

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO. **08-1725**
Plaintiff-Appellant : On Appeal from the Hamilton County
vs. : Court of Appeals, First Appellate
District
JAMES LESTER : Court of Appeals
Defendant-Appellee : Case Number C-070383

MEMORANDUM IN SUPPORT OF JURISDICTION

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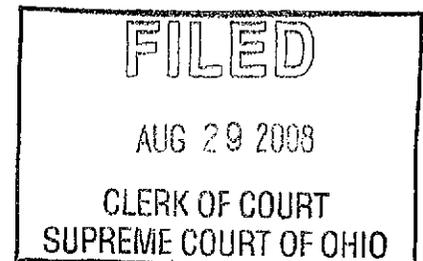


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IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO.
Plaintiff-Appellant :
vs. :
JAMES LESTER : MEMORANDUM IN SUPPORT OF
 : JURISDICTION
Defendant-Appellee :

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST OR INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

James Lester's conviction for Aggravated Robbery was reversed by the First District Court of Appeals on the basis of *State v. Colon*, "*Colon I*."¹ This Court's reconsideration of the case did not touch upon a number of issues raised in *Colon I*, including those relied upon here by Judge Mark Painter, who authored the First District's opinion.² The analysis used by the First District, taken directly from *State v. Colon*, is in direct conflict with this Court's decision in *State v. Wharf*.³ Confusion has resulted in the lower courts and in an attempt to reconcile these two cases, varying results have been achieved.

¹ *State v. Colon*, 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-Ohio-1624.

² *State v. Colon*, Slip Opinion No. 2008-3749.

³ *State v. Wharf*, 86 Ohio St.3d 375, 715 N.E.2d 172, 1999-Ohio-112.

Cases from the Seventh and Tenth District are in conflict with the First District.⁴ The Ohio Jury Instructions Committee has also produced a revision of the Aggravated Robbery and Robbery instructions that conflicts with the First District's holding. This creates a situation that is of great public interest because there is no uniformity in the administration of justice or in the implementation of the *Colon* principles of law.

The *Colon* decision has further implications that should be dealt with by this Court. Numerous felony statutes are written to prohibit criminal conduct that also encompasses the commission of a second crime. Aggravated Robbery and Robbery occur during a theft offense.⁵ Aggravated Burglary and Burglary occur during the commission of a criminal trespass.⁶ Murder can be committed during the commission of a felonious assault.⁷ Case law has developed stating that the mens rea element to be proven by the state rests within the underlying crime, such as with felony murder.⁸ The introductory conduct, in many statutes - for example, the use of a gun in Aggravated Robbery, force, stealth or deception in Aggravated Burglary or Burglary, force, threat or deception in Kidnapping - should be strict liability according to *State v. Wharf*.⁹

⁴ These decisions, *State v. Peterson*, 8th Dist. No. 90263, 2008-Ohio-4239, and *State v. Ferguson*, 10th Dist. No. 07-AP-640, 2008-Ohio-3827, were published more than 10 days after the judgment entry in *Lester* was journalized. This prevented the state from certifying a conflict to this Court.

⁵ R.C. 29110.01; R.C. 2911.02.

⁶ R.C. 2911.11; R.C. 2911.12.

⁷ R.C. 2903.02(B).

⁸ See *Hopkins v. Reeves* (1998), 524 U.S. 88, 91, 118 S.Ct. 1895, 1897; *State v. Bowles* (May 11, 2001), 11th Dist. No. 99-L-075.

⁹ *State v. Wharf*, 86 Ohio St.3d 375, 715 N.E.2d 172, 1999-Ohio-112.

The *Colon* decision, despite its later clarification, continues to require proof of a mens rea in crimes where it has never been required. This issue must be addressed by this Court because of the public or great general interest and because of the conflicting decisions that have resulted in the appellate districts of Ohio. These conflicts can be resolved by accepting jurisdiction in this case and adopting the reasoning of *State v. Wharf*, *State v. Peterson* and *State v. Ferguson*.¹⁰

STATEMENT OF THE CASE AND FACTS

Lester was charged in separate indictments with two counts of theft from the elderly, robbery and aggravated robbery. He tried his case to a jury and was convicted on all charges. He was sentenced to serve seven years on the aggravated robbery conviction and eighteen months on each theft conviction, consecutively. The robbery conviction was merged for the purpose of sentencing.

A direct appeal was filed with the First District Court of Appeals. Appellate counsel for Lester filed a Supplemental Brief after the release of *State v. Colon*. The First District found no merit in the original assignments of error, but on July 18, 2008, reversed the aggravated robbery conviction on the basis of *Colon*. The state now brings this appeal.

Synopsis

James Lester stole cash from three men, aged 84, 74, and 61, by posing as an out-of-towner who needed help. A third man would “happen to come along,” and the two lured the victims into a card game in which the victims always lost. Lester pulled a knife on one of the victims and threatened harm to two of them if they did not cooperate with his scheme.

¹⁰ *State v. Peterson*, 8th Dist. No. 90263, 2008-Ohio-4239, and *State v. Ferguson*, 10th Dist. No. 07-AP-640, 2008-Ohio-3827.

Mr. Otha Bonner

Otha Bonner, 84, was a retired supervisor at General Electric. On April 12, 2006, Mr. Bonner withdrew about \$1000 cash from his account at the Fifth Third Bank in St. Bernard. He needed money to tide him over until May 3rd, when he would receive his retirement check. After leaving the bank, he went to the IGA grocery on Vine St. nearby. Lester approached Mr. Bonner and asked if he knew where the Kroger grocery was located. Mr. Bonner said he did, and Lester asked him for a ride. Lester met another man there who said he worked at Kroger's. The three got something to eat and rode back to the IGA parking lot. The men asked Mr. Bonner to play a card game which he called "three-card Molly." Lester sat in the back seat, and the third man sat in the front passenger seat.

Mr. Bonner saw that the third man had some cash. After he and Mr. Bonner began playing cards, Lester said he wanted to count the money held by both men. He appeared to have the passenger's cash in a paper bag. Mr. Bonner pulled out his bank envelope and gave Lester \$1,000.50. He thought that Lester was holding the money, stating "It's supposed to be all of our money, his and mine." Mr. Bonner and the third man resumed playing cards. At some point, the men told Mr. Bonner they had to meet a woman. They said they would put the bag of cash in Mr. Bonner's trunk and meet up later, presumably to continue playing cards. They told Mr. Bonner to come back in an hour and pick them up.

Mr. Bonner went home and checked the trunk of his car for his money. He found only a paper bag filled with toilet paper. "I came back in the hour, in that one hour, but they did not show up, never showed again. That's the last that I saw of them." Fingerprints were taken from Mr. Bonner's car. Defense counsel stipulated that the fingerprints were the defendant's.

Mr. Sherman Lynem

Mr. Sherman Lynem, 74, was getting ready to mow his lawn on October 24, 2006. Lester walked up to him and asked if he knew the location of "Pea Street" or "Pea Zone Street." He did not, and Lester asked if he knew where the First Baptist Church was located. Mr. Lynem said he did. Lester said he needed to meet with a woman who had offered to rent him an apartment there, and asked for a ride.

Lester offered Mr. Lynem \$20 for the ride. He showed Mr. Lynem a piece of paper that said his father had been killed in a traffic accident, and that he was entitled to some money as a result. Lester also showed Mr. Lynem a roll of money that had a \$20 bill on the outside. Mr. Lynem drove him to the First Baptist Church on Redbank Rd. They could not find any apartment buildings, so Lester asked Mr. Lynem to drive him to a Walgreen's in Pleasant Ridge. When they arrived, Lester got out and asked him to wait.

When Lester returned, another man approached. Lester told Mr. Lynem that the man was a minister, and said "Let's help this man out." The man had a briefcase with him. The man told Lester to get in the back seat, and he got in the passenger seat. The man said "Let's play this game," and pulled out three cards. He told Mr. Lynem it was called "three-card Monte." One card was different than the other two. The cards would be mixed up, and the players were to pick out the card that was different.

Lester and the third man made bets and played a few rounds. They had Mr. Lynem pick out the card, and Lester would bet on whether he was correct. Lester lost the next few bets, and said that he was doubling the bet. The third man pulled out an envelope that had "\$4,000" written on it. He

told Mr. Lynem that he was a manager at the Walgreen's, and that this was the deposit he needed to put in the bank.

Mr. Lynem and the other man lost the next two bets. The man told him that they needed to double the bet and get the money back. He winked at Mr. Lynem and acted as if Lester was a "dummy," and didn't know what he was doing. He told Mr. Lynem to "bet whatever you have." Mr. Lynem pulled out his wallet, which contained about \$100. The man put the wallet and the envelope in a bag. The man shoved the bag under Mr. Lynem's leg. Lester continued to win, and the bag of money was handed over to him.

At this point, the third man told Mr. Lynem that they were going to have to get the Walgreen's deposit back. He asked Mr. Lynem to make a withdrawal from his own account at his bank. Mr. Lynem said he got nervous, and refused to withdraw any money. He told the man he was going back home, and that he would not go along with this. The man told him that he would talk to Lester and see what he could do. The man returned, saying that Lester would not go along with this plan. The man told Mr. Lynem "if you don't - - I am going to have to get rid of you and Mr. Lester." Mr. Lynem took this threat to mean that Lester was armed with a gun.

As a result of the threat, Mr. Lynem drove to his bank with the men. Mr. Lynem went inside and told the clerk he needed to withdraw money, but that he didn't have his savings account number. She used his social security number and allowed him to withdraw \$3,000. Mr. Lynem said he thought the men were watching him during the transaction.

When he came out of the bank, all three men returned to his car. Lester took Mr. Lynem's money and counted it. He said Lester put "all of that rolled up money" in a bag. They told him to open his trunk, and that they would put the bag of money inside. Mr. Lynem stayed seated in his car,

and popped the trunk from inside. He said he told the men he thought “you all are in cahoots here with this,” and that he thought it was a con game. He got out of the car and checked the trunk, but the two men had left. When Mr. Lynem looked, he found only a bag filled with rolled-up newspaper. He drove back to Walgreen’s and went inside looking for the man who had said he was a manager. He did not find the man.

Later that night, he told his wife what had happened. She convinced him to report it to the police. He was shown a photo array, and picked out Lester’s photograph. Lt. Bruce Plummer testified that he interviewed Mr. Lynem and showed him the photo array in which he identified Lester. He returned with Mr. Lynem to Walgreen’s to speak with the manager, who, clearly, was not the other man involved in the scam.

Lt. Plummer explained to the jury that “three-card Monte” is a sleight-of-hand card game in which the player who conducts the game secretly holds a fourth card. Typically, the game involves a player, a target (victim), and a “shill,” who is unknown to the target. The shill will come by and act as a disinterested party. The target bets on the game, and is purposely permitted to win a number of hands. After betting “a couple of hundred dollar hands,” the target is encouraged to bet double or nothing, or a large sum. At this point, the player uses the fourth card to cause the target to lose. After interviewing Mr. Lynem, Lt. Plummer concluded this was the scam being conducted.

Carlos Gray

The third victim, Carlos Gray, went through the drive-up window at the U.S. Bank on Eighth Avenue on October 24, 2006. He withdrew \$1,800, which he put in a briefcase. The briefcase was not shut, as Mr. Gray was planning on paying men who work for him in his remodeling business.

Lester approached the van and spoke in a broken Louisiana dialect. He told Mr. Gray that he was in town to pick up insurance money, and that he needed to find a woman who lived on Pea Green Street. When Mr. Gray said he had never heard of such a street, Lester asked him if he knew of a Kroger's downtown, where the woman worked. He said he was not looking for money, and showed Mr. Gray what appeared to be a large wad of cash. Mr. Gray admonished him for walking around with such a sum, and agreed to drive him to Kroger's. Not finding the store, they eventually parked the van. Lester told Mr. Gray that he had met people at the bus station who were trying to take advantage of him and trying to engage him in some sort of game. While having this discussion, a small man walked towards them down the street. Lester said to Mr. Gray, "Let's ask this guy to get an opinion . . ." Mr. Gray put his briefcase on the back seat of the van, and Lester moved to the back seat. Lester stopped the man and told him about the people who were trying to take advantage of him. He showed the man his roll of cash. Lester asked whether he should go back to the bus station and deal with the people he met earlier. The man advised Lester "I wouldn't do that if I were you." He said he was on his way to deposit cash from the restaurant he managed.

Mr. Gray said that this is where "it's a little convoluted." The man told him that he was going to make an example of Lester and show him how easy it was to lose his money. He took out all of his deposit money and put it in a bag. He asked Mr. Gray to put his money in a bag. Mr. Gray gave him \$100 from his wallet. The man said "let's do this, winner takes all. If we can do this, it will show him, teach him a lesson." Mr. Gray said he agreed. The men played a card game called "three-card Molly." Mr. Gray lost. He told the men "wait a minute; I don't think that I like what is going on here, guys." He asked to see the bag of money. Mr. Gray grabbed the bag and tried to grab the man. He managed to get his \$100 back, but Lester took the money from Mr. Gray's briefcase and

ran. Mr. Gray chased him until Lester pulled out a knife and threatened to cut him. Mr. Gray tried to dial 911 on his cell phone, but Lester knocked it out of his hand. A car came around the corner and Lester jumped in the back seat. Mr. Gray saw that the license plates were from Shelby County, Tennessee, where he had relatives. He gave this information with a description of the car to the police. When arrested later, Lester denied being in Mr. Gray's van. He said he had no reason to get into someone's van. Cash and a knife were recovered with Lester in the car.

ARGUMENT

PROPOSITION OF LAW: There is no distinction, for the purpose of assigning a mens rea element, between the acts of possessing or controlling a deadly weapon during a theft and brandishing, displaying, using or indicating possession of a deadly weapon during a theft.

The reversal of Lester’s conviction for aggravated robbery ignores this Court’s analysis of the legislative intent to impose strict liability for robbery under R.C. 2911.02(A)(1) in *State v. Wharf*. As no proof is necessary of the mens rea for the “deadly weapon” element of R.C. 2911.02(A)(1), it should not be required for the “deadly weapon” element of RC. 2911.01(A)(1).

Lester was convicted of aggravated robbery and robbery, the latter of which was merged at sentencing. The First District Court of Appeals ruled that because *State v. Colon* held that a robbery indictment must contain the element of “recklessness,” the same applies to an aggravated robbery indictment.¹¹ Apparently, the difference in the statutes involved, i.e., R.C. 2911.02(A)(2) in *Colon* and R.C. 2911.01.(A)(1) in the case sub judice, was not germane to the appellate court’s reasoning.¹² The decision in *Lester* is in direct conflict with the Ohio Supreme Court’s analysis in *State v. Wharf* and only perpetuates the confusion caused by *Colon* I.¹³ This court’s July 31, 2008 clarification after

¹¹ *State v. Colon*, 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-Ohio-1624.

¹² R.C. 2911.02(A)(2): “No person, in * * * committing a theft offense * * * shall (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another.”

R.C. 2911.01(A)(1): “No person, in * * * committing a theft offense * * * shall (1) Have a dangerous 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.”

¹³ *State v. Wharf*, 86 Ohio St.3d 375, 715 N.E.2d 172, 1999-Ohio-112.

a Motion for Reconsideration in *Colon II* left this issue unresolved, and the result is confusion about the law and conflict between the appellate districts.¹⁴

In *State v. Colon*, this Court reviewed an indictment for robbery under R.C. 2911.02(A)(2). It stated that the failure to include a mens rea element for the act of “[i]nfllicting, attempt[ing] to inflict, or threaten[ing] to inflict physical harm” constituted a defect. The court also ruled that the applicable mens rea for this crime was recklessness.¹⁵

In *State v. Wharf*, the court reviewed an indictment for robbery under R.C. 2911.02(A)(1). It concluded that there was no specific mens rea for the act of having “a deadly weapon on or about the offender’s person or under the offender’s control.”¹⁶ The court stated:

“Our reading of the statute leads us to conclude that the General Assembly intended that a theft offense, committed while an offender was in possession or control of a deadly weapon, is robbery and no intent beyond that required for the theft offense must be proven.”¹⁷

This case overruled all appellate court cases that held that the mens rea of recklessness applied to this crime. The court relied heavily upon the fact that a theft was elevated to the more severe crime of robbery due to the presence of a deadly weapon. The court stated that “the severity of appellant’s unlawful actions and the risk of harm quickly escalated due, in large measure, to a deadly weapon being readily accessible to appellant.”¹⁸

¹⁴ See *State v. Peterson*, 8th Dist. No. 90263, 2008-Ohio-4239; *State v. Ferguson*, 10th Dist. No. 07-AP-640, 2008-Ohio-3827.

¹⁵ *State v. Colon*, 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-Ohio-1624, ¶14.

¹⁶ *Wharf* at 377, 174.

¹⁷ *Id.* at 377, 174.

¹⁸ *Id.* at 380, 176.

In the case sub judice, the appellant was convicted of aggravated robbery under R.C. 2911.01(A)(1). A robbery under the (A)(1) subsection is elevated to an aggravated robbery when the offender, while in possession of a deadly weapon, displays, brandishes, uses or indicates that he possesses it. The same reasoning from *Wharf* applies to the aggravated robbery statute.

The *Wharf* case cites from *State v. Edwards*, a Montgomery County appellate decision. In *Edwards*, the court discussed the legislative intent behind the elevation of a theft to a robbery when a weapon is introduced into the factual scenario. The court stated:

“The thrust and philosophy of [Am.Sub.] H.B. [No.] 511 is to remove the potential for harm that exists while one is committing a theft offense. The anti-social act is the theft offense, committed while armed with a weapon. Merely *having* the weapon is the potentially dangerous factual condition warranting the more severe penalty.”

The same philosophy exists within the aggravated robbery statute - to remove the potential for harm that exists while one is committing a robbery. The crime is elevated beyond that involving mere possession of a weapon when the weapon is displayed, brandished, used or indicated that it is present during the theft.

As it has been decided that the act of possessing the weapon is a strict liability offense, the act of displaying or indicating its presence should be likewise. The *Wharf* court found that the legislature’s distinction between the crime of theft and the same crime while in possession of a weapon evidenced an intent for strict liability rather than a mens rea of recklessness. Two other appellate districts, along with the Ohio Jury Instruction Committee, have applied the *Wharf* analysis to hold that aggravated robbery under the (A)(1) subsection are strict liability offenses.

In *State v. Peterson*, the Eighth District Court of Appeals held that “Unlike the physical harm element, ‘[t]he deadly weapon element of R.C. 2911.02(A)(1), to wit, [h]ave a deadly weapon on

or about the offender's person or under the offender's control[,] does not require the *mens rea* of recklessness.’ ”¹⁹ The court noted that the deadly weapon element of aggravated murder is analogous, and also does not require proof of a specific mens rea element. It then concluded that the indictment for aggravated robbery under R.C. 2911.01(A)(1), which did not contain a mens rea element other than that for theft, was sufficient.

In *State v. Ferguson*, the Tenth District held that the *Colon* case does not apply to the crime of aggravated robbery under R.C. 2911.01(A)(1), the same statute under which Lester was convicted.²⁰ The decision cited to *State v. Wharf* for the proposition that robbery, i.e., a theft or attempted theft while in possession or control of a deadly weapon, is a strict liability offense. The court noted that “[a]rguably, there is dicta in *Wharf*” that distinguished between possession or control of a deadly weapon and brandishing, displaying, using or indicating possession of a deadly weapon. The dicta was inconsequential.

The Tenth District noted that *Wharf* has been held applicable to aggravated robbery under R.C. 2911.01(A)(1) in *State v. Kimball*, a Seventh District case, and by the Ohio Jury Instructions Committee that revised the instructions to comply with *Colon*. While the committee found that the mens rea of “recklessly” applied when an offender inflicts or attempts to inflict physical harm during a theft offense, it did not add a mens rea element to the instructions for aggravated robbery under the (A)(1) subsection. The *Ferguson* court explained:

“As part of the Comment to the revised instruction for aggravated robbery, the Committee cited *Wharf*, supra, for the proposition that it is unnecessary ‘to prove ‘recklessness’ or any specific mental state with regard to the deadly weapon element

¹⁹ *State v. Peterson*, 8th Dist. No. 90263, 2008-Ohio-4239, ¶15.

²⁰ *State v. Ferguson*, 10th Dist. No. 07-AP-640, 2008-Ohio-3827.

of the offense of robbery.’ The Committee further noted it “believes this decision [*Wharf*] applies by analogy to R.C. 2911 .01(A)(1).”²¹

Further Implications of the Application of Colon I and II

The introductory conduct described in many Ohio criminal statutes does not contain a mens rea element, and is clearly intended to be strict liability.²² For example, “have a deadly weapon” in Aggravated Robbery and Robbery; “force, stealth or deception” in Aggravated Burglary or Burglary; “force, threat or deception” in Kidnapping, are clearly intended as strict liability elements.²³

Colon I, however, still appears to require a culpable mental state for these elements. This is wrong, and was not addressed or corrected in *Colon II*. The First District failed to grasp this notion, while the Eighth District and the Twelfth District identified the problem and applied the analysis the state urges here.²⁴

The result is that the law in Ohio is not uniform on this issue and as such, needs to be corrected by this Court.

²¹ *Id. at ¶* .

²² R.C. 2901.21(B)

²³ See *State v. Wharf*, 86 Ohio St.3d 375, 715 N.E.2d 172, 1999-Ohio-112.

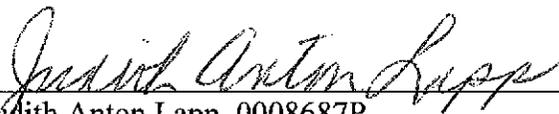
²⁴ *State v. Peterson*, 8th Dist. No. 90263, 2008-Ohio-4239; *State v. Ferguson*, 10th Dist. No. 07-AP-640, 2008-Ohio-3827.

CONCLUSION

The First District Court of Appeals failed to apply the law enunciated in *State v. Wharf* in the case below. This decision, which purported to apply the holdings of *Colon I*, is in conflict with the decisions of other appellate courts that are also analyzing *Colon I*, as well as *Colon II*. Further error will be perpetuated if this situation is allowed to persist. For this reason, the state urges this Court to entertain jurisdiction and accept this case for review.

Respectfully,

Joseph T. Deters, 0012084P
Prosecuting Attorney

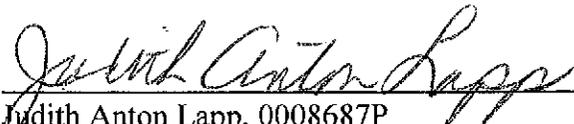


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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Support of Jurisdiction, by United States mail, addressed to Christine Y. Jones, 114 East 8th Street, Suite 400, Cincinnati, Ohio 45202, counsel of record, this 26th day of August, 2008.



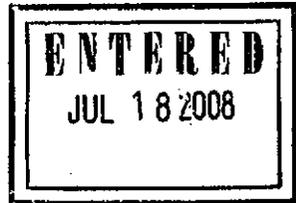
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APPENDIX

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**



STATE OF OHIO, : APPEAL NO. C-070383 ✓
Plaintiff-Appellee, : TRIAL NOS. B-0609954
 : B-0610741
vs. : JUDGMENT ENTRY.
JAMES LESTER, :
Defendant-Appellant. :



This cause was heard upon the appeal, the record, the briefs, and arguments.

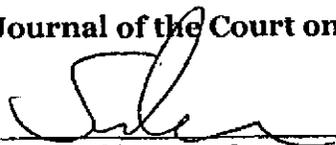
The judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on July 18, 2008 per Order of the Court.

By: 
Presiding Judge

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-070383
	:	TRIAL NOS. B-0609954
Plaintiff-Appellee,	:	B-0610741
vs.	:	<i>DECISION.</i>
	:	PRESENTED TO THE CLERK
JAMES LESTER,	:	OF COURTS FOR FILING
	:	
Defendant-Appellant.	:	JUL 18 2008
		COURT OF APPEALS

Criminal Appeal From: Hamilton County Common Pleas Court

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: July 18, 2008

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Christine Y. Jones, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

MARK P. PAINTER, Judge.

{¶1} In separate indictments, defendant-appellant James Lester was charged with two counts of theft from the elderly,¹ robbery,² and aggravated robbery.³ Lester's case was tried to a jury, and he was found guilty and convicted of theft from the elderly and aggravated robbery. The trial court sentenced Lester to seven years on the aggravated-robbery conviction and to 18 months on each theft conviction. The terms were to be served consecutively for a total of ten years' incarceration.⁴

{¶2} After oral arguments in this case had been heard, the Ohio Supreme Court decided *State v. Colon*,⁴ which announced a new constitutional norm for grand-jury indictments in Ohio. *Colon* held that it is structural error to omit an essential mens rea element from an aggravated robbery or robbery indictment.⁵ We sua sponte granted leave for Lester to file a supplemental brief addressing issues raised by *Colon*. In light of *Colon*, we reverse Lester's conviction for aggravated robbery, but affirm his two convictions for theft from the elderly.

{¶3} Lester had duped several "marks" into playing three-card monte—a "game" in which often an outside man pretends to conspire with the mark to cheat the inside man, while in fact conspiring with the inside man to cheat the mark. Generally, the game is played with three cards that are placed face down on a table or box. The dealer shows the target card, for example the ace of spades, then rearranges the cards quickly in attempting to confuse the player (or mark) about

¹ R.C. 2913.02(A)(3).

² R.C. 2911.02(A)(2).

³ R.C. 2911.01(A)(1).

⁴ 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

⁵ *Id.* at ¶24.

which card is which. The mark then selects the card that is believed to be the ace of spades; if the mark is correct, they win; otherwise they lose. Misdirection and sleight of hand ensure that the mark never wins. And to that end, as Lt. Bruce Plummer testified at trial, the dealer often secretly holds a fourth card. The accomplice will walk by the game and pretend to be a disinterested party. The mark bets on the game and is usually allowed to win a number of hands. After betting several hundred dollars, the mark is encouraged to bet a larger sum. Then the dealer uses the fourth card, causing the mark to lose.

{¶4} We now recite the facts more fully, identifying the victims of Lester's scams as Marks One, Two, and Three.

1. Mark One

{¶5} In mid-April 2006, Mark One withdrew \$1,000 from the bank to tide him over till May. After withdrawing the money, Mark One went to an IGA grocery store, where he was approached by Lester. Lester asked Mark One the location of a certain Kroger store and for a ride. Mark One agreed. Lester and Mark One were soon joined by another man ("the accomplice"), who had identified himself as a Kroger employee. Later Lester and the accomplice asked Mark One to play three-card monte. The accomplice then flashed a roll of cash indicating his readiness and ability to play for money. Mark One and the accomplice played a few nominal games, and then Lester asked to count Mark One's and the accomplice's money. The accomplice's money was purportedly contained in a brown paper bag. For whatever reason, Mark One handed Lester the \$1000 withdrawal, and Lester then commingled Mark One's \$1,000 withdrawal into the brown paper bag that purportedly contained the accomplice's money.

{¶6} While Lester held the bag containing Mark One's and the accomplice's money, the two continued the game. Eventually, the men told Mark One that they had to meet a woman but that the bag of cash would be stashed in Mark One's trunk in the interim. Mark One dropped the men off, gave the men the watch from his wrist to ensure that they knew when to regroup, and was to pick them up in an hour to resume their game.

{¶7} Mark One returned home, checked the trunk of his car, and discovered that the bag in the trunk with the stash of cash was actually trash. He returned to the agreed meeting place, but the men were nowhere to be seen. Police later found Lester's fingerprints on Mark One's car. Defense counsel stipulated that the fingerprints were Lester's.

II. Mark Two

{¶8} On October 24, 2006, Lester approached Mark Two outside a U.S. Bank branch in Cincinnati. Mark Two had just withdrawn \$1,800, placing the money in a briefcase, when Lester approached him and asked where "Pea Green Street" was located. Mark Two testified that Lester had said that he needed to find a woman who lived on "Pea Green Street." Mark Two replied that he had never heard of "Pea Green Street," but that he would give Lester a ride to the woman's workplace. At some point, Lester showed Mark Two what appeared to be a large sum of money that had been tightly wadded. Mark Two then advised Lester that carrying such a large amount of cash was foolish. After failing to find the woman for whom they had been searching, Mark Two parked his vehicle, and Lester began telling the mark that he had been engaged by bus-station patrons to play some sort of scam game.

{¶9} An unidentified man began walking towards the vehicle, when Lester suggested that they solicit the man's advice on the scam. To make room, Lester

moved to the rear passenger side of the vehicle, and Mark Two moved the briefcase containing the cash to the rear driver's side of the vehicle (opposite Lester). The accomplice had indicated that he was a restaurant manager and that he had been on his way to the bank to make a deposit. Lester told the man about the scam game, and the unidentified man ("the accomplice") advised Lester that the inanity of returning to the bus stop to play the game was obvious. Then the accomplice laid out what was purported to be an altruistic plan to teach Lester a lesson and beseeched Mark Two to play along. The moral of Lester's lesson would be the ease at which a fleecable dullard could be relieved of his bankroll. The vehicle used to teach the lesson would be a winner-take-all game of three-card monte.

{¶10} In preparation for the game, the accomplice placed what was asserted to be the deposit in a bag; he asked Mark Two if he had any money to contribute to "the lesson," and Mark Two agreed to place \$100 in the bag. They played, and unsurprisingly Mark Two lost his \$100. Sensing Lester and the accomplice's chicanery, Mark Two retorted, "Wait a minute; I don't like what is going on here guys," and then asked to see the bag of money. The accomplice's bag was empty! Mark Two then snatched Lester's bag, retrieving his \$100 in the process. This was a small victory indeed, because Lester had already taken the \$1800 from the briefcase and, despite Mark Two's best effort to subdue Lester, had begun to flee.

{¶11} Mark Two pursued Lester, but the chase ended when Lester threatened Mark Two with a knife. Mark Two then attempted to dial 911 on his cellular phone, but Lester swatted the phone out of his hand before he could call. A car then careened around the corner, and Lester leaped into the back seat. Mark Two later called the police and described the getaway vehicle as a gold car that had been licensed in Shelby County, Tennessee. Based on Mark Two's description, arresting officer Craig Kunz stopped a gold

vehicle that had been licensed in Shelby County, Tennessee. Lester was taken to the police station, where an inventory of his vehicle yielded a pocketknife and a \$100 bill.

III. Mark Three

{¶12} On that same day in October 2006, Mark Three was mowing his lawn when Lester approached him and asked the location of "Pea Street" or "Pea Zone Street." Mark Three did not know. Lester then asked where the First Baptist Church was located and then offered \$20 for a ride to the church. Lester flashed a roll of cash that was encircled by a \$20 bill and stated that he needed to go to the church to meet with a woman concerning an apartment rental. On arrival, no woman, or apartments, or others awaited. Lester then asked that they ride to the Walgreens in Pleasant Ridge, Ohio. Mark Three agreed and on arrival Lester exited from the vehicle.

{¶13} Lester returned with a man who professed to be a minister, and Lester recommended that they help the minister out. The unidentified minister (who we now refer to as "the accomplice") sat in the passenger seat, and Lester sat in the rear. On entering the vehicle, the accomplice suggested that the three men play three-card monte. Mark Three testified that, in this game, one card was different than the other two and that the object of the game was to pick out the different card.

{¶14} So Mark Three picked the card that he thought was different, and Lester and the accomplice bet on whether he would be correct. After losing several hands, Lester evidently decided that he was not betting enough because he then doubled down. The accomplice then produced from his jacket an envelope emblazoned on its face with a handwritten "\$4,000." The accomplice indicated that the envelope's contents had belonged to Walgreens and that they had been earmarked for deposit. The accomplice wagered the \$4,000 envelope and lost to Lester. The accomplice then turned to Mark Three and with a wink of the eye said,

"We need to get this money back." Mark Three testified that the wink suggested that Lester was a "dummy" who did not know what he was doing. The accomplice then implored Mark Three to bet on the next hand. Mark Three produced his wallet containing about \$100, and the accomplice placed the wallet and the envelope into a brown bag. The brown bag was then purportedly placed underneath Mark Three's seat. Because Lester continued to win, the accomplice transferred possession of the bag from Mark Three to Lester.

{¶15} The accomplice then declared that he and Mark Three would have to win the money back or else he would lose his job; he then asked if Mark Three would withdraw money from his own account. Mark Three originally agreed but quickly reneged when he and the accomplice reached the bank. So they drove back to Walgreens to find Lester, and while en route the accomplice said that he would attempt to work out a deal with Lester. But no deal could be made. The accomplice again reiterated that the money had to be won back, or he might have to "get rid of" both Mark Three and Lester. Mark Three testified that the threat impliedly meant that the accomplice was armed with a firearm.

{¶16} The threat worked. Mark Three withdrew \$3,000 and then returned to his vehicle. Lester then counted the \$3,000 and placed it in a paper bag. Lester and the accomplice then directed Mark Three to open his trunk so that they could stash the bag of cash; he did, as did they—or so he thought.

{¶17} Mark Three later indicated his belief that the men had collaborated in defrauding him. As Mark Three exited from his vehicle to check on the cash, Lester and the accomplice had already begun to walk away. They vanished. A check of the trunk revealed, once again, that the stash of cash was actually trash. And the accomplice was no manager of Walgreens.

{¶18} This string of events earned Lester two separate indictments. One indictment charged two counts of theft from the elderly for his swindling of Marks One and Three. The other charged robbery and aggravated robbery for his run-in with Mark Two. The trial court consolidated the cases, and a jury found Lester guilty of aggravated robbery and theft from the elderly.

IV. Assignments of Error

{¶19} Lester's original appeal argued that his convictions were against the sufficiency and weight of the evidence, and that the trial court erred in (1) consolidating the cases (arguing also that trial counsel failed to object to the joinder); (2) overruling his continuance and new-counsel motions; (3) refusing to give a jury instruction on a lesser-included offense; (4) admitting the knife found in Lester's car as evidence; (5) allowing a juror to remain on the panel; and (6) imposing sentences contrary to law. We granted Lester leave to file a supplemental brief, and he has added one more argument: that his aggravated-robbery conviction was tainted by structural error. We reverse Lester's aggravated-robbery conviction, but affirm Lester's two theft-from-the-elderly convictions.

V. Structural Error

{¶20} Because the aggravated-robbery indictment omitted the essential mens rea element for the offense, Lester argues that his conviction was plagued by structural error. According to the Ohio Supreme Court, he's right. Structural errors mark an exception to the rule; the rule is that most errors, even constitutional errors, are reviewed for harmlessness.⁶ But structural errors are categorically prejudicial—they always call for a new trial.⁷ And structural errors are not waived by the

⁶ *State v. Hill* (2001), 92 Ohio St.3d 191, 197, 749 N.E.2d 643; see, also *Rose v. Clark* (1986), 478 U.S. 570, 579 106 S.Ct. 3101.

⁷ *State v. Fischer*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222.

defendant's acquiescence at trial—they can be raised for the first time on appeal. Few errors have been found deserving of this stern treatment.⁸ But the Ohio Supreme Court identified a new one in April.⁹

¶21 It is structural error when an indictment omits an essential mens rea element.¹⁰ Ohio's high court so held in *State v. Colon*. Colon was charged and convicted of robbery. But his indictment, tracking the statutory language, omitted the mens rea element, which, because of the omission, was recklessness as implied by law.¹¹ Both parties agreed that the indictment was defective. The issue was whether Colon had waived appellate review by not objecting at, or before, trial. The court first noted that the Ohio Constitution guarantees grand-jury indictments for serious offenses.¹² The court added that the indictment's defect produced other serious errors: It failed to properly notify Colon of the charged crime; it led to defective jury instructions; and it permitted the state to imply that the crime was a strict-liability offense. (In this case, the trial court correctly instructed the jury on what would have been the proper mens rea element, i.e., knowingly, had that element not been omitted in the indictment. But under *Colon* this was without consequence because at inception the defective indictment tainted the entire process.) The court concluded that whenever an essential mens rea element is omitted from an indictment, the omission not only deprives criminal defendants of a constitutional right but also undermines the entire trial process.¹³ In short, the omission is structural error. Thus, Colon had not waived the issue by failing to object in the trial court.

⁸ *Johnson v. United States* (1997), 520 U.S. 461, 468-469, 117 S.Ct. 1544.

⁹ See *Colon*, supra.

¹⁰ *Id.* at ¶19.

¹¹ R.C. 2901.21(B).

¹² *Colon*, supra at ¶17, citing Section 10, Article I, Ohio Constitution.

¹³ *Id.* at ¶32.

{¶22} The state argues that we should ignore *Colon* and follow *State v. Wamsley*, *State v. Adams*, and *State v. O'Brien*;¹⁴ and that *Colon* renders Crim.R. 7(D), Crim.R. 12(C), and R.C. 2941.29 meaningless. But we are an intermediate appellate court, bound to follow Ohio Supreme Court precedent.

{¶23} Thus Lester was entitled to an indictment charging every essential element, but the indictment charging Lester with aggravated robbery omitted the mens rea element for the offense. *Colon* is directly on point. The Ohio Supreme Court has told us that this kind error is never harmless. Even though Lester did not raise this issue below, we still must reverse.

{¶24} Our decision to reverse Lester's aggravated robbery conviction moots all other assignments of error relating to those charges. We review the remaining assignments of error only as they relate to the two remaining convictions for theft from the elderly.

VI. Prejudicial Joinder

{¶25} Lester argues that the trial court erred in consolidating the cases into a single trial, and that his trial counsel was ineffective in failing to object to the consolidation. Lester concedes that the joinder was not objected to at trial.

{¶26} Generally, if the charged offenses are of the same or similar character, are based on two or more transactions connected together, or are parts of a common scheme or course of criminal conduct, then the offenses can be joined into the same

¹⁴ 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45; (1980), 62 Ohio St.2d 151, 404 N.E.2d 144; (1987), 30 Ohio St.3d 122, 508 N.E.2d 144.

indictment and trial.¹⁵ Joinder of charges is preferred because it facilitates judicial economy, consistent results, and witness convenience.¹⁶

{¶27} We are convinced that joinder was proper in this case; consequently, in this respect counsel's assistance at trial cannot be considered ineffective. The state showed that Lester and an accomplice had carried out a common scheme and course of criminal conduct. Specifically, the mode of operation, on more than one occasion, had been to lurk outside a bank, to approach elderly citizens who had just made sizable withdrawals, and then, along with the accomplice, to trick the marks into playing three-card monte. The same trickery had been perpetrated against three different victims. In California, three-card monte is specifically prohibited by statute.¹⁷ Joinder was proper, and counsel was effective.

{¶28} Lester also argues that his convictions were not supported by the weight and sufficiency of the evidence. Not so. The jury heard testimony from all three marks. They each testified that Lester and an accomplice had conned them, employing various derivations of three-card monte. All three marks felt that they had been helping a person in need, but only one questioned Lester's intention—Mark Two testified that when he confronted Lester, Lester had threatened him with a knife.

{¶29} Lester's defense had been that he was a good gambler, and that he had won the money from the three marks fair and square. But the evidence corroborated each of the marks' trial testimony. It was a jury question; the jury disbelieved Lester.

{¶30} We conclude that the evidence was sufficient to sustain Lester's convictions, and that the jury did not lose its way in concluding that Lester was guilty.

¹⁵ See *Crim.R. 8(A)*; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476.

¹⁶ See *State v. Webster*, 1st Dist. Nos. C-070027 and C-070028, 2008-Ohio-1636, at ¶31, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293; *State v. Brotherton*, 1st Dist. Nos. C-050121 and C-050122, 2006-Ohio-1747, at ¶17, citing *State v. Thomas* (1980), 61 Ohio St.2d 223, 225, 400 N.E.2d 401.

¹⁷ Cal. Penal Code 332; see, also, *People v. Frigerio* (1895), 107 Cal. 151, 40 P. 107.

VII. Motions for Continuance and New Counsel

{¶31} Lester next argues that the trial court erred in denying his continuance and new-counsel motions. Around mid-day on the day of trial, Lester requested a continuance based on an alleged “communication breakdown” with defense counsel. Lester’s basis for the continuance and new-trial motions had been that defense counsel had “cursed at him” and had used the word “dammit.”

{¶32} An indigent defendant’s Sixth Amendment right to counsel extends to competent counsel, but it does not guarantee a “meaningful” (whatever that means) attorney-client relationship. Even if we were to assume that Lester’s counsel had used the language cited by Lester, that fact could not have sustained his motions. A defendant is not entitled to a meaningful relationship with his or her attorney, and a discharge is warranted only when the communication breakdown impinges on the defendant’s right to effective assistance of counsel.¹⁸

{¶33} On the day of trial, Lester’s counsel stated that he was prepared for trial and for cross-examination of the state’s witnesses. We are convinced that an accused’s attorney’s use of swear words alone does not deprive the accused of effective assistance of counsel. We hold that the trial court did not err in denying Lester’s motions.

VIII. Lester’s Final Assignments of Error

{¶34} Lester last argues that the trial court erred in its sentence and by allowing a juror who had worked with one of the marks to remain on the panel.

{¶35} After listening to Mark Two’s testimony, a juror informed the court that she and Mark Two had worked at the same company about ten years earlier. The court examined the juror and learned that Mark Two had worked for the

¹⁸ See *Morris v. Slappy* (1983), 461 U.S. 1, 103 S.Ct. 1610.

company part-time, for only a short period, and that the juror had very little interaction with Mark Two. The juror concluded that she could remain fair and impartial and that her association with Mark Two would not affect her consideration of the case. The court allowed the juror to remain on the panel.

{¶36} A trial court has discretion to determine whether a juror can be impartial, and on review, its determination will not be disturbed absent an abuse of discretion.¹⁹ The decision to grant or deny a mistrial is likewise reviewed under an abuse-of-discretion standard. Our review of the record fails to reveal any abuse of discretion. The record reveals but a tenuous relationship between the juror and Mark Two. The assignment of error is overruled.

{¶37} Likewise, we summarily overrule Lester's final assignment of error, that the sentence was excessive. The sentence was within the appropriate statutory range. Lester's original assignments of error still lack merit, and we thus affirm the trial court's judgment regarding the two charges of theft from the elderly, but under *Colon* we reverse his conviction for aggravated robbery, and remand the cause for further proceedings consistent with the law and this decision.

Judgment affirmed in part and reversed in part, and cause remanded.

SUNDERMANN, P.J., and DINKELACKER, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

¹⁹ *State v. Thompson*, 4th Dist. No. 06CA28, 2007-Ohio-5419.