[Cite as *In re W.H.*, 2009-Ohio-5835.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92786

IN RE: W.H.

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL-08127322

BEFORE: Stewart, J., Kilbane, P.J., and Sweeney, J.

RELEASED: November 5, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Timothy Young
State Public Defender

BY: Angela Miller
Assistant State Public Defender
Office of Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, OH 43215

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Katherine Mullin
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, OH 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Juvenile W.H. appeals from a delinquency adjudication that found he committed acts which, if committed by an adult, would constitute the crimes of aggravated robbery and aggravated burglary, each with a firearm specification. His two assignments of error complain that (1) defense counsel performed deficiently by failing to offer a witness list prior to trial and (2) the adjudication is against the manifest weight of the evidence. We find no error and affirm.

{¶ 2} The victim testified that he was a neighborhood tattoo artist who worked out of his basement. On the night of the robbery, he was in his basement playing video games. His girlfriend slept next to him on his couch. The victim heard someone come in through an unlocked screen door near the basement stairs. As he turned around, he saw a person wearing a mask and holding a gun coming down the stairs. He also heard voices coming from the top of the basement stairs, and saw the legs of someone who was holding the screen door open. The robber pointed the gun at the victim and told him to "turn around, don't look at me." At some point, the robber's mask moved enough to allow the victim to see more of the robber's face, and the victim recognized him as a former customer, a juvenile later identified as "K.C." K.C. took two video game consoles, a television, video games, a cell phone, at

least $60 in cash and some marijuana, passing some of the items along to those who were standing on the stairs.

{¶ 3} After the robbers left, the victim secured the screen door and called the police. He left the house and found his cell phone and marijuana in W.H.'s yard, located about seven houses away. Later, after the victim returned to his house, W.H. and two others stopped by to ask the victim about what had happened. The victim said that he had been robbed, but at that point someone called W.H.'s name and the three individuals left.

{¶ 4} The following day, the victim saw W.H. and K.C. walking. One of them carried a backpack, and the victim thought the backpack might hold one of his game consoles. The victim watched W.H. and K.C. walk past a corner store. By the time the victim approached the store, he saw the two leaving the store, but not holding the backpack. The victim heard W.H. say to another, "don't tell them where you got that from."

{¶ 5} The victim called the police and told them that he saw the two who robbed him, but the police arrived too late to encounter W.H. and K.C. The police did, however, search a nearby field in the hope that W.H. and K.C. had abandoned the remaining game console. As the officers conducted the search, the victim told them that W.H. and K.C. had just exited W.H.'s house, this time carrying a plastic bag. When they saw the victim, W.H. and K.C. jumped a fence. The victim alerted the police and W.H. and K.C. began to

run. W.H. fell and was immediately apprehended; K.C. ran back to W.H.'s house and thereafter was apprehended by the police.

{¶ 6} The victim identified K.C. through a "Scoon" tattoo he had given him. The victim still had the stencil for the tattoo design and turned that stencil over to the police. The victim could not, however, identify the person standing on the basement stairs or anyone else involved in the robbery. In a later conversation with W.H.'s mother, the victim told her that he did not see W.H. and that he would be willing to buy back his game consoles and say that he did not see W.H.

{¶ 7} The victim's girlfriend, however, did see the person standing on the stairs. She testified that although the victim had pushed her head down, the lowered position of her head created a line of sight up the stairs and to the screen door. She saw a light-skinned person on the stairs and another person outside the door whom she identified as W.H. The light-skinned person was telling the robber in the basement to "hurry up and let's go." The girlfriend recognized W.H. from having seen him before and knew his first name. She could not identify the person standing on the steps because he wore a mask, but W.H. did not wear a mask.

{¶ 8} A police officer who assisted in W.H.'s arrest testified that he had responded to the victim's call that the perpetrators of the robbery were in the area. As the officer walked the area, the victim alerted him that W.H. and

K.C. were walking together. The officer entered his vehicle and drove toward the area where the victim pointed. He saw W.H. and K.C., with K.C. carrying a large gift bag. The two were ordered to approach the officer's police car, but they turned and ran. The officer exited his car to chase them, but W.H. slipped and fell. K.C. abandoned the bag and fled. The bag contained a video game console. Knowing that K.C. ran in the general direction of W.H.'s house, the police drove there and covered the exits. After several minutes of waiting, K.C. exited the house, but with changed clothes. The victim told the officer that K.C. would have the word "Scoon" tattooed on his left shoulder, a fact the officer confirmed after taking K.C. into custody. The police discovered that the tag on the abandoned gift bag had the name "Man Man" written on it. A family member told the officer that they called W.H. "Man Man." When W.H. denied any involvement in the robbery, the officer asked W.H. why the tag on the gift bag would bear his nickname "Man Man." W.H. "put his head down and didn't answer any other questions."

