

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO

*

CASE NO. 08-0453

PLAINTIFF-APPELLEE

*

vs.

*

On Appeal from the Tuscarawas
County Court of Appeals, Fifth
Appellate District

RUSSELL J. RENICKER, JR.

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DEFENDANT-APPELLANT

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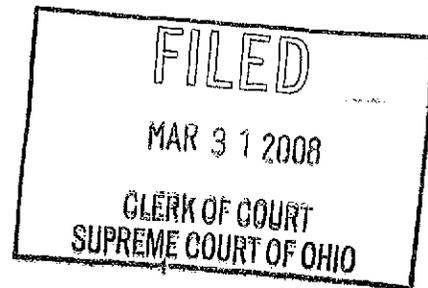
Court of Appeals
Case No. 2006 AP 10 0059

*

STATE OF OHIO'S MEMORANDUM
IN OPPOSITION TO JURISDICTION

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THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT OF GREAT PUBLIC OR GENERAL INTEREST.

Appellant was convicted of aggravated robbery in violation of R.C. 2911.01(A)(3) for mugging an eighty-one year old woman at a shopping mall, knocking her unconscious, seriously injuring her, and stealing her purse. (T. 138-148). The culpable mental state for the infliction-of-harm aspect of aggravated robbery is recklessness. The trial court failed to instruct on recklessness. Appellant claims that the error is structural and requires reversal. The U.S. Supreme Court has already analyzed this issue in the case of *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, and concluded that the error is not structural. Rather, Chief Justice Rehnquist held that the erroneous jury instruction that omits an element of the offense is subject to a harmless-error analysis. In this case, the Fifth District Court of Appeals correctly conducted such an analysis and concluded that failure to instruct on the culpable mental state of recklessness constituted harmless-error.

This case does not raise an novel constitutional issue or an issue of great public or general interest.

RESPONSE TO PROPOSITION OF LAW NUMBER ONE

Failure to instruct the jury on an element of the offense is not structural error requiring reversal. Rather, an erroneous jury instruction that omits an element of the offense is subject to the harmless-error analysis.

ARGUMENT

Appellant was convicted of aggravated robbery in violation of R.C. 2911.01(A)(3) following a two day jury trial. The culpable mental state for the infliction-of-harm aspect of aggravated robbery is recklessness. The trial court failed to instruct on recklessness. Appellant claims that the error is structural and requires reversal. On the contrary, an erroneous jury instruction that omits an element of the offense is subject to the harmless-error analysis.

This issue has already been thoroughly analyzed and decided by the United States Supreme Court. In *Neder v. United States*,¹ Chief Justice Rehnquist held that an erroneous jury instruction that omits an element of the offense is subject to the harmless-error analysis. The Court rejected the argument that the error was structural. The U.S. Supreme Court held in syllabus one as follows:

The harmless-error rule of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, applies to a jury instruction ** 1830 that omits an element of an offense. Pp. 1833-1839.

A limited class of fundamental constitutional errors is so intrinsically harmful as to require automatic reversal without regard to their effect on a trial's outcome. Such errors infect the entire trial process and necessarily render a trial fundamentally unfair. For all other constitutional errors, reviewing courts must apply harmless-error analysis. An instruction that omits an element of the offense differs markedly from the constitutional violations this Court has found to defy harmless-error review, for it does not *necessarily* render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Omitting an element can easily be analogized to improperly instructing the jury on the element, an error that is subject

¹ 527 U.S. 1, 119 S.Ct. 1827.

to harmless-error analysis, *Johnson v. United States*, 520 U.S. 461, 469, 117 S.Ct. 1544, 137 L.Ed.2d 718.

Ohio Courts have also held that failing to instruct the jury on elements of the offense should be reviewed under the harmless-error standard.. In *State v. Furlow*,² the defendant was charged with robbery. The jury instruction omitted several elements of theft. The Montgomery County Court of Appeals found the error to be harmless. The Court ruled that “any claim that this defect in the Court’s instructions may have misled the jury or affected the outcome of defendant’s trial was wholly frivolous, given the state of the evidence in the case.” In *State v. Flannery*,³ the Fifth District Court of Appeals found that any error in the trial court’s failure to instruct the jury in a prosecution for kidnaping, rape, felonious assault, and tampering with evidence on aiding and abetting was harmless, where the evidence of defendant’s guilt was overwhelming.

In *State v. Adams* the Ohio Supreme Court held that the trial court’s failure to separately and specifically charge the jury on every element of each crime with which the defendant is charged does not per se constitute plain error “nor does it necessarily require reversal of a conviction.”⁴

In *State v. Ullman*,⁵ the trial court failed to provide a jury instruction that defined *recklessly* as the mental state required for the offense. The Twelfth District Court of Appeals held that the defendant failed to show any prejudice from the trial court’s error. **Appellant’s mental state was never an issue at trial.** Appellant never argued at trial that she did not possess the requisite mental

² 2002 WL 313168 (Ohio App.2 Dist., Montgomery, 03-01-2002) No. 18879.

³ 2005 WL 750077, (Ohio App. 5 Dist., Richland, 04-01-2005) No. 03-CA-24.

⁴ 62 Ohio St.2d 151.

⁵ 2003 WL 21729826, No. CA2002-10-110.

state. Because it was apparent that the jury believed the officer's testimony, the Court found "no manifest miscarriage of justice." The Court found "no indication that the result of the trial would have been different had the trial judge given a 'recklessly' instruction." In *State v. Sawyer*, the trial court failed to instruct the jury that recklessness was the culpable mental state for child endangering. In upholding the conviction, the Eighth District Court of Appeals held that it was not clear that the outcome would have been different if the instruction had been given.⁶

Any error in the case at bar in failing to give a *recklessness* instruction was clearly harmless error. Appellant's mental state was never an issue at trial. Appellant never argued at trial that he did not possess the requisite mental state. His sole defense was the unreliability of eyewitness identification. It was clear from the testimony of the victim and the other witnesses at the scene that the acts were done at least recklessly. The testimony of the eyewitnesses, if believed, leads to no other conclusion.

The eighty-one year old victim testified that she observed a man with a lot of tattoos and wearing a white tank top walking along the side of the cars in the parking lot (T. 140, 149). She got out of her car and headed toward the mall entrance. She was feeling fine and was not dizzy (T. 141). She paused at the road in front of the mall to look for traffic (T. 140). There was none. (T. 141-142). She was hit and knocked unconscious. When she regained consciousness, she was on the pavement bleeding and seriously injured. Three eyewitnesses saw the tattooed man in the white tank top sprinting from the scene. (T. 156-157, 163, 165, 166, 171).

⁶ 2003 WL 1772646 (Ohio App. 8 Dist., Cuyahoga, 04-03-2003), No. 81133.

It was clear from the eyewitness testimony that the act was done at least recklessly. The testimony leads to no other conclusion. The jury believed the eyewitness testimony. There is no indication that the result of the trial would have been different had the trial judge given a *recklessly* instruction. Any error in failing to give the recklessly instruction was harmless.

Appellant requested the Fifth District Court of Appeals to certify that this case was in conflict with the Seventh District case of *State v. Wamsley*. The Fifth Appellate District denied appellant's motion on 2/29/08. The appellate court found the cases to be factually distinguishable. The appellate court found that appellant's mental state was not an issue at trial and that failure to instruct on "recklessness" was harmless-error.

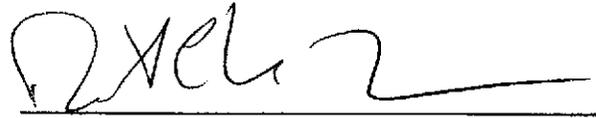
Appellant also implies that the trial court imposed a "strict liability element" in this case. Contrary to appellant's assertion, no instruction on strict liability was given.

CONCLUSION

An erroneous jury instruction that omits an element of the offense is subject to the harmless-error analysis. "Unlike such defects as the complete deprivation of counsel or trial before a biased Judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."⁷ Failure to instruct the jury on an element of the offense is not structural error. This issue has already been analyzed and decided by the United States Supreme Court in *Neder v. United States*, 527 U.S. 1, 119

⁷ *Neder v. United States*, 527 U.S. 1, 9.

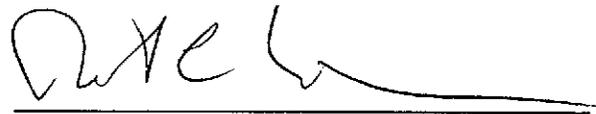
S.Ct. 1827. Defendant's Proposition of Law is erroneous. This case does not involve a substantial constitutional question or great public or general interest.



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PROOF OF SERVICE

I certify that I have served a copy of the foregoing Memorandum in Opposition on Attorney Gerald A. Latanich, Public Defender's Office, by placing in their mailbox at the Clerk of Court's Office, this 28th day of March, 2008.



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