

County Criminal Court: CRIMINAL LAW—Evidence. The trial court properly denied motion for judgment of acquittal. The record demonstrates sufficient evidence to support each element of the crime of which Appellant was convicted, and the sentence imposed is a legal sentence. Affirmed. *Mark Parco v. State of Florida*, No. 13-CF-6047-WS (Fla. 6th Cir. App. Ct. January 5, 2014).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

MARK PARCO,
Appellant,

UCN: 512013CF006047A000WS
Appeal No: CRC1306047CFAWS
L.T. No: 2013-1592-MM-WS

v.

STATE OF FLORIDA,
Appellee.

_____ /

On appeal from County Court,

Honorable Anne Wansboro,

Frank D. L. Winstead, Esquire,
for Appellant,

Office of the State Attorney,
for Appellee.

ORDER AND OPINION

After a full and independent review of the record, we find no arguable issue on appeal. Therefore it is unnecessary to allow counsel to file an additional brief, or appoint new counsel to represent Appellant, as counsel for Appellant filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). We find no error in the denial of Appellant's motion for judgment of acquittal, and find the sentence imposed in this case is a legal sentence. The trial court is therefore affirmed.

STATEMENT OF THE CASE AND FACTS

Appellant was charged with misdemeanor battery in violation of § 784.03(1), Fla. Stat. A jury trial was had in the matter at which seven witnesses testified. Deputy Sweeney testified that on March 4, 2013 he responded to two calls regarding the alleged battery, one from Appellant and one from the victim's mother. The Deputy first went to Appellant's home, and Appellant stated he had been in an altercation with some juveniles on his property, that one had approached him in an aggressive manner and Appellant shoved him to create distance, that the juvenile then struck Appellant and they fell to the ground where a struggle ensued, at which point Appellant grabbed the juvenile's testicles. The altercation was broken up when two other juvenile males allegedly attacked Appellant, at which point Appellant stated he retreated to his home and called the police. Appellant stated there were no witnesses to corroborate his story.

The Deputy then responded to the second call from the victim's mother, who informed the Deputy her son was attacked by an older man. The Deputy interviewed the victim, who appeared afraid and in pain, had tears running down his face and could barely speak. The Deputy interviewed and took written statements from five juveniles who stated they had witnessed the attack, and their individual accounts of the altercation were consistent. The Deputy returned to Appellant's home to retrieve Appellant's written statement, and placed Appellant under arrest for battery based on the results of the investigation. Appellant refused to give a written statement or allow himself to be photographed.

Appellant moved for judgment of acquittal after the presentation of the State's evidence, which was denied. Appellant then testified on his own behalf and renewed a motion for judgment of acquittal which was denied. The cause was submitted to the jury, which returned a verdict of guilty of the charge of battery. Appellant was sentenced to 30 days in jail followed by 11 months' probation, with probation conditions, as well as court fines and costs. Appellant sought review of the order denying the motion for judgment of acquittal and the judgment and sentence in this case. On appeal, counsel for Appellant filed a brief pursuant to *Anders v. California*, 386 U.S. 738.

STANDARD OF REVIEW

Once an attorney has filed an *Anders* brief, the Court has “the responsibility of conducting a full and independent review of the record to discover any arguable issues apparent on the face of the record.” *In re Anders Briefs*, 581 So. 2d 149, 151 (Fla. 1991) (citing *Anders*, 386 U.S. at 744). “If the appellate court finds that the record supports any arguable claims, the court must afford the indigent the right to appointed counsel, and it must give the state an opportunity to file a brief on the arguable claims.” *Id.*

When the State has demonstrated competent evidence to support each element of a crime a motion for judgment of acquittal is properly denied. *Anderson v. State*, 504 So. 2d 1270, 1271 (Fla. 1st DCA 1986). This Court will not reverse the judgment and sentence of the trial court if there is competent substantial evidence supporting it, and the sentence imposed is a legal sentence. *See Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002).

LAW AND ANALYSIS

Attorney for Appellant filed a brief on appeal stating that no meritorious argument could be found to support the contention that the trial court committed reversible error in this case, despite a thorough review of the record and the law on point. Accordingly, if this Court finds the possibility of reversible error, counsel should be permitted to file another brief on behalf of Appellant, or other counsel appointed to do so. *Penson v. Ohio*, 488 U.S. 75, 109 S. Ct. 346 (1988); *Anders*, 386 U.S. at 744. The *Anders* case provides “a narrow exception” to an indigent’s “right of counsel by enabling courts to entertain an appeal as of right without counsel when counsel believes the appeal is wholly without merit,” but, “once a court determines that the trial record supports arguable claims, there is no basis for the exception and, as provided in *Douglas*, the criminal appellant is entitled to representation.” *In re Anders Briefs*, 581 So. 2d at 150-51 (citing *Douglas v. California*, 372 U.S. 353 (1963)). “However, the appellate court is to conduct its full and independent review even if the indigent elects not to file a pro se brief,” and may only allow counsel to withdraw and consider the merits of the appeal without assistance of counsel “if the appellate court finds no arguable issue for appeal.” *Id.* at 151 (citing *Penson*, 488 U.S. at 80).

On appeal, counsel for Appellant directs the Court's attention to potential error in the trial court's denial of Appellant's motion for judgment of acquittal, and the sentence imposed in this case. The purpose of a judgment of acquittal is to review the legal sufficiency of the evidence. When each element of a crime is supported by competent evidence a motion for judgment of acquittal should be denied. *Anderson*, 504 So. 2d at 1271. "When a defendant moves for judgment of acquittal," it amounts to an admission of "all facts in evidence adduced and every conclusion favorable to the State reasonably inferable therefrom." *Id.*

At trial, the three juveniles who testified as to observing the altercation had substantially the same testimony, which was that they were near the victim's house prior to the altercation, and did not go onto Appellant's private property. Appellant yelled at them to leave the area, and as they began to leave Appellant ran towards the victim and pushed him, at which point the two began fighting and fell to the ground, that Appellant grabbed the victim's testicles, and once they observed the victim in pain two of the juveniles intervened by yelling at Appellant and using some force so the victim could get away. The testimony was that Appellant continued to act aggressively toward them until they reached the road and Appellant was told to "back off" by one of the witnesses. All three consistently testified that the victim was not aggressive toward Appellant prior to his pushing the victim, and that afterward the victim was crying and in pain. One of the witnesses testified that the victim did hit Appellant after being pushed, but was not aggressive toward Appellant physically or verbally prior to that point.

The victim testified he was in no way aggressive to Appellant prior to Appellant running toward him and pushing him, that he then hit Appellant, and used a choke hold on Appellant in self-defense, but let go when Appellant began grabbing his testicles which caused immense pain, that he then fell to the ground screaming, at which point his friends helped him get away. The victim testified that most of the homes in the area have fences designating where private property begins, that Appellant's home may not have had a fence, but the victim did not believe they were on private property.

Appellant testified he was sitting on his lanai when he heard kids yelling behind his house and being vulgar, and that one of the kids then came about 12 feet inside of his property line. Appellant testified he told the kid to get out of his yard, after which the

kid said something offensive and then left, and Appellant approached the kids and told them to leave, that there were 8-10 kids in the group, none of whom verbally threatened Appellant, but that he felt threatened, that the victim moved toward him in what Appellant viewed as an aggressive manner, and Appellant then pushed the victim as he felt his personal space was being invaded. Appellant testified he was then hit on the back of his head and someone jumped on his back and put an arm around his throat, and Appellant could not breathe and was afraid the kid was going to kill him, at which point Appellant grabbed the victim's testicles. Appellant testified he had just been released from the hospital 12-14 hours earlier that day and was in no condition to be fighting, that someone threatened to kill him, and that once the victim released the choke hold on Appellant he released the grip on the victim's testicles.

The State produced evidence in the trial court of the elements of the crime charged sufficient to withstand a motion for judgment of acquittal. Section 784.03(1), Fla. Stat., requires the State prove:

- (1) The defendant intentionally touched or struck the victim against his or her will; or,
- (2) The defendant intentionally caused bodily harm to the victim.

The evidence presented was sufficient that a jury could reasonably reach a guilty verdict on the charge. The Deputy's testimony combined with the testimony of the victim and the three witnesses is sufficient to support a finding that Appellant intentionally struck the victim against his will or intentionally caused the bodily harm. The record also supports a finding that the victim did not act aggressively or hit Appellant prior to being pushed by Appellant. When determining a motion for judgment of acquittal the evidence is viewed in a light most favorable to the State, and the trial court does not consider weight of the evidence or credibility of the witnesses. *State v. Shearod*, 992 So. 2d 900, 903 (Fla. 2d DCA 2008). On appeal, this Court may not reweigh the evidence or make determinations as to credibility.

The sentence imposed in this case of 30 days in jail followed by 11 months' probation is a legal sentence. The charge is a first degree misdemeanor, for which the maximum penalty is a term of imprisonment not to exceed one year. See §§ 784.03(1), 775.082, Fla. Stat.

Despite being provided notice by order of this Court that Appellant had the opportunity to file an additional brief as a result of appellate counsel filing a brief pursuant to *Anders v. State of California*, 386 U.S. 738, Appellant did not elect to file an additional brief or otherwise respond to the Court's notice.

CONCLUSION

After conducting a full and independent review of the record and applicable law, we find no error with the trial court's denial of the motion for judgment of acquittal, and further, that the sentence imposed in this case is a legal sentence. We therefore affirm the order of the trial court.

It is ORDERED AND ADJUDGED that the order of the trial court is AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 5th day of January, 2015.

Original order entered on January 5, 2014 by Circuit Judges Stanley R. Mills, Shawn Crane and Daniel D. Diskey.