[Cite as *In re T.H.*, 2018-Ohio-2300.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106433

IN RE: T.H.

Minor Child

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 16107976

BEFORE: Stewart, J., McCormack, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: June 14, 2018

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MELODY J. STEWART, J.:

{¶1} The juvenile court found that appellant T.H. committed acts that, if committed by an adult, would constitute the crime of aggravated robbery. In this appeal, T.H. complains that the adjudication of delinquency is against the manifest weight of the evidence, that trial counsel was ineffective for failing to seek the suppression of a photo array used to identify him, and that he was denied his right to confront the police officer who administered the photo array to the victim.

I. Weight of the Evidence

{¶2} T.H. complains that the victim's testimony identifying him as the perpetrator of an automobile theft by force was unbelievable because it was not based on a specific description, but on a cold-stand identification. He claims this rendered the victim's identification unreliable.

{¶3} The manifest weight of the evidence standard requires the reviewing court to examine "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 and a new trial ordered." *State v. Otten*, 33 Ohio App.3d 339, 340, 515 N.E.2d 1009 (9th Dist.1986). This is a difficult burden for an appellant to overcome because the trier of fact has the sole responsibility to resolve factual issues. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Because the standard of review uses the word "manifest," it means that we can only reverse the trier of fact if its decision is very plainly or obviously contrary to the evidence.

{¶4} The victim testified that he drove to his fiancée's house to give her some money. Because he was not planning to stay, he kept his car running on the street despite his fiancée's warning that three or four males were walking down the street. When one of those males entered the car, the victim ran toward the open driver's side window to stop him. The driver pulled away with the victim hanging on — he had caught his arm in the window. As the victim tried to stop the thief, the victim said the thief "reached and tried to pull out a weapon." The victim then freed his arm while the thief drove away. The victim and the fiancée used her car to search the neighborhood for the stolen vehicle, but to no avail. The police later located the victim's car with three males inside who exited the car and ran off before they could be stopped. The victim's car was recovered, but was a total loss.

{¶5} A few days later, the victim saw the person who took his car. He testified that "[m]e and him locked eyes, like I will never forget his eyes. I locked eyes with him again for the second time." He called the police, but the police did not respond until he told them that "if you do not do nothing [sic], then I'm gonna handle matters in my own hands, and the outcome that, you know — the outcome that you all don't want may happen." The police eventually took a person into custody and asked the victim to walk by a police cruiser to identify that person. The victim identified T.H. About one month later, the police asked the victim if he would be able to identify T.H. from a photo array. Saying "yeah, I'll never forget his face because I was eye to eye," the victim identified T.H. with "100 percent" certainty.

{¶6} T.H. argues that the state failed to offer any evidence of how the victim described his assailant, with no mention of age, skin color, glasses, or hair. A police officer who responded to the initial report of the stolen car testified that the victim "didn't give me any real actual description due to the fact that he was frantic and everything due to the fact that his vehicle was just taken."

{¶7} The victim said that his mental state immediately after the car had been stolen did not allow him to give the police a description of T.H. However, a police officer did not find that unusual, testifying that "anyone would be frantic or a little bit scared" after enduring what the victim endured. Viewing the evidence in this light, this is not a case where the victim could not describe his assailant because he did not see who committed the offense. The court made this precise finding when denying T.H.'s Juv.R. 29(F)(1) motion to dismiss the complaint, stating that "[t]he only thing" that prevented the victim from identifying T.H. was that the victim "was just so highly agitated and upset that he couldn't describe him at that time and that it took them time to just calm him down because of the frustration that he was dealing with at that particular time." The court found the victim "very credible" because he provided specific statements about the theft, including his testimony that he was "eye to eye" with T.H. and would never forget his face. This gave the court no reason to believe that the victim was being dishonest. We have no basis for overturning this credibility assessment.

{¶8} T.H. also claims that the victim was inconsistent because he did not first inform the police that the car thief had a firearm because the victim himself had trouble with the law and did not wish the car thief to be in a situation where "they would have caught him and shot him." The import of this testimony is negligible given that the court dismissed the counts of the complaint relating to a firearm. In any event, the evidence conflicted on this point: one of the police officers testified that the stolen vehicle report came over as a "Code One, which means a priority assignment for a vehicle possibly taken at gunpoint." Any inconsistency about whether T.H. used a gun during the car theft was not so great that it completely destroyed the victim's credibility.

II. Ineffective Assistance of Counsel

{¶9} T.H. complains that counsel should have filed a motion to suppress the results of a cold-stand identification. He maintains that counsel should have objected on grounds that the cold-stand was legally impermissible and unduly suggestive.

{¶10} To prevail on a claim of ineffective assistance of counsel, T.H. must prove both (1) his attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards; and (2) his attorney's deficient representation subjected him to prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Prejudice" means a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. A "reasonable probability" means a "probability sufficient to undermine confidence in the outcome." *Id*.

{¶11} A licensed attorney is presumed competent, *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62, so T.H. must establish that counsel's performance or nonperformance cannot be explained as a matter of sound trial strategy. *State v. Bird*, 81 Ohio St.3d 582, 585, 692 N.E.2d 1013 (1998). The nature of this burden on T.H. is such that we can only reverse for ineffective assistance of counsel when the record demonstrates no rational tactical purpose for counsel's omissions. *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, ¶ 61.

{¶12} A defendant has a due process right to suppress identification evidence that stems from a pretrial police procedure that is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). Cold-stand or show-up identifications — where the police take a suspect into custody and take him to be identified by a witnesses — are suggestive, but not per se impermissibly suggestive. *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

{¶13} The parties' efforts at explaining why the cold stand either was or was not unduly suggestive are fruitless for purposes of this ineffective assistance of counsel claim because suppression of the cold stand would not have affected the outcome of trial. The victim separately identified T.H. from a photo array, the validity of which T.H. does not contest in this assignment of error. Even without the results of the cold stand, the case could have gone forward for adjudication solely on the photo array identification. *State v. Chilton*, 2d Dist. Montgomery No. CA 10586, 1988 Ohio App. LEXIS 1974, 6 (May 20, 1988) (rejecting assertion that circumstances surrounding show up identification were so inherently suggestive that they tainted subsequent identification by photo array). T.H. has failed to show that the outcome of the adjudication would have been different had the victim's identification been suppressed. *State v. Thomas*, 8th Dist. Cuyahoga No. 105375, 2018-Ohio-1081, ¶ 16 ("A defendant's failure to prove either prong of the *Strickland* two-part test makes it unnecessary for a court to consider the other prong.").

III. Photo Array

{¶14} The police officer who acted as a "blind administrator" for the photo array did not testify at trial. T.H. argues that the blind administrator's absence denied him the ability to confront the witness to determine whether the array had been administered consistent with the procedure set forth in R.C. 2933.83.

{¶15} T.H. concedes that counsel objected to the admission of the photo array only on grounds that "a six-pack photo array is not the preferred method of a photo lineup and that the folder method should have been used." Appellant's brief at 11. He candidly states that "counsel failed to object to the admission of the array on the grounds that the administrator did not testify[.]" *Id*. T.H. maintains that the lack of a specific objection is of no moment, however,

because "the State's failure to present the blind administrator of the photo array goes to that objection." *Id*. at 11-12. We disagree.

{¶16} R.C. 2933.83 creates a system for identification where individual photographs are placed in separate folders to be shown by a blind administrator who does not know which lineup member is being viewed by the eyewitness. *See* R.C. 2933.83(A)(3). In contrast, a six-pack array presents six photographs on one sheet of paper. *See State v. Patton*, 6th Dist. Lucas No. L-12-1356, 2015-Ohio-1866, ¶ 18, fn. 1. Although R.C. 2933.83 creates a folder system, it does not require that the system be used: "'We have previously held that R.C. 2933.83 does not require the use of the "folder system" but, rather, the "folder system" is one system that can be used by law enforcement for photo lineups.'" *State v. Johnson*, 8th Dist. Cuyahoga No. 99822, 2014-Ohio-494, ¶ 44, quoting *State v. Quarterman*, 8th Dist. Cuyahoga No. 99317, 2013-Ohio-4037.

{¶17} At trial, defense counsel objected to the six-pack display because he believed that the police were legally required to use the folder system. This objection is worlds apart from a claim that the state failed to offer the testimony of the officer who administered the six-pack array. And even though T.H. concedes that counsel did not object based on any denial of the right to confrontation, he does not make any argument as to why there would be plain error in allowing the six-pack array over the folder array. We overrule this assignment of error.

{¶18} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court, juvenile division, 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.

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MELODY J. STEWART, JUDGE

TIM McCORMACK, P.J., and
EILEEN T. GALLAGHER, J., CONCUR