

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

STATE OF OHIO	:	
	:	Appellate Case No. 23076
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2008-CR-1755
v.	:	
	:	
RICHARD D. COTTRELL	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 20th day of November, 2009.

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MATHIAS H. HECK, JR., by R. LYNN NOTHSTINE, Atty. Reg. #0061560, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
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Attorney for Defendant-Appellant

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BROGAN, J.

{¶ 1} Richard Cottrell appeals from his conviction of two counts of aggravated burglary, having a weapon while under a disability, felonious assault and three firearm specifications.

{¶ 2} The facts surrounding Cottrell's conviction are as follows: On the evening of April

30, 2008, Keith Allen awoke to find his nephew, Cottrell, beating him over the head with a handgun, demanding that Allen give him "his money." Allen testified at the trial that Cottrell led him upstairs to search Allen's bedroom for the money. After finding nothing in the bedroom, Cottrell led Allen back toward the stairs leading to the first floor. At that time, Allen's grandchildren appeared and began screaming at Cottrell to leave their grandfather alone. Cottrell pointed his gun at the children threatening to shoot them if they did not return to their room. Cottrell then again struck Allen on his head numerous times with the gun and proceeded to drag Allen outside the house.

{¶ 3} While Cottrell and Allen are in the front yard, Dayton police officers pull up to the house and see Cottrell standing over Allen. Cottrell sees the police and takes off running in between houses, with an officer in pursuit of him. Officer Scot Bernstein pursued Cottrell over a fence and into the alley running behind Allen's home. In the alley, Bernstein lost sight of Cottrell as he approached an apartment building; when the officer approached the apartment building he heard the entry door slam shut and when he reached the door it was locked. After police learned from Allen's son, Mario, on the scene that Richard Cottrell was the suspect and that Cottrell lived in the building in the upper left apartment, the officer proceeded to kick in the locked entry door and enter the building. Officers knocked on Cottrell's door and Cottrell's girlfriend answered. The officer who chased Cottrell through the alley saw him sitting on the couch, entered the apartment and placed Cottrell under arrest. After placing Cottrell under arrest the officer placed his hand on Cottrell's chest. Cottrell's heart was beating rapidly and his breathing was heavy, signs consistent with a suspect who had just fled from police. Officers noticed blood on Cottrell's t-shirt, jeans and boots, and a gun was found outside of Cottrell's apartment

building that also had blood on it. The gun was discovered in the bushes behind the apartment building in the area where the pursuing officer lost sight of Cottrell in the alley. The blood on Cottrell's t-shirt, boots, and the gun found outside Cottrell's apartment was Allen's.

{¶ 4} Allen was taken to the Miami Valley Trauma Center for treatment of his injuries. Allen was bleeding from his brain, suffered serious facial injuries that required his jaw to be wired shut and screwed in place, suffered leg and back injuries that left him partially paralyzed and affected his mobility. Allen has also suffered from severe headaches and has had two seizures since the incident. Allen's injuries were so bad that the responding officer could not tell if he was male or female due to the amount of blood he was covered in and how badly he was beaten. Allen spent over a month in the hospital due to his injuries.

{¶ 5} Antwan Smith, age nine and the victim's grandson, testified at the trial that he saw Cottrell holding a gun on Allen while they were both standing in the upstairs hallway. Smith testified that he saw his grandfather bleeding from his head and nose and he saw Cottrell threaten him at that time. Smith said he saw Cottrell go downstairs with Allen and go outside with Allen and hit him in the face with a gun.

{¶ 6} The State also produced testimony during its case in chief that Cottrell had a prior criminal record which prevented him from legally possessing a weapon.

{¶ 7} Cottrell testified in his own defense. He testified he saw an unknown black male hitting Allen while Allen was in his front yard. Cottrell said he heard the black male throw something metal away as he ran from the front yard. Cottrell said he discovered the metal object was a gun and went to help Allen. He testified that when the police

arrived he ran away because he thought the police would mistake him for the robber.

{¶ 8} Mario Allen, the victim's son, testified he saw an unknown black male assault his father. (It is noteworthy that Officer Paul Saunders testified during the State's case that it was Mario Allen who told him on the night of the assault that it was Cottrell who had pistol whipped his father.)

{¶ 9} Antwanette Smith, age 12 and the victim's granddaughter, testified she heard a commotion downstairs on the night of the assault and went downstairs and saw Cottrell trying to help her grandfather up who was lying on the front steps. She admitted on cross-examination she told Detective Mark Belinski that she had seen her grandfather being dragged downstairs by Cottrell while he was hitting her grandfather with a gun.

{¶ 10} Cottrell argues his convictions were against the manifest weight of the evidence because the victim was not credible because he gave bizarre answers to certain questions on cross-examination. He notes that Keith Allen stated he "died at the bottom of my steps outside of my house" in response to being asked whether he was admitted to the hospital as a result of the beating he received from Cottrell. Allen's answer is not bizarre in light of the severe injuries he suffered before he was taken to the hospital. Allen was also asked on cross-examination if he had not previously denied at a prior hearing that he was HIV positive when in fact he is HIV positive. Allen testified he only recently discovered that he was HIV positive. There is nothing bizarre about this testimony and no testimony refuted Allen's explanation. Lastly, Allen admitted he was taking pain medication the night he was attacked. Allen explained he initially misunderstood counsel's question when he initially denied taking some pills the evening he was assaulted. There was no evidence presented that the medication Allen was

prescribed would affect his ability to recall the events surrounding his beating.

{¶ 11} There is no evidence the jury lost its way in convicting Cottrell of all charges. There was ample eyewitness and forensic evidence to support the jury's verdict. The convictions were not against the manifest weight of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380. The first assignment of error is Overruled.

{¶ 12} In his second assignment, Cottrell contends the indictment failed to charge a mens rea for the trespass aspect and physical harm aspect of the aggravated burglary statute.

{¶ 13} *Colon I* does not apply to Cottrell's indictment for aggravated burglary under R.C. 2911.11(A)(1) because aggravated burglary includes two mens rea elements; knowingly or recklessly trespass and purpose to commit any criminal offense. *State v. Smith*, Montgomery App. No. 07CA139, 2009-Ohio-56, at ¶ 76; *State v. Day*, Clark App. No. 07CA139, 2009-Ohio-56, at ¶ 22-23. An indictment setting forth a charged offense that tracks the language of the statute creating the offense does not have to set forth the elements of predicate offenses separately. *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707. Failure to list the elements of predicate offenses does not prevent the defendant from being on notice of the charges against him. *Id.* In this case Cottrell's indictment for aggravated burglary included the predicate offense of trespass and tracked the statutory language of R.C. 2911.11(A)(1) including "with purpose to commit * * * any criminal offense." (Docket Entry No. 1.) Therefore the indictment included mens rea elements for trespass as a predicate offense and aggravated burglary as an offense, so Cottrell was on notice of the charges against him and the indictment was not deficient.

{¶ 14} Cottrell's contention that the indictment is deficient because it failed to

properly charge the requisite mens rea for subpart (1) of R.C. 2911.11(A) is also without merit. The relevant part of the indictment reads “did *recklessly* inflict, or attempt or threaten to inflict physical harm to another.” (Docket Entry No. 1.) (Emphasis added.) The State was complying with *Colon I* to properly charge Cottrell with a mens rea and actus rea element for each offense in the indictment. The indictment tracks the language of subpart (1) and “recklessly” was inserted in the most logical place to comport with the Supreme Court’s holding in *Colon I*. The Appellant’s second assignment of error is Overruled.

{¶ 15} The judgment of the trial court is Affirmed

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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