[Cite as *State v. Husband*, 2009-Ohio-2900.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 08AP-917 (C.P.C. No. 06CR-09-6654)
v.	:	(REGULAR CALENDAR)
Joshua E. Husband,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 18, 2009

Ron O'Brien, Prosecuting Attorney, *Richard A. Termuhlen,* and *Barbara A. Farnbacher*, for appellee.

Dennis Pusateri, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Joshua E. Husband, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a jury verdict, of trafficking in cocaine with specification, in violation of R.C. 2925.03, a third-degree felony.

{¶2} According to appellant, on December 28, 2005, Randy Holschuh, a friend of appellant's, came to his home. Holschuh told appellant that he needed money, so he was going to sell cocaine to his boss. However, Holschuh did not want his boss to know that

he was going to keep the profits, so he asked appellant to pose as the dealer, with Holschuh supplying the drugs.

{¶3} On December 29, 2005, Holschuh and his brother came to appellant's home. Holschuh left and then returned to the house with an undercover police detective, David Barrick, who was posing as Holschuh's boss. Appellant handled a gun while Barrick was in the home. Barrick paid appellant $750 in marked bills, took the cocaine, and soon left appellant's home. During the transaction, a child ran into the room, and appellant's wife retrieved the child. Throughout the proceedings, the state referred to the person with whom Barrick went to the house with as a "confidential informant," but did not reveal Holschuh as the confidential informant.

{¶4} Barrick tried to arrange another drug transaction for January 3, 2006, but was unable to do so. On the same day, Barrick executed a search warrant on appellant's home, at which time he found no drugs or marked money, but found a gun. Pursuant to a consent search at another address, to which appellant had traveled during police surveillance on January 3, 2006, police found the digital scale appellant used on December 29, 2005, cocaine, marijuana, and a Palm Pilot.

{¶5} On September 1, 2006, appellant was indicted for trafficking in cocaine with firearm specification; possession of cocaine with firearm specification; tampering with evidence; and four counts of endangering children. The trafficking in cocaine charge was alleged to have occurred on December 29, 2005, while the remaining counts were alleged to have occurred on January 3, 2006. Appellant filed motions to disclose the identity of the confidential informant and to suppress evidence seized during the execution of the search warrant, both of which were denied prior to trial.

{¶6} A trial commenced September 9, 2008. At the close of the state's case, appellant moved to dismiss the four counts of endangering children, and the trial court granted the motion. The remaining charges were submitted to a jury, which found appellant not guilty of the possession of cocaine and tampering with evidence charges, but guilty of trafficking in cocaine with firearm specification. The trial court immediately held a sentencing hearing and imposed a one-year prison term for the trafficking in cocaine conviction and three years for the firearm specification, to be served consecutively, for a total sentence of four years. The trial court journalized the judgment on September 16, 2008. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] THE TRIAL COURT ERRED BY DEPRIVING DEFENDANT-APPELLANT OF HIS RIGHT TO COMPULSORY PROCESS BY VIRTUE OF ITS FAILURE TO ENFORCE A PROPERLY SERVED SUBP[OE]NA, AND BY FAILING TO REQUIRE THE STATE TO ACT TO BRING THE WITNESS TO COURT.
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> [II.] THE TRIAL COURT ERRED BY FAILING TO CHARGE THE JURY WITH A MISSING WITNESS INSTRUCTION[.]
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> [III.] THE TRIAL COURT ERRED IN DEPRIVING DEFENDANT-APPELLANT OF THE EFFECTIVE ASSISTANCE OF COUNSEL[.]

{¶7} Appellant first argues that the trial court erred when it failed to enforce a properly served subpoena, and by failing to require the state to act to bring a witness to court. Specifically, appellant contends he was denied compulsory process and due process because the trial court did not take any action to assure that Holschuh appeared pursuant to a valid subpoena. We disagree. Initially, we note that, despite appellant's claim that "no one actually did anything" to see that Holschuh appeared at trial, the trial

court did take several actions toward securing his attendance. The trial court personally signed a subpoena for the attendance of Holschuh, and that subpoena was served on Holschuh. The trial court also subsequently signed an arrest warrant for Holschuh, which was returned unexecuted.

{¶8} Notwithstanding, appellant's assignment of error must be overruled. Even if the trial court erred, a party is not permitted to take advantage of an error that the party invited or induced. *State v. Bey*, 85 Ohio St.3d 487, 493, 1999-Ohio-283, citing *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, paragraph one of the syllabus. This rule is generally referred to as the "invited error doctrine." Here, after Holschuh failed to appear, pursuant to the court signed subpoena, appellant's counsel asked that the trial court issue an arrest warrant, which it did. After appellant testified at trial, and Holschuh failed to appear as appellant's next witness, the following discussion took place:

> [APPELLANT'S COUNSEL]: I have no further witnesses other than Mr. Holschuh. However, I understand that the second-week jurors – and just in the grand scheme of things, we can't leave this case open forever hoping that Mr. Holschuh will be picked up by the Franklin County Sheriff's Department or the Columbus Police Department. Therefore, I am willing to rest my case at this time, subject to the admission of my exhibits and subject to the possible arrest of Mr. Holschuh, should he get arrested prior to starting closing arguments, basically.
>
> If he gets arrested prior to starting closing arguments, I would like the opportunity to have him brought in the courtroom outside of the view of the jury so that the Court, the prosecutor, and myself could voir dire Mr. Holschuh, because I know we all have sort [sic] of questions about his materialness and his actual role. I believe it's still the State's official position that Mr. Holschuh is – they are neither confirming nor denying that he is the confidential informant at this time.

> * * *
>
> [THE COURT]: * * * I suspect that he would not be a very credible witness for anybody from what I've heard so far, so I'm not going to hold up the trial for him. But, you know, we are going to take time – a long break now to prepare the instructions and the verdict forms. And, of course, if they get him in the meantime, we would do as [appellant's counsel] requested, bring him in, put him under oath, ask him what he's going to say.

(Tr. 308-10.) After appellant's exhibits were admitted into evidence, appellant's counsel then rested his case, and appellant never raised the issue again.

{¶9} It is clear from the above that appellant's counsel agreed that, if Holschuh did not appear prior to the start of closing arguments, appellant would rest his case. Appellant's counsel explicitly conceded to the trial court that the case could not be indefinitely delayed while waiting for Holschuh to be located and/or arrested. It is also clear that the trial court did everything appellant's counsel requested in order to secure Holschuh's appearance. Appellant's counsel requested that the trial court sign a subpoena for Holschuh's attendance, which it did, and appellant's counsel then requested that the trial court issue an arrest warrant for Holschuh, which it also did. Appellant failed to request that the trial court or state do anything further, and then agreed to rest his case if Holschuh was not apprehended prior to closing arguments. Any error in the trial court's failure to further attempt to secure the attendance of Holschuh was invited by appellant. Therefore, appellant's first assignment of error is overruled.

{¶10} Appellant argues in his second assignment of error that the trial court erred when it failed to charge the jury with a missing witness instruction. Appellant contends Holschuh was a key witness for the state, he did not testify for the state, and the trial court did not give an explanation for his absence. Appellant claims that the trial court should

have instructed the jury that it could draw an adverse inference where a witness is favorable to a party in the litigation and does not appear and testify. Appellant cites to *Silveous v. Rensch* (1969), 20 Ohio St.2d 82, in support of his argument. In *Silveous*, the Ohio Supreme Court held:

> A special instruction prior to argument, stating that when it appears a litigant knows of the existence of a material witness, and such witness is within the control of the litigant whose interest would naturally be to produce him, and without satisfactory explanation he fails to do so, the jury may draw an inference that the testimony would not be favorable to him, is error where the jury is not also instructed regarding the facts to be considered in determining what evidence a litigant would naturally produce at trial.

Id. at paragraph one of the syllabus.