I

{¶ 9} The first assignment of error complains that defense counsel was ineffective for failing to file a witness list and notice of alibi.

A

{¶ 10} A claim of ineffective assistance of counsel requires a defendant to show that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668. This requires two distinct lines of inquiry. First, we determine "whether there has been a substantial violation of any of defense counsel's essential duties to his client[.]" *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. When making this inquiry, we presume that licensed counsel has performed in an ethical and competent manner. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. Second, we determine whether "the defense was prejudiced by counsel's ineffectiveness." *Bradley*, 42 Ohio St.3d at paragraph two of the syllabus. Prejudice requires a showing to a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at paragraph three of the syllabus.

{¶ 11} Our review of claims of ineffective assistance of counsel is undertaken with the understanding that we are not in a position to second-guess trial counsel. In *Strickland*, the United States Supreme Court stated, "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after a conviction or adverse sentence, and it is all too easy for a

court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. Debatable trial tactics will not form a basis for proving ineffective assistance of counsel. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, at ¶45.

B

{¶ 12} At the close of the state's case, defense counsel informed the court that she would call W.H.'s mother as a witness. The state objected because W.H. did not offer a witness list prior to trial and the state was unprepared for the mother as a witness. Defense counsel told the court that she had discussions with the state about how the mother would testify "with regards to her communications with the victim, with regards to inconsistencies in his statements here — some of his statements and what he was telling her — [the assistant prosecuting attorney] is aware of those." The court then asked defense counsel why she would "taint this proceeding by having her sitting in and listening to the testimony the whole time even if you intended on calling her on some sort of rebuttal on your clients [sic] case? Have her sit outside." After confirming that the state had filed a discovery request and that W.H. did not provide a witness list, the court prohibited the mother from testifying. See *In re G.E.S.*, Summit App. No. 23963, 2008-Ohio-2671 (juvenile court did

not abuse its discretion by refusing to allow a juvenile's mother from testifying because she had not been listed on the witness list).

C

1

{¶ 13} We are unable to conduct the first prong of the *Strickland* ineffective assistance of counsel analysis — whether counsel violated an essential duty to the client by failing to list the mother as a witness — because the record does not indicate the substance of the mother's testimony.

{¶ 14} When the court excludes evidence, a party may not claim error on appeal unless a substantial right of the party is affected and, if the substance of the evidence is not apparent from the context, an offer of proof is made. See Evid.R. 103(A). An offer of proof generally contains two elements: (1) the legal theory supporting admissibility and (2) a showing of what the witness was expected to testify to and what that evidence would have proven or tended to prove. *Moser v. Moser* (1991), 72 Ohio App.3d 575, 580.

{¶ 15} Defense counsel told the court that the mother would testify "with regards to her communications with the victim, with regards to inconsistencies in his statements here — some of his statements and what he was telling to her ***." The exact nature of these "inconsistencies" is unstated and is not apparent from the record. The victim testified that he had a conversation with the mother about the robbery. When asked if he

told the mother that W.H. "was not involved," the victim said he told her that "I didn't see" W.H. He also told her that "I will buy my own stuff back, and I said that I will say that I didn't see [W.H.]" When asked if he had truthfully told the mother that he did not see W.H., the victim replied, "[y]eah, I told her — I didn't see him."

{¶ 16} Given the victim's concession that he did not see W.H. at the time of the robbery, it is difficult to know what inconsistency the mother might have offered as a witness. If we assume that the purpose of the mother's testimony would have been to corroborate the victim's admission that he could not identify W.H. as one of the robbers, that corroboration would have been cumulative because the victim never wavered in saying that he could not identify W.H. as one of the robbers. Counsel has no duty to offer cumulative evidence. *United States v. Schaflander* (C.A.9, 1984), 743 F.2d 714, 719.

