[Cite as *In re J.S.*, 2010-Ohio-3094.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94306

IN RE: J.S.
A Minor Child

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 09113012

BEFORE: Jones, J., Boyle, P.J., and Sweeney, J.

RELEASED: July 1, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Anita Barthol Staley
7327 Center Street
Mentor, Ohio 44060

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Lauren Bell
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, "J.S.,"[1] appeals his delinquency adjudication. Finding no merit to the appeal, we affirm.

{¶ 2} In 2009, J.S. was charged in juvenile court with aggravated robbery and kidnapping with one- and three-year firearm specifications on both counts. The matter proceeded to an adjudicatory hearing before the bench, at which the following pertinent evidence was presented.

{¶ 3} Late one night in July 2009, Matthew Hoegler ("Hoegler"), was walking down the street in Euclid, Ohio. Two people in a gray car approached him and Hoegler offered them $10 to drive him to a local bar. When he got in the car, the driver, later identified as J.S., and another young man told Hoegler they had to detour to stop and pick up a cousin. They arrived at an apartment complex. The passenger got out of the car and went into the apartment building. Eventually Hoegler got out of the car, with the intention of walking away because he was concerned that the passenger had not returned.

{¶ 4} At that time, two men came out of the building; one man had a shotgun.[2]

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[1] The juvenile is referred to herein by his initials in accordance with this court's established policy regarding nondisclosure of juveniles in all juvenile cases.

[2]Hoegler testified that he could not remember whether the passenger was one of the men, but the officer testified that Hoegler had reported that the passenger was one of the assailants.

{¶ 5} The two men fought with Hoegler and stole his money and cell phone. The men jumped into the gray car and drove off.

{¶ 6} Hoegler flagged down the police. As Hoegler spoke with the officers, he saw the gray car again and identified it as the car that had been used in the robbery. The Euclid police pulled the car over and Hoegler identified J.S. as the driver of the car that had picked him up. Hoegler was unable to identify J.S. in court.

{¶ 7} Officer Nolan of the Euclid police testified that he was responding to a disturbance call involving a white van when Hoegler flagged him down. Hoegler had abrasions on his face and his pants were torn, but he did not appear inebriated.

{¶ 8} The trial court adjudicated J.S. delinquent on both counts and sentenced him to one year for aggravated robbery consecutive to one year for the firearm specifications up to his twenty-first birthday at the Ohio Department of Youth Services. See R.C. 2152.17(A)(2).

{¶ 9} J.S. now appeals and raises the following three assignments of error for our review:

> "I. The Juvenile Court erred as a matter of law by adjudicating appellant to be a delinquent child by virtue of having committed the offense[s] of kidnapping and aggravated robbery along with accompanying firearm specifications when there was insufficient evidence to support these convictions.
>
> "II. The Juvenile Court's adjudication of appellant to be a delinquent child by virtue of having committed the offense[s] of kidnapping and

aggravated robbery along with accompanying gun specifications was against the manifest weight of the evidence.

{¶ 10} "III. The defendant-appellant's due process rights and right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution were violated by ineffective assistance of counsel."

{¶ 11} Assignments of error one and two will be discussed together as they involve the same facts.

Sufficiency and Manifest Weight of the Evidence

{¶ 12} The same standard of review for sufficiency of evidence and manifest weight challenges applies to juvenile and adult criminal matters. *In re G.R.*, Cuyahoga App. No. 90391, 2008-Ohio-3982.

{¶ 13} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Furthermore:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

Id. at paragraph two of the syllabus; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. "In essence, sufficiency is a test of adequacy." *Thompkins* at 386.

{¶ 14} J.S. argues that there was insufficient evidence to show that he was involved in the kidnapping and aggravated robbery. He also argues that there was insufficient evidence to convict him of the gun specifications because there was no evidence that J.S. had anything to do with the gun. Instead, he argues both that he is a victim of mistaken identity, and that there was no evidence that the driver of the gray car was involved in the incident.

{¶ 15} After a careful review of the evidence and record in this case, we find that there was sufficient evidence to convict J.S. of kidnapping and aggravated robbery with accompanying gun specifications.

{¶ 16} R.C. 2905.01(A)(2), which prohibits kidnapping, states that "[n]o person, by force, threat, or deception, * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o facilitate the commission of any felony or flight thereafter * * *." R.C. 2911.01(A)(1), aggravated robbery, provides that "[n]o 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 * * * [h]ave 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 * * *."

{¶ 17} We find that the state presented sufficient evidence that J.S. committed kidnapping by deception as he and his friend deceived Hoegler into

thinking they would drop him off at a bar, when their real intent was to rob him. This finding is supported by Hoegler's testimony that the two youths did not speak once Hoegler got into the car other than to inform Hoegler that they had to make a stop and because J.S. waited until the robbery occurred and provided the means of egress for his accomplices.

{¶ 18} We also find that the state presented sufficient evidence to support the court's finding of delinquency for aggravated robbery as the evidence showed that J.S. was complicit in the robbery. Complicity is codified in R.C. 2923.03 and provides, in pertinent part, that:

{¶ 19} "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶ 20} " * * *

{¶ 21} "(2) Aid or abet another in committing the offense."

{¶ 22} It is well established that to prove that a person aided and abetted in the commission of a crime, "the state must show that the defendant incited, assisted, or encouraged the criminal act." *State v. Woods* (1988), 48 Ohio App.3d 1, 548 N.E.2d 954. To aid and abet requires "that the defendant's conduct be directed— with the culpable mental state of the principal offense—towards accomplishing, assisting, inciting, or encouraging commission of the principal offense." *State v. Mendoza* (2000), 137 Ohio App.3d 336, 738 N.E.2d 822.

{¶ 23} Therefore, the evidence in this case must show that J.S. supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. See *State v. Johnson* (2001), 93 Ohio St.3d 240, 754 N.E.2d 796, syllabus. "Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed." *Johnson* at 245, quoting *State v. Pruett* (1971), 28 Ohio App.2d 29, 273 N.E.2d 884.

{¶ 24} Hoegler testified that when he got into the gray car, J.S. was driving. When J.S. turned into the apartment complex, one of the youths told Hoegler they were stopping to pick up a cousin. The passenger and driver did not exchange any words before the passenger got out of the car. When the two assailants exited the apartment building, one was holding a shotgun, and they immediately approached Hoegler and attacked him. J.S. sat in the gray car during the entire event and drove off with the assailants after the attack. Thus, we find that the state provided sufficient evidence that J.S. assisted both before and after the aggravated robbery occurred.

{¶ 25} Next, we turn to the one- and three-year gun specifications. A one-year gun specification imposes a one-year mandatory prison term upon an offender if the offender had a firearm on or about his person or under his control while committing the offense. R.C. 2941.141. A three-year gun specification adds the additional requirement that the offender displayed the firearm,

brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. R.C. 2941.145.

{¶ 26} To convict a defendant of a firearm specification, the "[s]tate must present evidence beyond a reasonable doubt that the firearm was operable, or could readily have been rendered operable, at time of offense; however, such proof can be established beyond a reasonable doubt by the testimony of lay witnesses who were in a position to observe the instrument and the circumstances surrounding the crime." *State v. Murphy* (1990), 49 Ohio St.3d 206, 551 N.E.2d 932, syllabus. The shotgun in this case was never recovered, but proof does not require the production or empirical analysis of the firearm. Id. at 209.

{¶ 27} A firearm is "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant." R.C. 2923.11(B)(1). It includes "an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable." Id. Concerning operability, "the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm." R.C. 2923.11(B)(2).

{¶ 28} "The State can prove that the weapon was operable or could readily have been rendered operable at the time of the offense in a variety of ways without admitting the firearm allegedly employed in the crime into evidence." *State v. Gains* (1989), 46 Ohio St.3d 65, 545 N.E.2d 68, syllabus. In *Thompkins*

(1997), 78 Ohio St.3d 380, 678 N.E.2d 541, the Ohio Supreme Court held that "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" when determining whether a weapon was operable. Id. at paragraph one of the syllabus. In *Thompkins*, the Court found a defendant could be convicted of a firearm specification when he told a clerk that he was committing a "holdup," pointed a gun at the clerk, and told the clerk to be "quick, quick," finding that these actions contained an implicit threat to discharge the weapon. Id. at 383-384.

{¶ 29} Since *Thompkins*, Ohio courts have routinely found sufficient evidence to support a firearm specification when the defendant brandished a firearm and implicitly threatened to fire it by pointing it at the victim. See *State v. Brooks*, Cuyahoga App. No. 92389, 2009-Ohio-5559; *State v. Robinson*, Cuyahoga App. No. 80718, 2003-Ohio-0156; *State v. Pierce*, Franklin App. Nos. 02AP-1133 and 02AP-1134, 2003-Ohio-4179; *State v. Macias*, Montgomery App. No. 1562, 2003-Ohio-1565.

{¶ 30} In this case, since the shotgun was never recovered, circumstantial evidence must show beyond a reasonable doubt that the gun was operable.

{¶ 31} Although no evidence was presented that J.S. personally held the gun, there was ample evidence that he was complicit in the actions of his co-conspirators. See *State v. Allmond*, Cuyahoga App. No. 89020, 2007-Ohio-6191, ¶19. Hoegler testified that one of the men who attacked him

had a shotgun, and Officer Nolan testified that Hoegler told him that the assailant pointed the shotgun directly at him. Based on Hoegler's and the officer's testimony, we find that there was sufficient circumstantial evidence to support the adjudications of delinquency for the one- and three-year firearm specifications.

{¶ 32} We next consider whether J.S.'s adjudication as a delinquent child was against the manifest weight of the evidence. In determining whether a conviction is against the manifest weight of the evidence an appellate court:

> "[M]ust 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, 515 N.E.2d 1009. A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins* at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

{¶ 33} J.S. argues that Hoegler's testimony was not credible because Hoegler had been drinking prior to the attack, could not entirely remember what

happened that evening, and his testimony was inconsistent with what he had told police on the night of the robbery.

{¶ 34} The trial court, as the trier of fact in this case, was in the best position to determine the credibility of the witnesses, and we will not usurp the role of the trial court in this case. We do not find that this is the rare case where the evidence weighs heavily against J.S.'s adjudication.

{¶ 35} Therefore, the first and second assignments of error are overruled.

Ineffective Assistance of Trial Counsel

{¶ 36} In the third assignment of error, J.S. argues that his counsel was ineffective. Specifically, he claims that his counsel should have objected to hearsay testimony and should have allowed J.S. to testify on his own behalf.

{¶ 37} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus. To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. Id. at paragraph two of the syllabus.

{¶ 38} J.S. complains that his counsel should have objected to the hearsay testimony of Officer Nolan. But, "[t]his court will not second-guess what could be considered to be a matter of trial strategy, and decisions about the use of objections at trial are matters of strategy." *State v. Hall*, Cuyahoga App. No. 88476, 2007-Ohio-3531, ¶34; *State v. Brady*, Cuyahoga App. No. 92510, 2010-Ohio-242, ¶34. Moreover, in order for an appellant to succeed on a claim of ineffective assistance of counsel, he must be able to prove that there is a reasonable probability that he would have been found not guilty had it not been for trial counsel's actions or failure to act. *State v. Milton*, Cuyahoga App. No. 92914, 2009-Ohio-6312, ¶24.

{¶ 39} Based on the record before us, we cannot say that defense counsel was ineffective for choosing not to object to the officer's testimony, nor would exclusion of this testimony have changed the outcome of the trial for J.S.'s adjucation for kidnapping and aggravated robbery. Moreover, counsel will not be faulted for not having J.S. testify as "[t]he advice provided by a criminal defense lawyer to his or her client regarding the decision to testify is 'a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance.'" *State v. Winchester*, Cuyahoga App. No. 79739, 2002-Ohio-2130, ¶12.

{¶ 40} Therefore, the third assignment of error is overruled.

{¶ 41} Accordingly, judgment is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

LARRY A. JONES, JUDGE

MARY J. BOYLE, P.J., and
JAMES J. SWEENEY, J., CONCUR