

[Cite as *State v. Singfield*, 2009-Ohio-5945.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24576

Appellee

v.

PHILLIP A. SINGFIELD

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 2008-09-3117

Appellant

DECISION AND JOURNAL ENTRY

Dated: November 10, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Phillip Singfield, appeals from his convictions and sentence in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} At approximately 1:30 a.m. on July 26, 2008, Staci Smith and her cousin, Natea Proctor, drove to a bar on Newton Street. Smith parked her vehicle in the bar's lot, and she and Proctor remained in the vehicle to eat some food that they had just purchased. While they were eating, a man approached the vehicle and asked the women for a light. Subsequently, the man produced a handgun and threatened to shoot the women while he demanded their purses. Smith and Proctor handed over their purses, and the man walked away, entered a nearby car, and drove off. Smith and Proctor went to the bar and called 911 to report the incident. Both Smith and Proctor provided the police with descriptions of their assailant.

{¶3} Smith later saw the man whom she believed had robbed her while riding the bus and again while walking down a street near her home. On the second occasion, Smith telephoned Proctor. Proctor, who was at Smith's house, was able to look outside and see the man. Proctor also identified him as the person who had robbed her. Smith began to follow the man and called 911. Upon their arrival, the police arrested Singfield, the man whom both Smith and Proctor had identified as their assailant.

{¶4} On October 3, 2008, a grand jury indicted Singfield on the following counts: (1) two counts of aggravated robbery, in violation of R.C. 2911.01(A)(1), both with firearm specifications, in violation of R.C. 2941.145; (2) two counts of robbery, in violation of R.C. 2911.01(A)(1)/(2), both with firearm specifications, in violation of R.C. 2941.145; (3) having a weapon while under disability, in violation of R.C. 2923.13(A)(2)/(3); (4) theft, in violation of R.C. 2913.02(A)(1)/(4); and (5) petty theft, in violation of R.C. 2913.02(A)(1)/(4). The matter proceeded to a jury trial and, on December 15, 2008, the jury found Singfield guilty on all counts and the specifications linked to those counts. On December 16, 2008, the trial court orally sentenced Singfield, including a prison term for each specification, to a total sentence of fourteen years.

{¶5} On December 22, 2008, Singfield filed a motion to modify his sentence, arguing that his firearms specifications were allied offenses for which the trial court should not have imposed separate sentences upon him. The trial court held a hearing on the motion and issued another oral sentence. The trial court: (1) merged Singfield's sentences for his two counts of robbery with firearm specifications with his counts for theft and petty theft; (2) increased his two aggravated robbery sentences by one year each and ordered them to run consecutively for a total period of ten years; (3) issued three year sentences on each of the two firearm specifications

attached to Singfield's two aggravated robbery convictions, ordering them to run concurrently with one another but consecutively with the sentence for aggravated robbery; and (4) ordered a one year consecutive sentence for having a weapon while under disability. Accordingly, Singfield still received a total sentence of fourteen years. The court journalized Singfield's sentence on December 29, 2008.

{¶6} Singfield appealed, and this Court affirmed the judgment of the trial court in part and reversed it in part. *State v. Singfield*, 9th Dist. No. 24576, 2009-Ohio-4172. In reversing in part, this Court reversed Singfield's convictions for aggravated robbery and their attendant specifications because his indictment did not include the mens rea of recklessness with regard to aggravated robbery's deadly weapon element. *Id.* at ¶17-18. On August 27, 2009, the State filed an application for reconsideration. On October 7, 2009 we granted the State's application, vacated our decision, and reinstated Singfield's appeal. Singfield's reinstated appeal is now before this Court, raising three assignments of error for our review.

II

Assignment of Error Number One

“APPELLANT SINGFIELD’S INDICTMENT WAS DEFECTIVE UNDER THE OHIO CONSTITUTION, ARTICLE I, SECTION 10 AS THE STATE FAILED TO INCLUDE A MENTAL CULPABILITY ELEMENT FOR AGGRAVATED ROBBERY IN THE INDICTMENT OR AT TRIAL.”

{¶7} In his first assignment of error, Singfield argues that his two convictions for aggravated robbery should be reversed because neither he, nor the jury, was made aware of the mens rea element applicable to that offense. Specifically, he argues that the omission amounts to structural error. We disagree.

{¶8} “When an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in

the indictment.” *State v. Colon* (“*Colon I*”), 118 Ohio St.3d 26, 2008-Ohio-1624, syllabus. That is, a defendant may raise a defective indictment claim for the first time on appeal. *Id.* Appellate courts generally apply a plain error analysis when considering a defective indictment argument on appeal. *State v. Colon* (“*Colon II*”), 119 Ohio St.3d 204, 2008-Ohio-3749, at ¶7-8. If, however, a defective indictment “result[s] in multiple errors that are inextricably linked to the flawed indictment,” a structural error analysis is appropriate. *Id.* at ¶7. “[S]tructural errors permeate 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.” *Colon I* at ¶23. In *Colon I*, the Supreme Court concluded that structural error existed where Colon’s indictment and the court’s jury instructions omitted the mens rea of recklessness for the crime of robbery and the State treated robbery as a strict liability offense in closing argument. *Id.* at ¶29-31.

{¶9} A person cannot be guilty of an offense unless they possess “the requisite degree of culpability for each element” of that offense. R.C. 2901.21(A)(2). “When the section [defining an offense] neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.” R.C. 2901.21(B). Accordingly, “recklessness is the catchall culpable mental state for criminal statutes that fail to mention any degree of culpability[.]” *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, at ¶21.

{¶10} R.C. 2911.01(A)(1) provides, in relevant part, that:

“No person, in attempting or committing a theft offense, *** shall *** [h]ave 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[.]”

Singfield’s indictment essentially tracked R.C. 2911.01(A)(1)’s language such that no mens rea was included as to the deadly weapon element. Singfield argues that the mens rea of

recklessness applies to the deadly weapon element and, because his indictment did not include any mens rea with regard to that element, his aggravated robbery convictions must be vacated. In *State v. Lester*, Slip Opinion No. 2009-Ohio-4225, at ¶1, the Ohio Supreme Court held that R.C. 2911.01(A)(1) imposes strict liability with regard to its deadly weapon element such that no mens rea is required. Because the catchall culpable mental state of recklessness does not apply to R.C. 2911.01(A)(1), Singfield’s indictment was not defective. Singfield’s first assignment of error is overruled.

Assignment of Error Number Two

“APPELLANT SINGFIELD’S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF SECTION 3(B)(3), ARTICLE IV OF THE OHIO CONSTITUTION, THUS CREATING A MANIFEST MISCARRIAGE OF JUSTICE BECAUSE THE GREATER WEIGHT OF THE EVIDENCE DEMONSTRATED THAT APPELLANT SINGFIELD DID NOT COMMIT THE OFFENSES.”

{¶11} In his second assignment of error, Singfield argues that his convictions for aggravated robbery and having a weapon while under disability are against the manifest weight of the evidence. We disagree.

{¶12} When considering a manifest weight argument, the Court:

“[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.* Therefore, this Court’s “discretionary

power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶13} Once again, R.C. 2911.01(A)(1) provides, in relevant part, as follows:

“No person, in attempting or committing a theft offense, *** shall *** [h]ave 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[.]”

R.C. 2923.13(A)(2) provides that “[u]nless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if *** [t]he person *** has been convicted of any felony offense of violence[.]” “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).

{¶14} At trial, Singfield stipulated that he was previously convicted of attempted robbery, a felony offense of violence for purposes of R.C. 2923.13(A)(2). He does not take issue with his stipulation on appeal and does not challenge any specific elements of the crimes of aggravated robbery or having a weapon while under disability. Instead, he argues that his convictions are against the manifest weight of the evidence because the State’s witnesses gave inconsistent testimony and his alibi evidence demonstrated that he could not have been the individual who attacked Smith and Proctor.

{¶15} Smith testified that she and Proctor arrived at the parking lot of a bar on Newton Street at approximately 1:00 a.m. and remained in the vehicle to eat the food that they had just purchased. She further testified that at about 1:30 a.m. a man approached the passenger’s side of

the vehicle and asked for a light. According to Smith, she exited the driver's seat, walked around the vehicle, and offered the man a light. The man produced a firearm and demanded Smith's and Proctor's purses, threatening to shoot them if they failed to comply. Once the man left, Smith and Proctor were able to go into the bar and call the police. Smith described the gun that was used to threaten her in great detail. According to Smith, the parking lot was well lit on one side, but more dimly lit where she had parked the vehicle. Smith described her assailant as being around 5'8" or 5'9", black, and overweight with "fat roll[s] in his head." Smith also indicated that her assailant had a raspy voice.

{¶16} Smith testified that weeks after the foregoing incident she saw her assailant on two separate occasions. First, Smith saw her assailant while riding the bus. Smith recognized him by sight and by sound because she heard him speak to a nearby bus passenger in his raspy voice. Smith testified that she immediately became "nervous, shaking, [and] sweating" when she saw the man. Smith reported the sighting to the police after she exited the bus. Second, Smith saw her assailant walking down a street near her house. Smith testified that the man greeted her when he walked by such that she heard his raspy voice again. Thereafter, Smith followed the man while calling the police on her cell phone. Police arrested the man, later identified as Singfield, shortly thereafter.

{¶17} Proctor also testified that she and Smith were eating food in a parked vehicle sometime after 1:00 a.m. when a man approached the passenger's side of the vehicle and asked for a light. According to Proctor, she exited the vehicle to give the man a light and he pointed a gun at her. Proctor testified that Smith had exited the driver's side of the vehicle and was in the process of walking around to the passenger's side when the man pointed his gun. The man then demanded their purses, took the purses, and left. Proctor testified that she was in a state of shock

during the incident and was focused on her assailant's gun. According to Proctor, she did not think that the parking lot had any lighting. Proctor reported to police that she believed her assailant was black and heavy set. Proctor testified that Smith called her and told her to look outside on the day that Smith saw their assailant walking down the street. Proctor stated that when she saw the man, "I just had this feeling. *** I just started sweating and I watched him, and I seen him when he walked past *** and I was, like, oh, my God, that's him."

{¶18} Detective James Phister testified that he interviewed Smith and Proctor shortly after they were attacked on July 26, 2008. Detective Phister testified that Smith described her assailant as being a black male, 27 to 33 years of age, 5'8" to 5'9" tall, and 250 to 275 pounds with a very raspy voice. He specified that Smith said that the suspect "was so fat that he actually had rolls in his head." As to Proctor, Detective Phister testified that her description of the suspect was "very close" to Smith's description. Specifically, Proctor described the suspect as being a black male, 27 to 33 years of age, 5'7" to 5'9" tall, and 200 to 235 pounds with a raspy voice. Detective Phister testified that Singfield was "slightly taller" than Smith and Proctor described, but otherwise matched their description.

{¶19} Singfield argues that his convictions are against the manifest weight of the evidence because Smith and Proctor varied in their exact description of the events and the physical description of their assailant. Singfield notes that Smith and Proctor each claimed to have been the one to get out of their vehicle to offer their assailant a light on the night of the incident and disagreed as to the lighting conditions of the parking lot where the crime occurred. The record reflects that both witnesses were focused on the gun that their assailant used during his attack. Considering the stressfulness of the situation, it would not be surprising for the victims to be confused about certain details of their attack. Moreover, Detective Phister testified

that it is common for people to vary somewhat in their physical descriptions of others and that, because the parking lot in which Smith and Proctor were attacked was built at an angle, a suspect could appear taller or shorter depending on where he was standing in relation to a victim. The jury was aware of the differences in Smith's and Proctor's testimony, but found them to be reliable witnesses. We cannot say, based on these minor differences, that the jury lost its way in convicting Singfield. *Otten*, 33 Ohio App.3d at 340.

{¶20} As to Singfield's alibi evidence, Singfield's mother, Stephanie Singfield, and his friends, LaShawn Pryor and Byron Jackson, testified that Singfield attended a party at his mother's house on the night of July 25, 2008 through the early morning hours of July 26, 2008 when the attack on Smith and Proctor occurred. Each witness admitted, however, that Singfield was not in their sight the entire time they were at the party, and Pryor testified that she was "pretty lit up" that night. Further, Stephanie Singfield admitted that her home was only 1.78 miles away from the bar and parking lot where Smith and Proctor were attacked. Based on the foregoing, we cannot conclude that the jury erred in rejecting Singfield's alibi evidence and concluding that he was the individual who assailed Smith and Proctor with a handgun. Singfield's argument that his convictions for aggravated robbery and having a weapon under disability are against the manifest weight of the evidence lacks merit.

Assignment of Error Number Three

"THE TRIAL COURT ERRED WHEN IT RESENTENCED APPELLANT SINGFIELD TO A GREATER PERIOD OF INCARCERATION THAN ORIGINALLY IMPOSED WITHOUT ARTICULATING REASONS FOR THE INCREASED PENALTY AS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT (sic) AND IN VIOLATION OF OHIO LAW."

{¶21} In his third assignment of error, Singfield argues that the trial court committed plain error when it imposed longer sentence terms upon him for each of his aggravated robbery

counts in response to his motion to modify his sentence. Specifically, Singfield argues that the court lacked authority to vacate his first sentence and impose a higher sentence with regard to his aggravated robbery convictions. We disagree.

{¶22} In *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, the Ohio Supreme Court held that:

“A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court.” *Baker* at syllabus.

Because “a court speaks only through its journal entries[,] *** ‘where there has been no journalization of the sentence, a sentence announced in open court may be amended without formal journal entry.’” *State v. Overstreet*, 9th Dist. No. 21367, 2003-Ohio-4530, at ¶8, quoting *State v. Ismail* (Aug. 21, 1991), 9th Dist. No. 15007, at *1. “Courts may increase sentences when the sentence does not constitute a final order.” *Overstreet* at ¶8, quoting *State v. Teets* (Sept. 20, 2000), 9th Dist. No. 3022-M, at *1.

{¶23} Singfield argues that the sentence the trial court imposed upon him on December 16, 2008 was final such that the trial court had no authority to resentence him to increased terms on his aggravated robbery convictions. The record reflects, however, that the trial court did not journalize Singfield’s sentence until after it “resentenced” him. On December 16, 2008, the trial court orally imposed a fourteen year sentence on Singfield, consisting of three years for each of his two gun specifications and four years for each of his two aggravated robbery convictions. The trial court did not journalize its sentence. On December 19, 2008, the trial court held another sentencing hearing and agreed to “resentence” Singfield in response to his argument that his gun specifications were allied offenses. The trial court orally imposed a fourteen year sentence, this time consisting of three years for his gun specifications, five years for each of his

two aggravated robbery convictions, and one year on his conviction for having a weapon while under disability. At the time the trial court “resentenced” Singfield, it had yet to journalize any sentencing entry. Accordingly, the court had authority on December 19, 2008 to hold a hearing, alter Singfield’s sentence, and increase certain aspects of it. *Overstreet* at ¶8.

{¶24} On December 29, 2008, the trial court journalized two separate sentencing entries. One sentencing entry embodied the court’s December 16, 2008 sentence and the other embodied the court’s December 19, 2008 sentence. Singfield argues that the court’s December 16, 2008 entry was time stamped at 12:23 p.m. and the court’s December 19, 2008 entry was time stamped at 12:25 p.m. Accordingly, he argues that his original sentence became final two minutes before his “resentencing” such that the trial court could not increase his sentence without first establishing the absence of a retaliatory motive for doing so. Upon this Court’s review of the docket, it appears that Singfield’s two sentencing entries were time stamped at the exact same time. The record only contains photocopies of the sentencing entries. Singfield has not provided this Court with his original sentencing entries or otherwise explained why the originals are not available. On both photocopies, the last digit of the time stamp is partially illegible. It appears, however, that both time stamps read “2008 DEC 29 PM 12:25.” Without more than the photocopies, we find no merit in Singfield’s assertion that the entries were time stamped two minutes apart. See *State v. Dunn*, 9th Dist. No. 03CA0037, 2004-Ohio-2249, at ¶55 (“As in any appeal, Defendant bears the burden of ensuring that the record on appeal is complete.”).

{¶25} It is unclear why the trial court journalized the sentencing entry pertaining to Singfield’s December 16, 2008 oral sentence when the trial court had already conducted another hearing, altered Singfield’s sentence, and prepared another sentencing entry. At the very least, however, the journal entry pertaining to Singfield’s October 16, 2008 oral sentence was not

journalized before the trial court orally altered his sentence or before the court journalized that altered sentence. Accordingly, the trial court had full authority to alter Singfield's sentence and to increase the specific terms contained therein. *Overstreet* at ¶8. Singfield's third assignment of error lacks merit.

III

{¶26} Singfield's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.
CONCURS, SAYING:

{¶27} I concur in the majority's judgment, but I would analyze the first assignment of error solely under *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732.

APPEARANCES:

J. DEAN CARRO, Appellate Review Office, School of Law, The University of Akron, for Appellant.

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