

**IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SENECA COUNTY**

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 13-14-31

v.

JOHN C. FRITZ,

OPINION

DEFENDANT-APPELLANT.

**Appeal from Tiffin-Fostoria Municipal Court
Trial Court No. 14CRB0929**

Judgment Affirmed

Date of Decision: April 20, 2015

APPEARANCES:

***Kent D. Nord* for Appellant**

***Richard H. Palau* for Appellee**

SHAW, J.

{¶1} Defendant-appellant John C. Fritz (“Fritz”) appeals the October 1, 2014, judgment of the Tiffin-Fostoria Municipal Court sentencing Fritz to 180 days in jail, with 120 suspended after Fritz was found guilty in a jury trial of Complicity to Assault in violation of R.C. 2923.03(A)(2) and R.C. 2903.13(A), a misdemeanor of the first degree.

{¶2} The facts relevant to this appeal are as follows. On July 31, 2014, Fritz was charged with unlawfully aiding or abetting Joshua Creeger in committing an Assault in violation of R.C. 2903.13(A), a first degree misdemeanor.

{¶3} On August 11, 2014, Fritz was arraigned and pled not guilty to the charge.

{¶4} On September 5, 2014, the State filed a Bill of Particulars indicating that it intended to prove that “[o]n or about July 30, 2014 * * * Fritz did unlawfully and knowingly aid or abet Joshua Creeger in committing a violation of section 2903.13 [(A)] by surrounding the victim Brent Milton while he was leaving 84 N. Washington St. and in doing so allowed Joshua Creeger to strike Brent Milton on or around the right ear.” (Doc. No. 13).

{¶5} On September 15, 2014, the State filed a motion to amend the complaint to add the omitted revised code section for Complicity, R.C.

2923.03(A)(2). (Doc. No. 19). The original complaint alleged the wording of Complicity but omitted the numbered statute and subsection.

{¶6} On September 17, 2014, the trial court granted the State's motion to amend the complaint to add the statutory section regarding Complicity. (Doc. No. 22).

{¶7} On October 1, 2014, the case proceeded to a jury trial. At trial, the State called three witnesses including a bouncer at the bar outside of which the incident was alleged to have happened, the victim, and an officer investigating the incident. Fritz then took the stand and testified on his own behalf. Following closing arguments, the case was submitted to the jury. The jury returned a guilty verdict against Fritz on the sole count of Complicity to Assault.

{¶8} The trial court proceeded immediately to sentencing. Ultimately Fritz was ordered to serve 180 days in jail, with 120 days suspended. A final judgment entry accepting the jury's guilty verdict and memorializing Fritz's sentence was filed that same day, October 1, 2014. (Doc. No. 29).

{¶9} It is from this judgment that Fritz appeals, asserting the following assignments of error for our review.

ASSIGNMENT OF ERROR 1
THE CONVICTION IN THE TRIAL COURT SHOULD BE
REVERSED BECAUSE IT WAS AGAINST THE MANIFEST
WEIGHT OF THE EVIDENCE AND BECAUSE THE
EVIDENCE SUPPORTING IT WAS INSUFFICIENT AS A

MATTER OF LAW TO PROVE THE CONVICTION OF APPELLANT BEYOND A REASONABLE DOUBT.

ASSIGNMENT OF ERROR 2

THE CONVICTION IN THE TRIAL COURT SHOULD BE REVERSED BECAUSE THE TRIAL COURT IMPROPERLY DENIED THE CRIMINAL RULE 29(A) MOTION FOR ACQUITTAL.

ASSIGNMENT OF ERROR 3

APPELLANT WAS DEPRIVED OF HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL BY HIS APPOINTED COUNSEL, IN CONTRAVENTION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION, WHICH SEVERELY PREJUDICED THE RIGHTS OF APPELLANT AND DID NOT FURTHER THE ADMINISTRATION OF JUSTICE.

First Assignment of Error

{¶10} In his first assignment of error, Fritz argues that there was insufficient evidence to convict him and that his conviction was against the manifest weight of the evidence. Specifically, Fritz argues that the State did not prove that Fritz aided and abetted Josh Creeger in assaulting the victim in this case.

{¶11} Whether there is legally sufficient evidence to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* When an appellate court reviews a record upon a sufficiency challenge, “ ‘the relevant inquiry is whether, after viewing the

evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.’ ” *State v. Leonard*, 104 Ohio St.3d 54, 2004–Ohio–6235, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶12} The Ohio Supreme Court has “carefully distinguished the terms ‘sufficiency’ and ‘weight’ in criminal cases, declaring that ‘manifest weight’ and ‘legal sufficiency’ are ‘both quantitatively and qualitatively different.’ ” *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, ¶ 10, quoting *State v. Thompkins*, 78 Ohio St.3d 380 (1997), paragraph two of the syllabus.

{¶13} Unlike our review of the sufficiency of the evidence, an appellate court’s function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *Thompkins, supra*, at 387. In reviewing whether the trial court’s judgment was against the weight of the evidence, the appellate court sits as a “thirteenth juror” and examines the conflicting testimony. *Id.* In doing so, this Court must review the entire record, weigh the evidence and all of the reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the factfinder “ ‘clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial

ordered.’ ” *State v. Andrews*, 3d Dist. Allen No. 1–05–70, 2006–Ohio–3764, ¶ 30, quoting *Thompkins* at 387.

{¶14} In this case, Fritz was convicted of Complicity to Assault by aiding and abetting Joshua Creeger in assaulting Brent Milton in violation of R.C. 2923.03(A)(2) and R.C. 2903.13(A). Assault, pursuant to R.C. 2903.13(A), reads, “No person shall knowingly cause or attempt to cause physical harm to another or to another’s unborn.” Complicity, pursuant to R.C. 2923.03(A)(2), reads,

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

* * *

(2) Aid or abet another in committing the offense;

{¶15} The Ohio Supreme Court defined how a defendant may be convicted of Complicity by aiding and abetting in *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, at syllabus. In *Johnson*, the Ohio Supreme Court held,

“To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), 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.* Such intent may be inferred from the circumstances surrounding the crime.”

(Emphasis added.)

{¶16} At trial, the State called three witnesses in order to prove that Fritz was guilty of Complicity to Assault. The first witness called was Robert Gay, who

worked at the Viaduct Bar and Grill as a bouncer and was working on July 30, 2014, the date of the alleged incident. Gay testified that while working, he witnessed Fritz, Josh Creeger and Cody Johnson come into the Viaduct. Gay testified that he was familiar with them as they came in “quite often.” (Tr. at 71).

{¶17} Gay testified that Fritz, Creeger, and Johnson “were walking with a purpose” like “they were looking for somebody when they walked in.” (Tr. at 73). Gay testified that when the three walked by Brent Milton, Milton got up to leave. (*Id.*) Gay testified that he knew who Milton was, but did not know him well. (*Id.*) According to Gay, Milton was seated at the front half of the bar when Fritz, Creeger, and Johnson walked past him. (*Id.*) Gay testified that Fritz and Creeger started “talking at” Milton when they walked past. (*Id.* at 74). Gay testified that he did not hear what was said because the bar was “escalating pretty quickly to be a hostile environment.” (*Id.*)

{¶18} Gay testified that Milton tried to leave the bar, walking out the front door. (Tr. at 75). At that time, Gay testified that Fritz, Creeger, and Cody Johnson went out the side door to the bar. (*Id.*) Gay testified that he walked out the front door of the bar, following Milton, “[b]ecause it was pretty apparent that it was a three on one situation and I don’t want to see anybody getting hurt. So I went out there to make sure nothing happened.” (*Id.* at 75).

{¶19} Gay testified that when he got outside the bar, he saw Fritz, Creeger, and Johnson coming around the corner to the front of the bar. (Tr. at 76). Gay testified that Fritz, Creeger, and Johnson were moving quick when they were coming around the corner. (*Id.* at 95). According to Gay, when Fritz came around the corner he asked Creeger, “who are we whooping?” (*Id.* at 77). Gay testified that Creeger pointed at Milton and said, “him.” (*Id.*)

{¶20} Gay testified that after Fritz made the “who are we whooping” statement, Fritz began to “circle to the left of [Milton].” (Tr. at 77). Gay testified that Creeger moved to approximately Milton’s “two o’clock” so Milton “could see him but he wasn’t directly in front of him.” (*Id.*) Gay testified that Fritz kept making his way closer to Milton and that Creeger “got into [Milton’s] face.” (*Id.* at 78). Gay testified that Fritz and Creeger both got within two to three feet of Milton. (*Id.*) According to Gay, while Creeger was at Milton’s “two o’clock,” Fritz was at about Milton’s “[ten] o’clock.” (*Id.*) Gay testified that Milton was trying to avoid the confrontation. (*Id.*)

{¶21} Gay testified that there were other people outside of the bar, and he was trying to “diffuse the situation.” (Tr. at 79). Gay testified that he got between Fritz and Milton as Fritz circled around Milton. (*Id.*) Gay testified that he got between them because Fritz’s “body language” was “hostile, like tense.” (*Id.* at

80). Gay testified that he had “been working in bars for a long time” and that he could “get a sense of when something is gonna go wrong.” (*Id.*)

{¶22} Gay testified that at that time Fritz was “mouthing off” to “[a]nybody and everybody that was out there,” though not specifically to Milton. (Tr. at 80). Gay testified that Fritz then “yelled” something at Milton from only two to three feet away, and Milton looked over at him, then Creeger hit Milton when Milton was looking at Fritz. (*Id.* at 81-82). Gay could not recall specifically what Fritz yelled, but he recalled that Fritz’s voice was “raised and he was very anger infused.” (*Id.* at 82).

{¶23} Gay testified that Creeger hit Milton behind the ear. (Tr. at 82). Gay testified that after Milton was struck, employees of the Viaduct told everyone to leave. (*Id.* at 83). Gay testified that Fritz then made the comment, “I’ll knock every mother fucker out that’s out here, including females because I’m no holds barred[.]” (*Id.*) Gay testified that Fritz, Creeger, and Johnson then started walking away.¹ (*Id.*)

{¶24} On cross-examination Gay testified that the Viaduct’s bartender came out to help him break-up the confrontation. (Tr. at 85-86). Gay testified that when he was between Fritz and Milton, there was not a way for Fritz to get closer to Milton. (*Id.* at 91-92).

¹ According to Gay, Johnson had not been involved and had stayed distant during the incident.

{¶25} The State next called Brent Milton. Milton testified that on the date of the incident he was at the Viaduct bar with his girlfriend, who was Josh Creeger's ex. (Tr. at 103). Milton testified that when he saw Creeger walk into the Viaduct, he asked his girlfriend if he should leave, and she indicated that he should, so he got up to leave out the front door, and his girlfriend lingered to make sure Creeger did not follow. (*Id.*)

{¶26} Milton testified that he then left the bar, and got about ten feet outside when Creeger, Fritz, and Johnson approached. (Tr. at 104). Milton testified that one of them said "Get em," then Fritz and Creeger started walking toward him. (*Id.* at 104-105). Milton testified that Creeger was about two feet in front of him, and Fritz was right in front of him at first but as the bouncer came outside Fritz started circling around Milton. (*Id.*) Milton testified that Fritz was saying that he "would knock everybody that was outside out," and that Fritz was making "derogatory statements" to Milton. (*Id.* at 106).

{¶27} Milton testified that he had never met Fritz before the encounter, and did not know what kind of person he was. (*Id.*) Milton testified that "with the look [Fritz] was giving me I could tell he wasn't joking around when he said that he would knock everybody out." (*Id.* at 106-107).

{¶28} Milton testified that he was "trying to keep [his] eyes on both Creeger and Fritz at the same time, because * * * one was on my right, one was on

my left[.]” (Tr. at 107). Milton testified that he “had looked back and forth between them a few times and one of the times when [he] turned to look away at Fritz is when Creeger hit [him] back behind the ear[.]” (*Id.*) Milton testified that when he was hit, he fell to the ground and stayed on the ground for approximately ten seconds, and then he got back up and his ear was ringing. (*Id.*)

{¶29} Milton testified that he had interactions with Creeger previously. (Tr. at 107-108). Milton testified that Creeger followed him once in his vehicle, and that when they were stopped at a red light Creeger got out in the middle of the street “and tried starting an altercation.” (*Id.* at 108).

{¶30} Milton testified that despite his previous interaction with Creeger at the Viaduct he was “more concerned” with Fritz than Creeger because he had never seen Fritz before and he did not know what his “actions were.” (Tr. at 108). Milton testified that he had come in contact with Creeger before “and nothing ever happened so [he] was kind of hoping that it would be one of them circumstances, again. [He] was paying more attention to his buddies, Fritz.” (*Id.*)

{¶31} On cross-examination Milton testified that he was distracted at some point during the altercation to look at Fritz, and that was when he was hit by Creeger. (Tr. at 111). Milton clarified that Fritz never actually touched him. (*Id.*) Milton also testified that when Creeger, Fritz, and Johnson first walked into the bar they walked right past him. (*Id.* at 112). In addition, Milton testified that the

bouncer, Gay, was actually 5-10 feet from him when he was struck by Creeger, and that the bouncer did not step between him and Fritz before he was struck by Creeger. (*Id.* at 113).

{¶32} As its final witness, the State called Sergeant Joseph Feld of the Tiffin Police Department. Sergeant Feld testified that he was called to the Viaduct for an assault, and that while there he spoke with Gay and Milton. (Tr. at 116). Sergeant Feld testified that another officer located Fritz and Creeger close to the Viaduct. (*Id.* at 117). Sergeant Feld testified that Fritz denied any involvement and denied that anything happened. (*Id.* at 118). Sergeant Feld testified that Fritz was uncooperative and belligerent. (*Id.*)

{¶33} At the conclusion of Sergeant Feld's testimony, the State rested. Fritz then made a Crim.R. 29 motion for acquittal, arguing that the State had not proven that Fritz had done anything to "aid and abet" Creeger in committing the assault. (Tr. at 124). The State responded by arguing that reasonable minds could come to different conclusions, that Fritz cooperated or assisted in Creeger committing the assault. (*Id.* at 125). The trial court ultimately overruled the motion for acquittal, stating that "there is sufficient evidence for reasonable minds [to] interpret." (*Id.*)

{¶34} On appeal, Fritz renews his argument that the State presented insufficient evidence to convict him. He does not argue that an assault did not

take place, conceding that there was sufficient evidence to establish that Josh Creeger punched Milton. (Appt's Br. at 7). Rather, Fritz argues that the State failed to establish that Fritz aided or abetted Creeger in committing the assault.

{¶35} Despite Fritz's arguments, the State did produce evidence from which a reasonable fact-finder could conclude that Fritz aided and abetted Creeger in committing the assault. Under the Ohio Supreme Court's decision in *Johnson, supra*, in order to show that Fritz aided and abetted Creeger the State had to establish that Fritz, "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." *Johnson* at syllabus.

{¶36} The State presented evidence that Fritz and Creeger walked into the Viaduct with a purpose, like they were going to "get" someone. Gay, the bouncer, testified that Fritz and Creeger said something to Milton and that the bar became tense and hostile afterward. According to Gay, Milton then tried to leave the situation by walking out the front door of the Viaduct.

{¶37} Gay testified that he followed Milton outside to make sure nothing happened, and that when he got outside, Fritz, Creeger, and Johnson had gone out the side door of the Viaduct and had come around to the front. Gay testified that Fritz then said, "who are we whooping," that Creeger indicated Milton, and that Creeger and Fritz then approached Milton. Both Gay and Milton testified that

Fritz then began circling around Milton. Milton testified that he was distracted looking back and forth between the two, and Gay testified that Fritz said something, which drew Milton's attention, and that it was at that moment Creeger punched Milton.

{¶38} From these facts, looking at them in the light *most favorable to the prosecution*, the State produced evidence that could be construed as Fritz "supporting," "assisting," "encouraging," or "cooperating," with Creeger to commit the assault. Therefore we cannot find that the State produced insufficient evidence to convict Fritz in this case. Fritz's argument is thus not well-taken.

{¶39} Fritz next argues that his conviction was against the manifest weight of the evidence. In his case-in-chief, Fritz took the stand himself and testified to his version of events as to what happened on the date in question.

{¶40} Fritz first testified that he suffered from several mental disabilities, including manic depression, anxiety, and bipolar disorder. (Tr. at 127). Fritz testified that he did not take medication for those issues because he could not afford it. (*Id.*) Fritz testified that when he got riled up he could "become belligerent" and that he does not like to talk to authority. (*Id.* at 128).

{¶41} Fritz testified that on the date of the incident he was going to the Viaduct to "talk to the bartender about getting back into the Viaduct" because he was no longer allowed inside. (Tr. at 128). Fritz testified that when he walked

into the bar he started talking to the bartender. (*Id.* at 130). He testified that Josh Creeger was elsewhere, and Fritz was not paying attention to what he was doing. (*Id.*) Fritz testified that “[w]hen it’s all said and done we walk out the side door” and “[n]ext thing I know they’re fighting up front.” (*Id.*) According to Fritz, by the time he got to the front of the Viaduct, Milton was “already laid out on the sidewalk.” (*Id.* at 131). Fritz testified that he was not present when Milton got struck. (*Id.*)

{¶42} Fritz testified that it was only after Milton was already struck that he was “talking * * * shit to everybody[.]” (Tr. at 131). Fritz testified that after the incident they walked up a nearby street and were eventually approached by “Officer Aller.” (*Id.*) Fritz testified that he told Officer Aller that he did not do anything, and that he was not there for the incident. (*Id.* at 132). Fritz testified that eventually Sergeant Feld arrived and he was detained by Sergeant Feld for Complicity to Assault. (*Id.* at 133).

{¶43} On cross-examination Fritz testified that he had an extensive criminal history, which included “some assault charges,” “thefts,” “burglaries and robberies, intimidation of witnesses, a lot of fleeing and eludings.” (Tr. at 138). Fritz also testified that he had anger issues, and that he was a “very aggressive person” who walks and talks aggressively. (*Id.* at 137-138). Fritz testified that had he been involved in the situation he would have just fought in the bar rather

than going outside. (*Id.* at 143). Fritz reiterated that he was not present until after Milton had already been struck. (*Id.* at 144). At the conclusion of Fritz's testimony, he rested his case.

{¶44} On appeal, Fritz argues that his conviction for Complicity to Assault was against the manifest weight of the evidence. While Fritz testified that he was not actually present at the time of the altercation, the jury elected not to believe his version of events and chose to believe the version testified to by Gay and Milton. The jury was well within its authority as factfinder to find Fritz not to be credible in his testimony as to what happened. Therefore we cannot find that there was a manifest miscarriage of justice or that the jury clearly lost its way in convicting Fritz of Complicity to Assault. Accordingly, Fritz's first assignment of error is overruled.

Second Assignment of Error

{¶45} In his second assignment of error, Fritz argues that the trial court erred in overruling his Crim.R. 29 motion for acquittal at the close of the State's case. Strangely, Fritz cites in his brief the principle that the test for determining sufficiency of the evidence and for determining whether a trial court erred in overruling a Crim.R. 29 motion for acquittal is the same, yet he argues this point in two separate assignments of error. Having already determined that the State presented sufficient evidence to convict Fritz, we cannot find that the trial court

erred in overruling his Crim.R. 29 motion for acquittal. Accordingly, Fritz's second assignment of error is overruled.

Third Assignment of Error

{¶46} In Fritz's third assignment of error, he argues that his trial counsel was ineffective for failing to renew his Crim.R. 29 motion for acquittal at the close of his case-in-chief. However, we have already determined that sufficient evidence was presented to convict Fritz, so any failure to renew a motion for acquittal would not have prejudiced Fritz in any manner. *See State v. Haskell*, 3d Dist. Seneca No 13-03-45, 2004-Ohio-3345, ¶ 19, ("Failure to offer a motion for acquittal for which no reasonable grounds exist is not ineffective assistance of counsel.") Therefore, Fritz is unable to establish any remote claim to prejudice in this case and cannot maintain an argument for ineffective assistance of counsel. Accordingly, Fritz's third assignment of error is overruled.

{¶47} For the foregoing reasons Fritz's assignments of error are overruled and the judgment of the Tiffin-Fostoria Municipal Court is affirmed.

Judgment Affirmed

PRESTON and WILLAMOWSKI, J.J., concur.

/jlr