[Cite as *State v. McClurkin*, 2010-Ohio-1938.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2007-03-071
	:	O P I N I O N
- vs -		5/3/2010
	:	
LESHAWN McCLURKIN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2006-10-1886

Robin N. Piper III, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011-6057, for plaintiff-appellee

Timothy Young, Ohio Public Defender, Spencer Cahoon, 250 East Broad Street, Suite 1400, Columbus, OH 43215, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, Leshawn McClurkin, appeals his convictions for robbery and aggravated robbery in the Butler County Court of Common Pleas. We affirm the convictions.

{¶2} On the night of September 26, 2006, Frieda Mull and her friend Lillian

Donham left a lodge in Middletown. When they left, each was holding a purse. Two men approached, and one pulled the purses off of the women's shoulders, pushed the women to the ground, and ran off with their purses. At the time of the robbery, Mull was 94 years old and Donham was 76. While Donham suffered little physical harm as a result of being pushed to the ground, Mull suffered head trauma, a dislocated right shoulder, multiple abrasions, and after spending six days in the hospital, was confined to a wheel chair where before she was able to walk with a walker.

{¶3} After the robbery, police detectives, with the help of a K-9 unit, tracked a scent to a wooded area behind an apartment building where they located the purse of one of the victims and soon thereafter, both wallets. As a result of the investigation, police questioned Timothy Thomas who later testified that he was with McClurkin at the time of the robbery. Specifically, Thomas told the jury that he and McClurkin left a gas station and were walking when McClurkin grabbed Mull's and Donham's purses, pushed them to the ground, and ran away. Thomas also told police that on the night of the robbery, he wore a red shirt and dark jeans, and that McClurkin wore a white t-shirt and black jeans. According to eye witness testimony, the man who approached the victims but did not steal their purses wore a red shirt and dark pants while the assailant wore a white t-shirt with black jeans.

{¶4} Middletown police tried to contact McClurkin who was residing in Columbus. Detective Frank Hensley of the Middletown Police Department spoke to McClurkin by phone and asked him to come to Middletown for a face-to-face interview. McClurkin was later arrested in Columbus and transported back to Middletown where Hensley tried to interview him. At some point, McClurkin was

advised of his *Miranda* rights, refused to speak with Hensley, and requested an attorney.

{¶5} After the investigation was complete, McClurkin was indicted on single counts of robbery and aggravated robbery. McClurkin pled not guilty and filed a notice of alibi. After a two-day trial, a jury found McClurkin guilty of both offenses and the trial court sentenced him to the maximum sentence of ten years for the aggravated robbery, and five years for the robbery. McClurkin now appeals his convictions and sentence, raising the following assignments of error.[1]

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ALLOWED STRUCTURAL ERROR TO DEVELOP IN MR. MCCLURKIN'S CASE WHEN (1) IT PROCEEDED ON AN INDICTMENT THAT INCLUDED NO MENS REA FOR THE SERIOUS PHYSICAL HARM SECTION OF THE AGGRAVATED ROBBERY CHARGE; (2) THE STATE DID NOT ATTEMPT TO PROVE THE ELEMENT OF RECKLESSNESS; (3) THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE ELEMENT OF RECKLESSNESS REGARDING THE AGGRAVATED ROBBERY; AND (4) THE STATE TREATED THE SERIOUS PHYSICAL HARM ELEMENT OF AGGRAVATED ROBBERY AS STRICT LIABILITY."

{¶8} In his first assignment of error, McClurkin asserts that the state charged him by a defective indictment because it did not list a mental state, and that the defect caused structural error that now requires reversal of his convictions. This argument lacks merit.

1. McClurkin first appealed his convictions and sentence in 2007 but his appeal was dismissed after his appellate counsel failed to file a merit brief after receiving two extensions of time. This court granted McClurkin's application to reopen his appeal in an entry dated April 8, 2009.

{¶9} As referenced in McClurkin's detailed assignment of error, we review the effect a defective indictment has on a defendant's trial based on several factors set forth in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749. ("*Colon II*") This court discussed both *Colon II*, and its predecessor *State v. Colon,* 118 Ohio St.3d 26, 2008-Ohio-1624, ("*Colon I*"), in *State v. Ripperger*, Butler App. No. CA2007-11-304, 2009-Ohio-925, wherein we applied plain error analysis to determine that Ripperger's defective indictment did not require reversal of his conviction.

