[Cite as *State v. Smith*, 2015-Ohio-2842.]

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

STATE OF OHIO Appellee v. DAVID C. SMITH Appellant	C.A. No. 27389 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 14 01 0223

DECISION AND JOURNAL ENTRY

Dated: July 15, 2015

SCHAFER, Judge.

{¶1} Defendant-Appellant, David C. Smith, appeals from his robbery conviction in the Summit County Court of Common Pleas. For the reasons set forth below, we affirm.

I.

{¶2} At roughly 2:00 p.m. on Friday, December 13, 2013, a man wearing a bulky black jacket, a gray ski mask, black sunglasses, gloves, and a hat walked into the FirstMerit Bank in Fairlawn, Ohio. At this time, Cody Hinkle was working as a teller at the bank. Ms. Hinkle was assisting a customer at the teller window. Christa Hosey, an employee of the bank, was waiting in line for the next available teller in order to conduct a transaction for a customer waiting in her office.

{¶3} After the man wearing the ski mask entered the bank, he scribbled a note on a deposit slip near the bank's entrance and proceeded to walk up to the teller window. While walking up to the teller window, the man nudged Ms. Hosey to the side, and said "excuse me" to

the customer before nudging her aside as well. The man then slid the note to Ms. Hinkle. The note read, "I Need Bottom Drawer $50 and $100." Ms. Hinkle complied with the note's demand and handed $4,000.00 from her bottom drawer to the man. The man put the money in his pocket and fled from the bank on foot. Ms. Hinkle then tripped the bank's alarm.

{¶4} Numerous witnesses testified that they witnessed a man in a black jacket and a dark ski mask run from the bank, across West Market Street, through the parking lot of the shopping plaza directly across the street from the bank, and disappear behind the plaza. Local police searched behind the shopping plaza and discovered foot prints in the snow, as well as an abandoned black jacket and a gray ski mask. Police also found an electronic cigarette in one of the jacket's pockets and a hat inside of the ski mask. The police sent the ski mask, hat, and electronic cigarette to the Ohio Bureau of Criminal Investigation (BCI) for forensic testing. BCI discovered DNA on the ski mask, hat, and electronic cigarette and ultimately determined that the DNA matched that of David C. Smith. With this information, the Fairlawn Police Department obtained an arrest warrant for Mr. Smith.

{¶5} Akron police arrested Mr. Smith on January 21, 2014. Detective David Zampelli met with Mr. Smith at the Summit County Jail, swabbed the inside of Mr. Smith's mouth, and forwarded the swab to BCI. Stacy Violi, a forensic scientist at BCI, tested the swab containing Mr. Smith's DNA standard and determined that the DNA found on the hat and ski mask was consistent with Mr. Smith. Ms. Violi also determined that Mr. Smith was the major source of DNA from the filter end of the electronic cigarette. Ms. Violi testified that the frequency of occurrence of such a result is one in 283 quintillion, 300 quadrillion unrelated individuals.

{¶6} On February 5, 2014, Mr. Smith was indicted on one count of robbery in violation of R.C. 2911.02(A)(3). The matter proceeded to a jury trial. Mr. Smith's defense counsel made

a Crim.R. 29 motion for acquittal after the State's case-in-chief. The trial court denied that motion. The defense then rested without putting on a case. The jury convicted Mr. Smith of robbery on May 1, 2014. The trial judge sentenced Mr. Smith to the maximum 36 months in prison.

{¶7} Mr. Smith filed this timely appeal raising two assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO CONDUCT A HEARING ON THE DEFENDANT'S REQUEST FOR A SANITY AND COMPETENCY EVALUATION.

{¶8} Mr. Smith argues that the trial court was required to conduct a hearing on his request for a sanity[1] and competency evaluation as required by R.C. 2945.37. Because we conclude that the trial court did hold a hearing on the matter, we disagree with Mr. Smith's assignment of error.

{¶9} A criminal defendant is presumed to be competent to stand trial. R.C. 2945.37(G). The test of a defendant's competency to stand trial is " '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.' " *State v. Rahman*, 23 Ohio St.3d 146, 156 (1986), quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960). One who lacks the capacity to understand the nature and object of the proceedings

[1] While Mr. Smith's assignment of error refers to both sanity and competency, his argument solely addresses the issue of competency. As such, we will not address the issue of whether the trial court properly conducted a hearing on Mr. Smith's request for a sanity evaluation.

against him, to consult with counsel, and to assist in preparing his defense may not stand trial. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶ 155, citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

{¶10} R.C. 2945.37 protects a defendant's right not to be tried or convicted while incompetent, which is a fundamental due process right. *State v. Were*, 94 Ohio St.3d 173, 174 (2002). R.C. 2945.37(B) provides that:

> In a criminal action in a court of common pleas, * * * [the] 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.

(Emphasis added.) The Ohio Supreme Court has held that the express language of R.C. 2945.37(B) requires the trial court hold a competency hearing if the issue of the defendant's competence is raised prior to trial. *Were* at 175. However, while the trial court must conduct a hearing, the decision to order a competency evaluation is within the discretion of the trial court. *State v. Johnson*, 9th Dist. Summit No. 25620, 2011-Ohio-6417, ¶ 12; *see also* R.C. 2945.371(A).

{¶11} Accordingly, the question before us is whether the trial court failed to conduct a hearing before denying Mr. Smith's request for a competency evaluation. Mr. Smith argues that a trial court's failure to hold such a hearing as mandated by R.C. 2945.37 is an abuse of discretion and constitutes reversible error. An abuse of discretion implies that the trial court's judgment is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶12} On Monday, April 28, 2014, the morning of trial, but just before voir dire, Mr. Smith's defense counsel requested a competency evaluation because Mr. Smith was making

"very concerning" statements and that she was "concerned about [Mr. Smith's] ability to proceed to trial." Specifically, Mr. Smith's defense counsel represented to the court that despite her conversations with her client regarding the case, Mr. Smith did not seem to realize that his trial was beginning that day, that the prosecutor's plea offer was no longer available, and that witnesses were going to be called to testify against him. In response, the prosecuting attorney told the court as follows:

> Judge, I can tell the court while I obviously have not spoken to Mr. Smith directly, I have listened to his jail calls including two calls he made this weekend after we were here on Friday.
>
> In both of those calls he talks to two different people about the issues in the case, the evidence, the offer. He relates to them the offer and the different kind of permutations of what he is looking for. He evaluates the strengths and weaknesses of the case. He talks about the evidence pointing to him but still continues to deny that he was involved in this crime.
>
> I would offer to the court, and if the court wants to listen to those calls to make a decision, I can make them available probably by tomorrow morning, have them burned to a disc. Those calls indicate that he does understand what's going on in these proceedings.

Based upon the prosecutor's representations, the trial judge denied Mr. Smith's motion for a competency evaluation and found him competent to stand trial. The trial judge ordered the prosecutor to provide her with a disc of the phone conversations and stated that if she ultimately determined that Mr. Smith's competency was called into question after listening to the disc, she would stop the trial.[2] Mr. Smith then made a pro se motion for a continuance, which the trial court summarily denied due to the fact that the jury panel was waiting to enter the courtroom. After a brief recess wherein the trial judge listened to the recordings, the trial judge stated as follows:

> We're on the record right now, Mr. Smith, and I want you to know that I actually listened to the phone calls you made over the weekend, and based upon listening

[2] The trial judge did contemplate that stopping the trial would raise an issue of whether jeopardy had attached, but concluded that "that would be an issue for someone else to decide."

> to those calls, including all the detail that you communicated, I am firmly convinced that you are competent to stand trial.

The prosecutor then played for Mr. Smith and his defense counsel a portion of the phone conversation in which Mr. Smith makes what can be described as an admission of guilt. After listening to the phone conversation, another brief recess was taken so that Mr. Smith could speak with his defense counsel. Following the recess, the potential jurors entered the courtroom and the trial court commenced with voir dire. Mr. Smith did not object to the trial court's finding that he was competent to stand trial.

{¶13} It is undisputed that Mr. Smith made his request for a competency evaluation before his trial commenced. *See State v. Scott*, 8th Dist. Cuyahoga No. 100980, 2014-Ohio-4925, ¶ 30, citing *State v. Austin*, 7th Dist. Mahoning No. 09MA167, 2010-Ohio-6583, citing *State v. Murphy*, 173 Ohio App.3d 221, 2007-Ohio-4535 (12th Dist.) (holding that a competency request made on the day of trial and immediately before the jury voir dire is a request made prior to trial and, as such, warrants a hearing). However, a competency hearing may take place immediately. *Scott* at ¶ 31; *Austin* at ¶ 34 (finding that the unambiguous language of R.C. 2945.37 does not prohibit a competency hearing from occurring on the same day as the request).

{¶14} Here, we find that a competency hearing did in fact occur in this case prior to trial. Mr. Smith was represented by counsel. The hearing occurred within thirty days of Mr. Smith's request, and it does not appear that the trial judge prevented any evidence or argument concerning the issue of competency. To the contrary, the trial judge allowed both parties to make their respective arguments and allowed the prosecuting attorney to introduce evidence of Mr. Smith's two phone conversations. The fact that Mr. Smith did not attempt to introduce any evidence in support of his contention that he was incompetent to stand trial does not mean that he was precluded from doing so. While the trial judge did not order a psychological evaluation of

Mr. Smith, she was not required to do so. *Scott* at ¶ 33. Lastly, the trial judge found Mr. Smith competent to stand trial. Therefore, because the trial court conducted a competency hearing as required under R.C. 2945.37(B), and because that hearing met all the requirements of R.C. 2945.37, we conclude that the trial court did not abuse its discretion in denying Mr. Smith's request for a competency evaluation.

{¶15} Mr. Smith's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> APPELLANT'S CONVICTION WAS BASED UPON INSUFFICIENT EVIDENCE TO SUSTAIN CONVICTION. THE TRIAL COURT ERRED BY DENYING APPELLANT'S CRIM.R. 29 MOTION.

{¶16} In his second assignment of error, Mr. Smith argues that his conviction for robbery was based on insufficient evidence and that the trial court erred in denying his Crim.R. 29 motion for acquittal. Specifically, Mr. Smith contends that the State failed to present sufficient evidence to demonstrate that "force" or a "threat of an immediate use of force" was used in the commission of a theft offense to support a finding of guilt on the charge of robbery. We disagree.

{¶17} "We review a denial of a defendant's Crim.R. 29 motion for acquittal by assessing the sufficiency of the State's evidence." *State v. Frashuer*, 9th Dist. Summit No. 24769, 2010–Ohio–634, ¶ 33. The issue of whether a conviction is supported by sufficient evidence is a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production. *Id.* at 390 (Cook, J., concurring). In making this determination, an appellate court must view the evidence in the light most favorable to the prosecution:

> 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.

State v. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy." *Thompkins* at 386.

{¶18} As it applies to Mr. Smith's case, R.C. 2911.02(A)(3) states that "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [u]se or threaten the immediate use of force against another." The State is not required to prove a culpable mental state with respect to the force element in R.C. 2911.02(A)(3). *State v. Tolliver*, 140 Ohio St.3d 420, 2014-Ohio-3744, paragraph one of the syllabus. Force is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). However, the Ohio Supreme Court has held that:

> The use or threat of immediate use of force element of the offense of robbery * * * is satisfied if the fear of the alleged victim was of such a nature as in reason and common experience is likely to induce a person to part with property against his will and temporarily suspend his power to exercise his will by virtue of the influence of the terror impressed.

State v. Davis, 6 Ohio St.3d 91 (1983), paragraph one of the syllabus. A defendant's actions and demeanor may support a finding of a threat of force. *State v. Bentley*, 69 Ohio App.3d 33, 36 (9th Dist.1990), citing *State v. Carter*, 29 Ohio App.3d 148, 150 (9th Dist.1985). In regard to whether a criminal defendant charged with robbery has threatened an immediate use of force, "evidence of whether the victim actually perceived a threat is not necessary; evaluation of the nature of a threat is subject to an objective, not subjective, test." *State v. Sumlin*, 8th Dist.

Cuyahoga No. 76261, 2000 WL 776986 (June 15, 2000), citing *Davis* at 94; *State v. Habtemariam*, 103 Ohio App.3d 425, 429 (10th Dist.1995).

{¶19} Applying the above standard, the evidence produced at trial, when viewed in its totality, supports Mr. Smith's robbery conviction beyond a reasonable doubt. During the bank robbery, Mr. Smith stole $4,000.00 from FirstMerit Bank. To carry out this theft, he wore a bulky black jacket and disguised himself by wearing a ski mask, hat, and sunglasses. Upon entering the bank, Mr. Smith scribbled a demand note on a deposit slip, walked directly up to the teller window, and slid the note to the teller, nudging two individuals out of his way while in the process. After sliding the demand note to the teller, the customer testified that the suspect ordered the teller on more than one occasion to give him the money. Ms. Hinkle testified that the manner in which the suspect was dressed, coupled with his actions, made her feel nervous and caused a feeling of compulsion to comply with the demand note. Ms. Hinkle, Ms. Hosey, and the customer all testified they were afraid that the suspect was armed because of his actions and how he was dressed. Ms. Hinkle stated that Mr. Smith was in total control of the situation and that she did not attempt to give Mr. Smith any bait money or dye packs because his note specifically demanded currency from the "bottom drawer," which indicated to her that he had knowledge that the bottom drawer is where the bank kept its overflow cash.

{¶20} Mr. Smith's conduct is the quintessential hallmark of a bank robbery. This Court determines that, in the aggregate, Mr. Smith's actions constituted either a use of force or a threat of an immediate use of force that would cause sufficient fear within a reasonable person and induce that person to part with her property and temporarily suspend her power to exercise her will. As such, we determine that the trial court did not err in denying Mr. Smith's Crim.R. 29 motion.

{¶21} Mr. Smith's second assignment of error is overruled.

III.

{¶22} Mr. Smith's assignments of error are overruled, and 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(C). 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.

JULIE A. SCHAFER
FOR THE COURT

HENSAL, P. J.
CARR, J.
CONCUR.

APPEARANCES:

ALAN M. MEDVICK, Attorney at Law, for Appellant.

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