

[Cite as *State v. Ryan*, 2009-Ohio-2494.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91508

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CAMERON RYAN

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-495594

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

RELEASED: May 28, 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).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Cameron Ryan, appeals his aggravated robbery conviction, rendered after a jury trial, in Case No. CR-495594, as set forth in his first assignment of error.¹ Ryan also challenges the indictment relative to Case No. CR-495594 in his third assignment of error. In his second assignment of error, Ryan also attempts to appeal his felonious assault and having a weapon while under a disability convictions, rendered after a no contest plea, in Case No. CR-506206. For the reasons that follow, we reverse and remand based on the third assignment of error, find the first assignment of error moot, and overrule the second assignment (relative to Case No. CR-506206).

{¶ 2} In April 2007, Ryan was charged with two counts of aggravated robbery in Case No. CR-495594. Count 1 charged aggravated robbery under R.C. 2911.01(A)(1), and Count 2 charged aggravated robbery under R.C. 2911.01(A)(3). Both counts contained one- and three-year firearm specifications and criminal gang activity specifications. At that time, Ryan was also under indictment in Case No. CR-494100. Further, while those two cases were pending, Ryan was charged in Case No. CR-506206.

¹The assignment reads: “The trial court abused its discretion when its evidentiary rulings improperly admitted gang-related testimony and exhibits that were prejudicial to the defendant, Cameron Ryan, and contrary to both the Rules of Evidence and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 16 of the Ohio Constitution.”

{¶ 3} As previously mentioned, Ryan was found guilty after a no contest plea to the charges in Case No. CR-506206. Case Nos. CR-495594 and CR-494100 were tried together before a jury.² The jury acquitted Ryan of the charges set forth in Case No. CR-494100. In this case, he was acquitted of Count 1 (aggravated robbery under R.C. 2911.01(A)(1)), but found guilty of Count 2 (aggravated robbery under R.C. 2911.01(A)(3)). He was acquitted of the specifications attendant to Count 2.

{¶ 4} The trial court sentenced Ryan to four years on this case, to be served concurrently with his sentence in Case No. CR-506206.

{¶ 5} Ryan did not file an appeal in Case No. CR-506206. That case was a separate proceeding from this case and, therefore, is not properly before this court. Accordingly, we overrule Ryan's second assignment of error, which challenges the plea in that case.

TRIAL TESTIMONY

{¶ 6} The victim, Curtis Conner, testified that on the evening of September 29, 2006, he drove from his house to the Mt. Carmel Deli in Cleveland. Upon arriving at the deli, he observed three or four young men walking up the street toward the deli. A frequent customer of the deli, Conner recognized the men as likewise frequent customers, although he did not know

²The trial also included the case against Ryan's codefendant in this case, Ronrico Williams, and another case against Ronrico Williams (Case No. CR-494899).

their names at the time. The men were standing by the front door of the deli as Conner went in.

{¶ 7} Conner testified that as he left the deli, the men were still outside by the door, and Ryan and Williams, who had camouflage handkerchiefs around their necks, pulled them up over their mouths. Upon seeing this, Conner knew that “something was about to go down,” and quickly walked to his vehicle. Conner testified that he got in his vehicle and was about to start it, when Ryan came up to him and told him to “give him everything that he had.” Conner told Ryan that he did not have anything, but Ryan demanded his wallet, grabbed him, and tried to pull him out of his vehicle. Meanwhile, Williams hit Conner’s face with a gun.

{¶ 8} Conner testified that he resisted the two men and was able to escape in his vehicle. He also testified that he feared for his life during the attack, and that afterward, he was swollen where Williams had hit him.

{¶ 9} After the attack, Conner drove home and told a friend what had happened. Conner and the friend then drove back to the deli and told the owner, who called the police. The deli owner gave Conner ice to put on his swollen face. The police arrived, and Conner made a report.

{¶ 10} Conner testified that he continued to go to the deli after the incident, although not as frequently as before, and would see Ryan and Williams, but they would flee when they saw his vehicle. On one occasion in February 2007, Conner

was in a friend's vehicle when he went to the deli. Williams was in front of the deli, and when he saw Conner, he went inside. Conner also went into the deli and saw Williams, who would not look at him; Conner testified that he felt like Williams was trying to avoid him. After he left the deli, Conner called the police to tell them that he had seen one of his assailants who could be observed on the deli's surveillance camera.

{¶ 11} Conner also testified that he later learned, after Williams had been arrested, that he used to work at an auto shop owned by Williams' grandparents. Conner denied that he was fired from the auto shop or that there was ongoing animosity between him and Williams' grandparents.

{¶ 12} Conner identified Ryan and Williams as his assailants from two separate photo arrays. He testified that he was "100 percent sure" he had identified the correct persons.

{¶ 13} In his third assignment of error, Ryan contends that the indictment against him was defective because it lacked the requisite mens rea element of recklessness.

{¶ 14} In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ("*Colon I*"), 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 the "recklessness" mens rea element associated with inflicting, attempting to inflict, or threatening to inflict physical harm in the course of a

theft offense. The Supreme Court stated that the omission of the reckless mental element from the indictment resulted in the State failing to charge an offense, and that failure constituted “structural error” which required reversal. *Id.* at syllabus.

{¶ 15} In this case, Ryan was found guilty of aggravated robbery under R.C. 2911.01(A)(3). In *State v. Ginley*, Cuyahoga App. No. 90724, 2009-Ohio-30, this court, following the Third Appellate District in *State v. Alvarez*, Defiance App. No. 4-08-02, 2008-Ohio-5189, held that the distinctions between R.C. 2911.01(A)(3) and the statute at issue in *Colon I* (R.C. 2911.02(A)(2)), are without a difference in terms of the mens rea requirement. *Ginley* at ¶33; *Alvarez* at ¶18.

{¶ 16} In *Ginley*, this court went on to consider the indictment in light of *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 (“*Colon II*”), stating:

{¶ 17} “On reconsideration of *Colon I*, the Ohio Supreme Court in *Colon II* emphasized that it rested its structural error analysis on those facts showing that the defective indictment spawned multiple trial errors. The Court found that (1) the indictment failed to meet constitutional requirements because it failed to include the mens rea of the crime of robbery; (2) there was no evidence that the defendant had notice that the State was required to prove that defendant had been reckless in order to convict him of the crime of robbery; (3)

the State did not argue that defendant's conduct in inflicting physical harm on the victim constituted reckless conduct; (4) the trial court failed to include the required mens rea in its instructions to the jury regarding the crime of robbery; (5) there was no evidence that the jury considered whether defendant had been reckless in inflicting, attempting to inflict, or threatening to inflict physical harm, as required under R.C. 2911.02(A)(2); and (6) during closing arguments, the prosecuting attorney treated robbery as a strict-liability offense. These were the considerations the *Colon I* court considered in concluding:

{¶ 18} 'In summary, the defective indictment in this case failed to charge all the essential elements of the offense of robbery and resulted in a lack of notice to the defendant of the mens rea required to commit the offense. This defect clearly permeated the defendant's entire criminal proceeding. The defendant did not receive a constitutional indictment or trial, and therefore the defective indictment in this case resulted in structural error.'" (Internal citations omitted.) *Ginley* at ¶34, quoting *Colon I* at ¶32.

{¶ 19} In this case, the defective indictment also affected the entire trial. In particular, Ryan was not provided with notice in either the indictment or bill of particulars that the State had to prove the injuries were recklessly inflicted; the trial court did not instruct the jury on recklessness; the State did not attempt to prove recklessness; and the State did not make reference to recklessness during either opening statement or closing argument.

{¶ 20} In light of the above, the third assignment of error is sustained; the first assignment of error is moot (see App.R. 12(A)(1)(c)); and the second assignment of error is overruled.

Reversed and remanded.

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

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.

CHRISTINE T. McMONAGLE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
SEAN C. GALLAGHER, J., CONCUR