[Cite as *State v. Matthews*, 2012-Ohio-1154.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-532
v.	:	(C.P.C. No. 10CR-04-2085)
Steven L. Matthews,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 20, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Kirk A. McVay, for appellant.

Steven L. Matthews, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Steven L. Matthews, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of one count of felonious assault and one count of domestic violence. Before this court is a counseled brief filed pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), and a pro se brief filed by appellant. For the reasons that follow, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} On April 1, 2010, a Franklin County Grand Jury indicted appellant on one count of felonious assault, one count of kidnapping, and one count of domestic violence. The charges arose out of a March 22, 2010 altercation involving the woman with whom appellant was living at that time. A jury trial began on July 19, 2010; however, a mistrial was declared during the jury's deliberations. Thereafter, appellant waived his right to a jury trial, and the matter was tried to the court on March 17, 2011.

{¶ 3} According to the evidence presented at trial, the victim, C.R., arrived at the emergency room at Doctors Hospital before dawn on March 22, 2010. C.R. presented with a number of injuries, including bruises to her face, arms, chest, buttocks, legs, and abdomen. Subsequent testing disclosed C.R. also had a fractured scapula. Though hospital personnel informed C.R. that it should be reported if her injuries were caused by domestic violence, C.R. denied that such was the cause and told hospital personnel her injuries were due to a fall down the stairs at home. Two days later, C.R. returned to the hospital for medical care and told hospital staff her March 22, 2010 injuries resulted from an assault.

{¶ 4} At trial, C.R. testified that she began living with appellant within a short time after they met late in the year of 2009. C.R. testified the relationship became tumultuous shortly after she moved into appellant's house. According to C.R., on the day in question, appellant asked her about money that he believed was missing from the house. When C.R. told appellant she knew nothing about the money, appellant picked her up and slammed her to the floor. Though she initially attempted to fight back, C.R. testified such attempts were futile. Appellant handcuffed C.R. behind her back and kicked her in the ribs. When asked again about the money, C.R. told appellant she sent the money to her mother. C.R. testified she lied about taking the money in an attempt to get appellant to let her go. However, instead of letting her go, C.R. testified appellant began hitting her with a belt that he obtained from the bedroom. According to C.R., appellant struck various parts of her body with the belt, "[p]robably 20 times, maybe." (Tr. 94.) While still lying handcuffed on the floor, appellant hit C.R. in the nose causing it to bleed. Appellant then handcuffed C.R. in the front of her body, and being unable to stand, C.R. sat on the floor against the wall. Appellant talked to C.R. about what had just occurred

and after saying she would not call the police or run away, appellant removed the handcuffs. Appellant told C.R. that "he lost control and he didn't mean for it to go that far." (Tr. 101.) Eventually, appellant drove C.R. to the hospital, and she told appellant she would tell the hospital staff that she fell down the steps. After they returned to appellant's house, appellant went to his sister's house, and C.R. called a friend, Quisha, to pick her up. Quisha took C.R. to the police station, and C.R. told the police what had happened.

{¶ 5} Appellant also testified at trial. According to appellant, he questioned C.R. about the missing money, and they got into an argument that prompted him to leave the house. After he returned, there was "more bickering back and forth" and "disrespectful words toward one another" and then C.R. left the house. (Tr. 254.) According to appellant, C.R. returned around midnight intoxicated, "beat up," and claiming she went to a club with Quisha and got into a fight with some females. (Tr. 256.) Appellant testified he then took C.R. to the hospital for treatment of her injuries, but did not go inside of the hospital with her because he feared he would be accused of inflicting her injuries even though he had not done so.

{¶ 6} Sergeant Michael Bynes of the Franklin County Sheriff's Office conducted an investigation of this matter. According to Sergeant Bynes, on March 23, 2010, belts, handcuffs, a broken cell phone, and C.R.'s bloodstained T-shirt were recovered from appellant's home.

{¶ 7} After considering the evidence, the trial court found appellant guilty of felonious assault, a second-degree felony in violation of R.C. 2903.11, guilty of domestic violence, a first-degree misdemeanor in violation of R.C. 2919.25, and not guilty of kidnapping. Subsequently, appellant was sentenced to an aggregate term of four years of incarceration.

{¶ 8} Appellant timely filed an appeal to this court. Appellant's appointed counsel has advised this court that he has reviewed the record and cannot find a meritorious claim for appeal. As a result, appellant's appointed counsel has filed a brief pursuant to *Anders* and moved this court to withdraw as counsel.

{¶ 9} In *Anders*, the United States Supreme Court held that if, after a conscientious examination of the record, a defendant's counsel concludes that the case is wholly frivolous, she should so advise the court and request permission to withdraw. *Id.*

at 744. Counsel must accompany her request with a brief identifying anything in the record that could arguably support the client's appeal. *Id*. Counsel also must: (1) furnish the client with a copy of the brief and request to withdraw; and (2) allow the client sufficient time to raise any matters that the client chooses. *Id*.

{¶ 10} Upon receiving an *Anders* brief, we must conduct a full examination of all the proceedings to decide whether the case is wholly frivolous. *Penson v. Ohio*, 488 U.S. 75, 80, 109 S.Ct. 346 (1988), citing *Anders* at 744. After fully examining the proceedings below, if we find only frivolous issues on appeal, we then may proceed to address the case on its merits without affording appellant the assistance of counsel. *Penson* at 80. However, if we conclude that there are nonfrivolous issues for appeal, we must afford appellant the assistance of counsel to address those issues. *Anders* at 744; *Penson* at 80.

{¶ 11} Appellant's counsel filed a brief pursuant to *Anders* in which he asserted six potential assignments of error for our review. Additionally, in accordance with *Anders*, counsel furnished appellant with a copy of the brief and a copy of the motion to withdraw, and notified appellant of his right to raise any additional matters he chose. After receiving the *Anders* brief filed by counsel, this court notified appellant of his appellate counsel's representations and afforded him time to file a pro se brief.

{¶ 12} Appellant filed a supplemental brief that does not contain established assignments of error, but instead consists of a "continuation" of the first and fifth potential assignments of error and a "correction" of the second potential assignment of error raised by his counsel. We will incorporate and address the arguments raised in appellant's supplemental brief as we address the *Anders* brief filed by his appointed counsel.

II. ASSIGNMENTS OF ERROR

{¶ 13} The following six potential assignments of error have been raised:

> [1.] DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN COUNSEL FAILED TO MOVE TO DISMISS THE INDICTMENT AGAINST DEFENDANT-APPELLANT ON GROUNDS OF DOUBLE JEOPARDY BASED UPON THE TRIAL COURT'S

DECLARATION OF A MISTRIAL ON THE BASIS OF JUROR MISCONDUCT AFTER JEOPARDY HAD ATTACHED IN THE FIRST TRIAL OF THIS MATTER.

[2.] DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN COUNSEL DISCLOSED TO COUNSEL FOR THE STATE THE ADDRESS OF THE STATE'S COMPLAINING WITNESS ON THE EVEN OF TRIAL

[3.] DEFENDANT-APPELLANT WAS DENIED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE COURT ACCEPTED HIS WRITTEN WAIVER OF HIS RIGHT TO JURY GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

[4.] THE TRIAL COURT ERRED, VIOLATING DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN IT PERMITTED GAIL HELLER TO TESTIFY ON BEHALF OF THE STATE AS AN EXPERT IN THE FIELD OF DOMESTIC VIOLENCE.

[5.] THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT AS TO COUNTS ONE AND THREE OF THE INDICTMENT WHEN THE VERDICTS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION.

[6.] THE TRIAL COURT COMMITTED HARMFUL ERROR IN SENTENCING THE DEFENDANT-APPELLANT.

III. DISCUSSION

A. First and Second Potential Assignments of Error

{¶ 14} Because they are interrelated, appellant's first two potential assignments of error will be addressed together. In these potential assignments of error, appellant's counseled brief asserts his trial counsel was ineffective for failing to move to dismiss the indictment on double jeopardy grounds and for disclosing the victim's address to the prosecution on the eve of trial. In his supplemental brief, appellant reasserts these arguments and includes a contention that his counsel was ineffective for failing to raise an argument pertaining to speedy trial violations.

{¶ 15} To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989), quoting *Strickland* at 697 ("[T]here 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.").

{¶ 16} In order to show counsel's performance was deficient, the appellant must prove that counsel's performance fell below an objective standard of reasonable representation. *Jackson* at ¶ 133. The appellant must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland* at 689. To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 204.

{¶ 17} Appellant first contends his counsel was ineffective for failing to file a motion to dismiss the indictment on double jeopardy grounds. According to appellant, double jeopardy concerns are implicated because a mistrial was declared during his first trial in this matter. When a claim of ineffective assistance of counsel is based on counsel's failure to file a particular motion, a defendant must show that the motion had a

reasonable probability of success. *State v. Barbour*, 10th Dist. No. 07AP-841 (May 6, 2008), citing *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577 (4th Dist.).

{¶ 18} The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, protects a criminal defendant from repeated prosecutions for the same offense. *State v. Loza*, 71 Ohio St.3d 61, 70 (1994), citing *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083 (1982). When a trial court grants a criminal defendant's request for a mistrial, the Double Jeopardy Clause does not bar a retrial. *Id*., citing *Kennedy* at 673. A narrow exception lies where the request for a mistrial is precipitated by prosecutorial misconduct that was intentionally calculated to cause or invite a mistrial. *Id*. *See also State v. Doherty*, 20 Ohio App.3d 275 (1st Dist.1984). Only where the prosecutorial conduct in question is intended to "goad" the defendant into moving for a mistrial may defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion. *Loza* at 70, citing *Kennedy* at 676.

{¶ 19} The record reveals that the first trial in this matter began on July 19, 2010. During the jury's deliberations, the jury foreperson notified the court that one of the jurors appeared to be disregarding the court's instructions. After discussions with said juror and counsel, the juror was excused and an alternate juror was placed. Prior to the jury rendering a verdict, however, appellant moved for a mistrial based on the excused juror's misconduct, and the prosecution opposed the motion. After review, the trial court granted the motion and excused the jury.

{¶ 20} Thus, according to the record, the trial court granted appellant's motion for a mistrial, and the conduct of the state did not provoke appellant into moving for a mistrial. Rather, the issue giving rise to appellant's motion for a mistrial arose because of a juror's actions; actions that were brought to the trial court's attention by other jurors. As such, we do not find the Double Jeopardy Clause barred a retrial in this matter or that a motion to dismiss on these grounds had a reasonable probability of success. Consequently, we cannot conclude appellant's counsel was ineffective for failing to file a motion to dismiss based on double jeopardy principles.

{¶ 21} Appellant next contends his counsel was ineffective for providing the victim's address to the prosecution on the eve of trial. While both the counseled and pro

se briefs make this assertion, the counseled brief states there is nothing in the record to support such a contention.

{¶ 22} Our review reveals the record is devoid of any evidence regarding how the victim's address and location were ascertained. Instead, it appears to be pure speculation that such information was disclosed by appellant's trial counsel, and that even if such disclosure occurred, it constituted deficient performance. Proof of ineffective assistance of counsel must consist of more than vague speculation. *State v. Giles*, 10th Dist. No. 08AP-941, 2009-Ohio-2661, ¶ 19, citing *State v. Otte*, 74 Ohio St.3d 555, 565 (1996); *State v. Ingram*, 10th Dist. No. 06AP-984, 2007-Ohio-7136. Because such vague speculation, like that currently presented by appellant, is insufficient to establish ineffective assistance of counsel, we find appellant's arguments unpersuasive.

{¶ 23} In his final contention in his supplemental brief, appellant contends his counsel was ineffective for failing to assert a claim that his statutory speedy trial rights were violated. As stated previously, when a claim of ineffective assistance of counsel is based on counsel's failure to file a particular motion, a defendant must show that the motion had a reasonable probability of success. *Barbour*, citing *Adkins*.

{¶ 24} Pursuant to R.C. 2945.71, a person against whom a felony charge is pending must be brought to trial within 270 days of arrest. R.C. 2945.71(C)(2). Each day spent in jail on the pending charge counts as three days. R.C. 2945.71(E). In the event a defendant is not brought to trial within the statutory speedy trial time frame, R.C. 2945.73 provides the remedy: "Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." R.C. 2945.73(B).

{¶ 25} Appellant does not attempt to count days for purposes of his speedy trial rights, nor account for the events on the record that would toll, waive or stop the counting of days. R.C. 2945.72(H) (continuances on accused's own motion toll time); *State v. Brown*, 7th Dist. No. 03-MA-32, 2005-Ohio-2939, ¶ 41-44 (continuances granted on accused's own motion or by joint motions toll time); *State v. Bauer*, 61 Ohio St.2d 83, 84-85 (1980) (defendant who fails to appear at a scheduled trial date waives speedy trial rights for time between initial arrest and rearrest); *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, syllabus (demand for discovery or bill of particulars tolls time).

Additionally, even if appellant did not agree to the continuances requested or agreed to by his counsel, it is well-established that a defendant is bound by the actions of counsel in waiving speedy trial rights by seeking or agreeing to a continuance, even over the defendant's objections. *State v. McQueen*, 10th Dist. No. 09AP-195, 2009-Ohio-6272, ¶ 37, citing *State v. McBreen*, 54 Ohio St.2d 315 (1978).

{¶ 26} Moreover, our review of this record reveals no violation of appellant's statutory speedy trial rights. The record establishes appellant was arrested on March 22, 2010, and his first trial began on July 19, 2010. Additionally, appellant was incarcerated for only portions of that time. After taking into account the appropriate tolling provisions, the record reveals appellant was brought to trial well within the parameters of R.C. 2745.71. Because appellant has not shown there was a reasonable probability that a motion to dismiss for a violation of speedy trial rights would have been successful, he has failed to demonstrate that trial counsel was ineffective for failing to file such a motion.

{¶ 27} For all of the foregoing reasons, we find no merit to appellant's first and second potential assignments of error.

B. Third Potential Assignment of Error

{¶ 28} In his third potential assignment of error, appellant contends the trial court erred in accepting his waiver of the right to a jury trial.

{¶ 29} The Sixth Amendment to the United States Constitution and Ohio Constitution, Article I, Section 10 guarantee a criminal defendant the right to a trial by jury. *See State v. Webb*, 10th Dist. No. 10AP-289, 2010-Ohio-6122, ¶ 20, citing *Columbus v. Boyland*, 58 Ohio St.2d 490 (1979), fn.1. Pursuant to Crim.R. 23(A), a criminal defendant may knowingly, voluntarily, and intelligently waive this right. *State v. Bays*, 87 Ohio St.3d 15, 19 (1999), citing *State v. Ruppert*, 54 Ohio St.2d 263, 271 (1978).

{¶ 30} R.C. 2945.05 and Crim.R. 23(A) require that a jury waiver be made in writing and be signed by the defendant, and the requirements must appear of record for the trial court to have jurisdiction to try the defendant without a jury. *See State v. Riley*, 98 Ohio App.3d 801 (2d Dist.1994). A written waiver of jury trial is required to ensure that the defendant's waiver is intelligent, knowing, and voluntary. *See State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶ 52.

{¶ 31} R.C. 2945.05 provides:

> In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I ....., defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury."
>
> Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.

{¶ 32} The Supreme Court of Ohio has determined that R.C. 2945.05 requires that five conditions be met in order for a waiver to be validly entered. The waiver must be (1) in writing, (2) signed by the defendant, (3) filed, (4) made part of the record, and (5) made in open court. *Webb* at ¶ 23, citing *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, ¶ 9. A trial court must strictly comply with the five requirements of R.C. 2945.05. *State v. Pless*, 74 Ohio St.3d 333, 337 (1996). "In the absence of strict compliance with R.C. 2945.05, a trial court lacks jurisdiction to try the defendant." *Id*.

{¶ 33} In the case sub judice, appellant executed a written jury waiver on March 15, 2011. The jury waiver states:

> I, Steven L. Matthews, Defendant in the above cause hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which said cause may be pending. I fully understand that under the laws of this State, I have a constitutional right to a trial by jury.

{¶ 34} The jury wavier is signed by the trial court, the prosecuting attorney, appellant, and appellant's trial counsel, and the language of the jury waiver substantially complies with that suggested by R.C. 2945.05. *Webb*; *State v. Townsend*, 3d Dist. No. 9-03-40, 2003-Ohio-6992.

{¶ 35} Additionally, the trial court verified that the signature on the waiver was appellant's. The trial court also questioned appellant as to whether he understood that he

had a constitutional right to have the matter tried to a jury of 12, and that by signing said waiver, appellant was waiving that constitutional right and consenting to have the matter tried to the court, and appellant responded, "[y]es." (Tr. 6.) The court then asked appellant if he signed the waiver because of anyone's promises or threats, and appellant replied, "[n]o, sir." (Tr. 6.)

{¶ 36} For these reasons, we find no merit to appellant's third potential assignment of error that suggests the trial court erred in accepting his waiver of the right to a jury trial.

C. Fourth Potential Assignment of Error

{¶ 37} In his fourth potential assignment of error, appellant asserts the trial court violated his due process rights when it permitted Gail M. Heller ("Heller"), retired Executive Director of CHOICES for victims of domestic violence, to testify as an expert witness.

{¶ 38} The admission of evidence, including expert testimony, lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Drew*, 10th Dist. No. 07AP-467, 2008-Ohio-2797, ¶ 46; *State v. Russell*, 10th Dist. No. 03AP-666, 2004-Ohio-2501. An abuse of discretion connotes more than a mere error of judgment; it implies a decision is without a reasonable basis and one that is clearly wrong. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 39} In *State v. Koss*, 49 Ohio St.3d 213 (1990), the Supreme Court of Ohio first recognized the admissibility of expert testimony regarding battered-woman syndrome when in support of a self-defense claim. In *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, the court extended its holding in *Koss* to allow the admission of expert testimony of battered-woman syndrome to be introduced by the state in a domestic violence case to aid the trier of fact in understanding the victim's actions.

{¶ 40} "If a woman is established to be a battered woman, and the expert is qualified, expert testimony regarding battered-woman syndrome presented in the state's case-in-chief is admissible 'to help a jury understand a victim's reaction to abuse in relation to her credibility.' " *Drew* at ¶ 48, quoting *State v. Caudill*, 6th Dist. No. WD-07-009, 2008-Ohio-1557, ¶ 39. "[E]xperts who are called to testify in domestic violence prosecutions must limit their testimony to the general characteristics of a victim suffering

from the battered woman syndrome. The expert may also answer hypothetical questions regarding specific abnormal behaviors exhibited by women suffering from the syndrome, but should never offer an opinion relative to the alleged victim in the case." *Haines* at ¶ 56, quoting Hawes, *Removing the Roadblocks to Successful Domestic Violence Prosecutions: Prosecutorial Use of Expert Testimony on the Battered Woman Syndrome in Ohio*, 53 Clev.St.L.Rev. 133, 158 (2005). In addition to limiting the expert's testimony, the court further advised that "[t]rial courts should tailor the scope of the state's questioning and should also ensure that jurors are instructed as to the limits of the expert's testimony." *Haines* at ¶ 57.

{¶ 41} In this case, a review of the record discloses the appropriate evidentiary foundation was laid for Heller's testimony and that its admission does not constitute an abuse of discretion. We further find that the trial court properly found that Heller was an expert in the field of domestic violence and, therefore, qualified to provide testimony regarding why a victim might delay in reporting or fully disclosing the details of abuse.

{¶ 42} Heller testified during the state's case-in-chief, and her testimony complied with the dictates set forth in *Haines*: she neither expressed an opinion as to appellant's guilt nor did she opine as to whether the victim suffered from battered-woman's syndrome. Heller explained that abuse in intimate relationships usually follows a pattern known as the "cycle of violence." (Tr. 193.) Heller also testified to the reasons why a victim might delay in reporting incidents of abuse or leaving the abuser.

{¶ 43} Moreover, as indicated previously, this matter was tried to the court. "Under Ohio law, 'the usual presumption is that in a bench trial in a criminal case the trial court considers only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.' " *State v. Copley*, 10th Dist. No. 04AP-1128, 2006-Ohio-2737, discretionary appeal not allowed, 111 Ohio St.3d 1432, 2006-Ohio-5351, ¶ 27, quoting *State v. Klempa*, 7th Dist. No. 01 BA 63, 2003-Ohio-3482, ¶ 15, citing *State v. Post*, 32 Ohio St.3d 380, 384 (1987).

{¶ 44} Based on the foregoing, we find no merit to appellant's fourth potential assignment of error.

D. Fifth Potential Assignment of Error

{¶ 45} In his fifth potential assignment of error, appellant contends his convictions are 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). 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*, 20 Ohio App.3d 172, 175 (1st Dist.1983). We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id*. 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*, 10th Dist. No. 96APA04-511 (Feb. 6, 1997).

{¶ 46} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967). The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶ 58; *State v. Clarke*, 10th Dist. No. 01AP-194 (Sept. 25, 2001). The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard*, 1st Dist. No. C-000553 (Oct. 12, 2001). Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶ 22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶ 17.

{¶ 47} In his supplemental brief, appellant contends his trial counsel should have impeached C.R. with her prior statements. However, a review of the transcript reveals that appellant's trial counsel extensively cross-examined C.R. about her prior statements made at various court proceedings and in letters that were submitted into evidence. Appellant also contends in his supplemental brief that the judge demonstrated bias against him. A trial judge is " 'presumed not to be biased or prejudiced, and the party alleging bias or prejudice must set forth evidence to overcome the presumption of integrity.' " *Weiner v. Kwiat,* 2d Dist. No. 19289, 2003-Ohio-3409, ¶ 90, quoting *Eller v. Wendy's Internatl., Inc.*, 142 Ohio App.3d 321, 340 (10th Dist.2000). Our review of the record does not reveal an indication of judicial bias.

{¶ 48} During appellant's trial, the court heard the testimony of both appellant and the victim regarding the events that occurred that night and, as trier of fact, was free to believe or disbelieve all or any of the testimony presented. *Jackson*. A conviction is not against the manifest weight of the evidence simply because the trier of fact believed the prosecution testimony. *State v. Anderson*, 10th Dist. No. 10AP-302, 2010-Ohio-5561, ¶ 19. Because the trier of fact could properly believe C.R.'s testimony and because the trier of fact is in the best position to determine the credibility of each witness by taking into account inconsistencies, as well as witnesses' manner and demeanor, we cannot conclude this record presents a scenario where the jury clearly lost its way or a manifest injustice has been created.

{¶ 49} Accordingly, we find no merit to appellant's fifth potential assignment of error.

E. Sixth Potential Assignment of Error

{¶ 50} In his sixth potential assignment of error, appellant contends the trial court committed error in sentencing appellant to four years on the felonious assault charge concurrent to six months on the domestic violence charge.

{¶ 51} We review a trial court's sentence to determine if it is clearly and convincingly contrary to law. *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶ 19 (standard of review is clearly and convincingly contrary to law); R.C. 2953.08(G). In applying this standard, we look to the record to determine whether the sentencing court considered and properly applied the [non-excised] statutory guidelines and whether the

sentence is otherwise contrary to law. *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶ 60; *Burton*. However, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio held in a plurality opinion that an appellate court must apply a two-step approach when reviewing a trial court's sentence: (1) determine whether trial court adhered to all applicable rules and statutes in imposing the sentence; and (2) determine whether a sentence within the permissible statutory range constitutes an abuse of discretion. Under either standard of review, the trial court did not err when it imposed the sentence at issue herein. *State v. Green*, 10th Dist. No. 10AP-934, 2011-Ohio-6451, ¶ 7 (reviewing maximum sentences under both standards).

{¶ 52} We see no basis to argue that the trial court failed to consider and apply the appropriate statutory sentencing criteria or that it imposed a sentence not authorized under the applicable statute. The trial court noted in its sentencing entry that it considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors in R.C. 2929.12. *See Green* at ¶ 8, citing *State v. Vaughn*, 10th Dist. No. 09AP-73, 2009-Ohio-4970, ¶ 21 (noting that such language in judgment entry belies a claim that the trial court failed to consider statutory guidelines). Additionally, R.C. 2929.14 and 2929.24 authorize the prison sentences imposed herein. Therefore, appellant's sentence is not clearly and convincingly contrary to law. *Green* at ¶ 8, citing *Vaughn* at ¶ 22; *State v. Hernton*, 11th Dist. No. 2008-L-104, 2009-Ohio-1487, ¶ 19 (sentence not contrary to law where trial court considered all statutory guidelines and sentence was within statutory range); *State v. Gray*, 7th Dist. No. 07 MA 156, 2008-Ohio-6591, ¶ 20-22.

{¶ 53} Nor do we find that the trial court abused its discretion when it imposed the concurrent four-year and six-month sentences. The sentence falls well below the potential sentence of eight years' incarceration for the felonious assault charge alone. Further, the sentence was imposed after review of the presentence investigation report and statements from both appellant and the victim. Additionally, the trial court explained why it was of the opinion that probation was not an appropriate sanction in this case.

{¶ 54} Accordingly, we find no merit to appellant's sixth potential assignment of error.

IV. CONCLUSION

{¶ 55} After our independent review of the record, we are unable to find any nonfrivolous issues for appeal, and we agree that the issues raised in the *Anders* brief and supplemental brief are not meritorious. Accordingly, we grant the motion of appellant's counsel to withdraw and affirm the judgment of the Franklin County Court of Common Pleas.

Motion to withdraw granted;
judgment affirmed.

CONNOR and DORRIAN, JJ., concur.
