[Cite as *State v. Branigan*, 2010-Ohio-5745.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23593
v.	:	T.C. NO. 2008CR04537
ARRIE L. BRANIGAN	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 24th day of November, 2010.

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CANNON, J. (by assignment)

{¶ 1} Appellant, Arrie L. Branigan, appeals his conviction, following a jury trial in the Montgomery County Court of Common Pleas, of aggravated robbery with a firearm specification. For the reasons that follow, we affirm.

{¶ 2} On December 16, 2008, the grand jury returned a one-count indictment against appellant charging him with aggravated robbery, a felony of the

first degree, in violation of R.C. 2911.01(A)(1) with a firearm specification, in violation of R.C. 2929.14 and 2941.145.

{¶ 3} Appellant pled not guilty and the case proceeded to jury trial. Robert Cowdrey, magistrate for the trial court, testified that on Friday evening, November 7, 2008, he and his friend of 30 years, Gayle Garrison, planned to go out to the Neon Theatre for a movie and dinner afterwards in downtown Dayton. Mr. Cowdrey lives a few streets from the theatre. Ms. Garrison picked him up at about 7:20 p.m. and then parked her car on Sixth Street, which is near the theatre. They walked to the theatre, saw the movie, and left at about 9:30 p.m.

{¶ 4} Mr. Cowdrey and Ms. Garrison walked back to Jay's Restaurant on Sixth Street. They stayed there for about one hour and then walked across Jay's parking lot to a restaurant/bar, Café Boulevard, on Fifth Street. At about 12:15 a.m. on Saturday, November 8, 2008, they walked back to Ms. Garrison's car, taking the same path across Jay's parking lot.

{¶ 5} After Mr. Cowdrey unlocked the front passenger door for Ms. Garrison, he heard a man's voice behind him saying, "Give me your money." He turned around slightly and saw two black males in their mid-20s wearing dark-colored hooded sweatshirts. Mr. Cowdrey asked the male if he was joking. He said, "No, we're not joking, give us your money in your wallet."

{¶ 6} Mr. Cowdrey said he did not have any money. The male then checked Mr. Cowdrey's back pockets. When he did not find anything, he told Mr. Cowdrey to give him the keys to the car. Although Mr. Cowdrey still had Ms. Garrison's keys, he told the male he was not going to give them to him.

{¶ 7} When the male demanded the keys, Mr. Cowdrey turned around completely and was face-to-face with the robber, standing one to two feet from him. The area was well-lit and the robber's face was not covered. The robber kept demanding the keys and Mr. Cowdrey kept refusing to hand them over. Mr. Cowdrey and the robber were circling each other and arguing. They ended up in the middle of Sixth Street, with the robber facing Mr. Cowdrey. He was attempting to stay away from the robber, while staying near Ms. Garrison, who was being held by the robber's accomplice near her vehicle.

{¶ 8} Suddenly, the robber pulled out a large black gun that Mr. Cowdrey said resembled a semi-automatic handgun and put it in Mr. Cowdrey's face, actually touching his nose with it. He again demanded the keys to the car. When the robber pulled out the gun, his hood fell off of his head and Mr. Cowdrey got an even better look at the robber's face. He had short hair, a full face, a stocky build, and perfect, shiny teeth. Mr. Cowdrey said he got a good look at the robber's face for at least one minute.

{¶ 9} Mr. Cowdrey heard Ms. Garrison screaming hysterically, "Bobby, Bobby, give him the keys, give him the keys!" Mr. Cowdrey took the keys out of his pocket and tossed them in the air. The robber then hit Mr. Cowdrey with his gun in his left eye and across the bridge of his nose. The gun felt very hard and metallic. The robber then picked up the keys, ran to Ms. Garrison's car, started it, and drove off.

{¶ 10} Ms. Garrison ran to Jay's Restaurant and pounded on the door for help. However, the restaurant was closed and no one answered. Just then, an

off-duty Dayton police officer, Sergeant John Sullivan, who lived in the area and was walking his dog, came over to Mr. Cowdrey and asked him if he was all right. Mr. Cowdrey told him what happened. Sergeant Sullivan called dispatch reporting the incident and requesting police and an ambulance. Police and medics arrived in five minutes. Mr. Cowdrey was taken to Miami Valley Hospital where he was treated for a severe laceration near his left eye and a broken nose.

{¶ 11} Ms. Garrison testified that while Mr. Cowdrey and the robber were arguing in the street, she pleaded with the accomplice to let them go. He put a gun to her head and told her to shut up. She then sat in her car. She kept looking backwards out the windows and saw Mr. Cowdrey and the robber walking backwards in the middle of the street. She saw the robber point a gun at Mr. Cowdrey's head demanding the keys to the car.

{¶ 12} Suddenly, the accomplice told Ms. Garrison to get out of the car. She hesitated, and, with his gun drawn, he said, "Get the f--- out of the car, bitch." She then got out of the car, and he went in the front passenger seat and shut the door. Ms. Garrison saw the robber smash Mr. Cowdrey in the face with his gun. He picked up the keys, ran to her car, and drove off with the accomplice in the passenger seat. They drove off with Ms. Garrison's purse, wallet, credit cards, social security card, cash, and cell phone.

{¶ 13} Ms. Garrison testified that when she first heard the robber tell Mr. Cowdrey to give him his money, she saw the robber's face. She was 12 to 16 inches from him and the area was well-lit. She saw his face for 15 seconds.

{¶ 14} Officer James Mollohan was dispatched to the robbery scene at 12:54

a.m. He arrived in two to three minutes. Ms. Garrison and Mr. Cowdrey described the stolen car and the two robbers. Officer Mollohan put a broadcast out on dispatch that two assailants had stolen Ms. Garrison's car and that they were both armed. A few minutes later, dispatch reported to Officer Mollohan that the stolen vehicle may have been located. In fact, at about 12:57 a.m., Ms. Garrison' s vehicle was involved in a crash on nearby Riverside Drive. The driver had apparently lost control of the vehicle, wrecked it, and left it at the scene. The vehicle was secured and towed to the evidence garage for processing.

{¶ 15} On Monday, November 10, 2008, Ms. Garrison was at her mother's house when a male called and said his wife had found a cell phone in their front yard. He said the cell phone number of Ms. Garrison's mother was displayed on the phone, and he called that number hoping to find the phone's owner. Ms. Garrison reported this to the police, who picked up the phone for her.

{¶ 16} Detective Douglas Baker of the Dayton Police Department was assigned the investigation of this case. He testified that on Tuesday, November 11, 2008, he interviewed Mr. Cowdrey and Ms. Garrison at the police station.

{¶ 17} Detective Baker testified that Ms. Garrison's car was wrecked about one minute after the robbery. He said that during the search of Ms. Garrison's car by police, a magazine to a semi-automatic handgun with five live rounds was found by the driver's door in the car.

{¶ 18} Ms. Garrison testified that while she was at the police station, she picked up her phone in the property room. While she was with Detective Baker, she checked the phone's call history. Her phone indicated that on November 8,

2008, at 12:56 a.m., about two minutes after the robbery, her phone called a number with which she was not familiar. A few minutes later, a call was placed from that number to her phone. She showed this to the detective.

{¶ 19} Detective Baker learned that the unknown number was a Cricket Wireless cell phone number. He obtained a subpoena for the records of that number. These records showed that this number was registered to a Mary Branigan, who, Detective Baker discovered, is appellant's mother. Detective Baker testified the foregoing indicated that immediately after the two robbers abandoned Ms. Garrison's vehicle, they called each other using Ms. Garrison's and appellant's phones to regain contact. He said the accomplice most likely used Ms. Garrison's phone to call appellant, and he later called his accomplice back using his own phone.

{¶ 20} These records also showed that two hours after the robbery, at about 3:00 a.m., appellant received a phone call on his cell phone from another number, which Detective Baker learned belonged to a Richard Lee Smith. Detective Baker contacted Mr. Smith, who confirmed that the number is appellant's cell phone number. Mr. Smith told Detective Baker that he had called appellant at that number in the early morning hours of November 8, 2008.

{¶ 21} After learning that Ms. Garrison's phone had been used to call appellant's phone within minutes after the robbery, Detective Baker obtained appellant's description and compiled a photograph lineup that included appellant's photograph. On November 13, 2008, the detective met with Mr. Cowdrey, who identified appellant as the man who robbed him. Mr. Cowdrey testified he had no

doubt the photograph he selected was that of his assailant. On November 18, 2008, Detective Baker showed the same photograph array to Ms. Garrison, and she also identified appellant as Mr. Cowdrey's assailant. She also testified she had no doubt the photograph she chose was that of the man who robbed them. The victims also identified appellant at trial.

{¶ 22} Detective Baker testified that on November 25, 2008, appellant was arrested. Shortly thereafter, the detective approached appellant while he was being booked. Detective Baker noticed that appellant had replacement gold teeth that were shiny and perfect, just as Mr. Cowdrey had reported. Also, during the booking process, the detective found small pieces of paper in appellant's pocket that had the name "Weezie" written on them with appellant's cell phone number. Appellant demanded that Detective Baker throw them away and not put them in with his property. At that time, Detective Baker was unaware who Weezie was.

{¶ 23} Mr. Smith testified that he is a heroin addict and that he has bought heroin from appellant, who he knows by his street name, Weezie. He said that early Saturday morning, November 8, 2008, he called appellant wanting to buy heroin. He said that appellant told him he did not have a ride so he could not meet him that night.

{¶ 24} Appellant testified on his own behalf. He was convicted in 2003 of having a weapon while under a disability, the weapon being a handgun. In 2005, he was convicted of trafficking in drugs. In 2006, he was convicted of receiving stolen property of a motor vehicle. Also, in that year, he was convicted of carrying a concealed weapon, the weapon being a handgun. He has been sentenced to

prison twice. He testified that he sells drugs for a living and that his prior convictions arose out of his drug business. Detective Baker testified on rebuttal that, despite his criminal record, appellant had told him he has no involvement with guns.

{¶ 25} Appellant admitted at trial he knows Mr. Smith from the streets and that he has sold drugs to him. He said he gave his phone number to him for that purpose. He admitted that "Weezie" is his street name; that the unknown number on Ms. Garrison's phone was his cell number; and that he used that cell phone to sell drugs.

{¶ 26} Appellant did not dispute that the robbery occurred exactly as the victims reported. His sole defense was that the victims had misidentified him and that he had an alibi. He testified that he was at his girlfriend's apartment from 9:00 p.m. on November 7, 2008, until 4:00 a.m. on Saturday morning. He had previously told Detective Baker that he was with Shana Chase at the time of the robbery. The detective interviewed Ms. Chase at the time, but she did not confirm appellant 's alibi. She did not testify at trial.

{¶ 27} The jury found appellant guilty as charged in the indictment. He was sentenced to nine years in prison for aggravated robbery and three years for the firearm specification, for a total term of imprisonment of 12 years. Appellant appeals his conviction, asserting three assignments of error. For his first error, he alleges:

{¶ 28} "Appellant was prejudiced by a defective indictment which misstated the mens rea for the offense charged, denying the appellant a fair trial and due

process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Constitution of the state of Ohio."

{¶ 29} Appellant argues his due process rights were violated because the indictment alleged that he *recklessly* displayed, brandished, or used a deadly weapon, although the statute does not require a culpable mental state with respect to this element. We review the legal sufficiency of an indictment as a matter of law, applying a de novo standard of review. *State v. Berecz*, Washington App. No. 08 CA 48, 2010-Ohio-285, at ¶17.

{¶ 30} R.C. 2911.01(A)(1), aggravated robbery, provides:

{¶ 31} "(A) No person, in attempting or committing a theft offense *** or in fleeing immediately after the attempt or offense, shall ***:

{¶ 32} "(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 ***."

{¶ 33} In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, the Supreme Court of Ohio held that while R.C. 2911.02(A)(2), robbery by inflicting physical harm, does not indicate a culpable mental state, it does not impose strict liability and requires an allegation of recklessness. In an apparent attempt to conform to *Colon*, the indictment in the instant case included the allegation that appellant used a deadly weapon recklessly. The indictment alleged that appellant, "in attempting or committing a theft offense ***, or in fleeing immediately after the attempt or offense, did have a deadly weapon, to-wit: handgun, on or about his person or under his control and did *recklessly* display the weapon, brandish the weapon,

indicate possession of the weapon or use the weapon ***." (Emphasis added.)

{¶ 34} Following appellant's conviction, the Supreme Court of Ohio, in *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, held that "the General Assembly, by not specifying a mens rea in R.C. 2911.01(A)(1) [aggravated robbery while using a deadly weapon], plainly indicated its purpose to impose strict liability as to [this] element ***." Id. at ¶32. Further, the Supreme Court held that "the state is not required to charge a mens rea for this element of the crime of aggravated robbery under R.C. 2911.01(A)(1)." Id. at ¶32. The Supreme Court had previously held that an (A)(1) aggravated robbery is a strict liability offense. *State v. Wharf* (1999), 86 Ohio St.3d 375, 378.

{¶ 35} Appellant argues that because the state included recklessly as an additional element of aggravated robbery, the indictment was defective, resulting in the denial of his due process rights. We do not agree. The Supreme Court of Ohio held in *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, at ¶7-9:

{¶ 36} "The purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident. *Weaver v. Sacks* (1962), 173 Ohio St. 415, 417; *State v. Sellards* (1985), 17 Ohio St.3d 169, 170. This court has held:

{¶ 37} "'The sufficiency of an indictment is subject to the requirements of Crim.R. 7 and the constitutional protections of the Ohio and federal Constitutions. Under Crim.R. 7(B), an indictment "may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the

words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged."

{¶ 38} "'An indictment meets constitutional requirements if it "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."' *State v. Childs* (2000), 88 Ohio St.3d 558, 564-565, quoting *Hamling v. United States* (1974), 418 U.S. 87, 117-118."

{¶ 39} The indictment in this case included all the elements of the offense charged. By virtue of the Supreme Court's holding in *Lester*, supra, the inclusion of the reckless element in the indictment here was mere surplusage.

{¶ 40} This court addressed the inclusion of surplusage in an indictment in *State v. Frazier*, Clark App. No. 2008 CA 118, 2010-Ohio-1507. In that case, the defendant argued that the trial court erred when it allowed the state to amend the indictment by deleting the word "serious" before the phrase "physical harm" in a felonious assault charge committed with a deadly weapon. The amendment did not change the name or identity of the offense, but instead deleted language irrelevant to an R.C. 2903.11(A)(2) prosecution ("No person shall knowingly *** [c]ause or attempt to cause physical harm to another *** by means of a deadly weapon"). This court held:

{¶ 41} "We regard the inclusion of the word 'serious' in the indictment as mere surplusage, which is 'an averment which may be stricken, leaving sufficient description of the offense.' *** An indictment is valid even when it contains

'surplusage or repugnant allegations when there is sufficient matter alleged to indicate the crime and person charged[.]' R.C. 2941.08(I). And Crim.R. 7(C) permits a court to strike surplusage from the indictment. Here, 'serious' is surplusage because it is not relevant to a charge of felonious assault under R.C. 2903.11(A)(2) and can be removed from the indictment while leaving all the essential elements of the crime. Therefore, the trial court's decision to allow the amendment[] was proper." (Internal citations omitted.) Id. at ¶26.

{¶ 42} This court considered an even more pertinent argument in *State v. Scott*, Montgomery App. No. 22745, 2010-Ohio-1919. There, the defendant was charged with aggravated robbery under R.C. 2911.01(A)(1). In light of *Colon*, the trial court granted the state's motion to amend the indictment to allege recklessness. The defendant argued the trial court erred in permitting the amendment since aggravated robbery with a deadly weapon is a strict liability offense. This court held:

{¶ 43} "Aggravated robbery with a deadly weapon is, indeed, a strict liability offense. [*State v. Lester*, 2009-Ohio-4225,] at ¶1. *** Thus, the amendment arguably *increased* the State's burden of proof. Moreover, defense counsel conceded at trial that he would not have asked different questions of the witnesses or otherwise adjusted his trial strategy if the indictment had originally included the element of recklessness. Although, in hindsight, the amendment to include 'recklessness' was erroneous, it was not prejudicial to Scott under the facts presented here." (Emphasis sic.) *Scott*, supra, at ¶50.

{¶ 44} Turning to the facts of the instant case, the indictment included all the

essential elements of aggravated robbery under R.C. 2911.01(A)(1). If the reckless element had been deleted, pursuant to Crim.R. 7(C), the indictment would still have been complete. The inclusion of that element was therefore mere surplusage and did not deprive appellant of notice of the crime of which he was charged. Thus, the indictment did not deprive him of due process.

{¶ 45} In an apparent attempt to demonstrate prejudice, appellant argues that the inclusion of reckless in the indictment misled him to believe the state had a higher burden of proof than it actually had. However, appellant does not argue and the record does not show that his defense would have been different if this element had not been included. As noted above, appellant did not dispute that the victims had been robbed as they testified. Nor did he dispute that he had acted recklessly. The only issue asserted by the defense at trial was the identity of the robber. Moreover, as appellant concedes, the state's burden of proof was increased by including the reckless element in the indictment. As a result, appellant has failed to demonstrate that he was prejudiced by the inclusion of the reckless element.

{¶ 46} Appellant also argues that *Colon* compels us to find structural error as a result of his failure to object to the inclusion of the reckless element in the indictment. The Supreme Court of Ohio in *Colon*, 2008-Ohio-1624, held:

{¶ 47} "A defendant has a constitutional right to grand jury indictment and to notice of all the essential elements of an offense with which he is charged. The state must meet its duty to properly indict a defendant, and we will not excuse the state's error at the cost of a defendant's longstanding constitutional right to a proper

indictment. When a defective indictment so permeates a defendant's trial such that the trial court cannot reliably serve its function as a vehicle for determination of guilt or innocence, the defective indictment will be held to be structural error. See *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, at ¶17." Id. at ¶44.

{¶ 48} It is immediately apparent that *Colon* does not apply here because the indictment in that case *failed to include the required mental state of recklessness* for the crime of robbery under R.C. 2911.02(A)(2). Here, the reckless element was included, but was mere surplusage. Moreover, because the parties did not dispute at trial whether appellant acted recklessly and the court did not instruct the jury concerning recklessness, any error resulting from the inclusion of the reckless element in the indictment did not permeate the trial from beginning to end. Appellant therefore failed to demonstrate that the inclusion of the reckless element resulted in structural error.

{¶ 49} Appellant's alternative argument that his failure to object to the inclusion of the reckless element resulted in plain error is equally unavailing. Crim.R. 52(B) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The Supreme Court of Ohio in *State v. Barnes* (2002), 94 Ohio St.3d 21, stated:

{¶ 50} "Under 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.' By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, *i.e.*, a deviation from a 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. ***" (Internal citations omitted.) Id. at 27.

{¶ 51} As noted above, appellant does not argue—and the record does not show—that if the reckless element had been omitted, his defense would have been different. At trial appellant did not challenge the manner in which the gun was used. His sole strategy was to argue that the victims had incorrectly identified him as one of the perpetrators of this crime. As a result, any error resulting from the inclusion of the reckless element in the indictment would not have affected the outcome of the trial. Appellant therefore failed to demonstrate plain error.

{¶ 52} We therefore hold that the indictment notified appellant of the crime with which he was charged, and that his conviction did not result in the violation of his due process rights.

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

{¶ 54} For his second assigned error, appellant alleges:

{¶ 55} "The admission of inadmissible hearsay, physical evidence, and documents constitute plain error prejudicial to the appellant in violation of his right to a fair trial and due process of law under the Fifth and Fourteenth Amendments to the United States Constitution."

{¶ 56} Appellant challenges various items of evidence admitted at trial. He concedes that because trial counsel did not object to them, this court is limited to a

review for plain error. *Barnes*, supra, at *27. As noted above, there are three requirements for plain error. First, there must be error. Id. Second, the error must be plain in that it must be an obvious defect in the proceedings. Id. Third, the error must have affected the outcome of the trial. Id. "The burden of demonstrating plain error is on the party asserting it. See, e.g., *State v. Jester* (1987), 32 Ohio St.3d 147, 150. A reversal is warranted if the party can prove that the outcome 'would have been different absent the error.' *State v. Hill* (2001), 92 Ohio St.3d 191, 203." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶17.

{¶ 57} First, appellant challenges the testimony of Detective Baker that a handgun magazine and live rounds were found in Ms. Garrison's vehicle shortly after the robbery. He testified that an evidence technician, who did not testify, discovered the evidence while processing the vehicle at the police garage. Appellant now argues the detective's testimony was inadmissible, although he did not object to it at trial.

{¶ 58} Appellant argues the admission of this testimony, as well as the magazine and the rounds themselves, resulted in plain error because it demonstrated the firearm was operable. However, even if this evidence had not been admitted, the state presented sufficient *undisputed* circumstantial evidence to prove beyond a reasonable doubt that appellant's firearm was operable. In *State v. Thompkins* (1997), 78 Ohio St.3d 380, the Supreme Court of Ohio stated:

{¶ 59} "[I]n [*State v. Murphy* (1990), 49 Ohio St.3d 206], we held: 'The state must present evidence beyond a reasonable doubt that a firearm was operable at

the time of the offense before a defendant can receive an enhanced penalty pursuant to R.C. 2929.71(A). *However, such proof can be established beyond a reasonable doubt by the testimony of lay witnesses who were in a position to observe the instrument and the circumstances surrounding the crime*.' [Emphasis sic.] Id. at syllabus.

{¶ 60} "In *Murphy*, we found that there was sufficient evidence to establish proof beyond a reasonable doubt that the defendant possessed a firearm and that the firearm was operable or could readily have been rendered operable at the time of the offense. The defendant in *Murphy* entered a *** store and announced that he was robbing it. He then *** pointed [a] gun at the store clerk ***. The defendant waived the gun back and forth while announcing that if the clerk did not give him the money, he would kill him. The clerk *** described the gun as a one- or two-shot silver or chrome derringer.

{¶ 61} "The situation in *Murphy* is very similar to what occurred in the case at bar. The only noteworthy difference between *Murphy* and what occurred here is that the defendant in possession of the gun in *Murphy* explicitly threatened that he would kill the store attendant. Here, [the victim] Brinkman did not testify that Thompkins threatened to shoot her. Rather, the threats made by Thompkins to Brinkman were of an *implicit* nature, *i.e.*, Thompkins's pointing the gun at Brinkman and telling her that he was committing a 'holdup' and to be 'quick, quick.'

{¶ 62} "***

{¶ 63} "Even absent any explicit verbal threats on the part of Thompkins, the trier of fact in this case could have reasonably concluded, based on the totality of

the circumstances, that Thompkins was in possession of a firearm at the time of the offense, that is, a deadly weapon capable of expelling projectiles by an explosive or combustible propellant." (Emphasis sic.) *Thompkins*, supra, at *383.

{¶ 64} Here, Mr. Cowdrey testified that appellant pointed his gun at him while demanding the keys to Ms. Garrison's vehicle. When Mr. Cowdrey threw the keys up in the air, appellant struck him in the side of his head and on the bridge of his nose. Mr. Cowdrey testified the gun looked like a black semi-automatic handgun. Even absent any explicit threat on the part of appellant, the jury could have reasonably concluded, based on the totality of the circumstances, that appellant was in possession of a firearm and that it was operable at the time of the offense. While appellant disputed the identification of the robber, he did not dispute the perpetrator's actions, as recounted by Mr. Cowdrey and Ms. Garrison.

{¶ 65} As a result, appellant failed to prove that if the magazine and live rounds had not been admitted in evidence, the outcome of the trial would have been different. Appellant therefore failed to prove plain error.

{¶ 66} Next, appellant argues the cell phone records for Ms. Garrison's and appellant's cell phones and testimony concerning same were inadmissible hearsay because there was no testimony presented from any custodian to qualify the records as business records for purposes of the business records exception to the hearsay rule. Appellant did not object to this evidence at trial, and he now argues the admission of these records was plain error.

{¶ 67} In Ohio, the admissibility of a business record is governed by R.C. 2317.40, which provides that such a record is competent evidence "if the custodian

or the person who made such record *** testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission." Evid.R. 803(6) provides that such documents are admissible if authenticated by the testimony of the custodian of such records *or by another qualified witness*. Further, Evid.R. 901(A) provides: "The requirement of authentication *** as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(B)(1), which sets forth certain examples of this rule, provides: "By way of illustration only, *** the following are examples of authentication *** conforming with the requirements of this rule: (1) *Testimony of witness with knowledge*. Testimony that a matter is what it is claimed to be." (Emphasis sic.)

{¶ 68} When Ms. Garrison retrieved her cell phone from the police property room, she checked her cell phone call history, which showed that on November 8, 2008, at 12:56 a.m., some two minutes after the robbery, her phone was used to call a number unknown to her, and that at 1:00 a.m., this number called her phone back. Detective Baker testified this indicated that after the robbers fled the wrecked vehicle, they used Ms. Garrison's and appellant's phones to call each other. Ms. Garrison also identified the billing records for her phone, which showed the same two calls.

{¶ 69} Based on the foregoing information, Detective Baker discovered that the unknown number is a Cricket Wireless number. He subpoenaed the records

for this number, which identified its owner as appellant's mother. Appellant identified his phone records at trial and conceded they showed that Ms. Garrison's cell phone had called his number on November 8, 2008, at 12:56 a.m.

{¶ 70} Ms. Garrison and appellant thus authenticated the records for their own telephones, and these records were therefore properly admitted as business records. In any event, even if the phone records and related testimony had not been admitted in evidence, appellant has not proven the outcome of the trial would have been different. First, Ms. Garrison's phone revealed appellant's connection with Ms. Garrison's phone. Since appellant does not challenge on appeal the testimony regarding the call history provided by Ms. Garrison's cell phone, any resulting error is waived. *State v. Awan* (1986), 22 Ohio St.3d 120, 122. In any event, since Ms. Garrison's phone revealed contact with appellant's phone, and both appellant and Mr. Smith testified the unknown number belonged to appellant, any error resulting from the admission of her cell phone records was harmless. Crim.R. 52(A).

{¶ 71} Second, the identification evidence was sufficient to prove beyond a reasonable doubt appellant's involvement. Mr. Cowdrey was face-to-face with appellant for a lengthy period of time in well-lit conditions. He said he had no doubt of his selection of appellant's photograph in the array. The fact that appellant also has perfect, shiny teeth, just as Mr. Cowdrey reported to the police, is particularly compelling. In addition, Ms. Garrison testified she too saw appellant's face at close range and had no doubt of her identification of his picture in the array. The in-court identifications of both victims also revealed no hesitation

or doubt that appellant was Mr. Cowdrey's assailant.

{¶ 72} Finally, because we hold that any error resulting from the foregoing did not prejudice appellant's substantial rights, we reject his contention that the cumulative effect of errors deprived him of a fair trial. *State v. Hill* (1996), 75 Ohio St.3d 195, 212.

{¶ 73} Appellant's second assignment of error is overruled.

{¶ 74} For his third and final assignment of error, appellant alleges:

{¶ 75} "Appellant was prejudiced by the denial of his right to effective assistance of counsel, in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution."

{¶ 76} The standard of review for ineffective assistance of counsel was stated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 687. In order to support a claim of ineffective assistance of counsel, the defendant must satisfy a two-prong test. First, he must show that counsel's performance was deficient. *Strickland*, supra. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Id. A properly licensed attorney is presumed to be competent. Id. at 688. In order to rebut this presumption, the defendant must show the actions of counsel did not fall within a range of reasonable assistance. Id. at 689. The Court in *Strickland* stated, "[t]here are countless ways to provide effective assistance in any given case. ***" Id. at 689. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential. ***" Id. "A fair assessment of attorney performance requires that

every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. In addition, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ***." Id.

{¶ 77} Second, the defendant must show the deficient performance prejudiced the defense. In order to satisfy this prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's *** errors, the result of the [trial] would have been different." Id. at 694; accord *State v. Bradley* (1989), 42 Ohio St.3d 136, at paragraph three of the syllabus.

{¶ 78} It is well-settled that strategic and tactical decisions do not constitute a deprivation of the effective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Errors of judgment regarding tactical matters do not substantiate a claim of ineffective assistance of counsel. Id. In *Clayton*, supra, the Court held: "*** the fact that there was another and better strategy available [to counsel] does not amount to a breach of an essential duty to his client." Id. A reviewing court must not second-guess trial strategy decisions. Id. Further, the decision regarding which defense to pursue at trial is a matter of trial strategy "'within the exclusive province of defense counsel to make after consultation with his client.'" *State v. Murphy* (2001), 91 Ohio St.3d 516, 524. (Citation omitted.) This court can only find that counsel's performance regarding matters of trial strategy is deficient if counsel's strategy was so "outside the realm of legitimate trial strategy

so as 'to make ordinary counsel scoff[.]'" *State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, at ¶39, citing *State v. Yarber* (1995), 102 Ohio App.3d 185, 188. Further, the Supreme Court of Ohio has recognized that if counsel, for strategic reasons, decides not to pursue every possible trial tactic, defendant is not denied effective assistance of counsel. *State v. Brown* (1988), 38 Ohio St.3d 305, 319. When there is no demonstration that counsel failed to research the facts or the law or that counsel was ignorant of a crucial defense, a reviewing court defers to counsel's judgment in the matter. *Clayton*, 62 Ohio St.3d, at 49.

{¶ 79} Appellant argues that because his trial counsel did not object to the indictment, to the hearsay testimony of Detective Baker regarding the magazine and live rounds, or to the cell phone records, this automatically satisfied the first prong of the *Strickland* standard. We do not agree.

{¶ 80} First, as discussed above, at trial appellant's counsel chose to pursue the strategy of challenging only appellant's identification by the victims. He therefore did not dispute whether his conduct was reckless; whether the magazine and live rounds were found by police in the stolen vehicle; or whether the cell phone records were properly authenticated. The obvious reason was that the indictment and this evidence were not at odds with his defense strategy. According to appellant's theory of the case, it made no difference whether the indictment alleged recklessness or whether this evidence was admitted because his position was that he was not present and did not commit this robbery. Trial counsel could reasonably have determined that if she had also pursued these issues, such efforts would have been viewed by the jury as inconsistent with and a distraction from the

strategy pursued by the defense. Because the indictment and this evidence were consistent with the strategy of the defense, we hold appellant' s counsel was not ineffective for failing to object to them. Appellant has therefore failed to demonstrate his trial counsel's performance fell below an objective standard of reasonableness.

{¶ 81} Second, as discussed above, appellant has failed to demonstrate there is a reasonable probability that the outcome of the trial would have been different if the indictment did not include the reckless element or if the aforementioned evidence had not been admitted. He has therefore failed to demonstrate prejudice.

{¶ 82} Appellant's third assignment of error is overruled.

{¶ 83} For the reasons stated in the opinion of this court, the assignments of error are not well-taken. It is the judgment and order of this court that the judgment of the Montgomery County Court of Common Pleas is affirmed.

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BROGAN, J. and GRADY, J., concur.

(Hon. Timothy P. Cannon, Eleventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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