

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
	:	Case No. 22CA3998
Plaintiff-Appellee,	:	
	:	
v.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
JOHNATHAN D. KOZEE,	:	
	:	
Defendant-Appellant.	:	RELEASED: 01/24/2025

APPEARANCES:

Angela Miller, Jupiter, Florida, for appellant.

Shane A. Tieman, Scioto County Prosecuting Attorney, and Matthew F. Loesch and Jay Willis, Assistant Scioto County Prosecutors, Portsmouth, Ohio, for appellee.

Wilkin, J.

{¶1} This is an appeal from a Scioto County Court of Common Pleas judgment entry of conviction in which the jury found appellant, Johnathan D. Kozee, guilty of felonious assault. The trial court imposed a minimum prison term of 8 years and a maximum prison term of 12 years. Kozee presents four assignments of error challenging his conviction and sentence.¹

{¶2} In the first assignment of error, Kozee argues that his trial counsel was ineffective for failing to request jury instructions on the lesser-included offense of assault and for failing to file a motion to sever his trial from his co-defendant, Christopher Gay. Kozee claims he was prejudiced by counsel's

¹ Kozee in his initial briefing presented three assignments of error. Almost a year later, however, Kozee requested leave to file supplemental briefing to challenge his sentence. We granted his motion. In his supplemental briefing, Kozee raised an additional assignment of error.

representation. We disagree. Kozee fails to demonstrate his counsel's representation fell below an objective standard of reasonableness and/or that he was prejudiced. We will not second-guess Kozee's trial counsel's strategy and the evidence supported Kozee's felonious assault conviction. Further, both Kozee and his co-defendant Gay had the same defense of attacking the credibility of the State's witnesses. We, therefore, overrule Kozee's first assignment of error.

{¶3} In the second and third assignments of error, Kozee simultaneously argues that his conviction of felonious assault was against the sufficiency and manifest weight of the evidence. We disagree. The jury was in the best position to assess the credibility of the State's witnesses and simply because some inconsistent evidence existed at trial does not warrant reversal on manifest weight grounds. See *State v. Gay*, 2024-Ohio-1673, ¶ 50 (4th Dist.). The evidence established Kozee was an aggressor in his attack on James Liles that resulted in the hospitalization and later death of Liles. We, therefore, overrule Kozee's second and third assignments of error.

{¶4} In the fourth assignment of error, Kozee argues that his sentence is contrary to law because the trial court failed to inform him of the mandatory indefinite-prison-sentence notifications pursuant to the Reagan Tokes Act. We agree. At the sentencing hearing, the trial court failed to notify Kozee of the required notifications pursuant to R.C. 2929.19(B)(2)(c). Accordingly, we sustain this assignment of error and remand the matter for resentencing.

FACTS AND PROCEDURAL BACKGROUND

{¶5} In November 2021, Kozee, along with his co-defendant, Christopher Gay, were indicted of three felonies: murder, felonious assault, and tampering with evidence. Kozee was found guilty of felonious assault but not guilty of murder and tampering with evidence.

{¶6} The felonious assault conviction was based on Kozee's assault of James Liles in the early morning hours of August 14, 2021. On August 13, Kozee along with his girlfriend, Dakota Fitzpatrick, walked to Kala Rhea's house, which is located in Portsmouth, Ohio. Rhea's house is known as a drug house with an open-door policy. Rhea and her live-in boyfriend, co-defendant Gay, permit other drug users to use all the amenities at the house. On this particular night, there were six individuals at the house: Rhea, co-defendant Gay, Antwan Bass, James Liles, Fitzpatrick, and Kozee.

{¶7} Late at night, Kozee realized that half-a-gram of his drugs was missing. Kozee became angry and told the rest that no one is leaving until he found his missing drugs. Rhea noticed that Liles was missing and brought that to the attention of co-defendant Gay. Liles was in the first floor bathroom. Co-defendant Gay went to the bathroom and called for Kozee to come as Liles had something to tell him. Kozee walked from the dining room to the bathroom and a scuffle began. Kozee was seen punching Liles and then the bathroom door was closed. But the commotion continued until the door opened and Liles was dragged out by Kozee and co-defendant Gay.

{¶8} Liles was naked and was dragged by his hands and feet. Liles was dropped on the kitchen floor and co-defendant Gay began kicking him. Liles was not moving but could be heard moaning, and there was blood around his mouth/jaw and his nose. Kozee gathered some items and then he left.

{¶9} It was not until the next evening on August 14, that medical assistance was called and arrived at Rhea's house. Lieutenant Paramedic Ryan Robertson of the Portsmouth Fire Department was one of the medical emergency personnel who responded to the 9-1-1 call. He testified that Liles "had severe trauma to the face, to the ears, noticed bilateral bruising and swelling to the ears, bilateral bruising and swelling to the eyes, um there was also bruising to the left flank and um pupils were not responsive to light and they were unequal." Due to the severity of Liles' injuries, he was transported via a medical helicopter to St. Mary's Hospital in Huntington, West Virginia. Liles died in the hospital on August 21st.

{¶10} While Liles was in the hospital, the investigation into his assault resulted in the apprehension of Kozee and co-defendant Gay on August 17th. During the four-day jury trial, the State presented the testimony of 17 witnesses and admitted 116 exhibits.² Both Kozee and his co-defendant Gay did not present any evidence in their respective cases and rested following the State's case-in-chief. The jury found Kozee not guilty of murder and tampering with evidence, but guilty of felonious assault, a second-degree felony.

² For a detailed recitation of the facts, please refer to our opinion affirming co-defendant Gay's convictions in *State v. Gay*, 2024-Ohio-1673 (4th Dist.).

{¶11} The trial court imposed a minimum prison term of 8 years and a maximum prison term of 12 years. It is from this judgment entry of conviction that Kozee appeals.

ASSIGNMENTS OF ERROR

- I. APPELLANT KOZEE WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN HIS ATTORNEY FAILED TO: 1) REQUEST A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF ASSAULT; OR 2) FILE A MOTION TO SEVER WHEN THE DEFENDANTS HAD MUTUALLY ANTAGONISTIC DEFENSES.
- II. THE TRIAL COURT VIOLATED APPELLANT KOZEE'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED A JUDGMENT OF CONVICTION BASED ON INSUFFICIENT EVIDENCE.
- III. APPELLANT KOZEE'S CONVICTION FOR FELONIOUS ASSAULT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
- IV. THE TRIAL COURT FAILED TO PROVIDE MANDATORY REAGAN TOKES LAW NOTIFICATIONS SET FORTH IN R.C. 2929.19(B)(2)(C) AT THE SENTENCING HEARING.

ASSIGNMENT OF ERROR I

{¶13} In the first assignment of error, Kozee claims his counsel was ineffective for failing to request a jury instruction on the lesser-included offense of assault and for failing to file a motion to sever trial from co-defendant Gay. With regard to the argument that the jury should have been instructed on the lesser-included offense of assault, Kozee brings our attention to his trial counsel's closing statement that Kozee committed the offense of assault, but not felonious assault. Yet, trial counsel failed to request an instruction on the lesser-included offense of assault. Further, Kozee contends that the State's witnesses

corroborated his assertion that his involvement was minimal. According to Kozee, his counsel's failure not to request the assault jury instruction was prejudicial as the jury could have found that Kozee's assault involvement was not prolonged and that it was co-defendant Gay who continued to assault Liles causing him serious physical harm.

{¶14} On the issue of the motion to sever trial, Kozee contends that his trial counsel's failure to file the motion was prejudicial. This is because Kozee and co-defendant Gay's defenses were "mutually antagonistic" in which each one attempted to exculpate himself and inculpate the other. In support of this claim, Kozee brings to our attention co-defendant Gay's opening statement in which co-defendant Gay portrayed himself as the "Good Samaritan" and helped clean up the victim.³ This in turn, insinuated that Kozee was the perpetrator. Additionally, co-defendant Gay's cross-examination of the State's witnesses continued to highlight Kozee's involvement in the assault. Accordingly, Kozee maintains that his trial counsel was ineffective since from the beginning, the defenses were "mutually antagonistic" and as the trial progressed, it became more obvious that co-defendant Gay was pointing the finger at Kozee as the main aggressor.

{¶15} In response, the State disagrees and asserts that it was Kozee's trial counsel's strategy of "all or nothing" to not request jury instructions on the lesser-included offense of assault. Further, it is not reasonable to think the jury would have convicted Kozee of only a misdemeanor considering the injuries the

³ Rhea testified that after the attack and with Liles still lying on the kitchen floor, she demanded that co-defendant Gay clean up the mess which he did. And the cleanup included showering Liles and dressing him in clean cloths.

victim suffered. Additionally, Kozee cannot demonstrate prejudice in which witnesses testified that Kozee was a primary assailant who worked in concert with co-defendant Gay in assaulting the victim, and Kozee had injuries on his hand. Finally, the State maintains that the “all or nothing” strategy does not rise to ineffective assistance of counsel.

{¶16} On the issue of the motion to sever, the State asserts that Kozee’s trial counsel’s strategy was to attack the credibility of the witnesses, not pointing the blame on his co-defendant Gay. The State concludes by stating that Kozee’s strategy worked as he was acquitted of murder and tampering with evidence.

{¶17} In his reply brief, Kozee contends that the witnesses testified that co-defendant Gay was the primary aggressor, not Kozee. And it was apparent from the opening statement that co-defendant Gay was going to put the blame on Kozee. Therefore, the State’s claim that it was trial strategy fails because the strategy was not reasonable. Further, Kozee was prejudiced by trial counsel’s failure to request instructions on the lesser-included offense of assault as he was convicted of felonious assault and sentenced to eight years in prison.

Law and analysis

A. Standard of review

{¶18} To demonstrate ineffective assistance of counsel, Kozee “must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel’s errors, the proceeding’s result would

have been different.” *State v. Short*, 2011-Ohio-3641, ¶ 113, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984); *State v. Bradley*, 42 Ohio St.3d 136 (1988), paragraph two of the syllabus. Failure to demonstrate either prong of this test “is fatal to the claim.” *State v. Jones*, 2008-Ohio-968, ¶ 14 (4th Dist.), citing *Strickland*.

{¶19} Kozee “has the burden of proof because in Ohio, a properly licensed attorney is presumed competent.” *State v. Gondor*, 2006-Ohio-6679, ¶ 62, citing *State v. Calhoun*, 86 Ohio St.3d 279, 289 (1999), citing *Vaughn v. Maxwell*, 2 Ohio St.2d 299 (1965). “In order to overcome this presumption, the petitioner must submit sufficient operative facts or evidentiary documents that demonstrate that the petitioner was prejudiced by the ineffective assistance.” *Id.*, citing *State v. Davis*, 133 Ohio App.3d 511, 513 (8th Dist. 1999). To demonstrate prejudice, Kozee “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland* at 694.

B. Jury instruction – lesser-included offense of assault

{¶20} There is no dispute that assault is a lesser-included offense of felonious assault. The issue here is whether Kozee’s trial counsel should have requested a jury instruction on the lesser-included offense of assault. We hold that Kozee cannot demonstrate his trial counsel’s representation fell below an objective standard of reasonableness and overrule his argument.

{¶21} “Generally, a failure to request a jury instruction on a lesser-included offense is presumed to be a matter of trial strategy.” *State v. Vogt*, 2018-Ohio-4457, ¶ 119 (4th Dist.). Further, “tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance of counsel.” *State v. Rizer*, 2011-Ohio-5702, ¶ 37 (4th Dist.), citing *In re Wingo*, 143 Ohio App.3d 652, 668 (4th Dist. 2001). “A properly licensed attorney is presumed to execute his duties in an ethical and competent manner.” *State v. Taylor*, 2008-Ohio-482, ¶ 10 (4th Dist.), quoting *State v. Smith*, 17 Ohio St.3d 98, 100 (1985). Thus, “the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Vogt* at ¶ 122. Moreover, as the Supreme Court of Ohio highlighted

[w]hen the alleged error concerns what could be viewed as trial strategy, courts must be “highly deferential” to the attorney’s strategic decisions. *Id.*, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. After all, each case is unique and capable of being argued in a variety of ways. See *id.* at 689-690, 104 S.Ct. 2052. Nobody can predict the future, and “it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Id.* at 689, 104 S.Ct. 2052. Hindsight is 20/20 after all. Accordingly, the defendant “must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ ” *Id.*, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955).

State v. Lloyd, 2022-Ohio-4259, ¶ 17, *cert. denied*, __ U.S. __, 143 S. Ct. 2649 (2023).

{¶22} In support of his argument, Kozee cites to *State v. Brooks*, 2001-Ohio-8655 (12th Dist.). In that case, Brooks testified at trial and he requested that the jury be instructed on assault as a lesser-included offense of felonious

assault. *Id.* at *5. Brooks testified that he hit the victim near his eye and side and his involvement ended prior to the second assault by a different aggressor that resulted in the fracture of the victim's jaw. *Id.* at *6. The Twelfth District Court of Appeals in reviewing the issue on whether the trial court erred in denying Brooks' assault jury instruction request, found that the jury was presented with evidence, including Brooks' testimony, if believed would have demonstrated an offense of assault. *Id.*

{¶23} The matter at bar is distinguishable from *Brooks* in two major ways. First, Kozee's trial counsel's strategy based on the record before us is the all-or-nothing approach in which even if the jury believed the State's witnesses, the jury would only find that Kozee punched the victim once. And one punch in this case would not have resulted in Liles' serious injuries and Kozee would be acquitted. We have previously found that

[o]ften times, with respect to "lesser-included offenses," defense counsel will make the strategic decision not to request a lesser-included offense jury instruction in the hopes that the jury will outright acquit the defendant on the charged offense, having not been given the option to find guilt as to the lesser-included offense.

State v. Blanton, 2018-Ohio-1278, ¶ 128 (4th Dist.).

And as the Supreme Court emphasized, we must be "highly deferential" to Kozee's attorney's strategic decision. See *Lloyd* at ¶ 17.

{¶24} Second, Kozee did not testify. And the evidence presented at trial, including Fitzpatrick's testimony demonstrated that Kozee assaulted the victim multiple times. Therefore, Kozee cannot demonstrate that if his trial counsel requested the instructions it would have been granted by the trial court. This is

because “[e]ven though an offense may be statutorily defined as a lesser included offense of another, a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.” *State v. Thomas*, 40 Ohio St.3d 213 (1988), paragraph two of the syllabus. And here, as detailed below in the second and third assignments of error, the evidence demonstrates that Kozee was the aggressor and attacked the victim multiple times. The victim’s injuries were severe and resulted in his death at the hospital. Accordingly, we find that Kozee failed to meet his burden in demonstrating his trial counsel’s representation fell below an objective standard of reasonableness and overrule his argument.

C. Motion to sever trial

{¶25} Pursuant to Crim.R. 8(B):

Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

However,

[i]f it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires.

Crim.R. 14.

{¶26} It is understood that joinder “is favored because it conserves resources by avoiding duplication inherent in multiple trials and minimizes the possibility of incongruous results that can occur in successive trials before different juries.” *State v. Hamblin*, 37 Ohio St.3d 153, 157-158 (1988). Thus, the burden is on the defendant filing the motion to sever to demonstrate prejudice. See *State v. Moore*, 2024-Ohio-1783, ¶ 11 (8th Dist.). And the defendant “must furnish the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant’s right to a fair trial[.]” *State v. Lott*, 51 Ohio St.3d 160 (1990), syllabus.

{¶27} Moreover, “it is generally recognized that codefendants asserting antagonistic theories in a joint trial does not constitute prejudice as contemplated under Crim.R. 14, when the claims of prejudice are solely based on the existence of varying theories of the defense being presented to the jury.” *Moore* at ¶ 12, citing *State v. Brunson*, 2020-Ohio-5078, ¶ 51-52 (8th Dist.). Additionally, “[m]utually antagonistic defenses are not prejudicial per se[.]” *State v. Dues*, 2014-Ohio-5276, ¶ 31 (8th Dist.). But again, “the burden is on the defendant to demonstrate the existence of that prejudice beyond merely claiming that the arguments were ‘mutually antagonistic.’ ” *Moore* at ¶ 12.

{¶28} In support of his argument, Kozee cites to *State v. Klein*, in which the Fifth District Court of Appeals reversed Klein’s convictions finding that he was prejudiced by the joinder of his case with his wife, co-defendant Kasey. 2013-Ohio-228, ¶ 57 (5th Dist.). Klein and his wife were both convicted of child endangering and involuntary manslaughter after their three-year-old son was

found dead in the river and their two-year-old son was still missing. The Fifth District ordered a re-trial after reviewing the evidence which included Kasey's testimony. *Id.* at ¶ 21-47. The Fifth District evaluated several of Kasey's answers in which she stated that Klein's statement to the detective included incorrect information and that Klein lied, and because of his dishonesty, she stopped corresponding with her husband. *Id.* Her testimony insinuated that Klein did something to the boys. *Id.* at ¶ 47, 57. Moreover, Kasey's closing argument at trial pointed the finger at Klein. *Id.* at ¶ 48-54.

{¶29} Unlike the finger-pointing strategy supported by Kasey's testimony that occurred in *Klein*, Kozee's co-defendant Gay did not testify and did not point the finger at Kozee. As we previously stated, prejudice cannot be presumed based on a claim that the defense of co-defendant Gay is "mutually antagonistic." The prejudice must be demonstrated, and in the matter at bar, Kozee cannot meet his burden. Contrary to Kozee's claim, the defenses were not mutually antagonistic. Kozee extracts a miniscule section from the four-day jury trial in claiming co-defendant Gay pointed the finger at him. After thoroughly reviewing the opening statements, the testimony of the State's 17 witnesses, and closing arguments, it is clear that Kozee's trial strategy and that of co-defendant Gay were consistent – attack the credibility of the State's witnesses and challenge the expert witnesses' interpretation of the forensic evidence.

{¶30} Co-defendant Gay's opening statement began with him agreeing with Kozee's counsel in that he "touched upon a lot about what this case is going to rest on. It's going to rest on the credibility of three witnesses, okay." Co-

defendant Gay continued by attacking the State's witnesses' motives and credibility and ended by highlighting that he did not assault the victim but rather helped clean him up. At no point during the two-and-a-half-page opening statement did co-defendant Gay point the finger at Kozee. Further, co-defendant Gay's closing argument was short, two pages, and he emphasized that the State's main three witnesses "lied right there on the stand all the way through" and that they "have tried to blame these two and tried to blame my client, then they try to point the finger at each other. There is no consistent story here just lies motivated by plea deals[.]"

{¶31} Therefore, because Kozee fails to demonstrate prejudice from the joinder of the trials, we cannot conclude that his trial counsel was ineffective for failing to file a motion to sever the trials. Accordingly, we overrule Kozee's first assignment of error.

ASSIGNMENTS OF ERROR II & III

{¶32} Kozee in the second and third assignments of error, which he argues together, claims that his conviction of felonious assault was not supported by sufficient evidence and was against the manifest weight of the evidence. Kozee maintains that his involvement was minimal and he removed himself from the situation, thus, he could not have caused the victim serious physical harm. Further, Kozee questions the credibility of the State's witnesses and highlights that the prosecution in closing argument conceded that its witnesses were drug addicts and gave conflicting stories. Specifically, Kozee notes that Fitzpatrick's testimony was inconsistent with her initial statement to law enforcement. Her

inconsistent testimony, which was after her plea deal with the prosecution, elaborated more and escalated Kozee's involvement in Liles' assault. Similarly, Bass provided inconsistent statements. According to Kozee, due to the conflicting testimony and his minimal assault of the victim, his conviction of felonious assault should be reversed.

{¶33} In response, the State maintains that this is not one of those exceptional cases that warrants reversal. The State asserts that several witnesses testified that Kozee was the assailant and they were consistent in that testimony. And the victim's injuries speak for themselves of the severity of that attack. Moreover, the jury was in the best position to judge the credibility of the witnesses and it did not lose its way in this case.

Law and analysis

A. Standard of review

{¶34} When reviewing whether the evidence is sufficient to sustain a conviction, the focus is on the adequacy of the evidence. *See State v. Sims*, 2023-Ohio-1179, ¶ 115 (4th Dist.). Thus, "[t]he standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *Id.*

{¶35} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court reviews 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983). “Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C.E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279 (1978), syllabus.

Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.

State v. Jenks, 61 Ohio St.3d 259 (1991), paragraph one of the syllabus.

{¶36} The weight and credibility of evidence are to be determined by the trier of fact. *State v. Kirkland*, 2014-Ohio-1966, ¶ 132. The trier of fact “is free to believe all, part or none of the testimony of any witness,” and we “defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses’ demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility.” *State v. Dillard*, 2014-Ohio-4974, ¶ 28 (4th Dist.), citing *State v. West*, 2014-Ohio-1941, ¶ 23 (4th Dist.).

{¶37} In addition, “[a] verdict is not against the manifest weight of the evidence because the finder of fact chose to believe the State’s witnesses.” *State v. Chancey*, 2015-Ohio-5585, ¶ 36 (4th Dist.), citing *State v. Wilson*, 2014-Ohio-3182, ¶ 24 (9th Dist.), citing *State v. Martinez*, 2013-Ohio-3189, ¶ 16 (9th

Dist.). Moreover, “ ‘[w]hile the jury may take note of inconsistencies and resolve or discount them accordingly, * * * such inconsistencies (sic.) do not render defendant’s conviction against the manifest weight or sufficiency of the evidence.’ ” *State v. Corson*, 2015-Ohio-5332, ¶ 31 (4th Dist.), quoting *State v. Proby*, 2015-Ohio-3364, ¶ 42 (10th Dist.), citing *State v. Gullick*, 2014-Ohio-1642, ¶ 10 (10th Dist.).

{¶38} A finding that a conviction is supported by the manifest weight of the evidence is “also dispositive of the issue of sufficiency.” *Sims*, 2023-Ohio-1179, ¶ 120 (4th Dist.), citing *State v. Waller*, 2018-Ohio-2014, ¶ 30 (4th Dist.).

B. Felonious assault

{¶39} Kozee was convicted of felonious assault in violation of R.C. 2911.03(A)(1), which states that “[n]o person shall knowingly do either of the following: (1) Cause serious physical harm to another or to another’s unborn[.]”

A person acts knowingly, regardless of purpose, when the person is aware that the person’s conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

R.C. 2901.22(B).

{¶40} And “serious physical harm” includes:

- (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
- (b) Any physical harm that carries a substantial risk of death;
- (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

- (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
- (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

R.C. 2901.01(A)(5)(a), (b), (c), (d) & (e).

{¶41} Under these assignments of error, Kozee challenges his conviction arguing that the evidence did not establish he caused Liles serious physical harm and that the jury lost its way in believing the State's witnesses: Rhea, Fitzpatrick and Bass.

{¶42} Contrary to Kozee's assertions, the evidence as viewed most favorably to the prosecution established that Kozee assaulted Liles and caused him serious physical harm. Kozee was angry when some of his drugs went missing. Kozee punched Liles more than once before the bathroom door was closed. After the bathroom door was closed, the fighting continued. Liles, who had clothing on prior to the assault, was naked and had to be dragged out of the bathroom by his hands and legs by Kozee and co-defendant Gay. Liles was dropped on the kitchen floor and he was unresponsive. Liles was bleeding from his mouth/jaw and nose areas. Liles' injuries just moments after exiting the bathroom were so severe that he defecated while lying on the floor naked and was unresponsive. And when Kozee was apprehended three days later, his hands and knuckles were red. The injuries stood out to former detective Steve Timberlake because the right hand was swollen and red and this is consistent with an injury "if he was involved in a fight or an assault[.]"

{¶43} Kozee is correct that the State's three witnesses who witnessed the

assault provided conflicting statements to law enforcement prior to their testimony at trial. However, each of them explained why their initial statements were inconsistent, and each also explained that they made plea deals with the prosecution on their respective criminal proceedings. Rhea elaborated that when medical assistance was called, she and Bass and co-defendant Gay agreed to say that Liles came to the house beat up. And that is what she stated when law enforcement came. Rhea testified that she made the false statement because she was scared: “[t]his has been very traumatic . . . I have never been around anything like this in my life.”

{¶44} Fitzpatrick testified while dressed in jail clothing, thus, she was questioned quickly regarding her current incarceration and her plea deal with the prosecution. Fitzpatrick also explained that she lied to law enforcement when she was initially questioned about the assault but explained that this was because she was on drugs and was scared. Similarly, Bass explained that he went along with co-defendant Gay in informing law enforcement that Liles came to the house beat up because he was scared what co-defendant Gay and Kozee would do to him. Bass also testified that he was the one who insisted the next day to call for medical assistance for Liles and completed the phone call.

{¶45} We reiterate that

[g]enerally, it is within the province of the jury to choose which witnesses to believe, and even which portions of each witnesses’ testimony to believe. “[O]n review for evidentiary sufficiency we do not second-guess the jury’s credibility determinations; rather, we ask whether, ‘*if believed*, [the evidence] would convince the average mind of the defendant’s guilt beyond a reasonable doubt.’” *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001),

quoting *Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus (emphasis added).

Gay, 2024-Ohio-1673, ¶ 37 (4th Dist.).

{¶46} In the matter at bar, the evidence submitted, if believed, supports Kozee’s conviction. Furthermore, “[a] defendant is not entitled to a reversal on manifest weight grounds simply because inconsistent evidence existed at trial.” *Id.* at ¶ 50, citing *State v. Gunn*, 2021-Ohio-2253, ¶ 41 (6th Dist.). This is because the jury “could determine whether to credit all, part, or none of their testimony, and we defer to the jury’s credibility assessment[.]” and a conviction is not against the manifest weight of the evidence, even if the “evidence is subject to different interpretations.” *Id.* at ¶ 48, citing *State v. Adams*, 2014-Ohio-3432, ¶ 24 (2d Dist.); *State v. Simms*, 2023-Ohio-1179, ¶ 119 (4th Dist.).

{¶47} The jury was in the best position to assess the witnesses’ credibility by viewing their demeanor, gestures and voice inflections. And in this case, we cannot conclude that the jury lost its way for believing the State’s witnesses and finding Kozee guilty. Wherefore, Kozee’s second and third assignments of error are overruled and his conviction is affirmed.

ASSIGNMENT OF ERROR IV

{¶48} In the fourth assignment of error, Kozee argues that the trial court failed to provide the required Reagan Tokes Act notifications at the sentencing hearing. According to Kozee, because the trial court failed to comply with R.C. 2929.19(B)(2)(c), his sentence is contrary to law, even though the trial court incorporated the notifications in the judgment entry of conviction.

{¶49} The State agrees that the trial court failed to provide Kozee at the sentencing hearing of the required Reagan Tokes Act notifications and that the matter should be remanded for resentencing.

Law and analysis

{¶50} We must review Kozee's sentence pursuant to the dictates of R.C. 2953.08(G). *See State v. Marcum*, 2016-Ohio-1002, ¶ 16. Pursuant to R.C. 2953.08(G)(2)(b), an

appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

...
(b) That the sentence is otherwise contrary to law.

{¶51} "Effective March 22, 2019, the Reagan Tokes Law established indefinite-sentencing provisions for people convicted of non-life-sentence felony offenses of the first or second degree." *State v. Maddox*, 2022-Ohio-764, ¶ 4. Kozee was sentenced to an indefinite prison term and pursuant to R.C. 2929.19(B)(2)(c), the trial court was required to notify him at the sentencing

hearing of all of the following:

- (i) That it is rebuttably presumed that the offender will be released from service of the sentence on the expiration of the minimum prison term imposed as part of the sentence or on the offender's presumptive earned early release date, as defined in section 2967.271 of the Revised Code, whichever is earlier;
- (ii) That the department of rehabilitation and correction may rebut the presumption described in division (B)(2)(c)(i) of this section if, at a hearing held under section 2967.271 of the Revised Code, the department makes specified determinations regarding the offender's conduct while confined, the offender's rehabilitation, the offender's

threat to society, the offender's restrictive housing, if any, while confined, and the offender's security classification;

(iii) That if, as described in division (B)(2)(c)(ii) of this section, the department at the hearing makes the specified determinations and rebuts the presumption, the department may maintain the offender's incarceration after the expiration of that minimum term or after that presumptive earned early release date for the length of time the department determines to be reasonable, subject to the limitation specified in section 2967.271 of the Revised Code;

(iv) That the department may make the specified determinations and maintain the offender's incarceration under the provisions described in divisions (B)(2)(c)(i) and (ii) of this section more than one time, subject to the limitation specified in section 2967.271 of the Revised Code;

(v) That if the offender has not been released prior to the expiration of the offender's maximum prison term imposed as part of the sentence, the offender must be released upon the expiration of that term.

R.C. 2929.19(B)(2)(c)(i), (ii), (iii), (iv) & (v).

{¶52} In the matter at bar, the trial court failed to notify Kozee of the mandatory notifications at the sentencing hearing. We previously held that a defendant's sentence is contrary to law when a trial court fails to inform a defendant of the mandatory Reagan Tokes' notifications pursuant to R.C. 2929.19(B)(2)(c). See *State v. Long*, 2021-Ohio-2672 (4th Dist.); see also *State v. Estep*, 2024-Ohio-58 (4th Dist.). Kozee is correct that this error cannot be remedied by the trial court's inclusion of the notifications in the judgment entry of conviction, as the notifications must be provided at the sentencing hearing. See *Long* at ¶ 29.

{¶53} We, therefore, sustain Kozee's fourth assignment of error and remand the matter for resentencing so that the trial court may comply with R.C. 2929.19(B)(2)(c).

CONCLUSION

{¶54} We affirm Kozee's felonious assault conviction but we remand the matter to the trial court for resentencing.

**JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE
REMANDED.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and the CAUSE IS REMANDED. Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. and Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.