{¶11} Thus, the two requirements which must be met for a missing witness instruction are: (1) the witness in question must be within the particular power of a party to produce, and (2) the testimony of that witness would elucidate the transaction. *State v. Melhado*, 10th Dist. No. 02AP-458, 2003-Ohio-4763, ¶51; *State v. Long* (Sept. 27, 1984), 10th Dist. No. 83AP-444. If the testimony of the missing witnesses would have been merely cumulative, then the witness would not naturally be produced by the state, and the requested instruction would not be appropriate. *Silveous*.

{¶12} Here, we first note that appellant failed to request a missing witness instruction. The failure to request a jury instruction constitutes a waiver of any claim of error relative thereto, unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus. However, we find no error here, plain or otherwise. This court's decision in *Long* is instructive and involves similar circumstances as in the present case. In *Long*, the defendant engaged in a drug

transaction with police officers. The sale was arranged by an informant at the behest of the police as a means to "work off" the informant's previous charges. An officer, who was posing as the buyer, carried the drugs to the hotel room where the transaction was to occur. The defendant never touched the drugs. When the terms of the sale were arranged, either the officer or the informant removed money from a bag and passed it and a calculator to the defendant.

{¶13} At trial, the defendant in *Long* denied accepting either the money or the calculator, claiming that his refusal to touch the drugs, money, and calculator was intended to give to the others the impression that he was not associated with the transaction. The defendant testified that the informant had asked the defendant to accompany him as protection during a "scam" sale to the officer. The defendant denied any actual participation in the sale of drugs, stating that he was merely a dupe for the informant. The informant was subpoenaed by the defendant, but did not appear in court.

{¶14} On appeal of his conviction, the defendant in *Long* argued that the trial court erred by refusing to give a requested missing witness instruction. We rejected the defendant's argument. We found appellant failed to clearly show that the missing witness was within the particular power of the state at the time of trial, merely because, 11 months earlier, he had been a police informant. Thus, the first requirement for the requested missing witness instruction was not fulfilled. We further found that the issue of whether the informant's testimony would elucidate the transaction was open to debate. If the informant's testimony would have been merely cumulative to that of the arresting officers, then it would not naturally be produced by the state, and the requested instruction would not be appropriate.

{¶15} We also concluded in *Long* that, had the defendant succeeded in making a defense of entrapment, the informant's testimony could have been important to such a theory. In that case, the court's failure to give the requested instruction might indeed have been error. However, we found that, even so, it was doubtful that such an error would have been grounds for reversal because the defendant failed to show that the outcome of trial would have been different as he did not successfully raise the defense of entrapment.

{¶16} Here, as in *Long*, there is no evidence in the record that Holschuh was within the particular power of the state to produce. The trial took place nearly three years after the incident. There was no evidence that the state knew where to find Holschuh at the time of trial. The prosecutor stated he did not know Holschuh and had never met or spoken to him. The prosecutor did offer to telephone Detective Barrick during trial and ask Barrick to contact Holschuh, but there is no evidence in the record whether the prosecutor ever actually spoke with Barrick or whether Barrick took any action or even knew Holschuh's whereabouts. We cannot presume that the prosecutor or police would know where to find a witness merely because the witness was an informant many months prior to trial. See *Long* (merely because witness had been a police informant 11 months earlier does not establish that the witness was within the particular power of the state at the time of trial). Although appellant argues that Barrick had worked with the informant for several weeks before the transaction, entered into a written agreement with the informant, and possessed public and private data about the informant, even assuming Holschuh was the informant, these facts do not demonstrate that Holschuh was within the particular power of the state to locate at the time of trial. Rather, from the evidence in the record, it appears that only appellant knew Holschuh's whereabouts around the time of trial, as the

secretary of appellant's counsel personally served Holschuh with the first subpoena. Thus, the first requirement for the requested missing witness instruction was not fulfilled.

{¶17} Furthermore, as in *Long*, the issue of whether Holschuh's testimony would elucidate the transaction was open to debate. If Holschuh's testimony would have been merely cumulative to that of the arresting officers, then Holschuh would not naturally be produced by the state, and the requested instruction would not be appropriate. Although appellant claimed that Holschuh would testify consistent with appellant's testimony, and Holschuh's testimony could be important to appellant's entrapment defense, there was simply no evidence that Holschuh would testify in this respect. Neither appellant's counsel nor the prosecutor had ever communicated with Holschuh. The trial court also stated that it had no evidence to suggest that Holschuh's testimony would be relevant to appellant's entrapment defense. Thus, appellant also did not fulfill the second requirement for a missing witness instruction. Therefore, for these reasons, we find the trial court did not err in failing to issue a missing witness instruction. Appellant's second assignment of error is overruled.

{¶18} Appellant argues in his third assignment of error that he was deprived of effective assistance of trial counsel. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts employ a two-step process to determine whether the right to effective assistance of counsel has been violated. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the

"counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Id.

{¶19} An attorney properly licensed in Ohio is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In demonstrating prejudice, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶20} Here, appellant asserts his trial counsel was ineffective in three respects. Appellant first asserts his counsel was ineffective when he did not request a longer continuance in order to have the court's capias executed. However, appellant has failed to establish either requirement under *Strickland*. Appellant has not shown that his counsel's performance was deficient. Appellant fails to cite any support for the proposition that a competent attorney would have moved for a longer continuance under these circumstances. As reasoned by appellant's counsel, as a practical matter, the case could not be continued indefinitely while waiting for Holschuh to be arrested, which may well have never happened. Furthermore, even if appellant's counsel should have requested a longer continuance, appellant has failed to demonstrate that, were it not for counsel's errors, the result of the trial probably would have been different. Appellant cannot show that a longer continuance would have necessarily resulted in the arrest of

Holschuh. Also, as discussed above, appellant has not shown that Holschuh's testimony would have resulted in a different outcome. Therefore, we cannot find appellant's counsel was deficient in this respect.

{¶21} Appellant next asserts his trial counsel was ineffective for failing to request a missing witness instruction. However, as we have already found with respect to appellant's second assignment of error, that the trial court did not err in failing to issue a missing witness instruction, appellant's counsel was not ineffective in failing to request such.

{¶22} Appellant next asserts his trial counsel was ineffective for failing to object to Detective Barrick's testimony that he had been told by the informant that appellant was a narcotics trafficker. Appellant claims his counsel's ineffectiveness was exacerbated when his counsel began a line of questioning into the same subject matter upon cross-examination. We disagree with appellant's contentions. The failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel. *State v. Holloway* (1988), 38 Ohio St.3d 239, 244. Because objections tend to disrupt the flow of a trial, and are considered technical and bothersome by the fact finder, competent counsel may reasonably hesitate to object in the jury's presence. *State v. Campbell*, 69 Ohio St.3d 38, 53, 1994-Ohio-492.

{¶23} Here, as pointed out by the state, appellant's counsel may have failed to object to Barrick's testimony that he had been told by the informant that appellant was a narcotics trafficker because such an objection would have been ineffective. The jury had to presume that appellant had come to the attention of the police as a drug dealer in some manner. Whether it was the confidential informant or some other person who

informed the police of such is of little relevance, and any prejudicial effect would be highly speculative. In fact, as pointed out by the state, that an unnamed, unidentified informant provided the information to the police may have held less influence with the jury than if, for instance, another police officer would have been the one who prompted the police to investigate appellant.

{¶24} Further, that appellant's counsel briefly revisited the issue on cross-examination may have been trial strategy. On cross-examination, appellant's counsel questioned Barrick regarding the warrant submitted to the judge to search appellant's home. Appellant's counsel then pointed out that, in the very first paragraph of the warrant submitted to the judge, Barrick declared that a confidential informant had informed him that appellant was selling drugs. Appellant's counsel may have pointed this fact out to show the jury that the judge had no additional grounds to issue the warrant beyond the same unsubstantiated claims of this unnamed, unidentified informant. Also, as mentioned above, the jury may have questioned the reliability and credibility of an unnamed, unidentified informant. For these reasons, we cannot find that appellant's trial counsel provided ineffective assistance in any of the claimed instances. Appellant's third assignment of error is overruled.

{¶25} Accordingly, appellant's first, second, and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.

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