ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

KEVIN D. TOLLIVER

Defendant-Appellee.

Case No. 2013-0351

On Appeal from the Montgomery County Court of Appeals, Second Appellate District

Court of Appeals Case No. 24716

MERIT BRIEF OF APPELLANT, THE STATE OF OHIO

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SUPREME COURT OF OHIO

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STATEMENT OF FACTS

This case arose from Kevin Tolliver's direct appeal to the Second District Court of Appeals of his jury conviction on one count of Robbery (use of force), in violation of R.C. 2911.02(A)(3). Tolliver was indicted by the Montgomery County Grand Jury as a result of a shoplifting at a Dollar General store that became a robbery when Tolliver shoved a store employee who attempted to stop Tolliver from leaving the store with the stolen merchandise.

The Indictment brought against Tolliver charged that, in attempting or committing a theft offense, or in fleeing immediately after the attempt or offense, Tolliver "did recklessly use or threaten the immediate use of force" against the store employee. (Summary of Docket 48) But in instructing the jury at trial, the court tracked the language of the statute and advised the jury as follows:

> The indictment charges the Defendant, Kevin Darvon Tolliver, with robbery. Before you can find the Defendant guilty you must find beyond a reasonable doubt that on or about the 11th day of September, 2010 and in Montgomery County, Ohio, the Defendant, in committing, attempting to commit or fleeing after committing or attempting to commit a theft offense used or threatened the immediate use of force against Jasmine Jordan.

(Tr. 259) The jury was not instructed that they must find that Tolliver *recklessly* used or threatened the use of force against the store employee before finding him guilty.

The jury found Tolliver guilty as charged, and he was subsequently sentenced to four years in prison. (Tr. 277; Summary of Docket 48) He appealed his conviction to the Second District Court of Appeals.

On appeal, Tolliver argued that his conviction should be reversed because the trial court erred in not instructing the jury that recklessness was the mens rea for the charge of use-of-force robbery. The court of appeals, in a 2-1 decision, agreed and reversed Tolliver's conviction. (Appx. 3) The majority of the court of appeals held that "the mens rea applicable to the

additional element of Robbery under R.C. 2911.02(A)(3) – the use, or the threat of the immediate use, of force against another – is that of reckless." (Appx. 5 at ¶ 26) The majority likewise held that the trial court's failure to instruct the jury on recklessness was plain error. (*Id.* at ¶ 34)

In dissent, Judge Hall disagreed with the majority's opinion, reasoning instead that "the use-of-force element in a prosecution for robbery under R.C. 2911.02(A)(3) should not have recklessness added as a culpable mental state * * *." (*Id.* at ¶ 36) Judge Hall based his opinion on the wording of the statute itself, along with a survey of case law decided by this Court wherein this Court found that other subsections of the of aggravated robbery and robbery statutes did not include recklessness as a mens rea, but instead found them to be strict-liability offenses. (*Id.* at ¶ 37-39) Judge Hall concluded that use-of-force robbery does not include a reckless mens rea for the force element and the trial court, therefore, was not at fault for not instructing the jury about recklessness. (*Id.* at ¶ 42) He would have affirmed Tolliver's conviction.

The State of Ohio filed a timely notice of appeal with this Court on March 1, 2013. (Appx. 1) On May 22, 2013, this Court granted jurisdiction to hear the case and allowed this appeal.

ARGUMENT

Proposition of Law:

Applying the analysis in *State v. Wac*, 68 Ohio St.2d 84, 428 N.E.2d 428 (1981), and *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, to robbery as described in R.C. 2911.02(A)(3), indicates that the use-of-force element of the robbery statute does not require a mens rea; robbery, therefore, in violation of R.C. 2911.02(A)(3), is a strict-liability offense.

A. Introduction

The question on appeal is this: What is the required mens rea for the use-of-force element of robbery pursuant to R.C. 2911.02(A)(3)? According to this Court's precedent, the answer is that no mens rea is required for that element, and that the robbery statute does not require any further mens rea requirement beyond that already encompassed in the theft portion of the statute. By holding otherwise in its decision below, the Second District Court of Appeals committed an error of law.

Kevin Tolliver was charged with robbery in violation of R.C. 2911.02(A)(3), which provides:

> "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> * * *
>
> "(3) Use or threaten the immediate use of force against another."

In instructing the jury at trial, the court tracked the language of the statute:

> The indictment charges the Defendant, Kevin Darvon Tolliver, with robbery. Before you can find the Defendant guilty you must find beyond a reasonable doubt that on or about the 11th day of September, 2010 and in Montgomery County, Ohio, the Defendant, in committing, attempting to commit or fleeing after committing or attempting to commit a theft offense used or threatened the immediate use of force against Jasmine Jordan.

(Tr. 259) Tolliver was convicted as charged.

In his direct appeal, Tolliver asked that his conviction be overturned because the trial court failed to instruct the jury that recklessness was the mens rea for the use-of-force element of his robbery charge. A majority of the court of appeal agreed, concluding that the use-of-force element of the robbery statute in R.C. 2911.02(A)(3) requires proof of recklessness as a mens rea. (Appx. 5 at ¶ 26)

But in arriving at this holding, the court of appeals' majority seemingly ignored the direction given by this Court for how to determine a culpable mental state when one is not otherwise included in a discrete clause, subsection or division of a statute – as is the case with R.C. 2911.02(A)(3). When proper application of this Court's precedent is applied, the conclusion this Court should arrive at it clear: use-of-force robbery, prohibited by R.C. 2911.02(A)(3), does not include recklessness as the mens rea for the force element.

B. Governing Law

R.C. 2911.02(A)(3) proscribes the commission of a theft offense where force is used or threatened against a person. The statute does not include recklessness as an element, nor does it include a culpable mental state, of any kind, for the use-of-force element. But the statute does include two other culpable mental states for other elements of the crime – namely, the culpable mental states encompassed within the theft statute.

The theft statute, R.C. 2913.02, states that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over the property or services * * *." Consequently, in order to commit a robbery in violation of R.C. 2911.02(A)(3), the offender, in addition to using or threatening the use of force, must also *purposely* deprive the owner and *knowingly* obtain property or services.

What results is a statute with two discrete clauses: (1) the offender commits, attempts to commit, or flees immediately after committing or attempting a theft offense; and (2) the offender uses or threatens the immediate use of force. In cases where, like here, a mens rea element is included in one discrete clause, subsection or division of a statute but not in another discrete clause, subsection of division of the statute, this Court has determined that the analysis set out in *State v. Wac*, 68 Ohio St.2d 84, 428 N.E.2d 428 (1981), and *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, should be applied to determine the culpable mental state for those elements of the statute for which a mental state is not otherwise specified. *State v. Horner*, 126 Ohio St.3d 486, 2010-Ohio-3830, 935 N.E.2d 26.

And that is where the court of appeals erred in its decision below. In deciding that recklessness was the applicable mens rea for the use-of-force element of the robbery statute, the court of appeals failed to perform a proper *Wac/Maxwell* analysis. Its failure resulted in a potentially far-reaching error of law.

1. R.C. 2901.21(B) and the *Wac/Maxwell* Analysis

In determining the requirements for criminal liability when a statute defining an offense does not provide a culpable mental state, guidance first comes from R.C. 2901.21(B), which provides:

> 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.

This Court applied R.C. 2901.21(B) in *Wac, supra,* and found plain indications that the General Assembly meant to impose strict liability for the crimes of bookmaking in violation of R.C.

2915.02(A)(1), and operating a gambling house in violation of R.C. 2915.03(A)(1). *Wac,* 68 Ohio St.2d at 86-87, 428 N.E.2d 428.

R.C. 2915.02 provides:

> "(A) No person shall do any of the following:
>
> "(1) Engage in bookmaking, or knowingly engage in conduct that facilitates bookmaking."

Regarding R.C. 2915.02(A)(1), this Court concluded that "when a single subsection of a statute with two discrete clauses contains one clause that expresses a culpable mental state and another discrete clause that does not, the General Assembly has plainly indicated a purpose to impose strict criminal liability under R.C. 2901.21(B)." *Horner,* 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, at ¶ 34 (explaining its rationale in *Wac*).

A similar conclusion was reached regarding R.C. 2915.03, which provides:

> "(A) No person, being the owner or lessee, or having custody, control, or supervision of premises, shall:
>
> "(1) Use or occupy such premises for gambling in violation of section 2915.02 of the Revised Code;
>
> "(2) Recklessly permit such premises to be used or occupied for gambling in violation of section 2915.02 of the Revised Code."

As to R.C. 2915.03, which involves two separate divisions of a statute, rather than a single subsection with two discrete clauses, this Court concluded that "the inclusion of a culpable mental state in one division and the omission of a culpable mental state from another division means that the General Assembly plainly indicated a purpose to impose strict criminal liability for the second division." *Horner, supra.*

The analysis was continued in *Maxwell,* 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242. At issue there was the mens rea that applies to the act of bringing child pornography into

the state in violation of R.C. 2907.321(A)(6), which criminalizes pandering obscenity involving a minor. R.C. 2907.321 provides:

> "(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
>
> * * *
>
> "(6) Bring or cause to be brought into this state any obscene material that has a minor as one of its participants or portrayed observers."

In finding that the statute imposed strict liability as to the act of bringing child pornography in the state - rather than a mens rea recklessness - this Court held that "a court must be able to answer in the negative the following two questions before applying the element of recklessness pursuant to R.C. 2901.21(B): (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." *Maxwell,* 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, at ¶ 21. This Court further concluded that in order to determine whether R.C. 2901.21(B) operates to supply a missing mental element of recklessness, a court must determine whether the entire *section* of the statute includes a mental element, and not just whether the *division* of the statute at issue includes such an element. *Id.* at ¶ 22.

2. <u>Application of the *Wac/Maxwell* Analysis to R.C. 2911.02(A)(3)</u>

Applying the *Wac/Maxwell* analysis here leads to the conclusion that R.C. 2911.02(A)(3), use-of-force robbery, is a strict-liability offense. As was the case with the bookmaking statute at issue in *Wac, supra,* R.C. 2911.02 contains a subsection with two discrete clauses: The first clause (i.e. no person shall commit or attempt a theft offense) expresses a culpable mental state (i.e. purposely deprive the owner and knowingly obtain the property); while the second clause (i.e. use or threaten the immediate use of force) expresses no culpable mental state. In such

cases, where a subsection of a statute with two discrete clauses "contains one clause that expresses a culpable mental state and another discrete clause that does not, the General Assembly has plainly indicated a purpose to impose strict criminal liability under R.C. 2901.21(B)." *Horner,* 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, at ¶ 34; *Wac,* 68 Ohio St.2d at 86, 428 N.E.2d 428. Similarly, because the robbery *section* as a whole contains a culpable mental state (i.e. the two mental states encompassed within the theft statute), while the particular *division* at issue does not, the section plainly indicates a purpose to impose strict liability. *Horner, supra; Maxwell,* 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, at ¶ 30. Accordingly, use-of force robbery is a strict-liability offense.

3. <u>Other Analogous Statutes</u>

While this Court has not previously addressed subdivision (A)(3) of R.C. 2911.02, it has addressed every other subdivision of the robbery statute, as well every subdivision of the aggravated robbery statute, R.C. 2911.02. In each instance, this Court has found them to be strict-liability offenses. Given the rationales expressed by this Court for why other forms of robbery and aggravated robbery are strict-liability offenses, there is no plausible justification for treating R.C. 2911.02(A)(3) differently.

The aggravated robbery statute, R.C. 2911.01, provides:

> "(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 ordinance on or about the offender's person or under the offender's control;
>
> "(3) Inflict, or threaten to inflict, serious physical harm on another."

In *Horner, supra*, this Court addressed the culpable mental state applicable to the serious-physical-harm element of aggravated robbery in R.C. 2911.01(A)(3). In finding that no mens rea need be proven regarding the element of inflicting or attempting to inflict serious physical harm, this Court stated: "By choosing language in R.C. 2911.01(A)(3) that makes it a crime to merely inflict or attempt to inflict serious physical harm, as opposed to requiring a purpose or intent to injure, the General Assembly similarly has indicated its purpose to impose strict liability." *Horner,* 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, at ¶ 51.

A similar conclusion was reached regarding aggravated robbery with a deadly weapon in violation of R.C. 2911.01(A)(1). Regarding the elements of this subdivision, this Court held: "We are persuaded that the General Assembly, by not specifying a mens rea in R.C. 2911.01(A)(1), plainly indicated its purpose to impose strict liability as to the element of displaying, brandishing, indicating possession of, or using a deadly weapon. *Cf.* R.C. 2901.21(B)." *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038, ¶ 32.

Here, the rationale for finding that the subdivisions of the aggravated robbery statute are strict-liability offenses applies equally to robbery in violation of R.C. 2911.02(A)(3). By choosing language in R.C. 2911.02(A)(3) that makes it a crime to merely use or threaten the immediate use of force during a theft, as opposed to requiring a purpose or intent to use or threaten force, the General Assembly has indicated its intention to impose strict liability. Likewise, by not specifying a mens rea in R.C. 2911.02(A)(3), the General Assembly has plainly indicated its purpose to impose strict liability as to the element of using or threatening the immediate use of force in facilitating a theft offense.

This Court reached the same conclusion regarding a different subdivision of the very robbery statute at issue here. R.C. 2902.02(A)(1) proscribes committing or attempting a theft

offense while having possession or control of a deadly weapon. This Court held that "[o]ur 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.* * * * Thus, by employing language making mere possession or control of a deadly weapon, as opposed to actual use or intent to use, a violation, it is clear to us that the General Assembly intended that R.C. 2911.02(A)(1) be a strict liability offense." (Emphasis added.) *State v. Wharf*, 86 Ohio St.3d 375, 377-378, 715 N.E.2d 172 (1999). There is no reason to treat robbery in violation of subdivision (A)(3) of R.C. 2911.02 differently from subdivision (A)(1).

4. *Colon I*

Finally, the same is likely true regarding the physical-harm element of a third subdivision of the robbery statute, R.C. 2911.02(A)(2), which proscribes inflicting, attempting to inflict, or threatening to inflict physical harm upon another during the commission of a theft offense. In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ("*Colon I*"), this Court held that in order to convict a defendant for violating R.C. 2911.02(A)(2), the prosecution is required to prove that the defendant recklessly inflicted, attempted to inflict, or threatened to inflict physical harm. *Id.* at ¶ 14. But then this Court decided *Horner,* wherein it states, "*Colon I* is overruled." *Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, at ¶ 45.

The State recognizes that *Horner* did not explicitly address the recklessness issue in *Colon I.* Nevertheless, this Court did acknowledge that, in arriving at its holding in *Colon I*, it failed to apply the analysis used in *Wac* and *Maxwell. Horner, supra,* at ¶ 41. For that reason, appellate courts have concluded that "[t]he supreme court's analysis in *Horner* leads to the conclusion that the offense of [physical-harm] robbery under R.C. 2911.02(A)(2) is a 'strict

liability' offense." *State v. McCuller*, 8th Dist. No. 94793, 2011-Ohio-610, ¶ 24. *See also State v. Page*, 5th Dist. No. 10-CA-80, 2010-Ohio-6569, ¶ 18 (finding that *Horner* overruled *Colon I* and, for that reason, the element of recklessness need not be proven as part of a robbery charge under R.C. 2911.02(A)(2)). The dissent in *Tolliver* below likewise concluded that the clear implication of *Horner* "is that *Colon I* was wrongly decided regarding the addition of a reckless mens rea requirement to robbery under R.C. 2911.02(A)(2)." (Appx. 5 at ¶ 39)

Consequently, if *Horner* did indeed overrule *Colon I* in its entirety and if recklessness no longer needs to be proven as part of the physical-harm element of R.C. 2911.02(A)(2), then the implication of allowing the court of appeals' decision below to stand would be that every subdivision of the robbery statute, R.C. 2911.02, and every subdivision of the aggravated robbery statute, R.C. 2911.01, would be a strict-liability offense – except use-of-force robbery in violation of R.C. 2911.02(A)(3). This would be an absurd result with no legitimate rationale. Yet that is the result the majority of the court of appeals has reached below. It cannot stand.

CONCLUSION

The General Assembly, by not specifying a mens rea for the use-of-force element of robbery in violation of R.C. 2911.02(A)(3), intended that the offense be a strict liability offense under a proper application of the *Wac/Maxwell* analysis. The decision below, which held that recklessness is the applicable mens rea for the use-of-force element of robbery under R.C. 2911.02(A)(3), is fundamentally wrong by misapplying this Court's binding precedent. For that reason and in view of the foregoing law and argument, the State of Ohio respectfully prays that the decision of the Second District Court of Appeals be reversed and that Kevin Tolliver's conviction for robbery be reinstated.

Respectfully submitted,

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PROSECUTING ATTORNEY

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by first class mail on this 12th of August, 2013, to the following: Charles M. Blue, Murr, Compton, Claypoole & Macbeth, 401 East Stroop Road, Kettering, OH 45429-2829.

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IN THE SUPREME COURT OF OHIO

13-0351

STATE OF OHIO

Plaintiff-Appellant,

vs.

KEVIN D. TOLLIVER

Defendant-Appellee.

Case No. 2013-

On Appeal from the Montgomery County Court of Appeals, Second Appellate District

Court of Appeals Case No. 24716

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

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MAR 01 2013
CLERK OF COURT
SUPREME COURT OF OHIO

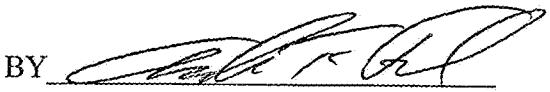
NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

The State of Ohio, gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Kevin D. Tolliver,* Case No. 24716. The Court of Appeals issued an opinion and entered a final entry on January 18, 2013.

This felony case presents a question of public or great general interest.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY 
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COUNSEL FOR APPELLANT,
STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent by first class mail on this 28th day of February, 2013, to the following: Charles M. Blue, Murr, Compton, Claypoole & Macbeth, 401 East Stroop Road, Kettering, OH 45429-2829 , Ben Swift, P.O. Box 49637, Dayton, OH 45449 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

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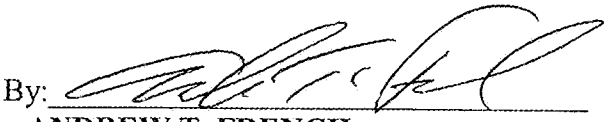
By: 
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GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	
Plaintiff-Appellee	Appellate Case No. 24716
v.	Trial Court Case No. 2010-CR-2996
KEVIN D. TOLLIVER	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	**FINAL ENTRY**

. . . . . .

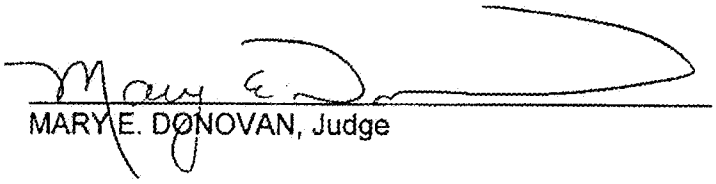
Pursuant to the opinion of this court rendered on the 18th day of January, 2013, the judgment of the trial court is **Reversed**; and this cause is **Remanded** for further proceedings consistent with the opinion.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

Mike Fain

MIKE FAIN, Judge



MARY E. DONOVAN, Judge

MICHAEL T. HALL, Judge

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[Cite as *State v. Tolliver*, 2013-Ohio-115.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 24716
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2010-CR-2996
v.	:	
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KEVIN D. TOLLIVER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
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OPINION

Rendered on the 18th day of January, 2013.

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FAIN, J.

{¶ 1} Defendant-appellant Kevin Darvon Tolliver appeals from his conviction and

sentence for Robbery, in violation of R.C. 2911.02(A)(3), a felony of the third degree. He contends that the trial court committed plain error when it failed to instruct the jury on recklessness as the mens rea applicable to the element of the use, or threat of immediate use, of force against a person. We agree. The judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I. Tolliver Leaves a Dollar General Store with Stolen Merchandise

{¶ 2} Jasmine Jordan, an assistant manager at a Dollar General store, saw Tolliver enter the store empty-handed, one day in September, 2010. Later, she saw Tolliver in a confrontation with Sean Fields, a store employee. Tolliver had Dollar General bags full of t-shirts, socks, and underwear, which Fields was asking him to give back. Tolliver said that he had come in with the merchandise, and was attempting to return it.

{¶ 3} Jordan told Tolliver that she would take the merchandise and do the return, intending thereby to regain possession of the merchandise. Tolliver said he did not have his receipt with him, and began to leave the store with the merchandise. Jordan described what happened next as follows:

> A. I am still standing, you know, face to face and I do – I put my arms out like this trying to get him to stop walking. And I'm pushed out of the way. And I push him back. And he raises his fist back like he's going to punch me in my face.
>
> Q. Okay. Let me back up a little bit. When you put your arms out, what are you doing? Why did you put your arms out like that?
>
> A. Because I was trying to get him to stop and talk.

Q. Okay. And why was that?

A. So I could try and get the stuff back. I was being calm and I was trying to get him to calm down. And, you know, and talk.

Q. And again, is this Defendant saying anything to you at that time?

A. That he's not giving the merchandise back. He's not going to give it to me.

Q. And when you indicated that you were pushed out of the way, could you describe that push?

A. Yes. I was standing in the doorway. And he shoved me. I did go back a little, but he didn't – it wasn't – it was kind of a powerful push, it was enough to move me out of the way.

Q. Okay. Could you describe what Defendant used to push you?

A. His hands.

Q. One hand or two hands?

A. Two hands.

Q. You said it was enough to move you out of the way. What does that mean?

* * *

THE WITNESS: When he pushed me I was standing in the doorway. And he knocked me back into the vestibule.

{¶ 4} Jordan clarified that she was standing in the inner doorway, between the vestibule and the interior of the store, when she was shoved into the vestibule. Jordan

continued:

Q. What happens after the push?

A. I push him back.

Q. Which direction is the Defendant facing when you push him?

A. He is facing towards the door.

* * *

Q. And what happens at that point when you push him back?

A. His fist goes back and it looked as if he was getting ready to punch me in my face. And Sean Fields comes in between and pushes us both back.

{¶ 5} Tolliver made his way out of the store with the merchandise.

{¶ 6} Tolliver testified in his own defense. He admitted that he was shoplifting, and that he told Fields and Jordan, falsely, that he was there to return the merchandise for credit. He initially described the confrontation as follows:

I'm like, "You know what, ma'am, I'm all right. I – you know, I go get my receipt." I'm trying to go. So as I'm walking, she jumps in front of [sic] and we make contact. And so when we make the contact, she steps backs [sic] and, you know, push me. So I had to – you know, I'm like, man, what's – you know, I come back like this off of the push, and when they fall back I leave.

And so I'm like – I'm like at that point I just – I'm kind of like wired up, like all – because of the extra static. She just offered me, you know, exchange for the stuff and I was declined it. So I felt like I was free to go, you know. And as a result of that, all the other stuff came into play. That's – you know, and like I was saying in

my opening statement, that a crime had been committed but not the crime in question based on how that was going on. I wasn't in there to cause no extra friction and stuff. If they would have ask – see, with the bag – took the bags or whatever, it would have just been that, you know. But that's pretty much.

BY MR. CLOUD [defense counsel]:

Q. So when they told you you were free to go –

A. Yes, sir.

Q. – and they tried to stop you –

A. They – they – in actual – being honest, they never told me I was free to go, per se. They just offered me to in-store credit. I declined it and I said, "Well, I go get my receipt," I'm just trying to leave with this – you know, go on about my business. I said – when I asked – she said, "I'll give you in-store credit," I said, "No, I'll go get my receipt."

She said, "Well, hold on" – because I wanted to get cash. She said, "Hold on, I give you cash," trying to convince me to take cash.

Q. Now when –

A. I'm like, "Ma'am, I" – you know, I don't got my receipt. I'm trying to go ahead and go, you know, and she's –

* * *

Q. Why do you say you didn't use force?

A. Because I didn't. I was just trying to leave. I never was in nor [sic] forceful manner. I wasn't like when they pulled up on me – when they asked me, I

wasn't like freak out and try to bust out of the store. You know, I didn't do that. You know, I said what I said, and they gave me the response they gave me. It's like it was all right you know, but they – but the action of standing up and getting in front of me was like – like – it's like, would the fish take the bait if he knew there was a hook on it. You know what I mean?

It was like – you know what I'm saying? I – I didn't – I knew I – you know, this was it, man. I was just trying to leave the store, man. I wasn't trying – I didn't – you know, didn't have no intentions of using no force. I didn't recklessly use force. I was trying to leave. They came onto me like, you know – and trying to force me to take the cash.

{¶ 7} On cross-examination, Tolliver testified that his arm motion, which Jordan had described as his cocking his fist, was a defensive reaction to his having been pushed, and was not intended as a threat.

II. The Course of Proceedings

{¶ 8} Tolliver was charged by indictment with Robbery (use of force), in violation of R.C. 2911.02(A)(3). Specifically, the indictment charged that Tolliver: " * * * in attempting or committing a theft offense, or in fleeing immediately after the attempt or offense, did recklessly use or threaten the immediate use of force against another, to-wit: **JASMINE JORDAN**; * * * ."

{¶ 9} At trial, Tolliver admitted to having committed the theft of the merchandise, but denied that he intended to use or threaten force against Jordan, or that he was reckless in

that regard. The jury was not instructed that Tolliver had to have any particular mental state of culpability with respect to the use or threatened use of force element of the offense, and defense counsel did not request any instruction along those lines.

{¶ 10} In its closing argument, the State alluded to the lack of a requirement of a culpable mental state, at least concerning an intent to cause injury or harm:

> And basically what you have here is the Defendant, when he is trying to leave, uses that force. He uses that compulsion. He moves her out of the way. He's trying to get away. He – you'll notice nowhere in the instructions does it say he had to have a purpose to hurt her or to cause her injury at all. It just – he had to have used any form of compulsion or constraint, and that's what he did when he put on [sic] his hands on her to move her out of the way so he could complete the theft. So he used force against her right when he pushed her.

{¶ 11} The State claimed in closing argument that Tolliver admitted, " 'Yeah, when I cocked my arm back it was to threaten her,' because he said, 'Well, I felt threatened.' " We have reviewed the transcript, however, and Tolliver never admitted that he had a purpose to threaten Jordan, despite the State's attempts to get him to so admit.

{¶ 12} The State then argued to the jury:

> * * * . And that's because there isn't any kind of – you don't have to knowingly do it. It's – frankly, if you do this at all during a theft offense, use any compulsion or threat of violence that's sufficient under the law of Ohio to – to be a robbery. Whether you think that's right or not, that's what the law is. That's something that the state of the law is. For whatever reason, that's what the law is.

{¶ 13} The jury found Tolliver guilty as charged. Tolliver was sentenced to four years, to be served consecutively with a sentence in another case. He was also ordered to pay $100 in restitution to Dollar General.

{¶ 14} From his conviction and sentence, Tolliver appeals.

III. Recklessness Is the Mens Rea Applicable to the Element of the Use or Threatened Use of Force in a Prosecution for Robbery Under R.C. 2911.02(A)(3)

{¶ 15} Tolliver's sole assignment of error is as follows:

> APPELLANT WAS PREJUDICED BY THE OMISSION OF AN ELEMENT OF THE CHARGED OFFENSE IN THE JURY INSTRUCTIONS, THEREBY DENYING THE APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1 [sic], SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO.

{¶ 16} Tolliver relies upon *State v. Colon,* 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (*Colon I*), and *State v. Colon,* 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 (*Colon II*), for the proposition that recklessness is the requisite mens rea for the element of the use or threatened use of force in a prosecution for Robbery. The conviction under review in *Colon I* was for Robbery in violation of R.C. 2911.02(A)(2), in which the element of the offense in addition to the commission or attempted commission of a theft offense is to: "Inflict, attempt to inflict, or threaten to inflict physical harm on another[.]" The Supreme Court held that the required mens rea for this additional element is recklessness. *Colon I*, at ¶ 11-15. Because the indictment in that case failed to allege recklessness in connection with

the element of physical harm, there was structural error, which required reversal even though the defendant had not challenged the sufficiency of the indictment in the trial court. *Colon I*, at ¶ 32.

{¶ 17} *Colon I* was reconsidered in *Colon II*. In reconsideration, the Supreme Court of Ohio held that in a defective-indictment case, unless there are "multiple errors that are inextricably linked to the flawed indictment," as occurred in that case, the proper analysis is a plain-error analysis, rather than a structural-error analysis, when the defendant has not challenged the indictment in the trial court. *Colon II*, at ¶ 7-8. The Supreme Court cited as the multiple errors justifying a structural-error analysis in that case the additional facts that the State had not argued that the defendant's conduct was reckless, but treated Robbery as a strict-liability offense, and that the trial court did not include recklessness as an element of the crime in its instructions to the jury. *Id.*, at ¶ 6.

{¶ 18} The State notes that in *State v. Horner,* 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, a decision post-dating appellate cases cited by Tolliver, the Supreme Court of Ohio overruled *Colon I* and *Colon II*. But *Horner*, at ¶ 45, only overruled that aspect of those cases that held that an indictment tracking the language of the criminal statute describing the offense, but lacking a mens rea element of the crime, is defective:

> Today we recognize the confusion created by *Colon I* and *II* and hold that when an indictment fails to charge a mens rea element of the crime, but tracks the language of the criminal statute describing the offense, the indictment provides the defendant with adequate notice of the charges against him and is, therefore, not defective. *See State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162 (an

indictment that does not identify the elements of a predicate offense provides adequate notice by citing the statute defining the predicate offense). * * * . In fact, *Colon I* is overruled, and *Colon II* is overruled to the extent that it holds that such an indictment is defective.

{¶ 19} Curiously, as noted by Justice Pfeiffer in his dissent in *Horner*, it was unnecessary in that case to reach the question of whether an indictment that omits a mens rea element, but tracks the language of the statute, is defective. In *Horner*, the convictions under review were for Aggravated Robbery, in violation of R.C. 2911.01(A)(3), which, in addition to containing the element of committing or attempting to commit a theft offense, includes the additional element to: "Inflict, or attempt to inflict, serious physical harm on another." The Supreme Court held that no mens rea was required for this additional element – as to that element, Aggravated Robbery is a strict-liability offense. *Id.*, at ¶ 53. Thus, even if the indictment in that case had been required to include applicable mens rea elements, it was not missing any; no mens rea element applied to the infliction-of-serious-physical-harm element. Therefore, the Supreme Court would have reached the same result, even without overruling *Colon I* and *Colon II.*

{¶ 20} The net result of *State v. Horner, supra,* leaves the case before us in a legal vacuum. *Horner* involved a conviction for Aggravated Robbery, not Robbery, and it did *not* overrule that part of *Colon I* holding that recklessness is the mens rea required for the R.C. 2911.02(A)(2) element of infliction of physical harm, or an attempt to inflict harm, or a threat to inflict harm. Furthermore, neither *Horner*, nor *Colon I* and *Colon II* involved the offense at issue in the case before us, Robbery in violation of R.C. 2911.02(A)(3), which requires the

element (in addition to Theft) of the use of force against another, or the threat of immediate force against another. Notably, there is no corresponding additional element in the Aggravated Robbery statute.

{¶ 21} That the General Assembly regards a Robbery under R.C. 2911.02(A)(3) as distinct from Robbery under either division (A)(1) or (A)(2) of the statute is apparent from the fact that Robbery under division (A)(3) is a felony of the third degree, while a Robbery under either of the other divisions of the statute is a felony of the second degree. The distinction lies in the extent of the risk of physical harm to a person posed by the different offenses. A Robbery under R.C. 2911.02(A)(1) involves a theft offense committed while the offender has a deadly weapon on or about his person, or under his control. Obviously, this offense involves a substantial risk of physical harm to a person or persons. A Robbery under R.C. 2911.02(A)(2) involves a theft offense in which the offender inflicts, attempts to inflict, or threatens to inflict, physical harm on another. Here, too, there is a substantial risk of physical harm to a person or persons.

{¶ 22} The use, or the threat of immediate use, of force against another – the additional element under R.C. 2911.02(A)(3) – may or may not pose a substantial risk of physical harm to another, depending upon the degree of force involved. The risk of physical harm is, generally speaking, less with regard to an (A)(3) Robbery. And, of course, it is much less than the risk of physical harm in an Aggravated Robbery under R.C. 2911.01(A)(3), which has as the additional element to Theft, the infliction, or attempt to inflict, serious physical harm on another – the offense involved in *State v. Horner, supra.* Noticeably missing from this additional element is the mere *threat* to inflict physical harm on another,

which is part of the additional element for a Robbery under R.C. 2911.02(A)(2) – the offense involved in *Colon I* and *Colon II.*

{¶ 23} The risk of physical harm is a significant part of the *Horner* analysis:

> Accordingly, under the [*State v. Wac* (1981), 68 Ohio St.2d 84, 22 O.O.3d 299, 428 N.E.2d 428]/[*State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242] approach to applying R.C. 2901.21(B), in defining the offense of serious-physical-harm aggravated robbery, R.C. 2911.01(A)(3) "plainly indicates a purpose to impose strict liability." It is clear that the General Assembly intended R.C. 2911.01(A)(3) to hold persons responsible for aggravated robbery *because of the heightened potential for even accidental physical harm that results from the commission of the robbery.*
>
> The section defining the offense – R.C. 2911.01 – specifies "knowingly" as a mens rea for the crime defined in division (B) of that statute, and R.C. 2911.01(A)(3) includes as an element an underlying theft offense, which itself includes a mens rea. Additionally, R.C. 2911.01(A)(3), defining the offense of serious-physical-harm aggravated robbery, plainly indicates a purpose to impose strict liability. Accordingly, R.C. 2911.01(A)(3) does not require proof of a mental state, and an indictment that does not identify a mental state is not defective. *State v. Horner, supra,* at ¶ 52-53 (emphasis added).

{¶ 24} In short, as we understand the rationale in *Horner,* the General Assembly intends that a person who actually inflicts, or who attempts to inflict, serious physical harm upon another, while committing a Theft offense, should be punished for Aggravated Robbery,

regardless of his or her intent to injure the other person. Actually, conviction for an attempt to commit an offense necessarily involves the mens rea of purposely or knowingly. R.C. 2923.02(A). Therefore, under *Horner*, the only instances in which someone could be convicted of an Aggravated Robbery under R.C. 2911.01(A)(3) as a strict-liability offense are those in which the offender has, in fact, inflicted serious physical harm on another in attempting to commit a Theft offense. We understand *Horner* to stand for the proposition that if an offender commits a Theft offense, the offender accepts the risk that if the commission of that offense proximately results in the infliction of serious physical harm on another, the offender will be criminally liable for Aggravated Robbery. It is the serious physical harm resulting from the train of events set in motion by the offender's commission of the Theft offense that makes the offender guilty of Aggravated Robbery as a strict-liability offense, regardless of the offender's lack of an intent to injure.

{¶ 25} By contrast, in the case before us, no physical harm to Jordan, or to anyone else, was alleged, nor is there any evidence in the record that anyone suffered physical harm, serious or otherwise. In other words, the dire consequence of the offender's commission of a Theft offense – serious physical harm, which animated the Supreme Court of Ohio to hold, in *Horner*, that the offense in that case was a strict-liability offense, is missing in the case before us.

{¶ 26} The issue is close. We hold that the mens rea applicable to the additional element of Robbery under R.C. 2911.02(A)(3) – the use, or the threat of the immediate use, of force against another – is that of recklessness. That element was not submitted to the jury, and the State argued, in closing argument, that no recklessness was required, although it did

argue, incorrectly, that Tolliver had admitted, in his testimony, that he had intended to threaten Jordan.

IV. The Failure to Submit an Element of the Offense to the Jury Constitutes Plain Error

{¶ 27} Tolliver acknowledges that he did not request that the jury be instructed on the element of recklessness, did not object to the failure of the trial court's charge to the jury to include that instruction, and did not object to the State's argument that it was not required to prove mens rea in connection with the use, or threat of use, of force against another. Therefore, unless the structural-error analysis adopted in *Colon I* applies, this assignment of error must be analyzed under a plain-error analysis. Because we conclude that the omission of an element of the offense from the instructions to the jury does constitute plain error, we will assume, for purposes of analysis, that a plain-error analysis applies to this issue, not a structural-error analysis.[1]

{¶ 28} The failure to instruct a jury concerning an essential element of a charged offense is a serious error, since it effectively removes that element of the offense from the jury's consideration. If the jury is not instructed that it must find the element beyond reasonable doubt to convict, it cannot be presumed from a verdict of guilty that the jury did, in fact, find the essential element beyond reasonable doubt.

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[1]An argument can be made, under *Colon I*, that a structural-error analysis applies. As in that case, the jury was not instructed concerning the element of recklessness, and the State argued that proof of recklessness was not necessary, treating the offense as a strict-liability offense. Unlike *Colon I*, the indictment in this case charged recklessness. The State argues that this was mere surplusage, the result of uncertainty brought on by *Colon I* and *II*, with *Horner* only having been decided two months before the indictment in this case.

{¶ 29} Tolliver cites three cases for the proposition that the failure to instruct a jury concerning an essential element of a criminal offense is always plain error, since it effectively deprives the defendant of his full right to a jury trial: *State v. Collins*, 88 Ohio App.3d 291, 623 N.E.2d 1269 (2d Dist. 1993); *State v. Endicott*, 99 Ohio App.3d 688, 694-695, 651 N.E.2d 1024 (6th Dist. 1994); and *State v. Stacy*, 12th Dist., Butler No. CA2002-03-073, 2003-Ohio-3695, ¶ 7. The State has not cited any authority to the contrary.

{¶ 30} *State v. Collins* was a decision of this court, but it was overruled in *State v. Tolliver*, 2d Dist. Montgomery No. 15184, 1996 WL 715438 *5 (Dec. 13, 1996).[2] In that case, at *4, we held that even when the plain error asserted is the failure to instruct the jury on an essential element of the offense, a manifest miscarriage of justice must be shown to secure reversal. In that case, the defendant was convicted of Kidnapping, and the jury was never instructed "that an essential element of the charged offense was that [the defendant's] purpose in removing [the victim] from the place where he was found or restraining him of his liberty was for the purpose of terrorizing him or inflicting serious physical harm upon him." *Id.*, at *2. We described the facts in that case as follows:

> The State presented evidence that [the defendant] conspired with seven teenagers to lure her boyfriend, Brian Denney, into her basement, where they would beat him, tie him up, and cut off his hair. When Denney arrived home from work, he went to the basement, as was his custom, to change clothes. He was struck in the head from behind with a board, and fell to the floor where he was beaten by several of the teenagers and [the defendant]. [The defendant] and one teenager then tied Denney

[2]The defendant in the case cited was Jackie Tolliver, not the same person as the defendant in the case before us.

> to a chair, and [the defendant] and at least one of the teenagers beat Denney with pistols. [The defendant] then cut Denney's hair. While Denney was in the chair, one of the teenagers pointed a gun at Denney, and it discharged. Afterwards, [the defendant] ordered Denney to leave the house. Denney was treated at Good Samaritan Hospital for injuries inflicted during the incident. He lost a tooth and sustained a basilar skull fracture. When the police searched [the defendant's] home pursuant to a warrant, they found blood not only on the floor, but high up on the walls of the basement. They also found Denney's hair. *Id.*, at *1.

{¶ 31} In concluding that the failure to have instructed the jury on the element of having had the purpose of inflicting serious physical harm upon, or terrorizing, the victim was not a manifest injustice, we noted that the attention of the jury was focused on a different issue, exclusively:

> In the case before us, the real point of dispute between the parties was whether [the defendant] was a knowing participant in the brutal attack upon Denney. Although [the defendant] did not testify, her counsel argued in closing that she had no foreknowledge that the teenagers were going to tie Denney to a chair and beat him; the teenagers, on the other hand, testified that she had planned and instigated the assault. The question for the jury was whom to believe.
>
> Because the attention of the jury was never focused on whether [the defendant], assuming that she instigated and planned the assault, had the requisite purpose in doing so, it is unlikely that the jury's verdict turned upon the failure to have given the jury this instruction. We cannot, therefore, say that a manifest miscarriage of justice

occurred in this case. *Id.*, at *2-3.

{¶ 32} By contrast, in the case before us, Tolliver, who testified, did focus the attention of the jury on his purpose, and state of mind, generally, during his physical confrontation with Jordan, even going so far, at one point, as testifying that: "I didn't *recklessly* use force." (Emphasis added.) Unlike the defendant in *Tolliver, supra,* the defendant in the case before us did not claim that he was just a bystander to events involving others.

{¶ 33} We conclude that *State v. Tolliver, supra,* is distinguishable. While the jury in the case before us might well have found on the evidence in the record that Tolliver recklessly used force, or recklessly threatened the immediate use of force, against Jordan (or even that he had the intent to do so), that element was very much in dispute between the parties. The failure to submit that essential element to the jury worked a manifest injustice upon Tolliver, because it deprived him of his right to have a jury decide that issue beyond reasonable doubt.

{¶ 34} The trial court's failure to have submitted the issue of recklessness to the jury was plain error. Tolliver's sole assignment of error is sustained.

V. Conclusion

{¶ 35} Tolliver's sole assignment of error having been sustained, the judgment of the trial court is Reversed; and this cause is Remanded for further proceedings consistent with this opinion.

. . . . . .

DONOVAN, J., concurs.

HALL, J., dissenting:

{¶ 36} Because I believe the use-of-force element in a prosecution for robbery under R.C. 2911.02(A)(3) should not have recklessness added as a culpable mental state, I dissent.

{¶ 37} I start with the wording of the statute itself, which does not include recklessness as an element. The robbery statute in question already has two culpable mental states. Robbery, in violation of R.C. 2911.02(A)(3), involves the commission of a theft offense by force against a person. The theft statute, R.C. 2913.02, states: "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either property or services * * *." Therefore, to commit a robbery, an offender must both purposely deprive the owner and knowingly obtain the property. Those are the only mental-state elements of the offense.

{¶ 38} A survey of case law interpreting the various forms of aggravated robbery and robbery reveals that recklessness is not added as an element of those offenses. Aggravated robbery in violation of R.C. 2911.01(A)(1) is the commission of a theft offense while having and displaying or using a deadly weapon. In *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038, the Ohio Supreme Court held that recklessness should not be read into the statute and that the weapon-display-or-use portion of the offense involved strict liability. Likewise, for the R.C. 2911.01(A)(3) form of aggravated robbery, which involves the commission of a theft offense with infliction of serious physical harm, the Ohio Supreme Court has held that the infliction-of-serious-physical-harm element is strict liability. *State v. Horner*, 126 Ohio St.3d 466, 2010–Ohio–3830, 935 N.E.2d 26. That form of aggravated robbery does not require any further mens rea beyond what is encompassed in the

theft portion of the statute. *Id.* at ¶53. Similarly, robbery, in violation of R.C. 2911.02(A), requires the commission of a theft offense while the offender merely has a deadly weapon. (A lack of display or use of the weapon distinguishes this offense from aggravated robbery under R.C. 2911.01(A)(1)). In *State v. Wharf*, 86 Ohio St.3d 375, 715 N.E.2d 172 (1999), paragraph one of the syllabus, the Ohio Supreme Court held that "[t]he deadly weapon element of R.C. 2911.02(A)(1) * * * does not require the mens rea of recklessness."

{¶ 39} This brings us to the case that first added a reckless mens rea to a robbery statute, *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ("*Colon I*"). There the court determined that recklessness is an element of robbery in violation of R.C. 2911.02(A)(2), which involves the commission of a theft offense with infliction of physical harm. I would not rely on *Colon I* as precedent for this proposition for at least two reasons. First, as noted in *Lester*, "[i]n *Colon I*, there was 'no dispute' that the defendant's indictment for robbery in violation of R.C. 2911.02(A)(2) was defective for failure to allege a mens rea." *Lester* at ¶29, quoting *Colon I* at ¶10. "'[T]he state agree[d] that the omission in the indictment of one of the essential elements of the crime of robbery,' i.e., the mens rea, rendered the indictment defective." *Id.* Therefore, *Colon I* never really analyzed the recklessness issue because the State had conceded the point. Second, in *Horner*, at both ¶45 and ¶54, the Ohio Supreme Court overruled *Colon I*, although perhaps not precisely on the recklessness issue. Nevertheless, the clear implication of ¶54 of *Horner* is that *Colon I* was wrongly decided regarding the addition of a reckless mens rea requirement to robbery under R.C. 2911.02(A)(2).

{¶ 40} A review of other statutory wording, and its analysis or lack thereof, further convinces me that recklessness should not be added as a culpable mental state for the force element of robbery under R.C. 2911.02(A)(3). I note that the resisting-arrest statute, R.C. 2921.33, distinguishes between recklessness and force: "(A) No person, recklessly or by force, shall resist or interfere with a lawful arrest * * *." Because recklessness is distinguished from force in that iteration, one could conclude the legislature viewed force and recklessness as separate concepts. In the same vein, when the legislature requires the use of force to be accompanied by a reckless mental state it does so explicitly, as in the assault statute, which provides: "No person shall recklessly cause serious physical harm * * *." R.C. 2903.13(B). The absence of a similar reckless modifier for the word "force" in the robbery statute should be viewed as an intention to exclude it. Moreover, force appears in numerous statutes, and I could find no case law for any of them appending an unmentioned culpable mental state of recklessness to the force element. For example, R.C. 2905.01, the kidnapping statute, provides: "(A) No person, by force, * * * shall remove another * * *." No case law supports the notion that this force element must be accomplished recklessly. The standard OJI instruction on the kidnapping offense does not suggest that recklessness should be included for the force element. OJI 505.01. Similarly, R.C. 2911.11(A)(1), the aggravated burglary statute, states: "No person, by force, * * * shall trespass * * *." No case law supports the notion that this force element must be accomplished recklessly. The standard instruction, OJI 511.11, does not suggest inclusion of a reckless instruction with regard to the force element. I see no reason why the word "force" in the robbery statute, R.C. 2911.02(A)(3), should be interpreted any differently than it is in these other statutes.

{¶ 41} I recognize some courts of appeals have held that recklessness is a necessary

part of the force component of robbery under R.C. 2911.02(A)(3). *See, e.g., State v.Ripperger*,12th Dist. Butler No. CA2007-11-304, 2009-Ohio-925, ¶14; *State v. Adams*, 12th Dist. Fayette No. CA2009–09–018, 2010–Ohio–1942, ¶13; *State v. Robertson*, 180 Ohio App.3d 365, 2008-Ohio-6909, 905 N.E.2d 678, ¶ 23 (10th Dist.2008). But each of these cases pre-dates *Horner* and the overruling of *Colon I*. There is also a reference in *State v. Tyson*, 10th Dist. Franklin No. 10AP–830, 2011–Ohio–4981, ¶ 33, that an R.C. 2911.02(A)(3) robbery requires the reckless use of force. However, that statement is made without citation, or analysis, and without recognition of the *Horner* result.

{¶ 42} My conclusion is that robbery by force, prohibited by R.C. 2911.02(A)(3), does not include a reckless mens rea for the force element. Thus, the trial court could not have been at fault for not instructing the jury about recklessness. Accordingly, I would affirm the judgment of the trial court.

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Baldwin's Ohio Revised Code Annotated
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2911. Robbery, Burglary, and Trespass (Refs & Annos)
Robbery

R.C. § 2911.02

2911.02 Robbery

Currentness

(A) No person, in attempting or committing a theft offense 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;

(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;

(3) Use or threaten the immediate use of force against another.

(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(C) As used in this section:

(1) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.

(2) "Theft offense" has the same meaning as in section 2913.01 of the Revised Code.

CREDIT(S)
(1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1982 H 269, § 4, eff. 7-1-83; 1982 S 199; 1972 H 511)

LEGISLATIVE SERVICE COMMISSION

1973:

As in the section on aggravated robbery, this section provides that the difference between theft and robbery is an element of actual or potential harm to persons. Also, robbery may be committed during an attempt at theft, in the commission of theft, or during flight after the attempt or theft, when the thief uses or threatens force against another. The person against whom force is used or threatened need not be the victim of the theft itself.

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R.C. § 2911.01

2911.01 Aggravated robbery

Currentness

(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.

CREDIT(S)

(1997 H 151, eff. 9-16-97; 1995 S 2, eff. 7-1-96; 1983 S 210, eff. 7-1-83; 1982 H 269, § 4, S 199; 1972 H 511)

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