[Cite as *State v. Dzelajlija*, 2009-Ohio-1072.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91115

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES DZELAJLIJA

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-478630

BEFORE: Boyle, J., Cooney, A.J., and Gallagher, J.

RELEASED: March 12, 2009
JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, James Dzelajlija, appeals his convictions for robbery under R.C. 2911.02(A)(2) and (A)(3).[1] He raises the following two assignments of error:

{¶ 2} "[I.] The case must be dismissed as a result of a defective indictment.

{¶ 3} "[II.] The convictions of appellant were against the manifest weight of the evidence."

{¶ 4} Under the Ohio Supreme Court's recent holding in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), and its subsequent clarification in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"), we are constrained to find merit to the appeal. Specifically, we find that the state failed to charge the appellant with the requisite mens rea of recklessness for the charged offenses, thereby rendering the indictment defective, and that this error permeated throughout the trial. Accordingly, we vacate appellant's convictions.

Defective Indictment and Application of *Colon I* and *Colon II*

[1]We note that the trial court should have merged the sentences on the two robbery counts because they constituted allied offenses of similar import. See *State v. Ellis*, 10th Dist. No. 05AP-800, 2006-Ohio-4231. Here, the facts giving rise to the two robbery counts involved a single occurrence.

{¶ 5} Relying on the Ohio Supreme Court's decision in *Colon I*, appellant argues in his first assignment of error that the indictment is defective and that his conviction must be reversed. Appellant raises this argument for the first time on appeal.

{¶ 6} In *Colon I*, the Supreme Court vacated the defendant's robbery conviction under R.C. 2911.02(A)(2) because it found that the indictment failed to charge the necessary mens rea. Id. The Court explained that "R.C. 2911.02(A)(2) does not specify a particular degree of culpability for the act of 'inflict[ing], attempt[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." Id. at ¶14. Because "recklessness is the catchall culpable mental state for statutes that fail to mention any degree of culpability," the state was required to prove that the defendant "recklessly inflicted, attempted to inflict, or threatened to inflict physical harm." Id. at ¶13-14, quoting *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, ¶21. Since the indictment failed to charge "that the physical harm was recklessly inflicted," it omitted one of the essential elements of the crime of robbery and, thus, was defective. Id. at ¶15.

{¶ 7} In determining whether an indictment that fails to charge an essential element can be raised for the first time on appeal, the Supreme Court applied a structural-error analysis, rather than a plain-error analysis, and held

that the defendant may raise the issue for the first time on appeal. Id. at ¶19. It described "structural errors" as constitutional defects that "defy analysis by 'harmless error' standards" because they "affect *** the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself." (Citations omitted.) Id. at ¶20. It further reasoned, "[s]uch errors permeate [t]he entire conduct of the trial from beginning to end so that the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." Id., quoting *Arizona v. Fulminante* (1991), 499 U.S. 279, 309, 310, quoting *Rose v. Clark* (1986), 478 U.S. 570, 577-578. Having found the indictment defective, and having determined that the defect was a structural error, the Supreme Court reversed the defendant's conviction. *Colon I* at ¶44-45.

{¶ 8} As in *Colon I*, appellant was indicted for one count of robbery under R.C. 2911.02(A)(2) ("physical harm" robbery), which provides:

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

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

{¶ 11} He was also separately charged and convicted of robbery under R.C. 2911.02(A)(3) ("force" robbery), which provides:

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

{¶ 13} "(3) Use or threaten the immediate use of force against another."

{¶ 14} Although R.C. 2911.02(A)(3) was not at issue in *Colon I*, this statute, which bears close resemblance to the "physical harm" robbery statute, has been interpreted to require the culpable mental state of recklessness as well. *State v. Gray*, 5th Dist. No. 2007-CA-0064, 2009-Ohio-455, ¶23; *State v. Robertson*, 10th Dist. No. 08AP-15, 2008-Ohio-6909, ¶22; see, also, *State v. Easter*, 2d Dist. No. 22487, 2008-Ohio-6038. And these cases further hold that an indictment for the "force" robbery statute, namely, R.C. 2911.02(A)(3), which fails to include the recklessness mens rea, is defective. Id.

{¶ 15} The indictment in this case, which mirrored the statutory language for each robbery count, failed to charge the required mens rea of recklessness. Thus, under *Colon I*, the indictment is defective. Our analysis, however, does not end here.

{¶ 16} In *Colon II*, the Ohio Supreme Court emphasized that its application of a structural-error analysis arose solely because of those facts showing that the defective indictment caused multiple errors that permeated throughout the trial. Id. at ¶6-7. The Court held:

{¶ 17} "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, citing *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 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.

{¶ 18} In explaining its application of a structural-error analysis, as opposed to plain error, the Court noted the multiple errors that occurred in *Colon I* as follows: (1) the indictment failed to include the mens rea of the crime of robbery; (2) there was no evidence that the defendant had notice that recklessness was an element of the crime of robbery; (3) the state did not argue that the defendant's conduct was reckless; (4) the trial court did not instruct the jury on a mens rea of recklessness; and (5) in closing arguments, the state treated robbery as a strict-liability offense. Id. at ¶6.

{¶ 19} The state urges this court to apply a plain error analysis because it contends that the same errors that permeated in *Colon I* do not exist here. Specifically, the state argues that it effectively implied that the mens rea of

"knowingly" was necessary for convictions of both counts of robbery. It further contends that the jury was instructed on the mens rea of "knowingly" as the required mental state for robbery under R.C. 2911.02(A)(2) and that the prosecutor did not treat the robbery as a strict liability offense. Because "knowingly" is a heightened standard of review than "recklessness," the state counters that appellant was not prejudiced and no plain error occurred.

{¶ 20} If the record supported the state's assertions, we would agree that a structural-error analysis is inappropriate and that the proper review is plain error. But we find no support in the record for the state's assertions. Instead, we find the facts of this case substantially indistinguishable from those in *Colon I*.

{¶ 21} First, the indictment lacked the necessary mental element of recklessness for "physical harm" robbery under R.C. 2911.02(A)(2) and "force" robbery under R.C. 2911.02(A)(3).

{¶ 22} Second, the appellant had no notice that recklessness was an element of "physical harm" robbery or "force" robbery. Notably, the bill of particulars did not include the reckless element either.

{¶ 23} Third, the trial court failed to instruct the jury that it must find appellant was reckless in attempting to inflict, inflicting, or threatening to inflict physical harm. Likewise, the trial court failed to instruct the jury that it must

find appellant was reckless in using or threatening the immediate use of force. Nor did the trial court instruct the jury that it must find that appellant acted "knowingly" with respect to either robbery count. The trial court did define the word "knowingly" but its instruction regarding the mens rea of knowingly was limited to the underlying theft offense. Specifically, the trial court stated the following:

{¶ 24} "Underlying theft offense. Before you can find that the defendant was committing or attempting to commit a theft offense, you must find beyond a reasonable doubt that the defendant *knowingly* obtained or exerted control over property with the purpose to deprive the owner of said property." (Emphasis added.)

{¶ 25} Thus, contrary to the state's assertion, the record is devoid of any evidence that the trial court instructed the jury to find that the appellant acted "knowingly" in committing either robbery offense.

{¶ 26} Finally, during closing arguments, the prosecutor failed to make any reference to the requisite mens rea of recklessness or even the mens rea of knowingly as to the causing of physical harm or the use of force.

{¶ 27} Accordingly, having found that all five *Colon* prongs are met in this case, we must follow the Ohio Supreme Court's direction and conclude that the defective indictment so permeated appellant's trial, resulting in structural error

and requiring reversal. See *Gray*, supra, ¶31, citing *Colon I*, ¶44; see, also, *State v. Ginley*, 8th Dist. No. 90724, 2009-Ohio-30 and *State v. Gilbert*, 8th Dist. No. 90615, 2009-Ohio-463 (applying *Colon I*, as clarified in *Colon II*, and reversing defendants' convictions for aggravated robbery, a violation of R.C. 2911.01(A)(3), because of an accumulation of errors stemming from a defective indictment and resulting in structural error). Thus, we sustain appellant's first assignment of error.

{¶ 28} Given our disposition of the first assignment of error, the second assignment of error is moot.

{¶ 29} Judgment reversed and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee costs herein taxed.

{¶ 30} The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, J., CONCURS;
COLLEEN CONWAY COONEY, A.J., DISSENTS WITH SEPARATE

OPINION

COLLEEN CONWAY COONEY, A.J., DISSENTING:

{¶ 31} I respectfully dissent. I would find that this is not the rare case in which 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."

{¶ 32} As the majority notes, the Court in *Colon II* found that applying structural analysis to a defective indictment is rare, and in most defective indictment cases, we analyze the error pursuant to Crim.R. 52(B). However, the Court also urged that "the syllabus in *Colon I* is confined to the facts in that case." Id. at ¶8.

{¶ 33} Given the Court's statements in *Colon II,* I would find that the errors that permeated the entire trial in *Colon I* are not present here. Thus, I would apply a plain error analysis under Crim.R. 52(B).

{¶ 34} Plain error should be invoked only to prevent a clear miscarriage of justice. *State v. Underwood* (1983), 3 Ohio St.3d 12, 14, 444 N.E.2d 1332. Plain error is one in which, but for the error, the outcome of the trial would have been different. *State v. Long* (1978), 53 Ohio St.2d 91, 97, 372 N.E.2d 804. Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Thus, Dzelajlija must

demonstrate that the outcome of his trial would have been different were it not for the defect in his indictment.[2]

{¶ 35} In the instant case, Dzelajlija admitted to the police and to his girlfriend, Jennifer Martin, that he committed the robbery. Furthermore, the trial court instructed the jury on the heightened mental state of "knowingly" with regard to both robbery counts.[3] The trial court's application of knowingly did not affect Dzelajlija's substantial rights because "knowingly" is more difficult to prove than recklessly. Having convicted him based on the knowingly instruction, the jury would have also convicted him of acting recklessly, which is a lower mental state. See *State v. Patterson*, Washington App. No. 05CA16, 2006-Ohio-1902. See, also, *State v. Jones*, Mahoning App. No. 07-MA-200, 2008-Ohio-6971, where the court found that reversal of Jones' conviction was not required because the State and the court proceeded through the trial as if "knowingly" was the required mental state for robbery.

{¶ 36} Thus, I would find that Dzelajlija's substantial rights were not affected and the outcome of Dzelajlija's trial would not have changed.

{¶ 37} Accordingly, I would overrule the first assignment of error.

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[2]Notably, despite a prior appeal and two trials, Dzelajlija raises, for the first time, the defective indictment argument with regards to his conviction under R.C. 2911.02(A)(2).

[3]The Court in *Colon I* held that reckless is the required mental state in R.C. 2911.02(A)(2).

{¶ 38} Having overruled the first assignment of error, I would address Dzelajlija's second assignment of error, in which he argues that his robbery convictions were against the manifest weight of the evidence. Because Dzelajlija admitted to committing the robbery, I would find that the jury did not lose its way.

{¶ 39} Therefore, I would overrule the second assignment of error and affirm Dzelajlija's convictions.