[Cite as *In re B.K.*, 2012-Ohio-6166.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of B.P.K.,	:	
		No. 12AP-343
(Delinquent Minor),	:	(C.P.C. No. 12JU-02-1367)
(Appellant).	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 27, 2012

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

KLATT, J.

{¶ 1} Defendant-appellant, B.P.K. ("B.P."), appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, affirming his delinquency finding and committing him to the legal custody of the Department of Youth Services ("DYS"). For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} In a complaint filed in the Allen County Court of Common Pleas, Juvenile Division, an officer of the Lima Police Department alleged that B.K. was a delinquent child as the result of the commission of a robbery in violation of R.C. 2911.02. The police alleged that B.K. and another person struck Irvin Jones in the head with a stick and took his computer. At the time of the offense, B.K. was 16-years old and living in a foster home

in Lima, Ohio. He was living in that home after being released on parole from the custody of DYS after a previous juvenile adjudication.

{¶ 3} At the adjudicatory hearing in the Allen County court, Irvin Jones testified that on the evening of November 13, 2011, he was sitting in his yard working on his laptop computer. He started to go into his house when someone hit him in the back of the head with a large stick. Although startled, within a couple of seconds he saw a person running away from him down toward the street with his computer. Jones chased the person until he slipped and fell and the person was able to get away. Jones could not identify the person because the person wore a ski mask on his head.

{¶ 4} K.H., another juvenile who lived with B.K. in the same foster home, testified that on the evening of November 13, 2011, he and B.K. left their foster home and, while they were walking around, saw a man sitting at a picnic table. B.K. commented that they should take the man's laptop and K.H. agreed. They walked up from behind the man and B.K. hit him with a stick that they found in the man's yard. K.H. then took the laptop and ran. K.H. testified that the man chased him, but that he was able to get away from him. He also testified that he had a ski mask on that night. On cross-examination, K.H. admitted that he previously told police that another person, not B.K., was involved with this robbery.

{¶ 5} Another juvenile living in the same foster home, R.R., testified that he saw B.K. sneak back into the home on the night of the robbery. B.K. told him that he had "hit a lick," meaning that they had robbed someone. (Tr. 39.) B.K. told him that he and K.H. hit someone with a log and took his computer. K.H. came back to the house later that night with a computer. R.R. admitted that when police first questioned him, he only implicated K.H. in the robbery but later told police that B.K. was also involved.

{¶ 6} The Allen County court concluded that B.K. committed the offense of robbery and, as a result, found him to be a delinquent child. The court then certified the matter to the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, for disposition. That court affirmed the Allen County's delinquency finding and committed B.K. to the custody of DYS for an indefinite term of at least one year and at most until he reaches his 21st birthday.

{¶ 7} B.K. appeals and assigns the following errors:

> [1.] There was insufficient competent, credible evidence to support the jury's verdict, thereby denying Appellant due process under the state and federal, Constitutions.
>
> [2.] The guilty verdict was against the manifest weight of the evidence.

{¶ 8} In a supplemental merit brief, B.K. assigns two additional errors:

> [1.] The Appellant was deprived of his right to a fair trial under the Sixth and Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution when Officer Stoodt, in response to a question posed by counsel for the state, expressed his opinion regarding the Appellant's delinquency in this matter.
>
> [2.] Trial counsel for Appellant rendered ineffective assistance when he failed to object to Officer Stoodt's opinion as to Appellant's delinquency in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution.

II. The Sufficiency and Manifest Weight of the Evidence

{¶ 9} In B.K.'s first and second assignments of error, he contends that his delinquency finding was not supported by sufficient evidence and also was against the manifest weight of the evidence. Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. McCrary*, 10th Dist. No. 10AP-881, 2011-Ohio-3161, ¶ 11, citing *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶ 15. "[T]hus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id.* In that regard, we first examine whether appellant's conviction is supported by the manifest weight of the evidence. *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, ¶ 46 (10th Dist.).

{¶ 10} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). When presented with a challenge to the

manifest weight of the evidence, an appellate court may not merely substitute its view for that of the trier of fact, but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.* An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983); *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶ 12.

{¶ 11} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 6. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, " 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id.*, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Accordingly, we afford great deference to the jury's determination of witness credibility. *State v. Redman*, 10th Dist. No. 10AP-654, 2011-Ohio-1894, ¶ 26, citing *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶ 55. See also *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus (credibility determinations are primarily for the trier of fact).

