

[Cite as *State v. Martin*, 2009-Ohio-3518.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 23114
Plaintiff-Appellee	:	
	:	Trial Court Case No. 07-CR-4373
v.	:	
	:	(Criminal Appeal from
KEVIN G. MARTIN	:	Common Pleas Court)
	:	
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 17th day of July, 2009.

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BROGAN, J.

{¶ 1} Kevin G. Martin appeals from his conviction and sentence following a jury trial on one count of harassment by an inmate and two counts of assault on a corrections officer.

{¶ 2} Martin's appointed appellate counsel has filed a brief pursuant to *Anders v.*

California (1967), 386 U.S. 738, asserting the absence of any non-frivolous issues for our review and requesting permission to withdraw from further representation. Counsel has set forth one potential assignment of error, however, questioning whether Martin's convictions are supported by the manifest weight of the evidence. Despite being given an opportunity to do so, Martin has filed no brief of his own.

{¶ 3} Upon review, we conclude that counsel's proposed assignment of error is frivolous. When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, 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 and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 4} The jury in the present case did not clearly lose its way, and the evidence does not weigh heavily against Martin's convictions. The jury convicted Martin of harassment by an inmate in violation of R.C. 2921.38(A), which provides: "No person who is confined in a detention facility, with the intent to harass, annoy, threaten, or alarm another person, shall cause or attempt to cause the other person to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the other person, by expelling the bodily substance upon the other person, or in any other manner."

{¶ 5} The State's evidence established that, while confined in Montgomery County Jail following his arrest for disorderly conduct, Martin intentionally spit bloody saliva on corrections officer Michael Hammond's head. The incident occurred as Hammond attempted to place Martin in a restraint chair. Martin did not deny spitting on Hammond, but claimed that he could not form the requisite intent because he was suffering from a concussion and that his actions were involuntary. Having reviewed the trial transcript, however, we believe the jury reasonably rejected this argument. Testimony from several witnesses supported a finding that Martin knew exactly what he was doing and acted with the required mental state when he spit on Hammond.

{¶ 6} We reach the same conclusion with regard to Martin's convictions for assault in violation of R.C. 2903.13(A), which provides: "No person shall knowingly cause or attempt to cause physical harm to another * * *." The offenses were fifth-degree felonies because the jury found that the assaults took place in a local correctional facility, the victims of the offenses were employees of the facility, and the offenses were committed by a person who was in custody in the facility subsequent to his arrest for any crime. See R.C. 2903.13(C)(2)(b).

{¶ 7} The State's evidence established that, while in custody in Montgomery County Jail following his arrest for disorderly conduct, Martin intentionally kicked corrections officer Marshall Howard on the shin, causing pain and bleeding, and intentionally bit corrections officer Dustin Johnson on the foot, causing pain and discoloration. Once again, Martin admitted these incidents, but claimed that he lacked the required mental state due to a concussion and that his actions were involuntary. The testimony of the State's witnesses supported a finding, however, that Martin knew

exactly what he was doing, that he knew Howard and Johnson were employees of the jail, and that he knowingly caused them physical harm. Even assuming arguendo that Martin had a concussion, the manifest weight of the evidence supports a finding that he was fully oriented to his surroundings and situation and that he acted with the required mental state to support each of his convictions.

{¶ 8} Pursuant to our responsibilities under *Anders*, we independently have reviewed the record in this case. Having done so, we agree with the assessment of appointed appellate counsel that there are no non-frivolous issues for our review. Counsel's request to withdraw from further representation is granted, and the judgment of the Montgomery County Common Pleas Court is affirmed.

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FAIN and FROELICH, JJ., concur.

Copies mailed to:

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Hon. Barbara P. Gorman