[Cite as *In re N.S.*, 2010-Ohio-1057.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93153

IN RE: N.S.

JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED FOR RESENTENCING

Civil Appeal from the
Juvenile Court Division
Cuyahoga County Court of Common Pleas
Case No. DL-08-124459

BEFORE: Blackmon, P.J., Stewart, J., and Celebrezze, J.

RELEASED: March 18, 2010

JOURNALIZED:

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant N.S.[1] appeals the judgment of the Cuyahoga County Court of Common Pleas, Juvenile Division, which adjudicated him delinquent on two counts of felonious assault. N.S. assigns the following errors for our review:

> **"I. The juvenile court committed plain error when it adjudicated N.S. delinquent of two counts of felonious assault, in violation of R.C. 2903.11(A)(1) and 2903.11(A)(2), when both offenses were alleged to have occurred during the same incident, with a single animus, against the same victim. R.C. 2945.25; *State v. Harris*, slip opinion 2009-Ohio-3323. Fifth Amendment to the United States Constitution; Article I, Section 10 of the Ohio Constitution. (Feb. 13, 2009, T.pp. 155-157; Mar. 13, 2009 Entry)."**
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> **"II. The juvenile court violated N.S.'s right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 16 of the Ohio Constitution, and Juvenile Rule 29(e)(4) when it adjudicated him delinquent of felonious assault, absent proof of every element of the charge against him by sufficient, competent, and credible evidence. (Feb. 13, 2009, T.pp. 155-157; Mar. 13, 2009 Entry)."**
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> **"III. The juvenile court violated N.S.'s right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 16 of the Ohio Constitution, and Juvenile Rule 29(e)(4) when it adjudicated him delinquent of felonious assault when that finding was against the manifest weight of the evidence. (Feb. 13, 2009, T.pp. 155-157; Mar. 13, 2009 Entry)."**
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> **"IV. Trial counsel was ineffective, in violation of the Sixth Amendment to the United States Constitution and Section 10, Article I [sic] of the Ohio Constitution, for failing to object to the**

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

imposition of an illegal disposition. (Feb. 13, 2009, T.pp. 155-157)."

{¶ 2} Having reviewed the record and pertinent law, we affirm in part, reverse in part, and remand for resentencing. The apposite facts follow.

{¶ 3} This case arises out of an incident that occurred on January 8, 2008, at South High School in Cleveland, Ohio, when members of rival gangs, the Creatine Clique and the Squad Up 93rd, began fighting in the hallway of the school. James Cappetto, a teacher at the school, who intervened to stop the fighting, sustained head and spinal cord injuries. Thereafter, Cappetto filed a police report alleging that N.S. was the student who struck him in the head.

{¶ 4} On May 23, 2008, the state of Ohio filed a complaint in the juvenile court charging N.S. with two counts of felonious assault, one count of criminal trespass, and one count of criminal activity on school property. On February 13, 2009, the trial court held an adjudicatory hearing and heard testimony from several witnesses.

Adjudicatory Hearing

{¶ 5} At the adjudicatory hearing, Cappetto testified that on January 8, 2008, shortly before school was about to end for the day, he heard a commotion in the hallway. Cappetto testified that when he looked into the hallway, he observed four groups of individuals boxing. He approached, tried to separate the fighters closest to him, asked them to stop fighting, and called for security.

{¶ 6} Cappetto testified that while waiting for the requested security to arrive, he tried shielding two of the fighters and attempted to find a classroom to enter. Cappetto testified that he eventually shepherded the two students into a math classroom, shut the door behind him, and secured them on the floor.

{¶ 7} Cappetto testified that moments later, the door opened and N.S. entered the classroom. Cappetto testified about the ensuing events as follows:

> **"* * * And then I saw N.S. come towards me * * *. I was putting their heads down so they would not get struck in the head. And as N.S. was coming towards me, I put my head forward. And I thought if he was going to strike any one of these kids, it would just mess up the whole angle of throwing a punch or whatever, or I would take the punch instead of them because they are 16-year-old kids, and so I was just looking at them eye-to-eye and - -**
>
> **The Court: You were looking at who eye-to-eye?**
>
> **The Witness: N.S.**
>
> **The Court: Okay.**
>
> **The Witness: And after we were just no more than maybe two feet apart, it was lights out."**[2]
>
> **"* * *"**
>
> **"Q. Okay. So you said it was lights out then, correct?**
>
> **A. Well, yes. I knew that he was in a declining motion. I was eyeballing him into me, and the next thing that was going to come was going to be a punch of some sort, and I didn't think these younger kids could take a blow if I had**

[2]Tr. 42-43.

my head up at a certain angle where I would get hit instead of having my head down or some other way."[3]

{¶ 8} Cappetto testified that as a result of the blow from N.S., he had a fractured skull with part of the scalp separated from his head. His neck was also broken with the first three vertebras shattered, while the fifth, sixth, and seventh vertebras were broken. Cappetto testified that a cadaver's vertebrae had to be inserted and fused together in a wire basket. In addition, the left side of Cappetto's body was paralyzed, and at the time of the adjudication hearing, Cappetto was partially paralyzed.

{¶ 9} Cappetto further testified N.S. was a former student of his, who had always been friendly towards him. Cappetto stated that the day prior to the incident, he encountered N.S. in the hallway minutes after school had ended for the day. Cappetto testified about the encounter as follows:

"* * * And he goes, Mr. Cappetto, you gotta see these, these are really neat. And I just looked at N.S. and I said, N.S., what do you got, brass knuckles? He says, How did you know? I said, You know, really, I was young once, and you know, the way you're - - I said, N.S., you must go around 280 pounds, you're too big to be having anything like that."[4]

{¶ 10} Cappetto testified that he told N.S. that he did not need to see the brass knuckles.

{¶ 11} Finally, Cappetto testified that in order to protect the two students he was shielding during the assault, he did not immediately come forward to identify

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[3]Tr. 47.

N. S. as the student who struck him. Cappetto stated that after the assault, he learned that threats of reprisal were made by members of the opposing gang against anyone who would identify N.S. as the attacker. Cappetto testified in pertinent part as follows:

> **"Q. What I asked you was why did you wait for a period of time before you identified the person that hit you?**
>
> **A. I told you when you were over my house that on one weekend, two people were shot in Slavic Village, they were teenagers, and one was killed, and the kids that were beneath me or the one that got away, they said that they know who did it to me, who hit me, but they were under threat of being shot - -**
>
> **Mr. Granito: Objection. Hearsay, your Honor.**
>
> **The Court: Overruled. It explains his actions. It's not asserted for the truth. Continue.**
>
> **A. That's - - that's what the student said. And I thought if there was a shooting six weeks after this happened where one person was injured and another one killed, maybe this - - maybe you want to call it a gang fight, it was kind of resolved after that incident, and that's when - - that's when I came forward and said who did it, what happened, because I didn't want to see anybody else get shot or killed as if - - if it happened to be involved in this supposed gang fight."[5]**

{¶ 12} Brian Costa, who is employed as a security guard at South High School, testified that he responded to the floor where the fighting took place. Costa testified that upon arrival, he observed between 50 to 100 students in the

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[4]Tr. 50.

[5]Tr. 53-54.

hallway. He also observed the school's principal holding a student against a locker, at which point another student struck the principal in the head.

{¶ 13} Costa testified that he immediately wrestled the student to the ground, handcuffed him, and proceeded to Room 223, where he found Cappetto lying unconscious on the ground in a pool of blood. Costa immediately called EMS and attempted to stop the bleeding by covering the wound with his shirt and the shirt of another security officer.

{¶ 14} South High School's principal, Timothy Bigenho, testified on behalf of the defense. Bigenho testified that while attempting to quell the fighting at the school on the day in question, he passed by Room 223 and saw Cappetto on the floor in a pool of blood. Bigenho testified that during the fighting he did not see N.S., but admitted that it was possible that N.S. had been present.

{¶ 15} Alina Scorteanu, a South High School math teacher, testified about the commotion, which spilled into her classroom as a result of the fighting in the hallway. Scorteanu testified that she went underneath her desk during the fighting. She recalled that Cappetto fell to the floor and immediately began bleeding, but could not explain what caused him to fall.

{¶ 16} At the close of the hearing, the trial court found N.S. delinquent on all four counts. On March 13, 2009, the trial court placed N.S. in the custody of Ohio Department of Youth Services for a period of 12 months up to his 21st birthday. This appeal followed.

Sufficiency of Evidence

{¶ 17} For ease of discussion, we begin with the second assigned error. In the second assigned error, N.S. argues there was insufficient evidence to convict him of felonious assault. We disagree.

{¶ 18} It must first be noted that the same standard of review for sufficiency of evidence applies to juvenile and adult criminal matters.[6] The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman*:[7]

> **"Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."**[8]

{¶ 19} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks*,[9] in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the**

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[6] *In re G.R.*, Cuyahoga App. No. 90391, 2008-Ohio-3982, citing *In re Washington*, 81 Ohio St.3d 337, 1998-Ohio-627, 691 N.E.2d 285.

[7](1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

[8]See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394; *State v. Davis* (1988), 49 Ohio App.3d 109, 113, 550 N.E.2d 966.

[9](1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

{¶ 20} Felonious assault is defined by R.C. 2903.11(A), which states that "[n]o person shall knowingly: (1) Cause serious physical harm to another * * *; [or] (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."[10]

{¶ 21} In the instant case, N.S. argues the State failed to prove that brass knuckles were used in the attack. Although Cappetto could not definitively say whether N.S. struck him with brass knuckles, the sheer magnitude of the injuries Cappetto sustained would lead one to conclude that he was struck with a deadly weapon.

{¶ 22} Here, the evidence established that Cappetto's skull was fractured with the scalp ripped from his head; that three neck vertebrae were shattered and three were broken, which required vertebrae from a cadaver being inserted and fused with Cappetto's. In addition, Cappetto was paralyzed on the left side of

[10]*In re R.G.*, Cuyahoga App. No. 90389, 2008-Ohio-6469.

his body and was partially paralyzed at the time of the adjudication hearing. Further, the single blow rendered Cappetto unconscious and resulted in significant loss of blood, which took the shirts of two security officers to contain.

{¶ 23} Although the evidence may have been circumstantial, as it pertained to what deadly weapon was used, we note that circumstantial evidence has the same probative value as direct evidence.[11] We find that the average person would not conclude that a single closed fist punch could cause the debilitating injuries Cappetto sustained. As such, in reviewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could find the essential elements of felonious assault beyond a reasonable doubt. Thus, there exists sufficient evidence to sustain N.S.'s delinquency adjudication for felonious assault. Accordingly, we overrule the second assigned error.

Manifest Weight of Evidence

{¶ 24} In the third assigned error, N.S. argues his conviction was against the manifest weight of the evidence. We disagree.

{¶ 25} In *State v. Wilson,*[12] the Ohio Supreme Court recently addressed the standard of review for a criminal manifest weight challenge, as follows:

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[11]*State v. Basham*, 5th Dist. No. CT2007-0010, 2007-Ohio-6995.

[12]113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264.

“The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence’s effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive --- the state’s or the defendant’s? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. ‘When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a ‘thirteenth juror’ and disagrees with the factfinder’s resolution of the conflicting testimony.” Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.”

{¶ 26} As discussed in the second assigned error, the State presented sufficient evidence to establish that N.S. caused serious physical harm to Cappetto. The evidence is uncontroverted that Cappetto sustained extensive and debilitating injuries as a result of the attack. In addition, the evidence established that Cappetto knew his attacker. Cappetto testified that N.S. was a former student and that on the day of the attack, he was looking at N.S. "eye-to-eye" as N.S. was about to strike him.

{¶ 27} Thus, based on the foregoing, we cannot say that the trial court clearly lost its way and created such a manifest miscarriage of justice that the conviction is against the manifest weight of the evidence. Accordingly, we overrule the third assigned error.

Allied Offenses

{¶ 28} In the first assigned error, N.S. argues the trial court erred in sentencing him on both counts of felonious assault involving a single victim. We agree.

{¶ 29} Because N.S. failed to object, he has waived this argument on appeal but for plain error. Plain error is set forth in Crim.R. 52(B): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

{¶ 30} The Supreme Court of Ohio held: "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and

only to prevent a manifest miscarriage of justice."[13] The Supreme Court of Ohio further held: "The plain error test requires that, but for the existence of the error, the result of the trial would have been otherwise."[14]

{¶ 31} The Double Jeopardy Clause of the United States Constitution prohibits (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[15] These double-jeopardy protections apply to the states through the Fourteenth Amendment.[16] Additionally, Section 10, Article I of the Ohio Constitution provides, "No person shall be twice put in jeopardy for the same offense."

{¶ 32} The facts of this case involve the third double-jeopardy prohibition — the prohibition against multiple punishments for the same offense. R.C. 2941.25 provides:

> **"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.**

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[13]*In re S.M.*, Cuyahoga App. No. 91408, 2008-Ohio-6852 at ¶ 8, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

[14]Id., quoting *State v. Wiles* (1991), 59 Ohio St.3d 71, 86, 571 N.E.2d 97.

[15]*United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656.

[16]*Benton v. Maryland* (1969), 395 U.S. 784, 786, 89 S.Ct. 2056, 23 L.Ed.2d 707; *State v. Tolbert* (1991), 60 Ohio St.3d 89, 90, 573 N.E.2d 617.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 33} In the instant case, the record indicates that the offenses resulted from a single act with a single objective and were also part of a single criminal adventure, with a logical relationship to one another, which were bound together by time, space, and purpose. Thus, pursuant to R.C. 2941.25, N.S. may be convicted of only one form of the two offenses.

{¶ 34} Consequently, the trial court erred in imposing a sentence covering both counts of felonious assault. We also acknowledge that the sentence the trial court imposed is consistent with a single count of felonious assault. However, we reverse and remand the matter for imposition of a sentence covering only one count of felonious assault, at which time the state is to elect which allied offense it would pursue against N.S.[17] Accordingly, we sustain the first assigned error.

Ineffective Assistance of Counsel

{¶ 35} In the fourth assigned error, N.S. argues he was denied the effective assistance of counsel because trial counsel failed to object to the imposition of a sentence covering both counts of felonious assault.

[17]*State v. Whitfield*, Slip Opinion No. 2010-Ohio-2, ___N.E.2nd___.

{¶ 36} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*.[18] 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.[19] 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.[20]

{¶ 37} In the instant case, we sustained N.S.'s first assigned error because we found that the trial court erred in imposing a sentence that covered both counts of felonious assault. However, we also acknowledge that the sentence the trial court imposed was consistent with a single count of felonious assault. Since the sentence imposed is consistent with a single count of felonious assault, N.S. was not prejudice, thus was not denied the effective assistance of counsel. Accordingly, we overrule the fourth assigned error.

Judgment affirmed in part, reversed in part, and remanded for resentencing.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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[18](1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052.

[19]*State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus.

[20]Id. at paragraph two of the syllabus.

It is ordered that a special mandate be sent to the Juvenile Court Division of the Cuyahoga County Court of Common Pleas 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MELODY J. STEWART, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR