

[Cite as *State v. McClurkin*, 2010-Ohio-5958.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2007-03-071
 :
 - vs - : OPINION
 : 12/6/2010
 :
 LESHAWN McCLURKIN, :
 :
 Defendant-Appellant. :

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

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

Leshawn McClurkin, A546538, Warren Correctional Institution, P.O. Box 120,
Lebanon, Ohio 45036, defendant-appellant, pro-se

YOUNG, P.J.

{¶1} This matter is before the court on remand from the Ohio Supreme Court
in *State v. McClurkin*, Slip Opinion No. 2010-Ohio-5268, with instructions to apply its
ruling in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830.

{¶2} Leshawn McClurkin was convicted of robbery and aggravated robbery

in the Butler County Court of Common Pleas, and this court affirmed his convictions on direct appeal. *State v. McClurkin*, Butler App. No. CA2007-03-071, 2010-Ohio-1938.

{13} McClurkin was arrested for robbing Frieda Mull, who was 94 years old at the time of the robbery, and Lillian Donham, who was 76. During the trial, the state presented evidence that as Mull and Donham left a meeting, McClurkin ran up to the women, grabbed their purses from their shoulders, and pushed them to the ground. While Donham suffered little physical harm as a result of being pushed to the ground, Mull suffered head trauma, a dislocated right shoulder, multiple abrasions, and was confined to a wheel chair after spending six days in the hospital.

{14} McClurkin pled not guilty and offered an alibi witness who testified that McClurkin was with her at the time of the robbery. The jury, however, found this testimony unconvincing, and found McClurkin guilty of the charges. On appeal, McClurkin asserted six assignments of error, arguing that: his indictment was defective because it did not contain a mental state, the trial court erred by instructing the jury on flight, the trial court erred by allowing the state to use his post-arrest silence to establish recent fabrication of his alibi, the trial court erred by not continuing his trial so that a defense witness could appear, his trial counsel's performance was ineffective, and that he was denied a fair trial because of the cumulative effect of errors made during his trial.

{15} This court overruled each of McClurkin's assignments in turn, and affirmed the decision of the trial court. Regarding McClurkin's first assignment of error, we analyzed whether his indictment for aggravated robbery was defective for failing to list a mental state. We first stated that inflicting serious physical harm

during the commission of a robbery in violation of R.C. 2911.01(A)(3) required the state to prove a reckless mental state because no mental state is listed in the statute and "the section is not otherwise a strict liability offense." *McClurkin* at ¶12.

{¶6} We then addressed the Ohio Supreme Court's holding in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, and its immediate progeny *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, and determined that while the indictment was defective, the defect did not cause a structural error and that the defective indictment did not constitute plain error. McClurkin then appealed our decision to the Ohio Supreme Court.

{¶7} In the interim, the supreme court released *State v. Horner* in which it overruled its previous decisions in the *Colon* cases, and also held that R.C. 2911.01(A)(3) is a strict liability offense. On remand, the court directed us to apply its holding in *Horner* to McClurkin's argument that his indictment was defective.

{¶8} In *Horner*, the court held that "R.C. 2911.01(A)(3) does not require proof of a mental state, and an indictment that does not identify a mental state is not defective." 126 Ohio St.3d 475, 2010-Ohio-3830 at ¶53. McClurkin's indictment repeated the statutory language of R.C. 2911.01(A)(3), and as such, placed him on explicit notice of what the state was required to prove in order to secure a conviction. Because of the strict liability nature of his crime, the state was not required to list a mental state, so that his indictment was not defective.

{¶9} Upon remand, and after applying *Horner*, we affirm McClurkin's conviction.

{¶10} Judgment affirmed.

BRESSLER and HENDRICKSON, JJ., concur.