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IN THE COURT OF APPEALS OF INDIANA

S.M.J.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 71A03-0807-JV-335
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Barbara J. Johnston, Magistrate
The Honorable Peter J. Nemeth, Judge
Cause No. 71J01-0707-JD-531

October 28, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, S.M.J., appeals his delinquency adjudication for battery by means of a deadly weapon, a Class C felony if committed by an adult, Ind. Code § 35-42-2-1, and the juvenile court's decision to commit him to the Indiana Department of Correction (DOC).

We affirm.

ISSUES

S.M.J. presents two issues for our review:

(1) Whether he received ineffective assistance of counsel; and

(2) Whether the juvenile court abused its discretion by committing him to the DOC.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of July 5, 2007, S.M.J. went to Merrifield Park in Mishawaka, Indiana, with a group of about fifteen people, including Andrew Farmer (Farmer) and Raven Gaines (Gaines). They went to the park so that Farmer could "meet" with Joshua Haines (Haines), who was at the park with three friends and his girlfriend. (November 13, 2007 Transcript p. 98). As Farmer and Haines talked, Gaines approached and hit Haines on the back of the head. Haines tried to go back to his friends, but the large group of people surrounded him and started beating him. Haines tried to defend himself and ended up on his knees. While Haines was on his knees, S.M.J. stabbed him in the back, puncturing Haines' diaphragm and leading to a three-day hospital stay.

Police transported several people, including S.M.J., to the police station. One of the witnesses, Ryan Neddo (Neddo), talked with S.M.J. S.M.J. told Neddo that he still had the knife that he used to stab Haines. Neddo told S.M.J. to hide the knife, so S.M.J. hid it outside the police station. At the police station, S.M.J. told Haines' girlfriend, Misty Richardson (Richardson), that Haines "had it coming." (Nov. 13, 2008 Tr. p. 115). S.M.J. also told one of his friends, Britney Bowley (Bowley), that he had stabbed Haines.

As Mishawaka Police Captain Ronald Treely (Captain Treely) began investigating the incident, another witness at the police station told him that S.M.J. would be a "good witness." (Nov. 13, 2007 Tr. p. 128). Captain Treely took S.M.J. into the station's media room and asked him what had happened and how to contact his mother. S.M.J. gave Captain Treely his mother's cell phone number and told him that he did not know who had stabbed Haines. Captain Treely then left to interview another witness. According to Captain Treely, S.M.J. was not a suspect at that point.

Meanwhile, Neddo told officers that S.M.J. had stabbed Haines and showed them where S.M.J. had hidden the knife. Upon receiving this information, Captain Treely called S.M.J.'s mother, told her that S.M.J. had been involved in a stabbing, and asked her to come to the station. Captain Treely described his interaction with S.M.J.'s mother as follows:

> I just told her everything that I knew up to that point. I mean, I didn't hide anything, I just said, listen, this is what happened. I said, we've got a guy that just identified or we have a person that just identified your son as the one that had done the stabbing and I also, at that time I think we had already recovered the weapon and I told her that. I didn't hide anything. I said, this is how it's going to be, I said, I'll bring your son in here, you have all the private time you want, just talk to him and I said, it's going to be up to both of you whether, you know, he wants to talk to me. You got to agree to it and he has too [sic] also

> and she said, okay and I got up and I went out and got [S.M.J.] and I put him in the room with his mom and went back in the bureau and sat down and probably fifteen minutes later or so the door opened up and I went down there and she says, you know, he – he wants to talk and I said, okay, fine.

(Nov. 13, 2007 Tr. pp. 131-32). S.M.J. and his mother then signed a waiver of S.M.J.'s rights, and S.M.J. gave a videotaped statement. In this statement, S.M.J. said that he was being beaten by Haines and that he stabbed him in self-defense.

On July 12, 2007, the State filed a Petition alleging that S.M.J. had committed battery by means of a deadly weapon, a Class C felony if committed by an adult, I.C. § 35-42-2-1. On November 13, 2007, the juvenile court held a fact-finding hearing. Evidence of S.M.J.'s two statements to Captain Treely was admitted with no objection from S.M.J.'s attorney. On November 20, 2007, the juvenile court adjudicated S.M.J. a delinquent child.

On February 5, 2008, the juvenile court held a dispositional hearing and ordered S.M.J. committed to the DOC, specifically, the Indiana Boys' School. Furthermore, the juvenile court ordered S.M.J. and his mother "to participate in and complete the Community Transition Program (CTP) while the child is in the [DOC] and during the transition and after-care period following incarceration." (Appellant's App. p. 16). The juvenile court chose this disposition in large part because of the seriousness of S.M.J.'s offense and because the community transition program could offer S.M.J. the education he was not otherwise receiving. (February 5, 2008 Transcript pp. 13-17).

S.M.J. now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Ineffective Assistance of Counsel*

On appeal, S.M.J. first argues that his adjudication should be reversed because he received ineffective assistance of counsel. Specifically, he contends that his trial attorney should have objected to the admission of his statements to Captain Treely. S.M.J. asserts that, if counsel had objected, the statements would have been suppressed, and he would not have been adjudicated a delinquent child. We disagree.

A person claiming ineffective assistance of counsel must show that counsel's performance was deficient and that he or she was prejudiced by that deficient performance. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. *Id*. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id*.

S.M.J. contends that his attorney should have objected to the admission into evidence of his statements to Captain Treely based on Indiana Code section 31-32-5-1, the statute governing the waiver of rights in juvenile proceedings. Indiana Code section 31-32-5-1 provides, in pertinent part:

> Any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only:
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> * * * *
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> (2) by the child's custodial parent, guardian, custodian, or guardian *ad litem* if:
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> (A) that person knowingly and voluntarily waives the right;

(B) that person has no interest adverse to the child;
(C) meaningful consultation has occurred between that person and the child; and
(D) the child knowingly and voluntarily joins with the waiver[.]

When a claim of ineffective assistance of counsel is based on counsel's failure to object, the claimant must show that a proper objection would have been sustained. *Willsey v. State*, 698 N.E.2d 784, 794 (Ind. 1998), *reh'g denied*. We will separately address each of S.M.J.'s two statements.

A. *First Statement*

S.M.J. argues that his attorney should have objected to the admission into evidence of his first statement to Captain Treely—in which S.M.J. said that he did not know who stabbed Haines—because "there was no *Miranda*[1] warning given and S.M.J.'s mother had not yet arrived at the police station." (Appellant's Br. p. 6). Even though S.M.J., in his first statement, disclaimed any knowledge of who stabbed Haines, he suggests that the admission of the statement prejudiced him because it was contradictory to his second statement, implying that the two conflicting statements damaged his credibility.

But even if S.M.J. had objected to the admission of S.M.J.'s first statement based on *Miranda* and the juvenile waiver statute, there is not a reasonable probability that the objection would have been sustained. As the State notes, S.M.J. was not in custody when he made his first statement. "As a general rule, when a juvenile who is not in custody gives a statement to police, neither the safeguards of *Miranda* warnings nor the juvenile waiver statute is implicated." *Borton v. State*, 759 N.E.2d 641, 646 (Ind. Ct. App. 2001), *trans.*

denied. Here, other than noting that he was at the police station at the time of his first statement, S.M.J. cites nothing else in the record and no authority to support his claim that he was in custody at that time. Captain Treely testified that he was talking with S.M.J. because another witness had told him that S.M.J. would be a good witness. Likewise, Captain Treely testified that, at the time of his first statement, S.M.J. was not a suspect. S.M.J. has failed to show that an objection to the admission of his first statement would have been sustained. Therefore, his attorney did not perform deficiently by failing to object.

B. *Second Statement*

With regard to his second statement—in which S.M.J. admitted that he stabbed Haines but claimed that he did so in self-defense—S.M.J. contends that his consultation with his mother was not "meaningful" for purposes of Indiana Code section 31-32-5-1 because it occurred before Captain Treely explained S.M.J.'s rights under *Miranda*. Stated differently, S.M.J. asserts that, in order for consultation to be meaningful, it must occur after the juvenile and the parent or guardian are informed of the juvenile's specific rights. Because that did not happen in this case, S.M.J. argues that his attorney should have objected to the admission of his second statement into evidence.

We cannot say that S.M.J.'s attorney performed deficiently by failing to object. To the contrary, an objection would have been in direct conflict with his defense strategy. S.M.J.'s defense at the fact-finding hearing was that he stabbed Haines in self-defense. S.M.J. testified as such, and his attorney argued self-defense in his closing argument.

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Furthermore, S.M.J.'s second statement was consistent with a self-defense strategy. In that statement, S.M.J. told Captain Treely that he stabbed Haines because Haines was beating him.

Still, S.M.J. contends that the self-defense strategy "was a reaction to, and not the reason for, the failure to object to S.M.J.'s inadmissible statements." (Appellant's Br. p. 7). In other words, S.M.J. suggests that his trial attorney only opted to pursue self-defense after he dropped the ball by failing to object. But, again, a strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable judgment. *Perez*, 748 N.E.2d at 854. Here, self-defense was probably S.M.J.'s most viable strategy given that Neddo, Richardson, and Bowley all testified that S.M.J. admitted to them that he had stabbed Haines. As such, S.M.J.'s attorney did not perform deficiently by failing to object to the admission of S.M.J.'s second statement into evidence.[2]

II. *Commitment to the DOC*[3]

S.M.J. argues that, even if we uphold his delinquency adjudication, we should reverse the juvenile court's decision to commit him to the DOC. The choice of a specific disposition for a delinquent child is within the discretion of the trial court, subject to the statutory

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[2] Because we conclude that an objection would have been inconsistent with S.M.J.'s trial strategy, we need not determine whether an objection, if made, would have been sustained. However, we do note that, in making his argument, S.M.J.'s appellate counsel has cited a dissenting opinion from an Indiana supreme court case without alerting us to the fact that it is a dissenting opinion. (Appellant's Br. p. 6) (citing *Graham v. State*, 464 N.E.2d 1, 11 (Ind. 1984) (DeBruler, J., dissenting)). Whether that omission was intentional or a mere oversight, we ask counsel to take more care in the future.

[3] S.M.J. turned eighteen on October 8, 2008. The State suggests that S.M.J.'s commitment to the DOC was to end on his eighteenth birthday. If the State is correct, then S.M.J.'s challenge to his commitment is moot. However, the State has not cited any authority or anything in the record suggesting that S.M.J.'s commitment

considerations of the welfare of the child, the safety of the community, and a statutory policy favoring the least harsh disposition. *A.M.R. v. State*, 741 N.E.2d 727, 729 (Ind. Ct. App. 2000). We may overturn the trial court's disposition order only if we find that it has abused its discretion. *Id*. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*.

S.M.J. correctly notes that the general policy in Indiana is for the juvenile court to enter a dispositional decree that is "in the least restrictive (most family like) . . . setting available[.]" I.C. § 31-37-18-6. However, the juvenile court is only required to do so "[i]f consistent with the safety of the community and the best interest of the child[.]" *Id*. In this case, the juvenile court clearly concluded that a disposition less restrictive than commitment to the DOC would not be consistent with the safety of the community and the best interests of S.M.J.

Specifically, the juvenile court noted that "[t]his was a serious, serious offense" that "seriously, seriously injured a young man[.]" (Feb. 5, 2008 Tr. pp. 15, 17). Moreover, the juvenile court was very concerned with S.M.J.'s educational history and his future educational progress. The juvenile court noted that S.M.J. had been in and out of school throughout his youth. S.M.J.'s mother had previously withdrawn him from school to be home schooled but did not have "the registration or the certificate necessary to home school him." (Feb. 5, 2008 Tr. p. 13). At the time of the dispositional hearing, S.M.J. had not been

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was to end automatically on his eighteenth birthday, nor does it argue that S.M.J.'s challenge to his

in school for approximately three years. The juvenile court expressed confidence in S.M.J.'s educational prospects because of changes in the community transition program at the Indiana Boys' School, stating:

> Let me tell you this and I said this to another boy who was in front of me not too long ago, if it were not for the community transition program that is currently in place, I wouldn't send him to Boys' School because we didn't have the kinds of services that we now have with this community. We are seeing young men come out of Boys' School in five months. Never use[d] to see that before.
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> * * * *
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> I think the program will assist in his getting some education . . . . [I]t's also going to put in services that you probably have never had access to and monitoring. It's not that we just go to Boys' School and then you get out. The family is involved in every step of the process. There is individual counseling. There is family counseling. There is Parenting With Love and Limits. There's a lot of pieces. I've sat in on some of the sessions there. I'm very impressed with what goes on. If it weren't for that program, I wouldn't send him. But because I know of the program, because I believe in the program and it's [sic] success . . .

(Feb. 5, 2008 Tr. pp. 14-15). S.M.J. has given us no valid reason to disturb the juvenile court's conclusion that S.M.J.'s commitment to the community transition program at the Indiana Boys' School is the most consistent with both the safety of the community and S.M.J.'s best interest.

Still, S.M.J. would have us liken his case to that of *E.H. v. State*, 764 N.E.2d 681 (Ind. Ct. App. 2002), *trans. denied*, where we held that there were less restrictive options than DOC commitment of a juvenile who had stolen a necklace that was hanging off of a set of bleachers during a gym class. In that case, we expressly noted that "there is no evidence in the record before us that E.H. is a threat to the community." *Id*. at 686. Here, on the other

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commitment is moot. Therefore, we will address the merits of S.M.J.'s challenge.

hand, S.M.J. was committed to the DOC for stabbing Haines in the back with a knife, an act that seriously injured Haines and that could have easily resulted in his death. Needless to say, S.M.J.'s case is distinguishable from *E.H.*

In sum, we conclude that the juvenile court did not abuse its discretion by committing S.M.J. to the DOC.

CONCLUSION

Based on the foregoing, we conclude that S.M.J. did not receive ineffective assistance of counsel and that the juvenile court did not abuse its discretion by committing S.M.J. to the DOC.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.