[Cite as *State v. McIntire*, 2010-Ohio-3955.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No: 09CA10
	:	
v.	:	
	:	**DECISION AND**
WILLIAM JAY McINTIRE,	:	**JUDGMENT ENTRY**
aka WILLIAM JAY McINTYRE,	:	
	:	
Defendant-Appellant.	:	File-stamped date: 8-18-10

APPEARANCES:

William Jay McIntire, pro se, for Appellant.

Judy C. Wolford, Pickaway County Prosecutor, and Rose K. Vargo, Pickaway County Assistant Prosecutor, Circleville, Ohio, for Appellee.

Kline, J.:

{¶1} William Jay McIntire (hereinafter "McIntire") appeals the judgment of the Pickaway County Court of Common Pleas. After a jury trial, McIntire was convicted of felonious assault in violation of R.C. 2903.11(A)(1). On appeal, McIntire initially contends that there was insufficient evidence to support his conviction. Because, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of felonious assault proven beyond a reasonable doubt, we disagree. McIntire's next two arguments flow from a situation involving an alleged alibi witness who did not testify at McIntire's trial. As a result of this situation, McIntire contends (1) that he received ineffective assistance of counsel and (2) that the trial court erred by excluding the alleged alibi witness. Because McIntire

cannot demonstrate prejudice under either argument, and because McIntire created the situation he now complains about, we disagree with both of McIntire's alibi-related arguments. Finally, McIntire contends that he should receive a new trial because of the cumulative errors in the proceedings below. Because McIntire cannot demonstrate that any errors occurred, let alone multiple errors, we disagree. Accordingly, we overrule McIntire's assignments of error and affirm the judgment of the trial court.

I.

{¶2} The victim of the assault (hereinafter the "Victim") was shopping at a Wal-Mart in Circleville at approximately 2:00 p.m. on December 11, 2008. While shopping, the Victim ran into McIntire near the jewelry department. Because the Victim has a child with McIntire's sister, the Victim had already known McIntire for some time. After McIntire and the Victim went their separate ways, the Victim left the store and found McIntire waiting near the entrance. The Victim had to walk home, and McIntire was waiting for a "ride," so they started walking together in the direction of a Mexican restaurant about five stores down from the Wal-Mart. As they were walking, a black car pulled up near the Victim and McIntire. The car was McIntire's ride, and McIntire asked the Victim if he, too, wanted a ride home. The Victim accepted, and, as he reached for the door handle, McIntire punched him. After McIntire punched the Victim again, the Victim fell to the ground. Then, McIntire repeatedly kicked the Victim in the head, causing the Victim to black out.

{¶3} Before the attack, the Victim and McIntire passed Chase Smith (hereinafter "Smith") as Smith, his family, and his girlfriend were walking towards the Mexican restaurant. Smith got to the door, turned around, and saw McIntire standing over the

prone Victim. Smith did not actually see the attack, but he heard McIntire say "something to the effect of don't f---ing say that again, or something like that[.]" Transcript at 139. After McIntire departed in the black car, Smith called 9-1-1 and attended to the Victim. When Smith asked the Victim what had happened, the Victim responded that he did not know.

{¶4} Later that evening, McIntire went back to the Wal-Mart to return some cosmetics. McIntire already knew Christy Boltenhouse (hereinafter "Boltenhouse"), the Wal-Mart employee who handled the return. As Boltenhouse processed the return, McIntire asked her if she had seen the ambulance in the parking lot earlier that day. When Boltenhouse said that she had not, McIntire told Boltenhouse that he was in a fight with the Victim, that they fought because the Victim had stolen McIntire's wallet, and that the Victim was left in the parking lot "twitching." McIntire successfully returned the cosmetics and received a Wal-Mart gift card in exchange. The return receipt, which McIntire signed, lists Boltenhouse's employee number and McIntire's state-identification-card number. Sometime later, Boltenhouse told the police about her conversation with McIntire.

{¶5} The Victim suffered a facial fracture and nerve damage as a result of the attack. A week later, the Victim underwent reconstructive surgery and had a surgical plate inserted into his face.

{¶6} On February 6, 2009, a Pickaway County Grand Jury indicted McIntire for felonious assault. During McIntire's April 6, 2009 trial, the Victim identified McIntire as his attacker. On cross-examination, McIntire's attorney questioned the Victim about what he told Smith immediately after the attack – that, when asked, the Victim did not

know what had just happened. The Victim claimed that he was groggy and confused after blacking out. When the grogginess and confusion subsided, the Victim stated that he could positively identify McIntire as his attacker.

{¶7} Also at trial, Smith identified the Victim and McIntire as the men he saw in the parking lot on December 11, 2008. Smith further identified McIntire as the man standing over the Victim. Additionally, Boltenhouse testified about her conversation with McIntire as he returned the cosmetics, and Dr. Joseph Minarchek testified about the Victim's injuries and subsequent treatment.

{¶8} McIntire called one witness and also testified on his own behalf. At the close of evidence, McIntire informed the trial court judge about an alleged alibi witness. This led to McIntire's attorney explaining that he had visited McIntire in jail on the Thursday before McIntire's Monday trial date. Then, to make a record, McIntire's attorney described the following series of events. "I actually took a continuance entry [to the Thursday meeting] and asked him, when he brought up the issue that he wanted to present an alibi. I said you're going to have to sign a continuance because I have to give them notice of alibi seven days prior to any trial. I had the form with me. I expected him to sign it and we would get a continuance or at least ask for a continuance, and he insisted upon not signing that, not waiving his right to speedy trial, and proceeding to trial today. I told him I could not present an alibi. I think it's the girlfriend at the Bingo Hall. She apparently is here this morning and, of course, pursuant to the rules, that I have explained to him, and he made that choice.

{¶9} "He also made the choice to testify today, and that was against my advice. And I want to put that on the record, but he has that right, that's what he chose, he

made those decisions. And I want to make it clear on the record that he had the opportunity to ask for a continuance. I was up here Thursday in court, I made contact with the prosecutor saying I might ask for a continuance, but he insisted upon going to trial today, and here we are." Transcript at 191-92.

{¶10} After McIntire tried to explain his version of events, the trial court judge told him, "[W]hat [your attorney] advised you with respect to trying to use an alibi witness is correct. There are rules about when that has to be disclosed. He's been on your case from the get go in terms of representing you in this matter. * * * And you could have extended [your speedy-trial time]. You're the only one that could do that. I can't do that. * * * So I don't find any fault on behalf of your attorney. And he's correct that if you tried to call the witness, I'm assuming the state would have objected because of lack of notice, and [the witness] wouldn't have been permitted to testify anyway. So that's the issue, the court's addressed it, and we'll proceed with closing arguments." Id. at 193-94.

{¶11} The jury returned a guilty verdict, and McIntire was convicted of felonious assault and sentenced to six years in prison.

{¶12} McIntire appeals and asserts the following four assignments of error: I. "The State failed to present sufficient evidence to sustain Appellant[']s conviction violative to the Fourth, [F]ifth, Sixth, and Fourteenth Amendment[s] to the U.S. Constitution, Art. I, Sec. 10 of the Ohio Const." II. "The inadequate representation that the [D]efendant-Appellant received at trial fell below an objective standard of reasonableness, thus violating his right to the [e]ffective assistance of counsel under the Sixth Amendment to the U.S. Constitution, and Art. I Sec. 10 of the Ohio Const." III. "The Defendant-

Appellant was denied a fair trial and his right to due process of law when the trial court excluded testimony of an alibi witness violative to the Fourteenth Amendment to the U.S. C[o]nstitution." And, IV. "The cumulative effect of the errors at trial denied the appellant the right to due process of law and a fair trial, as is guaranteed to him under the 4th, 5th, 6th, and 14th Amendment[s] to the U.S. Constitution, and Article I Se[c]tion 10 of the Ohio Constitution."

II.

{¶13} In his first assignment of error, McIntire contends that there was insufficient evidence to support his conviction.

{¶14} When reviewing a case to determine if the record contains sufficient evidence to support a criminal conviction, we must "examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶33, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, at paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319.

{¶15} The sufficiency-of-the-evidence test "raises a question of law and does not allow us to weigh the evidence." *Smith*, 2007-Ohio-502, at ¶34, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Instead, the sufficiency-of-the-evidence test "'gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate

facts.'" *Smith*, 2007-Ohio-502, at ¶34, quoting *Jackson* at 319. This court will "reserve the issues of the weight given to the evidence and the credibility of witnesses for the trier of fact." *Smith*, 2007-Ohio-502, at ¶34, citing *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80; *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of the syllabus.

{¶16} McIntire was convicted of felonious assault. Under the felonious assault statute, "[n]o person shall knowingly * * * [c]ause serious physical harm to another[.]" R.C. 2903.11(A)(1). "Serious physical harm" means "[a]ny physical harm that carries a substantial risk of death; * * * that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; * * * that involves some permanent disfigurement or that involves some temporary, serious disfigurement; [or] that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." R.C. 2901.01(A)(5)(b)-(e). See, also, *State v. Lee*, Lucas App. No. L-06-1384, 2008-Ohio-253, at ¶13-24.

{¶17} Here, the evidence clearly supports McIntire's conviction. The Victim testified that McIntire had punched and kicked him, and Smith identified McIntire as the individual standing over the Victim as the Victim lay on the ground. Furthermore, both the Victim and Smith testified that there were no other people in the immediate area of the assault. In addition to the eyewitness testimony, Boltenhouse testified that McIntire told her he was in a fight with the Victim earlier that day. McIntire's return receipt corroborates Boltenhouse's story because the receipt was signed by McIntire and also lists his state-identification-card number. And finally, Dr. Minarchek testified about the

Victim's injuries and agreed that, as of the trial date, the Victim still experienced "significant nerve damage and pain." Transcript at 128.

{¶18} After viewing the foregoing evidence in a light most favorable to the prosecution, any rational trier of fact could have found that McIntire knowingly caused serious physical harm to the Victim. McIntire tries to attack the credibility of the evidence against him, especially the Victim's own testimony. But here, the jury obviously found the state's evidence to be credible, and we will not second-guess the jury's finding as to credibility. See *State v. Stout*, Gallia App. No. 07CA5, 2008-Ohio-1366, at ¶14. That is, under our standard of review for a claim of insufficient evidence, we must construe this evidence in favor of the State. As a result, McIntire's arguments are without merit.

{¶19} Accordingly, for the foregoing reasons, we overrule McIntire's first assignment of error.

III.

{¶20} For ease of analysis, we will review McIntire's second and third assignments of error together. Both assignments of error relate to McIntire's alleged alibi witness and the applicability of Crim.R. 12.1. Under Crim.R. 12.1, "[w]henever a defendant in a criminal case proposes to offer testimony to establish an alibi on his behalf, he shall, not less than seven days before trial, file and serve upon the prosecuting attorney a notice in writing of his intention to claim alibi. The notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense. If the defendant fails to file such written notice, the court may exclude evidence

offered by the defendant for the purpose of proving such alibi, unless the court determines that in the interest of justice such evidence should be admitted."

{¶21} "The purpose of Crim.R. 12.1 is to provide the State 'some protection against false and fraudulent claims of alibi often presented by the accused so near the close of the trial as to make it quite impossible for the state to ascertain any facts as to the credibility of the witnesses called by the accused.'" *State v. Lette*, Lake App. No. 2007-L-213, 2008-Ohio-5942, at ¶24, quoting *State v. Thayer* (1931), 124 Ohio St. 1, 4. "Requiring the defendant to give notice of an alibi defense to the state insures a fair trial for all parties. * * * While Crim.R. 12.1 requires a defendant to file timely notice of an alibi defense, it also gives the trial court the discretion to waive the notice requirement. If the testimony of an alibi does not surprise or otherwise prejudice the state[, and if the defendant has acted in good faith], the interest of justice may require admission of the alibi testimony." *State v. Burkhart*, Washington App. No. 08CA22, 2009-Ohio-1847, at ¶20, citing *State v. Smith* (1977), 50 Ohio St.2d 51, 53 (other internal citations omitted).

{¶22} First, we will summarize the events surrounding the alleged alibi witness. Apparently, McIntire told his attorney about the alleged alibi witness on the Thursday before McIntire's Monday trial date. Because of the seven-day-notice requirement in Crim.R. 12.1, McIntire's attorney told McIntire that he would need to request a continuance to present the alibi evidence. McIntire, however, refused to waive his speedy-trial rights. As a result, the trial proceeded as scheduled, and McIntire's trial counsel did not call the alleged alibi witness to testify.

{¶23} At the close of evidence, McIntire informed the trial court about the alleged alibi witness. Then, McIntire's attorney described the events surrounding the last-

minute revelation of the alleged alibi witness, including McIntire's refusal to ask for a continuance. The trial court judge explained that, because McIntire did not provide a notice of alibi, the prosecution could have objected to the alleged alibi witness. Consequently, even if McIntire's attorney had called the alleged alibi witness, the trial court judge said that the witness would not have been permitted to testify.

{¶24} We address McIntire's second and third assignments of error with these events in mind.

A.

{¶25} In his second assignment of error, McIntire contends that he received ineffective assistance of counsel. McIntire claims that his trial counsel failed to investigate the alleged alibi witness. Presumably, McIntire believes that an investigation would have resulted in his attorney calling the alleged alibi witness to testify.

{¶26} "In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness." *State v. Norman*, Ross App. Nos. 08CA3059 & 08CA3066, 2009-Ohio-5458, at ¶65 (internal quotations omitted); see, also, *State v. Wright*, Washington App. No. 00CA39, 2001-Ohio-2473; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56, cert. den. *Hamblin v. Ohio* (1988), 488 U.S. 975. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient * * * " which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[;]" and (2) "that the deficient performance prejudiced the defense * * *[,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose

result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Norman* at ¶65. "Failure to satisfy either prong is fatal as the accused's burden requires proof of both elements." *State v. Hall*, Adams App. No. 07CA837, 2007-Ohio-6091, at ¶11, citing *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶205.

B.

{¶27} In his third assignment of error, McIntire contends that the trial court erred by excluding the testimony of the alleged alibi witness.

{¶28} A trial court has broad discretion in the admission or exclusion of evidence. *Norman* at ¶51. "When reviewing a trial court's decision to exclude alibi evidence, we determine whether the trial court abused its discretion." *Burkhart* at ¶19 (citations omitted). See, also, *State v. Jamison* (1990), 49 Ohio St.3d 182, 187-89. "An abuse of discretion involves more than an error of judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable." *State v. Voycik*, Washington App. Nos. 08CA33 & 08CA34, 2009-Ohio-3669, at ¶13, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "In applying the abuse of discretion standard, we are not free to substitute our judgment for that of the trial court." *Burkhart* at ¶19 (citations omitted). See, also, *Norman* at ¶51.

C.

{¶29} We find no merit in either McIntire's second or third assignments of error because, under either assignment, McIntire cannot demonstrate prejudice. As it relates to the present case, we agree with the reasoning in *State v. Starks*, Summit App. No. 23622, 2008-Ohio-408. In *Starks*, the defendant claimed ineffective assistance of counsel based on the failure to file a notice of alibi as required by Crim.R. 12.1. The

Ninth District Court of Appeals rejected the defendant's argument and held that, "[w]hen the claimed ineffectiveness [of counsel] is a failure to call certain witnesses, a defendant will never be able to establish prejudice on a direct appeal because the appellate court is limited to facts that appear in the record before the trial court. [Similarly,] the inability to call alibi witnesses to testify * * * leads to the same outcome * * * because, based on the record in this appeal, this Court cannot assume that [the defendant's] alibi witnesses would have supported his [version of events]." *Starks* at ¶14 (internal quotation omitted).

{¶30} Based on the reasoning in *Starks*, McIntire's second assignment of error fails the prejudice prong of the *Strickland* test. See, generally, *State v. Six* (May 28, 1999), Washington App. No. 98CA9 ("If a defendant fails to satisfy either prong of the *Strickland* test, his claim of ineffective assistance of counsel must fail and the court need not address the other prong."), citing *Strickland* at 687. Because we have no way of discerning the testimony of the alleged alibi witness, we can only speculate as to the effects of that testimony. And "[s]peculation regarding the prejudicial effects of counsel's performance will not establish ineffective assistance of counsel." *State v. Leonard*, Athens App. No. 08CA24, 2009-Ohio-6191, at ¶68 (internal quotation omitted). Furthermore, as stated in *Starks*, McIntire's third assignment of error fails because he cannot demonstrate that exclusion of the alleged alibi witness resulted in prejudice. Basically, McIntire cannot demonstrate that the alleged alibi witness would have corroborated McIntire's testimony.

{¶31} Furthermore, we note that McIntire created the situation he now complains about. McIntire withheld the existence of the alleged alibi witness from his trial counsel

until just before the trial date. Then, instead of asking for a continuance, McIntire insisted on proceeding with the trial even after he was told about the notice-of-alibi requirement. As a result, McIntire has only himself to blame for the alleged alibi witness not testifying. See *State v. Skatzes*, Montgomery App. Nos. 22322 & 22484, 2008-Ohio-5387, at ¶96 (rejecting ineffective-assistance-of-counsel argument because defendant did not cooperate with trial counsel); cf. *State v. Allen*, Franklin App. No. 02AP-862, 2003-Ohio-1114, at ¶9 (stating that the defendant "ha[d] only himself to blame" because trial counsel honored the defendant's wishes).

{¶32} Accordingly, we overrule McIntire's second and third assignments of error.

V.

{¶33} In his fourth assignment of error, McIntire contends that he should receive a new trial because of the cumulative errors in the proceedings below.

{¶34} Under 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; *State v. DeMarco* (1987), 31 Ohio St.3d 191, at paragraph two of the syllabus.

{¶35} In his fourth assignment of error, McIntire briefly addresses three new arguments. McIntire claims that (1) the trial court's jury instruction on circumstantial evidence was not the same instruction found in the Webster's Legal Dictionary, (2) Boltenhouse's testimony was essentially hearsay, and (3) the Victim committed perjury. "Generally, a party cannot assert new legal theories for the first time on appeal." *State*

v. Landrum (2000), 137 Ohio App.3d 718, 722, citing *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43. Therefore, except for plain error, McIntire has forfeited his right to raise these arguments for the first time here. See *Norman* at ¶21.

{¶36} Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights. "Inherent in the rule are three limits placed on reviewing courts for correcting plain error." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶15. "'First, there must be an error, *i.e.*, a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.'" Id. at ¶16, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68 (omissions in original). We will notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, at paragraph three of syllabus. And "[r]eversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill*, 92 Ohio St.3d 191, 203, 2001-Ohio-141, citing *Long* at paragraph two of the syllabus.

{¶37} McIntire's three new arguments are without merit under any standard of review. First, as to the jury instruction, the trial court did not misstate Ohio law regarding circumstantial evidence. Second, McIntire has not demonstrated that Boltenhouse's testimony violated the Rules of Evidence. And third, McIntire's perjury argument is completely unsubstantiated. Therefore, we find no error, let alone plain error, in any of the new arguments under McIntire's fourth assignment of error.

{¶38} If "a reviewing court finds no prior instances of error, then the [cumulative-error] doctrine has no application." *State v. McKnight*, Vinton App. No. 07CA665, 2008-Ohio-2435, at ¶108; *State v. Hairston*, Scioto App. No. 06CA3089, 2007-Ohio-3707, at ¶41. We have already found no error related to the sufficiency of the evidence, the effectiveness of McIntire's trial counsel, or the exclusion of the alleged alibi witness. Furthermore, we find no errors related to the new arguments in McIntire's fourth assignment of error. As such, McIntire has not demonstrated that any errors occurred, let alone multiple errors. Therefore, McIntire's fourth assignment of error is without merit.

{¶39} Accordingly, we overrule McIntire's fourth assignment of error. Having overruled all of McIntire's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY:_____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.