ATTORNEY FOR APPELLANT:

F. HARRISON GREEN
Cincinnati, Ohio

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ARTHUR THADDEUS PERRY
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF C.F.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 81A05-0703-JV-175
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE UNION CIRCUIT COURT
The Honorable Matthew Cox, Judge
Cause No. 81C01-0605-JD-104

November 8, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

C.A.F. ("C.F.") appeals his adjudication as a delinquent child for committing acts that would be battery as a class B misdemeanor if committed by an adult.[1]

We affirm.

ISSUES

1. Whether C.F. received ineffective assistance of counsel.

2. Whether sufficient evidence supports the adjudication.

FACTS

On the afternoon of April 10, 2006, thirteen-year-old W. was walking home from school with two other boys – C.F. (also age thirteen) and J.G. The two other boys accused W. of beating up a girl at school and threatened to beat him up. W.'s eleven-year-old sister and eight-year-old brother were about a half-block behind the three boys. They observed W. backing away from C.F. and body language by C.F. suggesting that he was going to attack W.[2] The brother and sister ran forward. The eight-year-old brother yelled at C.F. to not "pick on" his brother. (Tr. 7, 18, 35). C.F. grabbed the eight-year-old brother by the front of his shirt, picked him up, "cussed at him," threatened him, and

---

[1] As the State correctly notes, counsel for C.F. has not complied with Indiana Appellate Rule 50(B)(1)(a), which provides that the appellant's Appendix in a criminal appeal "shall contain" copies of "the Clerk's record, including the chronological case summary." The Appendix submitted by C.F. does not contain these. Moreover, the Appendix does not contain the Petition of Delinquency. In his brief, C.F. states that the petition sought to find him "delinquent for violating Ind. Code 35-42-2-1(a)(1)(A)," which is battery resulting in bodily injury to another, a class A misdemeanor. C.F.'s Br. at 1. C.F. does include the order of fact-finding on the delinquency petition in his Appendix. Therein, the trial court found that C.F. committed an act that – "if committed by an adult" – would be "a class B misdemeanor, a lesser included offense of that which was originally charged. (App. 61).

[2] The sister testified that it looked like C.F., "was getting ready to punch" W. (Tr. 18) The brother testified that C.F. "had his hands out" and "looked like he was going to push" W. (Tr. 34).

held him off the ground. (Tr. 8, 19). The sister grabbed her little brother "by his legs so he wouldn't fall." (Tr. 9). C.F. released the boy, and his sister eased him to the ground. C.F. then grabbed the little brother's lunch box and threw it into the road. The sister said she was going to call her mother, and C.F. and J.G. ran.

At the fact-finding on November 1, 2006, the three siblings testified to the above. In addition, W. testified that both C.F. and J.G. "said that they were going to beat [him] up," and that initially both "were coming toward him." (Tr. 6, 7). W. further testified that while C.F. grabbed his younger brother and picked him up, J.G. was "standing there waiting and if this fight was going to start, he was going to help [C.F.]." (Tr. 13). The sister testified that while C.F. grabbed her brother and picked him up, J.G. "was just standing there watching and laughing." (Tr. 27).

C.F. testified that he did not grab W.'s younger brother or pick him up. C.F. admitted that the boy had told him to quit picking on W. However, C.F. testified that the boy then "started hitting [C.F.] with his lunch box," at which point C.F. "grabbed it out of his hand" and threw it. (Tr. 51, 52).

The trial court found that C.F. had committed an act that would be battery, as a class B misdemeanor, if committed by an adult, and it adjudicated him a delinquent.

DECISION

1. Assistance of Counsel

C.F. argues that he did not receive effective assistance because his counsel "failed to introduce the testimony of" his friend J.G. to "corroborate" his version of the events of that afternoon. He proffers as an "exhibit" in his Appendix a form captioned "Voluntary

Statement," dated May 8, 2006, which purports to be signed by J.G. and is handwritten as follows:

> We were walking down the street after school with [W.] and his brother and sister. Me and [C.F.] was talking to [W.] and then his little brother started hitting [C.F.] with his lunch box. [C.F.] asked him to please stop, and he wouldn't. [C.F.] turned around, grabbed his lunch box and threw it into the road. [W.]'s sister called her mom and said [C.F.] was hitting [the younger brother] and we just walked away.

(App. Ex. 1).

To establish a claim of ineffective assistance of counsel, the appellant must prove that counsel's performance fell below an objective standard of reasonableness based on prevailing norms, *and* there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Latta v. State*, 743 N.E.2d 1121, 1125 (Ind. 2001) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)) (emphasis added). Whether trial counsel provided effective assistance revolves around the particular facts of each case. *Dew v. State*, 843 N.E.2d 556, 561 (Ind. Ct. App. 2006), *trans. denied*. On appeal, the presumption that counsel was competent can be overcome only by strong and convincing evidence. *Id.* A decision regarding what witnesses to call is generally "a matter of strategy which an appellate court will not second-guess." *Johnson v. State*, 832 N.E.2d 985, 1003 (Ind. Ct. App. 2005), *trans. denied*; *see also Clancy v. State*, 829 N.E.2d 203, 212 (Ind. Ct. App. 2005), *trans. denied*; *Elisea v. State*, 777 N.E.2d 46, 50 (Ind. Ct. App. 2002).

In *Williams v. State*, 508 N.E.2d 1264 (Ind. 1987), the case cited by C.F., the appellant sought post-conviction relief on the basis of ineffective assistance by his trial counsel. On the first morning of trial, Williams' counsel had moved

> to withdraw, stating that he was unprepared to represent Williams because Williams had lacked the money to finance a proper investigation and defense. He said Williams' poverty prevented him from deposing the State's witnesses and two crucial alibi witnesses from Chicago. (Trial counsel explained in the post-conviction hearing that the alibi witnesses had indicated that they had no money to travel to Indianapolis for the trial, and Williams' own indigency prevented him from providing those funds.) Counsel said he had not even interviewed any of the State's witnesses.

508 N.E.2d at 1266. The trial proceeded, and Williams was convicted. In addition to the foregoing evidence, apparently gleaned from the trial record, there was a post-conviction relief evidentiary hearing – at which "[t]rial counsel testified." *Id.* at 1265. At the latter hearing, trial counsel admitted that "he was unprepared to represent Williams at trial," and "admitted his failure to interview any of the State's witnesses." *Id.* at 1267. Trial counsel confirmed his knowledge that the alibi witnesses "would not attend the trial without the provision of travel funds," and that he "failed to inform the court of this predicament until the first day of trial." *Id.* In addition, the record reflected that trial counsel "did not indicate that Williams required public funds for depositions until the morning of trial, although he regarded deposing both the alibi witnesses and the State's witnesses as necessary for a proper defense." *Id.* Our Supreme Court found "the compilation of errors and omissions by counsel," the "accumulation of . . . failures," led to the conclusion that Williams had received "substandard representation." *Id.* at 1268.

Without extensive analysis, it is clear that the facts in *Williams* are far different than those before us. Most importantly, C.F.'s counsel made no statements to the trial court indicating impediments to proceeding with the fact-finding, and C.F. presents no testimonial evidence from his trial counsel as to the reason J.G. was not called as a witness. That J.G. made the unsworn statement that C.F. proffers does not establish that J.G. would have testified consistent with that statement had he been called to testify on the witness stand at the fact-finding hearing. Further, according to the testimony of the siblings, J.G. might have had an accessory role in the battery upon W. Moreover, as the State posits, it is possible that C.F.'s trial counsel did not call J.G. to testify because "he had changed his story." State's Br. at 5. C.F. has not presented the strong and convincing evidence necessary to establish that his trial counsel was ineffective because he did not call J.G. to testify. *Dew*, 843 N.E.2d at 561.

C.F. further argues that trial counsel was ineffective for failing to object to several questions posed by the prosecutor that he characterizes as "leading" or assuming "facts not in evidence." C.F.'s Br. at 8. The single case cited by C.F., *Goodman v. State*, 479 N.E.2d 513 (Ind. 1985), simply defines a "leading question" -- as "one that suggests to the witness the answer desired," "one which embodies a material fact and admits of a conclusive answer in the form of a simple 'yes' or 'no.'" *Id.* at 515. Thus, our Supreme Court did not find counsel ineffective for having failed to object to leading questions, and C.F. cites no authority so holding.

In *King v. State*, 508 N.E.2d 1259, 1263 (Ind. 1987), our Supreme Court held that when a child is a witness, "it is permissible for the trial court to allow leading questions,

given the varying degrees of comprehension." *See also Riehle v. State*, 823 N.E.2d 287, 294 (Ind. Ct. App. 2005), *trans. denied*; *Kien v. State*, 782 N.E.2d 398, 408 (Ind. Ct. App. 2003), *trans. denied.* Further, the "trial judge is best able to determine the capabilities of the witness and his decision to permit a certain manner of questioning will not be overturned absent a clear showing of prejudicial error." *King*, 508 N.E.2d at 1263.

Moreover, trial counsel's own questioning of C.F. consisted of asking only the four following questions about the incident:

Q. Did you ever grab [the younger brother]?

Q. Did you grab a lunch box that [the younger brother] had?

Q. Did you throw that lunch box in the street?

Q. Did you ever pick up [the younger brother]?

(Tr. 50). As the trial court observed on the one occasion when C.F.'s counsel objected to a question as leading, mid-way through the third sibling's testimony, both sides "led quite a bit." (Tr. 35).

We do not find the presumption that trial counsel was competent has been overcome by C.F.'s assertion that trial counsel should have demanded strict compliance with evidentiary rules in the questioning of the child witnesses. Therefore, his ineffective assistance claim fails.

2. Sufficiency

Our standard of review for sufficiency of the evidence in a juvenile case has been described as follows:

> [W]hen the State seeks to have a juvenile adjudicated to be [a] delinquent child, the State must prove every element of that offense beyond a reasonable doubt. Upon review, we will not reweigh the evidence or judge the credibility of the witnesses. Rather, this court looks to the evidence and the reasonable inferences therefrom that support the [true finding], and we will affirm a conviction if evidence of probative value exists from which the factfinder could find the defendant guilty beyond a reasonable doubt. Thus, we will affirm the finding of delinquency unless it may be concluded that no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt.

C.T.S. v. State, 781 N.E.2d 1193, 1200-01 (Ind. Ct. App. 2003), *trans. denied* (quoting *J.V. v. State*, 766 N.E.2d 412, 415 (Ind. Ct. App. 2002), *trans. denied*.). Further, it is for the trier of fact to resolve conflicts in testimony and to determine the weight of the evidence and the credibility of the witnesses. *C.T.S.*, 781 N.E.2d at 1201.

C.F. argues that the State "failed to meet its burden of proof beyond a reasonable doubt" because C.F., "whose credibility was never questioned, contradicted the testimony of" the three siblings, and there were "inconsistencies" in the testimonies of the siblings. C.F.'s Br. at 3. C.F. simply asks that we reweigh the evidence, resolve conflicts in testimony, and assess witness credibility – all of which our appellate standard of review precludes. *See C.T.S.*, 781 N.E.2d at 1200-01.

The trial court heard the testimony of the siblings and that of C.F. It was for the trial court to assess witness credibility, weigh the evidence, and resolve conflicts in witness testimony. The trial court heard testimony that C.F. grabbed the boy by his shirt and picked him up off the ground, and that C.F. cursed at him while doing so. This is sufficient evidence to sustain the trial court's finding that C.F. committed an act that would be battery, as a class B misdemeanor, if committed by an adult.

Affirmed.

MAY, J., and CRONE, J., concur.