{¶10} In *Ripperger*, we recognized that the courts in *Colon I* and *Colon II* set forth four factors to consider before finding structural error: (1) the indictment violated the constitutional right to indictment by a grand jury by failing to list all elements of the crime charged; (2) the defendant had no notice that the state was required to prove that he had acted recklessly; (3) the state did not argue at trial that the defendant had acted recklessly, nor had the jury been instructed that it had to find the defendant's conduct reckless in order to convict him; and (4) the prosecution had treated robbery as a strict liability crime in closing argument. Id. at ¶13.

{¶11} Regarding the first factor, we agree with McClurkin that his indictment was defective because it failed to list a mental state. McClurkin was charged with one count of aggravated robbery in violation of R.C. 2911.01(A)(3), which states that "no person, in attempting or committing a theft offense,*** or in fleeing immediately after the attempt or offense, shall do any of the following: inflict, or attempt to inflict, serious physical harm on another."

{¶12} Because no mental state is listed in the section dealing with inflicting serious physical harm, and the section is not otherwise a strict liability offense, a reckless mens rea applies. See R.C. 2901.21(B); and *State v. Ryan*, Cuyahoga App.

No. 91508, 2009-Ohio-2494, ¶15, (finding mental state for R.C. 2911.01[A][3] is recklessness). While McClurkin's indictment repeats the statutory language of R.C. 2911.01(A)(3), it does not reference the requisite mental state.

{¶13} Nevertheless, plain error analysis is proper because the defective indictment did not result in multiple errors that were inextricably linked to the flawed indictment. Instead, the fact that the indictment failed to list recklessness as the required mental state did not lead to the structural errors that McClurkin now asserts.

{¶14} Regarding notice, the state's opening statement put McClurkin and the jury on notice that it was going to prove that McClurkin acted, in the least, recklessly during the theft offense and that his recklessness caused serious harm to Frieda Mull. "Specifically this case is about a robbery and this defendant's actions during and after that robbery. It's a trial to hold him accountable for the results of his actions." Later in the state's opening, it reminded the jury that "this case is about the defendant's actions. It's about his actions during and after the robbery." Regarding those actions, the state explained to the jury that it would offer evidence to prove that on the night of the incident, McClurkin pushed the elderly women to the ground in order to steal their purses.

{¶15} Regarding arguments at trial, the state put on evidence during McClurkin's two-day trial that demonstrated that he acted, at the very least, recklessly. According to R.C. 2901.22(C), "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances

are likely to exist."

{¶16} In order to prove that McClurkin acted recklessly, the state presented evidence from various witnesses, including the two victims, that McClurkin pushed the elderly women down in order to steal their purses. While McClurkin now argues that a reasonable juror could conclude that he did not act recklessly because only one of the victims was injured, the jury heard evidence that McClurkin came upon the elderly women, and pushed both to the ground. Although only one woman sustained serious physical injury, the evidence demonstrated that McClurkin pushed Mull to the ground with indifference to the consequences and with disregard to the risks inherent in pulling a purse off a 94 year old woman's shoulder and pushing her to the ground.

{¶17} McClurkin's own testimony indicates that he was aware that the state was required to prove that he acted recklessly in inflicting or attempting to inflict physical harm. During direct examination, McClurkin's counsel asked him if he robbed Mull to which McClurkin replied, "no ma'am." The following exchange then occurred.

{¶18} [McClurkin's Counsel] "Did you in any way strike or injure this woman?"

{¶19} [McClurkin] "No, ma'am."

{¶20} [McClurkin's Counsel] "Would you do such a thing?"

{¶21} [McClurkin] "No, ma'am,"

{¶22} This exchange demonstrates that McClurkin was trying to rebut the state's contention that he pushed the women to the ground by stating that he did not, and would not, have the requisite mental state to inflict physical harm.

{¶23} While the jury instructions did not list recklessly as the required mental state for inflicting or attempting to inflict physical harm, a review of the record

indicates that the state did not treat McClurkin's crime as a strict liability offense during its closing. Instead, the state reviewed the evidence it presented specific to McClurkin's actions during the robbery. Time and again, the state reminded the jury that McClurkin's actions included approaching the elderly women, grabbing their purses, and pushing them to the ground. It then stated, "his purpose was to cause serious physical harm *** [Mull] fell to the ground and she was injured." By stating that McClurkin acted purposely, the state was holding itself to a higher standard than acting recklessly.

{¶24} While McClurkin focuses on a portion of the state's closing argument wherein it stated that "it's not important to prove that [McClurkin] wanted to cause physical harm" as proof that it treated the crime as strict liability, we disagree. The state was accurate in stating that it was not important to prove that McClurkin wanted to cause physical harm. Instead, it was only under a statutory duty to prove that he acted recklessly in inflicting physical harm on Mull. Therefore, the state's assertion was not erroneous and did not cause any structural error in the case.

{¶25} McClurkin also takes issue with the state's remark that the robbery and serious injury were undisputed so that "the only thing you guys get to decide today is whether it was Mr. McClurkin." While McClurkin asserts that this statement somehow imputed strict liability, it is important to note the context of the statement within closing arguments. The state made the remark directly after stating that McClurkin's purpose was to cause serious physical harm and after reminding the jury that Mull was pushed to the ground and that she was injured. The state continued its argument by stating that a person knowingly committed the theft offense, that serious physical harm resulted, and introduced the idea that the jury would decide whether

the person who committed the offense was McClurkin. Throughout the trial, McClurkin's defense strategy was that he did not commit the crime because he was with his girlfriend at the time the crime occurred. Therefore, the state was correct in telling the jury that it would "get to decide *** whether it was Mr. McClurkin." This statement, however, neither alleviated the jury's duty to also find that McClurkin acted knowingly in committing the theft offense and that he acted recklessly in inflicting or attempting to inflict serious physical harm, nor did it cause the jury to disregard the evidence establishing McClurkin's mental state at the time he pushed Mull to the ground.

{¶26} Therefore, having found that the defective indictment did not cause structural error, McClurkin's failure to object to the defect in his indictment now requires this court to find plain error before reversing McClurkin's convictions. According to Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Waddell,* 75 Ohio St.3d 163, 166, 1996-Ohio-100. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Haney*, Clermont App. No. CA2005-07-068, 2006-Ohio-3899 ¶50, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶27} Here, the fact that McClurkin's indictment was defective does not constitute plain error. Instead, there is nothing in the record that indicates that had the indictment specifically listed the mental state as reckless, the outcome of his trial would have been different. As discussed above, the jury heard ample evidence of

McClurkin's guilt including testimony from eye witnesses and from the man McClurkin was with at the time of the robbery. Specifically, the jury heard evidence that McClurkin violently pushed two elderly women to the ground in order to steal their purses. Therefore, even if the indictment had listed the required mental state, there is nothing to indicate that McClurkin would have been acquitted. Having found that the defective indictment did not result in structural error, and that no plain error existed which calls for reversal of his convictions, McClurkin's first assignment of error is overruled.

{¶28} Assignment of Error No. 2:

{¶29} "THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY ON FLIGHT WHEN THE DEFENDANT HAD STAYED NEARBY AT HIS RESIDENCE FOR A NUMBER OF DAYS AFTER THE CRIME, AND WAS LATER FOUND IN COLUMBUS, AT HIS OTHER RESIDENCE, AFTER HE CONTACTED THE POLICE FROM THERE."

{¶30} In his second assignment of error, McClurkin claims that the trial court erred in instructing the jury on flight. There is no merit to this argument.

{¶31} The decision whether to issue a flight instruction rests within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. *State v. Campbell*, Butler App. No. CA2009-01-002, 2009-Ohio-6044. However, we need not analyze whether the trial court abused that discretion because McClurkin failed to object to the instruction at the time the trial court gave the jury its instructions, and has therefore waived that argument except for plain error. Therefore, we will consider whether the instruction amounted to plain error, using the rules of law stated in McClurkin's first assignment of error.

{¶32} The trial court gave the jury the following instruction:

{¶33} "Testimony has been provided by the State indicating that the Defendant attempted to avoid prosecution by fleeing from the police.

{¶34} "In regard to this evidence you are instructed that flight from justice, concealment and related conduct, in and of itself does not raise a presumption of guilt, but it may tend to show a consciousness of guilt on the part of the Defendant or a guilty connection with the crime.

{¶35} "If you find that the Defendant's conduct was not motivated by consciousness of guilt, or if you are unable to determine what the Defendant's motivation was, you should not consider this evidence for any purpose. However, if you find that the testimony is true and you find that the defendant's conduct was motivated by consciousness of guilt, you may consider that evidence in determining whether or not the Defendant is guilty of one or more of the offenses charged. You alone will determine the weight, if any, to be given to this evidence." See *State v. Goodbread*, Butler App. No. CA2003-02-038, 2004-Ohio-419 (upholding validity of jury instruction nearly identical to that given to McClurkin's jury).

{¶36} McClurkin now argues that it was error to give this instruction because the state failed to provide evidence that he fled the jurisdiction. Instead, McClurkin argues that the evidence demonstrates that he merely returned home to his Columbus residence after the robbery.

{¶37} "Flight from justice means some escape or affirmative attempt to avoid apprehension." *State v. White*, Lucas App. No. L-06-1636, 2008-Ohio-2990, ¶68. However, "a mere departure from the scene of the crime is not to be confused with a deliberate flight from the area in which the suspect is normally to be found." *State v.*

Norwood (Sept. 30, 1997), Lake App. Nos. 96-L-089, 96-L-090, *5.

{¶38} After reviewing the record, we find the trial court did not err in giving the jury the flight instruction. Instead, the state presented evidence from which the jury could conclude that McClurkin made an affirmative attempt to avoid apprehension rather than merely departing Middletown to return to his Columbus residence. Specifically, the jury heard testimony from two of McClurkin's acquaintances who testified that McClurkin told them of his intention to leave Middletown after police began to investigate the robbery. The jury also heard evidence that McClurkin was arrested in Columbus even though Detective Hensley asked McClurkin to return to Middletown to discuss the robbery. The state also presented evidence that while McClurkin's primary residence was in Columbus, he had been staying at his girlfriend's Middletown residence for the two months preceding the robbery.

{¶39} Having found that the jury instruction did not rise to the level of plain error, McClurkin's second assignment of error is overruled.

{¶40} Assignment of Error No. 3:

{¶41} "MR. MCCLURKIN RESPONDED TO THE POLICE'S ACCUSATION THAT HE ROBBED TWO WOMEN BY STATING THAT HE DID NOT DO IT. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE, OVER DEFENSE OBJECTION, TO USE MR. MCCLURKIN'S POST-ARREST 'SILENCE' AS EVIDENCE OF RECENT FABRICATION OF HIS ALIBI."

{¶42} In his third assignment of error, McClurkin asserts that the trial court erred in permitting the state to question him regarding his alibi defense because his right to silence was protected once he exercised his *Miranda* rights. This argument lacks merit.

{¶43} "While it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle v. Ohio* (June 17, 1976), 426 U.S. 610, 618, 96 S.Ct. 2240.

{¶44} However, "if a defendant voluntarily offers information to police, his toying with the authorities by allegedly telling only part of his story is certainly not protected by *Miranda* or *Doyle*." *State v. Osborne* (June 22, 1977), 50 Ohio St.2d 211, 216, vacated on other grounds. "If a defendant talks, what he says *or omits* is to be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can be later referred to." *State v. Gillard* (1988), 40 Ohio St.3d 226, 232, abrogated on other grounds. (Emphasis sic.) See also *State v. Jones* (Apr. 29, 1993), Cuyahoga App. No. 62415, *2 (affirming trial court's decision to permit state to question defendant on his "refusal to corroborate his statements to police" where defendant told police that he had not shot anyone but offered an alibi for the first time at trial).

{¶45} The Supreme Court further clarified its decision in *Doyle* by discussing the impact a defendant's choice to testify in his own defense has on the Fifth Amendment. "Once a defendant decides to testify, the interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination. Thus, impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of

the criminal trial." *Jenkins v. Anderson* (1980), 447 U.S. 231, 238, 100 S.Ct. 2124.

{¶46} After McClurkin was brought to Middletown from Columbus, but before he chose to remain silent, detectives asked McClurkin if he committed the crime. At that point, McClurkin stated that he "did not do it," but did not give the detectives an alibi. At trial, the state introduced its intent to question McClurkin on his failure to give an alibi when the detectives first questioned him. McClurkin objected, claiming the Fifth Amendment privilege against self-incrimination and his right to not have his silence used against him at trial. However, the trial court allowed the state to question McClurkin and through the cross-examination, McClurkin admitted that he told police that he did not commit the crime, but failed to indicate that he had an alibi.

