

[Cite as *State v. Martin*, 2021-Ohio-1096.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 108996
 v. :
 :
 TYSEAN MARTIN, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 1, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-634921-B

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and John F. Hirschauer, Assistant Prosecuting Attorney, *for appellee*.

Timothy Young, Ohio Public Defender, and Timothy Hackett, Assistant State Public Defender, *for appellant*.

ANITA LASTER MAYS, J.:

{¶ 1} Defendant-appellant Tysean Martin (“Martin”) appeals the Cuyahoga County Common Pleas Juvenile Court’s decision to transfer his case from the Juvenile Division to the General Division. We affirm the juvenile court’s decision.

{¶ 2} Martin pleaded guilty in the Cuyahoga County Common Pleas Court, General Division, to involuntary manslaughter, a first-degree felony, in violation of R.C. 2903.04(A); aggravated riot, a fourth-degree felony, in violation of R.C. 2917.02(A)(2); and having weapons while under disability, a third-degree felony, in violation of R.C. 2923.13(A)(2). Martin was sentenced to an aggregate prison term of 15 years.

I. Facts and Procedural History

{¶ 3} On July 11, 2018, Martin was involved in a shootout that left victim, Darnez Canion (“Canion”), dead in a middle school parking lot. During their investigation of the shooting, Maple Heights police officers obtained the surveillance video and camera images from the school, which showed approximately 15 to 20 males in the middle of the parking lot. The surveillance video from the loading dock camera shows a young male later identified as Martin at the loading dock wearing a backpack. Martin walked off camera, and then gunshots were fired from the same direction. After the gunshots were fired, groups of people, including Martin retreated from the area. Two surveillance camera images showed Martin wearing the backpack and holding a firearm in his hand. No other individual was shown to have had a firearm in their hand.

{¶ 4} During the investigation, the police found four 9 mm shell casings in the same area that Martin traveled from when the shooting occurred. In addition to the shell casings and surveillance camera footage, Martin posted a picture on his

social media page of the same gun he is seen holding in the surveillance image. Martin was also wearing the same head covering from the camera footage.

{¶ 5} On August 17, 2018, a complaint was filed in Cuyahoga County Juvenile Court alleging Martin was delinquent. The complaint alleged that Martin participated in a shootout at the middle school where Canion sustained a fatal gunshot wound. The state then filed a motion for mandatory bindover. On November 2, 2018, a probable cause hearing was held. The state presented three witnesses at the hearing; M.G., a friend of Martin; Richard Richey, director of security for Maple Heights City Schools; and Detective Andrew Sperie, investigator for the Maple Heights Police Department.

{¶ 6} M.G., a 15-year-old girl, testified that on July 11, 2018, she and a group of her girlfriends were involved in a physical altercation with another group of girls at Stafford Park. During this altercation, M.G. lost her necklace and headphones. One of the girls, not in M.G.'s group, told her family about the altercation and claimed that Damien Stewart ("Stewart"), a friend of M.G. and Martin, hit her. Another girl called Stewart and told him that "he was gonna get touched." (Tr. 28.) M.G. explained that getting touched meant that someone is going to fight you. After that call, Stewart, Martin, and other friends of M.G. agreed to go back to Stafford Park to find M.G.'s necklace and headphones.

{¶ 7} When the boys arrived at the park, one of M.G.'s friends FaceTimed¹ her. M.G. testified that the group moved towards Milkovich Middle School, which is adjacent to the park. While on video, M.G. testified that she saw a car pulling towards the group of boys, calling for Stewart. Stewart then stated that he did not fight the girl who accused him of hitting her. At that point the boys got into a physical altercation. M.G. testified that she saw a girl hand a boy a gun, but Stewart punched it out of his hand, and they started fighting. (Tr. 36.) Then Martin picked up the gun, and M.G. saw Martin shoot the gun, and then the gun locked up. Martin then started running. *Id.* Also, in M.G.'s statement to the police, she stated that she observed Martin shooting the gun. (Tr. 58.)

{¶ 8} On November 16, 2018, the juvenile court ruled that based on the evidence presented there was probable cause to believe Martin committed the Category 2 offense of involuntary manslaughter with firearm specifications, two counts of aggravated riot with firearm specifications, and having weapons while under disability. The juvenile court also determined that Martin was 16 years old or older at the time of the offense, he did have the firearm on or about his person, under control, displayed it, brandished it, or used it, and the offense was a mandatory transfer under R.C. 2152.10.

¹ FaceTime is an app that supports video and audio calling between Apple devices.

{¶ 9} Martin subsequently pleaded guilty in the general division and was sentenced to 15 years' imprisonment. Martin filed this appeal assigning five errors for our review:

- I. The government presented insufficient evidence of operability to support a firearm specification necessary for mandatory transfer under R.C. 2152.12. Fifth and Fourteenth Amendments to the U.S. Constitution, and Article I, Section 16 of the Ohio Constitution.
- II. The juvenile court erred and violated Tysean Martin's due process rights when it granted the government's motion for mandatory transfer without ever deciding whether the alleged firearm was operable, in violation of R.C. 2152.12, the Fifth and Fourteenth Amendments to the U.S. Constitution; and, Article I, Section 16 of the Ohio Constitution.
- III. Because the evidence showed three clusters of shell casings but only one fatal bullet, and because the government failed to present any ballistics evidence showing a match, the government also presented insufficient evidence of proximate causation for involuntary manslaughter. R.C. 2903.04; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 16 of the Ohio Constitution.
- IV. Alternatively, Ohio's "more than a mere suspicion" standard violates a child's state and federal due process rights. Crim.R. 52; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 16 of the Ohio Constitution.
- V. Tysean was deprived of his right to the effective assistance of counsel, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution; and Article I, Sections 10 and 16 of the Ohio Constitution.

II. Mandatory Bindover

A. Standard of Review

{¶ 10} We review the juvenile court’s decision to grant the state’s motion for mandatory bindover under an abuse of discretion standard. *State v. Flagg*, 8th Dist. Cuyahoga Nos. 93248 and 93279, 2010-Ohio-4247, ¶ 17. An abuse of discretion connotes more than an error of judgment, it implies that the trial court’s attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). However, “[w]hether sufficient evidence exists to sustain a verdict in a criminal case is a question of law.” (Citations omitted.) *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 47. “Likewise, whether the state has produced sufficient evidence to support a finding of probable cause in a mandatory-bindover proceeding is a question of law, and we review questions of law de novo.” *Id.*, citing *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 8.

{¶ 11} Thus,

a juvenile court’s probable-cause determination in a mandatory-bindover proceeding involves questions of both fact and law, and thus, we defer to the trial court’s determinations regarding witness credibility, but we review de novo the legal conclusion whether the state presented sufficient evidence to demonstrate probable cause to believe that the juvenile committed the acts charged.

Id. at ¶ 51.

B. Law and Analysis

{¶ 12} In the first assignment of error, Martin argues that the juvenile court erred when it granted the state’s motion for mandatory transfer because the state did not prove that the firearm seen in Martin’s hand and on his social media page was operable, which is necessary to support a firearm specification necessary for mandatory transfer. The gun was never recovered, however, “[b]oth a firearm’s existence and its operability may be inferred from the surrounding facts and circumstances. It is not necessary to admit the firearm used during the crime in evidence in order to establish a firearm specification.” *State v. Ercoli*, 8th Dist. Cuyahoga No. 104578, 2017-Ohio-5571, ¶ 24, citing *State v. Vann*, 2d Dist. Montgomery No. 22818, 2009-Ohio-5308, ¶ 27.

{¶ 13} Consequently,

[t]he probable cause standard for mandatory bindover requires the state to “provide credible evidence of every element of an offense to support a finding that probable cause exists to believe that the juvenile committed the offense before ordering mandatory waiver of juvenile court jurisdiction pursuant to R.C. 2151.26(B).” *State v. Iacona*, 93 Ohio St.3d 83, 93, 752 N.E.2d 937 (2001). Probable cause in this context is not guilt beyond a reasonable doubt — it is evidence that raises more than a suspicion of guilt. *See In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, at ¶ 16. This standard requires the juvenile court to “evaluate the quality of the evidence presented by the state in support of probable cause as well as any evidence presented by the respondent that attacks probable cause.” *Iacona* at 93.

In re T.T., 8th Dist. Cuyahoga No. 94829, 2010-Ohio-5148, ¶ 7.

{¶ 14} The surveillance camera images showed Martin holding a gun, running from an area where the police found four shell casings. Also, M.G. testified

that she saw Martin shoot the gun before it jammed. She said he shot the gun a few times, then he started running. (Tr. 38.) From the images taken by the surveillance cameras, the shell casings, and M.G.'s testimony, it can be inferred that the gun was operable.

{¶ 15} On cross-examination, M.G. stated that she could not be sure that Martin's gun fired. (Tr. 59.) M.G.'s testimony and credibility are best assessed by the trial court. "The trier of fact is in the best position to make credibility determinations because it is able to view the demeanor of a witness while he or she is testifying; this court cannot. The trier of fact is therefore in the best position to determine if the proffered testimony is credible." *Harmon v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 105574, 2017-Ohio-8662, ¶ 51, quoting *State v. Holloway*, 8th Dist. Cuyahoga No. 101289, 2015-Ohio-1015, ¶ 42.

{¶ 16} We find that the juvenile court considered all the facts and circumstances of the crime and listened to the testimony given by the witnesses. "[P]roof of operability of a firearm can be established by circumstantial evidence, which can consist of the brandishing of the firearm by the defendant and the implicit threat to shoot." *State v. Williams*, 8th Dist. Cuyahoga No. 78961, 2001 Ohio App. LEXIS 4474 (Oct. 4, 2001).

{¶ 17} Next, Martin argues that in the juvenile bindover context, prosecutors may not point to an accomplice to prove operability. Martin cites *State v. Hanning*, 89 Ohio St.3d 86, 2000-Ohio-436, 728 N.E.2d 1059, where the Supreme Court held that "[a] plain reading of both statutes does not permit this court to apply the

complicity concept of R.C. 2923.03 to the bindover proceedings of R.C. 2151.26 because the bindover statute itself does not provide that a child can be bound over based on the fact that a firearm was used by an accomplice.” *Id.* at 91. In *Hanning*, the state conceded that the juvenile charged in the case did not personally have a firearm on or about his person or under his control, nor did he personally display, brandish, indicate possession of, or use a firearm to facilitate the commission of the act charged. *Id.*

{¶ 18} The juvenile in *Hanning* possessed a BB gun while his adult accomplice possessed a 9 mm handgun. “All parties agree that a plastic BB gun or pellet gun does not fit the definition of a firearm under R.C. 2923.11(B), which defines the term as ‘any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant.’” *Id.* at 90. However, in the instant case, the state argued that Martin did have a firearm on or about his person that he personally displayed, brandished, indicated possession of, or used a firearm to facilitate the commission of the act charged. The state did not argue the complicity concept to prove operability as Martin contends. Therefore, we determine that the Supreme Court’s decision in *Hanning* does not apply to Martin’s case.

{¶ 19} Thirdly, Martin argues that the prosecutor presented no evidence of operability.

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*, 49 Ohio St.3d 206, 207, 551 N.E.2d 932 (1990). 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.

In re C.B., 8th Dist. Cuyahoga No. 95256, 2010-Ohio-5620, ¶ 13.

{¶ 20} The state presented video and picture evidence of Martin, with a gun in his hand, running around the school away from where the shooting took place. Additional pictures of Martin holding a gun on social media with the same backpack and head wrap were presented to the trial court. Finally, the testimony from M.G., stating that she saw Martin fire the gun before it jammed, offers proof of operability.

{¶ 21} Martin’s final issue under assignment of error one argues that the juvenile court’s finding that there was probable cause to believe that Martin committed involuntary manslaughter is against the manifest weight of the evidence. “The probable cause standard is not as stringent as that of beyond a reasonable doubt and considers whether the state has demonstrated more than a mere suspicion of guilt when weighed upon any evidence presented by the defense.” *State v. Cleveland*, 8th Dist. Cuyahoga No. 105443, 2018-Ohio-1185, ¶ 30, citing *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, at ¶ 16.

{¶ 22} However, “[a] manifest weight of the evidence claim requires a different review. The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other.” *State v. Medley*, 8th Dist. Cuyahoga No. 105760, 2018-Ohio-1391, ¶ 19,

citing *State v. Brindley*, 10th Dist. Franklin No. 01AP-926, 2002-Ohio-2425, ¶ 16. As previously stated, our review of the evidence is de novo, because it is a question of law. *See In re A.J.S.*, ¶ 51. Therefore, a review of the weight of the evidence is not proper in this case.

{¶ 23} We find there is sufficient evidence of operability to support a firearm specification necessary for mandatory transfer under R.C. 2152.12.

{¶ 24} Martin's first assignment of error is overruled.

{¶ 25} Martin's second assignment of error is very similar to his first. However, he adds that the juvenile court failed to issue a sufficient statement of the reasons for its decision, in addition to contending that the juvenile court did not resolve whether or not the firearm was operable. In our previous review, we determined that there was sufficient evidence to determine that the firearm was operable.

{¶ 26} On November 16, 2018, the juvenile court rendered its decision in response to the probable cause hearing stating,

So the Defendant is charged with a Category 2 offense which would be Involuntary Manslaughter. And the Defendant was 16 years of age based on testimony that was provided. And based on the videos that we saw, did have firearm on or about his person, under control, displayed, brandished or indicated using the firearm. So therefore under 2152.10, this is a mandatory transfer to the General Division.

(Tr. 8-9.)

{¶ 27} R.C. 2152.10 states,

(A) A child who is alleged to be a delinquent child is eligible for mandatory transfer and shall be transferred as provided in section 2152.12 of the Revised Code in any of the following circumstances:

(2) The child is charged with a category two offense, other than a violation of section 2905.01 of the Revised Code, the child was sixteen years of age or older at the time of the commission of the act charged, and either or both of the following apply:

(a) The child previously was adjudicated a delinquent child for committing an act that is a category one or a category two offense and was committed to the legal custody of the department of youth services on the basis of that adjudication.

(b) The child is alleged to have had a firearm on or about the child's person or under the child's control while committing the act charged and to have displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged.

{¶ 28} In accordance with the statute, the juvenile court determined that Martin was at least 16 years old or older at the time of the offense. The court also determined that Martin committed a Category 2 offense, he had a firearm under his control, and that he brandished the firearm. The juvenile court referred to the video and picture evidence that showed Martin running while holding a gun in his right hand.

{¶ 29} Martin cites *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), to provide validity to his claim that the trial court did not issue a sufficient statement providing reasons for its decision. The court in *Kent* stated,

[m]eaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not “assume” that there are adequate reasons, nor may it merely assume that “full investigation” has been made.

Id. at 561.

{¶ 30} We agree with the court in *Kent*. However, Martin’s contentions are misplaced. The juvenile court *did* state its reasons for the decision. The juvenile court stated that based on the videos, there is probable cause for the mandatory transfer.

{¶ 31} Martin’s second assignment of error is overruled.

III. Sufficient Evidence to Demonstrate Probable Cause

A. Standard of Review

{¶ 32} As previously stated, “we review de novo the legal conclusion whether the state presented sufficient evidence to demonstrate probable cause to believe that the juvenile committed the acts charged.” *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, at ¶ 51.

“[T]he state must provide credible evidence of every element of an offense to support a finding that probable cause exists to believe that the juvenile committed the offense before ordering mandatory waiver of juvenile court jurisdiction pursuant to R.C. 2152.12(A)(1)(a).” *Id.* at ¶ 42, quoting *Iacona*, 93 Ohio St.3d 83, 93, 752 N.E.2d 937 (2001). “In meeting this standard the state must produce evidence that raises more than a mere suspicion of guilt, but need not provide evidence proving guilt beyond a reasonable doubt.” *Id.*, quoting *Iacona* at 93. In other words, “the standard of probable cause is a fair probability, not a prima facie showing, of criminal activity.” (Citations omitted.) *State v. Grimes*, 2d Dist. Greene No. 2009-CA-30, 2010-Ohio-5385, ¶ 16.

State v. Starling, 2d Dist. Clark No. 2018-CA-34, 2019-Ohio-1478, ¶ 37.

B. Law and Analysis

{¶ 33} In Martin’s third assignment of error, he argues that the state failed to present sufficient evidence of proximate causation to establish involuntary manslaughter. R.C. 2903.04(A), the involuntary manslaughter statute, states, “[n]o person shall cause the death of another or the unlawful termination of another’s pregnancy as a proximate result of the offender’s committing or attempting to commit a felony.” “The term ‘proximate result’ used in R.C. 2903.04 mandates that a person will be criminally responsible for causing the death of another only where the consequences of his conduct are direct, normal, and reasonably inevitable when viewed in the light of ordinary experience.” (Citations omitted.) *State v. Crawford*, 8th Dist. Cuyahoga No. 108431, 2020-Ohio-2939, ¶ 32, citing *State v. Sabatine*, 64 Ohio App.3d 556, 560, 582 N.E.2d 34 (8th Dist.1989).

{¶ 34} Martin contends that the evidence is insufficient because the state failed to prove that the bullet that killed Canion came from his gun. Martin’s argument is similar to the appellant’s argument in *State v. Wilson*, 182 Ohio App.3d 171, 2009-Ohio-1681, 912 N.E.2d 133 (8th Dist.). In *Wilson*, the appellant was involved in a gun fight with another person. While the two were shooting at each other, a girl was killed. The bullet that killed the girl was not from the appellant’s gun, but the other person shooting back at the appellant. The appellant argued that

he should have not been convicted of involuntary manslaughter because he was not the cause of the girl's death. *Id.* at ¶ 23.

{¶ 35} The court disagreed, quoting *State v. Robinson*, 98 Ohio App.3d 560, 649 N.E.2d 18 (8th Dist.1994), and stated,

“Having found that the Ohio legislature intended to adopt the proximate cause theory of criminal liability, as to R.C. 2903.04, we hold that when a person, acting individually or in concert with another, sets in motion a sequence of events, the foreseeable consequences of which were known or should have been known to him at the time, he is criminally liable for the direct, proximate and reasonably inevitable consequences of death resulting from his original criminal act.’ *See also, State v. Younger*, [8th Dist.] Cuyahoga No. 57080, 1990 Ohio App. LEXIS 2107. (May 31, 1990).”

Wilson at ¶ 25.

{¶ 36} Although it was not determined whether the bullets Martin fired were the ones that killed Canion, Martin had a firearm and the facts revealed he fired it in Canion's direction. We find this evidence to be sufficient to demonstrate probable cause of involuntary manslaughter. *See, e.g., State v. Crawford*, 8th Dist. Cuyahoga No. 108431, 2020-Ohio-2939, ¶ 40.

{¶ 37} Martin's third assignment of error is overruled.

IV. Ineffective Assistance of Counsel

{¶ 38} Martin addresses his fourth and fifth assignment of errors together arguing that his counsel was ineffective for not objecting to the “more than mere suspicion” standard used at his probable cause hearing, in accordance with R.C. 2152.10 and 2152.12. Martin contends that the standard in the statutes violates a child's due process rights. “In order to establish a claim of ineffective assistance of

appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense." (Citations omitted.) *State v. Harris*, 8th Dist. Cuyahoga No. 108377, 2020-Ohio-5425, ¶ 8. Martin's argument about his counsel is misplaced because he has not demonstrated that his counsel's performance was deficient.

{¶ 39} Martin is challenging the constitutionality of the statutes.

There are two primary ways to challenge the constitutionality of a statute: by facial challenge or through an "as-applied" challenge. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 37. In a facial challenge to the constitutionality of a statute, the claimant must show that there are no set of facts under which the challenged statute is constitutional. An as-applied challenge alleges that a particular application of a statute is unconstitutional. "Facial challenges present a higher hurdle than as-applied challenges because, in general, for a statute to be facially unconstitutional, it must be unconstitutional in all applications." *State v. Romage*, 138 Ohio St.3d 390, 2014-Ohio-783, 7 N.E.3d 1156, ¶ 7, citing *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, 915 N.E.2d 1205, ¶ 13.

Derrico v. State, 8th Dist. Cuyahoga No. 107192, 2019-Ohio-1767, ¶ 17.

{¶ 40} "Where there is no suspect class or fundamental right at issue, as is the case here, a rational-basis test applies." *Id.* at ¶ 18, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 289, 595 N.E.2d 862 (1992). "A 'suspect class' is defined as 'one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 33, quoting *Massachusetts*

Bd. of Retirement v. Murgia, 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

{¶ 41} “Under both Ohio and federal law, juveniles are not considered a suspect class * * *.” *Id.* “[J]uveniles do not have a fundamental right to an amenability hearing, because the right to such a hearing is not ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty,’” *id.*, quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

{¶ 42} “Under rational-basis review, a decision by the state to treat individuals differently is invalidated only when it is ‘based solely on reasons totally unrelated to the pursuit of the State’s goals and only if no grounds can be conceived to justify” it. (Citations omitted.) *Id.* at ¶ 35, citing *State v. Williams*, 88 Ohio St.3d 530, 2000-Ohio-428, 728 N.E.2d 342.

{¶ 43} Thus, the Supreme Court of Ohio ruled that the “more than mere suspicion” standard does not violate a child’s due process rights. The court stated, “[W]e hold that the mandatory bindover of certain juvenile offenders under R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) complies with due process and equal protection as guaranteed by the Ohio and United States Constitutions.” *Id.* at ¶ 38.

{¶ 44} Additionally, failing to object to a failing conclusion is not ineffective assistance of counsel. *See Woodmere v. Young*, 8th Dist. Cuyahoga No. 106011, 2018-Ohio-1508, ¶ 6 (“The failure to object to error, alone, is not enough to sustain a claim for ineffective assistance of counsel.”). “The failure to object is not a per se

indicator of ineffective assistance of counsel because counsel may refuse to object for tactical reasons.” (Citations omitted.) *State v. Wright*, 8th Dist. Cuyahoga No. 92344, 2009-Ohio-5229, ¶ 45, citing *State v. Gumm*, 73 Ohio St.3d 418, 428, 653 N.E.2d 253 (1995).

{¶ 45} Therefore, Martin’s counsel’s performance was not deficient; the “more than mere suspicion” standard is not unconstitutional.

{¶ 46} Martin’s fourth and fifth assignments of error are overruled.

{¶ 47} 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 issue out of this court directing the common pleas 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.

ANITA LASTER MAYS, JUDGE

SEAN C. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR