

[Cite as *In re C.B.*, 2010-Ohio-5620.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95256

IN RE: C.B.
A Minor Child

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 10106022

BEFORE: Gallagher, A.J., Kilbane, J., and Jones, J.

RELEASED AND JOURNALIZED: November 18, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, C.B.,¹ appeals the disposition of the Cuyahoga County Court of Common Pleas, Juvenile Court Division, which found him to be a delinquent child by reason of carrying a concealed weapon. For the reasons stated herein, we affirm.

¹ Appellant is referred to herein by his initials in accordance with this court's established policy regarding nondisclosure of identities in juvenile cases.

{¶ 2} On April 8, 2010, a complaint was filed in the juvenile court that alleged C.B., who was 17 years of age, was a delinquent child for carrying a concealed weapon in violation of R.C. 2923.12. The juvenile court held a hearing on May 10, 2010, and found C.B. was delinquent as charged. The juvenile court committed C.B. to the Department of Youth Services for a minimum of six months and a maximum of until his 21st birthday.

{¶ 3} At the hearing, Officer Neil Pesta, a Cleveland police officer, testified to events occurring the night of April 7, 2010. He and his partner responded to a call that a bar had been robbed. They were also informed that a maroon Hyundai picked up the two suspects and that four occupants were in the vehicle. The officers located the vehicle and pulled the vehicle over. Officer Pesta observed a lot of movement by all four occupants in the vehicle as it was being pulled over.

{¶ 4} Officer Pesta identified C.B. as one of the occupants, and stated that C.B. was seated in the backseat behind the driver. A security guard from the bar where the robbery allegedly occurred identified the juveniles involved in the robbery. Ultimately, the police were unable to verify whether a robbery in fact occurred.

{¶ 5} After securing the occupants of the vehicle, Officer Pesta observed the end of a firearm in the middle of the backseat, under a boxing glove and a

T-shirt. Upon lifting the boxing glove, Officer Pesta found two firearms. The firearms were located within arm's reach of where C.B. had been seated.

{¶ 6} Officer Pesta identified state's exhibits 1 and 2 as the firearms he recovered, a Jennings 25 automatic and a .38 caliber revolver. Officer Pesta retrieved these weapons and unloaded shell casings on the back of the vehicle. He stated that the firearms were live. The firearms were tested by an S.I.U. detective; however, Officer Pesta was not present when the firearms were tested.

{¶ 7} Officer Pesta indicated that, as a Cleveland police officer, he has carried a gun for two and one-half years. He was familiar with a .38 caliber revolver and had fired one in the past. Officer Pesta employed what is commonly referred to as the "pencil test" to demonstrate the operability of state's exhibit 2 and determined the firearm was operable.² He testified to the procedure employed and indicated that the pencil test is a "standard test" used by the police department to inspect weapons to determine if they will fire live rounds. He conceded that weapons are still sent to S.I.U. for testing and that the pencil test is not foolproof.

² Officer Pesta described the "pencil test" as follows: "if you stick a pencil in the barrel [of the firearm] and cock the hammer back to pull the trigger, the pencil would be ejected." If the firearm ejects the pencil, then the firing pin of the firearm is operable and will expel a live round of ammunition.

{¶ 8} C.B. testified that on the night in question he and a friend, who could not find his bus pass, called another friend for a ride home. He claimed that as they were being pulled over by police, the driver reached down and threw something wrapped in a shirt into the backseat. C.B. stated he did not know what was in the shirt. He denied moving around while the car was being pulled over. He also testified he told the police he did not know who the guns belonged to and that he was just getting a ride home.

{¶ 9} C.B. has appealed the dispositional ruling of the juvenile court that found him to be delinquent for carrying a concealed weapon. He raises three assignments of error for our review.

{¶ 10} C.B.'s first assignment of error provides as follows: "The juvenile court committed plain error when it allowed unreliable expert testimony to establish that State's Exhibit 2 was an operable firearm, in violation of Ohio Evid.R. 702(C), and [C.B.'s] right to due process of law. * * *."

{¶ 11} The state charged C.B. as a delinquent for carrying a concealed weapon, alleging he had concealed, ready at hand, a "handgun, a firearm which was loaded or for which ammunition was ready at hand, in violation of ORC 2923.12, a felony of the fourth degree." R.C. 2923.11(C)(1) states that a handgun includes a "firearm" that is "designed to be held and fired by the use of a single hand." Moreover, R.C. 2923.11(B)(1) defines "firearm" as a

“deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant.”

{¶ 12} C.B. argues that the state failed to present evidence that the firearm recovered from the vehicle was operable and that Officer Pesta’s testimony regarding the “pencil test” should have been excluded pursuant to Evid.R. 702 and *Daubert v. Merrell Dow Pharmaceuticals* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469. As no objection was raised below, we review for plain error. “Plain error exists only if but for the error, the outcome of the trial clearly would have been otherwise, and is applied under exceptional circumstances and only to prevent a manifest miscarriage of justice.” (Citation and quotations omitted.) *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, ¶ 61.

{¶ 13} When determining the operability of a firearm, “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). The Ohio Supreme Court has held that “the state can rely upon all of the surrounding facts and circumstances” in order to demonstrate that a certain object at issue constitutes a firearm. *State v. Murphy* (1990), 49 Ohio St.3d 206, 207, 551 N.E.2d 932. Further, “proof of the existence of a firearm may be based on lay testimony, and is not dependent on an empirical analysis of the gun.” *Id.* at 209, 551 N.E.2d 932.

{¶ 14} In this case, Officer Pesta indicated that he was responding to a purported robbery, that all four individuals in the suspect car were making a lot of movement, that he found the firearms in the backseat of the suspect vehicle within arm's reach of C.B., and that the firearms were loaded with live casings. Officer Pesta further determined the operability of the firearm marked as state's exhibit 2, through experience, by placing a pencil into it and pulling the trigger.³ Thus, Officer Pesta's testimony was a report of his personal observations surrounding the incident and his examination of the firearms. It was not an empirical analysis of the gun for which expert analysis was required.⁴

{¶ 15} Even if his testimony were considered "expert" because of his "pencil test" demonstration, Officer Pesta established sufficient familiarity with the firearm from his professional experience, training, and previous use of the same type of firearm. Officer Pesta could offer an opinion on the operability of the firearm based on his training and experience as an officer,

³ We note an analogy exists to field sobriety tests. Officers often perform field sobriety tests, based upon training and experience, to form opinions as to a person's impairment.

⁴ Evid.R. 701, which applies to opinions of lay witnesses, provides as follows: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

which included the use of a commonly performed “pencil test,” and the circumstances upon which the loaded firearms were recovered.⁵

{¶ 16} Moreover, Officer Pesta’s “pencil test” method of demonstrating the operability of the firearm was straightforward and easily understood. To the extent the trial court did not review the reliability requirements under Evid.R. 702(C),⁶ C.B. did not raise any objection to Officer Pesta’s testimony in this regard. Further, it does not appear that the admission of this evidence prejudiced C.B. Officer Pesta conceded that the test was not foolproof and was cross-examined about the test. Indeed, the pencil test was

⁵ See *State v. Jones* (May 23, 1995), Franklin App. No. 94APA12-1753 (finding sufficient evidence of operability upon circumstances that included the brandishing of a weapon during a robbery and the use of a “pencil test” to demonstrate the operability of the firearm).

⁶ Evid.R. 702 sets forth the requirements for expert witness testimony. Apart from expert knowledge and qualifications, the rule requires that “[t]he witness’ testimony is based on reliable scientific, technical, or other specialized information.” Evid.R. 702(C). The reliability component further instructs as follows: “To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply: (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles; (2) The design of the procedure, test, or experiment reliably implements the theory; (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.” Evid.R. 702(C). It appears that the reliability component is oftentimes overlooked when a “qualified” expert is called to offer testimony on a matter involving specialized knowledge. We emphasize that a trial court is obligated to act as a “gatekeeper” to ensure that the proffered information is relevant and sufficiently reliable before permitting the expert to testify. See *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238; *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 590, 113 S.Ct. 2786, 125 L.Ed.2d 469; *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72.

only one factor used in determining operability. The majority of his testimony concentrated on his own personal knowledge of the surrounding circumstances and his own observations. Accordingly, we find Officer Pesta's testimony was sufficient to establish the operability of the firearm beyond a reasonable doubt. See *State v. Holt*, Marion App. No. 9-09-39, 2010-Ohio-2298, ¶ 66-67.⁷ Finding no plain error occurred, C.B.'s first assignment of error is overruled.

{¶ 17} C.B.'s second assignment of error provides as follows: "[C.B.'s] adjudication for carrying concealed weapons was against the manifest weight of the evidence * * *."

{¶ 18} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether

⁷ In *Holt*, after the police secured a house with heroin inside, a gun with a loaded magazine was found inside a coat pocket. The experienced officer who recovered the gun testified that it appeared operable to him. The court found as follows: "Lt. Gruber's experience as an officer, his examination of the gun, his opinion that the gun was operable based upon that examination, and the presence of two loaded magazines, one of which was actually inside of the gun, was sufficient evidence for a rational trier of fact to conclude that the gun was operable." *Id.* at ¶ 67.

the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 81.

{¶ 19} C.B. was charged as a delinquent by reason of carrying a concealed weapon in violation of R.C. 2923.12. R.C. 2923.12(A) provides as follows: “No person shall knowingly carry or have, concealed on the person’s person or concealed ready at hand, any of the following: (1) A deadly weapon other than a handgun; (2) A handgun other than a dangerous ordnance; (3) A dangerous ordnance.” “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B).

{¶ 20} First, C.B. argues that the state failed to establish the chain of custody of the firearms. The state is not required to prove a perfect, unbroken chain of custody for evidence to be admissible. *State v. Keene* (1998), 81 Ohio St.3d 646, 662, 693 N.E.2d 246. Any breaks in the chain of custody go to the weight afforded to the evidence, not to its admissibility. *State v. Wilkins* (1980), 64 Ohio St.2d 382, 389, 415 N.E.2d 303. In this case, Officer Pesta testified that he recognized both state’s exhibits 1 and 2 as the firearms he removed from the vehicle and unloaded. There is nothing in the

record to suggest that after the firearms were recovered by the police, they were altered or tampered with in any manner. Accordingly, we find any rational trier of fact could have concluded that state's exhibits 1 and 2 were the firearms found during the incident.

{¶ 21} Second, C.B. claims there was no evidence that a robbery actually occurred, and C.B. testified that he had no knowledge of the guns. However, Officer Pesta testified that he was responding to a reported robbery, that the suspects had entered a maroon Hyundai, that C.B. was among the occupants in the vehicle, that all occupants were observed "moving around," and that C.B. was seated within arm's reach of the loaded firearms. The juvenile court had the opportunity to weigh the testimony and assess the credibility of the witnesses. From the testimony provided by Officer Pesta, the juvenile court could reasonably conclude that all the elements of carrying a concealed weapon, including knowledge, had been proved beyond a reasonable doubt. Upon our review, we find the juvenile court's disposition was supported by competent, credible evidence going to all the essential elements of the case, and was not against the manifest weight of the evidence. C.B.'s second assignment of error is overruled.

{¶ 22} C.B.'s third assignment of error provides as follows: "Trial counsel rendered ineffective assistance, in violation of [C.B.'s] right to effective assistance of counsel * * *."

{¶ 23} In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 310, 2009-Ohio-2961, 911 N.E.2d 242, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 24} C.B. argues that his trial counsel was ineffective for failing to object to the use of the "pencil test" and to the state's failure to prove a chain of custody. Having already found no merit to the underlying assertions, we find no deficient performance by counsel or resulting prejudice occurred. C.B.'s third assignment of error is overruled.

Judgment 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. The finding of delinquency having been affirmed, any bail or stay of execution pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

LARRY A. JONES, J., CONCURS;

MARY EILEEN KILBANE, J., CONCURS IN JUDGMENT ONLY