[Cite as *State v. Mick*, 2015-Ohio-408.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 14CA3433
	:	
vs.	:	
	:	DECISION AND JUDGMENT
RICKY MICK,	:	ENTRY
	:	
Defendant-Appellant.	:	**Released: 01/29/15**

APPEARANCES:

James S. Sweeney, James Sweeney Law, LLC, Columbus, Ohio, for Appellant.

Sherri K. Rutherford, Law Director, City of Chillicothe, Ohio, for Appellee.[1]

McFarland, A.J.

{¶1} This is an appeal by Ricky Mick of his conviction for theft, a misdemeanor of the first degree, in violation of R.C. 2913.02, after a jury trial in the Chillicothe Municipal Court. Appellant's counsel has advised this Court that, after reviewing the record, he cannot find a meritorious claim for appeal. However, he has pointed out two potential issues: (1) that Appellant was rendered ineffective assistance of counsel as a result of his counsel's failing to challenge the seating of a juror who was an employee of

[1] The State has not filed a brief or other responsive pleading herein.

the Walmart from which Appellant's charge arose; and (2) that the trial court erred in overruling Appellant's request for a jury instruction on the lesser included offense of attempted theft. However, Appellant's counsel has moved to withdraw under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). We find no merit to the assignments of error raised by appellate counsel and, after independently reviewing the record, find no additional error prejudicial to the Appellant's rights in the trial court proceedings. The motion of counsel for Appellant requesting to withdraw as counsel is granted and the trial court's judgment is affirmed as the appeal is wholly frivolous.

FACTS

{¶2} On January 15, 2014, Appellant was arrested and charged with theft, a misdemeanor of the first degree. After two pretrial hearings, Appellant proceeded to a one-day jury trial on February 11, 2013. Two witnesses testified for the State. Appellant did not present any testimony or other evidence.

{¶3} Donald Barton, a loss prevention officer with Walmart, testified he was working a late shift when he noticed Appellant with a shopping cart with a number of bottles of orange Tide, among other products. Barton notified the assistant manager about Appellant's cart full of items that were

typically shoplifted.[2] As Appellant left the infant section and passed the shoe department, he walked towards the grocery alley. Barton notified the manager that he believed Appellant was planning to push the cart out the door and he began following Appellant. Appellant walked straight out the grocery doors, past the last point of sale and past the security bars. Barton specifically testified there was a space of 15-20 feet between the security bars and the exit doors. Appellant walked outside the door and Barton stepped in front of him. Barton identified himself as an employee in asset protection with Walmart. Appellant immediately told Barton his wife had the receipt for the items. Barton suggested they walk back into the store and take care of the problem. He reached for Appellant's arm, but Appellant pushed away and ran around the corner of the building. Barton followed him approximately ten feet and then notified the police of a "runner," according to Walmart policy.

{¶4} Barton testified he wheeled the cart back into the store and photographed it. Walmart ultimately recovered the items in Appellant's cart.

{¶5} The State's other witness was Officer Lucas Hansen of the Chillicothe Police Department. When the shoplifting incident was

[2] According to Barton, Tide is a large market value item that is often resold at flea markets or smaller markets.

dispatched, he responded to Walmart immediately. He could not find Appellant so Hansen went inside the store and viewed the security video with Mr. Barton. Then Hansen returned to his cruiser to do his paperwork. As he was sitting inside the vehicle, he saw Appellant coming out of some bushes behind the store. Hansen detained Appellant and placed him under arrest. Hansen testified he did not observe Appellant's action in obtaining the items, other than on the security video.

{¶6} At the end of Hansen's testimony, 4 photographs of the items in Appellant's cart were admitted into evidence as State's Exhibit A, and the State rested. Then the defense rested. Appellant spoke up and requested a new trial and new counsel, based on "my case against a victim of being accused an employee of Walmart." The trial court denied the motions and addressed Appellant's issue with the Walmart employee as juror, stating on the record:

> "It seems to me that the lady that says she was an employee of Walmart indicated that she didn't have any problem. She'd be fair to both sides. She, there was nothing else brought up that would indicate that she has any bias one way or another."

{¶7} Then Appellant's counsel made his request for a jury instruction on the lesser included charge of attempted theft. The trial court denied the request, stating it was not warranted by the evidence. The jury found Appellant guilty and he was sentenced to 180 days in jail.

{¶8} Appellant filed a timely notice of appeal.

A. ANDERS BRIEF

{¶9} Under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), counsel may ask permission to withdraw from a case when counsel has conscientiously examined the record, can discern no meritorious claims for appeal, and has determined the case to be wholly frivolous. *Id.* at 744; *State v. Adkins*, 4th Dist. Gallia No. 03CA27, 2004-Ohio-3627, ¶ 8. Counsel's request to withdraw must be accompanied with a brief identifying anything in the record that could arguably support the client's appeal. *Anders* at 744; *Adkins* at ¶ 8. Further, counsel must provide the defendant with a copy of the brief and allow sufficient time for the defendant to raise any other issues, if the defendant chooses to. *Id.*

{¶10} Once counsel has satisfied these requirements, the appellate court must conduct a full examination of the trial court proceedings to determine if meritorious issues exist. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and address the merits of the case without affording the appellant the assistance of counsel. *Id.* If, however, the court finds the existence of meritorious issues, it must afford the appellant assistance of counsel before deciding the

merits of the case. *Anders* at 744; *State v. Duran,* 4th Dist. Ross No. 06CA2919, 2007-Ohio-2743, ¶ 7.

{¶11} In the current action, Appellant's counsel advises that the appeal is wholly frivolous and has asked permission to withdraw. Pursuant to *Anders,* counsel has filed a brief raising two potential assignments of error for this Court's review.

B. POTENTIAL ASSIGNMENTS OF ERROR

1. "INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO CHALLENGE THE SEATING OF A JUROR WHO WAS AN EMPLOYEE OF THE WAL-MART IN WHICH APPELLANT WAS CONVICTED OF STEALING FROM."

a. STANDARD OF REVIEW

{¶12} Criminal defendants have a right to counsel, including a right to the effective assistance from counsel. *McMann v. Richardson,* 397 U.S. 759, 770, 90 S.Ct. 1441 (1970); *State v. Stout*, 4th Dist. Gallia No. 07CA5, 2008-Ohio-1366, ¶ 21. To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Issa,* 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (20010); *State v. Goff,* 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). "In order to show deficient performance, the defendant must prove that

counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability, that, but for counsel's error, the result of the proceeding would have been different." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95 (citations omitted). "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

{¶13} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* "A properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No 07CA1, 2008-Ohio-482, ¶ 10, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show

ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v. Gondor,* 112 Ohio St.3d 388, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin,* 37 Ohio St.3d 153, 524 N.E.2d 476 (1988).

{¶14} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that but for counsel's errors, the result of the trial would have been different. *State v. White,* 82 Ohio St.3d 15, 23, 693 N.E.2d 772 (1998); *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), at paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but must require that prejudice be affirmatively demonstrated. See *State v. Clark,* 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, at ¶ 22.

b. LEGAL ANALYSIS

{¶15} The Supreme Court of Ohio has consistently declined to "second-guess trial strategy decisions" or to impose "hindsight views about current counsel might have voir dired the jury differently." *State v. Pickens,* --N.E.3d--, 2014-Ohio-5445, ¶ 44, quoting *State v. Mason,* 82 Ohio St.3d 144, 157, 694 N.E.2d 932 (1998). "[C]ounsel is in the best position to determine whether any potential juror should be questioned and to what

extent." *Pickens, supra*, quoting *State v. Murphy*, 91 Ohio St.3d 516, 539, 747 N.E.2d 765 (2001). "Where jurors demonstrate during voir dire that they are able to remain fair and impartial, no action will lie for ineffective assistance of counsel for not seeking their removal." *State v. Burns*, 12th Dist. Clinton No. CA2013-10-09, 2014-Ohio-4625, ¶ 12, quoting *State v. Bofia*, 3rd Dist. Henry No. 07-03-12, 2004-Ohio-3018, ¶ 14.

