

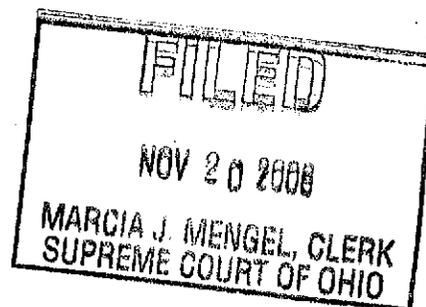
IN THE SUPREME COURT OF OHIO

STATE OF OHIO : Case No. **06-2139**
Plaintiff-Appellee : On Appeal from the Cuyahoga
County Court of Appeals, Eighth
-vs- : District
VINCENT COLON : Court of Appeals Case No. 87499
Defendant-Appellant :

NOTICE OF CERTIFIED CONFLICT
FILED ON BEHALF OF APPELLANT VINCENT COLON

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender
BY: CULLEN SWEENEY, ESQ. (0077187) (COUNSEL OF RECORD)
Assistant Public Defender
1200 West Third Street
100 Lakeside Place
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(216) 443-3632 FAX
COUNSEL FOR APPELLANT VINCENT COLON

WILLIAM MASON, ESQ.
Cuyahoga County Prosecutor
BY: JENNIFER DRISCOLL, ESQ. (0073472)
WILLIAM LELAND, ESQ. (0076317)
Assistant Prosecuting Attorneys
Justice Center, 9th Floor
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(216) 443-7800
COUNSEL FOR APPELLEE STATE OF OHIO



Notice of Certified Conflict

Appellant Vincent Colon hereby gives notice of certified conflict to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 87499 (2006-Ohio-5335) on October 12, 2006. The Eighth District Court of Appeals has certified the following question to the Ohio Supreme Court:

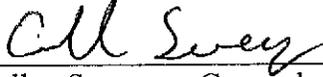
Where an indictment fails to charge the mens rea element of the crime, and the defendant fails to raise that issue in the trial court, has the defendant waived the defect in the indictment?

In so certifying the conflict, the Eighth District Court of Appeals has determined that its decision in this matter is in conflict with the following decisions of the First and Third Appellate Districts: *State v. Shugars* (2006), 165 Ohio App. 3d 379 (First District) and *State v. Daniels*, Putnam App. No. 12-03-12, 2004-Ohio-2063 (Third District).

Pursuant to S.Ct.R.IV, Section 1, copies of the Eighth District Court of Appeals' order certifying the conflict and copies of all decisions determined to be in conflict have been attached hereto in the Appendix following the certificate of service.

Respectfully Submitted,

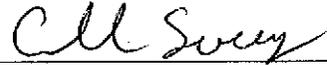
ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender



Cullen Sweeney, Counsel of Record
Assistant Public Defender
Counsel for Appellant Vincent Colon

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Certified Conflict was served upon William D. Mason, Esq., Cuyahoga County Prosecutor and/or upon a member of his staff, on this 6 day of November 2006.



Cullen Sweeney
Assistant Public Defender
Counsel of Record for Appellant

APPENDIX

Order of the Eighth District Court of Appeals certifying a conflict in *State v. Colon*, Cuyahoga App. No. 87499 (November 2, 2006)

Decision of the Eighth District Court of Appeals in *State v. Colon*, Cuyahoga App. No. 87499, 2006 Ohio 5335 (journalized October 23, 2006)

Conflicting Cases:

State v. Shugars (2006), 165 Ohio App. 3d 379

State v. Daniels, Putnam App. No. 12-03-12, 2004-Ohio-2063

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
87499

LOWER COURT NO.
CP CR-470439

-vs-

COMMON PLEAS COURT

VINCENT COLON

Appellant

MOTION NO. 389812

Date 11/02/2006

Journal Entry

MOTION BY APPELLANT TO CERTIFY A CONFLICT IS GRANTED. SEE JOURNAL ENTRY OF SAME DATE.

RECEIVED FOR FILING

NOV - 2 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

Adm. Judge, ANN DYKE, Concurs

Judge MICHAEL J. CORRIGAN, Concurs

[Signature]
Judge KENNETH A. ROCCO

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87499

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VINCENT COLON

DEFENDANT-APPELLANT

ORDER CERTIFYING A
CONFLICT WITH THE FIRST AND
THIRD CIRCUIT COURTS OF APPEALS

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-470439

BEFORE: Rocco, J., Dyke, A.J., and Corrigan, J.

RELEASED: November 2, 2006

JOURNALIZED: NOV - 2 2006

KENNETH A. ROCCO, J.:

Article IV, Section 3(B)(4) of the Ohio Constitution states:

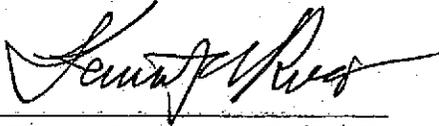
"Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

In the opinion in this case released October 12, 2006, we held that appellant had waived his challenge to the sufficiency of the indictment because appellant did not raise this issue in the trial court. Specifically, we held that the failure to charge the mens rea element of robbery could have been corrected by amendment pursuant to Crim.R. 7(D), so appellant's failure to raise the issue constituted a waiver under Crim.R. 12(C)(2). We find that this holding is in conflict with the decisions of the First Appellate District in *State v. Shugars*, 165 Ohio App.3d 379, 2006-Ohio-718 and the Third Appellate District in *State v. Daniels*, Putnam App. No. 12-03-12, 2004-Ohio-2063.

Given this actual conflict between our district and the First and Third Appellate Districts, we hereby certify the record of this case to the Supreme Court of Ohio for review and final determination on the following question: Where an indictment fails to charge the mens rea element of the crime, and the

defendant fails to raise that issue in the trial court, has the defendant waived the defect in the indictment?

The parties are directed to S. Ct. Prac. R. IV for guidance in how to proceed.

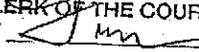


KENNETH A. ROCCO, JUDGE

ANN DYKE, A.J., and
MICHAEL J. CORRIGAN, J., CONCUR

RECEIVED FOR FILING

NOV - 2 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

OCT 23 2006

Court of Appeals of Ohio

CA 87499

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CULLEN SWEENEY
ASSISTANT PUBLIC DEFENDER
1200 WEST THIRD ST., NW
100 LAKESIDE PLACE
CLEVELAND, OH 44113

JOURNAL ENTRY AND OPINION
No. 87499

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VINCENT COLON

DEFENDANT-APPELLANT

**JUDGMENT:
CONVICTION AFFIRMED;
SENTENCE VACATED AND REMANDED.**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-470439

BEFORE: Rocco, J., Dyke, A.J., and Corrigan, J.

RELEASED: October 12, 2006

JOURNALIZED: OCT 23 2006

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ATTORNEYS FOR APPELLEE

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Jennifer Driscoll, Assistant
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Cleveland, Ohio 44113

**FILED AND JOURNALIZED
PER APP. R. 22(E)**

OCT 23 2006

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY CEL Y DEP.**

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

OCT 12 2006

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY CEL Y DEP.**



N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) 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(E) 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(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

**NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED**

622 80895

KENNETH A. ROCCO, J.:

Defendant-appellant, Vincent Colon, appeals from his conviction and sentence for robbery. He urges that (1) the court deprived him of his right to self-representation; (2) the court restricted his access to counsel; (3) the evidence was insufficient to support his conviction; (4) his conviction contravened the manifest weight of the evidence; (5) the indictment was insufficient; (6) the court erred by failing to instruct the jury about an element of the charge; (7) he did not have the effective assistance of counsel; and (8) the court erred by imposing a sentence that exceeded the statutory minimum term. We find no error in the proceedings below and affirm the trial court's judgment. However, we vacate the sentence pursuant to the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and remand for resentencing.

Procedural History

Appellant was charged with robbery in a one count indictment filed September 20, 2005. The case proceeded to a jury trial on November 14, 2005. At trial, the state presented the testimony of the victim, Samuel Woodie; Jennie Harris, Woodie's neighbor; Jerron Powell, Harris's son; and Patrolman Henry Steel, who intervened in the disturbance. Woodie testified that he is a 76 year old man living on East 114th Street in the City of Cleveland. On September 7, 2005 at approximately 9:00 p.m., the appellant returned a bench saw to Woodie

which Woodie had loaned to his neighbor, Ms. Harris. Appellant asked to borrow \$40 for Ms. Harris. Woodie gave him the money. Woodie testified that appellant returned at approximately 1:30 a.m. and said Ms. Harris wanted \$40 more, which Woodie also gave to him.

The following morning, appellant rang Woodie's doorbell at approximately 9:30 a.m. and said Ms. Harris needed \$20 more. He and appellant walked next door to Harris's house. As they approached her side door, appellant grabbed Woodie's left rear pants pocket, in which Woodie kept his wallet. Woodie and appellant struggled in the driveway. Harris came out and yelled at appellant to stop; she joined in the fight as well. Harris's son also joined. Woodie testified that they were all rolling around on the driveway. They rolled off of him and he got up. He went to the garage and got a brick, which he used to strike appellant in the head twice, rendering him unconscious. Police then arrived. In the course of the struggle, Woodie's wallet ended up on the ground, and he picked it up. Woodie said his knees and elbows were scraped and his hip hurt afterward, but he refused medical attention.

Jenny Harris testified that the appellant is her nephew. On the morning of September 8, 2005, she heard Woodie's voice outside her side door, so she opened it. Appellant and Woodie were standing there. Appellant then grabbed Woodie's left rear pants pocket. Woodie also grabbed the pocket, and Harris did

as well. Harris yelled at appellant to let Woodie go. Woodie fell down; Harris and appellant fell down with him.

Harris said she got her arm around appellant's neck, but he pushed her away. Harris's son then came out and joined the fracas. Woodie's pocket ripped and his wallet fell out. Appellant grabbed it and put it in the front of his pants "in the crotch area." Harris reached into appellant's pants and got the wallet and returned it to Woodie. Woodie went and got a brick and hit appellant twice on the head with it. Police arrived and instructed Woodie to put the brick down.

Harris's son, Jerron Powell, testified that he went to the side door of his mother's home when he heard her screams. He saw appellant, Woodie and Harris "tussling on the ground." He then jumped on appellant's back and pulled him off. Woodie got up. In the course of the affray, appellant grabbed Woodie's wallet, which was lying on the ground, and put it in his shorts. Harris retrieved the wallet and gave it back to Woodie. As Powell "bear-hugged" appellant on the ground, Woodie went to the garage and got a brick which he used to hit appellant twice.

Patrolman Steel testified that he and his partner were patrolling on East 114th Street when he saw a disturbance and went to investigate. He saw an older man take a brick and hit another man on the head twice. Patrolman Steel instructed the older man to drop the brick and he did. All three persons at the

scene said that appellant was trying to rob Woodie, so Steel handcuffed appellant, who was unconscious, and called EMS, who transported appellant to a hospital.

At the conclusion of the state's case, appellant moved for dismissal pursuant to Criminal Rule 29. The court denied the motion. Appellant then presented the testimony of Patrolman Steel's partner, Patrolman Leon Goodlow, and appellant.

At the conclusion of the trial, the jury returned a verdict finding appellant guilty of robbery. The court sentenced appellant to seven years' imprisonment.

Law and Analysis

In his first assignment of error, appellant argues that the court deprived him of his right to represent himself. During voir dire, appellant asked if he could appear as co-counsel and represent himself. The court instructed him to "write up a motion and put out your reasons and what you want to do. Okay?" Appellant did not submit a written motion to the court.

At the conclusion of Ms. Harris's testimony, appellant again asked to be designated as "co-counsel" so that he could ask questions his attorney had not asked. The court advised appellant that he could not act as co-counsel, that he could either have an attorney represent him or he could represent himself. Appellant reiterated that he wanted his attorney to continue to represent him. The court allowed appellant a ten-minute recess to think about what he wanted.

When proceedings resumed, counsel was still representing appellant.

To assert the right to self-representation, the defendant must clearly and unequivocally invoke his right to self-representation and must knowingly, intelligently and voluntarily waive the concomitant right to the assistance of counsel. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, ¶38; *Godinez v. Moran* (1993), 509 U.S. 389, 400-02. In this case, the appellant did not clearly and unequivocally inform the court that he wished to waive his right to counsel. Rather, he repeatedly asked to act as co-counsel, a role which the court correctly informed him he could not assume. *State v. Martin*, 103 Ohio St.3d 385, 390, 2004-Ohio-5471, ¶32. Therefore, appellant did not invoke his right to self-representation.

Appellant claims the court erred by failing to inform him of his right to stand-by counsel. Once a defendant chooses to represent himself, “[a] trial court may – but is not required to – appoint stand-by counsel to aid a defendant if and when the defendant requests assistance ***.” *State v. Watson* (1998), 132 Ohio App.3d 57, 65. Contrary to appellant’s suggestion, *Martin* does not create a right to stand-by counsel, but rather recognizes that stand-by counsel may be appointed by the court at its discretion to assist a pro se defendant, “even over objection by the accused.” *Martin*, at ¶28, quoting *Faretta v. California* (1975), 422 U.S. 806, 834 n. 46. Therefore, we reject this argument.

The first assignment of error is overruled.

Second, appellant contends that the court impermissibly restricted his access to counsel. During the direct examination of the first defense witness, the court called a recess, excused the jury and stated: "Now, the defendant, Mr. Colon, is going to have to remember, I told you a couple of times I don't want any temper tantrums. I had to bring in a second deputy. If you act up any more - I heard you screaming and yelling at your attorney in there. I am not allowing your attorney to be anywhere with you from now, as [sic] that's a court order, except here in this courtroom discussing privately here." At the conclusion of the day's proceedings, the court reiterated: "***** [Defense counsel] is not to go in with the defendant any further on this trial whether he wants to or not. He has to be out here and have the conference in front of the deputies in open court, privately, but out here."

Contrary to appellant's arguments, these orders did not restrict appellant's access to his attorney, but only affected the manner in which he could consult with counsel. Appellant could consult with counsel in person in the courtroom with deputies present. There were no restrictions on the length of any consultation. There were also no restrictions on appellant's ability to consult telephonically with his attorney. Therefore, this case is not analogous to *Geders v. United States* (1976), 425 U.S. 80, where the defendant was completely

prohibited from consulting with counsel overnight. The limitations the court imposed here did not interfere with appellant's right to access to his counsel, so we overrule the second assignment of error.

Third, appellant contends that the evidence was insufficient to sustain his conviction. Appellant asserts that the crime of robbery consists of four basic elements, that the defendant (a) knowingly (b) committed or attempted to commit a theft offense, and (c) recklessly (d) inflicted, attempted to inflict, or threatened to inflict physical harm. *State v. Crawford* (1983), 10 Ohio App.3d 207. Appellant asserts that there is insufficient evidence that he recklessly caused physical harm to Mr. Woodie. We disagree. Mr. Woodie testified that appellant threw him to the ground and struggled with him. Pursuant to R.C. 2901.22(C), "[a] person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." A reasonable jury could find that, by throwing Mr. Woodie to the ground and struggling with him, appellant perversely disregarded a known risk that the septuagenarian victim would be injured. Therefore, we overrule the third assignment of error.

Appellant next contends that the manifest weight of the evidence does not support his conviction. Ms. Harris contradicted Mr. Woodie when she testified that appellant did not throw Woodie to the ground. The mere fact of a conflict in

the testimony does not demonstrate that the jury lost its way, however. It was for the jury to decide which witness's testimony was more believable. Therefore, we overrule the fourth assignment of error.

Fifth, appellant urges that the indictment was insufficient because it did not charge the mens rea elements of robbery. He asserts that the indictment therefore failed to charge an offense. "[A]n indictment charging an offense solely in the language of a statute is insufficient when a specific intent element has been judicially interpreted for that offense." *State v. O'Brien* (1987), 30 Ohio St.3d 122, 124.

Under Crim.R. 12(C)(2), defects in an indictment are waived if not raised before trial, except failure to show jurisdiction in the court or to charge an offense, which may be raised at any time during the pendency of the proceeding. Appellant here did not raise this issue at any time during the pendency of the proceedings before the trial court. Had he raised the issue in the trial court, the state could have amended the indictment to include the mens rea elements. Crim.R. 7(D); *O'Brien*, 32 Ohio St.3d at 125-26. Therefore, he has waived this argument on appeal. *State v. Davis*, Ashland App. No. 03COA016, 2004-Ohio-2255, ¶48.

Sixth, appellant claims the court erred by failing to instruct the jury that the state was required to prove, beyond a reasonable doubt, that appellant

recklessly inflicted, attempted to inflict, or threatened to inflict, physical harm. Because appellant's counsel did not object to the court's instructions, we must evaluate this assignment of error under a plain error analysis. See, e.g., *State v. Williford* (1990), 49 Ohio St.3d 247, 251. "[A]n erroneous jury instruction 'does not constitute a plain error or defect under Crim. R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.'" *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 227 (quoting *State v. Long* (1978), 53 Ohio St.2d 91, 97). As noted above, there was ample evidence that appellant recklessly caused physical harm to Woodie. Therefore, we cannot say that the outcome of the trial would have been different if the jury had been instructed on this issue. The sixth assignment of error is overruled.

Seventh, appellant urges that his attorney did not provide him with effective assistance. "To win a reversal on the basis of ineffective assistance of counsel, the defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693. Accord *State v. Bradley* (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373, paragraph two of the syllabus. "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were

it not for counsel's errors, the result of the trial would have been different.' Id., paragraph three of the syllabus." *State v. Jones*, 91 Ohio St.3d 335, 354, 2001-Ohio-57.

In this case, appellant claims his attorney's performance was deficient because he failed to object to the indictment and failed to request a jury instruction regarding recklessness. Assuming that these alleged deficiencies fell outside the "wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, we cannot say that, but for counsel's errors the result of the trial would have been different. If counsel had objected to the indictment, the state would have had the opportunity to amend it to correct the alleged deficiency; there is no reasonable probability that the indictment would have been dismissed on that basis. Likewise, if counsel had objected to the jury instructions, the court would have included an instruction on recklessness. The outcome of the trial would not likely have been affected because there was ample evidence that appellant recklessly caused physical harm to Woodie. Therefore, we overrule the seventh assignment of error.

Finally, appellant challenges the sentence the court imposed upon him. He claims that the court's imposition of a sentence in excess of the minimum statutory term was based on judge-found facts and therefore was unconstitutional pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

He further asserts that the *Foster* remedy of severing the unconstitutional provisions of the sentencing statutes, thus allowing the court to impose any sentence within the appropriate felony range, is an ex post facto law, and that the court is limited to imposition of the minimum term of two years' imprisonment in this case.

Appellant was found guilty of robbery, a second degree felony. R.C. 2911.02(A)(2) and (B). The range of sentences available for a second degree felony is two to eight years. Thus, appellant's sentence of seven years' imprisonment was more than the minimum term.

Prior to the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, "Ohio ha[d] a presumptive minimum prison term that [had to] be overcome by at least one of two judicial findings." *Foster*, at ¶60. For someone who was never to prison before, the trial court was required to find that the shortest term would "demean the seriousness" of the crime or would inadequately protect the public in order to impose a sentence in excess of the statutory minimum. Otherwise, the court was required to find that the offender had already been to prison to impose more than a minimum term. R.C. 2929.14(B)(2) .

In *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, the Ohio Supreme Court found that several provisions of S.B. 2 (including R.C. 2929.14(B)(2))

offended the constitutional principles set forth in *Blakely v. Washington* (2004), 542 U.S. 296, that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Foster*, supra, at ¶82 (citing *United States v. Booker* (2005), 543 U.S. 220, 224).

The *Foster* court severed R.C. 2929.14(B) and other sentencing provisions, and rendered them unconstitutional. As a result, the trial court is no longer obligated to follow these mandatory guidelines when sentencing a felony offender. "Where sentencing is left to the unguided discretion of the judge, there is no judicial impingement upon the traditional role of the jury." *Foster*, supra, at ¶90. The court further held that cases pending on direct review involving these statutes should be remanded for resentencing. *Id.* at ¶104. Thus, in accordance with *Foster*, we sustain this assignment of error, vacate appellant's sentence and remand for a new sentencing hearing.

Appellant's argument that application of *Foster* constitutes an ex post facto law is not yet ripe for our review. *State v. Jones*, Cuyahoga App. No. 87262 & 87263, 2006-Ohio-4100, ¶¶10 & 11.

In resentencing appellant, the trial court may want to keep in mind the Ohio Supreme Court's holding in *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-

855, at ¶38: "Although after *Foster*, the trial court is no longer compelled to make findings and give reasons at the sentencing hearing, *** nevertheless, in exercising its discretion the court must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purpose of sentencing, and R.C. 2929.12, which provides guidance in considering the factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by the statutes that are specific to the case itself."

Appellant's conviction is affirmed, his sentence is vacated, and this cause is remanded for resentencing.

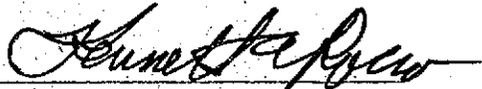
It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.



KENNETH A. ROCCO, JUDGE

ANN DYKE, A.J., and
MICHAEL J. CORRIGAN, J., CONCUR

LEXSEE 165 OHIO APP3D 379

STATE OF OHIO, Plaintiff-Appellee, vs. JAMES O. SHUGARS, Defendant-Appellant.

APPEAL NO. C-050380

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

165 Ohio App. 3d 379; 2006 Ohio 718; 846 N.E.2d 592; 2006 Ohio App. LEXIS 652

February 17, 2006, Date of Judgment Entry on Appeal

NOTICE: THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Shugars*, 109 Ohio St. 3d 1508, 2006 Ohio 2998, 849 N.E.2d 1029, 2006 Ohio LEXIS 1886 (Ohio, June 21, 2006)

PRIOR HISTORY: Criminal Appeal From: Hamilton County Municipal Court. TRIAL NO. 04CRB-48939.

DISPOSITION: Judgment vacated and complaint dismissed.

HEADNOTES: INDICTMENT/COMPLAINT - PROCEDURE/RULES - CONSTITUTIONAL LAW/CRIM.

SYLLABUS: [*380] [***593] A conviction for violating Cincinnati's home-improvement ordinance was contrary to law when the trial court had no jurisdiction to hear the case due to the complaint's failure to allege recklessness as an essential element of the offense; even though the ordinance does not specifically refer to a culpable mental state, recklessness is an element of the offense under Cincinnati Municipal Code 902-11(b) because the plain language of the ordinance does not indicate an intention to impose strict liability.

When a complaint fails to state an offense under Ohio law by omitting an essential element, any resulting conviction must be vacated, and the complaint itself must be dismissed, but the defendant may be tried again without violating the *Double Jeopardy Clause* because jeopardy

has never attached due to the lack of jurisdiction resulting from the defective complaint

COUNSEL: Julia L. McNeil, City Solicitor, Ernest F. McAdams, Jr., City Prosecutor, and Keith C. Forman, Assistant Prosecutor, for Appellee.

Jon R. Sinclair, for Appellant.

JUDGES: MARK P. PAINTER, Judge. HILDEBRANDT, P.J., and DOAN, J., concur.

OPINION BY: MARK P. PAINTER

OPINION:

DECISION.

MARK P. PAINTER, Judge.

[**P1] In a case of first impression, we interpret Cincinnati's home-improvement ordinance as requiring proof of recklessness. Because neither the complaint nor the facts statement upon which the conviction was based included that element, the conviction was improper.

[**P2] Defendant-appellant James O. Shugars appeals his conviction for violating Cincinnati's home-improvement ordinance, a second-degree misdemeanor. n1 Shugars pleaded no contest and was sentenced to 90 days in jail and a \$ 750 fine, with 80 days and \$ 650 suspended, plus one year of probation. Shugars now claims that the state failed to assert that he "recklessly" violated the ordinance, and that, therefore, his conviction cannot be sustained. He is more right than he alleges.

n1 Cincinnati Municipal Code 891-3.

165 Ohio App. 3d 379, *; 2006 Ohio 718, **;
846 N.E.2d 592, ***; 2006 Ohio App. LEXIS 652

[*381] [***594] *I. A Bad Deal*

[**P3] Julia Blanco hired Shugars to build a carport and a deck at her house. Blanco paid Shugars over \$ 9,000, but all Shugars did was excavate and remove some debris from the area.

[**P4] After Blanco contacted the prosecutor's office, Shugars was charged with failing to provide Blanco with a contract containing certain mandatory provisions. For example, Shugars's contract with Blanco did not include, among other things, a complete description of the work, the dates for beginning and ending the work, language concerning applicable permits, or language limiting the down payment on the contract to ten percent.

[**P5] Shugars pleaded no contest and the trial court found him guilty. In mitigation, Shugars's attorney stated, "Certainly there is no question that Mr. Shugars has violated the City Municipal Code 891, all of the sections that [the prosecutor] has pointed out." Later, his attorney said, "We certainly are not disputing, as I said, Judge, the violations of 891."

II. Essential Element Missing

[**P6] In his single assignment of error, Shugars now claims that the state failed to prove the culpable mental state of recklessness.

[**P7] Cincinnati Municipal Code 891-3 does not mention a specific culpable mental state. It merely states that a contractor "shall" provide a written contract to the home owner and discusses in detail what the contract must contain.

[**P8] The Cincinnati Municipal Code mirrors the Ohio Revised Code concerning the culpable mental state for an offense when an ordinance is silent on the issue. "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." n2

n2 Cincinnati Municipal Code 902-11(b);
R.C. 2901.21(B).

[**P9] The state argues that the offense is one of strict liability. But the Ohio Supreme Court has repeatedly held that the drafter of a statute or ordinance must plainly indicate in the language an intent to impose strict liability. n3 Public-policy arguments or the fact that the statute or ordinance [*382] contains mandatory lan-

guage do not factor into the determination whether strict liability is imposed. n4 It is not enough that the legislative body may have intended to enact a strict-liability law--it must "plainly indicate that intention in the language of the [law]." n5

n3 See *State v. Collins*, 89 Ohio St.3d 524, 530, 2000 Ohio 231, 733 N.E.2d 1118; *State v. Moody*, 104 Ohio St. 3d 244, 2004 Ohio 6395, 819 N.E.2d 268, P12.

n4 See *Collins*, *supra*, at 530; *Moody*, *supra*, at PP16-17.

n5 *Collins*, *supra*, at 530.

[**P10] The plain language of Cincinnati Municipal Code 891-3 does not indicate an intention to impose strict liability. If the city had so intended, it could easily have made the offense one of strict liability; it did not. Therefore, the state must both charge and prove recklessness as an element of the offense. Furthermore, if the state fails to prove recklessness, there is insufficient evidence to convict a person charged with the offense.

[***595] *III. Analogy*

[**P11] As an analogy, we look to Ohio's statute concerning child endangering. n6 The Ohio Supreme Court has held that because the child-endangering statute does not specify a culpable mental state, the default mental state of recklessness is an essential element of the crime. n7 In addition, the court has held that "an indictment charging an offense solely in the language of a statute is insufficient when a specific intent element has been judicially interpreted for that offense." n8

n6 *R.C. 2919.22*.

n7 See *State v. McGee*, 79 Ohio St.3d 193, 195, 1997 Ohio 156, 680 N.E.2d 975; *State v. O'Brien* (1987), 30 Ohio St.3d 122, 30 Ohio B. 436, 508 N.E.2d 144, paragraph one of the syllabus.

n8 See *State v. O'Brien*, *supra*, at 124.

[**P12] In this case, the complaint against Shugars did not state any culpable mental state. Likewise, in its explanation of the circumstances of the offense, the state did not assert that Shugars had recklessly failed to pro-

vide Blanco with the required contractual provisions. In fact, the state did not assert or discuss Shugars's mental state at any time in the trial court.

[**P13] Therefore, because the state failed to allege an essential element of the offense, Shugars's conviction cannot be sustained.

IV. No Waiver

[**P14] The state argues that because Shugars pleaded no contest, it is now too late for Shugars to challenge the state's evidence regarding the element [*383] of a culpable mental state. But Shugars's plea of no contest only admitted the truth of the facts alleged by the state. n9 The state did not allege that Shugars had acted recklessly. A conviction in which an essential element was not proved cannot stand.

n9 See *Crim.R. 11(B)(2)*; *State ex rel. Stern v. Mascio*, 75 Ohio St.3d 422, 423, 1996 Ohio 93, 662 N.E.2d 370.

[**P15] Furthermore, the complaint did not even allege the culpable mental state of recklessness, and a valid complaint is a jurisdictional prerequisite to a conviction. n10 A defendant cannot waive the right to challenge a charging document that fails to state an essential element, even if the defendant pleads guilty to the charged offense. n11 Therefore, the issue has not been mooted because Shugars pleaded no contest.

n10 See *Crim.R. 12(C)(2)*; *State v. Byrd*, 7th Dist. No. 04 BE 40, 2005 Ohio 2720, at P16; *State v. Daniels*, 3rd Dist. No. 12-03-12, 2004 Ohio 2063, at P3.

n11 Id.

[**P16] While we are aware that the Ohio Supreme Court, in a death-penalty case, allowed a rape conviction to stand when an element was never charged in the indictment on the grounds of waiver (!), at least in that case the element was proved at trial. n12 But here, the element was neither alleged or proved. Even were it possible to waive an element of an offense--a strange proposition of law at best--something not mentioned cannot be waived.

n12 See *State v. Carter*, 89 Ohio St. 3d 593, 598, 2000 Ohio 172, 734 N.E.2d 345.

V. Conviction Vacated

[**P17] By omitting an essential element, the complaint against Shugars failed to state an offense under Ohio law. This defect has affected Shugars's substantial rights, and we must vacate Shugars's conviction [***596] and dismiss the complaint against him. But because the charging instrument did not charge an offense, the trial court had no jurisdiction to try Shugars, n13 so Shugars has not been placed in jeopardy. Therefore, another prosecution is not barred. n14

n13 See *State v. Cimpritz (1953)*, 158 Ohio St. 490, 110 N.E.2d 416, paragraph six of the syllabus.

n14 See *State v. Keplinger*, 12th Dist. No. CA2002-07-013, 2003 Ohio 3447.

[*384] [**P18] Accordingly, we sustain Shugars' assignment of error, vacate his conviction, and dismiss the complaint against him.

Judgment vacated and complaint dismissed.

HILDEBRANDT, P.J., and DOAN, J., concur.

LEXSEE 2004 OHIO 2063

STATE OF OHIO, PLAINTIFF-APPELLEE v. RICKY DANIELS, DEFENDANT-
APPELLANT

CASE NUMBER 12-03-12

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, PUTNAM
COUNTY

2004 Ohio 2063; 2004 Ohio App. LEXIS 1785

April 26, 2004, Date of Judgment Entry

SUBSEQUENT HISTORY: Appeal after remand at *State v. Daniels*, 2005 Ohio 1920, 2005 Ohio App. LEXIS 1832 (Ohio Ct. App., Putnam County, Apr. 25, 2005)

PRIOR HISTORY: [**1] Criminal Appeal from Common Pleas Court.

DISPOSITION: Judgment reversed.

COUNSEL: MARIA SANTO, Attorney at Law, Lima, OH, For Appellant.

KURT W. SAHLOFF, Prosecuting Attorney, Ottawa, OH, For Appellee.

JUDGES: BRYANT, J. SHAW, P.J., and CUPP, J., concur.

OPINION BY: BRYANT

OPINION:

BRYANT, J.

[*P1] Defendant-appellant Ricky Daniels ("Daniels") brings this appeal from the judgment of the Court of Common Pleas of Putnam County finding him guilty of child endangerment and involuntary manslaughter.

[*P2] On April 11, 2003, Daniels was indicted on one count of endangering children, one count of felonious assault, and one count of murder. Daniels was arraigned on April 14, 2003, and entered a plea of not guilty and not guilty by reason of insanity. Daniels was examined and found competent to stand trial. It was also determined that Daniels did not meet the criteria to be found not guilty by reason of insanity. On June 19, 2003, Daniels entered a guilty plea to a bill of information to one count of endangering children and one count of in-

voluntary manslaughter. The State dismissed the charges in the indictment pursuant to the plea agreement. On July 23, 2003, the trial court sentenced Daniels to [**2] eight years in prison on the endangering children charge and ten years in prison on the involuntary manslaughter charge, to be served consecutively. It is from this judgment that Daniels appeals and raises the following assignments of error.

The bill of information was insufficient under *Crim.R. 7(B)* for it failed to state an essential element of endangering children.

The trial court committed an error of law by imposing maximum consecutive sentences.

[*P3] In the first assignment of error, Daniels claims that the bill of information must allege the mental state of recklessness. *Crim.R. 7(B)* requires that a bill of information contain sufficient statements to provide the defendant with notice of all of the elements of the offense for which the defendant is charged. The element of recklessness is an essential element of the offense of child endangerment and the charging instrument must include it. *State v. McGee (1998)*, 128 Ohio App. 3d 541, 715 N.E.2d 1175. The State claims that Daniel's failure to object prior to a guilty finding waives the issue on appeal. However, by pleading guilty to an offense, a defendant does not waive the right to challenge a [**3] charging document that fails to state an essential element. *State v. Keplinger, 12th Dist. No. CA2002-07-013, 2003 Ohio 3447*.

Generally, an indictment or, in this case, an information must allege all elements of the crime intended to be charged. * * * If an essential and material element identifying the offense is omitted from the information, it is insufficient to charge an offense. * * * The omission of a material element of the crime from an indictment renders the indictment invalid.

Id. at P7.

In this case, the bill of information used the statutory language. The statutory language does not include the mens rea of recklessness.

[An] indictment charging endangering children solely in the language of that statute necessarily omits an essential element of the offense, i.e., recklessness. As such, the indictment does not give the accused notice of all the elements of the offense with which he is charged. Therefore, the indictment in its original form was insufficient under *Crim.R. 7(B)*.

McGee, supra at 544 (citing State v. O'Brien [1987], 30 Ohio St.3d 122, 30 Ohio B. 436, 508 N.E.2d 144). Since recklessness is an **[**4]** essential element of the offense of child endangerment, it must be included in the bill of

information for it to be a satisfactory charging document. The failure to include this element is substantial and amounts to plain error. Thus, the first assignment of error is sustained.

[*P4] The second assignment of error alleges that the trial court erred by imposing maximum, consecutive sentences. Since we sustained the first assignment of error and reversed the conviction, an assignment of error concerning the sentence imposed is moot.

[*P5] The judgment of the Court of Common Pleas of Putnam County is reversed.

Judgment reversed.

SHAW, P.J., and CUPP, J., concur.