

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

STATE OF OHIO,	:	APPEAL NO. C-080249
	:	TRIAL NO. B-0707647
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
WESLEY D. GILL,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant, Wesley D. Gill, was originally indicted on one count of aggravated robbery under R.C. 2911.01(A)(1), one count of kidnapping under R.C. 2905.01(A)(2), one count of having weapons while under a disability under R.C. 2923.13(A)(3), and two counts of felony murder under R.C. 2903.02(B) involving two separate victims. The predicate offense for both counts of felony murder was aggravated robbery.

Under a plea agreement, Gill pleaded guilty to one count of aggravated robbery and one count of having weapons while under a disability. The two felony-murder counts were reduced to two counts of involuntary manslaughter under R.C. 2903.04(A), and Gill pleaded guilty to the lesser offenses. The state dismissed the kidnapping count. The trial court sentenced Gill to serve a total of 25 years' imprisonment. This appeal followed.

In his sole assignment of error, Gill contends that he was prejudiced by a structural defect in the indictment. He argues that the indictment's failure to include the essential

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

element of mens rea for four of the five counts on which he was indicted denied him his rights to due process and to a proper grand-jury indictment. This assignment of error is not well taken.

In *State v. Colon (Colon I)*,<sup>2</sup> the Ohio Supreme Court permitted the defendant to raise the issue of a defective indictment for the first time on appeal. It held that the absence of a mens rea in the indictment, together with significant errors throughout the trial, constituted structural error that warranted reversal of the defendant's conviction.<sup>3</sup>

Subsequently, the court clarified its holding in *Colon I* on a motion for reconsideration. In *State v. Colon (Colon II)*,<sup>4</sup> it stated that a structural-error analysis is appropriate only in rare cases in which multiple errors at trial follow the defective indictment. Generally, where the indictment is defective because it did not include an essential element and the defendant fails to object, courts should apply a plain-error analysis.<sup>5</sup>

This court has discussed the problem of applying the analysis in *Colon I* and *Colon II* to the offense of felony murder. “[F]elony murder is one of the few crimes in Ohio that has no mens rea element directly attached to it. The mens rea element is found in the predicate offense and does not arise from the catchall culpable mental state of recklessly found in R.C. 2901.21(B).”<sup>6</sup>

In the present case, though, the predicate offense was aggravated robbery under R.C. 2911.01(A)(1), which also does not specify a culpable mental state. Gill was also indicted for a separate count of aggravated robbery and one count of kidnapping, neither of which specified a mens rea. Therefore, the state was required to prove that the

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<sup>2</sup> 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

<sup>3</sup> *State v. Sandoval*, 9<sup>th</sup> Dist. No. 07CA009276, 2008-Ohio-4402.

<sup>4</sup> 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169.

<sup>5</sup> *State v. Dubose*, 1<sup>st</sup> Dist. No. C-070397, 2008-Ohio-4983; *State v. Salaam*, 1<sup>st</sup> Dist. Nos. C-070385 and C-070413, 2008-Ohio-4982; *Sandoval*, supra.

<sup>6</sup> *Dubose*, supra; *Salaam*, supra.

defendant acted recklessly for all of these offenses,<sup>7</sup> but the indictment did not contain language to that effect.

Nevertheless, Gill never objected to the indictment. The record shows that he had notice of the offenses with which he was charged. After the trial court overruled his motion to suppress, he entered into a plea agreement and pleaded guilty to reduced charges. The record does not show that he was prejudiced by the indictment's defects or that the defects permeated the entire proceedings. This case is not that rare case that involves a structural defect.

Therefore, we apply a plain-error analysis. Our review of the record does not demonstrate that the error rose to the level of plain error. We cannot hold that, but for the error, the results of the proceeding would have been otherwise, or that we must reverse Gill's convictions to prevent a manifest miscarriage of justice.<sup>8</sup> Consequently, we overrule Gill's assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**SUNDERMANN, P.J., PAINTER and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on December 10, 2008

per order of the Court \_\_\_\_\_  
Presiding Judge

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<sup>7</sup> R.C. 2901.21(B); *Colon I*, supra.

<sup>8</sup> See *State v. Wickline* (1990), 50 Ohio St.3d 114, 552 N.E.2d 913; *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 448 N.E.2d 452; *State v. Brundage*, 1<sup>st</sup> Dist. No. C-030632, 2004-Ohio-6436.