, 480 N.E.2d 414 citing *State v. Eubank* (1979), 60 Ohio St.2d 183, 398 N.E.2d 567. We presume the trial court was cognizant of *Colon I* and the judge duly considered the evidence in light of *Colon I*, as the Ohio Supreme Court decided *Colon I* on April 9, 2008 and the trial to the court in the present case occurred on August 18, 2008. Accordingly, this Court may analyze the error in this case pursuant to the Crim.R. 52(B) plain-error analysis.

{¶24} Crim.R. 52(B) provides that, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. In order to find plain error under Crim.R. 52(B), it must be determined, but for the error, the outcome of the trial clearly would have been otherwise. *Id.* at paragraph two of the syllabus. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to "prevent a manifest miscarriage of justice." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, quoting *State*

v. Long (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. *Perry,* supra, at 118, 802 N.E.2d at 646.

{¶25} Under the circumstances of this case, where the trial court determined Appellant's guilt or innocence pursuant to the necessary elements of R.C. 2911.02(A)(2), we cannot say the outcome of Appellant's trial clearly would have been otherwise.

{¶26} Appellant's first Assignment of Error is overruled.

II.

{¶27} Appellant argues in his second Assignment of Error his conviction for robbery was against the sufficiency and the manifest weight of the evidence. Appellant's arguments relate to the lack of evidence regarding the requisite mental culpability of recklessness required for a crime of robbery. We disagree.

{¶28} When reviewing a claim of sufficiency of the evidence, an appellate court's role is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶29} Conversely, when analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in reviewing the entire record, "weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶30} Appellant argues that while he stipulated to the facts of the offense, those stipulated facts did not include evidence regarding Appellant's mental culpability at the time he committed the offense. Appellee concedes that neither the indictment nor the stipulation contained the culpable mental state of recklessness. Accordingly, Appellant states that Appellee was unable to prove every essential element of the case.

{¶31} 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." R.C. 2901.22(C). A person acts "knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶32} In the present case, the trial before the court concerned only Appellant's affirmative defense of not guilty by reason of insanity. The parties presented expert testimony regarding whether Appellant was insane at the time he committed the offense. During the testimony, the experts discussed Appellant's mental state at the

time he committed the offense and whether Appellant's impairment would affect his ability to act knowingly. (Bench Trial T. at 68).

{¶33} The mental state of "knowingly" is a higher standard than "recklessly." Further, "[i]n some instances, evidence bearing on the issue of insanity may also be relevant in determining whether the required *mens rea* was present." *State v. Mackert* (Jan. 13, 1977), Franklin App. No. 76-AP-428

{¶34} As stated above, a reviewing court presumes the trial court applied the law correctly. Our review of the record, including the stipulations, shows there was sufficient evidence to support Appellant's conviction and his conviction was not against the manifest weight of the evidence.

{¶35} Appellant's second Assignment of Error is overruled.

III.

{¶36} In Appellant's third Assignment of Error, Appellant argues that at Appellant's competency hearing on March 3, 2008, the trial court improperly admitted the competency restoration report submitted by Heartland Behavioral Healthcare. The improperly admitted report, Appellant argues, constitutes hearsay, which is not admissible under any exception.

{¶37} After the trial court ordered Appellant to Heartland Behavioral Healthcare for purposes of restoring Appellant to competency, the trial court also ordered Heartland Behavioral Healthcare to submit a report to the trial court pursuant to R.C. 2945.38(F). R.C. 2945.38(F) provides that Heartland Behavioral Healthcare is to submit a written report when the person supervising Appellant's treatment believes the defendant is capable of understanding the proceedings against him and can assist in his defense.

After the receipt of the report, under R.C. 2945.38(H), the trial court is required to conduct a competency hearing.

