[Cite as *State v. Ashdown*, 2015-Ohio-1761.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-05-104
	:	O P I N I O N
- vs -		5/11/2015
	:	
BRANDON JAMES ASHDOWN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2013-07-1050

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Neal D. Schuett, 121 West High Street, Oxford, Ohio 45056, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Brandon James Ashdown, appeals his conviction in the Butler County Court of Common Pleas for aggravated robbery and petty theft. For the reasons discussed below, we affirm Ashdown's conviction.

{¶ 2} In August 2013, Ashdown was indicted for one count of aggravated robbery, a felony of the first degree, and one count of petty theft, a misdemeanor of the first degree, for an incident that occurred at a department store in Fairfield Township on June 30, 2013. Plea

negotiations were unsuccessful, and a trial was scheduled for January 8, 2014.

{¶ 3} However, on January 7, 2014, the trial court held an impromptu pretrial hearing at defense counsel's request (the January 7 hearing). At the hearing, defense counsel stated that during the final preparations for trial, Ashdown had indicated he no longer wanted to be represented by counsel at trial, but rather wished to represent himself. In addition, counsel informed the court that Ashdown had rejected a plea deal that morning that would have reduced the aggravated robbery charge to simple robbery, a felony of the second degree under R.C. 2911.02. Counsel stated that as recently as January 5, Ashdown had expressed his desire for a plea agreement that would reduce the aggravated robbery charge to a felony of the second degree.

{¶ 4} Defense counsel also noted that Ashdown's decisions seemed to be based on what Ashdown characterized as "visions that everything's going to be okay." Counsel stated that "when [Ashdown] starts talking about visions, I start becoming concerned about his mental health as to whether or not he's making decisions based upon ration [sic] and reason, or based upon some faith or delusion * * *." Thus, defense counsel asked the court to question Ashdown and determine "whether or not [the court] needs to maybe do some competency evaluations or otherwise."

{¶ 5} The trial court proceeded to question Ashdown. First, the court verified that Ashdown understood the different possible sentences for felonies of the first and second degree, and that he understood the implications for taking the case to trial. The trial court made clear that the potential outcomes included Ashdown being found either guilty or not guilty of aggravated robbery and petty theft, respectively. Additionally, the court explained that even if Ashdown were found not guilty of aggravated robbery, he might still be found guilty of lesser-included offenses such as simple robbery. Ashdown confirmed that he understood. When the trial court asked whether defense counsel or the prosecutor had

anything further to add, defense counsel reiterated, "[t]he only thing I'd ask is maybe the Court inquire as to the visions thing that I'm concerned about."

{¶ 6} Thereafter, the trial court inquired into Ashdown's change of heart regarding his willingness to accept a plea agreement for a felony of the second degree. Ashdown explained, "I went and I thought real good and hard for two days. * * * And I said I want to take it to trial. * * * I believe in my heart it'll be all right and it'll work out for me in the end."

{¶ 7} This latter statement occasioned further questioning from the trial court.

> THE COURT: What does that mean to you when you say I believe that it'll be all right for me and that it will work out okay in the end? * * *
>
> [ASHDOWN]: I believe that * * * if I hold strong enough in my faith and my belief that Jesus will walk with me and he will guide me and everything will work out. * * *
>
> * * *
>
> THE COURT: * * * [G]iven what you've said, Jesus is going to walk with you, * * * he'll work things out; well, you know, if he works with you, and is with you when you're going to prison for five or six or seven or 11 years, that will be an acceptable result?
>
> [ASHDOWN]: That's right. If that's what happens, that's what has to happen.
>
> THE COURT: * * * [Y]ou're not saying that because you believe Jesus is walking with you that you will necessarily be found not guilty?
>
> [ASHDOWN]: No, I'm not saying that.
>
> * * *
>
> THE COURT: You understand that there's a possibility that you're going to be found guilty [at trial]?
>
> * * *
>
> [ASHDOWN]: I understand the possibilities.

{¶ 8} The trial court then continued to discuss the case with Ashdown at great length,

explained the elements of the offenses with which Ashdown was charged, and once again verified that Ashdown believed he could prevail at trial:

> THE COURT: Okay. * * * so your plan is to cross-examine the state's witnesses and just to be able to, by your cross-examination, show the weaknesses of their testimony. And is your belief then * * * that you'll be able to convince the jury * * * that there is reasonable doubt that you've committed the crime? * * *

Ashdown affirmed that he believed the evidence did not support the offenses he was charged with, and that he could prevail at trial.

{¶ 9} Next, the trial court examined Ashdown's understanding of how a trial works, and the people involved in a trial. The trial court asked Ashdown about the role of the defense, the prosecutor, and the judge. After listening to Ashdown's answers, the trial court concluded:

> I can find no reason to believe that Mr. Ashdown is incompetent to stand trial. He seems well aware of what a trial is, how a trial works, * * * in what capacity various persons function in a trial. He's aware of the need to present facts to convince the jury of the truthfulness of the allegations of the State, he's aware that it's the State's obligation to do that. He's aware that as * * * the Defendant in this case, he and/or his attorney has the job of trying to poke holes in the strength of the State's case * * *
>
> [H]e understands the differences between the levels of robberies and understands that he's been charged with a first degree felony. * * * He thinks that the jury will find that all of the elements of the aggravated robbery has [sic] not been proved. * * *
>
> So I can't really find any reason * * * to order a competency evaluation. I don't think there's any reason * * * to believe that he isn't competent to stand trial.

{¶ 10} Still, the trial court continued to probe Ashdown's desire to represent himself, and sought to confirm that Ashdown understood he was giving up his defense counsel's knowledge, expertise, and preparation for the trial. After Ashdown again confirmed his understanding, the trial court granted Ashdown's oral motion to represent himself, continued

the trial to mid-March so that Ashdown could prepare, and ordered Ashdown's defense counsel to be on-hand as "standby counsel" in case Ashdown either decided during trial that he wanted an attorney or had any questions about procedure.

{¶ 11} One week later, on January 13, 2014, the trial court held a second hearing to obtain Ashdown's waiver of counsel in writing pursuant to Crim.R. 44(C) (the January 13 hearing). Although the trial court had already granted Ashdown's oral motion to represent himself, the court nevertheless had Ashdown's "standby counsel" present. Prior to requesting that Ashdown sign the waiver of counsel, the trial court read the entire form to him and verified that Ashdown understood each paragraph. The court reviewed the charges, the potential penalties for each charge, Ashdown's constitutional right to counsel, the benefits of having defense counsel, and the standards to which Ashdown would be held during the trial. At the end of the form, the court asked, "the last sentence is this: 'I hereby knowingly, intelligently, and voluntarily waive my rights to a lawyer.' Do you think that's exactly what you are doing here today?" Ashdown responded, "Yes, sir," and signed the waiver.

{¶ 12} Ashdown's jury trial began on March 13, 2014, and the state called three witnesses. The first witness was Lanetta Spurlock, a loss prevention supervisor at the department store where Ashdown's offenses occurred. Spurlock testified that she was on duty when Ashdown entered the store at approximately 8 p.m. on June 30, 2013, and that she watched him on the store's surveillance cameras. As the state played the video footage of Ashdown taken by the surveillance cameras that evening, Spurlock described Ashdown's movements through the store, and noted his placement of several pairs of shorts, nine pairs of sunglasses, and two pairs of shoes in the back of his cart before entering the fitting rooms.

{¶ 13} The video further showed that when Ashdown exited the fitting rooms, he parked his cart and headed straight for the front doors of the store. Spurlock observed that store merchandise was visible beneath his clothing. She then recounted what transpired

when she followed Ashdown out the front door:

> I said, sir, excuse me, I'm store security. You need to turn around and come back in with me. * * * He turned around, he said, "Bitch, you need to back off." And at that point, I heard a click * * *
>
> * * * when he turned, I could see he had a knife. I could see the blade of the knife * * * He brought it up like this * * *

{¶ 14} The state then presented a second video taken from surveillance cameras outside the entrance of the store. Spurlock confirmed that the footage from this second video captured her exchange with Ashdown. As the video played, Spurlock identified the object that she perceived as the knife in Ashdown's hand. A "freeze frame" photograph of Ashdown with the object that Spurlock identified as the knife was also entered into evidence.

{¶ 15} Next, the state called Taya Thomas, the manager on duty at the department store on June 30, 2013. Thomas testified that, on the evening in question, she had been called to the loss prevention office to help after Spurlock had observed Ashdown's suspicious behavior. Thomas testified that she had followed Spurlock out the front doors and witnessed Spurlock's exchange with Ashdown. Thomas testified that although she could not hear what was being said, she was certain she saw Ashdown holding a knife "towards" Spurlock.

{¶ 16} Finally, the state called Officer Cory Stebbins of the Fairfield Township Police Department. Officer Stebbins testified that he had been summoned to the department store by Spurlock on the evening of June 30, 2013, and that he was in his police cruiser in the parking lot when Ashdown exited the store. Although he did not see Ashdown wield the knife, he did hear Spurlock shouting, "he's got a weapon." Further, after Ashdown was apprehended by another officer on the scene, Officer Stebbins conducted a "Terry patdown" and found a butterfly knife on Ashdown's person. Officer Stebbins testified that butterfly knives are designed primarily to inflict serious physical harm, and that they can even penetrate bulletproof vests.

{¶ 17} At the conclusion of the trial, on March 14, 2014, the jury returned a verdict finding Ashdown guilty of both aggravated robbery and petty theft. The trial court sentenced him to a prison term of eight years on the aggravated robbery charge, and a concurrent jail term of 180 days on the petty theft charge.

{¶ 18} Ashdown now appeals, raising four assignments of error.

{¶ 19} Assignment of Error No. 1:

{¶ 20} DEFENDANT-APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 21} Ashdown claims that defense counsel was ineffective because he did not file a motion requesting a competency evaluation after raising concerns about Ashdown's competency at the January 7 hearing.

{¶ 22} "Reversal of convictions on ineffective assistance of counsel requires that the defendant 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. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, ¶ 40, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). A court considering an ineffective assistance claim must indulge a strong presumption that counsel's representation fell within the wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 142 (1989). A reviewing court may approach the ineffective assistance analysis starting with either prong of the test, and a defendant's failure to satisfy one prong obviates the court's need to review the other. *Strickland* at 697; *Bradley* at 143.

{¶ 23} A review of the record reveals that defense counsel's conduct was not deficient. Counsel worked with Ashdown for several months to prepare for the trial, and had conducted negotiations with the state – with Ashdown's apparent approval – to reach a plea agreement that would reduce the aggravated robbery charge to simple robbery, a felony of the second

degree. Upon learning that Ashdown no longer desired to be represented by counsel, was no longer willing to accept a plea agreement, and had "visions that everything would be okay," counsel immediately contacted the trial court and secured an impromptu hearing.

{¶ 24} During the January 7 hearing, counsel twice asked the court to question Ashdown to determine "whether or not [the court] needs to maybe do some competency evaluations." We find that defense counsel's oral requests to the court to consider a competency evaluation did in fact constitute the motion Ashdown alleges counsel failed to make. Moreover, even if we were to find these requests were not properly or timely made, it is highly unlikely such a request would have been granted given the trial court's subsequent determinations. In fact, it was counsel's requests which led the court to conduct an exhaustive and independent colloquy with Ashdown, after which the court confidently concluded there was no reason to order a competency evaluation or to find Ashdown incompetent to stand trial.

{¶ 25} Ashdown has failed to show he received the ineffective assistance of counsel; he has not demonstrated that his counsel's performance was deficient. Consequently, Ashdown's first assignment of error is overruled.

{¶ 26} Assignment of Error No. 2:

{¶ 27} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT FAILED TO ORDER A COMPETENCY HEARING AND EVALUATION SUA SPONTE.

{¶ 28} Ashdown claims that his due process rights were violated by the trial court's failure to hold a competency hearing or order a competency evaluation sua sponte after it learned of Ashdown's "visions."

{¶ 29} "A defendant is presumed to be competent to stand trial." R.C. 2945.37(G). When an issue with the defendant's competence is raised prior to trial, R.C. 2945.37(B)

requires that "the court *shall* hold a hearing on the issue." (Emphasis added.) In addition to holding a hearing, "the court *may* order one or more evaluations of the defendant's present mental condition * * *." (Emphasis added.) R.C. 2945.371(A). If, after a hearing and possibly an evaluation, a criminal defendant successfully rebuts the presumption of competence, then fundamental principles of due process prohibit a trial court from permitting that defendant to stand trial. *State v. Berry*, 72 Ohio St.3d 354, 359 (1995).

{¶ 30} In the present case, the trial court had a duty to hold a competency hearing pursuant to R.C. 2945.37(B) because the issue of Ashdown's competency was raised prior to trial. After a thorough review of the record, we find the January 7 hearing satisfied the court's duty. Upon learning of defense counsel's concerns regarding Ashdown's competency, the trial court went on the record for the purpose of determining Ashdown's competency. Thereafter, Ashdown, his defense counsel, and the state all had the opportunity to address the court, and the court had the opportunity to thoroughly question Ashdown. In effect, except for the absence of a formal written motion requesting a competency hearing and a formal scheduling order on the court's docket, the January 7 hearing *was* a competency hearing.

{¶ 31} Further, pursuant to R.C. 2945.371(A), the decision to order competency evaluations is within the sound discretion of the trial court, and we review the court's decision not to order a competency evaluation under an abuse of discretion standard. *State v. Mackey*, 12th Dist. Warren No. CA99-06-065, 2000 WL 190033, *3 (Feb. 14, 2000). An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). Given the lucidity of Ashdown's responses to the court's questions at the January 7 hearing about the nature and objective of the proceedings against him, and the knowledge of trial procedure that Ashdown demonstrated, it was reasonable for the court to

conclude Ashdown was competent to stand trial, and to decline to order a competency evaluation.

{¶ 32} In short, the record does not support Ashdown's argument that the trial court failed to hold a competency hearing, or that a competency evaluation was necessary. As a result, Ashdown's second assignment of error is overruled.

{¶ 33} Assignment of Error No. 3:

{¶ 34} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ALLOWED HIM TO REPRESENT HIMSELF WITHOUT THE DEFENDANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVING HIS RIGHT TO COUNSEL.

{¶ 35} Ashdown argues the court committed reversible error by allowing him to represent himself at trial. In support of his argument, Ashdown contends that the waiver of his right to counsel at the January 7 hearing was invalid because it was not in writing. He also asserts that the trial court's attempt to obtain his waiver in writing at the January 13 hearing was ineffective given the concerns that had previously been raised regarding his competency. Thus, Ashdown argues he never knowingly, intelligently, and voluntarily waived his right to counsel.

{¶ 36} A criminal defendant has the constitutional right to represent himself at trial. *Faretta v. California*, 422 U.S. 806, 816, 95 S.Ct. 2525 (1975); *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶ 89. However, before a defendant can represent himself in cases involving a "serious offense," Crim.R. 44(A) requires the trial court to (1) fully advise the defendant of his right to assigned counsel, and (2) ensure the waiver of defendant's right to counsel is knowing, intelligent, and voluntary.[1] In addition, Crim.R. 44(C) requires that the

1. According to Crim.R. 2, all felonies are "serious offenses."

waiver of counsel be in open court and in writing.

{¶ 37} "[T]he trial court must demonstrate substantial compliance with Crim.R. 44(A) by making a sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel." *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, paragraph two of the syllabus. If the trial court demonstrates substantial compliance with Crim.R. 44(A), then the failure to obtain a written waiver of counsel pursuant to Crim.R. 44(C) is harmless error. *State v. Schleiger*, 141 Ohio St.3d 67, 2014-Ohio-3970, ¶ 20; *Martin* at ¶ 39.

{¶ 38} The United States Supreme Court has not prescribed any formula or script to be read to a defendant who elects to proceed without counsel. *Johnson* at ¶ 101. Rather, the information a defendant must possess in order to make an intelligent election depends on a range of case-specific factors. *Iowa v. Tovar*, 541 U.S. 77, 88, 124 S.Ct. 1379 (2004); *Johnson* at ¶ 101. Thus, the Ohio Supreme Court has stated that in order for a waiver of counsel to be knowingly, intelligently, and voluntarily made, it "'must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments * * *, possible defenses to the charges and circumstances in mitigation * * *, and all other facts essential to a broad understanding of the whole matter.'" *Martin* at ¶ 40, quoting *Von Moltke v. Gillies*, 332 U.S. 708, 723, 68 S.Ct. 316 (1948).

{¶ 39} The record shows that the trial court substantially complied with Crim.R. 44(A) during the January 7 hearing. As described above, upon learning of Ashdown's "visions" and his desire to represent himself at trial, the court conducted a careful and deliberate review with Ashdown of the charges against him, the potential range of sentences, and basic trial procedure. Throughout this colloquy, Ashdown affirmed his understanding of the consequences of the proceedings, and cogently discussed a trial strategy that demonstrated his grasp of the elements of the various offenses of which he could potentially be convicted

(e.g., demonstrating the state could only prove simple robbery, rather than aggravated robbery). The court also warned Ashdown of the difficulties and risks of proceeding pro se, and encouraged him to reconsider his decision to proceed without the benefit of counsel. Notwithstanding the court's efforts to dissuade him, Ashdown indicated that he wished to represent himself.

{¶ 40} The trial court's substantial compliance with Crim.R. 44(A) at the January 7 hearing rendered its failure to obtain a written waiver of Ashdown's right to counsel as harmless error. *Martin*, 103 Ohio St.3d 385 at ¶ 38. Moreover, less than a week later, and without any intervening proceedings, the trial court held another hearing, i.e., the January 13 hearing, to remedy its initial failure.[2] During that hearing, the court again engaged Ashdown to confirm that he understood the charges against him, the range of potential sentences, and the difficulties and risks of proceeding pro se. Indeed, at the January 13 hearing the court even went so far as to ask Ashdown to expressly verify that he was "knowingly, intelligently, and voluntarily" waiving his rights to counsel. Only after receiving such assurances did the court obtain Ashdown's written waiver of counsel.

{¶ 41} Under the foregoing circumstances, we find that Ashdown knowingly, intelligently, and voluntarily waived his right to counsel. His third assignment of error is overruled.

{¶ 42} Assignment of Error No. 4:

{¶ 43} APPELLANT'S [sic] CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

2. Although Ashdown effectively waived his right to counsel at the January 7 hearing, Ashdown's former defense counsel was nevertheless present at the January 13 hearing (and throughout Ashdown's trial) as standby counsel. The Ohio Supreme Court has described the role of standby counsel as "'to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.'" *Martin*, 103 Ohio St.3d 385 at ¶ 28, quoting *Faretta*, 422 U.S. at 834, fn. 46.

{¶ 44} Ashdown contends that his conviction for aggravated robbery was not supported by "the greater weight of credible evidence." Specifically, he asserts that the jury lost its way in assessing the credibility of the eyewitness testimony, and finding him guilty. In support of his argument, Ashdown points to a single example: the contradiction between Spurlock's original statement to police that the knife was in his left hand, and her later testimony that it was in his right hand. Ashdown notes that the video evidence clearly shows he was holding nothing in his left hand. Thus, he argues his conviction for aggravated robbery was against the manifest weight of the evidence.

{¶ 45} A manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997); *State v. Johnson*, 12th Dist. Fayette No. CA2013-04-012, 2014-Ohio-1694, ¶ 19. To determine whether a conviction is against the manifest weight of the evidence, the reviewing court must look at the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Setty*, 12th Dist. Clermont Nos. CA2013-06-049 and CA2013-06-050, 2014-Ohio-2340, ¶ 83. In conducting its review, the court must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the evidence. *State v. Kilbarger*, 12th Dist. Fayette No. CA2013-04-013, 2014-Ohio-2341, ¶ 7.

{¶ 46} Ashdown was convicted, by a jury, of aggravated robbery in violation of R.C. 2911.01(A)(1). That statute provides that "[n]o person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave 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 * * *." R.C. 2911.01(A)(1).

{¶ 47} After reviewing the entire record, weighing inferences, and examining the credibility of witnesses, we find that Ashdown's conviction for aggravated robbery was not against the manifest weight of the evidence. Spurlock testified that she observed Ashdown steal merchandise from the department store and approached him as he was exiting through the front doors, and that Ashdown responded to her approach with the use of foul language and the display of a knife. Although it appears that Spurlock may have incorrectly suggested the knife was in Ashdown's left hand in her original statement to police, her later correction of this statement to indicate the knife was in his right hand does not render her account incredible.

{¶ 48} In addition, Spurlock's testimony regarding Ashdown's display of the knife was corroborated by a second eyewitness, Thomas, and by the video and photographic evidence. Further, Officer Stebbins' testimony confirmed that a butterfly knife was found on Ashdown's person after he was apprehended in the department store parking lot, and that the butterfly knife was, indeed, a deadly weapon.

{¶ 49} In short, Ashdown has failed to show that his conviction for aggravated robbery was not supported by the greater weight of credible evidence. Consequently, Ashdown's fourth assignment of error is overruled.

{¶ 50} Judgment affirmed.

PIPER, P.J., and M. POWELL, J., concur.