[Cite as *State v. Hawkins*, 2011-Ohio-6658.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-907
v.	:	(C.P.C. No. 09CR-372)
Maurice W. Hawkins,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 22, 2011

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

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Maurice W. Hawkins, from a judgment of sentence and conviction entered by the Franklin County Court of Common Pleas following a jury trial in which appellant was found guilty of murder, felonious assault, aggravated robbery, and kidnapping. The trial court made a separate guilty finding on a charge of having a weapon under disability.

{¶2} On January 21, 2009, appellant was indicted on one count of aggravated robbery, in violation of R.C. 2911.01; one count of murder, in violation of R.C. 2903.02;

one count of felonious assault, in violation of R.C. 2903.11; two counts of kidnapping, in violation of R.C. 2905.01; and two counts of having a weapon while under disability, in violation of R.C. 2923.13. The indictment arose out of the shooting death of Mohammad Khan on July 17, 2007, while Khan was working at a drive-thru carryout, located at 2899 Suwanee Road, Columbus.

{¶3} The matter came for trial before a jury beginning on June 1, 2010. In July of 2007, Mohammed Rehman was the owner of the "Kwik-N-Kold Carryout" (hereafter "the Kwik-N-Kold"). (Tr. 93.) Rehman's friend, Kahn, worked at the store. Rehman gave the following account of the events on July 17, 2007. At approximately 1:15 p.m., Rehman was in his office where the cash register was located, while Kahn was working near a walk-in cooler. At that time, an individual entered the store and requested a pint of wine. Rehman sold a bottle of wine to the man, later identified as Leon Mahone.

{¶4} After Rehman waited on another customer at the drive-thru area, Mahone told Rehman that he had changed his mind; he wanted a smaller size bottle. Rehman walked outside the office and observed the man had a weapon. Mahone told Rehman: "Ask your friend to come inside the office." (Tr. 96.) Rehman told Kahn that "this guy is here to rob us. He wants both of us in the office." (Tr. 96.) The three men went inside the office, and the gunman demanded money from the register. Rehman opened the register and took out "probably like $100 or $150." (Tr. 96.) Mahone ordered Rehman and Kahn to get down on the ground, and told them he needed more money. Kahn told the man that they had other money in the cooler. Mahone then stated: "You guys have drugs here." (Tr. 98.) Rehman responded: "We don't have drugs." (Tr. 98.)

{¶5} The men walked inside the cooler; Kahn was behind Rehman, and Rehman "heard a gunshot, and then as soon as I turned it was my friend, he got hit." (Tr. 97.) Rehman testified that Kahn and Mahone "collided," and Mahone shot Kahn in the chest. (Tr. 97.) Rehman saw his friend run outside with one hand on his chest and one hand on his head. Rehman also began running, and Mahone shot him in the right elbow and the right thigh. Mahone then fled toward a nearby alley.

{¶6} Kahn died at the scene of the shooting. At trial, the parties stipulated to the admission of a coroner's report indicating that Kahn died as a result of a gunshot wound that perforated his left lung, heart, and liver. Rehman was taken to a hospital for treatment of his wounds. At the hospital, a detective showed Rehman a photo array, and he picked out the individual depicted in photograph No. 2 of the array. Rehman was certain that the individual in the photograph was his assailant.

{¶7} Germaine Bryant, a semi-truck driver, resides on Agler Street, near the Kwik-N-Kold. On July 17, 2007, Bryant was sitting on the porch of his home when he noticed a green car driving back and forth. The back window of the car was busted out, and Bryant observed two black men, "a heavy-set guy and a smaller guy." (Tr. 35.) According to Bryant, "the car kept driving back and forth." (Tr. 35.) Bryant then heard gunshots coming from the drive-thru, and he observed a man running North through the alley from the area of the store. The man, who was wearing cutoff jeans, a black shirt, and a "do-rag," had a gun in one hand, and was also carrying some shirts. (Tr. 36.) Police officers later showed Bryant a photo array, and he selected the individual depicted in photograph No. 2 of the array.

{¶8} Brenda Peck is a former resident of the neighborhood where the Kwik-N-Kold is located. On July 17, 2007, Peck was sitting on her front porch when she heard three or four gunshots. Peck observed a dark-skinned older man carrying a gun and t-shirts. The man started running toward Peck's residence, and Peck went inside her front door and locked it. The individual approached and tried to open the side door, but Peck's father locked that door. The man then ran through Peck's backyard and tripped while trying to jump a fence, dropping the gun. He picked up the gun and ran through the alley toward Robert Street. Police officers subsequently transported Peck to a location where several suspects were being detained. Peck identified one of the individuals as the man she earlier observed with a gun running through her backyard.

{¶9} Brady Inman is a Clinton Township police officer. On July 17, 2007, Inman was working a special duty assignment for a road crew that was performing repaving work at the intersection of Westerville and Agler Roads, near the Kwik-N-Kold. On that date, Inman heard three consecutive gunshots; he went to the area of the shots and observed a male victim laying face down in an alley just South of the drive-thru. The man did not appear to be breathing, and Inman immediately radioed a dispatcher. Inman then heard voices and observed a second male with gunshot wounds to the forearm and leg. Inman spoke to this individual, and he was given a description of an assailant: "[A] male black, tall, 6'1", 6'2", wearing a black cap, black shirt, and black pants or shorts," carrying a handgun and observed running through an alley West of the carryout. (Tr. 75.) Another individual gave Inman a description of a green Saturn station wagon with a rear window busted out.

{¶10} Columbus Police Officer Travis Fisher was driving to work on July 17, 2007 when he heard a radio dispatch reporting a shooting. While driving westbound on Morse Road, Officer Fisher observed a green vehicle matching the description from the dispatch, and he began following the vehicle. The driver of the vehicle turned northbound onto Tamarack Boulevard, and then turned left into the parking lot of the 3-C Foodmart, located at Tamarack Boulevard and Morse Road. Officer Fisher stopped in front of the vehicle, identified himself as a Columbus police officer, and ordered the four occupants to place their hands out of the windows of the car. The occupants all complied with the officer's request. One of the individuals in the back seat matched the description provided over the radio dispatch. Police officers found cash and a "do-rag" in the back seat of the vehicle. (Tr. 165.) A stipulation was entered at trial that, at the time the four occupants were detained, Richard Whiting was sitting in the driver's seat, Raymond Galloway was sitting in the front passenger seat, Mahone was sitting in the back seat behind the driver, and appellant was sitting in the back seat behind the front passenger.

{¶11} Mahone, age 40, testified on behalf of the state. Mahone entered a plea of guilty to charges related to the shooting death of Khan, and he received a sentence of 25 years to life. Mahone testified he suffers from drug, alcohol, and mental health problems. Mahone began using crack in 1992, and he has obtained money for drugs through robberies, including a robbery in 2005. Mahone has previously bought cocaine from Whiting, whom he first met in 2004. Mahone is also an acquaintance of appellant, and he has purchased crack from appellant.

{¶12} On the date of the incident, Mahone was staying at the residence of a friend, Darren. That morning, Mahone went to a nearby gas station; when he returned to

Darren's residence, Whiting, appellant, and an individual referred to as "Fat Boy," later identified as Galloway, were at the residence. Whiting suggested robbing the Kwik-N-Kold, and Mahone agreed. Whiting told Mahone that the carryout "had drugs and stuff in it." (Tr. 193.) According to Mahone, appellant made a comment that "he wanted to hit that spot, but I guess I was doing it now." (Tr. 195.)

{¶13} A short time later, Whiting drove past the drive-thru with appellant, Mahone, and Galloway. As they were driving by, Whiting said to Mahone: "Go in there and get the money and get the dope too, and [appellant] agreed with him." (Tr. 195.) When they arrived at the carryout, Mahone asked appellant if he would "go see who all is in there." (Tr. 195.) Appellant "handed Richard his gun and went to see who was in there." (Tr. 195.) Appellant "came back out with some chips and pop in his hand" and said: "Yes, there is only two people in there." (Tr. 195.) Whiting "gave me a gun, said was I ready. I said yes. I told Maurice to cock it for me to make sure." (Tr. 195.) Appellant then cocked the weapon for Mahone.

{¶14} Mahone walked to the carryout and asked a clerk for some wine. After the clerk waited on another customer in a truck at the store's drive-thru area, Mahone asked for a different size bottle of wine. When the clerk came out of the booth, Mahone pointed the weapon at him and asked for money. The clerk went to the register and took out all of the money. Mahone then asked for drugs, and one of the clerks told him there were drugs in the cooler. This clerk then attempted to punch Mahone, and Mahone shot him. Mahone then turned and shot the other clerk.

{¶15} After the shooting, Mahone ran through an alley, cut through a yard, and eventually jumped into the back of the car with the other three individuals. Mahone told

them: "I had to shoot him." (Tr. 201.) Whiting asked if he got money and drugs; Mahone responded that he "got the money, but they ain't give me no drugs." (Tr. 201.) Mahone gave the money and weapon to Whiting. The four individuals then drove to the residence of Whiting's girlfriend to hide the weapon. Whiting went inside the residence and then returned to the car. They drove away, but were stopped by police a short time later. At the time of the police stop, Whiting was in the front driver's seat, and "Fat Boy" (Galloway) was in the front passenger seat. Whiting threw the money in the back toward Mahone, telling him to "hold the money, and everybody said: Don't say nothing to the police because they don't know what's up." (Tr. 203.)

{¶16} In 2008, Mahone entered a guilty plea to aggravated murder, aggravated robbery, and attempted murder in connection with the incident at the Kwik-N-Kold. In September of 2008, detectives spoke with Mahone, and indictments were subsequently brought against Whiting and appellant. Mahone signed a proffer statement and a plea agreement with respect to the shooting incident. According to Mahone, appellant was aware that a robbery was to take place, and appellant provided the weapon used in the robbery. Appellant had possession of the weapon when Mahone first got into Whiting's vehicle that day. Appellant told Mahone he had bought the weapon, and Mahone had seen appellant with the gun several days earlier. It was Mahone's idea to have appellant initially go inside the carryout to "see who all was in there." (Tr. 198.) Mahone denied that appellant was asleep during the incident. Mahone testified that Galloway was not aware of the robbery until they arrived at the Kwik-N-Kold.

{¶17} Columbus Police Detective James McCoskey went to the hospital to interview the surviving shooting victim (Rehman) shortly after the incident. Detective

McCoskey prepared a photo array that included a picture of Mahone, and Rehman selected Mahone's picture from the array. On July 17, 2007, charges were filed against Mahone. Also on that date, appellant was transported to police headquarters and was interviewed by detectives. At trial, a portion of a tape-recorded interview with appellant was played for the jury. During the interview, appellant told detectives that he was passed out in the vehicle during the shooting, and that he was asleep when the police officer detained all four individuals subsequent to the incident.

{¶18} Daniel Davison is a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation ("BCI"). Davison performed gunshot residue tests with respect to four individuals, including appellant. Davison testified that the presence of gunshot primer residue on a person's hands is consistent with handling a weapon after it has been fired. Davison's testing of appellant indicated "one three-component particle, one component with lead, barium and antimony on the left hand." (Tr. 137.)

{¶19} Galloway testified on behalf of appellant. Galloway, age 30, is an acquaintance of Whiting. On the morning of July 17, 2007, Galloway was at the home of Whiting. Later, Whiting and Galloway drove to Cleveland Avenue, where Whiting stopped the vehicle and began talking to appellant. At about that time, Mahone walked up and started talking to Whiting about attending a barbecue. Whiting then received a call from Jesse Dennis regarding a drug sale, so Whiting, appellant, Galloway, and Mahone drove to a location approximately one block from the Kwik-N-Kold.

{¶20} While they were waiting, appellant stated he was thirsty, and wanted to get something to drink. Appellant got out of the car, and Mahone followed him. The two men returned, and Mahone asked Whiting for some money to buy something to drink; Mahone

then left the car, and the others waited for Dennis to arrive for the drug sale. Dennis arrived a short time later, while Mahone was still absent from the vehicle. According to Galloway, he heard no discussion of a robbery, and Galloway did not see a weapon in the car.

{¶21} The men then began driving around the area. A short time later, Mahone jumped into the car through the broken back window. Galloway smelled gunpowder, and Mahone was "frantic and just running off at the mouth." (Tr. 347.) Appellant was "just like he was intoxicated, just hanging out the window or something." (Tr. 347.) Whiting drove away, he later stopped the vehicle, and Galloway got out of the car. After Mahone explained that he had not done anything, Galloway got back inside the car. A police officer subsequently stopped the vehicle, and Galloway was taken to police headquarters where he was interviewed.

{¶22} On cross-examination, Galloway testified that appellant was known as "Buck" because he had a sawed-off shotgun. (Tr. 385.) Galloway acknowledged that he lied to police officers about the events at the time of the incident. In February of 2010, Galloway spoke with a defense investigator who gave Galloway details regarding what appellant was relating about the incident. Portions of a tape-recording of this meeting were played for the jury.

{¶23} Following deliberations, the jury returned verdicts finding appellant guilty of murder, felonious assault, aggravated robbery, and both counts of kidnapping. The trial court separately found appellant guilty of having a weapon while under disability. The court sentenced appellant by judgment entry filed August 27, 2010.

{¶24} On appeal, appellant sets forth the following three assignments of error for this court's review:

> I. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF MURDER, AGGRAVATED ROBBERY, KIDNAPPING AND TAMPERING WITH EVIDENCE AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
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> II. APPELLANT WAS DEPRIVED OF HIS RIGHT TO BE PRESENT AND TO THE PRESENCE AND ASSISTANCE OF HIS COUNSEL DURING A CRITICAL STAGE OF HIS JURY TRIAL, AND HIS RIGHT TO DUE PROCESS AND A FUNDAMENTALLY FAIR JURY TRIAL AS REQUIRED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTIONS FIVE, TEN AND SIXTEEN OF THE OHIO CONSTITUTUION AND CRIMINAL RULE 43(A).
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> III. APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE, THEREBY DENYING HER [SIC] THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶25} Under his first assignment of error, appellant challenges both the sufficiency and the weight of the evidence pertaining to his convictions. Appellant's primary contention is that the state's main witness, Mahone, was not credible.

{¶26} In *State v. Sexton,* 10th Dist. No. 01AP-398, 2002-Ohio-3617, ¶30-31, this court discussed the distinctions between sufficiency and weight of the evidence as follows:

> To reverse a conviction because of insufficient evidence, we must determine as a matter of law, after viewing the evidence in a light most favorable to the prosecution, that a rational trier

of fact could not have found the essential elements of the crime proved beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, * * * paragraph two of the syllabus. Sufficiency is a test of adequacy, a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, * * * citing *State v. Robinson* (1955), 162 Ohio St. 486, * * *. We will not disturb a jury's verdict unless we find that reasonable minds could not reach the conclusion the jury reached as the trier of fact. *Jenks*, supra, at 273 * * *. We will neither resolve evidentiary conflicts in the defendant's favor nor substitute our assessment of the credibility of the witnesses for the assessment made by the jury. *State v. Willard* (2001), 144 Ohio App.3d 767, 777-778, * * *; citing *State v. Millow* (2001), Hamilton App. No. C-000524. A conviction based upon legally insufficient evidence amounts to a denial of due process, *Thompkins*, supra, at 386, * * *, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211; and if we sustain appellant's insufficient evidence claim, the state will be barred from retrying appellant. *Willard*, supra, at 777, * * *, citing *State v. Freeman* (2000), 138 Ohio App.3d 408, 424 * * *.

A manifest weight argument, by contrast, requires us to engage in a limited weighing of the evidence to determine whether there is enough competent, credible evidence so as to permit reasonable minds to find guilt beyond a reasonable doubt and, thereby, to support the judgment of conviction. *State v. Brooks* (2001), Franklin App. No. 00AP-1440, * * *, citing *Thompkins*, supra, at 387, * * *. Issues of witness credibility and concerning the weight to attach to specific testimony remain primarily within the province of the trier of fact, whose opportunity to make those determinations is superior to that of a reviewing court. *State v. Bezak* (1998), Summit App. No. C.A. 18533, * * * citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, * * *. Nonetheless, we must review the entire record. With caution and deference to the role of the trier of fact, this court weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury, as the trier of facts, clearly lost its way, thereby creating such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against a conviction. * * *.

{¶27} We first address appellant's sufficiency argument. As applicable to the facts of this case, felony murder is defined under R.C. 2903.02(B) to state: "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree."

{¶28} R.C. 2911.01(A) defines aggravated robbery in part as follows:

> No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
>
> * * *
>
> (3) Inflict, or attempt to inflict, serious physical harm on another.

{¶29} Felonious assault is defined under R.C. 2903.11(A)(2) as follows: "No person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." Ohio's kidnapping statute, R.C. 2905.01(A)(2), states in part: "No person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o facilitate the commission of any felony or flight thereafter."

{¶30} In considering appellant's sufficiency challenge, the state presented evidence that, if believed, indicated the following. On the date of the incident, Whiting suggested robbing the Kwik-N-Kold, and he told Mahone that there were drugs at the drive-thru. Appellant made a comment that "he wanted to hit that spot, but I guess [Mahone] was doing it now." (Tr. 195.) Mahone, Whiting, appellant, and Galloway then

drove to the area of the Kwik-N-Kold. Whiting told Mahone to go inside and get money and drugs from the store, and appellant agreed with Whiting. Mahone, however, asked appellant to first go into the carryout to "see who all is in there." (Tr. 195.) Appellant handed Whiting his gun, and appellant walked to the store, returning with some food. Appellant told Mahone: "Yes, there is only two people in there." (Tr. 195.)

{¶31} Whiting handed Mahone the firearm, and Mahone asked appellant to cock the weapon, which appellant did. Mahone testified that he then went to the carryout, pointed the gun at the two employees, obtained money from the register, and then shot both employees. After the shooting, Mahone jumped into the car and Whiting drove the four men to his girlfriend's apartment to hide the weapon. Whiting took the weapon inside the apartment; after returning to the car, Whiting drove the four individuals to a carryout on Cleveland Avenue, where they were detained by a police officer. After his arrest, a gunshot residue test was performed on appellant, and a BCI forensic scientist testified that testing indicated the presence of gunshot residue on appellant's left hand.

{¶32} In considering the evidence presented, a rational trier of fact could have found appellant was present at the drive-thru and actively participated in the planning and execution of the robbery, including providing a loaded weapon to Mahone and scouting out the location just before the robbery. Here, viewing the evidence in a light most favorable to the state, the evidence was sufficient to support the verdicts.

{¶33} We next consider appellant's argument that his convictions were against the manifest weight of the evidence. As noted, appellant asserts that Mahone was not a credible witness. Appellant cites Mahone's admissions that he had abused alcohol and

drugs, and that he suffered from severe mental health problems. Appellant argues that no rational trier of fact should have found this witness to be credible.

{¶34} The record indicates the jury was made aware of Mahone's drug use, his mental health issues, his prior arrests and convictions, as well as the fact that he pled guilty to aggravated murder and aggravated robbery with respect to the shooting death of the victim in the instant case. The jury also heard appellant's witness, Galloway, corroborate some of Mahone's testimony, including testimony by Galloway that appellant went inside the carryout prior to the shooting, and that Whiting drove to his girlfriend's house after the shooting. While appellant told police detectives that he was asleep in the vehicle during the events at issue, Mahone testified that appellant was not asleep, and Officer Fisher corroborated Mahone's testimony that no one was asleep in the vehicle at the time he detained these individuals. Further, at the time the suspects were detained, appellant was seated in the backseat of the vehicle beside Mahone, and cash and a do-rag were found in the backseat of the vehicle.

{¶35} While appellant contends that Mahone was not a credible witness, it was up to the jury to assess his credibility. Despite being made aware of his background, it is apparent that the jury found Mahone's testimony believable, and the decision to credit his testimony was within the province of the trier of fact. See *State v. Golden* (Dec. 20, 2001), 10th Dist. No. 01AP-367, 2001-Ohio-8769 (rejecting defendant's claim that his conviction was against the manifest weight of the evidence because the state's witnesses were either on drugs or intoxicated at the time of the incident; jury was able to observe the witnesses and determine whether they were believable, and the assessment of credibility was within the province of the trier of fact); *State v. Braun,* 8th Dist. No. 91131,

2009-Ohio-4875, ¶156 (while the record reflects that most of the state's lay witnesses were "drug users, felons, and jailhouse snitches," issues of credibility are nevertheless within the province of the jury, and convictions were not against manifest weight of the evidence). The record also indicates that Mahone's credibility was vigorously challenged by defense counsel on cross-examination, allowing the jury to assess Mahone's motives and believability. See *State v. Mayes,* 10th Dist. No. 03AP-1154, 2005-Ohio-1769, ¶23 (despite admitted drug use of state's witnesses, appellant's convictions were not against manifest weight of the evidence; defense counsel cross-examined the witnesses for inconsistencies, and jury was free to believe all, part, or none of the testimony of each witness).

{¶36} Upon review, and affording deference to the jury's credibility determinations, we do not find that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. Accordingly, the convictions are not against the manifest weight of the evidence. Having found sufficient evidence to support the convictions, and that such convictions are not against the manifest weight of the evidence, appellant's first assignment of error is not well-taken and is overruled.

{¶37} Under his second assignment of error, appellant asserts that he was deprived of his right to be present during a critical stage of his trial. Specifically, appellant argues that, during jury deliberations, the jurors asked several questions, including a question indicating they were deadlocked on two of the charges. The trial court subsequently provided the jury with a "*Howard*" charge. See *State v. Howard* (1989), 42 Ohio St.3d 18. Appellant acknowledges that defense counsel was present during this

procedure, but appellant contends that he was not present for the reading of the instruction. Appellant further argues that trial counsel did not waive his presence.

{¶38} In response, the state argues that the record does not establish that appellant was absent when the trial court read the supplemental instruction to the jury. The state further argues that appellant failed to object to the procedure, and that appellant is unable to demonstrate either plain error or prejudicial error.

{¶39} A review of the trial transcript reflects that, on June 10, 2010, at 1:08 p.m., while the jury was deliberating, the trial court spoke with the prosecutor and defense counsel about providing the jury a *Howard* charge, and the court noted "a general agreement" by both sides to "read them the Howard charge." (Tr. 655.) The jury then returned to the jury box, and the trial court provided them with an oral supplemental instruction. (Tr. 656-58.) The trial court asked both the prosecutor and defense counsel whether they wished to add anything further, and defense counsel responded: "No, Your Honor." (Tr. 658.) At 1:38 p.m., the trial court noted: "Record should reflect that the Defendant is present with counsel, the Prosecutors are present in the jury room and the jury is not in the room. I believe we have a verdict." (Tr. 659.)

{¶40} On February 8, 2011, the state filed with the trial court a motion to correct the record, requesting that the court "settle and correct the record by issuing an Entry explaining whether the defendant was physically present in the courtroom when the trial court read the jury * * * instruction, pursuant to *State v. Howard*." The trial court conducted a hearing on the state's motion on February 24, 2011.

{¶41} At the hearing, Doug Stead, an assistant Franklin County prosecutor, stated that he was lead counsel for the state during appellant's trial. Stead testified in part: "I

know that the Defendant was present when we did the Howard charge." (Feb. 24, 2011, Tr. 7.) While Stead could not "specifically remember seeing [appellant] at any point in the trial," Stead represented: "he was present when we actually read the instructions." (Feb. 24, 2011, Tr. 7.)

{¶42} Warren Edwards, an assistant Franklin County prosecutor, testified that he was co-counsel for the state during appellant's trial. Edwards did not specifically recall the moment when the jury indicated they were unable to reach a verdict as to two of the counts. He stated: "I don't have any recollection of abnormal procedure that day." (Feb. 24, 2011, Tr. 11.)

{¶43} Robert Krapenc, co-defense counsel during appellant's trial, stated that he has never proceeded with a *Howard* charge without the defendant in the room. Krapenc did not have any specific recollection with respect to the *Howard* charge in appellant's trial. He testified, however: "I sat next to [appellant] the whole trial. If he was not there I would have known he was not there. Can I specifically say on this date was he in the courtroom? No, I can't say that for all, any part of the trial." (Feb. 24, 2011, Tr. 18.)

{¶44} Appellant testified on his own behalf, and stated he did not recall the trial judge reading the *Howard* charge to the jury. During cross-examination, appellant stated: "I don't know what a Howard charge is." (Feb. 24, 2011, Tr. 24.)

{¶45} At the close of the hearing, the trial judge noted that he had "some specific recollection of these events." (Feb. 24, 2011, Tr. 30.) The trial judge recalled that both sides agreed to the *Howard* charge. The trial judge further stated: "I have never ever ever given a Howard charge to a jury without the Defendant being present." (Feb. 24, 2011, Tr. 33.)

{¶46} Following the hearing, the trial court filed an entry which stated in part:

> This matter is before the Court on the State's * * * Motion to Correct the Record * * *. The Court held a hearing * * * on February 24, 2011.
>
> The State's motion is granted to the following extent:
>
> Insofar as the State seeks clarification of whether the defendant was present or absent from the courtroom when the *Howard* charge was read to the jury, this Court has no specific recollection of whether the defendant was present or absent from the courtroom when the *Howard* charge was read to the jury. The Court confirms that it is the practice of this Court to have the defendant present in the courtroom when a *Howard* charge is read to the jury, and this Court has never given a *Howard* charge when the defendant was not present.

{¶47} The Supreme Court of Ohio has recognized that "[a]n accused has a fundamental right to be present at all critical stages of his criminal trial." *State v. Frazier,* 115 Ohio St.3d 139, 2007-Ohio-5048, ¶139, citing Section 10, Article I, Ohio Constitution; Crim.R. 43(A). The right of a defendant to be present at all stages of the proceedings includes the right to be present "during a communication between the trial judge and the jury regarding the judge's instructions given in response to a request from the jury." *State v. Darby,* 10th Dist. No. 10AP-416, 2011-Ohio-3816, ¶17, citing *Columbus v. Bright* (June 21, 1984), 10th Dist. No. 83AP-857. Further, " '[I]t is the right and privilege of a defendant to be present when a jury, during its deliberations on a verdict in a felony case, returns to the courtroom for further instructions from the trial judge as to the law, where [the] accused is affected by such instructions.' " *Darby* at ¶17, quoting *Bright.* However, an accused's absence "does not necessarily result in prejudicial or constitutional error. '[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, *and to that extent only*.' " *Frazier* at ¶139,

quoting *Snyder v. Massachusetts* (1934), 291 U.S. 97, 107-08, 54 S.Ct. 330, 333, (emphasis sic).

{¶48} In *Darby,* the appellant argued that she was deprived of a fair trial, contending that the record did not reflect she was present during the time period in which counsel and the trial court reviewed questions presented by the jury and formulated responses. In *Darby* at ¶22-23, this court held in relevant part:

> Here, the record does not affirmatively prove that appellant was absent from the proceedings addressing the questions from the jury. The transcript does not say one way or another whether appellant was present during the discussions involving the jury questions. Yet, the transcript is consistent in that it never indicates whether appellant was physically present during each proceeding throughout the course of this action.
>
> For example, the transcript is silent as to appellant's presence before each witness' testimony, despite the fact appellant was identified in open court by at least three witnesses, as well as prior to opening statements, even though it is quite apparent that appellant was indeed present, as she was addressed by name by defense counsel in his opening statement. Thus, we cannot draw any conclusion from the transcript's failure to mention whether appellant was present when the trial court addressed the jury questions. Moreover, we cannot say that the transcript affirmatively indicates appellant's absence by its silence. Appellant has failed to meet her burden of showing error by referencing matters in the appellate record which affirmatively demonstrate she was not present. See *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197.

{¶49} In *State v. Simmons,* 7th Dist. No. 06 JE 4, 2007-Ohio-1570, ¶82, the court held: "[W]here the record is silent, the reviewing court does not presume that the defendant and his counsel were absent when the court answered a question. * * * Instead, the record must affirmatively indicate the absence of a defendant or his counsel during the stage of trial in question." Thus, where there is "no affirmative indication either

way * * * we presume presence." Id. See also *State v. Clark* (1988), 38 Ohio St.3d 252, 258 ("the record must affirmatively indicate the absence of a defendant or his counsel during a particular stage of the trial"); *State v. Davis* (May 20, 1986), 10th Dist. No. 85AP-883 ("[t]he record in this case does not affirmatively show either the absence of defendant or counsel; thus, their presence is presumed").

{¶50} In the present case, while the record may not specifically reflect appellant's presence during the reading of the *Howard* charge, it does not affirmatively establish that he was absent. Moreover, a review of the testimony at the hearing on the state's motion to correct the record casts serious doubt on appellant's claim that he was absent during the reading of the supplemental instruction. The record also contains the trial court's entry indicating its standard practice in providing such an instruction to a jury. Here, in the absence of an affirmative indication appellant was absent, we presume his presence. *Simmons; Davis*.

{¶51} Further, this court has previously held that certain communications with the jury during the deliberation stage may be harmless, notwithstanding the absence of the defendant, where the defendant's counsel was present and the additional instructions provided were not erroneous. *State v. Blackwell* (1984), 16 Ohio App.3d 100, 101. In the instant case, even assuming appellant was absent during the *Howard* charge, the record affirmatively indicates that: (1) defense counsel agreed to the reading of the *Howard* charge; (2) counsel was present when the charge was read; (3) there was no objection to manner in which the supplemental instruction was given to the jury; and (4) there is no contention that the instruction provided by the trial court was erroneous.

{¶52} Even accepting that appellant was not present, it is not clear from the record how appellant's presence would have aided his counsel in protecting his interests, and we agree with the state that appellant has failed to demonstrate plain error or prejudice. See *State v. Nguyen,* 9th Dist. No. 22883, 2006-Ohio-5064, ¶9 (appellant failed to show why his presence during "*Allen* charge" was critical to outcome or would have contributed to fairness of the procedure, nor did appellant demonstrate how he was prejudiced by his absence from the charge or how his presence "had a reasonably substantial relation to his opportunity to fully defend against the charges").

{¶53} Accordingly, appellant's second assignment of error is not well-taken and is overruled.

{¶54} Under his third assignment of error, appellant argues that his trial counsel was ineffective. Specifically, appellant argues that counsel's actions in calling Galloway as a witness constituted deficient performance.

{¶55} In order to prevail on a claim of ineffective assistance of counsel, a defendant is required to "show, first, that counsel's performance was deficient, and second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *State v. Diar,* 120 Ohio St.3d 460, 2008-Ohio-6266, ¶137, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. In order to show prejudice, "a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different." *State v. McGee,* 7th Dist. No. 07 MA 137, 2009-Ohio-6397, ¶13. Further, prejudice "may not be assumed," but "must be affirmatively shown." Id.

{¶56} Appellant argues that during cross-examination, the prosecution repeatedly questioned Galloway about "coaching" by the defense investigator. Appellant argues that the witness was also confronted about his admittedly false statements to the police at the time of the events. Appellant maintains that the net effect of Galloway's testimony was to harm his case more than assist it.

{¶57} In response, the state argues that there was a possible tactical reason to call Galloway as a witness, as he was the only potential witness who could provide helpful testimony regarding appellant's claim without subjecting appellant to cross-examination. More specifically, by calling Galloway as a witness, defense counsel was able to elicit his testimony that there was no discussion of a robbery while driving to the carryout, and Galloway further testified that he did not see a weapon in the vehicle. The state further argues that, without the testimony of Galloway, appellant was left with only his "incredible" story to police detectives that he was asleep in the car during the entire time the robbery and shooting were planned and executed.

{¶58} Generally, "a decision by counsel 'whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.' " *State v. Douthat,* 10th Dist. No. 09AP-870, 2010-Ohio-2225, ¶17, citing *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4. See also *State v. Lopez,* 8th Dist. No. 94312, 2011-Ohio-182, ¶93, citing *State v. Utz*, 3d Dist. No. 3-03-38, 2004-Ohio-2357, ¶12 (the decision to call or not call witnesses is "a matter of trial strategy and, absent a showing of prejudice, does not deprive a defendant of the effective assistance of counsel").

{¶59} Upon review, we agree with the state that defense counsel's decision to call Galloway as a witness was a permissible tactical decision that did not constitute deficient

performance. The Supreme Court has recognized that " 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.' " *State v. Williams,* 99 Ohio St.3d 493, 2003-Ohio-4396, ¶125, citing *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2052. Under the facts of *Williams,* the Supreme Court noted that the record "shows that Williams's counsel investigated, ascertained what the witnesses would say, and made an informed, conscious choice between strategic options." Id. Similarly, in the instant case, defense counsel investigated the case, determined what the witness would say, and made an informed, strategic choice. As also noted by the state, counsel's decision to present the testimony of Galloway provided potentially valuable testimony for appellant while serving as an alternative to subjecting him to cross-examination. See *State v. Alexander,* 10th Dist. No. 06AP-647, 2007-Ohio-4177, ¶50 (defense counsel's decision to allow tape to be admitted in entirety reflected strategic decision as it allowed jury to hear appellant, who did not testify, give his "side of the story," and served as an alternative to appellant being subject to cross-examination). Upon review, we conclude that trial counsel was not ineffective in deciding to call the witness at issue, and appellant's third assignment of error is without merit and is overruled.

{¶60} Based upon the foregoing, appellant's first, second, and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.

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