[Cite as *State v. Freeman*, 2012-Ohio-2244.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-T-0059**
- vs -	:	
MICHAEL D. FREEMAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 11 CR 04.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.,

{¶1} Appellant, Michael D. Freeman, appeals from the judgment of conviction entered by the Trumbull County Court of Common Pleas, after trial by jury, on one count of aggravated robbery. For the reasons that follow, we affirm.

{¶2} Appellant was indicted on one count of aggravated robbery, a first-degree felony, in violation of R.C. 2911.01(A)(1)(3). A jury trial followed.

{¶3} At trial, the following was adduced through testimony: On December 21, 2010, appellant entered the Sears department store inside the Eastwood Mall in Niles, Ohio. Paul Avery and Jordan Wert, two employees working "loss prevention" at the department store, watched from security surveillance as appellant entered the electronics department. The department sells MP3 players (a small portable electronic device). A security device keeps the players locked onto a display arm. As such, a prospective buyer would have to locate a store clerk to complete a purchase. The store clerk would then unlock the security device using a store key and take the MP3 player to the register. Appellant gained access to an MP3 player, valued at $89.99, without a store key. Instead, he used a sharp object to cut the plastic tag around the MP3 player, thereby removing it from the security mechanism. Appellant left the store without paying and entered the mall's concourse. Mr. Avery and Mr. Wert left their surveillance posts, and quickly pursued appellant on foot.

{¶4} Once in the concourse, Mr. Wert stopped appellant and told him that the store was aware of the stolen merchandise. Mr. Avery asked appellant to return to the store. As the trio walked back towards the store, appellant reached into his pocket, pulled out an object, and took a swing at Mr. Avery, who was walking alongside him. Mr. Wert, hearing a clicking sound, turned around and immediately identified the item in appellant's hand as a box cutter. He quickly shouted out to his co-worker that appellant had a weapon. Appellant took additional shots at the men, although testimony differs as to the precise number of swings. The two men disengaged pursuit and, instead, followed appellant at a safe distance because they are trained not to engage an armed suspect. Mr. Wert called the police. Appellant exited the mall and was detained in the

Sears parking lot by responding officer Les Nagy, who was situated nearby when he heard the call. Officer Nagy found a cell phone and a pair of wire cutters on appellant. The MP3 player was recovered in a snowy bank near a parked car in the parking lot. The box cutter was never located. Neither employee sustained injuries from the attack. The defense conceded that appellant had stolen the MP3 player, but argued that no weapon was used and that the two employees had no right to detain him.

{¶5} As the trial testimony of Mr. Avery, Mr. Wert and Officer Nagy concluded, the attorneys met at sidebar to discuss jury instructions. There, trial counsel informed the court that he had discussed requesting jury instructions of the lesser included offense of robbery with appellant, advising him of the "pros and cons." Trial counsel stated that appellant did not want him to make the request for lesser included offenses. It is not clear what lesser included offenses other than robbery trial counsel discussed with appellant as there was no post-conviction proceeding of any kind.

{¶6} Appellant was thereafter found guilty of aggravated robbery and was sentenced to ten years in prison. He now appeals and asserts three assignments of error. For ease of discussion, appellant's assignments will be addressed in reverse order.

{¶7} Appellant's third assignment of error states:

{¶8} "The appellant's conviction is against the manifest weight of the evidence."

{¶9} To determine whether a verdict is against the manifest weight of the evidence, a reviewing court must consider the weight of the evidence, including the credibility of the witnesses and all reasonable inferences, to determine "whether the jury lost its way and created such a manifest miscarriage of justice that the conviction must

be reversed and a new trial ordered." *State v. Thompkins,* 78 Ohio St.3d 380, 387 (1997). In weighing the evidence submitted at a criminal trial, an appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶10} Further, "[n]o conviction resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the appeal." *Webber v. Kelly*, 120 Ohio St.3d 440, 2008-Ohio-6695, ¶6. (Citations omitted.)

{¶11} Specifically, appellant argues that the two eyewitnesses, Mr. Avery and Mr. Wert, did not actually view him dispose of a box cutter in the mall's snow-covered parking lot, even though the witnesses followed behind him. This would logically mean, appellant contends, that Officer Nagy would have found a box cutter on appellant's person. Appellant concludes that, because a box cutter—the aggravating factor—was not ever located on him or in the parking lot, the verdict is against the weight of the evidence.

{¶12} As a preliminary matter we note that "[p]roof of the existence of a deadly weapon does not require that the state actually come into possession of the weapon—the fact required to be proved may be inferred from other evidence." *State v. Haskins*, 6th Dist. No. E-01-016, 2003-Ohio-70, ¶41, citing *State v. Boyce*, 21 Ohio App.3d 153, 154 (1985) and *State v. Vondenberg*, 61 Ohio St.2d 285, 288 (1980).

{¶13} Here, evidence indicated that appellant was armed with a box cutter, a deadly weapon pursuant to R.C. 2923.11. First, the MP3 player's plastic tag was cut

using a sharp object to detach it from the security device. The recovered MP3 player was entered into evidence before the jury. The item is very clearly damaged as though it had been cut by a sharp object. Second, both Mr. Avery and Mr. Wert testified that the object in appellant's hand was not a cell phone or wire cutters, but a box cutter. Mr. Wert testified to hearing the clicking noise of the protracting blade. Mr. Avery testified that he *at first* could not be sure what the object was as it came out of appellant's pocket, but quickly thereafter could see the item was a box cutter. Third, the two witnesses stated that they vigorously pursued appellant into the mall's concourse, only to let him walk free. This action is consistent with their account of appellant brandishing a deadly weapon.

{¶14} Additionally, Officer Nagy testified that he did not search the entire parking lot for the box cutter because it would have been too time-consuming, especially considering that the lot was covered in dirty snow, filled with cars, and lined with snow banks. Further, the jury was only presented with one version of events. Mr. Avery's and Mr. Wert's testimony about specifically seeing a box cutter went uncontroverted and was obviously deemed credible by the jury. Thus, we cannot conclude that the jury lost its way in returning a guilty verdict. Instead, the jury's verdict was the product of the evidence before it. Appellant's third assignment of error is without merit.

{¶15} Appellant's second assignment of error states:

{¶16} "The trial court committed plain error by failing to instruct the jury on the lesser included offense of theft."

{¶17} As a general matter, R.C. 2945.74 states that a criminal defendant may be found guilty of a lesser included offense even if that offense was not set forth in the

charging instrument. *See State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, ¶8. However, A jury instruction on a lesser included offense is only required if the evidence would reasonably support a conviction on the lesser included offense, as well as an acquittal on the indicted offense. *State v. Thomas*, 40 Ohio St.3d 213 (1988), paragraph two of the syllabus.

{¶18} Whether the evidence presented at trial is sufficient to require a particular instruction is a determination that falls within the sound discretion of the trial court. *State v. Strickland*, 11th Dist. No. 2005-T-0002, 2006-Ohio-2498, ¶24, citing *State v. Mitts*, 81 Ohio St.3d 223, 228 (1998). As a result, this court will not disturb a ruling of the trial court absent an abuse of discretion.

{¶19} Appellant did not object to the instructions given to the jury at trial. Accordingly, he has waived all but plain error, pursuant to Crim. R. 52(B). "Plain error is present only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different." *State v. Turner*, 11th Dist. No. 2010-A-0060, 2011-Ohio-5098, ¶34, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶108.

{¶20} Appellant argues that the court should have, sua sponte, instructed the jury on the lesser included offense of theft pursuant to R.C. 2913.02(A), a first-degree misdemeanor. R.C. 2913.02(A) provides:

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

{¶22} Appellant correctly notes that theft, as defined in R.C. 2913.02, is a lesser included offense of aggravated robbery, as was expressly held by this court after a lengthy discussion in *State v. Smith*, 11th Dist. No. 2008-T-0023, 2008-Ohio-6998, ¶97. As such, we must determine whether the court committed plain error in not instructing the jury on the offense of theft. Here, the trial court made the record clear:

{¶23} "[E]ven if neither the prosecution [n]or the defense had requested a lesser included offense, if the court in listening to the evidence found that there was credible evidence that would lead one to believe that there should be a lesser included offense, then the court would be obligated on its own to put that lesser included offense in, even if not requested. However, I think I should make the record clear as to why the court is going to allow the defense request to not allow a lesser included offense, and that is simply because the evidence from the eyewitnesses in this case * * * both indicated that there was a weapon—a box cutter; there was nobody who testified in this case who was a witness to the incident that testified differently. * * * [A]ll the evidence indicated there was a box cutter and no evidence to the contrary."

{¶24} As indicated above, we agree with the assessment of the trial court regarding the weight of the evidence. As the court pointed out at sidebar, there would be several scenarios where it would be obligated to issue an instruction on a lesser included offense even absent a request: if appellant or another eyewitness had testified that there was no box cutter, in direct contradiction to the other witnesses; if Mr. Wert or Mr. Avery during cross examination was unclear or uncertain in indicating that there was a box cutter; or if Mr. Wert or Mr. Avery had been impeached by a prior inconsistent statement concerning a box cutter. However, none of those things happened.

{¶25} Based on a review of the foregoing, as well as the complete transcript, we conclude that the court did not commit plain error in not instructing the jury on the offense of theft. In fact, the court acted well within its discretion in only instructing the jury on aggravated robbery because there is insufficient evidence in the record that would justify the use of an instruction on the lesser included offense of theft. Appellant's second assignment of error is without merit.

{¶26} Appellant's first assignment of error states:

{¶27} "The appellant received ineffective assistance of counsel in violation of his rights pursuant to the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution."

{¶28} In order to prevail on an ineffective assistance of counsel claim, appellant must demonstrate that trial counsel's performance fell below an objective standard of reasonable representation, and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus, adopting the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). If a claim can be disposed of by showing a lack of sufficient prejudice, there is no need to consider the first prong, i.e., whether trial counsel's performance was deficient. *Id.* at 142, citing *Strickland* at 695-696. There is a general presumption that trial counsel's conduct is within the broad range of professional assistance. *Id.* at 142-143.

{¶29} Appellant claims trial counsel was ineffective for two reasons. First, appellant claims his counsel was ineffective because he apparently did not consider the crime of theft a lesser included offense, but allegedly only discussed the prospect of a

robbery lesser-included instruction. We note that the record is not clear on exactly what lesser included offenses other than robbery trial counsel discussed with appellant and, without the benefit of a post-conviction proceeding, it is impossible to determine. However, the point is moot because, as explained above, a theft instruction would be inapplicable to the case given the evidence of a deadly weapon and no evidence to the contrary. Further, the trial court made it clear that, even if the defense had requested an instruction for a lesser included offense, the court would have rejected it. That is, the result of the proceeding would not have been different had trial counsel ignored appellant's wishes and nonetheless requested jury instructions for lesser included offenses.

{¶30} Second, appellant claims counsel was ineffective because, though he knew there would be no instruction on lesser included offenses, he nonetheless conceded that appellant was guilty of some sort of theft offense. However, the trial evidence clearly indicated that appellant did, in fact, steal the item. There was surveillance video of appellant acting suspiciously, bending over the merchandise and leaning behind the display shelf. There was also the recovered MP3 player, which was damaged at the top, evidencing that it was cut to remove the security device. Thus, there would be no difference in the outcome had trial counsel not conceded that appellant stole the MP3 player because the state would have still introduced that evidence. Appellant's first assignment of error is without merit.

{¶31} The judgment of the Trumbull County Court of Common Pleas is affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.