{¶47} McClurkin now asserts that the record is ambiguous regarding the point at which he was read his rights. However, according to the following exchange on direct examination, it is clear that McClurkin denied his involvement in the crime, but omitted his alibi, before he asserted his right to remain silent and to have an attorney.

{¶48} [McClurkin's Counsel] "Okay. Did they – did they ask you if you committed this crime?"

{¶49} [McClurkin] "They asked me and I told them that I did not do it."

{¶50} [McClurkin's Counsel] "So you told these detectives that you didn't do anything?"

{¶51} [McClurkin] "Yes, Ma'am."

{¶52} [McClurkin's Counsel] "And what was the detectives' response?"

{¶53} [McClurkin] "They were like yes, you did."

{¶54} [McClurkin's Counsel] "Okay."

{¶55} [McClurkin] "And I was like, I didn't want to talk to them without a

lawyer."

{¶56} McClurkin later testified that even after stating that he wanted an attorney, he continued to tell the police that he did not "hit those old ladies" and denied his involvement in the crime.

{¶57} During cross-examination, the state asked McClurkin to review his failure to tell detectives that he had an alibi.

{¶58} [State] "*** You were brought back down from Columbus and you said you had a conversation with Detective Specht and Detective Hensley; isn't that true?"

{¶59} [McClurkin] "Yes."

{¶60} [State] "And at that time you didn't mention anything to them prior to the conversation stopping about an alibi; isn't that true?"

{¶61} [McClurkin] "Yes."

{¶62} [State] "Yes, that is true, you never mentioned it?"

{¶63} [McClurkin] "Well, like --." (Interruption in original.)

{¶64} [State] "I want to make it clear for the record when I ask, you never told them about an alibi prior to that conversation; isn't that true?"

{¶65} [McClurkin] "I told them I didn't do it. They got the wrong person."

{¶66} McClurkin confirmed that while he freely spoke to the detectives and denied his participation, he did not offer an alibi. These exchanges also demonstrate that McClurkin clearly spoke to the detectives voluntarily and did not end the conversation by asserting his Fifth Amendment right until after he denied his participation in the robbery. Therefore, because McClurkin voluntarily offered information to police, his toying with the authorities by denying participation in the crime but failing to offer an alibi is not protected by *Miranda* or *Doyle*.

{¶67} However, even if we were to entertain McClurkin's assertion that ambiguity exists because there is no testimony directly establishing at what point he asserted his *Miranda* rights, the decision of the trial court would be harmless error. The questions and answers, while they tended to prove that McClurkin fabricated the alibi, were not prejudicial because the jury heard other evidence that McClurkin engineered possible alibis while he was in jail. Specifically, the jury heard a recorded phone call made while McClurkin was incarcerated between McClurkin and his girlfriend wherein they discussed the importance of an alibi and who might offer such testimony.

{¶68} The jury also heard testimony from McClurkin's girlfriend, Fedia Arnold, that she was with McClurkin at the time of the theft. However, on cross-examination, Arnold admitted that the first time frame she gave officers was inaccurate because while she claimed that McClurkin was with her and did not leave her presence until after 2:00 a.m., a videotape from a local convenience store showed McClurkin in the store at 11:17 p.m. Therefore, the state's questions regarding McClurkin's failure to assert an alibi was cumulative to the other evidence which tended to demonstrate that McClurkin fabricated his alibi.

{¶69} Given the strong evidence of McClurkin's guilt, including eye witness testimony and testimony from Timothy Thomas, as well as the cumulative nature of the state's questions concerning McClurkin's alibi, any error was harmless beyond a reasonable doubt.

{¶70} Having found no abuse of McClurkin's constitutional protections, his third assignment of error is overruled.

{¶71} Assignment of Error No. 4:

{¶72} "DEFENSE COUNSEL ATTEMPTED TO CALL BRITTANY COOPER, WHO HAD BEEN SERVED WITH A SUBPOENA. MS. COOPER FAILED TO SHOW UP FOR THE SECOND DAY OF TRIAL. THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT ADDITIONAL TIME OR COMPEL MS. COOPER'S PRESENCE, AFTER DEFENSE COUNSEL PROFFERED HER TESTIMONY AS AN UNBIASED ALIBI WITNESS."

{¶73} In his fourth assignment of error, McClurkin asserts that the trial court erred in not granting his request for a continuance or not subpoenaing his alibi witness. There is no merit to this argument.

{¶74} Appellate courts review a trial court's decision to deny a continuance under an abuse of discretion standard. *State v. Fornash*, Butler App. No. CA2003-04-082, 2004-Ohio-797. An abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶181.

{¶75} On the second day of trial, McClurkin attempted to call Brittany Cooper, a subpoenaed witness, who was supposedly going to testify that she saw McClurkin at the time the robbery occurred. While she appeared the first day of trial but was not called, Cooper failed to appear on the second day when McClurkin wanted to call her as a witness. After McClurkin explained to the trial court that Cooper failed to appear, the following exchange occurred.

{¶76} [Trial Court] "And you don't know if she's going to be here or not?"

{¶77} [McClurkin's Counsel] "She said that she was going to be here, but she would have to have a ride. If that means I go get her, I'll go get her."

{¶78} At that time, the trial court called an early lunch recess to provide time

for Cooper to appear at court. However, when court resumed from its lunch recess, Cooper was not there. The court granted an additional 15-minute recess, but refused to grant any additional continuances after Cooper did not appear after the second continuance. At that time, the following exchange occurred.

{¶79} [Trial Court] "The court has been informed that it would be at the very earliest 1:45 or 2:00 before she can be here; is that correct?"

{¶80} [McClurkin's Counsel] "Your Honor, that is correct."

{¶81} McClurkin then agreed to proffer what Cooper's testimony would have been, but did not otherwise object to the court's decision to move forward with the trial, or ask that the trial court compel Cooper's appearance.

{¶82} Given that it granted an early lunch recess and permitted an additional recess, the trial court did not abuse its discretion in denying McClurkin's request for an additional continuance. Instead, the jury was impaneled and waiting for the trial to resume, and the trial court had no indication from McClurkin that Cooper would in fact appear.

{¶83} McClurkin also argues that the trial court abused its discretion by not compelling Cooper's attendance, as she had been properly subpoenaed. A trial court has the discretion to find a person in contempt if that person has been subpoenaed but otherwise fails to appear at court to testify. *Fornash* at ¶10. "When a subpoena is left at a witness' usual place of residence *** and the witness has actual knowledge of the subpoena, service of summons has been completed." Id.

{¶84} Although McClurkin's counsel stated that she served Cooper, the trial court expressed concern over counsel's ability to serve witnesses. McClurkin's counsel stated, "normally I serve the subpoenas because the sheriff's department –

it's hard for them to get these people served. And I served it and she appeared yesterday."

{¶85} Service by McClurkin's attorney was proper because according to Crim.R. 17(D), service may be performed by an attorney at law. The fact that Cooper appeared on the first day of trial tends to establish that she understood that her testimony was required, and the trial court seems to have imputed actual knowledge of the subpoena on Cooper. After McClurkin's counsel stated that Cooper had not appeared, the court responded, "if there were any issues, I would have been more than happy to order that she be here at 9:00 in the morning. I didn't think, based upon your representation that was necessary."

{¶86} When the trial court indicated its intention to deny any further continuances, McClurkin failed to object or to request that the trial court compel Cooper's appearance in accordance with the subpoena. Instead, McClurkin indicated that he had no other witnesses and rested. Having failed to request a warrant or raise an objection, McClurkin has waived any challenge, other than plain error, to the trial court's decision not to compel Cooper's appearance.

{¶87} The trial court's refusal to sua sponte compel Cooper's appearance does not rise to the level of plain error because there is no indication that the outcome of McClurkin's trial would have been different had the jury heard Cooper's testimony. Instead, according to the proffered summary of Cooper's testimony, Cooper would have testified that she saw McClurkin with his girlfriend, Fedia Arnold, at the time the robbery was happening. While this testimony would suggest a possible alibi, the jury heard from Arnold who testified that she was with McClurkin at the time of the robbery.

{¶88} McClurkin also presented testimony from his neighbor, Reginald Collier, who testified that McClurkin was on Arnold's balcony at the time the robbery was taking place. Collier testified that he and McClurkin spoke that night across their respective balconies, and that their conversation occurred before and after the ambulance's sirens and flashing lights could be seen at the scene of the robbery. Collier also testified that McClurkin told him that he had seen men running from the direction of the lights and sirens.

{¶89} Cooper's testimony would therefore be cumulative to Arnold's and Collier's and was not integral to his defense. Although McClurkin asserts that Cooper's testimony would have changed the outcome of the case because it offered an unbiased alibi, there is no guarantee that the jury would consider the testimony unbiased or give it any other weight than it gave alibi testimony from Arnold or Collier.

{¶90} Having found that the trial court did not abuse its discretion in refusing to grant additional continuances, and that no plain error exists because of the trial court's refusal to sua sponte compel Cooper's testimony, McClurkin's fourth assignment of error is overruled.

{¶91} Assignment of Error No. 5:

{¶92} "WHEN DEFENSE COUNSEL FAILED TO (1) EXPLICITLY OBJECT TO THE TRIAL COURT'S REFUSAL TO WAIT FOR MS. COOPER AND (2) TO REQUEST THAT MS. COOPER BE COMPELLED TO APPEAR OR THAT A MISTRIAL BE DECLARED, DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE."

{¶93} In his fifth assignment of error, McClurkin claims that he received ineffective assistance of counsel because his trial counsel failed to request that the

trial court compel Cooper to testify and failed to request a mistrial. There is no merit to these arguments.

{¶94} The Sixth Amendment guarantees an accused's right to effective assistance of counsel. However, and warning against the temptation to view counsel's actions in hindsight, the Supreme Court stated that judicial scrutiny of an ineffective assistance claim must be "highly deferential***." *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052.

{¶95} Also within *Strickland*, the Supreme Court established a two-part test that requires an appellant to establish that first, "his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial." *State v. Myers*, Fayette App. No. CA2005-12-035, 2007-Ohio-915, ¶33, citing *Strickland*.

{¶96} Regarding the first prong, an appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Strickland* at 688. The second prong requires the appellant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

{¶97} Here, McClurkin claims that he was denied effective assistance because his trial attorney failed to ask the court to compel Cooper to testify and failed to request a mistrial when the court denied the request for a continuance.

{¶98} However, the record indicates that trial counsel's performance was not deficient in regard to McClurkin's request to continue the trial. Instead, McClurkin's trial counsel was able to persuade the court to take an early lunch recess, and gained another 15-minute recess to provide time for Cooper to appear as a witness.

As the ultimate decision to deny an additional continuance or to compel witness testimony rested with the trial court, we cannot say that trial counsel's performance was deficient or that it prejudiced McClurkin.

{¶99} Regarding his trial counsel's failure to request a mistrial, McClurkin relies on *State v. Fornash*, wherein this court noted that "a second option available to the trial court was to declare a mistrial if the missing witness was reasonably required for the presentation of a defense." *Fornash* at ¶16. However, we are unable to say that the trial court would have granted any mistrial motion McClurkin's counsel may have made.

{¶100} Instead, and as discussed under McClurkin's fourth assignment of error, Cooper's testimony was cumulative to alibi testimony offered by Arnold and Collier. Because McClurkin offered an alibi through two separate witnesses, he was able to present a defense, and Cooper's testimony was not reasonably required.

{¶101} Having found that McClurkin's trial counsel's performance was not deficient, and that McClurkin suffered no prejudice, he was not denied effective assistance of counsel. McClurkin's fifth assignment of error is, therefore, overruled.

{¶102} Assignment of Error No. 6:

{¶103} "THE TRIAL [sic] ERRED WHEN IT ENGAGED IN MULTIPLE ERRORS, AS PREVIOUSLY NOTED. THOSE ERRORS, EVEN IF NOT HARMFUL INDIVIDUALLY, HAD THE CUMULATIVE EFFECT DENYING MR. MCCLURKIN A FAIR TRIAL."

{¶104} In his final assignment of error, McClurkin asserts that the cumulative error doctrine is applicable to his case, and warrants reversal of his convictions. We disagree.

{¶105} According to the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168.

{¶106} However, we have found that no errors occurred during McClurkin's trial. Therefore, McClurkin was not deprived of a fair trial, and the cumulative error doctrine is inapplicable. McClurkin's final assignment of error is overruled.

{¶107} Judgment affirmed.

BRESSLER and HENDRICKSON, JJ., concur.