[Cite as *State v. O'Neal*, 2009-Ohio-5290.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA-42
KEITH M. O'NEAL	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas Case No. CR2008-0090
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 29, 2009

APPEARANCES:

For Plaintiff-Appellee:

D. MICHAEL HADDOX 0004913
Muskingum County Prosecutor
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RON WELCH 0069133
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

DAVID A. SAMS 0055235
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Delaney, J.

{¶1} Defendant-Appellant, Keith M. O'Neal, appeals from judgment of the Muskingum County Court of Common Pleas, convicting him of one count of aggravated robbery, in violation of R.C. 2911.01(A)(3) one count of theft, in violation of R.C. 2913.02(A)(1), and one count of theft of a credit card, in violation of R.C. 2913.71(A). The State of Ohio is Plaintiff-Appellee.

{¶2} Harry Holbert testified that he met Appellant when Appellant came to his house and wanted to store some of his belongings at his house. According to Holbert, Appellant did not have permission to stay at Holbert's residence, but began doing so anyhow with a young female companion.

{¶3} Appellant and his companion stayed at Holbert's for a couple of weeks before leaving.

{¶4} On March 7, 2008, Holbert was sitting in his chair in the living room when Appellant entered his residence, placed a pillow over his face and tried to suffocate him. Holbert was able to struggle and free himself from the situation, at which time, Appellant grabbed him by the back of his pants and tore his wallet out of his pants. Appellant took Holbert's wallet, which had his social security card, driver's license, bank card, and cash in it.

{¶5} Holbert immediately reported the incident to the police, who arrived at the scene at approximately 2:30 in the afternoon. He reported what had happened and was able to identify Appellant to police by the only name he had for him – "Jonesy". Officers then went to Holbert's residence, where they were able to secure pieces of paper inside

the house with Appellant's real name on them. Holbert was also able to identify Appellant out of a photo array.

{¶6} At trial, Appellant called an alibi witness, Carmello Dooley. Dooley testified that on the date of the offense, between 2:30 and 3:00 p.m., Appellant came over to his house with a 30 pack of beer and they drank it. Dooley approximated that he drank 15 beers. He stated that he and Appellant drank until approximately 9:00 or 10:00 p.m., at which time, Dooley left and went to a bar.

{¶7} After hearing the evidence, the jury convicted Appellant of all counts. The trial court sentenced Appellant on July 7, 2008, to twelve years in prison.

{¶8} Appellant raises eight Assignments of Error:

{¶9} "I. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND THE RIGHT TO A GRAND JURY INDICTMENT UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY STRUCTURAL ERROR IN THE FORM OF A DEFECTIVE INDICTMENT WHICH DID NOT ALLEGE EVERY ELEMENT OF THE OFFENSE OF AGGRAVATED ROBBERY.

{¶10} "II. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY STRUCTURAL ERROR IN THE FORM OF A CONVICTION BASED UPON INSUFFICIENT EVIDENCE.

{¶11} "III. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION

AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY STRUCTURAL ERROR IN THE FORM OF A VERDICT OF GUILTY WHICH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶12} "IV. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY STRUCTURAL ERROR IN THE FORM OF DEFICIENT JURY INSTRUCTIONS WHICH DID NOT INSTRUCT ON EVERY ELEMENT OF THE CHARGE OF AGGRAVATED ROBBERY (ID.).

{¶13} "V. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY STRUCTURAL ERROR IN THE FORM OF THE TAKING OF JUDICIAL NOTICE OF THE IDENTITY OF THE DEFENDANT-APPELLANT AS THE PERPETRATOR OF THE OFFENSE (ID.).

{¶14} "VI. THE DEFENDANT-APPELLANT WAS DENIED DUR [SIC] PROCESS AND A FAIR TRIAL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY STRUCTURAL ERROR IN THE FORM OF INEFFECTIVE ASSISTANCE OF COUNSEL (ID.).

{¶15} "VII. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED

STATES CONSTITUTION BY STRUCTURAL ERROR IN THE FORM OF CUMULATIVE ERROR (ID.).

{¶16} "VIII. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND TWICE PLACED IN JEOPARDY BY THE IMPOSITION OF SUCCESSIVE PUNISHMENTS FOR THE SAME OFFENSE IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION (ID.).

I.

{¶17} In his first assignment of error, Appellant alleges that his indictment for aggravated robbery under R.C. 2911.01(A)(3) was defective because it did not contain the element of recklessness. In support of this proposition, Appellant cites to the Ohio Supreme Court opinion of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

{¶18} *Colon I*, supra, concerned an indictment for robbery in violation of R.C. 2911.02(A)(2), which provides:

{¶19} "No person, in attempting or committing a theft offense * * * shall do any of the following: * * *

{¶20} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm."

{¶21} The *Colon I* court held:

{¶22} R.C. 2911.02(A)(2) does not specify a particular degree of culpability for the act of 'inflict[ing], attempt[ing] to inflict, or threaten [ing] to inflict physical harm,' nor does the statute plainly indicate that strict liability is the mental standard. As a result, [pursuant to R.C. 2901.21(B),] the state was required to prove, beyond a reasonable

doubt, that the defendant recklessly inflicted, attempted to inflict, or threatened to inflict physical harm. *Colon*, 2008-Ohio-1624, ¶ 14, 118 Ohio St.3d 26, 885 N.E.2d 917.

{¶23} The court in *Colon I* engaged in a structural error analysis, stating that "[s]tructural errors are constitutional defects that defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, rather than simply being an error in the trial process itself. Such errors permeate the entire conduct of the trial from beginning to end so that the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. A structural error mandates a finding of per se prejudice." *Colon I*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶ 20.

{¶24} Subsequently, the Ohio Supreme Court issued a clarification in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 ("*Colon II*"), in reconsideration of its holding in *Colon I*. The court in *Colon II* explained that its ruling in *Colon I* was to be applied prospectively and only to those cases pending when *Colon I* was announced. Id. at ¶ 5. Further, *Colon II* emphasized that the facts of *Colon I* were "unique" and that a structural-error analysis of a defective indictment would be appropriate only in "rare" cases, where "multiple errors" follow the defective indictment. Id. at ¶ 6, 8. *Colon II* held that the syllabus of *Colon I* was to be confined to the facts in that case. Id. at ¶ 8. In *Colon II,* the court limited the holding of *Colon I* to "rare cases, * * * in which multiple errors at the trial follow the defective indictment." Id. at ¶ 8, 885 N.E.2d 917. It explained, "[i]n *Colon I*, the error in the indictment led to errors that 'permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence.' "

Id., citing *Colon I*, at ¶ 23 and *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 17.

{¶25} The court in *Colon II* emphasized that its reversal in *Colon I* had been premised on four factors: (1) the indictment did not charge the recklessness element for robbery; (2) the State did not attempt to prove the element of recklessness; (3) the trial court failed to instruct the jury on the mens rea element of recklessness; and (4) in closing arguments, the State treated robbery as a strict liability offense. Id. at ¶ 6, 893 N.E.2d 169, citing *Colon I*, at ¶ 30, 31, 893 N.E.2d 169.

{¶26} Moreover, the Sixth and Tenth Districts have held, and we concur, that where a defendant is charged with a crime other than a violation of R.C. 2911.01(A)(2), *Colon I* will not apply. *State v. Walker*, 6th Dist. No. L-07-1156, 2008-Ohio-4614, ¶ 72, following *State v. Hill*, 10th Dist. No. 07AP-889, 2008-Ohio-4257, ¶ 36; *State v. Solether*, 6th Dist. No. WD-07-053, 2008-Ohio-4738, ¶ 74, 91.

{¶27} In the present case, the prosecutor did not argue that this was a strict liability offense. Rather, the prosecutor argued that Appellant's purpose was to incapacitate the victim through suffocation in order to effectuate the theft of the victim's wallet and credit card. As such, this case does not meet the structural error standard set forth in *Colon I.*

{¶28} We then must turn to an analysis of whether the indictment was defective under the appropriate standard of review.

{¶29} Applying a plain error standard of review we note that an alleged error does not constitute plain error pursuant to Crim.R. 52(B) " * * * unless, but for the error,

the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

{¶30} Upon review, we cannot say that but for the alleged error the outcome of the trial would have been different. The victim knew Appellant because Appellant lived with him at one point. Having been able to positively identify Appellant, we find the jury could have easily relied on the victim's credibility in determining Appellant's guilt.

{¶31} Appellant's first assignment of error is overruled.

II & III

{¶32} In his second and third assignments of error, Appellant relies on his structural error analysis from his first assignment of error and claims that his convictions were not supported by sufficient evidence and that they were against the manifest weight of the evidence, claiming there was insufficient evidence of recklessness. We disagree.

{¶33} When reviewing a claim of sufficiency of the evidence, an appellate court's role is to 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. 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. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶34} Conversely, when analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in reviewing the entire record, "weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶35} We first reject Appellant's structural error analysis as it relates to proof of recklessness based on our disposition of Appellant's first assignment of error.

{¶36} Appellant next argues that there was insufficient evidence of serious physical harm, specifically stating in his brief, "the victim's loss of breath during the robbery was only momentary and he was able to quickly free himself." Appellant was indicted under R.C. 2911.01(A)(3), which provides that an offender either attempts to cause or actually causes serious physical harm. We find that holding a pillow over a victim's face in an attempt to suffocate him amounts to an attempt to cause serious physical harm.

{¶37} Finally, Appellant argues that there was insufficient evidence to prove Appellant's identity. We disagree. The victim identified Appellant both at the preliminary hearing and at trial. He also identified the victim in a photo array shortly after the robbery. Additionally, Appellant resided with the victim for a short time preceding the robbery, thus providing the victim with familiarity of Appellant.

{¶38} Regarding Appellant's alibi defense, the jury was within its province to discredit Appellant's alibi witness, who admitted to consuming 15 beers with Appellant on the date of the offense prior to going to a bar for the evening.

{¶39} Appellant's second and third assignments of error are overruled.

IV.

{¶40} In his fourth assignment of error, Appellant argues that it was structural error for the trial court to not instruct on the element of recklessness as it relates to the charge of aggravated robbery under R.C. 2911.02(A)(3).

{¶41} First, as previously noted, we reject the argument that structural error applies outside of the narrow facts in *Colon I*. As such, we turn to an analysis of whether the jury instruction was defective under the appropriate standard of review, which is plain error.

{¶42} Applying a plain error standard of review we note that an alleged error does not constitute plain error pursuant to Crim.R. 52(B) " * * * unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

{¶43} As we noted in our disposition of Appellant's first assignment of error, upon review, we cannot say that but for the alleged error the outcome of the trial would have been different. The victim knew Appellant because Appellant lived with him at one point. Having been able to positively identify Appellant, we find the jury could have easily relied on the victim's credibility in determining Appellant's guilt.

{¶44} Having so determined, we overrule Appellant's fourth assignment of error.

V.

{¶45} In his fifth assignment of error, Appellant argues that the court committed structural error by taking judicial notice of the identity of Appellant as the perpetrator of the offense. Appellant has failed to demonstrate how such a judicial decision amounts to structural error, has failed to cite to any case law which supports a structural error analysis in such an instance, and as such, we decline to address this assignment of error.

{¶46} We would note, however, that the court did not take judicial notice of the identity of Appellant. The victim identified the Appellant in court and the record reflected that the person that he identified by pointing to Appellant was in fact Keith O'Neal.

{¶47} Appellant's fifth assignment of error is overruled.

VI.

{¶48} In his sixth assignment of error, Appellant argues that counsel was ineffective for failing to object to a defective indictment and deficient jury instructions, in failing to object to the court taking judicial notice of Appellant's identity, and in making reference to the fact that Appellant was previously incarcerated.

{¶49} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might

be considered sound trial strategy.'" Id. at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

{¶50} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." Id. at 690.

{¶51} Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

{¶52} When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense "is meritorious," and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375, 106 S.Ct. 2574, 2583; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, 739 N.E.2d 798 citing *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

{¶53} We do not find that Appellant has met his burden in either showing that the alleged conduct was ineffective, given our disposition on Appellant's previous assignments of error, nor do we find that Appellant has met his burden of showing that

but for the alleged errors, there is a reasonable probability that the outcome of the trial would have been different had the motions been granted.

{¶54} Moreover, Appellant fails to cite any reason why the mention of Appellant's prior incarceration was detrimental to Appellant's case. Without such a demonstration by Appellant, he has failed to meet his burden as required by law.

{¶55} Appellant's sixth assignment of error is overruled.

VII.

{¶56} In his seventh assignment of error, Appellant claims he was denied the right to a fair trial based on cumulative error. Specifically, Appellant alleges that the errors outlined in his first six and eighth assignments of error amount to cumulative error requiring reversal.

{¶57} In *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623, 637, the Supreme Court held that pursuant 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."

{¶58} In the present case, we do not find that there have been multiple instances of error triggering the cumulative error doctrine. Appellant's seventh assignment of error is overruled.

VIII.

{¶59} In his eighth assignment of error, Appellant argues that the prohibition against double jeopardy was violated because the trial court imposed consecutive sentences for his convictions of aggravated robbery and two counts of theft arising out

of the same incident. Appellant fails to cite any authority that would demonstrate that the imposition of consecutive sentences in a violation of the constitutional guarantees against double jeopardy.

{¶60} Moreover, we reject Appellant's conclusion that the charges of aggravated robbery and theft merge merely because they involve events arising from the same incident and that the aggravated robbery and theft offenses merge merely because theft is a predicate offense of the aggravated robbery. Appellant has failed to cite to the trial record where the evidence establishes the offenses were committed with the same animus, let alone not committed separately. Having failed to affirmatively demonstrate in the record the error of which he complains, we overrule Appellant's eighth assignment of error.

{¶61} For the foregoing reasons, Appellant's assignments of error are overruled and the judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

[Cite as *State v. O'Neal*, 2009-Ohio-5290.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
KEITH M. O'NEAL	:	
	:	
Defendant-Appellant	:	Case No. 08-CA-42
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. SHEILA G. FARMER

_____
HON. JOHN W. WISE