

[Cite as *State v. Hill*, 2010-Ohio-1687.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-398
v.	:	(C.P.C. No. 08CR03-1889)
	:	
Mark A. Hill,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 15, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins IV*,
for appellee.

Robert C. Bannerman, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Mark A. Hill ("Hill"), appeals his conviction for felonious assault in the Franklin County Court of Common Pleas. For the following reasons, we affirm.

{¶2} The Franklin County Grand Jury indicted Hill on two counts of felonious assault, in violation of R.C. 2903.11, felonies of the second degree, as the result of an

altercation outside of Brew-Stirs Tavern ("Brew-Stirs") in Columbus, Ohio, on March 5, 2008. A third count charged Hill with harassment by bodily substance, in violation of R.C. 2921.38, a felony of the fifth degree. Hill entered a plea of guilty to Count 3 of the indictment, and a jury trial was held on the felonious assault charges. The jury found Hill guilty of felonious assault against Michael Newman ("Michael"), as charged in Count 1 of the indictment, and not guilty of felonious assault against Kyle Smith ("Kyle"), as charged in Count 2 of the indictment. The trial court sentenced Hill to seven years imprisonment on Count 1 and 12 months imprisonment on Count 3, with the sentences to run consecutively.

{¶3} On the evening of March 4, 2008, Hill and his friend, Rondale Massey ("Rondale"), arrived at Brew-Stirs shortly after 8:00 p.m. and began drinking pitchers of beer. Hill had consumed approximately seven alcoholic beverages that day before arriving at Brew-Stirs. Sometime after 11:00 p.m., Michael and his girlfriend, Angela Theado ("Angela"), Kyle and his girlfriend, Emily Boyle ("Emily"), and several of Angela's co-workers arrived at Brew-Stirs to sing karaoke. Hill testified that, during the course of the evening, he flirted with the girls in that group. Toward the end of the evening, Hill bought Emily a shot, which she accepted. There was no conflict in the bar throughout the evening.

{¶4} After last call, Hill followed Emily outside, where Emily immediately joined Michael and Angela who were standing to the left of the front door. There was testimony that Kyle was also outside, leaning against the building, although Hill did not see him. Sensing that Emily wanted someone to intervene between her and Hill,

Michael stepped in front of Hill, and a struggle ensued. Michael testified that the two began to struggle after Hill grabbed Michael's jacket. Hill described the struggle as "a shoving match," but did not know who started it. (Tr. 449, 493.) Hill testified that, during the shoving match, he was "suckerpunched from the left side of [his] body in the face" by an unknown person and grabbed Michael to keep his balance, but he was being forced toward the ground. (Tr. 449.) At that moment, Hill grabbed the box cutter that he routinely carried in a sheath on his belt and, with his right hand, threw a punch with it. Michael initially thought he had simply been punched, but, when Hill raised his arm again, he saw the box cutter and began to taste blood. Michael was cut from the apple of his left cheek down through his upper lip. Michael denied that anyone else was involved in the struggle before Hill cut him.

{¶5} After being cut, Michael grabbed Hill's wrist and tried to pin him to the wall, at which time Kyle intervened and tried to tackle Hill and Michael from the left. In the fall, Michael lost his grip on Hill's right hand, which held the box cutter, and he suffered a cut on his hand. With his right hand free, Hill began slashing with the weapon. Hill testified, "I had been forced physically to the ground by two individuals, so I guess I'm swinging both hands, basically trying, I guess, to punch fight" with the box cutter. (Tr. 455.) Michael testified that Hill slashed at Kyle's head, that "Kyle was retreating and holding his arms with his elbows bent around his head," and that Kyle exclaimed, " 'I'm cut.' " (Tr. 53-54.) Kyle testified that he felt the left side of his face become "really hot" and, looking down, noticed his coat was "soaked with blood." (Tr. 192.) Kyle sustained

two approximately two-inch cuts above his right ear, under the hairline, and the cuts required staples.

{¶6} As Hill was slashing at Kyle, Michael flipped Hill face down onto the ground, elbowed him in the back of the head three to four times, knocked the box cutter from his hand, and hit him three to four more times in the back of the head to ensure "that he was unconscious and not going to continue the fight." (Tr. 55.) After Michael backed away from Hill, taking Angela with him, Rondale picked Hill up, and the two walked southbound on the sidewalk, leaving footprints in the snow. After the police arrived and spoke with witnesses, Officer Todd Aiello followed the footprints in the snow to a parked white van several streets away. One set of footprints went toward the driver's side of the van, and the other went toward the passenger side. Officer Aiello observed two men asleep in the van and called for backup, after which both Hill and Rondale were arrested. Despite initially lying to detectives about his involvement in the fight, at trial Hill admitted his involvement, but argued that he acted in self-defense.

{¶7} Hill timely appealed his conviction, and he raises the following assignments of error:

1. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL[.]
2. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]
3. APPELLANT'S GUILTY VERDICT WAS STATUTORILY DEFECTIVE AND VOID[.]

{¶8} Before turning to Hill's assignments of error, we briefly address a pro se motion filed by Hill on February 11, 2010, in which Hill requests that this court take

judicial notice of various documents attached to the motion. Those documents include a new, pro se appellate brief and other documents, including letters addressed from Hill to his attorney and to the Director of the Correctional Institution Inspection Committee. First, the attachments to Hill's motion do not qualify for judicial notice under Evid.R. 201(B), which permits judicial notice only of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Moreover, while a criminal defendant has a right to act pro se or to have counsel, he has no right to "hybrid representation," and, where appointed counsel files a merit brief on behalf of a defendant-appellant, the appellant is not entitled to file an additional brief pro se. See *State v. Saaty* (Mar. 4, 1997), 10th Dist. No. 96APA06-777, citing *State v. Thompson* (1987), 33 Ohio St.3d 1, 6-7. Finally, because an appellate court's review is limited to the certified record, the court cannot add matter that was not part of the trial court proceedings, and then decide the appeal based on the new matter. *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus. Accordingly, we may not consider the submitted documents that were not part of the certified record from the trial court. For these reasons, we deny Hill's motion and proceed to our discussion of his assignments of error.

{¶9} By his first assignment of error, Hill contends that he received ineffective assistance of trial counsel. The United States Supreme Court has established a two-pronged test for ineffective assistance of counsel. See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, the defendant must show that counsel's

performance was outside the range of professionally competent assistance and, therefore, deficient. *Id.* at 687, 104 S.Ct. at 2064. In evaluating allegations of deficient conduct by counsel, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, 104 S.Ct. at 2065, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Strickland* at 687, 104 S.Ct. at 2064. A defendant establishes prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. The Supreme Court of Ohio has adopted the two-prong *Strickland* analysis for determining whether counsel's assistance was so defective as to require reversal of a conviction. See *State v. Smith* (1985), 17 Ohio St.3d 98; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶10} Hill argues that his trial counsel performed deficiently in the following ways: (1) by waiving his right to a speedy trial without consent; (2) waiving a record of voir dire; (3) not fully arguing a Crim.R. 29 motion at the close of the state's case; (4) improperly introducing evidence of Hill's prior conviction; (5) not obtaining expert evidence to support Hill's self-defense theory; (6) not objecting to hearsay testimony; and (7) not objecting to a supposed hypothetical question posed to Hill on cross-

examination. Hill also argues that his counsel's errors, together, give rise to cumulative error, warranting reversal.

{¶11} Hill first argues that his counsel performed deficiently by tolling his speedy trial rights without consent. Hill filed pro se motions to dismiss and for a speedy trial on July 8, 2008. The trial court denied Hill's speedy trial motion, but did not address his motion to dismiss. Before Hill filed those motions, his counsel, who was subsequently replaced, twice moved for and was granted continuances for investigation and trial preparation. From July 30, 2008, Hill's substituted counsel requested and was granted five additional continuances, each of which bore Hill's signature, evidencing his consent. Hill's signature, however, does not appear on the first two continuances, filed by his original attorney, and he argues that those continuances should not have operated to toll the speedy trial time.

{¶12} The state is required to bring a defendant to trial on a felony charge within 270 days of arrest, but each day the defendant is held in jail in lieu of bail counts as three days. R.C. 2945.71(C) and (E). Certain events delineated in R.C. 2945.72, including continuances as a result of defense motions and reasonable continuances granted other than upon the defendant's request, will toll the time set forth in R.C. 2945.71. In addition to statutory speedy trial requirements, a defendant is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶32. Ohio's statutory

speedy trial provisions "constitute a rational effort to enforce the constitutional right to a public speedy trial." *State v. Pachay* (1980), 64 Ohio St.2d 218, syllabus.

{¶13} " 'A defendant's right to be brought to trial within the time limits expressed in R.C. 2945.71 may be waived by his counsel for reasons of trial preparation[,] and the defendant is bound by the waiver even though the waiver is executed without his consent.' " *State v. Brime*, 10th Dist. No. 09AP-491, 2009-Ohio-6572, ¶17, quoting *State v. McBreen* (1978), 54 Ohio St.2d 315, syllabus. Based on *Taylor* and *McBreen*, this court has rejected arguments that an attorney's waiver of speedy trial time was ineffective simply because the defendant did not consent to the waiver. See *Brime* at ¶18. This court has further held that time is tolled even where the defendant expressly objects to a reasonable continuance requested by his or her attorney. See *State v. Wade*, 10th Dist. No. 03AP-774, 2004-Ohio-3974, ¶13, citing *State v. Eager* (May 2, 1996), 10th Dist. No. 95APA09-1165. Here, Hill has not argued that the continuances requested were unreasonable.

{¶14} In *Brime*, this court rejected an argument that the defendant's speedy trial rights were violated where the defendant did not consent to various continuances and filed a pro se motion to dismiss. This court further found unpersuasive the defendant's argument that his trial counsel was ineffective in authorizing continuances, waiving the defendant's right to a speedy trial, without the defendant's consent. After concluding that neither the defendant's lack of consent to the continuances nor the defendant's pro se filing of a motion to dismiss affected the validity of his counsel's waiver of speedy trial rights, the court noted that waiver of the right to a speedy trial through a motion for a

continuance may generally be considered sound trial strategy. Accordingly, this court concluded that the defendant failed to establish either deficient performance by his counsel or prejudice as a result of his counsel's actions.

{¶15} As in *Taylor*, *McBreen*, and *Brime*, counsel's waiver of speedy trial time for the requested continuances binds Hill, even where Hill did not expressly consent to the request or the continuance. "[T]here is a presumption that waiver [of speedy trial time] is a sound trial strategy, 'especially when the purposes of the waiver are for trial preparation.'" *Brime* at ¶40, quoting *State v. Shepherd*, 11th Dist. No. 2003-A-0031, 2004-Ohio-5306, ¶31. Hill has not demonstrated deficient performance by his counsel regarding either the tolling or waiver of speedy trial time, nor has he demonstrated prejudice as a result of his counsel's actions.

{¶16} Hill next argues that his counsel's waiver of the presence of a court reporter to record voir dire proceedings constituted deficient representation. Counsel does not, however, have a duty to record voir dire proceedings. See *State v. Barker* (May 9, 1996), 10th Dist. No. 95APA09-1209, citing *State v. Schwarzbach* (Nov. 6, 1990), 10th Dist. No. 89AP-1504 (noting the common practice in non-capital cases to waive the presence of a court reporter for voir dire), and *State v. Robertson* (July 31, 1979), 10th Dist. No. 78AP-584. As such, the waiver of a record of voir dire does not rise to the level of deficient performance. Even if counsel's waiver of a record of voir dire could be considered deficient, however, Hill does not argue any specific error in voir dire or any specific prejudice arising out of the lack of a record. Moreover, establishing such prejudice would require proof outside the trial court record. Because our review is

confined to the trial record, that claim would not appropriately be considered on direct appeal. See *State v. Morales*, 10th Dist. No. 03AP-318, 2004-Ohio-3391, ¶29. Where a defendant claims ineffectiveness based on facts outside the record, the General Assembly has provided a procedure for post-conviction relief, under R.C. 2953.21, whereby a defendant may present other evidence of counsel's ineffectiveness. See *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228.

{¶17} Hill's third allegation of deficient performance, that counsel waived argument in support of his Crim.R. 29(A) motion for acquittal at the conclusion of the state's case, is similarly unpersuasive. A Crim.R. 29 motion for acquittal tests the sufficiency of the evidence. *State v. Darrington*, 10th Dist. No. 06AP-160, 2006-Ohio-5042, ¶15. Hill does not specify what his counsel should have argued in support of his Crim.R. 29 motion, nor does he articulate how he was prejudiced by the lack of argument. Indeed, Hill proceeded to take the stand and essentially admit to the felonious assault, subject to his claimed justification of self-defense. Especially in light of our conclusion below, that Hill's conviction was supported by the manifest weight of the evidence, Hill cannot demonstrate that he was prejudiced as a result of his counsel's strategic decision to make, but not offer additional argument in support of, a Crim.R. 29(A) motion.¹

{¶18} Hill next argues that his counsel's performance was deficient because counsel did not request, pursuant to Crim.R. 16(B)(1)(g), in camera inspections of prior statements by the state's witnesses to determine the existence of inconsistencies.

¹ A finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency of the evidence. *State v. Sowell*, 10th Dist. No. 06AP-443, 2008-Ohio-3285, ¶89.

Accordingly, Hill maintains that any inconsistencies were not fully explored and tested under cross-examination. Hill, however, does not identify any specific inconsistencies or explain how he was prejudiced by the supposed deficiency in his counsel's representation, where Hill's counsel cross-examined each of the state's witnesses and emphasized inconsistencies between the witnesses in arguments to the court and jury. Hill's vague claim provides no basis upon which we can evaluate his counsel's performance in that regard or address the question of resulting prejudice. See *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶218. Thus, we conclude that Hill has not demonstrated that his counsel's performance was deficient.

{¶19} The remainder of Hill's allegations of deficient performance by his attorney stem from evidentiary issues. Hill suggests that his counsel performed deficiently by questioning him about a prior felony conviction for drug possession in 1997. Evid.R. 609 generally permits impeachment of a witness, including a defendant, with evidence of the witness' prior conviction of a crime involving dishonesty or false statement where not more than ten years has elapsed since the latter of the date of the previous conviction, the witness' release from confinement or the termination of community control, post-release control, probation, shock probation, parole or shock parole. It is a reasonable strategy for an attorney to question his client about a prior conviction. See *State v. Hines*, 8th Dist. No. 90125, 2008-Ohio-4236 (refusing to find defense counsel's introduction of prior convictions deficient, even where the prior convictions may not otherwise have been presented to the jury in that case). Here, it reasonable to assume that, had Hill's counsel not questioned him about the prior conviction, the prosecution

would have. It is unclear whether Hill is suggesting that his 1997 conviction was inadmissible based on the ten-year time limitation in Evid.R. 609, but the record does not contain any evidence from which this court can resolve that question. While Hill's prior conviction was more than ten years old, there is no evidence of when Hill's imprisonment, community control, post-release control, probation, shock probation, parole or shock parole terminated. Hill's vague argument does not overcome the presumption that his counsel's questioning was the product of sound trial strategy and falls within the wide range of professional assistance.

{¶20} Hill also argues that his attorney's performance was deficient because he did not retain an expert witness to testify about the effect of Hill's pre-existing leg injury and about the extent of injury a box cutter could inflict. Hill does not explain what evidence an expert would offer or how expert evidence would have affected his self-defense claim. Where "[n]othing in the record indicates what kind of testimony an [expert witness] could have provided," resolving the issue of whether counsel was deficient in failing to employ an expert is "purely speculative." *State v. Madrigal*, 87 Ohio St.3d 378, 390-91, 2000-Ohio-448. See also *State v. Hillman*, 10th Dist. No. 06AP-1230, 2008-Ohio-2341, ¶55, citing *Madrigal*; *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶221 (rejecting as conjectural an ineffective assistance claim based on defense counsel's failure to request funds for an expert). Additionally, establishing what an expert would have testified to would require proof outside the record. Thus, Hill's claim of ineffective assistance based on the failure to retain and call an expert witness is not appropriately considered on direct appeal. See *Madrigal* at 391.

{¶21} Hill's final claims of deficient conduct by his attorney involve the lack of objections to Michael's testimony that, during the altercation, Kyle exclaimed, "I'm cut," and to the prosecution's questioning of Hill about the potential effects of a punch. First, Hill maintains that Michael's testimony regarding Kyle's exclamation constituted inadmissible hearsay. Michael testified that, after Kyle intervened in the struggle, Hill was slashing at Kyle's head and that Kyle retreated, exclaiming that he had been cut. Although he did not specifically remember intentionally cutting Kyle, Hill testified that, to the best of his recollection, he cut both Michael and Kyle. Even assuming that Michael's testimony regarding Kyle's statement is not admissible as an excited utterance under Evid.R. 803(2), as urged by the state, we cannot conclude either that Hill's counsel was deficient by failing to object to that testimony or that Hill suffered prejudice as a result. A failure to object to error, alone, is insufficient to sustain a claim of ineffective assistance of counsel. *State v. Mickens*, 10th Dist. No. 08AP-626, 2009-Ohio-1973, ¶29, citing *Hale* at ¶233. "Because 'objections tend to disrupt the flow of a trial, [and] are considered technical and bothersome by the factfinder * * * competent counsel may reasonably hesitate to object in the jury's presence.' (Citation omitted.)" *Mickens* at ¶29, quoting *State v. Campbell*, 69 Ohio St.3d 38, 53, 1994-Ohio-492. Furthermore, Hill was not prejudiced by Michael's testimony because the fact that Hill cut Kyle with the box cutter was corroborated by other evidence, including Kyle's own testimony, and Hill did not deny that fact. Accordingly, counsel's decision not to object to Michael's testimony is presumed effective. Although Hill references other testimony under his hearsay

argument, he does not explain the basis for any appropriate objection or argue any prejudice as a result of his counsel not objecting to that testimony.

{¶22} We similarly conclude that Hill has not overcome the presumption of effective representation based on the lack of an objection to the prosecutor's questioning of Hill's belief of imminent threat of death or serious bodily harm prior to unsheathing the box cutter. The following exchange occurred during Hill's cross-examination:

Q. You have been punched before, I assume, correct?

A. It's been a long time.

Q. You survived that punch. Obviously, you're here before us today?

A. Yes.

Q. A punch in itself isn't enough to make you think that your life is at stake, right?

A. I guess it would depend on the circumstances, really. I haven't been to a lot of fights, so I don't know at any given moment. I guess it just depends on the circumstances.

Q. But in these circumstances, you didn't think that you were going to die because you got punched in the face, did you?

A. Not from a punch, no.

(Tr. 501-02.) The basis for Hill's argument on appeal is a newspaper article published seven months after Hill's trial. We may not consider that article, which was not part of the trial court record. As with Hill's argument regarding Kyle's exclamation, counsel's decision of whether to object to particular testimony or questioning can be considered a

matter of sound trial strategy and does not support a claim of ineffective assistance of counsel. The issue of whether Hill reasonably believed he was in imminent threat of death or serious bodily harm was central to Hill's claim of self-defense, and we will not second-guess counsel's decision not to object to the prosecutor's questions, which go directly to that issue.

{¶23} Because Hill has not established any example of deficient performance by his counsel, as required by *Strickland*, we discern no cumulative error as a result of the combined effect of the alleged instances of ineffective assistance. For these reasons, we overrule Hill's first assignment of error.

{¶24} By his second assignment of error, Hill maintains that his conviction was against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, we sit as a "thirteenth juror." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id.* Additionally, we 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.' " *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness

to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶25} Defining felonious assault, R.C. 2903.11(A) states that no person shall knowingly "[c]ause serious physical harm to another" or "[c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." Hill maintains that his conviction was against the manifest weight of the evidence in two respects. Specifically, he argues that the manifest weight of the evidence did not support a finding that he knowingly committed the offense or the use of a deadly weapon. Neither argument is persuasive.

{¶26} Hill first argues that the state failed to prove that he had the requisite mental state for felonious assault. To prove felonious assault, the state was required to demonstrate either that Hill knowingly caused serious physical harm or that he knowingly caused or attempted to cause physical harm by means of a deadly weapon. R.C. 2903.11(A). One "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." R.C. 2901.22(B). When determining whether a defendant acted knowingly, his state of mind must be determined from the totality of the circumstances surrounding the alleged crime. *State v. Inman*, 9th Dist. No. 03CA0099-M, 2004-Ohio-1420.

{¶27} Hill's only argument regarding mental state is that his intoxication at the time of the offense prevented him from acting knowingly, the mental state required to commit felonious assault. R.C. 2901.21(C), however, states, in part, as follows:

Voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. * * * Evidence that a person was voluntarily intoxicated may be admissible to show whether or not the person was physically capable of performing the act with which the person is charged.

This court has held that, since the General Assembly amended R.C. 2901.21 in 2000, "voluntary intoxication may no longer be taken into account in determining the existence of a mental state that is an element of a criminal offense." *State v. Melhado*, 10th Dist. No. 02AP-458, 2003-Ohio-4763, ¶48. See also *Inman* at ¶7 (holding that a voluntary intoxication defense is not applicable to a charge of felonious assault).

{¶28} Hill directs this court to the Fourth District Court of Appeals' opinion in *State v. Goad*, 4th Dist. No. 08CA25, 2009-Ohio-580, in which the court suggested that, despite the language of R.C. 2901.21(C), intoxication may, in fact, preclude the existence of a knowing mental state, as required for felonious assault. We reject Hill's reliance on *Goad*. Not only has this court held that courts may no longer take voluntary intoxication into account when determining the existence of a mental state that is an element of a criminal offense, see *Melhado* at ¶48, but the cases upon which the Fourth District relied predate the 2000 amendments to R.C. 2901.21, which added the controlling statutory language.

{¶29} Hill does not argue that his voluntary intoxication rendered him physically incapable of performing the act with which he was charged. To the contrary, he admitted the physical acts underlying his conviction, but argued that he acted in self-defense. Here, Hill argues only that his voluntary intoxication prevented him from maintaining the requisite mental state for felonious assault, the exact argument precluded by R.C. 2901.21(C). Thus, Hill has not demonstrated that the jury's finding of the requisite mental state for felonious assault was against the manifest weight of the evidence.

{¶30} Hill also contends that the state failed to prove that he utilized a deadly weapon. For purposes of felonious assault, "deadly weapon" has the same meaning as set forth in R.C. 2923.11, which 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(A); R.C. 2903.11(E)(1). A knife is not presumed to be a deadly weapon. *Columbus v. Dawson* (1986), 28 Ohio App.3d 45, 46. Rather, the prosecution must prove that the knife was designed or specially adapted for use as a weapon or, alternatively, that the defendant possessed, carried or used the knife as a weapon. *Id.*

{¶31} A box cutter may constitute a deadly weapon. *State v. Carter*, 8th Dist. No. 84036, 2004-Ohio-6861, ¶14, quoting *State v. Tucker*, 8th Dist. No. 81885, 2003-Ohio-3022. Here, on cross-examination, Hill not only agreed that the box cutter he carried was "capable of causing death," but also agreed that, during the altercation giving rise to the indictment, he "used it as a weapon" to cut the victims. (Tr. 473.)

Other witnesses also testified to Hill's use of the box cutter to cut the two victims during the altercation. Therefore, we reject Hill's argument that the state failed to prove use of a deadly weapon. Having rejected both of Hill's arguments regarding the manifest weight of the evidence, we overrule Hill's second assignment of error.

{¶32} In his third and final assignment of error, Hill argues that his guilty verdict was void because it violated R.C. 2945.75(A)(2), which states that, when an additional element enhances the degree of an offense, the "guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present." Where the guilty verdict does not state the degree of the offense or that an additional element is present, the verdict constitutes a finding of guilt to the least degree of the offense charged. Hill maintains that his verdict is defective because it did not include the degree of the offense of which he was found guilty or state that degree-enhancing elements were found. Hill, thus, argues that he could only be convicted of aggravated assault, a felony of the fourth degree. Hill's argument is unpersuasive.

{¶33} R.C. 2903.11(A) and (B) establish the offense of felonious assault. Felonious assault is a felony of the second degree absent the presence of enhancing elements listed in R.C. 2903.11(D). R.C. 2903.11(D)(1). If, for example, the victim of felonious assault under R.C. 2903.11(A) is a peace officer or an investigator of the bureau of criminal identification and investigation, the degree of the offense is enhanced to a felony of the first degree. R.C. 2903.11(D)(1)(a).

{¶34} "Pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, syllabus. In *Pelfrey*, the defendant was indicted for tampering with records, in violation of R.C. 2913.42. Tampering with records is a misdemeanor absent a finding that the tampering involved government records, which would elevate the offense to a third-degree felony pursuant to R.C. 2913.42(B)(4). In *Pelfrey*, the jury found the defendant guilty, and the trial court imposed a sentence for a third-degree felony. Neither the verdict form nor the trial court's verdict entry, however, stated the degree of the offense or that the jury found that the records tampered with were government records. Accordingly, based on R.C. 2945.75, the Supreme Court concluded that the defendant could only be convicted of the least degree of offense under R.C. 2913.42, a misdemeanor.

{¶35} In this case, the relevant verdict form states: "We, the Jury, being duly impaneled and sworn, do find the Defendant, Mark Hill, GUILTY OF FELONIOUS ASSAULT (Michael Newman) as he stands charged in Count One of the indictment." Count 1 of the indictment charged Hill with a violation of R.C. 2903.11, a felony of the second degree. The trial court sentenced Hill accordingly. Hill was not charged with any degree-enhancing elements contained in R.C. 2903.11(D), nor did the trial court purport to convict him of an enhanced-degree offense. Absent any degree-enhancing elements, felonious assault is a felony of the second degree. The indictment properly

charged Hill with felonious assault, in violation of R.C. 2903.11, and the trial court convicted Hill of the least degree of the charged offense. Accordingly, neither R.C. 2945.75 nor *Pelfrey* are applicable, and we overrule Hill's third assignment of error.

{¶36} Having overruled each of Hill's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Motion overruled and judgment affirmed.

TYACK, P.J., and SADLER, J., concur.
