

ORIGINAL

IN THE SUPREME COURT OF OHIO
2010

STATE OF OHIO,

Case No. 09-311

Plaintiff-Appellee,

-vs-

On Certified Conflict from
Lucas County Court of Appeals
Sixth Appellate District

GREGORY HORNER,

Court of Appeals
Case No. L-07-1224

Defendant-Appellant.

**BRIEF OF AMICUS CURIAE
FRANKLIN COUNTY PROSECUTOR RON O'BRIEN
IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO**

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
STEVEN L. TAYLOR 0043876
(Counsel of Record)
Assistant Prosecuting Attorney
373 South High Street - 13th Floor
Columbus, Ohio 43215
Phone: 614-462-3555
Fax: 614-462-6103
E-mail:
sltaylor@franklincountyohio.gov
Counsel for Amicus Curiae Franklin
County Prosecutor Ron O'Brien

JULIA R. BATES 0013426
Lucas County Prosecuting Attorney
DAVID F. COOPER 0006176
(Counsel of Record)
Assistant Prosecuting Attorney
700 Adams Street, 2nd Floor
Toledo, Ohio 43604
Phone: 419-213-4700
Fax: 419-213-4595
Counsel for Plaintiff-Appellee

JOHN F. POTTS 0033846
405 Madison Avenue, Ste. 1010
Toledo, Ohio 43604
Phone: 419-255-2800
Fax: 419-255-1105
Counsel for Defendant-Appellant

TIMOTHY YOUNG 0059200
Ohio Public Defender
SPENCER CAHOON 0082517
(Counsel of Record)
Assistant State Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Phone: 614-466-5394
Fax: 614-752-5167
E-mail: spencer.cahoon@opd.ohio.gov
Counsel for Amicus Curiae Ohio Public
Defender

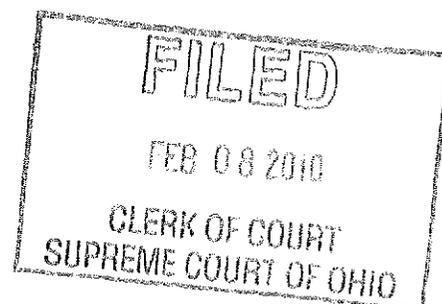


TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF AMICUS INTEREST	1
STATEMENT OF FACTS	1
ARGUMENT	2
<u>First Proposition of Law</u> : R.C. 2901.21(B) imports “reckless” into an offense only when the “section defining an offense” fails to specify any degree of culpability. R.C. 2901.21(B) therefore calls for a section-wide assessment in determining whether reckless will apply. If any part of the section includes a degree of culpability as to the same offense or as to another offense defined in the same section, then, as a matter of law, reckless will not be imported into any offense defined in that section. (<i>State v. Wac</i> (1981), 68 Ohio St.2d 84, and <i>State v. Maxwell</i> (2002), 95 Ohio St.3d 254, 2002-Ohio-2121, followed).....	2
<u>Second Proposition of Law</u> : Under R.C. 2901.21(B), the result of importing recklessness must be that “recklessness is sufficient culpability to commit the offense.” If another part of the offense already requires a degree of culpability greater than recklessness, then R.C. 2901.21(B) is inoperative, as recklessness would never be “sufficient” culpability for the offense.....	2
CONCLUSION.....	26
CERTIFICATE OF SERVICE	27
APPENDIX	
R.C. 2901.21	A-1
R.C. 2911.01	A-2

TABLE OF AUTHORITIES

CASES

<i>B.F. Goodrich v. Peck</i> (1954), 161 Ohio St. 202.....	12
<i>Columbus v. Bonner</i> (1981), 10 th Dist. No. 81AP-161	23
<i>Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.</i> (1969), 20 Ohio St.2d 125 ..	5
<i>State ex rel. Moorehead v. Indus. Comm.</i> , 112 Ohio St.3d 27, 2006-Ohio-6364.....	6
<i>State v. Buehner</i> , 110 Ohio St.3d 403, 2006-Ohio-4707	14
<i>State v. Clay</i> , 120 Ohio St.3d 528, 2008-Ohio-6325	passim
<i>State v. Colon</i> , 118 Ohio St.3d 26, 2008-Ohio-1624	passim
<i>State v. Colon</i> , 119 Ohio St.3d 204, 2008-Ohio-3749	2
<i>State v. Davis</i> , 119 Ohio St.3d 113, 2008-Ohio-3879	13
<i>State v. Evans</i> , 122 Ohio St.3d 381, 2009-Ohio-2974	11
<i>State v. Fairbanks</i> , 117 Ohio St.3d 543, 2008-Ohio-1470	passim
<i>State v. Harris</i> (1979), 58 Ohio St.2d 257	11
<i>State v. Huffman</i> (1936), 131 Ohio St. 27.....	5
<i>State v. Hustead</i> (1992), 83 Ohio App.3d 809	23
<i>State v. Jordan</i> (2000), 89 Ohio St.3d 488	21
<i>State v. Landrum</i> (1990), 53 Ohio St.3d 107	14
<i>State v. Lester</i> , 123 Ohio St.3d 396, 2009-Ohio-4225.....	passim
<i>State v. Lowe</i> , 112 Ohio St.3d 507, 2007-Ohio-606	6
<i>State v. Lozier</i> , 101 Ohio St.3d 161, 2004-Ohio-732.....	passim
<i>State v. Maxwell</i> (2002), 95 Ohio St.3d 254, 2002-Ohio-2121	passim
<i>State v. Miller</i> , 96 Ohio St.3d 384, 2002-Ohio-4931	14

<i>State v. Miniffee</i> , 8 th Dist. No. 91017, 2009-Ohio-3089	14
<i>State v. Murphy</i> (1992), 65 Ohio St.3d 554	15
<i>State v. Parrish</i> (1984), 12 Ohio St.3d 123.....	19
<i>State v. Payne</i> , 114 Ohio St.3d 502, 2007-Ohio-4642.....	13
<i>State v. Porterfield</i> , 106 Ohio St.3d 5, 2005-Ohio-3095	8
<i>State v. Roe</i> (1989), 41 Ohio St.3d 18.....	15
<i>State v. Salaam</i> , 1 st Dist. No. C-070385, 2008-Ohio-4982.....	14
<i>State v. Schaeffer</i> (1917), 96 Ohio St. 215.....	15
<i>State v. Schlosser</i> (1997), 79 Ohio St.3d 329.....	5, 12
<i>State v. Skatzes</i> , 104 Ohio St.3d 195, 2004 Ohio 6391	14
<i>State v. Smith</i> , 117 Ohio St.3d 447, 2008-Ohio-1260.....	10
<i>State v. Smith</i> , 121 Ohio St.3d 409, 2009-Ohio-787.....	11, 13
<i>State v. Wac</i> (1981), 68 Ohio St.2d 84.....	passim
<i>State v. Wharf</i> (1999), 86 Ohio St.3d 375.....	11, 15
<i>United States v. Bailey</i> (1980), 444 U.S. 394	10
<i>Westfield Ins. Co. v. Galatis</i> , 100 Ohio St.3d 216, 2003-Ohio-5849.....	4, 24, 26

STATUTES

R.C. 2901.01(A)(3)	23
R.C. 2901.21(A).....	8
R.C. 2901.21(A)(2).....	19
R.C. 2901.21(B).....	passim
R.C. 2901.21(D).....	8

R.C. 2907.321(A)(6).....	7
R.C. 2911.01(A)(1).....	15
R.C. 2911.01(A)(3).....	passim
R.C. 2911.01(B).....	9
R.C. 2911.02(A)(2).....	2, 12
R.C. 2913.02.....	10
R.C. 2913.02(A).....	10
R.C. 2925.01(P).....	17
R.C. 2925.03(A).....	17

OTHER AUTHORITIES

Am.Sub.H.B. 163 of the 125th General Assembly.....	17
Black’s Law Dictionary (8 th Ed. 2004), at 400.....	10

STATEMENT OF AMICUS INTEREST

The Office of the Franklin County Prosecutor prosecutes a large number of aggravated robbery cases every year, including the form of aggravated robbery involving the infliction or attempted infliction of serious physical harm under R.C. 2911.01(A)(3). Current Franklin County Prosecutor Ron O'Brien therefore has a strong interest in whether the mens rea of "reckless" applies to such offenses. In the interest of aiding this Court's review of the present appeal, Franklin County Prosecutor Ron O'Brien therefore offers the following amicus brief in support of the State of Ohio.

STATEMENT OF FACTS

Amicus Franklin County Prosecutor Ron O'Brien adopts by reference the procedural and factual history of the case as set forth in plaintiff-appellee State of Ohio's merit brief.

ARGUMENT

First Proposition of Law: R.C. 2901.21(B) imports “reckless” into an offense only when the “section defining an offense” fails to specify any degree of culpability. R.C. 2901.21(B) therefore calls for a section-wide assessment in determining whether reckless will apply. If any part of the section includes a degree of culpability as to the same offense or as to another offense defined in the same section, then, as a matter of law, reckless will not be imported into any offense defined in that section. (*State v. Wac* (1981), 68 Ohio St.2d 84, and *State v. Maxwell* (2002), 95 Ohio St.3d 254, 2002-Ohio-2121, followed)

Second Proposition of Law: Under R.C. 2901.21(B), the result of importing recklessness must be that “recklessness is sufficient culpability to commit the offense.” If another part of the offense already requires a degree of culpability greater than recklessness, then R.C. 2901.21(B) is inoperative, as recklessness would never be “sufficient” culpability for the offense.

Certified Question: “Whether the holdings of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 are applicable to the offense of aggravated robbery in violation of R.C. 2911.01(A)(3) or only to the offense of robbery, a violation of R.C. 2911.02(A)(2).”

In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (“*Colon I*”), the defendant stood convicted on a robbery charge under R.C. 2911.02(A)(2), alleging that, in attempting or committing a theft offense or fleeing therefrom, the defendant attempted, threatened, or inflicted physical harm on the victim. This Court reversed the conviction, concluding that, by operation of the reckless-importation provision in R.C. 2901.21(B), recklessness was an element of robbery under R.C. 2911.02(A)(2). This Court concluded that the omission of reckless was “structural error” requiring reversal because, inter alia, the jury instructions did not advise the jury that recklessness was an element.

Upon motion for reconsideration by the prosecution, this Court in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (“*Colon II*”), clarified that *Colon I* was prospective to pending cases only and that “[a]pplying structural-error analysis to a defective

indictment is appropriate only in rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment.” *Id.* at ¶ 8.

Defendant and his supporting amicus ask this Court to extend *Colon I* to the offense of aggravated robbery under R.C. 2911.01(A)(3). Counts one and two alleged that defendant, in attempting or committing a theft offense or fleeing therefrom, inflicted or attempted to inflict serious physical harm on another. Defendant claims that there is a similarity to the “physical harm” component of (A)(2) robbery addressed in *Colon I* and contends that there is no basis to distinguish the physical-harm form of robbery from the serious-physical-harm form of aggravated robbery under counts one and two.

This “similarity” argument finds no textual support in the reckless-importation provision in R.C. 2901.21(B). R.C. 2901.21(B) does not attempt to arrive at some overriding doctrinal consistency in how “reckless” will apply to harm-related offenses. The question of whether reckless applies to a particular offense in a particular statutory section depends on that *section*, not on whether reckless imports into another offense defined in another section having a similar element. The question of whether *Colon I* will be extended to the (A)(3) form of aggravated robbery is therefore fundamentally a question of how the *aggravated robbery* statutory section is structured.

Instead of extending *Colon I* to (A)(3) aggravated robbery, this Court should take the opposite tack by abandoning *Colon I* and its predecessor, *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, both of which fail to adhere to R.C. 2901.21(B). Under R.C. 2901.21(B), the entire statutory section must be silent as to mens rea in order for reckless to be imported. *Lozier* failed to fully adhere to *State v. Wac* (1981), 68 Ohio St.2d 84, and especially *State v. Maxwell* (2002), 95 Ohio St.3d 254, 2002-Ohio-2121, both of

which correctly recognized that a section-wide assessment of the statute was required. While *Lozier* could have been read as being limited to a narrow context of contrasting statutory definitions, *Colon I* extended *Lozier* beyond that narrow context, as did the more recent decision in *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325. On the other hand, just days before *Colon I* was issued, this Court adhered to the correct *Wac-Maxwell* approach in *State v. Fairbanks*, 117 Ohio St.3d 543, 2008-Ohio-1470.

This Court need not engage in the three-part *Galatis* analysis in determining whether to “overrule” *Colon I*, *Lozier*, or *Clay*. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. In this conflict amongst the *Wac-Maxwell* and *Lozier-Colon* approaches, the latter cases are the interlopers, having failed to engage in any *Galatis* analysis before failing to apply the entire-section review called for by *Wac* and *Maxwell*. The *Wac-Maxwell* approach is the most faithful to the text of R.C. 2901.21(B), and that approach should control.

In addition to abandoning *Colon I*, this Court should recognize something that is plain on the face of R.C. 2901.21(B). Reckless will be imported into an offense only if the end result would be that “recklessness is sufficient culpability to commit the offense.” This precise and unambiguous language must be followed, or else this Court would be engaged in judicial legislation. If importing reckless would not result in recklessness being sufficient culpability, then the provision could simply have no application.

In the case of robbery (see *Colon I*), weapon under disability (see *Clay*), and drug trafficking (see *Lozier*), reckless is *not* a sufficient culpability to commit such offenses. The robber must commit or attempt a theft offense, which usually requires purpose and knowledge. The WUD offender must knowingly possess the firearm. The drug trafficker

must knowingly engage in the drug selling. These cases are fundamentally flawed because the very condition for the operation of the reckless-importation provision – that reckless would be sufficient culpability – was lacking in those cases. It is also lacking in the present aggravated robbery case, in which the robber must have committed or attempted a theft, which requires purpose and knowledge.

A.

Before the Criminal Code revisions that took effect in 1974, “[l]egislative silence as to *mens rea* in a statute defining an offense was interpreted as an indication of the purpose to impose strict liability.” *State v. Schlosser* (1997), 79 Ohio St.3d 329, 331. “In the past, legislative silence as to a culpable mental state was interpreted as imposing strict liability.” *Clay*, at ¶ 16. There were good reasons for this approach.

There are no common-law offenses in Ohio. *State v. Huffman* (1936), 131 Ohio St. 27, paragraph one of the syllabus. Courts therefore have no common-law-like authority to “create” new offenses or to impose *mens rea* requirements that the General Assembly itself has not imposed. “[I]f a statute defining an offense is silent on the question of intent, it is not necessary to allege and prove an intent to commit the offense.” *Id.*

Adding a *mens rea* requirement to an offense also would violate the imperative that courts cannot legislate by inserting language into a statute that the General Assembly did not itself insert. “In determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.” *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127. “The court must first look to the plain language of the statute itself to determine the legislative intent. We apply a statute as it is written when its meaning is unambiguous and definite.

An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language.” *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 9 (citations omitted). “We have held that a court may not add words to an unambiguous statute, but must apply the statute as written.” *Id.* at ¶ 15. “We have long recognized that neither administrative agencies nor this court ‘may legislate to add a requirement to a statute enacted by the General Assembly.’” *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, ¶ 15. “This court should not graft * * * requirements to [the statute], because the statute has no text imposing them.” *Id.* at ¶ 19.

As can be seen, the general operating principle is that statutory silence as to mens rea represents an intent to impose no mens rea and that courts cannot supply a mens rea.

B.

Set against this general background principle of no importation, a court’s sole authority for adding a mens rea to an offense today would be the reckless-importation provision in R.C. 2901.21(B). Effective in 1974, R.C. 2901.21(B) provides, as follows:

(B) 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 the 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.

A reading of this provision reveals that there are three criteria that must be present in order for recklessness to be imported into a criminal statute under R.C. 2901.21(B).

First, the particular “section” of the Revised Code must not specify any degree of culpability. *Maxwell*, at ¶ 21. Second, the particular “section” must not plainly indicate a

purpose to impose strict liability. *Id.* Third, the result of importing recklessness must be that “recklessness is sufficient culpability to commit the offense.” R.C. 2901.21(B).

As *Maxwell* makes clear, “in determining whether R.C. 2901.21(B) can operate to supply the mental element of recklessness to R.C. 2907.321(A)(6), we need to determine whether the entire *section* includes a mental element, not just whether *division* (A)(6) includes such an element.” *Maxwell*, at ¶ 22 (emphasis sic). This “entire section” focus is shown by the outcomes in *Maxwell* and *Wac* themselves, and, more recently, by the outcome in *Fairbanks*, which expressly followed *Maxwell* and *Wac* on this point. The entire “section” is reviewed to determine whether a mens rea is set forth in any part of it; if so, then reckless will not be imported into any part of it.

In *Maxwell*, paragraph (A) set forth “knowingly” as to one of the elements, but subparagraph (A)(6) was silent as to any mens rea as to the elements set forth therein. Since knowingly was already found in one part of the “section,” recklessness would not be imported into another part.

In *Wac*, two sections were at issue. In one of the sections, the same subsection set forth two different offenses, one of which was silent as to mens rea, while the other had a “knowingly” mens rea. The inclusion of “knowingly” as to one of the offenses and the silence as to the other offense “plainly indicate[d]” a purpose of impose strict liability. *Wac*, 68 Ohio St.2d at 86.

Also in *Wac*, another section set forth two offenses in different subsections, with one of the offenses expressly including “reckless,” while the other offense was silent as to mens rea. The *Wac* Court concluded that inclusion of a mens rea in one of the

subsections, and silence as to the other subsection, “plainly indicate[d]” a purpose to impose strict liability in the silent subsection.

In *Fairbanks*, paragraph (B) of the section set forth a “willfully” requirement, while the penalty enhancement provision in paragraph (C)(5)(a)(ii) was silent as to mens rea. This Court relied on *Wac* and *Maxwell* and recognized that recklessness would not apply to paragraph (C)(5)(a)(ii). The inclusion of willfully in paragraph (B), when combined with the omission of mens rea in (C)(5)(a)(ii), plainly indicated the General Assembly’s purpose to impose strict liability with respect to the latter provision.

The “entire section” focus of the *Wac-Maxwell* analysis makes much sense. “As used in the Ohio Revised Code, the word ‘section’ unambiguously refers to a decimal-numbered statute only,” not to “divisions” or “subdivisions.” *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, at ¶ 16 and paragraph one of the syllabus.

Accordingly, when R.C. 2901.21(B) twice refers to the *section* lacking mens rea language, it is necessarily calling for a section-wide assessment of whether “the section defining an offense does not specify any degree of culpability.” R.C. 2901.21 itself shows that “section” means the *entire* section, as R.C. 2901.21(A) states, “[e]xcept as provided in division (B) of this section * * *.” See, also, R.C. 2901.21(D) (“As used in this section”). The focus is not on whether a particular subsection or division or element is silent as to mens rea; the entire section is reviewed. As stated in *Maxwell*:

Appellant [State of Ohio] argues that the court of appeals misinterpreted the word “section” in R.C. 2901.21(B) to mean “division” of a Revised Code section, and mistakenly applied R.C. 2901.21. We agree. The General Assembly distinguishes between sections and divisions in the Ohio Revised Code. For example, R.C. 2901.21(A) begins, “Except as provided in *division* (B) of this *section*.” (Emphasis added.) Likewise, R.C.

2907.321(C) states, “Whoever violates this *section* is guilty of pandering obscenity involving a minor. Violation of *division* (A)(1), (2), (3), (4), or (6) of this *section* is a felony of the second degree. Violation of *division* (A)(5) of this *section* is a felony of the fourth degree. If the offender previously has been convicted of or pleaded guilty to a violation of this *section* or *section* 2907.322 or 2907.323 of the Revised Code, pandering obscenity involving a minor in violation of *division* (A)(5) of the *section* is a felony of the third degree.” (Emphasis added.) Thus, in determining whether R.C. 2901.21(B) can operate to supply the mental element of recklessness to R.C. 2907.321(A)(6), we need to determine whether the entire *section* includes a mental element, not just whether *division* (A)(6) includes such an element.

Maxwell, 95 Ohio St.3d at 257 (emphasis sic). As *Maxwell* recognizes, in order to import reckless, “a court must be able to answer in the negative the following two questions * *
* (1) does the section defining an offense specify any degree of culpability, and (2) does the section plainly indicate a purpose to impose strict criminal liability?” *Id.* at 256-57.

When the General Assembly has made distinctions as to mens rea between various offenses in a single section, it is easy to conclude that silence as to mens rea as to a particular offense therein was intentional. When a section defines a purposeful offense “A,” a knowing offense “B,” and offense “C” that omits mens rea, such omission readily shows that the General Assembly meant to impose strict liability as to offense “C.”

As applied to (A)(3) aggravated robbery, the *Wac-Maxwell* analysis confirms that reckless should not be imported. The aggravated robbery “section” contains a “knowing” degree of culpability in the offense defined in paragraph (B). R.C. 2911.01(B) (“knowingly remove or attempt to remove a deadly weapon”; “knowingly deprive or attempt to deprive”). Since the entire “section” is not completely silent on mens rea, R.C. 2901.21(B) does not operate to import recklessness into any part of the “section.”

C.

As stated above, the second and third criteria for importing reckless require that the particular “section” must not plainly indicate a purpose to impose strict liability and that the result of importing recklessness must be that “recklessness is sufficient culpability to commit the offense.” As these criteria show, R.C. 2901.21(B) is only meant to import recklessness into offenses that otherwise would amount to strict liability. If the offense already has a required mens rea, it would be counterintuitive and a non-sequitur to inquire whether the offense plainly indicated a purpose to impose strict liability, since the offense, by definition, would not be a strict-liability offense. “Strict liability” offenses are “those offenses where criminal liability is imposed in the absence of any *mens rea* whatsoever.” *United States v. Bailey* (1980), 444 U.S. 394, 404 n. 4; Black’s Law Dictionary (8th Ed. 2004), at 400 (“strict-liability crime” is “crime that does not require a *mens rea* element”).

The aggravated robbery section requires that the offender committed or attempted to commit a theft offense, thereby already importing the mens rea requirements for theft or other theft offenses into the crime. The pertinent theft offense involved here was theft under R.C. 2913.02, which has “purpose” and “knowingly” mens rea requirements. R.C. 2913.02(A) (“purpose to deprive”; “knowingly obtain”).

In relation to robbery, which also includes the attempted or completed theft offense element, this Court recently has held that every robbery includes an attempted or completed theft offense. *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260. “[I]t would be impossible to ever commit a robbery by theft without also committing a theft.” *Id.* at ¶ 28. “[B]ecause theft is a lesser included offense of robbery, the indictment for

robbery necessarily included all of the elements of all lesser included offenses, together with any of the special statutory findings dictated by the evidence produced in the case.” *State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787, ¶ 15. As a result, an indictment for robbery (and, therefore, for aggravated robbery) “necessarily and simultaneously” charges all of the elements of the attempted or completed theft as well. *Id.* at ¶¶ 3, 15. The grand jury “necessarily considered each of the essential elements of the lesser offense.” *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, ¶ 8.

Given that the attempted or completed theft offense is necessarily included in the indicted aggravated robbery charge, it follows that every robbery and aggravated robbery charge includes all of the elements of the theft offense, which, in this case, included purpose and knowingly elements. See, also, *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225 (“The First District’s reference to ‘knowingly’ was to the mens rea element for the theft which was an element of the aggravated-robbery offense.”); *State v. Harris* (1979), 58 Ohio St.2d 257, 258 (“under the circumstances herein, there is no element of grand theft which is not also an element of robbery.”; “grand theft conviction herein did not require proof of any element not required to be proved for the robbery conviction”).

Given the mens rea requirements of the underlying attempted or committed theft in aggravated robbery, the aggravated robbery offense as defined is simply not a strict liability offense, and the importation of recklessness into the offense or charge would not mean that reckless is sufficient culpability for the offense. As this Court stated in relation to the deadly-weapon form of robbery, “no intent beyond that required for the theft offense must be proven.” *State v. Wharf* (1999), 86 Ohio St.3d 375, 377. Because purpose and knowledge vis-à-vis the theft predicate are required, a defendant simply

could not be convicted based solely on proof of recklessness, and it would be counterintuitive to inquire whether there is a plain indication of a purpose to impose strict liability. By definition, the offense is already not a strict liability offense.

This Court has found that, when there are “varying culpable mental states necessary for the predicate offenses,” such varying mental states support the view that reckless will not apply to the remaining elements of the compound offense. *Schlosser*, 79 Ohio St.3d at 331-32 (addressing RICO section). Even when the predicate offense would be strict liability, reckless still should not be imported into the compound offense, as “[i]t does not make sense” to apply reckless to the compound offense when liability is expressly allowed based on a strict-liability predicate. *Id.* at 335.

Because the same predicates of theft or attempted theft are stated in robbery under R.C. 2911.02(A)(2), defendant and his amicus will contend that *Colon I* controls in requiring recklessness even though the theft predicate here included its own mens rea requirements. But the prosecution had conceded that recklessness applied in *Colon I*, and *Colon I* did not address the involvement of the predicates of theft and attempted theft and did not address the precise question being raised here, i.e., whether the necessary involvement of degrees of culpability in the predicates is sufficient to avoid importation of recklessness. *Colon I* therefore does not settle those matters, as “[a] reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon at the time of the adjudication.” *B.F. Goodrich v. Peck* (1954), 161 Ohio St. 202, paragraph four of the syllabus. Although some might think that *Colon I* implicitly decided this point, there are no “implicit” precedents, and this Court is not bound by

“perceived implications” of an earlier decision that did not “definitively resolve” the issue. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶¶ 10, 12. This Court is now squarely faced with the issue that was not addressed in *Colon I*.

When recently addressing the deadly-weapon form of aggravated robbery in *Lester*, this Court found that *Colon I* did not control, in part because the prosecution in *Colon I* had conceded error on whether the indictment was defective. *Lester*, at ¶ 29. Equally so, the prosecutor’s concession in *Colon I* should not control vis-à-vis whether reckless should be imported into an offense having mens-rea-based predicates.

Indeed, even though the Court had summarily reversed an aggravated robbery conviction based on *Colon I* in *State v. Davis*, 119 Ohio St.3d 113, 2008-Ohio-3879, this Court in *Lester* found that the two-sentence ruling in *Davis* without full briefing and argument did not control. “*Davis* does not prevent us from considering this issue after full briefing and argument and reaching the conclusion we announce today regarding the aggravated-robbery statute.” *Lester*, at ¶ 31. Given the prosecutor’s concession in *Colon I*, the ruling therein did not result from full briefing on the role of predicates in deciding whether reckless will be imported into an offense.

Colon I also does not control here because it did not take into account this Court’s more recent decisions in *Smith*, which held that theft was a lesser included offense of robbery and that the elements of theft were necessarily and simultaneously included in the robbery charge. This holding in *Smith* brings to the forefront the question of whether the mens-rea-based theft in aggravated robbery defeats the importation of reckless under R.C. 2901.21(B). Given the purpose and knowing elements of theft, which are necessarily also elements of the aggravated robbery charge, it cannot be said that reckless

would be sufficient culpability to commit aggravated robbery.

The offense of felony murder provides another example of the predicate offense supplying the mens rea for the compound offense. In *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, this Court held that the felony murder was sufficiently proven because the mens rea for the predicate offense of felonious assault had been proven, i.e., knowingly causing physical harm. *Id.* at ¶¶ 21-34 & syllabus. Lower courts have refused to import reckless into felony murder, even after *Colon I*, in substantial part because the predicate offense itself supplies the mens rea for the offense. *State v. Miniffee*, 8th Dist. No. 91017, 2009-Ohio-3089, ¶¶ 41-55; *State v. Salaam*, 1st Dist. No. C-070385, 2008-Ohio-4982, ¶¶ 12-18. Just as the pertinent mens rea for felony murder is the mens rea required for the predicate offense, equally so, the pertinent mens rea for (A)(3) aggravated robbery is the mens rea required to commit the theft predicate. In light of such predicates, reckless would not be sufficient culpability for the commission of the aggravated robbery offense, and therefore reckless cannot be imported into the offense.

Defendant or his amicus might complain that the mens rea for the underlying theft predicate in the present case was not stated in the indictment. But, as recognized in this Court's *Smith* decision, the elements of the attempted or completed theft necessarily were included in the indictment. This Court has also held that a charge of a compound offense need not state the elements of the underlying predicate and that the compound charge need not specify the predicate at all. *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707 (elements of predicate offense need not be stated in indictment); *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶¶ 30-31 (kidnapping charge sufficient even though it did not set forth underlying felony or the elements thereof); *State v. Landrum*

(1990), 53 Ohio St.3d 107, 119 (rejecting challenge to indictment because it failed to set forth elements of underlying offenses of burglary and larceny); *State v. Schaeffer* (1917), 96 Ohio St. 215, paragraph two of the syllabus (manslaughter charge need not specify predicate offense); see, also, *State v. Murphy* (1992), 65 Ohio St.3d 554, 583; *State v. Roe* (1989), 41 Ohio St.3d 18, 24.

D.

This Court reached the right result in *Lester*, when it held that reckless would not be imported into the deadly-weapon form of aggravated robbery under R.C. 2911.01(A)(1). For the reasons stated above, the aggravated-robbery section states a mens rea in paragraph (B), and aggravated robbery is not a strict liability offense due to the required occurrence of an attempted or completed theft offense. Accordingly, reckless could not properly be imported into the deadly-weapon form of the offense.

While reaching the correct result, the *Lester* Court used a premature analysis of policy to get there. It noted the risks associated with deadly weapons, as previously recognized in *Wharf*, and further noted that, “[f]rom a victim’s perspective, or for that matter, from a bystander’s perspective, the risk of harm increases when a defendant brandishes or displays the weapon.” *Lester*, at ¶ 28. “It is rational to conclude that the General Assembly imposed strict liability in R.C. 2911.01(A)(1) for the brandishing, display, or use-of-a-deadly-weapon element in an aggravated robbery.” *Id.*

These observations were exceedingly correct judgments in terms of the policy underlying the statute, and they were relevant to the “plain indication” determination to be made under R.C. 2901.21(B). But the initial inquiries under R.C. 2901.21(B) depend on straight-forward assessments of whether the entire section is silent as to mens rea and

whether the offense would otherwise be a strict-liability offense without importing reckless. Unless the entire section is silent, and unless the offense would otherwise be a strict liability offense, there is no reason to proceed into an assessment of policy under the plain-indication prong of R.C. 2901.21(B).

Even under the policy-based rationale of *Lester*, however, defendant's arguments should be rejected. If the introduction of a deadly weapon into a theft incident must be discouraged because of its dangerousness and the risk of harm to persons, it stands to reason that, if serious physical harm actually resulted or was attempted, the policy reasons for holding the defendant fully accountable are even stronger. In inflicting or attempting serious physical harm, the aggravated robber necessarily created a highly volatile and risky situation that led to the serious physical harm or the attempt to inflict such harm. The record in the present case shows that defendant actually inflicted serious physical harm on two of the victims by striking one victim with a club-like item and by bludgeoning another victim in the face numerous times with a handgun. (2-27-07 Tr. 21-26) So this defendant's conduct was just as risky or even more risky than the conduct underlying the deadly-weapon form of aggravated robbery. By importing reckless into the serious-physical-harm component of aggravated robbery, this Court would be creating an accident or negligence defense for the aggravated robber, but the risk-based rationale used in *Lester* would lead to the conclusion that no such defense should exist.

E.

In light of the foregoing, this Court should abandon *Lozier*, *Colon I*, and *Clay*. *Lozier* is the font of much of the problem, as it failed to faithfully apply *Wac* and *Maxwell* even while purporting to cite them favorably. *Lozier*, at ¶¶ 22-31.

In *Lozier*, the Court engaged in a comparison of the “in the vicinity of a school” enhancement and the “in the vicinity of a juvenile” enhancement in the drug-trafficking section. *Lozier*, at ¶ 40. Because the definition of the “juvenile” provision included express strict-liability language, and because the definition of the “school” provision did not, the Court concluded that reckless should be imported into the “school” enhancement.

This approach was flawed. The court focused on comparing definitions of statutory terms alone rather than engaging in a review of the entire “section” involved. Notably, the General Assembly quickly amended the definition of “in the vicinity of a school” to legislatively overrule the *Lozier* result. See Am.Sub.H.B. 163 of the 125th General Assembly, amending R.C. 2925.01(P) (as eff. 9-23-04).

Given that the drug-trafficking section already had a knowing requirement, see R.C. 2925.03(A), the *Lozier* opinion should have acknowledged that drug trafficking is not a strict-liability offense and that reckless could not be imported into the offense. *Lozier* did not explain how the entire section was silent as to mens rea or how recklessness could be “sufficient culpability to commit the offense” when the offense already included a knowing requirement.

The *Lozier* opinion contained other significant flaws. It misstated the holding of *Wac*. *Lozier* contended that *Wac* involved one section, in which knowingly was stated in one part of the subsection while another part of the same subsection was silent. *Lozier* contended that *Wac* stood for the proposition that, in a contrast between discrete clauses of the same subsection, reckless would not be imported. *Lozier*, at ¶ 40 (“Applying the reasoning of *Wac*, if one part of a clause explicitly sets forth a mental state, that mental state does not apply to another discrete clause within that subsection. In fact, it is an

indication that the General Assembly is attaching differing mental states as to the two distinct clauses.”).

While *Wac* did involve such a section, it also involved a second statutory section in which the contrast existed between different subsections, with one subsection using recklessly, while a second and different subsection was silent. *Wac* actually held that reckless would not be imported into the second, silent subsection. Given that *Lozier* disregarded this part of *Wac*, *Lozier* erred by importing reckless into one subsection when the section as a whole already had a knowingly requirement in another subsection.

Lozier was more accurate in discussing the import of *Maxwell*, recognizing *Maxwell*'s “holding that where the General Assembly indicates a mental state in one part of a statute, and does not indicate any mental state in another part of that statute, that indicates an intent to impose strict liability in the other part.” *Lozier*, at ¶ 26. But then *Lozier* failed to apply this entire-section approach. Had *Lozier* been faithful to *Maxwell*, it would have refused to import reckless into the drug-trafficking offense, as the section already included a knowing requirement. The General Assembly's clear intent was to impose “knowing” as to the discrete sell-or-offer-to-sell element, while not imposing any mens rea as to the vicinity-of-school element.

Lozier also erred in claiming that “recklessness is the catchall culpable mental state for criminal statutes that fail to mention any degree of culpability, except for strict liability statutes, where the accused's mental state is irrelevant.” *Lozier*, at ¶ 21. Reckless is not a “catchall” mental state. Rather, its importation requires the three narrow conditions discussed earlier. Pursuant to *Wac* and *Maxwell*, if an offense in subsection (A) includes a knowing requirement, and if an offense in subsection (B) is

silent, then there is no importation of reckless into (B) because none of the conditions for importation is met. The entire section is not silent, and the contrast between “knowing” (A) and silent (B) constitutes a plain indication of a purpose to impose strict criminal liability as to (B). As this Court stated in *State v. Parrish* (1984), 12 Ohio St.3d 123, 124, *Wac* applies when, in the same section, “the General Assembly has expressly differentiated degrees of culpability.”

Lozier’s “catchall” comment should not have been helpful to the defendant in *Lozier* anyway, as the drug-trafficking offense *did* include a knowing mens rea as to one of the elements, which should have precluded the importation of reckless as to the vicinity-of-school element.

Lozier also erred in contending in dicta that “[t]he mental state of the offender is a part of every criminal offense in Ohio except for those plainly imposing strict liability.” *Lozier*, at ¶ 18. This statement presumes that every offense has a mental state, but no such presumption exists. To be sure, R.C. 2901.21(B) can result in the mens rea of reckless being supplied for an offense that is silent as to mens rea. But the conditions for such importation are narrow, as stated above.

Lozier relied on R.C. 2901.21(A)(2), which provides that an offender cannot be found guilty unless he has “the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.” But this language merely states the reflexive truth that, when a section expressly specifies a mental state for a particular element, the offender must have such mental state. This Court in *Fairbanks* emphasized this very point, noting that the element in question was “not an element that has a specified culpable mental state.” *Fairbanks*, at ¶¶ 10-11. R.C.

2901.21(A)(2) does not provide authority for importing reckless into an otherwise silent section. R.C. 2901.21(B) provides the sole authority to engage in such importation, and, as stated above, narrow conditions are required before such importation shall occur.

F.

The decisions in *Colon I* and *Clay* were also flawed. *Colon I* failed to address or explain how reckless could be sufficient culpability for the robbery offense when the element of robbery for attempting or committing a theft already required purpose and knowledge. *Clay* similarly failed to explain how the entire section was silent as to mens rea, or how reckless could be sufficient culpability for the offense, when the offense already included the requirement of knowing possession. Again, robbery and WUD were not strict-liability offenses, and therefore the reckless-importation provision could have no application to supply reckless for those offenses.

Emerging from these cases is the argument or assumption that reckless can be supplied as to a particular element, even though the remainder of the offense has one or more mens-rea requirements as to other elements. Even the recent *Lester* decision focused on whether reckless would apply to a particular element. *Lester*, at ¶ 1.

R.C. 2901.21(B) could have been written to adopt this element-by-element approach, but the text of the provision defeats such an element-by-element approach. Again, the first condition for importation of reckless is that the entire statutory *section* is silent as to mens rea. Silence as to mens rea as to one element is insufficient to warrant importation of reckless when other elements in the same section already have mens-rea requirements. In addition, the third condition for importation is that, if reckless is imported, “recklessness is sufficient culpability to commit *the offense*.” (Emphasis

added) At a minimum, this condition requires an *offense*-wide assessment; the absence of an express mens rea as to a single element will not provide a basis for importation. When one element has a mens rea requirement, while other elements are silent, such silence merely reflects that “different elements of the same offense can require different mental states.” *Fairbanks*, at ¶ 14, quoting *State v. Jordan* (2000), 89 Ohio St.3d 488, 493. “The decision in *Wac* demonstrates that a crime can have different degrees of mental culpability for different elements.” *Maxwell*, at ¶ 30.

Nor can the policy reasoning set forth in *Clay* support importation of reckless. In *Clay*, the Court faced a section with the same structure as that in *Maxwell*, i.e., a section containing subsection (A) that had “knowing” as a requirement, while subsection (A)(3) was silent as to mens rea regarding the element of having been indicted for a drug offense. The *Clay* majority acknowledged *Maxwell*, but the majority concluded that *Maxwell* must be distinguished because *Clay* involved possession of a firearm – a “constitutionally protected right” – while *Maxwell* (a child pornography case) did not involve such a right and did involve the “strong stance against child sex crimes.”

But, again, such policy distinctions would come at the end of the analysis of determining whether there was a plain indication of a purpose to impose strict liability. Such distinctions should not trump the straight-forward threshold inquiries of whether the entire section is silent as to mens rea and whether the importation of reckless would result in reckless being sufficient culpability to commit the offense. These inquiries are plainly required by R.C. 2901.21(B), and neither of these inquiries calls for such distinctions.

Even under the *Clay* “constitutionally protected right” approach, reckless would not be imported into (A)(3) aggravated robbery. Attempting or committing a theft

offense is not innocent or constitutionally-protected conduct, as recognized in *Lester*:

{¶ 25} The statute here is distinguishable from the one at issue in *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325, 900 N.E.2d 1000, ¶ 27. In that case, we held that for the purpose of proving the offense of having a weapon while under a disability pursuant to R.C. 2923.13(A)(3), the state had to show that the defendant acted recklessly with regard to his awareness that he was under indictment. 120 Ohio St.3d 528, 2008-Ohio-6325, 900 N.E.2d 1000, at syllabus. In *Clay*, we concluded that while the mere possession of a firearm was not unlawful, the additional fact of being under indictment made the act of possession criminal. When the additional fact makes innocent conduct criminal, as in *Clay*, it is unlikely that the General Assembly “plainly intended” to impose strict liability. By contrast, committing a theft offense is not innocent conduct. Consequently, it is reasonable that the General Assembly would impose strict liability on the additional circumstance of brandishing, displaying, using, or indicating possession of a deadly weapon, activity that enhances the seriousness of the criminal activity (from robbery, a second-degree felony, R.C. 2911.02(A)(1), to aggravated robbery, a first-degree felony, R.C. 2911.01(A)(1)).

Per the *Clay* analysis, as discussed in *Lester*, the *Maxwell* entire-section approach cannot be distinguished, as the additional element here – inflicting or attempting serious physical harm – does not render criminal otherwise innocent or constitutionally-protected conduct. *Maxwell* would still apply to the present case and would lead to the conclusion that reckless will not be imported into (A)(3) aggravated robbery.

G.

The defense and its amicus largely focus on the similarity between the physical-harm form of (A)(2) robbery and the serious-physical-harm form of (A)(3) aggravated robbery. Based on the similarity, defendant contends there is “no rational basis” to distinguish the offenses, so that reckless should apply to (A)(3) aggravated robbery just

as much as *Colon I* said reckless applied to (A)(2) robbery. A number of appellate cases have relied on this similarity to conclude that reckless should apply to (A)(3) aggravated robbery. In the wake of *Colon I*, the Ohio Jury Instructions committee also relied on the similarity to conclude that reckless should apply to (A)(3) aggravated robbery, since *Colon I* applied reckless to the “analogous” (A)(2) robbery offense..

Absent from several of these authorities, however, is any analysis of how the reckless-importation provision itself operates. Nothing in the text of R.C. 2901.21(B) indicates that the General Assembly intended that harm-based offenses would universally have “reckless.” It bears repeating that R.C. 2901.21(B) represents the sole basis for a court to intervene by supplying a reckless element that otherwise is lacking, and courts should adhere to the actual text of that provision closely. Under that actual text, reckless is not imported into (A)(3) aggravated robbery, for the various reasons stated above.

If similarities are to be explored, it is manifest that there *is* a fundamental distinction between the serious-physical-harm form of aggravated robbery and the physical-harm form of robbery. Serious physical harm is necessarily more serious than mere physical harm, as mere physical harm can be as minor as a shove, push, or punch causing temporary discomfort or pain. *Columbus v. Bonner* (1981), 10th Dist. No. 81AP-161 (mere discomfort enough); see, also, *State v. Hustead* (1992), 83 Ohio App.3d 809, 811-812; R.C. 2901.01(A)(3) (physical harm means “any injury, illness, or other physiological impairment, regardless of its gravity or duration.”). Because serious physical harm is necessarily more serious, there is greater reason not to create an accident or negligence defense by importing reckless into the serious-physical-harm element.

Defendant's victims suffered injuries far beyond mere physical harm. One victim suffered a gash to the head, a concussion, and lacerations requiring stitches, while the second victim – who was bludgeoned with the handgun – suffered the loss of several teeth (resulting in later dental reconstruction), numerous lacerations requiring stitches, numbness in his face, memory loss, and equilibrium problems. (2-27-07 Tr. 21-26) Even if defendant had “accidentally” caused such serious physical harm, he nevertheless would have been responsible for creating the risk(s) that led to the serious physical harm. The difference between serious physical harm and mere physical harm easily justifies differential treatment between (A)(3) aggravated robbery and (A)(2) robbery.

Another basis for differential treatment is that a mere threat of physical harm is enough for (A)(2) robbery, while a threat of serious physical harm is not enough to trigger (A)(3) aggravated robbery. Thus, the (A)(2) robbery can be based on threatening words, while the (A)(3) aggravated robbery requires actions that are at least sufficient to constitute an attempt to inflict serious physical harm. The dangers in the (A)(3) aggravated robbery are therefore more pronounced.

H.

As stated above, the *Galatis* factors should not control here, as the entire-section approach of *Wac* and *Maxwell* came first, and the later decisions in *Lozier*, *Colon I*, and *Clay* failed to justify their deviation from the entire-section approach.

In any event, even applying the *Galatis* factors, *Lozier*, *Colon I*, and *Clay* should be abandoned. They were wrongly decided at the time because they dispensed with the entire-section review that is required on the face of R.C. 2901.21(B). They also defy practical workability because they create great unpredictability in how R.C. 2901.21(B)

will be applied by lower courts and this Court. The abandonment of these cases also would not create an undue hardship because of any reliance by anyone. Indeed, this defendant did not rely on them at the time he committed his offenses or even when his case was in the trial court. The problem of whether reckless applies to a particular offense creates no reliance interest in the offender, as the offender would not “rely” on the possibility that his offense will have a mere-negligence or accident defense. Such matters, by definition, do not lend themselves to conscious reliance by the offender.

The party that has a strong reliance interest is the prosecution. A prosecutor giving this issue the longest and deepest attention at the time would have relied on *Wac* and *Maxwell* to conclude that reckless would not be imported into (A)(3) aggravated robbery. The entire-section review called for by *Wac* and *Maxwell* leads to the conclusion that reckless would not be imported, since paragraph (B) of R.C. 2911.01 has a knowingly requirement. The entire section is not silent. In addition, given the presence of the theft-offense predicate, with its own mens rea requirements, it cannot be said that “recklessness is sufficient culpability to commit the offense.” Finally, even if reckless could be imported on an element-by-element basis, there is differentiated culpability in this section, with the paragraph (B) aggravated robbery having a knowingly requirement, while the paragraph (A)(3) aggravated robbery is silent. Under *Wac*, such a contrast would constitute a plain indication that paragraph (A)(3) is intended to impose strict liability as to the latter paragraph.

Although *Lozier* had been decided in 2004, it did not purport to overrule *Wac* and *Maxwell*. Instead, *Lozier* cited them favorably. Despite the troubling language in *Lozier*, the actual holding in *Lozier* – involving a contrast between definitions of elements –

could be interpreted to be a narrow exception to the entire-section approach of *Wac* and *Maxwell*. The (A)(3) aggravated robbery here does not involve such contrasting definitions.

In short, there was good reason for a prosecutor in 2006 to follow the entire-section approach of *Wac* and *Maxwell* and to conclude that reckless would not be imported into (A)(3) aggravated robbery. Under the *Galatis* factors, such reliance interests would be a reason for adhering to the *Wac-Maxwell* approach in the present case, rather than a reason for extending the *Lozier-Colon I-Clay* line of cases any further.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Sixth District Court of Appeals should be affirmed.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



STEVEN L. TAYLOR 0043876
(Counsel of Record)
Assistant Prosecuting Attorney

Counsel for Amicus Curiae Franklin County
Prosecutor Ron O'Brien

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. mail on this 8th day of February, 2010, to the following known counsel of record

involved in the case:

David F. Cooper
Assistant Prosecuting Attorney
700 Adams Street, 2nd Floor
Toledo, Ohio 43604
Counsel for Plaintiff-Appellee

John F. Potts
405 Madison Avenue, Ste. 1010
Toledo, Ohio 43604
Counsel for Defendant-Appellant

Spencer Cahoon
Assistant State Public Defender
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Counsel for Amicus Curiae Ohio Public
Defender



STEVEN L. TAYLOR
Assistant Prosecuting Attorney

§ 2901.21. Requirements for criminal liability.

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing;

(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

(B) 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 the 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.

(C) Voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. Voluntary intoxication does not relieve a person of a duty to act if failure to act constitutes a criminal offense. Evidence that a person was voluntarily intoxicated may be admissible to show whether or not the person was physically capable of performing the act with which the person is charged.

(D) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for a sufficient time to have ended possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

(4) "Intoxication" includes, but is not limited to, intoxication resulting from the ingestion of alcohol, a drug, or alcohol and a drug.

HISTORY: 134 v H 511 (Eff 1-1-74); 148 v H 318. Eff 10-27-2000.

§ 2911.01. Aggravated robbery.

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

(1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;

(2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 147 v H 151. Eff 9-16-97.