IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

IN RE ROBERT P.

No. 1 CA-JV 18-0494
FILED 6-27-2019

Appeal from the Superior Court in Maricopa County
No. JV207956
The Honorable Melody Harmon, Judge *Pro Tempore*

AFFIRMED

COUNSEL

The Law Offices of Kevin Breger, Scottsdale
By Kevin Breger
Counsel for Appellant

Maricopa County Attorney's Office, Phoenix
By Lisa Marie Martin
Counsel for Appellee

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Jennifer M. Perkins and Judge David D. Weinzweig joined.

H O W E, Judge:

¶1 Robert appeals the juvenile court's order requiring him to pay $4,445 in restitution. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In February 2017, 14-year-old Robert and his friends entered a Phoenix convenience store on a "beer run." The store clerk noticed Robert and his friends leaving the store with two 12-packs of beer without paying for them and tried to stop them. The clerk cornered Robert and then called the police. Robert and one of the accomplices threw "a large merchandise display" and a case of beer at the clerk, which allowed Robert to flee before officers responded.

¶3 The police officer who responded observed that the clerk had "blood all over his face" and that "his nose was swollen." He also saw "blood all over the floor and beers scattered across [it]." After receiving several tips that Robert might have been involved in the incident, Phoenix Police arrested and interviewed him. During the interview, Robert admitted his involvement and identified himself in the store's video recording of the incident.

¶4 The State subsequently petitioned the juvenile court to find Robert delinquent, alleging (1) one count of aggravated robbery, a class 3 felony, (2) one count of shoplifting merchandise of less than $1,000 in value, a class 1 misdemeanor, and (3) assault, a class 1 misdemeanor. Robert pled responsible to facilitation to commit aggravated robbery, a class 6 designated felony, with a stipulation that he pay restitution to the victim for all economic loss arising out of the incident in an amount not to exceed $100,000 and that he be held jointly and severally liable for the restitution with two other co-juveniles.

¶5 At the change-of-plea hearing, the court received the clerk's Verified Victim Statement. The court informed Robert of the potential consequences of entering the plea and asked whether he understood the

rights that he would be foregoing. Robert said he understood. The court found that the plea was a knowing, intelligent, and voluntary admission, and accepted the plea.

¶6 After the court accepted the plea, Robert's counsel stated that Robert stipulated to pay the $4,445 requested restitution in the Verified Victim Statement. Asked whether Robert would like to add a written stipulation in the plea, Robert's counsel replied, "we can just put it on the record, for the sake of this."

¶7 The clerk was also present at the hearing. He stated that his Verified Victim Statement did not include all his costs because he still needed surgery on his nose and did not yet know what that would cost. The court told the clerk to keep the prosecutor informed about that and noted that the issue would be addressed at the disposition hearing. The court issued a minute entry stating that "[t]he parties stipulate to restitution in the amount of $4,445.00 (which will be ordered at the time of Disposition)."

¶8 At the July 19 disposition hearing, Robert's counsel again acknowledged the stipulation to the restitution amount embodied in the Verified Victim Statement. Robert's counsel also requested to appear at the hearings of the co-juveniles and asserted that he might request a restitution hearing if the clerk claimed restitution beyond the stipulated amount.

¶9 The court noted that the issue of additional restitution would be more "ripe" for consideration after all the co-juveniles had entered a plea, and it granted Robert permission to file a motion to appear at the co-juveniles' hearings. The court informed the clerk that he had until August 18, 2017, to produce any further claims and documentation for restitution, but the clerk never presented any additional information or claim for restitution. The court, however, never issued an order on the stipulated restitution.

¶10 Robert's co-juveniles requested and received a restitution hearing in October 2017. Neither Robert nor his counsel attended the hearing. Nor was Robert's case number called at the hearing. The court found Robert's co-juveniles liable to the clerk for $15.34 in medical bills and $720 for lost wages. At the end of the hearing, a co-juvenile asked the court whether the restitution could be "joint and several with co-defendant, Robert[.]" The court responded that "it will be joint and several."

¶11 In November 2018, the State requested a hearing on the restitution in Robert's case. The State asserted that Robert had stipulated to the amount in the Verified Victim's Statement and that "it was an error on

the part of the [c]ourt to not formally enter the order after the parties stipulated to entering the amount of $4,445." Robert countered that a "final appealable restitution order" was made at the October 2017 hearing because the court ordered the restitution to be joint and several between Robert and his co-juveniles. He argued "it was an abuse of discretion to now go back . . . and attempt to modify a final restitution order[.]"

¶12 The court ruled that Robert did in fact stipulate to the $4,445 the clerk had requested in his Verified Victim Statement. The court noted that it had referred to that amount on many occasions as a stipulated amount. It further noted that Robert's counsel stated at the disposition hearing that, in lieu of adding a written stipulation into the plea, he would "just put it on the record[.]" The court therefore ordered *nunc pro tunc* that Robert pay $4,445 in restitution. Robert timely appealed.

DISCUSSION

¶13 Robert contends that he was denied effective assistance of counsel because "there was no incentive" to stipulate to the requested restitution and "there was nothing on the record to suggest that by stipulating Robert P.'s attorney was limiting the amount of restitution that could be ordered."[1] To successfully plead a colorable claim of ineffective assistance of counsel, a juvenile must demonstrate that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Donald*, 198 Ariz. 406, 413 ¶ 15 (App. 2000). Prejudice is shown when "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Mata*, 185 Ariz. 319, 331 (1996). A reasonable probability is a probability sufficient to "undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶14 Accordingly, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. To overcome that presumption, the juvenile must show that counsel's performance fell outside the acceptable "range of

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[1] Although ineffective assistance of counsel claims in adult criminal cases cannot be addressed on direct appeal, *State v. Spreitz*, 202 Ariz. 1, 3 ¶ 9 (2002), they may be raised on direct appeal in juvenile cases, *see Maricopa Cty. Juv. Action No. JV-511576*, 186 Ariz. 604, 606–07 (App. 1996).

competence" and failed to meet "an objective standard of reasonableness." *Id*. at 687–89. A colorable claim of ineffective assistance of counsel must further be based on something more than mere speculation. *State v. Rosario,* 195 Ariz. 264, 268 ¶ 23 (1999). "In short, reviewing courts must be very cautious in deeming trial counsel's assistance ineffective when counsel's challenged acts or omissions might have a reasonable explanation." *State v. Pandeli*, 242 Ariz. 175, 181 ¶ 7 (2017).

¶15 The record shows that Robert's counsel was not deficient in representing him. Counsel had reason to believe that the clerk was going to claim additional damages because he said at the change-of-plea hearing that he still needed surgery on his nose and did not know the amount it would cost. By stipulating to the $4,445, counsel shielded Robert from the risk that he would be held responsible for additional damages. Indeed, counsel's decision could very well have been a matter of trial strategy and tactics and Robert has not overcome that presumption. Because counsel's performance was not deficient, we need not consider whether Robert was prejudiced. *See State v. Salazar,* 146 Ariz. 540, 541 (1985) ("In deciding an ineffectiveness claim, this court need not approach the inquiry in a specific order or address both prongs of the inquiry if the defendant makes an insufficient showing on one.").

¶16 Robert also argues—without citation to authority—that the State was collaterally estopped from relitigating the restitution issue because the $735.34 order was a final order. We review claims of collateral estoppel de novo. *Crosby-Garbotz v. Fell*, 246 Ariz. 54, 57 ¶ 9 (2019). Robert's argument fails because Robert was not a party to his co-juveniles' restitution hearing. *See State v. Edwards,* 136 Ariz. 177, 187 (1983) ("Whatever the wisdom of permitting non-mutual collateral estoppel in civil matters, we are not persuaded that it is a wise policy in criminal cases."). Restitution was not litigated and decided in a prior hearing between the State and Robert, but instead, in a hearing between the State and the co-juveniles. Neither Robert nor his counsel appeared at the hearing for the co-juveniles. In fact, Robert's case number was not even called at the hearing. As such, Robert's collateral estoppel claim fails.

¶17 Robert asserts next that the State's November 2018 motion was untimely filed because the $735.34 restitution order "was the only applicable and final restitution order that applied to Robert[.]" Robert therefore maintains that the State "should have appealed [the $735.34 restitution order] within the applicable time limits." The juvenile court's ruling issued in the co-juveniles' cases was not, however, a final order as to Robert. The record reflects that the juvenile court left the issue of additional

restitution unresolved. Further, as already noted, neither Robert nor his counsel were present at the October 2017 hearing and Robert was not a party to that hearing. Accordingly, the juvenile court's December 2018 order was the final restitution order that applied to Robert and his argument fails. *See In re Eric L.*, 189 Ariz. 482, 484 (App. 1997) (noting that a disposition is not final until restitution is considered and ruled upon).

¶18 Finally, Robert maintains that the court's restitution order would result in a "windfall" because it would make the victim more than whole. But we need not decide whether the record supports the amount of restitution ordered because Robert makes this argument for the first time on appeal. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) (matters not raised before the trial court generally cannot be raised on appeal). Furthermore, regardless of waiver, Robert's argument still fails because he stipulated to the restitution amount. *See State v. West*, 173 Ariz. 602, 609 (App. 1992) (noting that restitution beyond that established by the conviction or the record can be imposed so long as the defendant agrees).

CONCLUSION

¶19 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA