[Cite as *State v. Smith*, 2019-Ohio-1908.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	JUDGES:
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff - Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, J.
-vs-	:	
	:	
JAMEL SMITH,	:	Case No. 2018CA00081
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2017 CR 01222
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	May 13, 2019

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Prosecuting Attorney	GEORGE URBAN 116 Cleveland Avenue NW, Suite 808 Canton, Ohio 44702
By: KRISTINE W. BEARD Assistant Prosecuting Attorney Appellate Section 110 Central Plaza South – Suite 510 Canton, Ohio 44702-1413	

Baldwin, J.

{¶1} Defendant-appellant Jamel Smith appeals his conviction from the Stark County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On February 10, 2017, the Stark Count Grand Jury indicted appellant on one count of possession of cocaine in violation of R.C. 2925.11(C)(4)(d), a felony of the second degree. Due to a conflict of interest with the judges of the Stark County Court of Common Pleas, the Ohio Supreme Court appointed retired judge, the Honorable Richard Reinbold, Jr., to preside over the case.

{¶3} On July 13, 2017, appellant's original counsel, Jonathan Morris, filed a Motion for Competency Evaluation. Appellant's counsel, in such motion, indicated that in addition to the charge in this case, appellant was facing criminal charges in a federal case and that "[b]ased upon the prosecution's motion in that matter the federal court continued the trial in order for a competency evaluation to be conducted" upon appellant. On September 6, 2017, Morris filed a motion asking to withdraw as counsel for appellant due to "irreconcilable differences" and also asking that the Motion for Competency Evaluation be withdrawn. The motion to withdraw as counsel was granted pursuant to a Judgment Entry filed on November 2, 2017 and Wayne Graham was appointed to represent appellant.

{¶4} At his arraignment on December 18, 2017, appellant entered a plea of not guilty to the charge. At a pretrial held on February 5, 2018, Attorney Graham moved to withdraw as appellant's counsel. The trial court granted such motion and appointed Attorney Eddie Sipplin to represent appellant. At a pretrial on March 26, 2018, Attorney Sipplin moved to withdraw as appellant's counsel at appellant's request. Appellant

indicated to Attorney Sipplin that appellant's family was going to hire an attorney for him, but had not yet done so. The trial court granted the motion to withdraw and instructed appellant that the court was going to ask appellant a list of questions to see if he was competent to represent himself, and if so, the court would appoint Attorney Richard Drake as stand-by counsel. While appellant initially cooperated with the questioning, he later became angry with the court, uttered profanities and then overturned the defense table. The trial court had appellant removed from the courtroom. The trial court concluded that appellant was competent to represent himself and appointed Attorney Drake as stand-by counsel as memorialized in a Judgment Entry filed on March 27, 2018.

{¶5} On March 28, 2018, Attorney Drake filed a Notice of Standby Counsel. In his notice, he voiced concerns he had regarding appellant's competency to stand trial and also stated that he was "precluded by the defendant himself from filing a motion for competency evaluation, The Court can, of course, sua sponte order said evaluation." On April 20, 2018, the trial court appointed Attorney Drake to represent appellant.

{¶6} A jury trial commenced on May 22, 2018. The trial court's intention was to allow appellant to remain in the courtroom during his trial, but to be confined to an isolation booth located inside the courtroom encased in Plexiglas. Appellant refused to cooperate and the trial court ruled that appellant would be present using a series of laptops in the basement. The deputies transported appellant downstairs and court staff set up Skype technology so that appellant could see and hear the proceedings.

{¶7} At trial, City of Canton Police Officer Ryan Davis testified that he responded to a call for assistance on January 10, 2017 to the railroad tracks on Tuscarawas Street. The police had received a call that a vehicle was struck on the railroad tracks. When he arrived along with Officer Romanin, they observed a vehicle sitting on the tracks and a

gentleman sitting in the driver's seat. As Officer Davis approached the vehicle, he heard a clank and saw a beer bottle on the tracks leaking beer. The two then spoke with appellant to try to assess the damage to the vehicle. After appellant exited the vehicle, Officer Davis walked around to the driver's side and saw appellant "drop something, toss something with his left hand." Trial Transcript at 141. When the Officer walked around to the area, he found a Newport cigarette pack that was warm, dry and clean. At the time there was snow on the ground. Officer David testified that there was a plastic bag inside the cigarette pack that appeared to be full of crack cocaine. When asked, Officer Davis testified that there was nothing else around that appellant could have dropped. Although the Officer was wearing a body camera at the time of the incident, the camera did not show appellant dropping the cigarette pack.

{¶8} Officer Davis then placed the cigarette package on the hood of the vehicle and arrested appellant. He forwarded the cigarette pack and its contents to the Stark County Crime Lab for analysis. Jay Spencer, a drug chemist with the Canton-Stark County Crime Lab, testified that he received the cigarette pack in the case sub judice, and inside the same was a plastic bag which contained six additional plastic bags each containing a white material. Spencer testified that he tested the substance inside the bags and determined that the substance was crack cocaine, a Schedule II substance. He further testified that the total weight was 20.18 grams. No fingerprint analysis or DNA testing was performed on the cigarette pack or any of the bags inside.

{¶9} During Officer Davis's direct testimony, Officer Davis attempted to identity appellant through the use of Skype technology. However, appellant allegedly refused to show his face and pulled his shirt up over his head. The trial court, Officer Davis and

counsel for both parties then went downstairs so that the Officer could identity appellant. After appellant's shirt was pulled down off of his face, the Officer identified appellant.

{¶10} The jury, on May 22, 2018, found appellant guilty of possession of cocaine and further found that the amount of cocaine was equal to or exceeding twenty (20) grams of weight, but less than twenty-seven (27) grams of weight. The trial court sentenced appellant to serve five years (5) in prison.

{¶11} Appellant now raises the following assignments of error on appeal:

{¶12} "I. APPELLANT'S CONVICTION WAS AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE."

{¶13} "II. THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT THE UNITED STATES CONSTITUTION BY NOT ORDERING APPELLANT TO SUBMIT TO AN EVALUATION TO DETERMINE HIS COMPETENCY TO STAND TRIAL."

{¶14} "III. APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO FILE A MOTION REQUESTING AN EVALUATION TO DETERMINE APPELLANT'S COMPETENCY TO STAND TRIAL."

{¶15} "IV. THE TRIAL COURT ERRED BY NOT ALLOWING APPELLANT TO REPRESENT HIMSELF."

{¶16} "V. THE TRIAL COURT ERRED BY NOT ALLOWING APPELLANT TO BE PRESENT IN THE COURTROOM DURING HIS JURY TRIAL."

I

{¶17} Appellant, in his first assignment of error, argues that his conviction was against the sufficiency and manifest weight of the evidence. We disagree.

{¶18} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

{¶19} Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶20} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260, 674 N.E.2d 1159.

{¶21} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins, supra*, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held as follows: "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such

evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶22} Appellant, in the case sub judice, was convicted of possession of cocaine in violation of R.C. 2925.11(C)(4)(d). Such section states, in relevant part, as follows:

{¶23} (A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog….

{¶24} (C) Whoever violates division (A) of this section is guilty of one of the following:

{¶25} (4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

{¶26} (d) If the amount of the drug involved equals or exceeds twenty grams but is less than twenty-seven grams of cocaine, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term a second degree felony mandatory prison term.

{¶27} Appellant specifically argues that there was insufficient evidence that he discarded the cigarette pack containing the cocaine. Appellant notes that no fingerprint and/or DNA testing was never conducted on the cigarette pack or the plastic bags found inside the same and that there was no investigation regarding who made the call to the police for assistance. Appellant argues that there was insufficient evidence that he

knowingly possessed the cocaine. Appellant argues that the state did not prove "possession."

{¶28} R.C. 2925.01(K) defines "possess" or "possession" as "having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."

{¶29} Possession may be actual or constructive. "Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus. The evidence must prove that the defendant was able to exercise dominion and control over the contraband. *State v. Wolery*, 46 Ohio St.2d 316, 332, 348 N.E.2d 351 (1976). Dominion and control may be proven by circumstantial evidence alone. *State v. Holman,* 5th Dist. Stark No. 2017CA00114, 2018–Ohio–1373, ¶ 25, citing *State v. Trembly*, 137 Ohio App.3d 134, 738 N.E.2d 93 (8th Dist. 2000). Circumstantial evidence that the defendant was located in very close proximity to the contraband may show constructive possession. *State v. Barr,* 86 Ohio App.3d 227, 235, 620 N.E.2d 242, 247–248 (8th Dist. 1993); *State v. Morales,* 5th Dist. Licking No. 2004 CA 68, 2005–Ohio–4714, ¶ 50; *State v. Moses,* 5th Dist. Stark No. 2003CA00384, 2004–Ohio–4943,¶ 9. Ownership of the contraband need not be established in order to find constructive possession. *State v. Smith,* 9th Dist. Summit No. 20885, 2002–Ohio–3034, ¶ 13, *citing State v. Mann,* 93 Ohio App.3d 301, 308, 638 N.E.2d 585 (8th Dist.1993).

{¶30} Appellant further contends that Jay Spencer concluded that the substance tested weighed 20.18 grams, but also admitted that there was some "leeway" regarding

the weight and that Spencer admitted that he did not test every piece of material in every bag. Appellant, on such basis, maintains that the weight of the cocaine did not meet the threshold for the conviction of greater than 20 grams.

{¶31} However, we find that viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime of possession of cocaine proven beyond a reasonable doubt. Officer Davis testified that he arrived shortly after the call was received and that when he arrived, appellant was present in the driver's side of the vehicle. No one else was present. He testified that he observed appellant "drop something, toss something with his left hand." Trial Transcript at 141. The cigarette pack was located in close proximity to appellant. Officer Davis further testified that it was a snowy day, but that the cigarette pack was warm and dry and there was no other debris in the area. Moreover, Jay Spencer testified unequivocally that the weight of the white material inside the package was 20.18 grams. The following is an excerpt from his testimony at trial:

{¶32} Q: Okay. So just what we've determined to be cocaine base is what makes up your weight?

{¶33} A: That's correct.

{¶34} Q: Okay. What weight did you come up with?

{¶35} A: Total weight of the white material inside this package was 20.18 grams.

{¶36} Q: Okay. Now, I recall from looking at your report there is a range in there; is that correct?

{¶37} A: That's correct.

{¶38} Q: Okay. Why do you have a range?

{¶39} A: Well, in our protocols we, we have to establish, ah, quality control guidelines for weighing. So in, in the natural weighing of things, there is some variation in, in the scale, in, in the weight, water evaporates off of items, things like that. So that we establish a, a variability in that scale that within a range, 95% chance within that, that things fall within a range of that weight.

{¶40} Q: Okay. And that's quality control, though?

{¶41} A: That's right.

{¶42} Q: Okay. So when you weigh it, you're saying, "It's 20.18 grams;" is that right?

{¶43} A: That's correct.

{¶44} Q: But you have a range of .12?

{¶45} A: That - - that's right. Yes.

{¶46} Q: Okay. So what you're saying is the range could be 20.3 grams to 20.06 grams?

{¶47} A: That's correct.

{¶48} Q: If my math is correct?

{¶49} A: That's correct.

{¶50} Q: But that's really for quality control. What, what you're here to say today is that is 20.18 grams?

{¶51} A: That's right. When I, when I weighed it, the weight was 20.18 grams.

{¶52} Q: Okay. And the conclusions that you, you've made with the weight and, that it's a co - - that it's cocaine, are they to a reasonable degree of scientific certainty?

{¶53} A: Yes, they are.

{¶54} Q: And you testified, I believe already, that it's a Schedule II?

{¶55} A: That's correct.

{¶56} Trial Transcript at 191-193. Spencer further testified that he tested each plastic bag individually for cocaine and performed six separate tests.

{¶57} Based on the foregoing, we find that appellant's conviction for possession of cocaine is not against the sufficiency of the evidence and that the jury did not lose its way in convicting appellant.

{¶58} Appellant's first assignment of error is, therefore, overruled.

II

{¶59} Appellant, in his second assignment of error, asserts that his right to due process was violated by the trial court's sua sponte failure to order appellant to submit to an evaluation to determine his competency to stand trial. Appellant notes, in support of his argument, that the trial court appointed four separate attorneys to represent appellant and that each of the first three withdrew due to an inability to communicate with appellant. Appellant also points to appellant's disruptive behavior which included the use of profanity and overturning the defense table and the fact that Attorney Drake expressed both on the record and in writing that he had concerns with appellant's competency to stand trial.

{¶60} R.C. 2945.37 governs competence to stand trial. Subsection (B) states the following:

> 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.

{¶61} "A defendant is presumed to be competent to stand trial" unless the trial court finds after a hearing by a preponderance of the evidence that, "because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense." R.C. 2945.37(G).

{¶62} In *State v. Berry*, 72 Ohio St.3d 354, 359, 1995-Ohio-310, 650 N.E.2d 433, the Supreme Court of Ohio stated, in relevant part, the following:

> In *Dusky v. United States* (1960), 362 U.S. 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824, 825, the United States Supreme Court set forth the test to determine whether a defendant is competent to stand trial, stating that " * * * the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' " See, also, *Drope* [*v. Missouri* (1975), 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103], *supra*, 420 U.S. at 172, 95 S.Ct. at 904, 43 L.Ed.2d at 113. The right to a hearing on the issue of competency rises to the level of a constitutional guarantee where the record contains "sufficient indicia of incompetence," such that an inquiry into the defendant's competency is necessary to ensure the defendant's right to a fair trial. See *Drope*, *supra*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103; *Pate*, *supra*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815; and *State v. Bock* (1986), 28 Ohio St.3d 108, 110, 28 OBR 207, 209, 502 N.E.2d 1016, 1018-1019.

{¶63} We note that Attorney Drake did not file a motion requesting a competency exam, but in his March 28, 2018 Notice of Standby Counsel, voiced concerns over appellant's competency, but indicated that he was precluded by appellant from filing motion for a competency exam. Prior to the commencement of testimony at trial, Attorney Drake stated on the record as follows:

{¶64} Ah, the elephant in the room here is one that the Federal court also has just given up on: Is, is this man competent?

{¶65} He clearly is - - I think the answer would lean towards he is, because he knows his rights. He knows - - because competency is a very low level: Does he know what his attorney is supposed to do; does he know who you are; does he know her role, the jury's role.

{¶66} I believe so; but at the same time he vacillates between reality and ridiculousness. For instance, that the federal authorities are gonna stop this trial.

{¶67} I doubt that's going to happen.

{¶68} Ah, he, he clearly knows that and he has outlined all the ways that I am violating his rights, because I have - - goes - - the Judge must have found me competent, per se by going ahead with the trial, which is true. We wouldn't be doing this; and I'm competent and I am not going to give you the right to represent me. If they don't want me to be there to represent myself, then go ahead with the trial.

{¶69} Ah, in a way he's got a point there.

{¶70} But I've never been in this position.

{¶71} Trial Transcript at 26-27.

{¶72} We further note that in appellant's federal case, appellant was ordered to undergo a mental health examination. On October 5, 2017, the federal court received

notice that the examination was complete and that appellant was found competent to proceed in the federal case. In the federal case, appellant behaved in the same manner before the court as he did before the trial court judge in this case. Appellant went through a number of appointed counsel, insisted on representing himself, flipped over a defense table and was disruptive. In the federal case, appellant also spit on U.S. Marshall, assaulted his attorney and made threats.

{¶73} Based on the foregoing, we find that the trial court did not err in failing to sua order appellant to submit to an evaluation to determine his competency to stand trial.

{¶74} Appellant's second assignment of error is, therefore, overruled.

III

{¶75} Appellant, in his third assignment of error, maintains that he received ineffective assistance of counsel due to counsel's failure to file a motion requesting an evaluation to determine appellant's competency to stand trial.

{¶76} Our standard of review for ineffective assistance claims is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ohio adopted this standard in the case of *State v. Bradley* , 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; *i.e.*, whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his or her essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have

been different. *Id.* However, trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie,* 81 Ohio St.3d 673, 675, 1998-Ohio-343, 693 N.E.2d 267.

{¶77} In general, a trial counsel's failure to seek a competency evaluation or to pursue an insanity defense is not, per se, ineffective assistance of counsel. See *State v. Decke,r* 28 Ohio St.3d 137, 502 N.E.2d 647 (1986) and *State v. Wong* , 95 Ohio App.3d 39, 641 N.E.2d 1137 (4th Dist. 1994).

{¶78} The record in this case does not demonstrate that appellant was suffering from a mental condition that would have caused him to be incapable of understanding the nature and objective of the proceedings against him or that he was not capable of assisting in his defense. Appellant's own counsel indicated to the trial court that appellant was "smarter than most of the people" that come before the Court, had read many law books and understood the proceedings and the function or counsel, the court and the jury. Trial Transcript at 22. For these reasons and based on our disposition of appellant's first assignment of error, we do not find that counsel was ineffective for failing to request a competency evaluation.

{¶79} Appellant's third assignment of error is, therefore, overruled.

IV

{¶80} In his fourth assignment of error, appellant contends that the trial court erred in not allowing him to represent himself. Appellant notes that the trial court appointed Attorney Drake as stand-by counsel even though appellant had continually told the court that he wished to represent himself.

{¶81} In *State v. Gibson*, 45 Ohio St.2d 366, 354 N.E.2d 399 (1976), the Ohio Supreme Court held the Sixth Amendment, as made applicable to the States by the

Fourteenth Amendment, guarantees a defendant in a state criminal trial an independent constitutional right of self representation permitting that defendant to proceed to defend himself without counsel when a defendant voluntarily, and knowingly, and intelligently elects to do so. *Id.* at syllabus, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, "*Faretta* itself and later cases have made clear that the right of self-representation is not absolute. See *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.,* 528 U.S. 152, 163, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (no right of self-representation on direct appeal in a criminal case); *McKaskle v. Wiggins,* 465 U.S. 168, 178-179, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (appointment of standby counsel over self-represented defendant's objection is permissible); *Faretta,* 422 U.S., at 835, n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (no right 'to abuse the dignity of the courtroom')." *Indiana v. Edwards* (2008), 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345.

{¶82} While a defendant does have the constitutional right to represent himself, "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (Citation omitted.) *Faretta v. California* (1975), 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562, fn. 46. "The right of self-representation," said the court, "is not a license to abuse the dignity of the courtroom." Id.

{¶83} The trial court, in this matter, found that appellant had shown by his conduct over a period of time that he did not deserve to represent himself. In the case sub judice, as noted by appellee, appellant's continued disruptive behavior both in his federal case and this case posed a threat to the integrity and efficacy of the court. Appellant, in his federal case, assaulted his defense counsel, spit on U.S. Marshalls, insulted the Judge and flipped over a table. In this case, appellant engaged in erratic bravior and refused to

respond, and flipped over a defense table. In both cases, appellant went through a number of defense counsel.

{¶84} Appellant's fourth assignment of error is, therefore, overruled.

V

{¶85} Appellant, in his fifth assignment of error, argues that the trial court erred by not allowing him to be present in the courtroom during his jury trial.

{¶86} One of most basic rights reserved by the Confrontation Clause is a defendant's correlative right to be present in the courtroom in every stage of the trial. *Illinois v. Allen,* 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Section 10, Article I of the Ohio Constitution and Crim. R. 43(A) also require the defendant's presence. This right, however, is not absolute; appellant's presence is mandated unless he waived his right or there existed extraordinary circumstances requiring sequestration, such as misconduct. *State v. Williams,* 6 Ohio St .3d 281, 286, 452 N.E.2d 1323 (1983).

{¶87} Crim.R. 43(B) permits a court to exclude a defendant from any stage of a hearing or trial for disruptive conduct and provides:

> Where a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with his continued presence, the hearing or trial may proceed in his absence, and judgment and sentence may be pronounced as if he were present. Where the court determines that it may be essential to the preservation of the constitutional rights of the defendant, it may take such steps as are required for the communication of the courtroom proceedings to the defendant.

{¶88} The trial court, in this matter, indicated that while the court intended to have appellant start the trial in the isolation booth which was made of Plexiglas, there was a

"volume of prior violence that [appellant] has shown throughout his incarceration in the Federal and state system. Trial Transcript at 18. Appellant, in his federal case, had assaulted his defense attorney, assaulted two U.S. Marshalls by spitting on them, and made threats. The trial court noted that appellant, during a pretrial in this case, had flipped the defense table and refused to listen or respond, making it necessary for appellant to be removed from the courtroom. The trial court further stated, in relevant part, as follows: "Subsequent to that we, the prosecutor and defense and I, sat and tried to decide how we would best handle this particular case; and I think that there was a consensus that one of the problems we were going to face was that if [appellant] were sitting in the courtroom, that, as the Judge, I could not guarantee that he would not act out, either against his defense attorney, the prosecutor, flip tables. But my major concern was his close proximity to the jurors and having no visible means of protection." Trial transcript at 16. The trial court found that appellant, through his outrageous, egregious and unpredictable conduct, threatened the safety of other participants in the trial and had forsaken his right to be present in the courtroom. We concur with the trial court and find no err in the trial court's decision.

{¶89} Appellant's fifth assignment of error is, therefore, overruled.

{¶90} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Baldwin, J.

Delaney, P.J. and

Wise, Earle, J. concur.