

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

In the Matter of: :
G.L., : No. 09AP-955
: (C.P.C. No. 09JU07-9238)
Appellant. : (REGULAR CALENDAR)

D E C I S I O N

Rendered on March 10, 2011

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*, for appellee.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch

CONNOR, J.

{¶1} Appellant, G.L., appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, adjudging her a delinquent minor. Based upon the reasons that follow, we affirm the judgment of the trial court.

{¶2} By way of delinquency complaints filed on July 2, 2009, appellant was charged on felony counts of burglary, a violation of R.C. 2911.12(A)(2) and a felony of the second degree, theft from an elderly victim, a violation of R.C. 2913.02(A)(1) and a felony of the fifth degree, and aggravated robbery, a violation of R.C. 2911.01(A)(1) and a felony

of the second degree. The aggravated robbery charge related to an incident that occurred on October 11, 2008, while the burglary and theft charges related to an incident that occurred on June 7, 2009.

{¶3} On August 24, 2009, a juvenile magistrate presided over a bench trial on the aggravated robbery charge. The trial on the burglary and theft charges was continued to a later date.

{¶4} During the trial, the victim testified that she was riding a bicycle when she heard someone call her name. As a result, she stopped and was approached by appellant and J.S., a co-defendant. Appellant and J.S. stood around an arm's length away from the victim on each side of her. They told her to get off the bicycle. The victim questioned whether they were truly going to take the bicycle. Appellant and J.S. said that they were. During this exchange, J.S. lifted up her shirt and placed her hand on what the victim believed was the handle of a gun. The victim never saw any other part of the gun because J.S. never took it out of her shorts. The victim got off the bicycle, and appellant struck her in the face. Appellant and J.S. got on the bicycle and rode away.

{¶5} On August 25, 2009, the magistrate adjudged appellant delinquent on the aggravated robbery charge and further found that J.S. had possessed and brandished a firearm during the events of October 11, 2008. A pre-sentence investigation was ordered.

{¶6} On September 1, 2009, the prosecution reduced the burglary charge to the lesser included offense of attempted burglary as a felony of the third degree. It also dismissed the theft charge in exchange for appellant's admission to the reduced charge.

{¶7} As a result of the aggravated robbery delinquency, the magistrate recommended the commitment of appellant to the legal custody of the department of

youth services for institutionalization in a secure facility for a minimum period of one year and a maximum period not to exceed her attainment of the age of 21 years. For the attempted burglary delinquency, the magistrate recommended the commitment of appellant to the legal custody of the department of youth services for institutionalization in a secure facility for a minimum period of one year, to be served concurrently with the institutionalization for the aggravated robbery delinquency. With regard to the firearm specification, the magistrate recommended the commitment of appellant to the legal custody of the department of youth services for institutionalization in a secure facility for a minimum period of one year, to be served consecutively with her other commitments. Finally, the magistrate recommended imposing an order upon appellant to pay \$147 in restitution by completing 30 hours of community service through the juvenile restitution program.

{¶8} On September 14, 2009, a juvenile judge adopted the recommendations of the magistrate as the judgment of the trial court. Appellant has timely appealed and raises the following assignments of error:

FIRST ASSIGNMENT OF ERROR

The trial court erred in adjudicating Appellant delinquent for having committed the offense of aggravated robbery as there was insufficient evidence to support a guilty finding. This denied Appellant due process under the state and federal constitutions.

SECOND ASSIGNMENT OF ERROR

There was insufficient evidence to support a finding that Appellant possessed a firearm as defined in R.C. 2923.11.

THIRD ASSIGNMENT OF ERROR

Appellant was denied effective assistance of counsel as guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution because counsel failed to file timely objections to the recommendation of the juvenile magistrate, as required by Juv. R. 40(D)(3)(b)(iv).

{¶9} Initially, we note that appellant failed to object to the magistrate's decision and, as a result, has waived all but plain error in the proceedings before the magistrate. *In the matter of B.J.C.*, 10th Dist. No. 07AP-961, 2008-Ohio-2794, ¶5, quoting Juv.R. 40(D)(3)(b)(iv). In order to find plain error, an appellate court must determine that the outcome of the trial clearly would have been different but for the trial court's improper actions. *In re T.S.*, 10th Dist. No. 06AP-1163, 2007-Ohio-5085, ¶12, citing *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100. However, even if an appellate court finds plain error, it is not required to correct it. *Id.*, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Indeed, plain error should be noticed and corrected " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Id.*, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶10} In her first and second assignments of error, appellant argues that there was insufficient evidence to support an adjudication of delinquency as a result of having committed an aggravated robbery. Her first assignment of error challenges the evidence on the element of ownership of the bicycle or the absence of consent to use it. Her second assignment of error challenges the evidence on the firearm specification.

{¶11} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most

favorable to the state to determine whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶12} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶13} In the instant matter, appellant was adjudged delinquent for having committed the offense of aggravated robbery, a violation of R.C. 2911.01, which provides in relevant part:

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]

The definition of "theft" is set forth in R.C. 2913.02, and provides in relevant part:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent[.]

R.C. 2913.01(D) defines "owner" as, "any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful."

{¶14} When analyzing a theft offense, the relevant inquiry regards the right of the accused to the property at issue. *State v. Jeantine*, 10th Dist. No. 09AP-296, 2009-Ohio-6775, ¶23, citing *State v. Rhodes* (1982), 2 Ohio St.3d 74, 77. Indeed, "it is the appellant's relationship to the property that is controlling." *Id.* Rather than focusing on the issue of ownership, the proper focus regards the "wrongful taking." *Id.*, citing *State v. Shoemaker* (1917), 96 Ohio St. 570, 572.

{¶15} By way of her first assignment of error, appellant argues that there was no evidence demonstrating that she lacked the owner's consent to possess the property. She cites the victim's testimony, which indicated that the bicycle was owned by the step-brother of her ex-boyfriend. Appellant argues that the prosecution was required to introduce evidence demonstrating that appellant lacked his consent to possess the bicycle. As a result, she argues that a reversal and discharge is warranted. We disagree.

{¶16} We rejected the same argument in *Jeantine*, where the defense argued, "the State failed to provide evidence demonstrating appellant acted without the consent of the owner or the person authorized to give consent." *Id.* at ¶13. In response to this argument, our court held that "the prosecution only needs to prove that someone who had possession or control or an interest in the property was deprived of that property by the

accused." *Id.* at ¶22, citing *State v. Shaw* (Aug. 10, 1995), 10th Dist. No. 94APA12-1778; see also *State v. Mason* (July 14, 1992), 10th Dist. No. 91AP-1012.

{¶17} The trial testimony clearly showed that the victim had possession and control over the bicycle. Further, appellant and J.S. clearly deprived the victim of the property. We reject the suggestion that the prosecution must provide testimony from each and every individual who may potentially have had the express or implied authority to provide consent to possess the bicycle. Accordingly, there was sufficient evidence supporting the delinquency adjudication in relation to appellant's first assignment of error.

{¶18} By way of her second assignment of error, appellant argues that there was insufficient evidence to support the trial court's finding on the firearm specification. More specifically, she argues the State failed to prove operability. In support, appellant challenges the credibility of the victim's testimony. It is well-settled, however, that an appellate court is not to judge the credibility of testimony when reviewing matters under a sufficiency of the evidence standard. *State v. Winters*, 6th Dist. No. F-10-010, 2011-Ohio-141, ¶28, citing *State v. Walker* (1978), 55 Ohio St.2d 208, 212-13, certiorari denied (1979), 441 U.S. 924, 99 S.Ct. 2033.

{¶19} Furthermore, the operability of a firearm may be proven beyond a reasonable doubt by circumstantial evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, paragraph one of the syllabus. To reach a determination on the issue of operability, "the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm." *Id.*

{¶20} Again, in the instant matter, trial testimony indicated that when appellant and J.S. ordered the victim to turn over the bicycle, J.S. lifted up her shirt and placed her hand on the handle of a gun. According to the victim, at that point, she believed J.S. was going to shoot her if she did not turn over the bicycle. A sufficiency of the evidence challenge was recently upheld on circumstances similar to those at issue herein. See *State v. Potchik*, 2d Dist. No. 23865, 2011-Ohio-501, ¶3 ("reasonable juror could conclude that [appellant] used a gun during the commission of the offense" where appellant lifted his shirt and showed the butt end of what the victim believed was a gun as appellant asked for money). We similarly find that a reasonable juror could conclude that J.S. used a gun during the commission of the offense. Accordingly, there was sufficient evidence supporting the delinquency adjudication in relation to appellant's second assignment of error.

{¶21} Having found sufficient evidence in support of the delinquency adjudication, we find no error, let alone plain error, on the part of the trial court in adjudicating appellant delinquent. Appellant's first and second assignments of error are overruled.

{¶22} In appellant's third assignment of error, she argues she was denied effective assistance of counsel because counsel failed to file objections to the recommendation of the juvenile magistrate.

{¶23} Reversal of an adjudication of delinquency based upon ineffective assistance of counsel requires an appellant to demonstrate that counsel's performance was deficient and that the deficiency prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, with regard to the issue of prejudice, an appellant must demonstrate that " 'there is

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, quoting *Strickland* at 694.

{¶24} In the instant matter, appellant argues that appellate review was hindered by counsel's failure to file objections to the juvenile magistrate's recommendation. After our review of the record, however, we found sufficient evidence supporting the delinquency adjudication. As a result, appellant has shown no prejudice as a result of the purported deficiency on the part of appellant's trial counsel. Appellant's third assignment of error is overruled.

{¶25} Having overruled each of appellant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, adjudging appellant to be a delinquent minor for the commission of an aggravated robbery with a firearm specification.

Judgment affirmed.

BRYANT, P.J., and BROWN, J., concur.
