[Cite as *State v. Palmer*, 2010-Ohio-4628.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MICHAEL PALMER Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Sheila G. Farmer, J. Case No. 2009-CA-122 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Common Pleas Court, Case No. 2009-CR-364
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 27, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. PROSECUTING ATTORNEY RICHLAND COUNTY, OHIO BY: KIRSTEN L. PSCHOLKA-GARTNER Assistant Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902	DAVID HOMER 13 Park Ave. West, Suite 609 Mansfield, Ohio 44902

Hoffman, J.

{¶1} Defendant-appellant Michael Palmer appeals his conviction on one count of robbery in the Richland County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 5, 2009, Appellant entered Sutton Bank in Mansfield, Ohio, and handed the teller a note which read "You are being robbed: No Alarm: Give me the $100.00 bills- then $50's Quickly: No one gets hurt." The teller testified Appellant told him he had a weapon, and not to "do anything stupid." He further testified Appellant reached towards his back pocket, as if he was reaching for a gun, after indicating he had a weapon.

{¶3} Officer Larry Schacherer and Lieutenant Mike Higgins observed Appellant walking to his car carrying cash and a bundle, which included his coat, hat and sunglasses removed after exiting the bank. Officer Schacherer approached Appellant, at which point Appellant stated, "You got me, I did it, I did it." Appellant later admitted the cash had been taken from the bank, and to robbing the bank and handing the note to the teller.

{¶4} Appellant was indicted by the Richland County Grand Jury on one count of aggravated robbery, in violation of R.C. 2911.01(A)(1) and one count of robbery, in violation of R.C. 2911.02(A)(3). On September 9, 2009, a jury found Appellant guilty of aggravated robbery, in violation of R.C. 2911.01(A)(1). The jury also found Appellant guilty of robbery, in violation of R.C. 2911.02(A)(3). The trial court sentenced Appellant to a period of four years incarceration.

{¶5} Appellant now appeals, assigning as error:

{¶6} "I. THE VERDICT IS CONTRARY TO LAW.

{¶7} "II. APPELLANT WAS DEPRIVED DUE PROCESS OF LAW WHEN THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON THEFT AS A LESSER INCLUDED OFFENSE OF ROBBERY.

{¶8} "THE APPELLANT WAS DEPRIVED THE EFFECTIVE ASSISTANCE OF COUNSEL."

I.

{¶9} In the first assignment of error, Appellant argues his conviction is contrary to law as the State did not prove the requirements necessary for third-degree robbery under R.C. 2911.02(A)(3). Appellant asserts the evidence does not demonstrate Appellant used or threatened the use of force.

{¶10} The statute reads, in pertinent part:

{¶11} "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶12} "(1) Have a deadly weapon on or about the offender's person or under the offender's control;

{¶13} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;

{¶14} "(3) Use or threaten the immediate use of force against another.

{¶15} "(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.***"

{¶16} In *State v. Davis* (1983), 6 Ohio St.3d 91, the Ohio Supreme Court held,

{¶17} "In contrast, current R.C. 2911.02(A) defines the crime of robbery as the use or threat of immediate use of force against another. This requirement is satisfied if the fear of the alleged victim was of such a nature as in reason and common experience is likely to induce a person to part with property against his will and temporarily suspend his power to exercise his will by virtue of the influence of the terror impressed."

{¶18} In the case sub judice, the teller testified at trial,

{¶19} "A. What happened was when he walked in, he walked straight to me, and I asked him how you are doing today, he told me I'm doing fine, you are being robbed. Then I looked at him, I was like, are you serious. That's when he slid the note to me. I didn't read the whole note, I just read the first part of the note, because the first sentence was in bold letters, 'You are being robbed.' I'm not going to lie to you, I didn't really pay attention to anything else than that, because then that's when I took it serious. He also told me that, 'I have a weapon.'

{¶20} "So then I started to put all my money onto the counter, and I tried to put it a distance away so he can grab for it. Then as I was putting the money on the counter, I put fives and ones on there, and then he told me no ones or fives. And then at that moment I froze, because, like I said, I didn't read the rest of the note, so I don't know if that was on there or not.

{¶21} "Then when he proceeded to reach for the money I kind of shook out of it, and just continued to put the money on there, and he turned around and walked out.

{¶22} "Q. Did he ever make the comment to you, 'Don't do anything funny,' or 'don't do anything stupid'?

{¶23} "A. Yes.

{¶24} "Q. Will you tell us which one of those he said?

{¶25} "A. He said, 'Don't do anything stupid.'

{¶26} "Q. And when did he say that in the sequence of events?

{¶27} "A. He said that as I was putting the money on the counter.

{¶28} "Q. I'm going to show you what's been marked for identification purposes as State's Exhibit 3. Are you familiar with that exhibit?

{¶29} "A. Yes.

{¶30} "Q. Is that State's Exhibit 3 that I just handed you?

{¶31} "A. Yes.

{¶32} "Q. Will you explain to the jury, first of all, is that the note that was handed to you?

{¶33} "A. Yes, that is the note that was handed to me.

{¶34} "Q. How do you know that if you didn't read the whole thing?

{¶35} "A. Because the first sentence just says, 'You are being robbed.'

{¶36} "Q. Did you read anything else?

{¶37} "A. No.

{¶38} "Q. Just up to that point?

{¶39} "A. Yes.

{¶40} "Q. Now, you've also testified when this was given to you, 'You are being robbed,' and I believe you said earlier that he told you, 'I am robbing you, ' before he gave you the note?

{¶41} "A. Uh huh.

{¶42} "Q. When you see or hear the word rob at that point in time what were you thinking?

{¶43} "A. When I saw the note that's when I took him serious. I mean, I was pretty much scared for my life at that point.

{¶44} "Q. What made you scared for your life at that point?

{¶45} "A. The gentleman was serious. He also told me that he had a weapon.

{¶46} "Q. Now, when he told you that he had a weapon, in your mind, what kind of weapon did you think he had?

{¶47} "A. First thing that came to my mind was a gun.

{¶48} "Q. Even though you never saw the weapon?

{¶49} "A. Yes.

{¶50} "Q. Did you believe him when he told you he had a weapon?

{¶51} "A. Yes."

{¶52} Tr. p. 341-344.

{¶53} Upon review of the evidence presented at trial, Appellant's conviction is not contrary to law. The record demonstrates Appellant presented a note indicating "no one will get hurt" which implies the threat of force. Further, the teller involved testified Appellant stated he had a gun, and gestured accordingly. The teller feared Appellant would use force if he did not comply with the robbery demands. Accordingly, the evidence is sufficient to demonstrate Appellant threatened the immediate use of force in committing robbery. The first assignment of error is overruled.

II.

{¶54} In the second assignment of error, Appellant maintains the trial court erred in refusing to instruct the jury as to the lesser included offense of theft.

{¶55} R.C. Section 2913.02 sets forth the elements of theft:

{¶56} "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶57} "(1) Without the consent of the owner or person authorized to give consent;

{¶58} "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

{¶59} "(3) By deception;

{¶60} "(4) By threat;

{¶61} "(5) By intimidation.

{¶62} "(B)(1) Whoever violates this section is guilty of theft."

{¶63} In *State v. Thomas* (1988) 40 Ohio St.3d 213, the Supreme Court explained,

{¶64} "However, even though the aforestated prongs of the lesser included test are met, we have stated that a charge on the lesser offense is warranted only if the evidence adduced at trial would support it. *Kidder, supra,* 32 Ohio St.3d at 281, 513 N.E.2d at 314; *State v. Davis* (1983), 6 Ohio St.3d 91, 6 OBR 131, 451 N.E.2d 772; *State v. Wilkins* (1980), 64 Ohio St.2d 382, 18 O.O.3d 528, 415 N.E.2d 303. As to this consideration, we stated in *Kidder, supra,* that: 'Even though so defined, a charge on

the lesser included offense is not required, unless the trier of fact could reasonably reject an affirmative defense and could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense.' *Id.* 32 Ohio St.3d at 282-283, 513 N.E.2d at 315-316.

{¶65} "The meaning of this language is that even though an offense may be statutorily defined as a lesser included offense of another, a charge on the lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense."

{¶66} Here, for the reasons set forth in our analysis and disposition of Appellant's first assignment of error, we find the evidence does not support an acquittal on the crime charged, as the State has proven all the elements of robbery by force. Accordingly, the trial court was not required to give the instruction on the lesser included offense of theft by threat.

{¶67} The second assignment of error is overruled.

III.

{¶68} In the third assignment of error, Appellant asserts he was denied the effective assistance of counsel where counsel conceded Appellant was guilty of third degree robbery.

{¶69} The standard of review of an ineffective assistance of counsel claim is well-established. Pursuant to *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104

S.Ct. 2052, 2064, 80 L.Ed.2d 674, 673, in order to prevail on such a claim, the appellant must demonstrate both (1) deficient performance, and (2) resulting prejudice, i.e., errors on the part of counsel of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the trial court would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373; *State v. Combs,* supra.

{¶70} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley,* 42 Ohio St.3d at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶71} In order to warrant a reversal, Appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley,* supra at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

{¶72} As set forth in the statement of the facts and case above, Appellant entered the bank and handed the teller a note indicating the potential for harm. Additionally, the teller testified Appellant told him he had a gun, and not to “do anything stupid.” Appellant admitted to taking the money from the bank, and to handing the note to the teller. Based upon these facts and our analysis and disposition of the first two

assignments of error, Appellant has not demonstrated prejudice as the result of counsel's alleged error. The assignment of error is overruled.

{¶73} Appellant's conviction in the Richland County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Farmer, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MICHAEL PALMER	:	
	:	
Defendant-Appellant	:	Case No. 2009-CA-122

For the reasons stated in our accompanying Opinion, Appellant's conviction in the Richland County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER