[Cite as *State v. Herrington*, 2010-Ohio-6455.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 25150
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DAMOND D. HERRINGTON	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 06 2074 (A)

DECISION AND JOURNAL ENTRY

Dated: December 29, 2010

CARR, Judge.

{¶1} Appellant, Damond Herrington (hereinafter referred to as "Herrington"), appeals the judgment out of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} This case stems from an incident which occurred on June 19, 2008, at the home of Herrington and his mother, Minnie Herrington, located at 418 East Crozier Street in Akron, Ohio. Officer Ronald Kennedy of the Akron Police Department responded to the residence after dispatch received a call from a female who indicated that the father of her child had thrown her keys on a neighbor's roof. The woman who made the call was Kristi Milano, with whom Herrington had a daughter. Officer Kennedy entered the home and attempted to question Herrington about a possible domestic incident. The exchange between Officer Kennedy and Herrington escalated into a violent confrontation in which, after a struggle, Herrington ended up in possession of Officer Kennedy's gun. Officer Ronald Garey arrived on the scene moments

later and he, along with Officer Kennedy, were able to subdue Herrington. The testimony at trial indicated that there were several other people in the house during the course of the incident.

{¶3} After a jury trial, Herrington was found guilty of one count of attempted murder, a felony of the first degree; two counts of aggravated robbery, one as a generic count and one as specified against a peace officer, both felonies of the first degree; one count of kidnapping, a felony of the first degree; and one count of felonious assault against a peace officer, a felony of the first degree. The jury found Herrington guilty of firearm specifications to each of the aforementioned counts, and the trial court found Herrington guilty of repeat violent offender specifications to each of the aforementioned counts. In addition, Herrington was convicted of one count of having a weapon under disability, a felony of the third degree; and one count of resisting arrest, a felony of the fourth degree. Herrington was sentenced to a total of thirty years imprisonment.

{¶4} On appeal, Herrington raises two assignments of error.

II.

ASSIGNMENT OF ERROR I

"APPELLANT WAS DENIED HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL."

{¶5} In his first assignment of error, Herrington contends that he was denied his right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. This Court disagrees.

{¶6} Herrington makes several arguments in support of his first assignment of error. Initially, Herrington contends that trial counsel should have requested a jury instruction on self-defense. Herrington further asserts that trial counsel rendered ineffective assistance by failing to

object to the testimony of Officer Laurie Natko, as well as the State's reference to that testimony in its closing argument. Finally, Herrington argues that trial counsel rendered ineffective assistance by conceding guilt on the offenses of aggravated robbery and having weapons under disability during closing argument.

{¶7} In order to prevail on a claim of ineffective assistance of counsel, Herrington must show that "counsel's performance fell below an objective standard of reasonableness and that prejudice arose from counsel's performance." *State v. Reynolds* (1998), 80 Ohio St.3d 670, 674, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Thus, a two-prong test is necessary to examine such claims. First, Herrington must show that counsel's performance was objectively deficient by producing evidence that counsel acted unreasonably. *State v. Keith* (1997), 79 Ohio St.3d 514, 534, citing *Strickland*, 466 U.S. at 687. Second, Herrington must demonstrate that but for counsel's errors, there is a reasonable probability that the results of the trial would have been different. Id.

{¶8} The Supreme Court of Ohio has recognized that a court need not analyze both prongs of the *Strickland* test, where the issue may be disposed upon consideration of one of the factors. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143. Specifically,

> "'Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to

> ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.'" *Bradley*, 42 Ohio St.3d at 143, quoting *Strickland*, 466 U.S. at 697.

{¶9} It is well-settled that, "debatable trial tactics do not give rise to a claim for ineffective assistance of counsel." *State v. Hoehn*, 9th Dist. No. 03CA0076-M, 2004-Ohio-1419, at ¶45, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Even if this Court questions trial counsel's strategic decisions, we must defer to his judgment. Id. The Ohio Supreme Court has stated:

> "'We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the best of available practices in the defense field.' *** Counsel chose a strategy that proved ineffective, but the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client." Id., quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396.

{¶10} In support of his position that counsel rendered ineffective assistance by failing to request a jury instruction on self-defense, Herrington points to the Second District's decision in *State v. Fritz*, 2d Dist. No. 20796, 2005-Ohio-4736. In *Fritz*, the Court stated:

> "A court's jury instruction must be based on the actual issues in the case as presented by the evidence. Thus, a court should not give an instruction unless it is specifically applicable to the facts in the case. To determine whether an instruction on self-defense is warranted, the trial court must determine whether the defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue.'" (internal citations and quotations omitted). Id. at ¶19.

{¶11} Generally, the failure to request jury instructions is purely a matter of trial tactics and will not be disturbed upon review. See *Clayton*, 62 Ohio St.2d at 47-49. Here, the theory of the case presented by defense counsel did not encompass self-defense. This Court has stated that by claiming self-defense, a defendant "'concedes [that] he had the purpose to commit the act, but asserts that he was justified in his actions.'" *State v. Griffin*, 9th Dist. No. 23459, 2007-Ohio-1944, at ¶7, citing *State v. Howe* (July 25, 2001), 9th Dist. No. 00CA007732, quoting *State v.*

Barnd (1993), 85 Ohio App.3d 254, 260. In his opening statement, trial counsel did not indicate that Herrington would be raising any affirmative defenses. Instead of claiming that Herrington was justified in his actions, trial counsel stated "there are some things that Mr. Herrington is wrong about. Yes, he should not have had a gun in his hand, let alone the officer's gun. He should not have done or reacted the way he did." In his closing argument, defense counsel acknowledged that Herrington "commit[ted] his first crime by taking the officer's gun" but then argued that Herrington did not have the requisite mental state to be convicted of several of the charges for which he was indicted. Thus, the decision not to request a self-defense jury instruction, which would have been inconsistent with his theory of the case, fell within the purview of trial tactics and did not equate to ineffective assistance of counsel. See *Hoehn* at ¶45.

{¶12} Herrington attempts to bolster his argument that a self-defense jury instruction should have been requested by highlighting his own testimony. Herrington testified that he was "level-headed" and "even toned" as he tried to explain the situation when Officer Kennedy entered the house. Herrington testified that Officer Kennedy ordered Herrington to sit down. Herrington testified that when he attempted to stand up, Officer Kennedy grabbed Herrington and attempted to throw him to the ground. Herrington testified that when he was resistant to the force, Officer Kennedy said "f*** this" and pulled out his gun and pointed it at Herrington's forehead. Herrington testified that he put his hands up and took a step back. Herrington testified that he thought "I am dead, and it is going to be justified" because "I'm an ex-felon." Herrington testified that he then grabbed the gun and, after a struggle, eventually wrestled it away from Officer Kennedy. Herrington testified that he was holding the gun down by his side with his right hand when Officer Garey entered the house. Herrington testified that, as he was back-peddling, he released the clip from the gun and ejected the bullet from the chamber as Officer

Garey approached him. Herrington testified that he was never ordered to get on the ground. Herrington testified that he put the gun down on his own and that it was not knocked out of his hand. Herrington testified that after he put the gun down, Officer Kennedy punched him in the eye. Herrington testified that Officer Garey then put his gun away and drew his baton. Herrington testified that the struggle which ensued resulted in Herrington falling into and breaking a window. Herrington further testified that, at this point, both Officer Garey and Officer Kennedy had drawn their batons. Herrington testified that after he turned his back in submission, the "beating" lasted "[a]nywhere from thirty seconds to a minute." Herrington testified that he did not make any comments to Officer Garey regarding what he should have done to Officer Kennedy. Herrington also testified that he did not raise his voice or "throw[] a fit" in the paddy wagon. When asked if he intended to "shoot and/or kill" anybody during the incident, Herrington responded, "No, I did not." Herrington further testified that he did not cause serious physical harm to anyone during the incident.[1]

{¶13} Given Herrington's testimony, we cannot say that defense counsel acted unreasonably by not requesting a self-defense jury instruction. Herrington testified that he did not have the intent to shoot or kill during the incident. Herrington also testified that he did not cause serious physical harm to anyone during the incident. This testimony was inconsistent with a claim of self-defense, in which a defendant "concedes [that] he had the purpose to commit the act, but asserts that he was justified in his actions." See *Griffin* at ¶7

{¶14} We further note that Herrington's testimony was in direct conflict with that of other witnesses. Officer Kennedy testified as follows. Officer Kennedy responded to the scene

[1] After Herrington testified that he did not have the intent to "shoot and/or kill" anyone during the incident, he was then asked, "Did you have an opportunity to assault or cause any physical –

after dispatch received a call from a female who indicated that the father of her child had thrown her keys on a neighbor's roof. After speaking with the woman who placed the call, later determined to be Kristi Milano, Officer Kennedy approached Minnie Herrington and asked her if Damond Herrington was there. Minnie Herrington answered in the negative. Officer Kennedy testified that he then observed a male inside the house. When Officer Kennedy asked Minnie Herrington who was in the house, she responded that nobody was there. Officer Kennedy then entered the home and encountered Herrington. Officer Kennedy testified that when he entered the house, Herrington was "a little agitated" but cooperating. Officer Kennedy testified that Minnie Herrington was yelling "get the f*** out." Herrington's sister, Adrienne, was encouraging Herrington to cooperate at first but became agitated when Officer Kennedy told Minnie Herrington to "be quiet" because she had lied about Herrington not being there.

{¶15} As Minnie and Adrienne Herrington became more agitated, Herrington got up from his chair and said he was leaving. Officer Kennedy testified that he grabbed Herrington's arm and told him to sit down so they could resolve the issue. Herrington then asked what would happen if he left and Officer Kennedy then informed him that he would be placed under arrest. Officer Kennedy testified that Herrington then "bum rushed" him. Officer Kennedy explained that Herrington "[c]harged at me and ended up hitting chest to chest." Officer Kennedy testified that he did not want Herrington to leave because the woman who had placed the call to the police was standing outside. After Herrington charged him, Officer Kennedy testified that he put Herrington in a headlock. As he and Herrington fell onto a loveseat, Officer Kennedy felt Herrington was "tugging" at his gun. Officer Kennedy then sent out a "signal 5" distress call. Officer Kennedy testified that Herrington was "pulling so violently I actually thought he was

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serious physical alarm to anyone that day?" Herrington answered, "Yes, I did." Defense counsel

pulling off the belt." After Herrington was able to remove the gun from Officer Kennedy's holster, the two individuals engaged in a "tug of war" for the gun. Herrington eventually pulled the gun away from Officer Kennedy. Officer Kennedy testified that Herrington pointed the gun at him and screamed, "you're f***ing dead, you're f***ing dead, what are you going to do now, you're f***ing dead." Officer Kennedy testified that he could see Herrington's finger on the trigger. Officer Kennedy testified that Herrington lowered the gun at the time Officer Garey came through the door. As the two men approached Herrington, he did not comply with any of the orders he was given. Officer Kennedy testified that the gun "went flying" out of Herrington's hand as the officer began to strike him.

{¶16} Herrington's testimony was also directly contradicted by the testimony of Officer Ronald Garey. Officer Garey testified as follows. Officer Garey testified it sounded like Officer Kennedy was "fighting" when he put out his "signal 5" distress call. When Officer Garey arrived at the home, he saw three ladies standing outside. As he entered the home, Officer Garey saw Herrington holding a gun "out to the side" in such a way that "clearly he is showing it to me that he's got it." Officer Garey testified that the gun was not pointed at either himself or Officer Kennedy. Officer Garey immediately drew his gun and started "issuing orders to drop the gun or get on the ground." According to Officer Garey, there was a lot of screaming, including "an old woman yelling, get the f*** out of my house." Herrington did not obey Officer Garey's commands and instead pointed the gun into the dining room. While Herrington was still holding the gun, Officer Garey kicked Herrington in the stomach with the intent of knocking him to the ground. Herrington then reached up and removed the magazine from the gun. At this point Officer Garey noticed the gun was a Glock, which is carried by Akron police officers. As

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then asked, "Did you?" Herrington responded, "No."

Officer Kennedy approached Herrington, he cleared the round by expelling the bullet from the chamber. Officer Garey continued to give the order to get on the ground but Herrington did not comply. Officer Garey testified that he used his asp because Herrington was resisting arrest and "physically fighting" with the officers. When the officers did get Herrington on the ground, Minnie Herrington grabbed Officer Garey from behind and pulled him away from Herrington. Officer Garey testified he was able to push Minnie Herrington away and go back to Damond Herrington. Officer Garey testified that, after the officers finally did handcuff Herrington, Officer Kennedy was "very shaken, very upset." Officer Garey testified that the period of time that elapsed between the time he entered the house and the time Herrington was subdued was about five seconds. As Herrington was being taken from the house to the paddy wagon, Herrington told Officer Garey, "I should have killed that f***ing cop."

{¶17} Herrington's testimony was also contradicted by the testimony of Officer William Price. Officer Price escorted Herrington to the paddy wagon after he was taken in custody. When asked what Herrington said to him, Officer Price testified as follows:

> "Besides the cussing and everything, he was being belligerent, I mean just going on, ranting and raving, talking real loud, by the wagon, before I put him in, he looks over like, looks over his shoulder toward like, that is why I took that punk ass officer's gun."

{¶18} Officer Laurie Natko also testified on behalf of the State at trial. Officer Natko testified that she was about fifteen feet from Herrington as he was placed in the paddy wagon. Officer Natko further testified as follows:

> "The wagon was rocking back and forth. Damond [Herrington] was handcuffed behind his back, he was thrashing his body back and forth, and he was screaming at the top of his lungs. It drew the attention of me and everybody else standing on the side watching."

{¶19} While Herrington relies on his own testimony as a basis for why defense counsel should have requested a self-defense jury instruction, the record indicates that Herrington's testimony was directly contradicted by the testimony of Officer Kennedy, Officer Garey, Officer Price, and Officer Natko. According to Officer Kennedy, Herrington removed Officer Kennedy's gun from its holster and then wrestled the gun away from Officer Kennedy. Officer Kennedy testified that Herrington pointed the gun at him and used threatening language. Officer Kennedy further testified that Herrington would not comply with orders and that he did not drop the gun until it was knocked out of his hands. Officer Garey also testified that Herrington failed to comply with direct orders to drop the gun and get on the ground and that he fought with the officers as they attempted to subdue him. Officer Garey testified that only five seconds elapsed from the time he entered the house to the time Herrington was subdued. Officer Garey further testified that Herrington said he should have killed Officer Kennedy as he was being taken to the paddy wagon. Officer Price testified that Herrington was belligerent and loud as he escorted him to the paddy wagon. Officer Natko testified that Herrington was "thrashing his body back and forth" and "screaming at the top of his lungs" as he was placed in the paddy wagon. This testimony by the officers directly contradicts Herrington's testimony with respect to his behavior on the afternoon of the incident. In light of the issues surrounding the credibility of his testimony, Herrington has not demonstrated that the result of trial would have been different but for defense counsel's decision not to request the jury instruction. Therefore, he cannot prevail on his initial argument in favor of his assignment of error.

{¶20} Herrington's second argument in support of his first assignment of error is that trial counsel rendered ineffective assistance by failing to object when Akron Police Officer Natko testified that Officer Kennedy "has proven himself to be very consistent, very reliable and

a very honest person, and an officer that I would like to work with and an officer that I trust." Herrington argues trial counsel should have objected to this testimony because the defense had not presented any prior impeaching or character evidence against Officer Kennedy. Herrington also notes that the trial counsel did not object when the State referred to this testimony during closing arguments.

{¶21} On direct examination, Officer Natko testified that, after the incident had occurred, she was asked by Major Hall to pick up Officer Kennedy's wife, Angela, and take her to the hospital. Officer Natko testified that Major Hall had briefed her on what had taken place during the incident. Officer Natko testified that she told Angela Kennedy that "[O]fficer Kennedy was fine, he had been involved in an altercation, his weapon was taken away and he was slightly injured." Officer Natko took Angela Kennedy to the emergency room at Akron General Hospital where Officer Kennedy was being treated. Officer Natko testified that Officer Kennedy was very emotional when she and Angela Kennedy arrived at the hospital.

{¶22} On cross-examination, defense counsel's initial questions focused on the fact that Officer Natko had not witnessed what transpired in the house prior to her arrival and that she was relying on what she had been told by others. Defense counsel then elicited testimony that Officer Natko and Officer Kennedy had a professional rapport and that both were members of the Fraternal Order of Police. Defense counsel then asked Officer Natko, "As a result of that closeness, professionally, the brotherhood, et cetera, you accept everything that you are told and give it blind faith; is that accurate?" Officer Natko replied, "Not always, no." Officer Natko then clarified that, in this case, she was relying on the reports she received from other officers. The following exchange then took place between defense counsel and Officer Natko.

> "Q: And part of that, part of the reason for that is because of what you were told is such an egregious set of circumstances and facts, correct?

"A: Part of it is because of my knowledge of [O]fficer Kennedy.

"Q: And any other part must be the facts that are alleged here, correct?

"A: It is really my knowledge of [O]fficer Kennedy."

{¶23} On re-direct examination, Officer Natko was asked to clarify what she meant by her "knowledge of Officer Kennedy." Officer Natko testified:

> "As I stated earlier, Officer Kennedy and I, we work neighboring districts, so I rely on him a lot and he relies on me a lot to back each other up on various types of calls. You deal in rapport, you rely on somebody, you learn to -- I mean, you go on calls and you watch how they handle calls and there (sic) to watch how you handle calls, and you become pretty much the same on how you handle those calls because your partner[s] basically, and based on my experience with [O]fficer Kennedy in the years I have worked with him on numerous calls that I responded, he has proven himself to be very consistent, very reliable and a very honest person, and an officer that I would like to work with and an office that I trust. So that is why I believe what he tells me."

Trial counsel for Herrington did not object to this testimony.

{¶24} Defense counsel attempted to demonstrate that Officer Natko's testimony was unreliable because the fraternal nature of her relationship with other officers would cause her to accept anything she was told by other officers as true. On re-direct examination, the State asked Officer Natko to clarify why her "knowledge of Officer Kennedy" impacted why she believed the account of what transpired during the incident to be credible. Because defense counsel "opened the door" for this line of testimony when he asked whether Officer Natko would accept everything she was told by others officers in "blind faith," defense counsel did not have a basis to object to Officer Natko's testimony on re-direct examination. See *State v. Smith* (Nov. 8, 2000), 9th Dist. No. 99CA007399. Thus, defense counsel did not render ineffective assistance by not objecting to the testimony.

{¶25} Herrington's final argument in support of his first assignment of error is that trial counsel rendered ineffective assistance in conceding guilt on the offenses of aggravated robbery

and having weapons under disability. Trial counsel stated in closing argument that the concession was "offered to [the jury] as a show of credibility and faith." The Supreme Court of Ohio has recognized that a concession of guilt on a charge can fall under the purview of trial tactics. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, at ¶60. Given the emotional nature of the evidence and testimony in this case, trial counsel's concession of guilt was clearly a strategic decision made in an attempt to build rapport with the jury. Moreover, in light of the evidence against Herrington that was discussed above, Herrington has failed to demonstrate on appeal that the outcome of trial would have been different had defense counsel not conceded guilt on the offenses of aggravated robbery and having weapons under disability.

{¶26} Herrington's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT COMMITTED PLAIN ERROR IN 1) ALLOWING HERRINGTON TO REPRESENT HIMSELF AT TRIAL WITHOUT FULLY INFORMING APPELLANT OF ALL THE REQUIRED FACTORS TO DETERMINE A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF COUNSEL; 2) THEN IN ALLOWING HERRINGTON'S ORIGINAL DEFENSE COUNSEL TO RESUME REPRESENTATION RATHER THAN DECLARE A MISTRIAL; AND 3) FAILING TO SUA SPONTE INSTRUCT THE JURY ON HERRINGTON'S ASSERTED SELF-DEFENSE."

{¶27} In his second assignment of error, Herrington contends that the trial court committed plain error by allowing him to engage in self-representation without obtaining a knowing, voluntary and intelligent waiver of counsel; by allowing Herrington's original counsel to resume representation rather than declare a mistrial; and by failing to sua sponte give a jury instruction on self-defense. This Court disagrees.

{¶28} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." To constitute plain error, the error must be obvious and have a substantial adverse impact on both the integrity of,

and the public's confidence in, the judicial proceedings. *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. A reviewing court must take notice of plain error only with the utmost caution, and only then to prevent a manifest miscarriage of justice. *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶12. This Court may not reverse the judgment of the trial court on the basis of plain error, unless appellant has established that the outcome of trial clearly would have been different but for the alleged error. *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166.

{¶29} At the commencement of trial, Herrington was represented by counsel. Defense counsel actively participated in the voir dire process and delivered an opening statement. There was no cross-examination of the State's first two witnesses, Detective Patrick McMillan and Officer James Alexander, as their testimony served only to establish that Herrington had a prior robbery conviction in 1996 and a felony domestic violence conviction in 2003.

{¶30} During the cross-examination of the State's third witness, Officer Ronald Garey, Herrington expressed dissatisfaction with the line of questioning and asked the trial court if he could proceed as a pro se litigant. The trial court informed Herrington that he did have a right to proceed as a pro se litigant but strongly recommended that he not do so. The trial court informed Herrington that he would be held to the same legal standards as an attorney and that he would not be provided any "breaks" simply because he did not have a law degree. Herrington then reiterated that he wanted to represent himself. Defense counsel remained present to act as stand-by counsel. The trial court then informed Herrington of the nature of the charges pending against him along with the possible penalties associated therewith. The trial court emphasized to Herrington that there would be "dangers in proceeding" pro se because he did not have a legal education which would inform his ability to make certain objections and understand evidentiary

rules. The trial court also emphasized that Herrington would be held to the same standard as the prosecutors in following rules of law, and also that the trial court could not act as co-counsel with Herrington. The trial court then had Herrington execute a written waiver of his right to counsel and found on the record that he knowingly, voluntarily, and intelligently waived his right to counsel.

{¶31} Herrington proceeded to cross-examine Officer Garey regarding what transpired on the day of the incident. Herrington also cross-examined two additional State witnesses. The first witness was Kristi Milano, who had initially called the police after she and Herrington had a dispute regarding visitation with their daughter. During the cross-examination of Ms. Milano, the trial court sustained numerous objections to the line of questioning regarding their relationship and eventually ordered Herrington to end his questioning. The second witness Herrington cross-examined was Sergeant Jeffrey Mullins, who is assigned to the Akron Police Department's training bureau and police academy. Upon the completion of Sergeant Mullins' testimony on January 13, 2009, the court was in recess until the morning of January 15, 2009. Prior to the State calling its next witness on the morning of January 15, 2009, the State brought to the attention of the Court that, prior to exercising his right to proceed pro se, Herrington had not been told that an attorney would have knowledge of potential defenses. The trial court then informed Herrington that an attorney would have knowledge of any potential defenses which may be applicable to this case. Herrington then indicated he wanted defense counsel to reassume representation. The trial court then gave Herrington time to consult with defense counsel as to whether Herrington should proceed with self-representation. After a short recess, Herrington informed the trial court that he wanted to proceed with his former counsel reassuming

representation. When the trial court inquired as to why he wanted the same attorney whom he had fired two days earlier to represent him, Herrington stated,

> "I thought I could approach it in a different perspective, show my perspective or perception of it. It was not the correct way to go about doing it, and I'm not a legal expert."

Herrington also indicated that he understood that there were certain things that could not be "undone," such as cross-examination of witnesses who have already testified.

{¶32} Defense counsel stated on the record that there had been "several tactical and strategic endeavors on my part on behalf of Mr. Herrington that have – in my opinion have been undone." Defense counsel also noted that, given the fragmented nature of the representation, he would not expect "frivolous bar complaints [and] grievances" to be filed against him. Herrington indicated that understood and that there would be "[n]o complaints." At this point, defense counsel resumed his representation.

{¶33} Herrington argues that the trial court committed plain error by allowing him to engage in self-representation without informing him of possible defenses and other mitigating factors he could assert in his own defense. In support of his position, Herrington relies on this Court's decision in *State v. Yeager*, 9th Dist. No. 21510, 2004-Ohio-2368, in which we stated:

> "In determining the sufficiency of the trial court's inquiry in the context of the defendant's waiver of counsel, the [*State v. Gibson* (1976), 45 Ohio St.2d 366] court applied the test set forth in *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723 []:
>
> "'***To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broard understanding of the whole matter.'" *Yeager* at ¶8.

We note that the Supreme Court of Ohio subsequently vacated this Court's judgment in *State v. Yeager*, 9th Dist. No. 21510, 2004-Ohio-2368, and remanded the case for further consideration

in light of the Supreme Court's ruling in *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471. *State v. Yeager*, 103 Ohio St.3d 476, 2004-Ohio-5707.

{¶34} This Court had reexamined its position in *State v. Ragle*, 9th Dist. No. 22137, 2005-Ohio-590, and stated:

> "Although Defendant insists that a trial court *must* consider the factors enumerated in *Von Molkte*, including whether the trial court advised the defendant of possible defenses and mitigating circumstances, this is incorrect. *Gibson* merely quotes the dicta from the plurality decision in *Von Molkt*e to elucidate the defendant's arguments in that case. See *Gibson*, 45 Ohio St.2d at 377. The Ohio Supreme Court, however, did not specifically adopt those factors as determinative in decisions regarding waiver of the right to counsel. See id. In fact, the facts of *Gibson* reveal that the defendant in that case was *not* specifically advised of possible defenses or mitigating circumstances. See id. While the Ohio Supreme Court restated the same factors again in *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, at ¶40, a finding that the trial court must advise a defendant of defenses and mitigating circumstances, again, was unnecessary to the outcome of the case. Martin actually failed to unequivocally waive his right to counsel by consistently reiterating that he did not wish to serve as his own counsel. Id. at ¶42." *Ragle* at ¶11.

In *Ragle*, we went on to hold that "[t]his Court, likewise, will not adopt a rule which requires a trial court judge to fully acquaint himself with the facts of a case prior to trial in order to undertake pseudo-legal representation of a defendant by specifically advising him of possible viable defense or mitigating circumstances existing in his case." *Ragle* at ¶12. In concluding, this Court stated that in determining whether a defendant validly waived his right to counsel, an appellate court "need only consider the totality of the circumstances, including whether Defendant understood the dangers of self-representation, the nature of the charges against him, and the allowable penalties for those charges[.]" Id. This Court subsequently emphasized that "no one factor is dispositive[.]" *State v. Trikilis*, 9th Dist. Nos. 04CA0096-M, 04CA0097-M, 2005-Ohio-4266, at ¶13. In *State v. Smith*, 9th Dist. No. 23006, 2007-Ohio-51, at ¶9, this Court held that a defendant's waiver of counsel was not voluntarily and intelligently made when the

record contained no discussion regarding the nature of the charges, the statutory offenses included in them, or the range of allowable punishments. The Court also noted that there had been "no discussion of possible defenses or mitigating circumstances, not even a broad one as mandated by *Ragle*." Id.

{¶35} We emphasize, that the unique facts of this case differ from the facts at issue in our prior cases, where the respective defendants made the decision to defend themselves without counsel prior to the commencement of trial. Here, Herrington began the trial represented by counsel. Herrington's attorney gave an opening statement in which he set forth a theory of the case. It was not until after defense counsel had begun cross-examining the State's third witness that Herrington expressed a desire to defend himself without counsel. While this Court has held that a trial judge is not required to fully acquaint himself with the facts of a case in discussing possible defenses and mitigating circumstances, we recognize that, in cases where a defendant elects to proceed pro se in the middle of trial, a judge's perspective as to what is necessary to adequately inform a defendant of the dangers of self-representation will be informed by what has already transpired in the proceedings. In his opening statement, defense counsel did not indicate that Herrington would be asserting any affirmative defenses. In his merit brief, Herrington contends that self-defense was "the one and only defense [] asserted at trial." However, as noted in our resolution of the first assignment of error, this Court has held that by claiming self-defense, a defendant "concedes [that] he had the purpose to commit the act, but asserts that he was justified in his actions." *Griffin* at ¶7. In setting forth his theory of the case in his opening statement, defense counsel did not assert that Herrington was justified in his actions. Rather, defense counsel stated "there are some things that Mr. Herrington is wrong about. *** [H]e should not have had a gun in his hand, let alone the officer's gun. He should not have done or

reacted the way he did." Thus, Herrington has not established that the outcome of trial clearly would have been different but for the lack of a discussion of possible defenses. Given the circumstances of this case, the trial court's query into whether Herrington was making a knowing, voluntary, and intelligent waiver of his right to counsel did not result in manifest injustice and, therefore, did not constitute plain error.

{¶36} Herrington's second argument in support of his second assignment of error is that the trial court committed plain error in allowing Herrington's original defense counsel to resume representation rather than declare a mistrial. "It is well settled that a trial court may grant a mistrial sua sponte or on motion by the parties when 'there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.'" *Cleveland v. Walters* (1994), 98 Ohio App.3d 165, 168, citing *State v. Abboud* (1983), 13 Ohio App.3d 62, quoting *United States v. Perez* (1824), 22 U.S. 579. Because neither Herrington, during the portion of trial when he was defending himself, nor his attorney, moved for a mistrial, this Court must apply a plain error standard of review. In support of his position that the trial court committed plain error by not sua sponte granting a mistrial, Herrington points to his inability to effectively or properly cross-examine witnesses, as well as defense counsel's statement on the record that Herrington may have caused "irreparable harm" to his case by representing himself.

{¶37} The Supreme Court of Ohio has stated that, "[t]he Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so." *Gibson*, 45 Ohio St.2d at paragraph one of the syllabus, citing *Faretta v. California* (1975), 422 U.S. 806. Here, Herrington made the decision to defend himself without

counsel during the cross-examination of Officer Garey. The United States Supreme Court has explained the right to proceed pro se by noting that "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 819-820. The *Faretta* court held that a defendant who elects to defend himself "should be made aware of the dangers and disadvantages of self-representation." Id. at 835. This is because "[w]hen an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." Id. As discussed above, the trial court in this case did inform Herrington of the dangers of self-representation and urged him not to proceed pro se. One of the traditional benefits associated with the right to counsel is an understanding of how to properly cross-examine witnesses. The fact that Herrington, by exercising his right to self-representation, may have harmed his chances of prevailing was not reason for the trial court to sua sponte declare a mistrial. As the right to defend was given directly to Herrington, it cannot be said that the choices he made regarding whether to be represented by counsel at different points in the trial undermined the fairness and integrity of the judicial proceedings. Thus, the trial court did not commit plain error in allowing original defense counsel to resume representation.

{¶38} The final argument Herrington raises in support of his second assignment of error is that the trial court committed plain error in failing to sua sponte give a self-defense jury instruction. In support of his position, Herrington points to the Eighth District's decision in *State v. Wilson*, 8th Dist. No. 91091, 2009-Ohio-1681, where the court concluded that the trial court's decision not to give a jury instruction was not plain error because the decision was based on defense counsel's trial strategy. Herrington argues that the facts of this case are distinguishable from *Wilson* in that, here, trial counsel's decision not to request a self-defense jury instruction

was not part of a deliberate trial strategy. Rather, Herrington asserts that trial counsel's failure to request a self-defense jury instruction amounted to ineffective assistance of counsel. This Court, however, concluded in our resolution of Herrington's first assignment of error that trial counsel's decision not to request a self-defense jury instruction was part of a trial strategy. Given the theory of the case set forth by trial counsel, the trial court did not commit plain error in not sua sponte giving a self-defense jury instruction.

{¶39} Herrington's second assignment of error is overruled.

III.

{¶40} Herrington's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

NICHOLAS SWYRYDENKO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.