IN THE COURT OF APPEALS OF IOWA

No. 9-656 / 09-0216
Filed October 7, 2009

IN THE INTEREST OF S.S.,
Minor Child,

S.S., Minor Child,
Appellant.

Appeal from the Iowa District Court for Scott County, John G. Mullen, District Associate Judge.

Appellant S.S. appeals her adjudication as a juvenile delinquent for second-degree arson. **AFFIRMED.**

Jack Dusthimer, Davenport, for minor child.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Michael J. Walton, County Attorney, and Jay Sommers, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield, J. and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

Following a juvenile delinquency proceeding, S.S. appeals her adjudication for second-degree arson.[1] She asserts the district court erred in finding sufficient evidence to support a finding of delinquency on the charge of arson. She also asserts trial counsel was ineffective for (1) not pursuing a speedy resolution, (2) allowing prejudicial hearsay, and (3) not making a motion for judgment of acquittal. We affirm.

I. Background Facts and Proceedings.

On the morning of October 11, 2007, a fire broke out in the semi-furnished garage where fifteen-year-old Elijuan resided. Elijuan and S.S. had an altercation the night before, where Elijuan shot S.S. in the face with a pellet gun. Elijuan's older brother, Oliver, testified that upon discovering the fire, he saw S.S. running down the alley, away from the garage area. An arson investigator was called to the scene, accompanied by her accelerant detection canine, Brite, who was specifically trained and used to detect accelerants, gasoline, and hydrocarbons. The investigator found a charred and burned gasoline can in the garage, and indications gasoline had been spilled onto a couch. Later, Brite alerted to S.S.'s hands as a positive indication of having accelerant on them. S.S. denied any involvement, and testified that she spent the night at the home of a woman she called "grandmother Barbara," and remained there the entire

[1] Iowa Code section 712.3 (2007) defines arson in the second degree:

> Arson which is not arson in the first degree is arson in the second degree when the property which is the subject of the arson is a building or a structure, or real property of any kind, or standing crops, or is personal property the value of which exceeds five hundred dollars. Arson in the second degree is a class "C" felony.

morning when the fire occurred. Barbara could not corroborate this, testifying that she left the house two different times that morning. S.S.'s friend, Crystal, who also spent the night at Barbara's, testified that she slept most of the morning and only awoke upon hearing Elijuan pounding on the door after the fire occurred. On December 17, 2008, S.S. was adjudicated delinquent for arson in the second degree within the definition of Iowa Code section 232.2(12).[2] She appeals.

II. Scope and Standards of Review.

Iowa juvenile delinquency proceedings are not criminal prosecutions, but are special proceedings that provide an ameliorative alternative to the criminal prosecution of children. *In re J.D.S.*, 436 N.W.2d 342, 344 (Iowa 1989). Our review of juvenile delinquency proceedings is de novo. *In re S.M.D.*, 569 N.W.2d 609, 610 (Iowa 1997). We give weight to the factual findings of the juvenile court, especially regarding the credibility of witnesses, but are not bound by them. *In re J.D.F.*, 553 N.W.2d 585, 587 (Iowa 1996). The State must prove beyond a reasonable doubt that the child engaged in delinquent behavior. *In re D.L.C.*, 464 N.W.2d 881, 883 (Iowa 1991).

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[2] Iowa Code 232.2(12) defines "delinquent act" as:

> a. The violation of any state law or local ordinance which would constitute a public offense if committed by an adult except any offense which by law is exempted from the jurisdiction of this chapter.
> b. The violation of a federal law or a law of another state which violation constitutes a criminal offense if the case involving that act has been referred to the juvenile court.
> c. The violation of section 123.47 which is committed by a child.

III. Sufficiency of the Evidence.

S.S. makes three claims that the evidence against her was insufficient to prove she committed arson. First, she contends the State did not prove she left Barbara's house the morning of the fire, claiming her alibi witnesses, Barbara and Crystal, both substantiated this. However, neither witness could positively testify that S.S. was at Barbara's home at the time of the fire, as Barbara was away from the home for extended periods of time that morning and Crystal was asleep in another room.

Second, S.S. argues that with the high flames, smoke, and limited line of sight, Oliver could not have identified her as the person running down the alley. Oliver testified, "I smelled the smoke and . . . I opened the door and I seen [S.S.] run down the alley." When asked if he was sure it was S.S., he responded that he was "pretty sure" because he'd known her for over a year, he saw the side of her face, and he knows how she walks. Giving due deference to the juvenile court's findings of fact and assessments of witness credibility, we conclude there is sufficient evidence in the record to support the court's finding that S.S. "was seen running from the scene." *See In re D.L.C.*, 464 N.W.2d 881, 883 (Iowa 1991) ("Where there is a conflict in the evidence the fact finder must decide which evidence is credible and which is not.").

Third, S.S. asserts Brite's alert to accelerant on her hands was inconclusive. The arson investigator testified that "I asked S.S. to put her hands out and when she did, my dog alerted on her hands . . . [giving] me a positive indication that she smelled an accelerant on [S.S.'s] person." The canine handler testified as to both her training and experience in the field of arson investigation,

as well as that of Brite. With no evidence to undermine the accuracy of the canine's alert on S.S., the district court properly found "[S.S.] had accelerant on her hands and clothing as identified by the detection of an accelerant sniffing dog." *Sanchez v. Blue Bird Midwest*, 554 N.W.2d 283, 285 (Iowa Ct. App. 1996) ("Expert opinion testimony, even if uncontroverted, may be accepted or rejected in whole or in part by trier of fact.")

IV. Ineffective Assistance of Counsel.

S.S. asserts she did not receive effective assistance of counsel. The test for ineffective assistance of counsel in juvenile proceedings is generally the same as in criminal proceedings. *In re D.P.*, 465 N.W.2d 313, 316 (Iowa Ct. App. 1990). In order to establish ineffective assistance, a party must show counsel's performance was deficient, and actual prejudice resulted. *In re J.P.B.*, 419 N.W.2d 387, 392 (Iowa 1988) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)).

S.S. asserts counsel was ineffective for (1) not pursuing a "speedy" resolution, (2) allowing prejudicial hearsay, and (3) failing to move for a judgment of acquittal. First, S.S. made only general statements about a delay in setting the adjudicatory hearing, and failed to show that she was prejudiced by any delay.[3] *See State v. Brown*, 656 N.W.2d 355, 363 (Iowa 2003). Next, S.S. made only vague references to what statements she claimed were hearsay statements, and

[3] While a juvenile has a constitutional right to a speedy hearing, the juvenile does not have a statutory right. *In Interest of C.T.F.*, 316 N.W.2d 865, 866 (Iowa 1982). "It is the public policy of the state of Iowa that proceedings involving delinquency or child in need of assistance be concluded at the earliest possible time consistent with a fair hearing to all parties." Iowa Ct. R. 8.7. Because S.S. failed to show that she was denied her constitutional right to a speedy trial or establish she was prejudiced because of it, we affirm the juvenile court. *Id.*

she failed to explain how she was prejudiced by any such statements. The burden of proving ineffectiveness is on the claimant, and S.S. failed to do so. *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992). Finally, motions for judgment of acquittal are governed by Iowa Rule of Civil Procedure 2.19(8), the language of which presumes the existence of a jury trial. *State v. Abbas*, 561 N.W.2d 72, 73 (Iowa 1997). "No valid purpose would be served by requiring a defendant to make a motion for judgment of acquittal in the context of a criminal bench trial." *Id.* at 74. Therefore, counsel was not ineffective for failing to move for judgment of acquittal.

We conclude sufficient evidence was presented to support the finding that S.S. committed the delinquent act of second-degree arson. Further, S.S. failed to show her counsel breached an essential duty or that she was prejudiced by counsel's performance.[4]

AFFIRMED.

[4] We note noncompliance with the rules of appellate procedure, requiring the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(*c*).