

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

STATE OF OHIO,	:	Case No. 08CA40
	:	
Plaintiff-Appellee,	:	
	:	<u>DECISION AND</u>
v.	:	<u>JUDGMENT ENTRY</u>
	:	
LEEANN M. WISE,	:	Released 9/25/09
	:	
Defendant-Appellant.	:	

APPEARANCES:

David Reid Dillon, South Point, Ohio, for appellant.

J.B. Collier, Jr., LAWRENCE COUNTY PROSECTUOR, and Brigham M. Anderson, LAWRENCE COUNTY ASSISTANT PROSECUTOR, Ironton, Ohio, for appellee.¹

Harsha, J.

{¶1} In this consolidated appeal, Leeann M. Wise (“Wise”) challenges judgments of conviction and sentences entered by the Lawrence County Municipal Court. Following a bench trial, the court found Wise guilty of assault. In an unrelated case, Wise pled guilty to operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them (“OVI”) and using a fictitious registration. Her appointed counsel advised this Court that he has reviewed the record and can discern no meritorious claims for appeal. Accordingly, under *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, counsel has moved to withdraw. After independently reviewing the record, we agree with counsel’s assessment that no meritorious claims exist upon which to predicate an appeal. Therefore, we grant

¹ The State of Ohio did not file an appellate brief.

counsel's request to withdraw, find this appeal is wholly frivolous under *Anders*, and affirm the trial court's judgment.

I. Facts

{¶2} In September 2007, the Lawrence County Prosecuting Attorney filed a complaint upon affidavit against Wise, under case number CRB 0800016. The complaint alleged that on August 8, 2007, in Union Township, Lawrence County, Ohio, Wise knowingly caused or attempted to cause physical harm to Rebecca Hughes ("Hughes"), i.e. assaulted her, in violation of R.C. 2903.13. Wise was not served with the summons until July 28, 2008. After Wise pled not guilty to the charges, a bench trial held on November 10, 2008 produced the following evidence.

{¶3} Hughes testified that on August 8, 2007, she saw a car stop in front of her property. She went to the end of her driveway to see what its occupants needed. The passenger, who Hughes later learned was Wise, stepped out of the car and sprayed her in the face with what she believed to be mace. Because Hughes turned her face to the side before Wise sprayed her, she avoided getting the spray in her eyes. However, Hughes testified that the side of her face burned and was red. Hughes testified that Wise was upset because she told the Environmental Protection Agency ("EPA") that Wise's brother had been illegally dumping tires.

{¶4} According to Hughes, after Wise sprayed her, Ernie Hargis ("Hargis"), Hughes's boyfriend, called the sheriff's office while Hughes went in her home to retrieve a camera. Hughes took pictures of Wise and the driver of the car, Wise's mother, as they argued in the road for over an hour about which woman would fight Hughes. One of the pictures shows Wise with a can of some type attached to the keychain in her

hand. Hughes did not take pictures of her own face. Law enforcement responded approximately two hours after Wise sprayed Hughes. Wise and her mother had already left the scene. Hughes testified that an officer advised her to put milk on her face to help with the burning.

{15} Hargis testified that he saw a vehicle stop in front of Hughes's home. He saw a woman, who he identified as Wise, step out of the passenger side of the vehicle and spray Hughes in the face with something on her keychain. He initially testified it was "mace or something" and later testified that it "was either mace or pepper spray." He observed redness on the side of Hughes's face after the incident, and Hughes complained that her face burned. Hargis did not know what prompted the incident. Hargis testified that he called the sheriff's office, and Hughes photographed Wise and the driver of the vehicle, an older woman, as they argued in the roadway for 45 minutes to an hour about which woman would fight Hughes.

{16} Deputy J.D. McDaniels ("McDaniels") with the Lawrence County Sheriff's Department testified that he responded to the scene. Hughes told him about an altercation with two women in front of her house and that one of the women had maced her in the face. Hughes gave McDaniels the license plate number from their vehicle. McDaniels testified that he observed redness on the side of Hughes's face, but did not know whether she had been maced. However, he testified that he did not arrive on the scene until two hours after the department first learned of the incident, and by that time, other observable symptoms may have subsided. McDaniels testified that Hughes told him her face burned, and he remembered advising her to put milk on her face to take the burn out of it. McDaniels testified that several grades of pepper spray and mace

exist and that the sprays made for civilian use are weaker than the sprays law enforcement carry. On cross-examination, McDaniels testified that he did not recall speaking to Hargis about the incident and agreed that obtaining a statement from an independent witness would have been important for his investigation. However, on redirect, McDaniels acknowledged that in Hughes's statement, she mentioned her boyfriend calling the police.

{¶7} Wise testified on her own behalf. According to Wise, before the incident occurred, she and her mother were attempting to drive to her mother's property, but the roadway was blocked with brick and stone. Wise's mother stopped the car near Hughes's home so Wise could photograph the obstruction. Hughes began to scream at Wise's mother, said she would put her "in her grave before her time," and ran toward the car. Wise testified that she did not spray Hughes or otherwise touch her. However, when cross-examined regarding the photograph Hughes took of Wise holding a can attached to a keychain, Wise testified that it could be hairspray or pepper spray. Wise also acknowledged that she and her mother stayed at the scene "quite a while [sic]," but claimed they were only waiting for law enforcement to arrive. Wise testified that when this incident occurred, she did not know Hughes's name or that Hughes had reported a member of her family to the EPA. However, she was aware of problems her mother, brother, and half-brother had with Hughes and her family.

{¶8} The trial court found Wise guilty of assault. The court sentenced her to 30 days in jail and suspended 28 days of that sentence. The court also ordered her to pay a \$150 fine and court costs, perform community service, and refrain from having any further contact with Hughes.

{¶9} On June 29, 2008, the Ohio State Highway Patrol cited Wise for OVI, in violation of R.C. 4511.19(A)(1)(a), and fictitious registration, in violation of R.C. 4549.08, under case number TRC08-1669. Wise pled guilty to the charges. For the OVI conviction, the trial court sentenced her to 20 days in the Lawrence County Jail, to be suspended upon the successful completion of a 72-hour drivers' intervention program. The court ordered Wise to complete 30 hours of community service, pay a \$575.00 fine, and pay court costs. The court placed her on probation for one year. In addition, the court suspended Wise's driver's license for three years, to be reduced to 180 days on successful completion of the drivers' intervention program. For the fictitious registration conviction, the court ordered Wise to pay a \$30.00 fine.

{¶10} After the trial court entered judgments of conviction and sentences in both cases, Wise filed this appeal.

II. Proposed Assignments of Error

{¶11} In *Anders*, the United States Supreme Court held that if counsel determines after a conscientious examination of the record that the case is wholly frivolous, counsel should so advise the court and request permission to withdraw. *Id.* at 744. Counsel must accompany the request with a brief identifying anything in the record that could arguably support the appeal. *Id.* Counsel also must furnish the client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that the client chooses. *Id.* Once these requirements have been satisfied, the appellate court must then fully examine the proceedings below to determine if meritorious issues exist. *Id.* 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 may proceed to a decision on the merits if state law so requires. *Id.* Alternatively, if the appellate court concludes that any of the legal points are arguable on their merits, it must afford the appellant the assistance of counsel to argue the appeal. *Id.*

{¶12} Here, Wise's appointed counsel satisfied the requirements set forth in *Anders*, and appellant has not filed a pro se brief. Accordingly, we will examine appointed counsel's proposed assignments of error and the entire record to determine if this appeal lacks merit. Although improperly phrased, appointed counsel raises the following proposed assignments of error:

Assignment of Error #1: THE TRIAL COURT'S JUDGMENT OF GUILTY WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Assignment of Error #2: THE TRIAL COURT'S SENTENCE WAS WITHIN THE DISCRETION OF THE COURT.

Assignment of Error #3: THERE ARE NO NON-FRIVOLOUS ASSIGNMENTS OF ERROR TO BE APPEALED TO THIS COURT.

III. Manifest Weight of the Evidence

{¶13} In his first proposed assignment of error, appointed counsel examines whether Wise's assault conviction was against the manifest weight of the evidence. To determine whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. A reviewing court "may not reverse a

conviction when there is substantial evidence upon which the trial court could reasonably conclude that all elements of the offense have been proven beyond a reasonable doubt.” *State v. Johnson* (1991), 58 Ohio St.3d 40, 42, 567 N.E.2d 266, citing *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, at paragraph two of the syllabus.

{¶14} Even in this role we must still remember that the weight to be given evidence and the credibility to be afforded testimony are issues to be determined by the trier of fact. *State v. Frazier*, 73 Ohio St.3d 323, 339, 1995-Ohio-235, 652 N.E.2d 1000, citing *State v. Grant*, 67 Ohio St.3d 465, 477, 1993-Ohio-171, 620 N.E.2d 50. The fact finder “is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Thus, we will only interfere if the fact finder clearly lost its way and created a manifest miscarriage of justice.

{¶15} Wise was convicted of assault, in violation of R.C. 2903.13(A), which provides: “No person shall knowingly cause or attempt to cause physical harm to another * * *.” Under R.C. 2901.01(A)(3), “physical harm” is defined as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.” According to R.C. 2901.22(B), a person acts “knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.”

{¶16} Wise essentially argues that the trial court lost its way in discrediting her

testimony. According to her version of events, Wise and her mother did not stop near Hughes's house with any intention of starting an altercation with her. Hughes came out to their vehicle, yelling and threatening Wise's mother, but Wise did not spray Hughes with any substance or otherwise touch her. Wise argued that if Hughes had in fact been sprayed with mace or pepper spray, her symptoms would have been so severe that she could not have retrieved a camera and photographed Wise and her mother.

{¶17} As we explained in *State v. Murphy*, Ross App. No. 07CA2953, 2008-Ohio-1744, at ¶31:

It is the trier of fact's role to determine what evidence is the most credible and convincing. The fact finder is charged with the duty of choosing between two competing versions of events, both of which are plausible and have some factual support. Our role is simply to insure the decision is based upon reason and fact. We do not second guess a decision that has some basis in these two factors, even if we might see matters differently.

{¶18} For the trial court to conclude Wise did not commit assault, it had to assess the credibility of Wise and the State's witnesses and reject the testimony of the State's witnesses. Having heard the testimony and having observed the demeanor of Wise and the State's witnesses, the court could choose to believe all, part, or none of the testimony presented by any of these witnesses. *State v. Parish*, Washington App. Nos. 05CA14 & 05CA15, 2005-Ohio-7109, at ¶15, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096.

{¶19} The trial court chose to disbelieve Wise's version of events, and we will not substitute our judgment for that of the finder of fact under these circumstances. The evidence reasonably supports the conclusion that Wise intentionally sprayed Hughes in the face with mace, pepper spray, or some other substance, causing her skin to burn and redden. Hughes and Hargis both testified to this effect, and McDaniels recalled

seeing redness on Hughes's face. Thus, after reviewing the entire record, we cannot say that the trier of fact lost its way or created a manifest miscarriage of justice when it found Wise guilty of assault. Therefore, counsel's first proposed assignment of error lacks arguable merit.

IV. Assault Sentence

{¶20} In his second proposed assignment of error, appointed counsel examines whether the trial court abused its discretion when it imposed a jail term for the assault conviction. "Generally, trial courts enjoy broad discretion when imposing sentences in misdemeanor cases, and we will not vacate a sentence unless the court abused its discretion." *State v. Babu*, Athens App. No. 07CA36, 2008-Ohio-5298, at ¶36. "An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary." *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 498, 506, 589 N.E.2d 24. When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301. Nonetheless, the trial court lacks the discretion to disregard the statutory sentencing factors provided in R.C. 2929.22, even though it has discretion in the ultimate sentence handed down after consideration of those factors. See *Babu* at ¶36

{¶21} Here, the trial court found Wise guilty of assault, in violation of R.C. 2903.13(A), a first-degree misdemeanor. See R.C. 2903.13(C). The court sentenced Wise to 30 days in jail and suspended 28 days of that sentence. Under R.C.

2929.24(A)(1), the trial court could impose a jail term of not more than 180 days for a first-degree misdemeanor.

{¶22} The trial court did not specifically refer to any of the sentencing criteria in R.C. 2929.22 during the sentencing hearing or in its Judgment Entry. However, as we have previously explained, “when a jail sentence falls within the statutory limit * * * reviewing courts presume that the trial court followed the appropriate statutory guidelines.” *State v. Fitzpatrick*, Lawrence App. No 07CA18, 2007-Ohio-7170, at ¶10, citing *State v. Wagner* (1992), 80 Ohio App.3d 88, 95-96, 608 N.E.2d 852, and *State v. Crable*, Belmont App. No. 04BE17, 2004-Ohio-6812, at ¶24. Wise’s jail sentence falls within the statutory limit, so we presume the trial court followed the sentencing guidelines in R.C. 2929.22.

{¶23} Furthermore, we note that the trial court only sentenced Wise to one-sixth of the jail term it could have imposed under law and suspended most of her sentence. In addition, at the sentencing hearing the trial court observed that in the photographs Hughes took of Wise, Wise’s body language is “aggressive and provocative.” The trial court indicated that a jail term was appropriate because the incident did not occur on “neutral ground,” but instead, Wise instigated the incident by going to Hughes’s residence. Because we cannot conclude that the trial court ignored the appropriate statutory guidelines or acted unreasonably, unconscionably, or arbitrarily in sentencing Wise to jail time, counsel’s second proposed assignment of error lacks arguable merit.

V. Other Matters

{¶24} In his third proposed “assignment of error,” appointed counsel simply points out various issues and portions of the record that counsel examined in

determining that no meritorious claims exist for appeal. Therefore, counsel's third proposed assignment of error lacks arguable merit.

VII. Conclusion

{¶25} Having reviewed appointed counsel's proposed assignments of error and having independently discovered no meritorious issues for appeal, we grant counsel's motion to withdraw, find this appeal wholly frivolous, and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that 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 Lawrence County Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, 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.