{¶16} Here, the record reveals the trial court inquired of the prospective jurors, which included Juror Grizzle, as follows:

> Court: During this part of the trial as I said we're gonna focus on these folks over here and in the trial of this case each side is entitled to have a fair unbiased and unprejudiced jury. If there is any fact or any reason why any of you might be biased or prejudiced in any way you must disclose these reasons when you are asked to do so. It's your duty to make this disclosure.

{¶17} As it related to the Walmart store in question, the trial court inquired:

> Court: I have not told you much about this case. Do any of you think you may know something about this case? It supposedly took place at Walmart. Is there anybody who's not been to the local Walmart store. Everybody's been there. So you know what we're talking about. Do any of you know the four people seated here in front of you?

* * *

{¶18} The Court also inquired as follows:

> Court: * * * At the end of the case I'm gonna explain the law to you as it applies in this case. Are all of you willing to follow the law? Ok.

Later on, this exchange took place:

> Ms. Rout: Your Honor, there was a juror trying to get our attention. Ms. Grizzle.
>
> Court: Ms. Grizzle?
>
> Ms. Grizzle: (Inaudible)
>
> Court: Pardon me, you're an employee of Walmart? Do you work here in town? Ok. But you don't know who Don Barton is?
>
> Ms. Grizzle: I don't personally know (inaudible)
>
> Court: Are you involved at all in the loss prevention or theft area?
>
> Ms. Grizzle: No. No. I'm just a cashier. (Inaudible).
>
> Court: O.k. Well, thank you for telling us. It probably would have been a good question to ask.
>
> * * *

{¶19} After further unrelated questioning and general instructions, the trial court had the jurors sworn, including Grizzle, that they would "carefully deliberate all matters between the State of Ohio and the defendant * * * to the best of [their] understanding without bias or prejudice."

{¶20} In the case sub judice, the trial court engaged in a dialogue

with the jurors as a whole, including Juror Grizzle. The transcript shows he asked if there was any fact or reason why they might be biased or prejudiced and informed them it was their duty to make disclosure. In particular, the trial court asked them about the particular Walmart in Ross County and whether or not they knew any of the four persons seated with the attorneys, which included Donald Barton of loss prevention. The trial court also engaged directly with Juror Grizzle, who brought it to his attention that she was an employee of Walmart but was not involved with loss prevention. Finally, the trial court instructed the jury that they must be willing to follow the law. At the end of voir dire, the jurors, including Grizzle, swore that they would deliberate without bias or prejudice.

{¶21} In denying Appellant's motions for new trial and new counsel based on the jury issue, the trial court concluded that Juror Grizzle, though a Walmart employee, indicated she could be fair and impartial. Based on the transcript as set forth above, we find no merit to Appellant's argument that his counsel was ineffective failing to further question Juror Grizzle. As such, we find no merit to the first potential assignment of error.

2. "THE TRIAL COURT'S DECISION TO OVERRULE APPELLANT'S REQUEST FOR AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF ATTEMPTED THEFT."

a. STANDARD OF REVIEW

{¶22} "When the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser included offense." *State v. Maynard*, 4th Dist. Washington No. 10CA43, 2012-Ohio-786, quoting Crim.R. 31(C). See also, R.C. 2945. 74.

{¶23} In reviewing a trial court's decision regarding whether to give a jury instruction on a lesser included offense, we employ a two-tiered analysis. *Maynard, supra* , at ¶ 26. First, we must determine whether the offense for which the instruction is requested is a lesser included offense of the charged offense." *Id.* (Citation omitted). *State v. Smith*, 4th Dist. Scioto No.09CA3321, 2010-Ohio-5953, ¶ 23. A criminal offense may be a lesser included offense of another if (1) the offense carries a lesser penalty than the other; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove the commission of the lesser offense. *State v. Barnes*, 94 Ohio St.3d 14, 26-27, 759 N.E.2d 1240, citing *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), paragraph three of the syllabus.

{¶24} Once it is determined that a charge constitutes a lesser included offense of another charged offense, we then examine whether the record contains evidentiary support upon which a jury could reasonably acquit the defendant of the greater offense and convict him on the lesser offense. *Maynard, supra,* at ¶ 28. The trial court has discretion in determining whether the record contains sufficient evidentiary support to warrant a jury instruction on the lesser included offense, and we will not reverse that determination absent an abuse of discretion. *Maynard, supra,* citing *Smith, supra,* at ¶ 24. An abuse of discretion connotes more than a mere error of judgment; it implies that the court's attitude is arbitrary, unreasonable, or unconscionable. *Maynard, supra,* at ¶ 29, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

b. LAW AND ANALYSIS

{¶25} In *State v. Jordan,* 9th Dist. Summit No. 26598, 2013-Ohio-4172, Appellant was charged with theft after he assisted another person in loading two large boxed flag screen televisions onto a shopping cart in Walmart and engaged the store's elderly greeter in conversation while the other individual pushed the cart out of the store. One of Jordan's arguments on appeal was that the evidence established his conduct rose, at most, to the level of attempted theft because there was no evidence that he deprived

Walmart of the televisions. The appellate court found that Jordan misunderstood the essential elements of the crime of theft, including "purpose to deprive the owner of property." R.C. 2913.02(A)(1). A defendant need not actually permanently withhold or dispose of the property. *Jordan, supra,* at ¶ 28. The trial court held that the evidence established that Jordan acted with the requisite purpose to deprive Walmart of its property. His co-defendant fled the physical premises of the store when questioning was attempted. In addition the theft was completed when the televisions were moved throughout the store with the intent to deprive Walmart of the property. The *Jordan* court noted "The law does not require the store to wait until a defendant leaves the premises with merchandise to apprehend a suspect for shoplifting." *Id.,* quoting, *State v. Peak,* 11th Dist. Lake No. 2004-L-124, 2005-Ohio-6422, at ¶ 34. The *Jordan* court found under the circumstances, a jury could not reasonably find Jordan not guilty of theft but guilty of the lesser offense of attempted theft. *Id.*

{¶26} However, Crim.R. 30(A) provides:

> "At the close of evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The Court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The jury also may give some or all

> of its instructions to the jury prior to counsel's arguments. The court need not reduce its instructions to writing."

{¶27} In *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982), paragraph two of the syllabus, the Supreme Court of Ohio held:

> " '[A] requested special jury instruction must be in writing and made at the close of the evidence, or at such earlier time as the court reasonably directs to be proper.' Several appellate courts have found that *Fanning* applies to requests for jury instructions involving lesser included offenses."

{¶28} We recently reaffirmed this principal in *State v. McFadden.*, 4th Dist. Washington No. 14CA5, 2014-Ohio-5294, ¶ 11. Similarly, because of the law set forth above, that the trial court did not err in denying an oral request for the lesser included offense instruction, we need not address Appellant's argument that the record herein contained evidentiary support upon which the jury could reasonably have acquitted him of the greater offense. The record here does not contain any written request for the lesser included instruction, as required pursuant to Crim.R. 30(1). Therefore, the trial court did not err in refusing to give the instruction. As such, Appellant's second potential assignment of error has no merit.

c. CONCLUSION

{¶29} After fully reviewing the record herein, we find Appellant was not rendered ineffective assistance of counsel. We further find no abuse of discretion by the trial court's refusal to give the verbally requested jury

instruction. As such, we also conclude that the potential assignments of error advanced by appellate counsel are wholly without merit. The motion of counsel for Appellant requesting to withdraw as counsel is granted. The judgment of the trial court is affirmed as the appeal is wholly frivolous.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Harsha, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.