[Cite as *State v. Chaney*, 2009-Ohio-6118.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

COLE CHANEY

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Julie A. Edwards, J.
Hon. Patricia A. Delaney, J.

Case No. 2007CA00332

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Case No. 2007 CR 0641

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 16, 2009

APPEARANCES:

For Plaintiff-Appellee

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Hoffman, P.J.

{¶1} Defendant-appellant Cole Chaney appeals his conviction in the Stark County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} This matter comes before us upon the reopening of Appellant's prior appeal. On October 27, 2008, this Court affirmed Appellant's conviction and sentence in the Stark County Court of Common Pleas. As set forth in the Statement Of The Facts And Case in the prior appeal:

{¶3} On April 7, 2007, Albert Simia discovered Michael Kuligowski lying face down on the living room floor of Kuligowski's apartment, with his jacket over his head. Simia called the police, who observed Kuligowski lying dead on the living room floor dressed in a black jacket, black jeans and work boots. The right rear pocket of his pants was torn. His face was covered with blood, vomit and brain matter. The coffee table was turned over and there was "a lot of stuff" on the floor. Kuligowski's wallet was removed from his pants by one of the police officers in order to look for identification. The front door of the apartment had been damaged from the inside.

{¶4} Following an autopsy, the Stark County Coroner determined Kuligowski's head and face had suffered substantial injury. His left cheek and nose were markedly swollen, and the right side of his face was markedly flattened. His lips were bruised, his upper lip was torn and his jaw was broken. The coroner further determined Kuligowski suffered a distinct gap between the cervical vertebrae and the base of the skull, an "atlanto-ocipital disarticulation" in which the head was dislocated from the body. The coroner found Kuligowski had a blood alcohol level of .06 and a high concentration of

benzolyegonine in his body. He further determined Kuligowski was a chronic cocaine user.

{¶5} The coroner concluded the cause of death was multiple blunt force injuries to his head and neck. He was struck a minimum of six and a maximum of ten or twelve times. Kuligowski would have died shortly after his head was transected from his spinal cord, around 1:00 a.m.

{¶6} Rebecca Yarborough, a server at Alcarr's Tavern, told the Canton Police Kuligowski had been drinking with a blond haired girl and Appellant on the evening of April 6, 2007.

{¶7} Tina Rodrigues lived in an apartment right below Kuligowski's apartment. She stated she heard yelling, banging around, and a man yelling “[I]'m not fucking around” and “[I]'m not fucking around mother fucker” around 1:00 a.m. The commotion lasted about 15 minutes. Finally, she observed a balding man and a woman leave the building, walking down an alley on Kennet Court.

{¶8} Shirley Fisher told the police she had been drinking with Kuligowski and Appellant on the evening of April 6, 2007, at Alcarr's tavern. She said they wanted to keep drinking, and went up to Kuligowski's apartment. When she returned from using the bathroom, she saw Appellant hitting Kuligowski several times while he was sitting on the couch. Then, she saw Appellant grab Kuligowski by the ankles and drag him off the floor. Appellant continued hitting Kuligowski hard, and Fisher yelled for him to stop. Appellant continued the beating. Fisher later left the apartment with Appellant.

{¶9} After his arrest, Appellant made a statement to the Canton Police Department that Kuligowski took a swing at him, hitting his back. Appellant told the

police he went “crazy” and just started throwing “wild punches.” Then, he knocked him out. He didn't know how many blows he struck, but knew Kuligowski was “thumped a few times,” maybe five or more. Appellant removed $100 .00 from Kuligowski's wallet, ripping his pants in the process, and spent the money on drugs and alcohol.

{¶10} The Stark County Grand Jury indicted Appellant on one count of felony murder, a violation of R.C. 2903.02(B), aggravated robbery, a violation of R.C. 2911.01(A)(3), and one count of felonious assault, a violation of R.C. 2903.11(A)(1).

{¶11} Following a jury trial, Appellant was found guilty of all counts. The trial court sentenced Appellant to eight years on the felonious assault charge, ten years on the aggravated robbery count and fifteen years to life for the murder charge. The trial court ordered the sentences run consecutively for a total of thirty years to life in prison.

{¶12} On October 27, 2008 this Court affirmed Appellant’s conviction and sentence.

{¶13} On March 30, 2009, this Court granted Appellant’s motion to reopen his appeal on the claim of ineffective assistance of appellate counsel.

{¶14} On reopening, Appellant assigns as error:

{¶15} “I. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.”

{¶16} The standard for reviewing claims for ineffective assistance of counsel was set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St .3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel.

{¶17} First, we must determine whether counsel's assistance was ineffective; *i.e.,* whether counsel's performance fell below an objective standard of reasonable representation and volatile of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether the defense was actually prejudice by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. We apply the Strickland test to all claims of ineffective assistance of counsel, both trial counsel, or appellate counsel. *State v. Turner,* Licking App. No.2006-CA-123, 2007-Ohio-4583; *State v. Godfrey* (Sept. 2, 1999), Licking App. No. 97CA0155.

{¶18} Appellant bears the burden of establishing there is a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel, see, e.g. *State v. Spivey* 84 Ohio St.3d 24, 1998-Ohio-704, 701 NE 2d 696.

{¶19} As set forth above, Appellant was indicted on one count of aggravated robbery, in violation of R.C. 2911.02(A)(3). The statute reads:

{¶20} "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶21} "(1) Have 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;

{¶22} "***

{¶23} "(3) Inflict, or attempt to inflict, serious physical harm on another."

{¶24} Appellant maintains appellate counsel was ineffective in failing to raise the defect in the indictment wherein the State failed to set forth the mens rea for the element of infliction of serious physical harm as to the aggravated robbery count. Appellant argues R.C. 2911.02(A)(3) does not specify a particular degree of culpability for the act of inflicting or attempting to inflict, serious physical harm, nor does the statute plainly indicate strict liability is the mental standard. As a result, Appellant maintains the State was required to prove, beyond a reasonable doubt, the defendant recklessly inflicted or attempted to inflict, serious physical harm. *State v. Colon,* 118 Ohio St.3d 26, 2008-Ohio-1624.

{¶25} Additionally, Appellant maintains the structural defect in the indictment affected the charge of murder, in violation of R.C. 2903.02(B). The statute requires the State to demonstrate the accused caused the death of a person as a proximate result of committing an aggravated robbery or a felonious assault.

{¶26} In *Colon I,* the Ohio Supreme Court held that when an indictment fails to charge a mens rea element of a crime, the error is structural and the defendant's failure to raise such defect in the trial court did not waive appellate review of the error.

{¶27} The Supreme Court reconsidered *State v. Colon ("Colon I")* in *State v. Colon ("Colon II"),* 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169. In *Colon II,* the Court held, in relevant part, as follows:

{¶28} "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:*

{¶29} "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.

{¶30} In *State v. Moss*, Lucas App. No. L-07-1401, 2008-Ohio-4737, the Sixth District Court of Appeals addressed the issue raised herein, concluding:

{¶31} "Consequently, after considering *Colon I* and *Colon II* together, we conclude that the structural error analysis will only apply to cases in which multiple errors permeate the entire proceeding, and contain the following factors: a defective indictment; the defendant has had no notice of the specific mens rea of the offense; the jury instructions do not include the applicable mens rea; and, during trial, the prosecution applies an improper mens rea to the crime charged."

{¶32} Here, the trial court instructed the jury as to the charge of aggravated robbery:

{¶33} "For the purpose of deciding whether the Defendant committed the offense of aggravated robbery, you are to consider the following definitions: A criminal attempt is when one purposely does or fails to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step the conduct must be strongly corroborative of the actor's criminal purpose. Preparing, planning or arranging the means for the commission of the crime does not constitute an attempt.

{¶34} "The act of inflicting or attempting to inflict serious physical harm must occur during or immediately after the theft offense. Serious physical harm to persons means any of the following: Any physical harm which carries a substantial risk of death, any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporarily substantial incapacity, any physical harm that involves some permanent disfigurement or that involves some temporary serious disfigurement and any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

{¶35} "Before you can find the Defendant was committing or attempting to commit an offense, you must find beyond a reasonable doubt that the Defendant, Cole Bouman Chaney, Jr., knowingly obtained or attempted to obtain property owned by another without his consent and for the purpose of depriving him of that property.

{¶36} "The State must prove the theft offense beyond a reasonable doubt as it is one element of the offense of aggravated robbery. In order to determine whether the Defendant was committing or attempting to commit a theft offense, you are to consider the following definitions: Knowingly is an essential element of the charge and has been previously defined for you. But you will find the definition in its entirety here at this page. I am not going to reread it. Purpose is an essential of this charge and has been previously defined for you. It is here in its entirety and I will not reread it at this time.

{¶37} "Deprive means to withhold property of another permanently or for a period that appropriates substantial portion of its value or use. Owner means any person other than the Defendant who is the owner of or who has possession or control of or any license or interest in property or services even though such ownership, possession, control, license or interest is unlawful.

{¶38} "Property means any property, real or personal, tangible or intangible and any interest or license in that property. Consent may be either express or implied. Express consent is determined by the written or spoken words of the persons involved. Implied consent is determined by the facts and circumstances which surround those involved, including their words and acts from which you may infer the consent was given to the Defendant."

{¶39} Tr. at 75-76.

{¶40} Further, Appellant was indicted on and convicted of felonious assault, in violation of R.C. 2903.11, which reads:

{¶41} "(A) No person shall knowingly do either of the following:

{¶42} "(1) Cause serious physical harm to another or to another's unborn;"

{¶43} The mens rea element of the offense of felonious assault is "knowingly" as it relates to "causing serious physical harm to another." Appellant cannot therefore demonstrate structural or plain error as a result of the State's failure to include the element of recklessly as it relates to the serious physical harm element of aggravated robbery because the jury was instructed it must find the higher mens rea of knowingly with regard to the serious physical harm element when considering the felonious assault charge.

{¶44} Appellant was indicted in Count I of the indictment on the charge of felony-murder as a result of committing aggravated robbery **and/or** felonious assault, any error regarding the instruction on aggravated robbery would not affect the felony murder conviction because Appellant was also convicted of felonious assault. Accordingly, *Colon I* is inapplicable to Appellant's conviction for felony-murder.

{¶45} Based upon the above, Appellant has not met the second prong of *Strickland* by demonstrated prejudice as a result of appellate counsel's failure to object to the indictment herein.

{¶46} Appellant's conviction and sentence in the Stark County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Edwards, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
COLE CHANEY	:	
	:	
Defendant-Appellant	:	Case No. 2007CA00332

For the reasons stated in our accompanying Memorandum-Opinion, Appellant's conviction and sentence in the Stark County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY