[Cite as *State v. Matzdorff*, 2015-Ohio-901.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26370
	:	
v.	:	Trial Court Case No. 2013-CR-3080/1
	:	
DANIEL C. MATZDORFF	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 13th day of March, 2015.

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WELBAUM, J.

{¶ 1} Defendant-appellant, Daniel C. Matzdorff, appeals from his conviction and sentence received in the Montgomery County Court of Common Pleas after a jury found him guilty of one count of robbery. In proceeding with the appeal, Matzdorff's assigned counsel filed a brief under the authority of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) indicating there are no meritorious issues to present on appeal. After conducting a review as prescribed by *Anders*, we also find no meritorious issues for appeal. Accordingly, the judgment of the trial court will be affirmed.

{¶ 2} On October 30, 2013, Matzdorff was indicted on one count of robbery in violation of R.C. 2911.02(A)(2) (physical harm), a felony of the second degree. The charge arose from a bar fight at an establishment in Washington Township, Ohio, known as The Cubby Hole. While having drinks at The Cubby Hole, Matzdorff and his friend/co-offender, Michael McCullar, attacked another bar patron, Shauwn Nevels, and stole a necklace from Nevels's wife. Matzdorff pled not guilty to the charge and the matter proceeded to a three-day jury trial that concluded on July 24, 2014. Following trial, the jury returned a verdict finding Matzdorff guilty as charged. Thereafter, the trial court sentenced Matzdorff to two years in prison and ordered him to pay restitution to Mr. Nevels in the amount of $5,025.

{¶ 3} On September 2, 2014, Matzdorff filed a timely appeal from his conviction and sentence and was later appointed appellate counsel. Matzdorff's appellate counsel thereafter filed an *Anders* brief indicating that there are no meritorious issues to present on appeal. On January 12, 2015, this court notified Matzdorff that his counsel found no meritorious issues and granted him 60 days to file a pro se brief assigning any errors for

review. Matzdorff filed a pro se brief; however, he did not assign any additional errors, but instead agreed there are no meritorious issues for appeal.

{¶ 4} Our task in this case is to conduct an independent review of the record as prescribed by *Anders*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. In *Anders* cases, the appellate court must conduct a thorough examination of the proceedings to determine if the appeal is actually frivolous, and if it is, the court may "grant counsel's request to withdraw and then dismiss the appeal without violating any constitutional requirements, or the court can proceed to a decision on the merits if state law requires it." *State v. McDaniel*, 2d Dist. Champaign No. 2010 CA 13, 2011-Ohio-2186, ¶ 5, citing *Anders* at 744. "If we find that any issue presented or which an independent analysis reveals is not wholly frivolous, we must appoint different appellate counsel to represent the defendant." (Citation omitted.) *State v. Marbury*, 2d Dist. Montgomery No. 19226, 2003-Ohio-3242, ¶ 7.

{¶ 5} *"Anders* equated a frivolous appeal with one that presents issues lacking in arguable merit. An issue does not lack arguable merit merely because the prosecution can be expected to present a strong argument in reply, or because it is uncertain whether a defendant will ultimately prevail on that issue on appeal." *State v. Pullen*, 2d Dist. Montgomery No. 19232, 2002-Ohio-6788, ¶ 4. Rather, "[a]n issue lacks arguable merit if, on the facts and law involved, no responsible contention can be made that it offers a basis for reversal." *Id*.

{¶ 6} In conducting our independent review, Matzdorff's counsel has requested that we consider two potential assignments of error, the first of which is the following:

THE TRIAL COURT ERRED WHEN IT FOUND APPELLANT GUILTY OF

ROBBERY (PHYSICAL HARM) AS SUCH A FINDING IS AGAINST THE MANIFEST AND/OR SUFFICIENT WEIGHT OF THE EVIDENCE AND THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUPPORT THE CONVICTION.

{¶ 7} Under the foregoing assignment of error, Matzdorff challenges the legal sufficiency and manifest weight of the evidence. "A challenge to the sufficiency of the evidence differs from a challenge to the manifest weight of the evidence." *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 69. "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "When reviewing a claim as to sufficiency of evidence, the relevant inquiry is whether any rational factfinder viewing the evidence in a light most favorable to the state could have found the essential elements of the crime proven beyond a reasonable doubt." (Citations omitted.) *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997). "The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." (Citations omitted.) *Id*.

{¶ 8} In contrast, "[a] weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." (Citation omitted.) *Wilson* at ¶ 12. When evaluating whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences,

consider witness credibility, and 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." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). "The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence." *State v. Adams*, 2d Dist. Greene Nos. 2013 CA 61, 2013 CA 62, 2014-Ohio-3432, ¶ 24, citing *Wilson* at ¶ 14.

