

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-07-1272

Appellee

Trial Court No. CR-2007-1861

v.

Clever W. Watkins

DECISION AND JUDGMENT

Appellant

Decided: March 6, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Andrew J. Lastra, Assistant Prosecuting Attorney, for appellee.

Neil Stewart McElroy, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This case is before the court on appeal from the June 29, 2007 judgment of the Lucas County Court of Common Pleas wherein, defendant-appellant, Clever W. Watkins, was found guilty by the trial court of the offense of robbery in violation of R.C. 2911.02(A)(2). Appellant raises the following assignment of error:

{¶ 2} "Assignment of Error no. 1: The indictment failed to charge Mr. Watkins with an offense.

{¶ 3} "A. The appellant was charged with robbery by indictment. The indictment omitted an essential element – i.e. the *mens rea* required to constitute an offense. If one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment, such defective indictment is insufficient to charge an offense. As such Mr. Watkins was not charged with an offense. Should the conviction, therefore, be overturned?"

{¶ 4} Appellant's case involves consideration of the same indictment we considered in *State v. Buford*, 6th Dist. No. L-07-1275, 2008-Ohio-5505, as appellant and Buford were indicted together under the same indictment and for the same offense. The indictment reads:

{¶ 5} "The jurors of the Grand Jury of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that Clever Watkins and Donald Buford, on or about the 16th day of April, 2007, in Lucas County, Ohio, in attempting or committing a theft offense, or in fleeing immediately after the attempt or the offense as defined in §2913.02 of the Revised Code, did inflict, attempt to inflict, or threaten to inflict physical harm on another, in violation of §2911.02(A)(2) of the Ohio Revised Code, Robbery, being a felony of the second degree * * *."

{¶ 6} Buford and appellant were also tried together on the charge set forth in the indictment.

{¶ 7} Appellant argues that the indictment is structurally defective under the decisions of the Ohio Supreme Court in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*") and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*") (on reconsideration). He argues that the indictment failed to specify a mens rea for the element of "inflict, attempt to inflict, or threaten to inflict physical harm" under an indictment for robbery, a violation of R.C. 2911.02(A)(2), that the prosecutor did not argue that appellant had knowingly or recklessly inflicted, attempted to inflict, or threatened to inflict physical harm and that the trial court did not include a jury instruction that the jury was required to find that appellant knowingly or recklessly did "inflict, attempt to inflict, or threaten to inflict physical harm" in order to find him guilty of robbery. Appellant argues that these facts, considered together under *Colon I* and *Colon II*, require a conclusion that the indictment was structurally defective, that the error permeated the trial, and the error violated his rights to due process of law. He requests that this court reverse the judgment against him.

{¶ 8} The state agrees that appellant's conviction violates the requirement of mens rea under *Colon I* in that the state of Ohio did not prove beyond a reasonable doubt that appellant had exhibited the required mens rea when he inflicted or attempted to inflict physical harm. The state has requested this court to find appellant's argument well-taken.

{¶ 9} Accordingly, for the reasons stated in *State v. Buford*, we find appellant's assignment of error is well-taken. The judgment of the Lucas County Court of Common Pleas is reversed, and this case is remanded to that court for further proceedings consistent with this decision and judgment. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

William J. Skow, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.