{¶38} Heartland Behavioral Healthcare submitted its report on December 21, 2007, indicating Appellant was restored to competency. The trial court held a competency hearing on March 3, 2008. At the hearing, Appellee stipulated to the written report of Appellant's evaluation, but Appellant objected to the contents of the report. There was no testimony regarding the report. Over Appellant's objection, the trial court accepted the results of the contents in the written report and found that Appellant was restored to competency. (Mar. 3, 2008 Competency Hrg. T. at 4-5).

{¶39} Appellant argues the trial court's admission of the report was error for two reasons. First, Appellant contends that pursuant to R.C. 2945.37(E) the report was hearsay because no person who prepared the report was present at the hearing. R.C. 2945.37(E), states:

{¶40} "The prosecutor and defense counsel may submit evidence on the issue of the defendant's competence to stand trial. A written report of the evaluation of the defendant may be admitted into evidence at the hearing by stipulation, but, if either the prosecution or defense objects to its admission, the report may be admitted under sections 2317.36 to 2317.38 of the Revised Code or any other applicable statute or rule."

{¶41} R.C. 2317.36 states,

{¶42} "A written report or finding of facts prepared by an expert who is not a party to the cause, nor an employee of a party, except for the purpose of making such report or finding, nor financially interested in the result of the controversy, and

containing the conclusions resulting wholly or partly from written information furnished by the co-operation of several persons acting for a common purpose, shall, in so far as the same is relevant, be admissible when testified to by the person, or one of the persons, making such report or finding without calling as witnesses the persons furnishing the information, and without producing the books or other writings on which the report or finding is based, if, in the opinion of the court, no substantial injustice will be done the opposite party."

{¶43} Appellant states the trial court had no legal authority to admit and consider the report without supporting testimony. Appellee does not dispute this contention, but instead notes that Appellant only objected to the contents of the report, not its admissibility. Furthermore, the record reflects that Appellant did not request testimony from the doctor who prepared the report nor voice any concern regarding Appellant's ability to assist in this defense or his ability to understand the nature of the proceedings against him.

{¶44} Even assuming Appellant's objection to the contents of the Heartland Behavioral Healthcare report could be construed as a specific objection to admissibility; we find the admission of the report is not reversible error. Harmless errors are to be disregarded and the erroneous admission of evidence is not reversible unless it affects a substantial right that prejudices the defendant. See Crim.R. 52(A); Evid.R. 103(A). We find nothing of that sort here.

{¶45} Our review of the record reveals no indication that Appellant was unable to understand the nature of the proceedings or to assist his counsel in his defense. His trial counsel did not advise the trial court that Appellant exhibited any signs of

incompetency. At later hearings and trial, Appellant interacted appropriately with the court and his counsel. The record is devoid of any evidence to contradict the trial court's finding that Appellant's competency was restored. Therefore, any error in admitting the restoration of competency report was harmless.

{¶46} Secondly, Appellant argues the admission of the report implicates the prohibition in *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct.1354, that testimonial statements of a witness who does not appear at trial may not be admitted or used against a criminal defendant unless the declarant is unavailable to testify and the defendant has had a prior opportunity for cross-examination.

{¶47} A competency hearing pursuant to R.C. 2945.38(H) is a pretrial proceeding. Upon examination of the application of the *Crawford* rule to a pretrial suppression hearing, this Court has held that the *Crawford* rule applies to the actual criminal trial, not to a suppression hearing. *State v. Miller*, Guernsey App. No. 07 CA 11, 2008-Ohio-100, at ¶17, citing *State v. Massie*, Ottawa App. No. OT-04-007, 2005-Ohio-1678, at ¶16. We find this analysis to be appropriate in the present case upon Appellant's argument for the application of the *Crawford* rule to a pretrial competency hearing.

{¶48} Accordingly, Appellant's third Assignment of Error is overruled.

{¶49} The judgment of the Stark County Court of Common Pleas is affirmed.

By Delaney, J.

Hoffman, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

PAD:kgb

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ERIC WILLIAM LIESER	:	
Defendant-Appellant	:	Case No. 2008CA00202

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs to Appellant.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE