

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

In the Matter of: J.S.

Court of Appeals No. E-11-012

Trial Court No. 2010-CO-019

DECISION AND JUDGMENT

Decided: December 9, 2011

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

J.S., pro se.

* * * * *

SINGER, J.

{¶ 1} Appellant, J.S., appeals from her conviction in the Erie County Court of Common Pleas, Juvenile Division, for failing to send her child to school in violation of R.C. 3321.38(A). For the reasons that follow, we affirm.

{¶ 2} Appellant sets forth the following assignments of error:

{¶ 3} "I. The trial court abused its discretion and committed reversible error when it accepted the original filed and amended complaint in violation of [J.S.'s] constitutional rights.

{¶ 4} "II. The trial court abused its power and discretion and further, committed reversible error by not excepting [sic] the medical evidence presented at trial.

{¶ 5} "III. Counsel for [J.S.] failed to raise necessary issues relative to equal rights and due process errors to the trial court."

{¶ 6} In her first assignment of error, appellant contends that the trial court erred in accepting the state's amended complaint.

{¶ 7} On April 14, 2010, a complaint was filed against appellant in the Erie County Court of Common Pleas, Juvenile Division, alleging that she had violated R.C. 2919.24(A)(1), contributing to the unruliness or delinquency of a minor, for failing to send her son to school in violation of R.C. 3321.38(A).

{¶ 8} On October 18, 2010, the state filed a motion to amend the complaint to correct a typographical error. The motion was granted and the complaint was amended to reflect that appellant was being charged with failing to send her child to school in violation of R.C. 3321.38(A), a minor misdemeanor, as opposed to contributing to the unruliness or the delinquency of a minor in violation of R.C. 2919.24(A)(1), a misdemeanor of the first degree.

{¶ 9} Appellant contends that the court erred in allowing the state to amend the original complaint and then ultimately convicting her of the amended charge. Appellant contends that the amendment changed the name and nature of the original charge thereby making it difficult for her to prepare an adequate defense. She further contends that by accepting the amended complaint charging her with an unclassified misdemeanor, she was denied her right to a jury trial she would be entitled to had she been charged with contributing to the unruliness or delinquency of a minor.

{¶ 10} Crim.R. 7(D) governs the amendment of complaints and states:

{¶ 11} "[T]he court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury."

{¶ 12} "Amendment under Crim.R. 7(D) is a two-step analysis. First, we must determine whether the amendment changed the name or the severity of the charged crime. *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537. Next, we must determine whether the amendment changed the substance of the complaint and, if so, whether the appellant suffered any prejudice as a result. *City of Chardon v. Bulman*, 11th Dist. No. 2007-G-2811, 2008-Ohio-6769, ¶ 35." *Cleveland v. Sammon*, 8th Dist. No. 92469, 2009-Ohio- 3381, ¶ 14.

{¶ 13} Here, both the original complaint and the amended complaint alleged a violation of R.C. 3321.38(A), a minor misdemeanor. The original complaint also alleged a violation of R.C. 2919.24(A)(1), a misdemeanor of the first degree. The amended complaint only alleged a violation of R.C. 3321.38(A). As such, the amended complaint did change the severity of the charged crime. However, it cannot be said that appellant was prejudiced as the severity of the crime charged was reduced from a charge possibly entailing jail time to a charge entailing no jail time. Moreover, as both charging instruments alleged a violation of R.C. 3321.38(A), appellant was at all times put on notice that she needed to defend herself against a violation of R.C. 3321.38(A). Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 14} Though worded differently above, in her second assignment of error, appellant contends that her conviction is against the manifest weight of the evidence. Specifically, she contends that the state failed to prove that she specifically intended to prevent her son from attending school.

{¶ 15} The factual findings of a trial court are presumed correct since, as the trier of fact, it is in the best position to weigh the evidence and evaluate the testimony. *In re Brown* (1994), 98 Ohio App.3d 337, 342. Moreover, "[e]very reasonable presumption must be made in favor of the judgment and the findings of facts [of the trial court]." *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19. Thus, judgments supported by some competent, credible evidence going to all essential elements of the case are not against the manifest weight of the evidence. *Id.*; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279.

{¶ 16} Intent may be inferred from the circumstances surrounding the crime. *State v. Johnson* (2001), 93 Ohio St.3d 240, syllabus. In this case, the state presented evidence that appellant's son, enrolled in the third grade, was frequently tardy or absent from school without a valid medical excuse. As his mother, it is appellant's responsibility under the law to see that her son attends school. Therefore, her intent to keep her son from attending school can clearly be inferred from the facts and circumstances of this case.

{¶ 17} Appellant also contends in this assignment of error that the court erred in imposing a \$250 bond and ordering appellant to appear at two dispositional hearings as part of her sentence. Appellant's argument is without merit as appellant's bond is less than the maximum required by R.C. 3321.38(A). Appellant's second assignment of error is found not well-taken.

{¶ 18} In her third assignment of error, appellant argues that her counsel was ineffective.

{¶ 19} To establish a claim for ineffective assistance of counsel, a defendant must demonstrate the following: (1) that counsel's performance was deficient; that is, that counsel committed errors so serious that he or she was not, in effect, functioning as counsel; and (2) that such deficient performance prejudiced the defendant's defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. To prove that counsel's deficient performance prejudiced a defendant's defense, the defendant must show that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 143.

{¶ 20} Appellant contends her counsel was ineffective in failing to argue that a conflict of interest existed with the state's sole witness and because counsel failed to challenge the reliability of the school records. Such matters amount to tactical decisions to be made by trial counsel. Issues which are arguably a matter of counsel's trial tactics and strategies do not constitute ineffective assistance. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Furthermore, appellant in this case failed to provide this court with a transcript of the proceedings.

{¶ 21} "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower

court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶ 22} Accordingly, appellant's third assignment of error is found not well-taken.

{¶ 23} On consideration whereof, the judgment of the Erie County Court of Common Pleas, Juvenile Division, is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.