{¶ 9} "The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve." *State v. Hammad*, 2d Dist. Montgomery No. 26057, 2014-Ohio-3638, ¶ 13, citing *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684, *4 (Aug. 22, 1997). "This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the factfinder lost its way." (Citation omitted.) *State v. Bradley*, 2d Dist. Champaign No. 97-CA-03, 1997 WL 691510, *4 (Oct. 24, 1997).

{¶ 10} "Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency." (Citation omitted.) *State v. McCrary*, 10th Dist. Franklin No. 10AP-881, 2011-Ohio-3161, ¶ 11. As a result, "a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency."

(Citations omitted.) *State v. Braxton*, 10th Dist. Franklin No. 04AP-725, 2005-Ohio-2198, ¶ 15.

{¶ 11} In this case, Matzdorff was convicted of robbery in violation of R.C. 2911.02(A)(2), which provides that: "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, attempt to inflict, or threaten to inflict physical harm on another[.]" At trial, the State proceeded on grounds of complicity under R.C. 2923.03(A)(2), which provides that: "No person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." In other words, "[i]f a person acting with the kind of culpability required for the commission of an offense aids or abets another in committing the offense, that person is guilty of complicity in the commission of the offense, and shall be prosecuted and punished as if he were a principal offender." *State v. Wade*, 2d Dist. Clark No. 06-CA-108, 2007-Ohio-6611, ¶ 20, citing R.C. 2923.03(A)(2) and (F).

{¶ 12} " 'To aid or abet' means to support, assist, encourage, cooperate with, advise, or incite the principal in the commission of the crime." *Id*., citing *State v. Johnson*, 93 Ohio St.3d 240, 245, 754 N.E.2d 796 (2001). "Consequently, to support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the Supreme Court of Ohio has held that 'the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal.' " *Id*., quoting *Johnson* at 245. "Ohio courts have recognized that '[e]vidence of aiding and abetting another in the commission of crime may be demonstrated by both

direct and circumstantial evidence. Thus, "participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed." ' " *Id*., quoting *State v. Cartellone*, 3 Ohio App.3d 145, 150, 444 N.E.2d 68 (8th Dist.1981), quoting *State v. Pruett*, 28 Ohio App.2d 29, 34, 273 N.E.2d 884 (4th Dist.1971).

{¶ 13} At trial, the State presented testimony from Mr. Nevels, his wife, Koula Nevels, the bartender of The Cubby Hole, the bar cook, and the deputy and two detectives who investigated the case. The defense presented testimony from Matzdorff's friend/co-offender, McCullar, and Jacob Cross, another friend of Matzdorff.

{¶ 14} The jury heard evidence that on September 23, 2013, Matzdorff, McCullar, and Cross were drinking together at a bar called The Cubby Hole. After frequenting the establishment earlier in the day, the three men returned later that night for some more beverages. Upon their return, Mr. and Mrs. Nevels were drinking at The Cubby Hole as well and buying rounds of drinks for the entire bar. The bartender, McCullar and Cross each testified that Mr. Nevels was bragging to the bar patrons, including Matzdorff, about the worth of the jewelry worn by Mrs. Nevels. At trial, Mr. Nevels admitted to this conduct and Mrs. Nevels specifically testified that her husband had a conversation with Matzdorff about her jewelry.

{¶ 15} Multiple witnesses testified that a physical altercation later ensued between Mr. Nevels, Matzdorff and McCullar. According to Mr. Nevels, the altercation began with someone hitting him in the back of the head while he was standing at the bar. Mr. Nevels further testified that Matzdorff threw him to the ground. Mrs. Nevels and the bartender both testified that they saw Matzdorff and McCullar hit and kick Mr. Nevels while he was

on the ground. Cross also testified that he observed Matzdorff hit Nevels.

{¶ 16} As Mr. Nevels was being attacked, Mrs. Nevels testified that she was nearby screaming for them to stop. She testified that she dropped her credit card on the ground during the attack, and when she bent over to pick it up, McCullar ripped the necklace she was wearing off her neck. McCullar admitted to this conduct at trial. Multiple witnesses, including the bartender and the bar cook, heard Mrs. Nevels scream about her necklace being taken and saw McCullar and Matzdorff run out of the bar together shortly thereafter.

{¶ 17} Detective Bill Jones of the Miami Township Police Department testified that on the night of the robbery he spotted Matzdorff and McCullar walking together on State Route 725 approximately 40 minutes after the robbery was broadcasted over the police radio. He testified that when he activated his cruiser lights both men ran in opposite directions. Jones, however, was able to catch and arrest Matzdorff who denied that he was walking with anyone. McCullar, who was also arrested that night, admitted to taking the necklace and later pled guilty to robbery. In addition, McCullar testified that Matzdorff had nothing to do with the bar fight or the theft of Mrs. Nevels's necklace. McCullar was the only witness who testified that Matzdorff had nothing to do with the offense.

{¶ 18} The decision as to what extent to credit the testimony of McCullar "is within the peculiar competence of the factfinder, who has seen and heard the witness." *Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684 at *4. In this case, it is clear the jury discredited McCullar's testimony that Matzdorff had nothing to do with the bar fight or the theft. The fact that the jury did not believe McCullar's testimony does not

render Matzdorff's conviction as being against the manifest weight of the evidence.

{¶ 19} Based on the testimony and evidence presented at trial, there was adequate evidence for the jury to find that Matzdorff aided and abetted the robbery. There was evidence that Matzdorff: (1) was with McCullar at The Cubby Hole prior to the robbery; (2) had a conversation with Mr. Nevels about the worth of Mrs. Nevels's jewelry; (3) assisted McCullar in attacking Mr. Nevels during the robbery; (4) fled the scene with McCullar after the robbery; and (5) remained with McCullar until they were both apprehended by police 40 minutes later. Based on the foregoing, we conclude that this is not an exceptional case where the evidence weighs heavily against the conviction, as Matzdorff's participation in McCullough's criminal intent can be inferred from his presence, companionship, and conduct before, during, and after the offense. Accordingly, the manifest weight and sufficiency of the evidence issues raised herein lack arguable merit for appeal.

{¶ 20} The second potential assignment of error raised by Matzdorff's appellate counsel is as follows:

> COUNSEL FOR THE DEFENDANT WAS INEFFECTIVE AS HE DID NOT ADVISE HIS CLIENT OF HIS RIGHT TO TESTIFY IN HIS OWN DEFENSE.

{¶ 21} Under this assignment of error, Matzdorff contends that his trial counsel was ineffective in failing to advise him of his right to testify at trial, and claims that said failure renders his waiver to testify less than knowing and voluntary.

{¶ 22} A claim of ineffective assistance of trial counsel requires both a showing that trial counsel's representation fell below an objective standard of reasonableness, and

that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reviewing court "must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. The prejudice prong requires a finding that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, with a reasonable probability being "a probability sufficient to undermine confidence in the outcome." *Id*. at 694; *see also State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

{¶ 23} "Although the ultimate decision whether to testify rests with the defendant, when a tactical decision is made not to have the defendant testify, the defendant's assent is presumed." *United States v. Webber*, 208 F.3d 545, 551 (6th Cir.2000), citing *U.S. v. Joelson*, 7 F.3d 174, 177 (9th Cir.1993). "This is so because the defendant's attorney is presumed to follow the professional rules of conduct and is 'strongly presumed to have rendered adequate assistance' in carrying out the general duty 'to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.' " *Id*., quoting *Strickland* at 688-690.

{¶ 24} In this case, the record belies Matzdorff's claim that his counsel failed to inform him of his right to testify at trial. Prior to the defense presenting its case, the trial court specifically asked Matzdorff if he and his attorney had ever discussed his constitutional right to testify and Matzdorff confirmed that they had. In addition, the trial court had the following discussion with Matzdorff:

Court: Now it is important for you to understand that if you get on that

stand you open yourself up to cross-examination by the State's lawyer with respect to anything that's appropriate [sic] relevant to this case, including but not limited to your criminal record as it's defined in Ohio Rule of Evidence 609. Do you understand that?

Defendant: Yes, sir.

Court: All right. And that's also a discussion that you've had with your lawyer?

Defendant Yes, sir.

Trial Trans. Vol. II (July 23, 2014), p. 403.

{¶ 25} Despite there being no further discussion on the record regarding Matzdorff's final decision on this matter, his assent to not testify is presumed. *See Webber*. Also, even if Matzdorff's counsel had failed to advise Matzdorff of his right to testify, Matzdorff cannot demonstrate that he was prejudiced by this failure because the record indicates that the trial court informed him of his right to testify. For the foregoing reasons, the ineffective assistance of counsel claim raised herein lacks arguable merit.

{¶ 26} Having conducted an independent review of the record pursuant to *Anders*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, we agree with Matzdorff's appellate counsel that there are no meritorious issues to present on appeal. Accordingly, the judgment of the trial court is affirmed.

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DONOVAN, J., and HALL, J., concur.

Copies mailed to:

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