[Cite as *State v. Martin*, 2009-Ohio-5303.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 22744
Plaintiff-Appellee	:	
	:	Trial Court Case No. 07-CR-4890
v.	:	
	:	(Criminal Appeal from
ABDALA R. MARTIN	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 2nd day of October, 2009.

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Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Abdala Martin appeals from his conviction and

sentence, following a jury trial, for Abduction, in violation of R.C. 2905.02(A)(2). His assigned appellate counsel has filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, stating that after thoroughly examining the record and the law, he has found no potentially meritorious issues for appeal. We informed Martin that his counsel had filed an *Anders* brief on his behalf, and we granted him sixty days from that date in which to file his own, pro se brief. Martin filed a pro se brief, to which the State has responded.

{¶ 2} We find no arguable merit to the potential assignments of error discussed by appellate counsel, and we find no arguable merit to the assignments of error proposed by Martin in his pro se brief. Pursuant to our duty under *Anders,* we have conducted an independent review of the entire record, and we have found no potential assignments of error having arguable merit. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} On November 20, 2007, Emily Martin, aka Emily Larrier, came home for lunch and was surprised to find her husband, Abdala Martin, at home. The two discussed their individual Thanksgiving travel plans, and Larrier went to a cash advance store for money. She returned home, giving Martin money for his trip. At this point, Martin confronted Larrier, accusing her of infidelity, based on an anonymous phone call that he received while she was gone. Larrier denied the accusation, and Martin pushed her into a wall, insisting that she was lying.

{¶ 4} Larrier testified that Martin went to the garage and grabbed a rubber mallet, which he proceeded to use to hit her in the arms, legs, and head, as he continued to insist on a confession. During the altercation, Martin shoved Larrier onto the couch, locked all of the doors, and refused to allow her to leave the home until she told the truth. Larrier claimed that Martin ran into the kitchen and grabbed a steak knife, with which he tried to stab her.

{¶ 5} In an effort to calm Martin, Larrier told him that he was right. At Martin's insistence, Larrier called her mother and a friend, telling them that "everything" was her fault and that Martin had done nothing wrong. Larrier told Martin that she needed to go to the hospital, because she thought that her arm was broken. Martin insisted on accompanying Larrier to the hospital. On the way, they saw a neighbor and flagged her down. Larrier followed the neighbor to the hospital. Larrier first told hospital staff that she had fallen, but she later told them that Martin had beaten her. The neighbor arranged to drive Larrier and her two children to meet Larrier's sister. Larrier and her children stayed with her sister for one night and with her brother for the rest of the week, before she returned home and reported the incident to the police.

{¶ 6} Martin was charged with one count of Abduction and two counts of Felonious Assault (with deadly weapons). Martin testified on his own behalf. He insisted that he tried to avoid the argument with Larrier, but when he tried to walk away, she repeatedly stopped him. He admitted that although he did punch Larrier as she kicked him, he did not use any weapons against her. Following a jury trial,

Martin was found guilty of Abduction but not guilty of either count of Felonious Assault. The trial court sentenced him to five years in prison and ordered him to pay court costs. From his conviction and sentence, Martin appeals.

II

{¶ 7} Under the authority of *Anders,* supra, appellate counsel has identified four potential assignments of error that he considered before concluding that they have no arguable merit. The potential assignments of error are as follows: Martin was denied the effective assistance of counsel; the trial court erred in ordering a maximum, five-year sentence; and Martin's conviction is both against the manifest weight of the evidence and unsupported by sufficient evidence. Additionally, Martin has proposed seven assignments of error, which overlap counsel's potential assignments of error.

{¶ 8} Martin first claims that the jury's verdict is contrary to law, because the verdict form failed to include the elements of the offense of Abduction. The completed verdict form reads as follows: "We, the jury, upon the issues joined in the case, do find the Defendant, Abdala Martin, Guilty of ABDUCTION (restrain) as charged in the indictment." This is in accord with the Ohio Jury Instructions. See, e.g., 2 Ohio Jury Instructions (2007), Criminal Section 425.33. There is no requirement that the statutory definition of an offense be included on the verdict form. To the contrary, the inclusion of statutory definitions on a verdict form "invites confusion and error." *State v. Lampkin* (1996), 116 Ohio App.3d 771.

{¶ 9} In his Second Assignment of Error, Martin argues that his conviction is against the manifest weight of the evidence, and in his Sixth Assignment of Error,

he insists that the trial court erred in denying his Crim.R. 29 motion for acquittal. In support of both claims, he argues that Larrier's testimony was conflicting and unbelievable. However, "the weight to be given to the evidence and the credibility of witnesses are primarily for the trier of facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Our review of the record, including the transcript of Larrier's testimony, which we have not found to be lacking in credibility, indicates that no reasonable argument can be made that this is the rare case where a jury has lost its way, resulting in a manifest miscarriage of justice.

{¶ 10} Martin next insists that he was denied due process of law when the trial court communicated with the jury outside of his presence. During deliberation, the jury asked for clarification of the elements of the charge of Abduction. After consulting with the prosecutor and defense counsel, the court submitted a written response directing the jurors to review the written jury instructions. The Ohio Supreme Court has addressed this situation in *State v. Campbell* (2000), 90 Ohio St.3d 320, 346, 2000-Ohio-320. A criminal defendant has a right pursuant to the Fourteenth Amendment to be present at every "critical stage" of his trial. *Campbell,* supra, at 346, citing *Snyder v. Massachusetts* (1934), 291 U.S. 97, 54 S.Ct. 330. "The question is whether 'his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" Id., citing *Snyder,* supra, at 105-6. Although the oral delivery of jury instructions is a critical stage of a trial, a trial court's written response to a jury question seeking to clarify those instructions is not. Id., citations omitted.

{¶ 11} Fourth, Martin argues that the trial court erred in charging him for court

costs in its sentencing entry because the court failed to inform him of this at his sentencing hearing. To the contrary, R.C. 2947.23(A)(1) mandates imposition of the cost of prosecution. However, "[t]here is no requirement that the imposition of the costs of prosecution be articulated on the record at the sentencing hearing although such practice is preferable." *State v. Powell,* Montgomery App. No. 20857, 2006-Ohio-263, ¶¶9-11.

{¶ 12} In his Fifth Assignment of Error, Martin contends that he was denied the effective assistance of trial counsel. In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Martin asserts that he was denied the effective assistance of trial counsel in three respects. He argues that counsel should have objected to the verdict form and that counsel should have ensured his presence when the trial court responded to the jury's question, both of which we have already rejected.

{¶ 13} Martin also insists, without explanation, that counsel should have attacked Larrier's credibility by entering certain documents into evidence, namely a bank statement, a Yahoo! personal ad, and Larrier's mental health records, which would have revealed a suicide attempt. Although not admitted into evidence, defense counsel did use the bank statement in an attempt to refresh Larrier's recollection regarding a deposit Martin made in their joint account on the day before the altercation. Larrier denied knowledge of Martin's deposit, but she did admit that the statement reflected a deposit. Counsel also attempted to cross-examine Larrier regarding the personal ad, but the trial court sustained the State's objection.

While these documents may have bolstered Martin's testimony regarding the cause of the couple's fight that day, they were not relevant to Larrier's credibility regarding the elements of the offense of Abduction. Nor is any suicide attempt by the victim relevant to the issue of her credibility. Experienced defense counsel might well eschew an opportunity to present evidence of a victim's suicide attempt, reckoning that it might only arouse sympathy for the victim, doing more harm than good to the defense.

{¶ 14} Martin has shown neither deficient performance nor prejudice on the part of his trial counsel.

{¶ 15} Finally, in his Seventh Assignment of Error, Martin insists that he was denied a fair trial due to prosecutorial misconduct, because the prosecutor knowingly elicited false information from one of the State's witnesses. The two-part test for prosecutorial misconduct considers whether the prosecutor's conduct at trial was improper, and if so, whether that conduct prejudicially affected the defendant's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. In support of this claim, Martin relies on several documents, none of which are part of the record before us. Because those documents are not part of the appellate record, they may not be considered by this court. *State v. Ishmail* (1978), 54 Ohio St.2d 402, 406. Furthermore, even if we were to assume that the testimony was false, there is nothing in the record to demonstrate that the State was aware of this. Finally, even if there had been misconduct on the part of the prosecutor, Martin fails to explain how it was prejudicial to him, since it concerned testimony relating to

the explanation by police why Martin was brought back to Dayton, which has no evident relevance to the charge against Martin.

{¶ 16} We have independently reviewed the entire record, as required by *Anders v. Califonia*, supra. We have found no potential assignments of error having arguable merit, and we conclude that this appeal is wholly frivolous.

III

{¶ 17} Because we have found no potential assignments of error having arguable merit, and we find that this appeal is wholly frivolous, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

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