[Cite as *State v. Roddy*, 2010-Ohio-6487.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23774
vs.	:	T.C. CASE NO. 09CRB366
MARQUITA RODDY	:	(Criminal Appeal from County Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 29th day of December, 2010.

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GRADY, J.:

{¶ 1} Defendant, Marquita Roddy, was found guilty following a jury trial, of criminal trespassing, R.C. 2911.21(A)(4), and resisting arrest, R.C. 2921.33(A). The trial court sentenced Defendant to a suspended thirty day jail term plus a fifty dollar fine on the trespassing charge. On the resisting arrest charge,

the court sentenced Defendant to a suspended ninety day jail term plus a fine of one hundred dollars. Defendant was placed on five years of community control sanctions.

{¶ 2} Defendant appealed to this court from her conviction and sentence. Defendant's appellate counsel filed an *Anders* brief, *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 19 L.Ed.2d 493, stating that he could find no meritorious issues for appellate review. We notified Defendant of her appellate counsel's representations and afforded her sixty days to file her own pro se brief. On May 18, 2010, Appellant filed her pro se brief. Accordingly, we deem this appeal submitted for decision on the merits, and the case is now before us for our independent review of the record. *Penson v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300.

{¶ 3} Defendant's appellate counsel identified two possible issues for appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 4} "THE GUILTY VERDICT RENDERED BY THE JURY IN THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 5} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App.

No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 6} "[t]he 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 lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins* (1997), 78 Ohio St.3d 380.

{¶ 7} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (Aug. 22, 1997), Montgomery App.No. 16288, we observed:

{¶ 8} "Because the factfinder ... has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness."

{¶ 9} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it

is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 10} Defendant was convicted of criminal trespass in violation of R.C. 2911.21(A)(4), and resisting arrest in violation of R.C. 2921.33(A). Those sections provide, respectively:

{¶ 11} "(A) No person, without privilege to do so, shall do any of the following:

{¶ 12} * * *

{¶ 13} "(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either;

{¶ 14} "(A) No person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another."

{¶ 15} On the evening of March 7, 2009, Defendant went to the Danbarry Cinemas Complex in Huber Heights to watch a movie. Defendant purchased a ticket that allowed her to see one of the movies being shown, and then entered the theater where it would be shown. A group of female juveniles entered the theater, and were talking loudly and being disruptive. When the juveniles refused to quiet down, Defendant left the theater to notify theater staff and lodge a complaint. Security guard Joey Madden

subsequently asked the group of juveniles to exit the theater and step out into the hallway. They complied.

{¶ 16} In the hallway outside the theater, Defendant and the group of juveniles got into a verbal altercation in which profanity and threats of physical harm were exchanged. Security guard Madden and the manager of the theater, Chris Rowlette, each testified that they told the group of juveniles and Defendant to leave the complex. Defendant refused to leave without a refund of the price of her ticket. Rowlette explained to Defendant that no refunds are given when a customer is asked to leave the premises. Defendant continued to ask for a refund, despite several requests that she leave.

{¶ 17} After the theater management refused to refund her money, Defendant ran back into one of the theaters. Security guard Madden testified that he pursued her and successfully prevented Defendant from entering several of the theaters. Madden testified that during this time Defendant became physically aggressive and began attacking Madden, kicking him in the shins. That was witnessed by Madden's wife, Stephanie Madden, who also works at Danbarry Cinemas and who testified at Defendant's trial. Madden had to restrain Defendant. Meanwhile, the theater manager, Rowlette, called police.

{¶ 18} Huber Heights Police Officer Diulo arrived first,

followed by Officer Doyle. When Officer Doyle arrived, theater management was asking Defendant to leave and she continued to request a refund. Officer Diulo testified that he asked Defendant several times to come outside with him, but she refused that request as well. Officer Diulo said he told Defendant she was under arrest for criminal trespass and took hold of her wrist, and that Defendant pulled away and broke free of Officer Diulo's grasp.

{¶ 19} Officer Diulo testified that he attempted to handcuff Defendant to take her outside, but Defendant resisted and struggled with Officer Diulo. At that point Officer Doyle pulled out his tazer and told Defendant if she did not stop resisting she would be tazed. Officer Doyle repeated the warning three times, but Defendant continued to resist. Defendant was then tazed and taken into custody.

{¶ 20} Defendant testified at trial, and likewise said that the group of juveniles were disruptive, that Defendant reported their conduct to the theater management, and that she and the juveniles had an altercation in the hallway. Defendant admitted that she ran into one of the theaters when she was asked to leave, but contended that she came out again when she was told to. Defendant said she did not refuse to leave the theater premises when asked, but only and instead requested a refund of her price of admission, which theater management refused to give her.

Defendant testified that when police arrived she was not asked by them to leave or placed under arrest in any way before she was tazed unnecessarily and without warning.

{¶ 21} Viewing this evidence in a light most favorable to the State, a rational trier of facts clearly could have found all of the essential elements of criminal trespass and resisting arrest proven beyond a reasonable doubt. ***State v. Jenks*** **(1991), 61 Ohio St.3d 259. Defendant argues, however, that her convictions are against the manifest weight of the evidence because the officers may not have given clear instructions to Defendant, which led to her resisting, and the evidence was conflicting as to whether theater management ever asked Defendant to leave the premises. These contentions are refuted by the evidence presented.**

{¶ 22} Security guard Madden testified that Defendant refused several requests by him and the manager of the theater, Chris Rowlette, to leave the building. Madden also testified that police asked Defendant three of four times to leave and come outside with them, but she refused. Theater manager Chris Rowlette testified that despite his requests, Defendant refused to leave. Rowlette further testified that police asked Defendant three times to come outside with them but she refused. Officer Doyle testified that when he arrived, theater management was asking Defendant to leave but she was refusing. Officer Doyle also testified that Officer

Diulo asked Defendant multiple times to come outside but she refused. Officer Doyle warned Defendant three separate times to stop resisting arrest or she would be tazed.

{¶ 23} By its guilty verdicts, it is obvious that the jury believed the State's witnesses. The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of fact, the jury, to determine. *DeHass*. The jury did not lose its way simply because it chose to believe the State's version of the events, which it had a right to do. Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred. Defendant's convictions are not against the manifest weight of the evidence.

{¶ 24} This assignment of error lacks arguable merit.

SECOND ASSIGNMENT OF ERROR

{¶ 25} "THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION WHEN RULING ON THE ADMISSION OF HEARSAY EVIDENCE."

{¶ 26} The admission or exclusion of evidence is a matter resting within the sound discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173.

{¶ 27} During direct examination, the prosecutor asked Danbury

Cinemas security guard Joey Madden if he heard the police officers tell Defendant that she was under arrest. That question would elicit hearsay, evidence of an out of court statement made by the officers offered for the truth of the matter asserted, Evid.R. 801(C), which is generally inadmissible. Evid.R. 802. Accordingly, Defendant objected, and the trial court properly sustained that objection. The prosecutor then rephrased the question and asked Madden whether Defendant was placed under arrest. That question did not elicit any out of court statement by the officers or anyone else, and could be answered based upon Madden's own personal observations of what occurred in his presence. It would not elicit hearsay and was therefore properly allowed by the trial court. No abuse of discretion on the part of the trial court has been demonstrated.

{¶ 28} This assignment of error lacks arguable merit.

{¶ 29} In addition to reviewing the possible issues for appeal raised by Defendant's appellate counsel, we have conducted an independent review of the trial court's proceedings and have found no error having arguable merit. Accordingly, Defendant's appeal is without merit and the judgment of the trial court will be affirmed.

BROGAN, J. And CANNON, J., concur.

(Hon. Timothy P. Cannon, Eleventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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