{¶ 17} It is possible that evidence outside the record might substantiate W.H.'s claim of ineffective assistance of counsel, but with no evidence in the record to show what the mother would have testified to, W.H. cannot show that counsel was ineffective. Without a proffer of evidence, we cannot find a basis for concluding that defense counsel violated an essential duty. Cf. *In re G.E.S.*, Summit App. No. 23963, 2008-Ohio-2671, at ¶20 (failure to proffer substance of barred testimony insufficient to make out showing of prejudice).

{¶ 18} Even if counsel violated an essential duty to W.H. by failing to place the mother's name on a witness list for the purpose of having her testify about her conversation with the victim the day after the robbery, we cannot say that the result of trial would have been different. At all events, the victim said that he did not see W.H. at the time of the robbery — the mother's testimony to that same effect would only have parroted that of the victim. And to the extent that W.H. might argue that the victim told the mother W.H. was "not involved" as opposed to having said that he "didn't see him," this evidence would not have made the outcome of the adjudication different.

{¶ 19} Moreover, to the extent that W.H. might argue that the testimony was relevant to show that the victim had a motive to lie about W.H.'s identity, that argument was nullified when the victim candidly admitted that he told W.H.'s mother that he would tell the police that he did not see W.H. in exchange for the return of a game console. With no basis for finding that the mother's testimony would have offered any new evidence, there is no reasonable probability that the result of the trial would have been different had the mother testified.

D

{¶ 20} W.H. also argues that defense counsel was ineffective for failing to offer a notice of alibi. In support of this argument, he references statements made by his mother during sentencing to the effect that W.H. had a friend over at the house to sleep over and that they were at home when the offense occurred. The magistrate who conducted the dispositional phase of the proceedings refused to allow the mother to make any statements relative to W.H.'s presence in her house at the time of the robbery, saying "[b]ut ma'am, you do understand he's already unfortunately * * * he's been found guilty by a judge."

{¶ 21} "Counsel's performance will not be deemed ineffective unless and until counsel's performance is *proved* to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *Bradley*, supra, at paragraph two of the syllabus (emphasis added).

{¶ 22} The mother's unsworn statements concerning W.H.'s whereabouts on the night of the robbery have no evidentiary value. Additionally, there is nothing in the record to indicate that counsel was aware of an alibi defense. The mother's statements cannot serve as a basis for finding that defense counsel violated an essential duty by failing to offer an alibi defense. If this claim is provable, it will be with evidence outside the record, and beyond the scope of this direct appeal. There being no contrary

evidence in the record on appeal to challenge the presumption of counsel's competency, we find that counsel did not violate an essential duty by failing to give notice of an alibi.

II

{¶ 23} For his second assignment of error, W.H. complains that the delinquency adjudication is against the manifest weight of the evidence because the evidence creates a doubt as to whether W.H. had a role in the robbery.

{¶ 24} The manifest weight of the evidence standard of review requires us to review 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* (1986), 33 Ohio App.3d 339, 340. The use of the word "manifest" means that the trier of fact's decision must be plainly or obviously contrary to all of the evidence. This is a difficult burden for an appellant to overcome because the resolution of factual issues resides with the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶ 25} W.H.'s primary argument, that the girlfriend's identification of W.H. as being present during the robbery was inherently unbelievable, is without merit. Although the girlfriend said that the victim pushed her head down during the robbery, she testified that she was able to look up the stairs two or three times when the robber was not looking at them. An outside light illuminated the area by the door, and the girlfriend had seen W.H. on two previous occasions when he came over to the house. He lived nearby and she knew him by his first name. The court did not lose its way by finding the girlfriend's identification to be credible.

{¶ 26} The court could also find persuasive evidence that W.H. had twice been seen with K.C. after the robbery, particularly after disposing of a backpack near the convenience store and telling another "don't tell them where you got that from." Moreover, the court could rationally decide that W.H's complicity in the robbery was manifest from the abandonment of the gift bag bearing W.H.'s nickname and containing a game console. Finally, the court could find it compelling that K.C. fled to W.H.'s house after seeing the police. All of this evidence occurring over a two-day period could lead a rational trier of fact to conclude that W.H. played a large role in the robbery and subsequent disposition of the stolen goods. The court did not lose its way by adjudicating W.H. delinquent.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas – 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.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR