[Cite as *State v. Starks*, 2016-Ohio-7117.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio — Court of Appeals No. S-16-007

Appellee — Trial Court No. 15 CR 1201

v.

Terry Starks — **DECISION AND JUDGMENT**

Appellant — Decided: September 30, 2016

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} In this *Anders* appeal, appellant, Terry Starks, appeals the judgment of the Sandusky County Court of Common Pleas, sentencing him to a total of 15 years in prison following a jury trial. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} The incident giving rise to this appeal occurred on November 21, 2015, at the Copper Penny, a bar located in Fremont, Ohio. At 9:30 p.m. on that date, appellant was speaking with another patron at the bar, Steven Davis. Appellant, who was intoxicated at the time, was explaining to Davis his frustration over "females taking some money from him." After Davis encouraged appellant to "stop messing with them," appellant became upset. As the conversation intensified, appellant became increasingly agitated until he eventually pulled out a handgun from his waistband and shot Davis in the chest. Davis was subsequently transferred to the hospital where he eventually recovered.

{¶ 3} As a result of the foregoing shooting, appellant was indicted on December 4, 2015, on one count of attempted murder in violation of R.C. 2923.02(A), a felony of the first degree, two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (A)(2), felonies of the second degree, and one count of having weapons while under disability in violation of R.C. 2923.13(A)(2), a felony of the third degree. The indictment also included firearms specifications as to the attempted murder and felonious assault counts.

{¶ 4} A two-day jury trial eventually commenced on February 9, 2016. The state called several witnesses, as did appellant. At the conclusion of the trial, the jury found appellant guilty of all four counts contained in the indictment as well as the firearm specification. The court immediately proceeded to sentencing, at which time it merged

the felonious assault counts with the attempted murder count, and imposed the maximum sentence of 11 years for the attempted murder count. The court went on to impose a three-year sentence for having weapons while under disability, and ordered the sentences to be served consecutively to one another and consecutive to the mandatory one-year sentence for the firearm specification, for a total of 15 years in prison. Appellant's timely appeal followed.

{¶ 5} Based upon the belief that no prejudicial error occurred below, appellant's counsel has filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

{¶ 6} *Anders, supra,* and *State v. Duncan,* 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978), set forth the procedure to be followed by counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous, counsel should so advise the court and request permission to withdraw. *Anders* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.*

{¶ 7} Counsel must also furnish the defendant with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. *Id.* Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's

request to withdraw and dismiss the appeal without violating constitutional requirements, or it may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 8} In this case, appellant's counsel has satisfied the requirements set forth in *Anders*. Accordingly, this court shall proceed with an examination of the potential assignment of error set forth by appellant's counsel and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

B. Assignments of Error

{¶ 9} In her *Anders* appeal, appellant's counsel assigns the following possible errors for our review:

> Proposed Assignment of Error One: Appellant's convictions are not supported by sufficient evidence and are against the manifest weight of the evidence.
>
> Proposed Assignment of Error Two: Trial counsel rendered ineffective assistance in violation of appellant's Sixth Amendment right to counsel and pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984).

{¶ 10} Appellant has not filed a pro se brief.

II. Analysis

{¶ 11} In counsel's first proposed assignment of error, she argues that appellant's convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. While sufficiency and manifest weight are distinct concepts, we will address them together.

{¶ 12} When evaluating whether the evidence was sufficient to sustain a conviction, we must determine whether the evidence admitted at trial, "if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.E.2d 560 (1979); *see also State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Therefore, "[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997), citing *Jenks* at paragraph two of the syllabus.

{¶ 13} When reviewing a manifest weight claim,

> The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220.

{¶ 14} The crime of attempted murder is defined in R.C. 2903.02(A) and 2923.02(A). The murder statute, R.C. 2903.02(A), provides, "No person shall purposely cause the death of another." Thus, a person is guilty of attempted murder when he or she "purposely * * * engages in conduct that, if successful, would constitute or result in" the purposeful killing of another. R.C. 2923.02(A). The crime of having weapons while under disability is codified in R.C. 2923.13, which states in relevant part:

> (A) Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> * * *
>
> (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

{¶ 15} Here, appellant's convictions for attempted murder and having weapons while under disability were supported by ample evidence produced at trial. Indeed, a witness to the crime, Gary Davis ("Gary"), was detained by Fremont police and asked to identify the shooter from a photo array. The photo array was administered by Sergeant Justin Powell from the Ohio Highway Patrol, who was acting as a blind administrator with no prior knowledge of the facts of the case. According to Powell's report following the photo array, Gary positively identified appellant as the shooter and indicated that he

was "100% confident, no doubt at all." At trial, Gary testified that he witnessed appellant, who was outside the Copper Penny at the time, pull out what appeared to be a handgun during a verbal disagreement with Davis. Shortly thereafter, Gary heard one gunshot, at which point he witnessed Davis begin to fight with appellant. Gary went back inside the bar, but returned after he was alerted to the fact that Davis had been shot and needed medical attention. Gary ultimately transported Davis to the hospital.

{¶ 16} Davis also testified at trial. In his testimony, Davis stated that he had known appellant for "about a year and a half, two years." Concerning the shooting, Davis testified that he saw appellant reach behind his back and pull out a handgun from his waistband. At this point, appellant raised the handgun and shot Davis in his chest. When asked whether he was certain that appellant was the shooter, Davis responded, "yea, he was right there in my face."

{¶ 17} Next, the state called Detective Jason Kiddey to testify regarding his investigation of the case. After appellant's arrest and transfer to the police station, Kiddey conducted an interview, during which he noticed that appellant was suffering from "serious facial injuries." In particular, appellant's right eye was "heavily swollen, like, he had been struck by something or someone." The state then went on to introduce a booking photo of appellant into evidence that depicts appellant's facial injury. Appellant's condition was consistent with Davis's testimony that he had stomped on appellant's face two times prior to being transported to the hospital, resulting in appellant losing consciousness at the scene of the shooting.

{¶ 18} In an effort to rebut the foregoing testimony, appellant called two witnesses. Appellant's first witness, Officer Kevin Armbruster, was the officer who initially responded to Fremont Memorial Hospital prior to Davis's air transfer to Toledo. Upon arrival at the hospital, Armbruster interviewed Davis, who was "sitting up on the bed" at the time. When asked what happened to him earlier in the night, Davis told Armbruster that he was walking on the sidewalk on the east side of Ohio Avenue in Fremont when a white male walked up to him, told him to "give me the money," and shot him. Davis indicated to Armbruster that he had never met the assailant before. Further, Davis stated that the assailant was wearing a black hoodie with the hood up, but not covering his face. On cross-examination, Armbruster acknowledged that several medical personnel were working on Davis and administering medications to try to stabilize him at the time of the interview. At some point during the interview, Davis became comatose from the medication.

{¶ 19} As his second witness, appellant called Byron McMorris to the stand. McMorris is the owner of a barbecue establishment that shares a parking lot with the Copper Penny. In his testimony, McMorris stated that he did not see appellant outside the Copper Penny prior to his departure from the area on the night of the shooting. When asked about the approximate time of his departure, McMorris noted that he usually closes around 9:00 p.m. and was on site no later than 10:00 p.m.

{¶ 20} At the close of McMorris's testimony, trial counsel indicated that there would be no further defense witnesses. After trial counsel rested, the state recalled

Kiddey to the stand as a rebuttal witness. During his rebuttal testimony, Kiddey stated that officers were directed to search the Ohio Avenue area for any items of evidence relevant to the shooting at issue in this case. Kiddey noted that no evidence was discovered in that area, nor were any gunshots reported by residents of the area.

{¶ 21} Viewing the testimony presented at trial in a light most favorable to the prosecution, we find that a reasonable factfinder could conclude that appellant committed the crime of attempted murder by purposefully firing a bullet into Davis's chest from a distance of two to three feet away. That such conduct had the potential to cause Davis's death is beyond doubt. Moreover, the state introduced evidence that appellant had been previously convicted for murder in Illinois. Thus, a factfinder could have reasonably concluded that appellant was carrying, and did in fact use, a firearm while under disability. Therefore, appellant's convictions were supported by sufficient evidence.[1] Furthermore, in light of appellant's failure to present any credible conflicting evidence, we cannot say that this is the exceptional case in which the convictions were against the manifest weight of the evidence.

{¶ 22} Accordingly, appellate counsel's first proposed assignment of error is not well-taken.

{¶ 23} In counsel's second proposed assignment of error, she argues that appellant was deprived of the effective assistance of trial counsel. In order to demonstrate

[1] We need not address felonious assault counts contained in the indictment because the offenses were merged with the attempted murder offense as allied offenses of similar import.

ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, appellant must show that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-688, 694.

{¶ 24} Here, appellate counsel identifies two instances in which trial counsel's performance allegedly fell below an objective standard of reasonableness. First, appellate counsel takes issue with trial counsel's failure to stipulate to the legal disability element of having weapons while under disability. According to appellate counsel, the failure to stipulate to the disability element "unnecessarily highlighted the murder conviction." Second, appellate counsel takes issue with trial counsel's failure to object to the state's allegedly wrongful mention of appellant's 1998 conviction for having weapons while under disability. According to appellate counsel, "[n]othing other than prejudice could result from the jury hearing that appellant had a murder conviction and a conviction for the same offense." However, appellate counsel acknowledges that trial counsel's alleged ineffectiveness did not affect the outcome of the proceedings in this case. We agree.

{¶ 25} Even assuming that trial counsel performed unreasonably in failing to stipulate to the disability element or object to the state's reference to the prior conviction for having weapons while under disability, we are not persuaded that the result of the proceedings would have been different but for such errors. Indeed, the state's evidence,

which was largely uncontroverted, clearly demonstrates that appellant was the individual who shot Davis outside the Copper Penny bar on the evening of November 21, 2015. Therefore, the jury would have found appellant guilty of attempted murder and having weapons while under disability regardless of trial counsel's alleged deficiencies. Therefore, we do not find that appellant was deprived the effective assistance of counsel.

{¶ 26} Accordingly, appellate counsel's second proposed assignment of error is not well-taken.

III. Conclusion

{¶ 27} This court, as required under *Anders*, has undertaken our own examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we grant appellate counsel's motion to withdraw.

{¶ 28} The judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. The clerk is ordered to serve all parties with notice of this decision.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, P.J. _____
CONCUR.

_____
JUDGE