[Cite as *State v. Potchik*, 2011-Ohio-501.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23865
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2009-CR-2491
v.	:	
	:	(Criminal Appeal from
WILLIAM J. POTCHIK	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 4th day of February, 2011.

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FAIN, J.

{¶ 1} Defendant-appellant William J. Potchik appeals from his conviction and sentence for Robbery and Aggravated Robbery. Potchik contends that the trial court erred by

failing to conduct a competency hearing prior to trial. He further contends that the State did not present evidence sufficient to sustain the conviction. Finally, Potchik contends that the trial court erred when it ruled that if Potchik were to put on evidence of his timid character, that would open the door to the State's putting on evidence that Potchik had previously shoplifted items from the same store he was accused of robbing, and had been told that he would be trespassing if he were to return to the store..

{¶ 2} We conclude that this record does not support a finding that the trial court erred by failing to hold a hearing on the issue of Potchik's competency to stand trial. Potchik did not put his competency into issue, and there is nothing in the record to suggest incompetency other than one unexplained remark by the trial court, during a hearing on another issue before trial, alluding to a prior "suggestion that you were not currently competent to stand trial." We conclude that this one remark, without more, was not sufficient to put Potchik's competency to stand trial at issue.

{¶ 3} We conclude that the State presented sufficient evidence, in the form of eyewitness testimony, upon which a reasonable juror could conclude that Potchik used a gun during the commission of the offense. Finally, we conclude that the trial court did not err in its evidentiary ruling concerning character evidence.

{¶ 4} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 5} In late July, 2009, Samantha Brower was working as a cashier at a Rite Aid pharmacy on Linden Avenue when a man placed items on the counter before her. Brower

rang up the items and informed the man of the total, at which time the man lifted up his shirt and showed her what appeared to her to be a gun tucked into the waistband of his pants and said "give me the money." Brower gave the man the money in her cash register, and the man left the store.

{¶ 6} A video surveillance camera recorded the encounter. Personnel from the pharmacy viewed photographs taken from the videotape and recognized the robber as William Potchik. Potchik had been a former regular customer, but had been barred from the store. Brower also identified Potchik as the robber.

{¶ 7} Potchik was arrested at his apartment. He waived his rights and consented to an interview, during which he admitted that he was the man in the photograph taken from the videotape. However, he denied committing a robbery.

{¶ 8} Potchik was indicted on one count of Aggravated Robbery and one count of Robbery, both with firearm specifications. Following a jury trial, he was convicted as charged and sentenced to six years in prison. From his conviction and sentence, Potchik appeals.

II

{¶ 9} Potchik's First Assignment of Error states:

{¶ 10} "THE TRIAL COURT ERRED WHEN IT FAILED TO CONDUCT A COMPETENCY HEARING PURSUANT TO R.C. 2945.37."

{¶ 11} Potchik contends that the issue of his competency to stand trial was raised before trial, and that the trial court therefore erred by failing to conduct a competency hearing.

Potchik relies upon a statement made by the trial court during a pre-trial conference, a few days prior to trial, at which the trial court was attempting to make sure that Potchik understood the terms of a plea bargain offered by the State, which Potchik ultimately declined. That statement appears in the following colloquy:

{¶ 12} "THE COURT: Mr. Potchik, first of all, and I know Mr. Goraleski's already told you this, you're set to go to trial on Monday and you have an absolute right to a trial and I don't want to interfere with that in anyway, that is your absolute right. And I'm not trying to force you to do anything at all. All I'm trying to outline for you are your options and then you're going to have to make a decision, all right?

{¶ 13} "THE DEFENDANT: Yes.

{¶ 14} "THE COURT: One option, of course, is you come Monday and we have a trial. Now, result of the trial will depend upon what 12 individuals, 12 jurors, believe about the evidence. And if those 12 jurors are convinced beyond a reasonable doubt of your guilt and your guilt of aggravated robbery with a firearm specification, the minimum sentence at that point would be six years of incarceration, six years.

{¶ 15} "Now, given the plea negotiations which have occurred, and I know about your background, one of the issues that I looked at earlier was your history of depression and some other issues, the mental health issues that you've had over the years. I had review [sic] that because *there was a suggestion that you were not currently competent to stand trial. Remember, you went and had the evaluations done*. Do you remember all that?

{¶ 16} "THE DEFENDANT: Yes.

{¶ 17} "THE COURT: All right. And you know, I'm aware of the history that you

have and I appreciate that and I understand that. And, so based upon that what I've told Mr. Goraleski is that if there is a plea, if, I'd be willing to sentence you to a minimum term of three years, all right?" (Emphasis added.)

{¶ 18} We have reviewed the record, and we have found no other allusion, in this record, to the possibility that Potchik might not have been competent to stand trial.

{¶ 19} Based solely upon the colloquy quoted above, Potchik argues that the issue of his "competence to stand trial was raised before trial but there is no indication in the court's journal entries that any hearing was held or that any finding was made." Thus, he contends that his conviction must be reversed.

{¶ 20} The statute governing competency hearings, R.C. 2945.37, provides in part:

{¶ 21} "(B) In a criminal action in a court of common pleas, a county court, or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section. If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion.

{¶ 22} "(C) The court shall conduct the hearing required or authorized under division (B) of this section within thirty days after the issue is raised, unless the defendant has been referred for evaluation in which case the court shall conduct the hearing within ten days after the filing of the report of the evaluation or, in the case of a defendant who is ordered by the court pursuant to division (H) of section 2945.371 of the Revised Code to undergo a separate mental retardation evaluation conducted by a psychologist designated by the director of

developmental disabilities, within ten days after the filing of the report of the separate mental retardation evaluation under that division. A hearing may be continued for good cause.

{¶ 23} "(D) The defendant shall be represented by counsel at the hearing conducted under division (C) of this section. If the defendant is unable to obtain counsel, the court shall appoint counsel under Chapter 120. of the Revised Code or under the authority recognized in division (C) of section 120.06, division (E) of section 120.16, division (E) of section 120.26, or section 2941.51 of the Revised Code before proceeding with the hearing."

{¶ 24} "A defendant is presumed to be competent." *State v. Smith*, Montgomery App. No. 21058, 2006-Ohio-2365, ¶ 21, citing *State v. Rose*, Clark App. No.2004 CA 40, 2005-Ohio-3182, ¶ 10. "In order to rebut this presumption, the defendant must request a competency hearing and at a subsequent hearing, a preponderance of the evidence must show that the defendant, as a result of his present mental condition, is not capable of understanding the proceedings and is unable to assist in his defense." Id. R.C. 2945.37(F) provides that a defendant shall not be found incompetent simply because he has a mental health condition or because he is receiving psychotropic drugs. Mental health conditions do not equate with legal incompetence. *State v. Berry* (1995), 72 Ohio St.3d 354. A trial court must conduct a competency hearing where there are sufficient indicia of incompetency to call into question the defendant's competency to stand trial. Id.

{¶ 25} We conclude that there are insufficient indicia of incompetency in this case. Trial counsel never raised the issue of competency. Counsel did mention, in both the motion to suppress and the motion to reduce bond, that Potchik has experienced depression and has a bipolar disorder. But counsel affirmatively stated that Potchik's condition is treated and

controlled by medication. Potchik did not exhibit any behavior during the proceedings that would lead to a finding that he was not competent to stand trial. There is no expert or other opinion in the record to indicate that Potchik was incompetent. Furthermore, it is not clear from the transcript cited above that the "evaluations" that the trial court alluded to were related to a claim of incompetency. The trial court could have been referring to evaluations done in the past regarding Potchik's depression and bipolar disorder, to which his trial counsel had alluded.

{¶ 26} On this record, we conclude that there was not a suggestion of incompetency sufficient to have triggered a requirement of a competency hearing. In reaching this conclusion, we are motivated, to some extent, by a concern that trial judges should not be deterred from merely alluding, during a proceeding on the record, to the issue of a defendant's competency to stand trial, lest that mere allusion, without more, be deemed to trigger a requirement that the trial court conduct a full-blown competency hearing.

{¶ 27} The First Assignment of Error is overruled.

III

{¶ 28} The Second Assignment of Error is as follows:

{¶ 29} "WILLIAM POTCHIK WAS CONVICTED ON INSUFFICIENT EVIDENCE."

{¶ 30} Potchick contends that the State did not present evidence sufficient to support his convictions because the State did not demonstrate that he utilized a gun during the offense.

{¶ 31} "A sufficiency of the evidence argument disputes whether the State has

presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372. A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." Id.

{¶ 32} Potchik's argument centers on the fact that Brower testified that she did not "know anything specifically about guns," never saw the barrel of a gun, did not hear the robber mention a gun, and just "assumed it was a gun."

{¶ 33} Brower's testimony indicates that Potchik "lifted his shirt and showed the butt end of a gun[,] about the same time he asked me for the money." Brower testified that "it was a silver handle with black grips. Kind of – it's not small like a small handgun. It was a little bit bigger but I don't know anything specifically about guns." She testified that all she saw was the handle of the gun, because it was pointed downward. When asked whether she had any question regarding what Potchik was showing her by lifting his shirt, she replied "no, I just assumed it was a gun." She later reiterated that she had no doubt that Potchik showed her a gun.

{¶ 34} A video recording of the offense taken from Rite Aid's security camera was played during Brower's testimony while she described to the jury the events as they unfolded.

The State candidly admits that gun is not visible from the angle of the videotape. The DVD in our record contains some still pictures from the security camera, but even with the support of information technology specialists, we have not found a video recording on the DVD.

{¶ 35} The jury was presented with testimony from an eyewitness that Potchik had a gun during the commission of this offense. Having also viewed the video recording, the jury was free to believe or disbelieve Brower's testimony. Clearly, the jury accepted Brower's claim that a gun was utilized despite the lack of visibility on the video recording. From the record before us, we conclude that the jury's decision to credit Brower's testimony concerning the gun was reasonable.

{¶ 36} The Second Assignment of Error is overruled.

IV

{¶ 37} Potchik's Third Assignment of Error states as follows:

{¶ 38} "THE TRIAL JUDGE ERRED IN RULING ON THE DEFENDANT'S MOTION TO PRESENT CHARACTER WITNESSES PURSUANT TO EVIDENCE RULE 404(A)(1)."

{¶ 39} Potchik claims that the trial court erred by ruling that the State could present rebuttal character evidence of specific instances of conduct to rebut testimony concerning Potchik's peaceful character.

{¶ 40} Prior to trial, Potchik filed a motion in limine seeking to preclude any "evidence related to the defendant's contacts with Rite Aid staff on either June 19, 2006 or August 20, 2007." Those prior contacts apparently involved thefts or attempted thefts

committed by Potchik, which resulted in the store barring him from the premises.

{¶ 41} During trial, Potchik notified the trial court that he wanted to call four character witnesses who would testify "that his reputation in the community is a reputation for peacefulness." The trial court ruled that if Potchik presented this character-witness testimony, the State would then be free to introduce evidence regarding Potchik's prior contacts with the Rite Aid store.

{¶ 42} Evid.R. 404 provides that evidence of character is admissible for some limited purposes. That rule provides in part:

{¶ 43} "(A) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

{¶ 44} "(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; * * *

{¶ 45} " * * * *

{¶ 46} "(B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 47} Evid.R. 405 then sets forth the methods by which character may be proved. That rule provides:

{¶ 48} "(A) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or

by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

{¶ 49} "(B) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct ."

{¶ 50} Under Evidence. R. 404(A)(1), once an accused presents evidence of his good character, the prosecution may offer evidence to rebut the accused's good-character evidence. *State v. Ivory,* Cuyahoga App. No. 83170, 2004-Ohio-2968, ¶ 16. Under Evid.R. 405(A), where the character of an accused is in issue, inquiry is allowable on cross-examination into specific instances of conduct.

{¶ 51} Here, Potchik proffered the testimony of his character witnesses outside the presence of the jury. All four of these witnesses testified that Potchik was a peaceful person and had never been known to have a gun. One witness further testified that "[Potchik is] not a violent person. He doesn't get in trouble, he keeps to his own. He's a good guy. He has no reason to have a gun." Another testified that Potchik has "always been kind of like a shy, timid, seclusive type of person."

{¶ 52} The trial court determined that the character evidence proffered by Potchik was admissible. But the trial court pointed out the consequence to Potchik if he presented evidence concerning his good character:

{¶ 53} "Now the concern I have is if we go through the character evidence regarding peacefulness, and since the purpose of such character testimony is to demonstrate a general propensity that the Defendant is behaviorally incompatible with the crime charged, you have

to understand here that the crime charged is aggravated robbery and robbery, which are theft offenses. And if we go down that path, then it seems to me that that opens the door for the State to introduce evidence, either through cross-examination or by other witnesses of the two instances of petty theft at the Rite Aid that occurred in 2006 and 2007, which prompted Mr. Potchik to be trespassed from Rite Aid."

{¶ 54} Thereafter, Potchik decided not to put the witnesses before the jury.

{¶ 55} We agree with the trial court that the testimony proferred by Potchik's witnesses would open the door to the State's inquiry into any specific acts of conduct of the accused to rebut that testimony of peacefulness, shyness and timidity. This evidence and method of cross-examination is permitted by Evid.R. 404(A)(1) and 405(A) and the trial court did not abuse its discretion in so ruling.

{¶ 56} Accordingly, the Third Assignment of Error is overruled.

V

{¶ 57} All of Potchik's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN and FROELICH, JJ., concur.

Copies mailed to:

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