[Cite as *State v. Robinson*, 2004-Ohio-963.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

GLENN DARNELL ROBINSON

Appellant
C.A. No. 21583

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 03 01 0003

DECISION AND JOURNAL ENTRY

Dated: March 3, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BATCHELDER, Judge.

{¶1} Appellant, Glen Darnell Robinson, appeals from his conviction in the Summit County Court of Common Pleas for aggravated robbery, and from the

denial of his motion to withdraw his guilty plea on the charge of felonious assault. We affirm in part, reverse in part, and remand.

I.

{¶2} On January 9, 2003, Mr. Robinson was indicted for the following: (1) one count of aggravated murder, in violation of R.C. 2903.01(A), a special felony; (2) one count of aggravated murder, in violation of R.C. 2903.01(B), a special felony; (3) one count of murder, in violation of R.C. 2903.02(B), a special felony; (4) one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), a first degree felony; (5) one count of having weapons while under a disability, in violation of R.C. 2923.13(A)(2)/(A)(3)/(B), a third degree felony; (6) one count of carrying weapons while under a disability, in violation of R.C. 2923.12, a fourth degree felony; (7) one count of carrying concealed weapons, in violation of R.C. 2923.12, a first degree misdemeanor; and (8) one count of felonious assault, in violation of R.C. 2903.11(A)(1)/(A)(2), a second degree felony. Each of the aggravated murder, murder, aggravated robbery and having weapons while under a disability counts also carried with them a firearm specification, in violation of R.C. 2941.145.

{¶3} Mr. Robinson pled not guilty to all the charges in the indictment. The trial court issued a journal entry which severed the felonious assault charge from the remainder of the charges, and a jury trial was held on the remaining

charges.[1] At the conclusion of the State's case-in-chief, Mr. Robinson's counsel made a motion under Crim.R. 29 for dismissal of the case, which the court denied. Mr. Robinson's counsel renewed this motion at the conclusion of the defense's case, and the trial court once again overruled the motion.

{¶4} On April 14, 2003, a jury returned a verdict which found Mr. Robinson guilty of the two counts of aggravated murder, one count of murder, one count of aggravated robbery, and one count of having weapons while under a disability, one count of carrying concealed weapons, and a firearm specification; and found him not-guilty of the other count of carrying concealed weapons. At the sentencing hearing for these convictions, Mr. Robinson retracted his formerly entered not guilty plea on the felonious assault charge and instead pled guilty to the charge. The trial court then sentenced Mr. Robinson accordingly for the other convictions.

{¶5} At the sentencing hearing on the felonious assault charge, but before the trial court actually sentenced him, Mr. Robinson presented an oral motion to withdraw his guilty plea. The court denied this motion, and then sentenced Mr. Robinson accordingly on the felonious assault charge. This appeal followed.

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[1] Mr. Robinson had filed a motion for relief from prejudicial joinder of the felonious assault charge from the remainder of the charges. In support of this motion, Mr. Robinson asserted that the felonious assault charge arose out of an incident occurring on June 22, 2002, while the remaining charges stemmed from separate, unrelated events occurring on December 30, 2002. The trial court granted this motion.

{¶6} Mr. Robinson timely appealed, asserting two assignments of error for review.

II.

A.

First Assignment of Error

> "THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION OF AGGRAVATED ROBBERY (R.C. 2911.01(A)(1)). APPELLANT [sic.] CONVICTION OF AGGRAVATED ROBBERY WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶7} In his first assignment of error, Mr. Robinson avers that his conviction for aggravated robbery was not supported by sufficient evidence in the record, and was also against the manifest weight of the evidence. We disagree.

{¶8} As a preliminary matter, the Court observes that sufficiency of the evidence and weight of the evidence are legally distinctive issues. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52.

{¶9} Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal *** if the evidence is insufficient to sustain a conviction of such offense or offenses." A trial court may not grant an acquittal by authority of Crim.R. 29(A) if the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt. *State v. Wolfe* (1988), 51 Ohio App.3d 215, 216. In making this determination, all evidence must be construed in a light most

favorable to the prosecution. Id. "In essence, sufficiency is a test of adequacy." *Thompkins,* 78 Ohio St.3d at 386.

{¶10} "While the test for sufficiency requires a determination of whether the [S]tate has met its burden of production at trial, a manifest weight challenge questions whether the [S]tate has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, citing *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). When a defendant asserts that his conviction is against the manifest weight of the evidence,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving 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. Otten* (1986), 33 Ohio App.3d 339, 340.

This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

{¶11} Sufficiency of the evidence is required to take a case to the jury; therefore, a finding that a conviction is supported by the weight of the evidence necessarily includes a finding of sufficiency. *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462. "Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." Id.

{¶12} If the State relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *State v.*

Daniels (June 3, 1998), 9th Dist. No. 18761, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph one of the syllabus. "Circumstantial evidence and direct evidence inherently possess the same probative value[.]" *State v. Smith* (Nov. 8, 2000), 9th Dist. No. 99CA007399, quoting *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Furthermore, "[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." *State v. Chisolm* (July 8, 1992), 9th Dist. No. 15442, quoting *Jenks*, 61 Ohio St.3d at 272. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott* (1990), 51 Ohio St.3d 160, 168, citing *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329, 331. Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott*, 51 Ohio St.3d at 168, citing *Hurt*, 164 Ohio St. at 331.

{¶13} Additionally, circumstantial evidence is necessary especially when, as in the instant case, a defendant's purpose or intent in doing certain actions is disputed. See *State v. Ray* (Dec. 22, 1993), 9th Dist. No. 16050. "Intent 'can never be proved by the direct testimony of a third person and it need not be. It must be gathered from the surrounding facts and circumstances." *Ray*, supra, quoting *Lott*, 51 Ohio St.3d at 168.

{¶14} In the instant case, Mr. Robinson raises a challenge to the State's proof beyond a reasonable doubt of the requisite mental state for an aggravated robbery conviction. Mr. Robinson asserts that the record does not support a finding that robbing the victim, Anthony Thomas ("Thomas"), was his motive in shooting the victim. Additionally, Mr. Robinson asserts that the record does not reflect that any sum of money was missing or taken from the victim after the shooting. R.C. 2911.01(A)(1), aggravated robbery, states, in pertinent part:

> "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> "(1) Have 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[.]"

Per R.C. 2911.01(A)(1), it is enough that a perpetrator attempted to, rather than committed, a theft offense. The version of R.C. 2913.02, theft, in effect at the time the events in question occurred, provides:

> "(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:
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> "(1) Without the consent of the owner or person authorized to give consent;
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> "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
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> "(3) By deception;
>
> "(4) By threat;
>
> "(5) By intimidation."

{¶15} R.C. 2923.11(A) defines a "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." R.C. 2923.11 further provides that a

> "'[f]irearm' means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. 'Firearm' includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable." R.C. 2923.11(B)(1).

{¶16} The offense of aggravated robbery requires proof that the perpetrator acted "knowingly" in committing the offense. *State v. Smith* (June 10, 1992), 9th Dist. No. 2062-M, citing R.C. 2911.01 and *State v. Bumphus* (1976), 53 Ohio App.2d 171, 174-75 (stating that because R.C. 2911.01 references the theft statute, R.C. 2913.01, et seq., it "contemplates a precise degree of culpability – to wit, knowingly"). R.C. 2901.22(B) provides that "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶17} In its case-in-chief, the State presented the testimony of individuals who had witnessed the set of circumstances giving rise to Mr. Robinson's conviction for aggravated robbery. Harlin Hatcher testified on behalf of the State that he and his cousin, Thomas, were in the Main Attraction bar on Copley Road the evening of December 30, 2002 playing Dominos. He testified that Mr.

Robinson[2] came into the bar that evening, and said "'[s]omebody buy me an MF drink[.]" Mr. Hatcher testified that based on the five-six months that he knew of Mr. Robinson, that Mr. Robinson would usually shout out things while at the bar, and that therefore he and the other Domino players "never pa[id] *** attention" to him. Mr. Hatcher proceeded to testify that roughly one half hour later, he heard a "pow" and that he turned around to see Mr. Robinson holding a gun and Thomas falling out of his chair. He then testified that he observed Mr. Robinson "standing up over [Thomas]" and "fumbling with [Thomas.]" Mr. Hatcher testified that he ran out of the bar and drove off with another person because he was scared, but that he later returned to the street where the Main Attraction is located to see Mr. Robinson entering another bar called the Bartell across the street from the Main Attraction.

{¶18} Steve Martin also testified on behalf of the State, that, while at the Main Attraction that evening, Mr. Robinson asked him to buy him a drink. Mr. Martin testified that after the shooting, he observed Mr. Robinson "going through [Thomas'] pockets."

{¶19} Tamika Collins also testified on behalf of the State. Ms. Collins testified that she entered the Bartell around 6:00 p.m. on December 30, 2002 to begin her shift there, and that Mr. Robinson was already in the bar at that time. She testified that Mr. Robinson did not buy any drinks, and that he attempted to

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[2] Mr. Hatcher referred to Mr. Robinson as "Slater" during his testimony, as

buy a drink on credit from her. Ms. Collins also testified that she did not sell any drinks to Mr. Robinson before he left the bar around 8:00 p.m. Ms. Collins further testified that Mr. Robinson left the bar around 8:00 p.m., and that he later returned to the Bartell. Ms. Collins testified that "[h]e was rushing[,]" and that he asked somebody for a ride and told them that he would "pay him $20 if he got him out of there." Additionally, Ms. Collins testified that "as [Mr. Robinson] stood in front of the bar, he pulled the money out of his pocket; it was a bunch of money *** balled up." Ms. Collins testified that this time he paid for drinks for himself and at least two other individuals.

{¶20} Eena Jones also testified on behalf of the State. Ms. Jones testified that she was at the Bartell while Mr. Robinson left and reentered the Bartell, and that he returned approximately 30-45 minutes after he had left. She testified that when Mr. Robinson returned, he bought Ms. Jones and her niece drinks.

{¶21} Andrea Golden also testified on behalf of the State. On cross-examination, Ms. Golden testified that she was at the Bartell the evening the incident occurred, and that before Mr. Robinson left the Bartell for the Main Attraction, he had money with which to buy drinks. On re-direct examination, Ms. Golden explicated that Mr. Robinson had in fact purchased her a drink with cash that he had pulled out of his sock. Ms. Golden did testify on re-direct, however, that she did not see him pull any money out of his pockets at this point.

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that was the nickname by which Mr. Hatcher knew Mr. Robinson.

{¶22} Based upon this testimony, the jury could infer, at the least, that, Mr. Robinson, in trying to obtain drinks on credit and from others, in searching through Thomas' pockets, and later being seen with a "ball" of money, had knowingly attempted to exert control over any personal property that could be found in Thomas' pockets. See R.C. 2913.02(A) and 2911.01; *Smith*, supra. There is ample probative circumstantial evidence in the record from which the jury could infer, and ultimately conclude beyond a reasonable doubt, that Mr. Robinson had taken money from Thomas' pockets.

{¶23} After a careful review of the record, and upon viewing the evidence in the light most favorable to the prosecution, this Court cannot conclude that the jury lost its way and created a manifest miscarriage of justice when it found Mr. Robinson guilty of aggravated robbery. See *Otten*, 33 Ohio App.3d at 340. Accordingly, we find that Mr. Robinson's conviction for aggravated robbery was not against the manifest weight of the evidence.

{¶24} Having found that Mr. Robinson's aggravated robbery conviction was not against the manifest weight of the evidence, we also conclude that there was sufficient evidence to support the jury verdict in this case with respect to the aggravated robbery charge. See *Roberts*, supra.

{¶25} Mr. Robinson's first assignment of error is overruled.

B.

Second Assignment of Error

"THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION, MADE PRIOR TO SENTENCING, TO WITHDRAW HIS PLEA TO COUNT EIGHT, FELONIOUS ASSAULT."

{¶26} In his second assignment of error, Mr. Robinson avers that the trial court erred in denying his motion to withdraw his guilty plea on the felonious assault charge, which he made prior to sentencing. We agree.

{¶27} Crim.R. 32.1 provides that "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." The rule thus sets forth a standard by which post-sentence withdrawals of guilty pleas may be assessed, the "manifest injustice standard." Crim.R. 32.1; *State v. Xie* (1992), 62 Ohio St.3d 521, 526. Because Crim.R. 32.1 only sets forth a standard for evaluating post-sentence motions for withdrawals of guilty pleas and does not explicitly provide guidelines for ruling on a pre-sentencing motion, the Supreme Court of Ohio has articulated a standard to govern such pre-sentencing motions. See *Xie,* 62 Ohio St.3d at 526. This standard provides that pre-sentencing motions to withdraw guilty pleas are generally "to be freely allowed and treated with liberality[]" by the trial court, but the decision to grant or deny such a motion nevertheless lies within the sound discretion of the trial court. Id. at 526, quoting *Barker v. United States* (C.A.10, 1978), 579 F.2d 1219, 1223.

{¶28} Thus, an appellate court is not permitted to perform a de novo review of the trial court's decision with respect to a withdrawal of a guilty plea.

Xie, 62 Ohio St.3d at 527. Rather, the appellate standard of review for a motion to withdraw a guilty plea is limited to a determination of an abuse of discretion by the trial court. *State v. Honorable* (Sept. 23, 1987), 9th Dist. No. 13076, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, paragraph two of the syllabus. To constitute an abuse of discretion, a trial court's action must be arbitrary, unreasonable, or unconscionable. *State ex rel. V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 1998-Ohio-329. Unless it is established that the trial court acted unjustly or unfairly, an appellate court cannot find that an abuse of discretion occurred, and must affirm the trial court's decision. *Xie*, 62 Ohio St.3d at 526, citing *Barker*, 579 F.2d at 1223.

{¶29} It is important to note that "[o]ne who enters a guilty plea has no right to withdraw it." *Xie*, 62 Ohio St.3d at 526, citing *Barker*, 579 F.2d at 1223. As such, a defendant must communicate to the trial court a reasonable and legitimate basis for allowing such a withdrawal of a plea. *State v. Dewille* (Nov. 4, 1992), 9th Dist. No. 2101, citing *Xie*, 62 Ohio St.3d at 527. "A defendant's burden to supply a reasonable and legitimate basis for withdrawing a plea recognizes the state's interest in preserving guilty pleas." *Dewille*, supra. Furthermore, the determination of whether a "reasonable and legitimate basis" for the withdrawal of a plea exists also lies within the trial court's sound discretion. *State v. Rosemark* (1996), 116 Ohio App.3d 306, 308.

{¶30} This Court has held that a trial court does not abuse its discretion when considering a motion to withdraw a guilty plea if the following elements are

present: (1) the defendant is represented by competent counsel; (2) the trial court provides the defendant with a full hearing before entering the guilty plea; and (3) the trial court provides the defendant with a full hearing on the motion to withdraw his or her guilty plea, where the court considers the defendant's arguments in support of his motion to withdraw a guilty plea. *Rosemark*, 116 Ohio App.3d at 308. However, we have also previously noted that an evidentiary hearing with respect to such a motion is not always required. *Lorain v. Price* (Oct. 2, 1996), 9th Dist. No. 96CA006314 (the necessity of an evidentiary hearing depends on the facts and circumstances of the particular case). See, also, *State v. Cosavage* (June 28, 1995), 9th Dist. Nos. 17074 and 17075.

{¶31} The requirement that a trial court provide the defendant with a hearing before the defendant enters a guilty plea necessitates a determination as to whether such a plea is entered knowingly, voluntarily, and intelligently. See, e.g., *Rosemark*, 116 Ohio App.3d at 310-11. Crim.R. 11(C)(2) mandates that the trial court refuse to accept a guilty plea without first addressing the defendant personally, and also determining (a) whether the defendant's plea was voluntary; (b) whether the defendant understood the effects of the guilty plea at the time that he entered it; and (c) whether the defendant, at the time that he entered his guilty plea, understood that by entering the plea he was waiving his constitutional rights. "Crim.R. 11 'remedies the problems inherent in a subjective judgment by the trial court as to whether a defendant has intelligently and voluntarily waived his constitutional rights and ensures an adequate record on review by requiring the

trial court to personally inform the defendant of his rights and the consequences of his plea and determine if the plea is understandingly and voluntarily made.'" *State v. Rebman* (June 11, 1997), 9th Dist. No. 96CA006520, quoting *State v. Stone* (1975), 43 Ohio St.2d 163, 167-68.

{¶32} It is well settled, that, before accepting a guilty or no contest plea from a defendant, a trial court is required to tell the defendant that he is waiving the constitutional guarantees of the privilege against self-incrimination; the right to a jury trial; the right to confront his or her accusers; and the right of compulsory process of witnesses. *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus; see, also, *State v. Anderson* (1995), 108 Ohio App.3d 5, 8, citing *State v. Abuhilwa* (Mar. 29, 1995), 9th Dist. No. 16787. Since a defendant waives important constitutional rights by entering a no contest plea, the plea must be "'a voluntary and intelligent choice[.]'" *State v. Sherrard*, 9th Dist. No. 02CA008065, 2003-Ohio-365, at ¶6, quoting *State v. Sims* (May 24, 1995), 9th Dist. Nos. 16841 and 16936. Therefore, in order to make certain that a plea is made knowingly and intelligently, a trial court is required to engage in an oral dialogue with the defendant in accordance with Crim.R. 11(C)(2). *Sherrard* at ¶6, citing *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 1996-Ohio-179.

{¶33} With respect to the constitutional rights noted in Crim.R. 11, the Supreme Court of Ohio has articulated a standard of review to determine whether a trial court has satisfied its responsibility to inform the defendant of these rights. *Ballard*, 66 Ohio St.2d at 478. This test provides, that, if the record shows that the

trial court "engaged in a meaningful dialogue with the defendant which, in substance, explained the pertinent constitutional rights 'in a manner reasonably intelligible to that defendant[,]'" then the court's acceptance of a guilty plea is to be affirmed. *Anderson,* 108 Ohio App.3d at 9, quoting *Ballard*, 66 Ohio St.2d at paragraph two of the syllabus.

{¶34} Crim.R. 11(C) reads, in pertinent part, as follows:

"(C) **Pleas of guilty and no contest in felony cases.**

> "***
>
> "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> "***
>
> "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, *to have compulsory process for obtaining witnesses in the defendant's favor,* and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself." (Emphasis added.) Crim.R. 11(C)(2)(c).

{¶35} Although employing the exact language contained in Crim.R. 11(C) is recommended, not doing so does not provide grounds for vacating a plea, as long as the trial court's dialogue with the defendant meets the *Ballard* standard. *Anderson,* 108 Ohio App.3d at 9. However, a complete failure on a trial court's part to comply with the requirements of Crim.R. 11 is inherently prejudicial, and

does provide possible grounds for vacating a no contest plea. Id. at 9, citing *State v. Luhrs* (1990), 69 Ohio App.3d 731, 735. "[T]he failure to advise the defendant of his constitutionally mandated rights *** renders the plea constitutionally defective." *Ballard,* 66 Ohio St.2d at 482, fn. 8, citing *People v. Jaworski* (1972), 387 Mich. 21, 28-30, 194 N.W.2d 868; *State v. Thomas* (1990), 67 Ohio App.3d 127, 132.

{¶36} In the instant case, Mr. Robinson maintains that the trial court, prior to accepting his guilty plea on the felonious assault charge, did not inform him that he would be waiving his constitutional right to compulsory process, as required by Crim.R. 11(B)(2)(c).[3] We note, that, in its brief on appeal, the State acknowledges that the trial court did not inform Mr. Robinson of his right to compulsory process as required by Crim.R. 11(C)(2)(c), and concedes that such a failure necessitates reversal on this issue.

{¶37} The transcript from the sentencing hearing on the felonious assault charge reveals that the trial court in fact did not inform Mr. Robinson of the fact, that, in entering a guilty plea, he was waiving his constitutional right to compulsory process as enumerated in Crim.R. 11(C)(2)(c). The trial court neither cited this right during the hearing, nor explained the right in a manner "reasonably

[3] We note that in his brief on appeal, Mr. Robinson cites Crim.R. 11(B)(2)(c), but we proceed with the presumption, in light of his argument, that Mr. Robinson intended to cite Crim.R. 11(C)(2)(c).

intelligible" to Mr. Robinson. See *Anderson*, 108 Ohio App.3d at 9, quoting *Ballard*, 66 Ohio St.2d at paragraph two of the syllabus.

{¶38} Based upon the foregoing analysis and a review of the record, this Court finds that the trial court did not comply with Crim.R.11(C)(2)(c) when accepting Mr. Robinson's guilty plea on the felonious assault charge. Consequently, Mr. Robinson could not have made a voluntary, knowing and intelligent waiver of this constitutional right. See *Sherrard* at ¶6. Therefore, we must conclude that Mr. Robinson's guilty plea is "constitutionally defective." See *Ballard*, 66 Ohio St.2d at 482, fn. 8, citing *Jaworski*, 387 Mich. at 28-30; see, also, *Thomas*, 67 Ohio App.3d at 132.

{¶39} Accordingly, Mr. Robinson's second assignment of error is sustained.

III.

{¶40} Mr. Robinson's first assignment of error is overruled, and his second assignment of error is sustained. The conviction of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

WILLIAM G. BATCHELDER
FOR THE COURT

CARR, P.J.

WHITMORE, J.
CONCUR

APPEARANCES:

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