

[Cite as *State v. White*, 2009-Ohio-2965.]

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-02-046
- vs -	:	<u>OPINION</u> 6/22/2009
MAURICE KELLY WHITE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CR2008-01-0034

Robin N. Piper, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011-6057, for plaintiff-appellee

Fred Miller, 246 High Street, Hamilton, OH 45011, for defendant-appellant

**POWELL, P.J.**

{¶1} Defendant-appellant, Maurice Kelly White, appeals his conviction in the Butler County Court of Common Pleas on the basis that his indictment was defective, his trial counsel ineffective, and his trial the subject of a prejudicial joinder.

{¶2} Appellant was indicted for petty theft, kidnapping and two counts of robbery in connection with a series of incidents that began with an alleged shoplifting at

a Meijer's store in West Chester and involved allegations that appellant threatened harm to Meijer personnel, threatened harm to a high school student to compel the student to drive him away from the scene, and stole money from the student and services from a cab driver.

{¶13} Appellant's charges and those of Thomas Whitaker were contained in the same indictment. Both men were tried together before a jury, which returned guilty verdicts for each.<sup>1</sup> After sentencing, appellant instituted this appeal, setting forth three assignments of error for our review.

{¶14} Assignment of Error No. 1:

{¶15} "THE STATE PROCURED STRUCTURAL ERROR IN SEEKING AN INDICTMENT THAT DID NOT CONTAIN ALL THE ESSENTIAL ELEMENTS OF ROBBERY AND KIDNAPPING."

{¶16} Appellant did not object to his indictment at the trial level. He argues on appeal that his indictment was defective because the kidnapping and two robbery offenses did not contain a mens rea element, and pursuant to the structural error analysis of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), and reconsidered in 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*), his conviction on the three offenses should be vacated. *Colon II*, at ¶18 (structural error analysis is appropriate only in rare cases such as *Colon I* where multiple errors at trial follow a defective indictment; appropriate where error in indictment led to errors that "permeated 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" [internal citations omitted]).

---

1. Whitaker was charged with and found guilty of theft from the cab driver and one count of robbery in connection with the incident at Meijer.

{¶7} We find in reference to the kidnapping charge that appellant's indictment was not defective. See *State v. Carver*, Montgomery App. No. 21328, 2008-Ohio-4631, ¶11 (mens rea for kidnapping is any of the purposes specifically set forth in the kidnapping statute and indictment properly set forth purpose mens rea); see *State v. Hardges*, Summit App. No. 24175, 2008-Ohio-5567, ¶12; *State v. Davis*, Franklin App. No. 08AP-443, 2009-Ohio-1375, ¶36; *State v. Hodges*, Cuyahoga App. No. 91078, 2009-Ohio-1071, ¶7-16; *State v. Rice*, Hamilton App. No. C-080444, 2009-Ohio-1080, ¶20.

{¶8} The indictment in the case at bar for the kidnapping offense included the language, "for the purpose to facilitate the commission of any felony or flight thereafter." Without a defective indictment for kidnapping, we need not continue with any *Colon* analysis in connection with that offense. See, also, R.C. 2905.01(A)(2).

{¶9} Upon review, we find that the indictment in reference to appellant's two robbery offenses does not contain a mens rea element and is arguably defective. See, generally, *Colon I*, 2008-Ohio-1624; see R.C. 2911.02(A)(2). However, after reviewing the record within the parameters of the two *Colon* cases, we find that a structural error analysis is not appropriate. See *Colon II*, 2008-Ohio-3749 at ¶6 (*Colon I* court found structural error under the facts of the case after considering that: indictment failed to list all the elements of the crime charged; the defendant had no notice that state was required to prove he acted recklessly; the state did not argue at trial that defendant acted recklessly, nor had jury been instructed that it had to find defendant acted recklessly; and the prosecutor treated robbery as a strict liability offense in closing argument).

{¶10} In the instant case, the term "reckless" was not used at trial. However, the evidence presented and the arguments made by the state indicate that the robbery offenses were not treated as strict liability offenses; rather, both the evidence and argument focused on appellant's conduct to demonstrate that appellant's mental state was at the least reckless, and likely, greater than reckless.

{¶11} Specifically, the record indicates the state presented evidence on the first robbery offense that, when confronted by security outside of the Meijer store, appellant dropped the stolen clothing and placed his hand on the front of his pants and told the Meijer security officer that the officer "didn't want any of this," before appellant ran from the scene. In response to questions from the prosecutor, the security officer testified that he believed it was a threatening situation involving a gun, and he needed to keep others safely away from the situation.<sup>2</sup>

{¶12} The second robbery offense occurred after it was alleged that appellant kidnapped a high school student after approaching him at a gas station and threatening him when the student hesitated in assisting him in his flight. According to the student, appellant said "something bad was going to happen," if the student did not drive him away from the scene. The student testified that he interpreted the statements as a threat. After they drove away from the scene in West Chester, the student testified that he hoped the incident would end, but appellant allegedly made similar statements to the student to compel the student to take him to a neighborhood in Cincinnati. It was alleged that appellant also stole \$45 the student placed on the vehicle console.

{¶13} As we previously noted, the record does not indicate that the state treated

---

2. A second Meijer employee also testified that appellant, when confronted, reached into his pants "like he was going to pull something out," and said, [Y]ou don't don't want to go there."

the robbery offenses as strict liability offenses. The state called the jury's attention in its argument to appellant's statements, his "body tone" and the "manner" in which the statements were delivered. See R.C. 2911.02(A)(2) (inflict, attempt to inflict, or threaten to inflict physical harm). The prosecutor told the jury "all of the indications show" that appellant was making a threat when he gestured and said, "you don't want any of this." The prosecutor noted that appellant was successful in his threats to get the Meijer security officer to back away and to force the student to assist him.

{¶14} We also note that the trial court provided the jury with the definitions of "knowingly" and "purposely" in defining theft under the robbery offense, as well as defining "purposely" for an attempt to commit theft. The trial court gave those instructions for the charges against Whitaker and referred the jury to the same definitions under the applicable jury instructions for appellant's offenses.

{¶15} We do not find that the error in the indictment resulted in multiple errors that were inextricable linked to the flawed indictment so that a structural analysis would be appropriate. See *Colon II*, 2008-Ohio-3749 at ¶7; *State v. Taylor*, Montgomery App. No. 22564, 2009-Ohio-806, ¶19 (although several errors discussed in *Colon I* are present herein, the prosecutor did not discuss robbery as a strict liability offense and therefore, "the restrictive language of *Colon II* leads us to conclude that the facts are not sufficiently similar to justify a structural error analysis in this case"); see *State v. Ripperger*, Butler App. No. CA2007-11-304, 2009-Ohio-925, ¶20-22 (state presented evidence that defendant acted, at the very least, recklessly by using or threatening the use of force when he kept one hand in his pocket, representing that he had a gun as a way to threaten; jury had to consider defendant's mental state for robbery in order to

determine whether he chose his words and gestures as a way to convey a threat, and thus it was not treated as strict liability offense); see, also, R.C. 2901.22 (when recklessness suffices to establish an element of offence, then knowledge or purpose is also sufficient culpability for such element).

{¶16} Accordingly, the defective indictment for the robbery offenses will be reviewed for plain error. *Colon II*, at ¶7 (in most defective indictment cases in which the indictment fails to include an essential element of the charge, court expects that a plain-error analysis, pursuant to Crim.R. 52[B], will be the proper analysis to apply).

{¶17} Plain error does not exist unless "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 97. The plain-error rule is applied under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Davis*, 121 Ohio St.3d 239, 242, 2008-Ohio-4537, ¶11.

{¶18} After reviewing the record, we cannot say that, but for the error in omitting the mens rea for robbery in the indictment, the outcome of appellant's trial would have been different. Appellant's first assignment of error is overruled.

{¶19} Assignment of Error No. 2:

{¶20} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT REFUSED TO GRANT SEPARATE TRIALS FOR APPELLANT AND THE CO-DEFENDANT."

{¶21} As previously noted, the charges against appellant and Whitaker were contained in the same indictment. The law favors joinder of defendants and avoidance of multiple trials as joinder increases judicial efficiency, alleviates inconvenience to

witnesses, and reduces the possibility of incongruous results in successive trials before different juries. *State v. Thomas* (1980), 61 Ohio St.2d 223, 225.

{¶22} R.C. 2945.13 states that when two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly unless the court, for good cause shown upon application, orders one or more of said defendants to be tried separately. See, also, Crim.R. 8(B) (joinder of defendants with allegations of participating in same transaction or series of acts or in same course of criminal conduct). Crim.R. 14 provides, in pertinent part, that if it appears that a defendant is prejudiced by a joinder of defendants in an indictment, the court shall grant a severance of defendants, or provide such other relief as justice requires.

{¶23} When defendants are jointly indicted for a felony that is not a capital offense, the burden rests upon the applicant seeking a separate trial to show good cause why a separate trial should be granted. *State v. Perod* (1968), 15 Ohio App.2d 115, 118-119. The decision to grant or refuse a co-defendant's request for separate trials rests within the discretion of the trial court and will be reviewed for an abuse of discretion. *Id.* at 120; *State v. Schiebel* (1990), 55 Ohio St.3d 71, 88-89.

{¶24} Appellant filed his motion to sever prior to trial, arguing to the trial court that Whitaker's statements which he obtained in discovery were "incriminating" to appellant and would be highly prejudicial if admitted. Appellant's renewal of his motion for separate trials was overruled at trial.

{¶25} The record indicates that the state did not introduce Whitaker's statements, so the statements were not at issue. Eventually both appellant and Whitaker testified at trial and were subject to cross-examination. During his testimony,

Whitaker said he accompanied appellant to Meijers because he was addicted to and wanted drugs. Whitaker subsequently testified that he did not actively participate in the thefts, but if he did, he did so under threats of harm from appellant. Conversely, appellant admitted to attempting to commit a theft, and did not claim that it was Whitaker instead of appellant who committed the theft.

**{¶26}** The fact that one defendant tries to shift blame to another defendant does not mandate separate trials; a co-defendant frequently attempts to "point the finger," to shift the blame, or to save himself at the expense of the other. *State v. Walters*, Franklin App. No. 06AP-693, 2007-Ohio-5554, ¶39, citing *United States v. Flores* (C.A.8, 2004), 362 F.3d 1030, 1039-1040, and at 1041 (a defendant does not have a right against having his co-defendant elicit testimony that may be damaging to him) (internal citations omitted).

**{¶27}** We find that the trial court did not abuse its discretion in denying appellant's attempt to sever the trials. See *Walters* at ¶44 (defendant failed to demonstrate jury was prevented from making a reliable judgment about his guilt or innocence; trial court properly instructed the jury it was to consider separately the question of guilt, or lack of guilt, of each defendant). Appellant's second assignment of error is overruled.

**{¶28}** Assignment of Error No. 3:

**{¶29}** "APPELLANT RECEIVED THE INEFFECTIVE ASSISTANCE OF COUNSEL."

**{¶30}** Appellant argues that his trial counsel was ineffective for failing to object to hearsay testimony. Appellant further argues that structural error occurred when trial

counsel abandoned her role as counsel by failing to question appellant on the witness stand and permitting him to testify by narrative after he ignored her advice not to testify.

{¶31} To establish ineffective assistance, appellant must show that counsel's actions fell below an objective standard of reasonableness and he was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 104 S.Ct. 2052. Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.* at 694. In order to establish ineffective assistance, appellant must establish that trial counsel's performance was deficient; and that the deficient performance prejudiced the defense to the point of depriving appellant of a fair trial. *State v. Carmen*, Clinton App. No CA2007-06-030, 2008-Ohio-5842, ¶28, citing *Strickland* at 686-687.

{¶32} A reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *State v. Bradley* (1989), 42 Ohio St.3d 136, 143, quoting *Strickland* at 697.

{¶33} We reject appellant's argument that any part of this assignment of error should be reviewed under a structural error analysis akin to the "complete denial of counsel" example raised in *Colon I*. See *Colon I*, 2008-Ohio-1624 at ¶48.

{¶34} After reviewing the record and without commenting on whether all of the circumstances argued by appellant constitute hearsay, we do not find that trial counsel's failure to object to the alleged hearsay created a reasonable probability that, but for counsel's errors, the result of the trial would have been different and, appellant was denied a fair trial. *State v. McBride*, Stark App. No. 2008-CA-00076, 2008-Ohio-5888;

*State v. Romano*, Mahoning App. No. 04-MA-148, 2005-Ohio-5480.

{¶35} We further find that the results of the trial were not unreliable nor were the proceedings fundamentally unfair because of the performance of trial counsel in reference to appellant's narrative testimony. *State v. Davidson*, Portage App. No. 2005-P-0038, 2006-Ohio-1458, ¶36 (discern no prejudice from appellant being allowed to present narrative testimony); *Romano* at ¶49 ("While allowing appellant to give a narrative may not have been the most effective way of presenting his testimony, it again does not appear that absent the narrative, there is a reasonable possibility that the outcome of the case would have been different[;] [a]ppellant would have presented his recollection of the events one way or another, and the jury still had to make a determination as to who they believed"); cf. *Nix v. Whiteside* (1986), 475 U.S. 157, 106 S.Ct. 988 (ineffective assistance).

{¶36} Appellant's third assignment of error is overruled.

{¶37} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.