{¶ 12} B.K. claims that the trial court's delinquency finding was against the manifest weight of the evidence because it was based on the unreliable testimony of two witnesses who both implicated him after giving statements to the police that he was not involved in the robbery. He also notes that the victim only saw one person after being hit in the head.

{¶ 13} The victim in this case could not identify who hit him or who took his laptop and he testified that he only saw one person running from the scene of the robbery. This does not necessarily mean that only one person was involved in the attack and robbery. It is certainly possible that the victim was only able to see one person after being hit in the head. R.R. and K.H. both testified that B.K. was involved with the robbery. The trial

court obviously chose to believe these witnesses. That is a decision within the province of the trier of fact. *State v. Green*, 10th Dist. No. 11AP-526, 2012-Ohio-950, ¶ 11; *State v. Berry*, 10th Dist. No. 10AP-1187, 2011-Ohio-6452, ¶ 18. B.K. claims that these witnesses are not reliable because they originally did not implicate him in the robbery. However, the trial court was aware of this information and was in the best position to weigh and determine these witnesses' credibility based on that information. *Green* at ¶ 11. There is nothing in these witnesses' testimony that would make it so incredible as to render the delinquency finding against the manifest weight of the evidence. *Id.*, citing *State v. Thompson*, 10th Dist. No. 07AP-491, 2008-Ohio-2017, ¶ 35.

{¶ 14} Given the evidence presented at trial, the trier of fact did not lose its way or create a manifest miscarriage of justice. Accordingly, the trial court's delinquency finding is supported by the manifest weight of the evidence. This conclusion is also dispositve of B.K.'s claim that the finding was not supported by sufficient evidence. *Green* at ¶ 13. Accordingly, we overrule B.K.'s first and second assignments of error.

III. The Admission of Officer Stoodt's Testimony

{¶ 15} In B.K.'s supplemental brief, he presents two additional assignments of error arising from a small portion of the testimony of the investigating officer, Officer Robert Stoodt. (Tr. 49.) B.K.'s trial counsel did not object to the officer's testimony and has, therefore, waived all but plain error in its admission. *State v. Mosley*, 10th Dist. No. 05AP-701, 2006-Ohio-3102, ¶ 32. Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). Even if an error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. *Id.; State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416, ¶ 12 (4th Dist.). Courts are to notice plain error under Crim.R. 52(B) " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes*, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of syllabus.

{¶ 16} B.K. first argues that Officer Stoodt should not have been permitted to testify that he believed B.K. was involved in the robbery. However, the admission of the officer's testimony, even if erroneous, does not rise to the level of plain error. We note that two other witnesses testified that B.K. was involved in the robbery. In addition, B.K. was tried to the court. In a bench trial, a trial court is presumed to have considered only the relevant, material, and competent evidence. Thus, we presume that, even if the testimony was erroneously admitted into evidence, the trial court did not consider it in rendering its verdict. *Mosley* at ¶ 34. There is nothing in the record that indicates the trial court found the officer's opinion significant or that it relied on it. *See In re T.M. III*, 8th Dist. No. 83933, 2004-Ohio-5222, ¶ 24 (no plain error in admission of testimony where no evidence in the record to rebut the presumption that judge disregarded any evidence not properly admitted); *State v. Hawthorne*, 7th Dist. No. 04 CO 56, 2005-Ohio-6779, ¶ 27 (no plain error in admission of evidence where it does not affirmatively appear that trial court considered the evidence). Thus, we cannot say that the admission of the officer's testimony affected the outcome of the trial.

{¶ 17} Second, B.K. claims that his trial counsel's failure to object to the officer's testimony constituted ineffective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989), quoting *Strickland* at 697. ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

{¶ 18} In order to show counsel's performance was deficient, the appellant must prove that counsel's performance fell below an objective standard of reasonable representation. *Jackson* at ¶ 133. The appellant must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland* at 689. To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 204.

{¶ 19} Assuming that trial counsel was deficient for not objecting to the officer's testimony, and that such an objection would have been sustained, B.K. has not shown a reasonable probability that, but for that error, the result of the proceeding would have been different. As we previously noted, it does not appear from the trial court's comments finding B.K. delinquent that the trial court relied on the officer's testimony in finding that B.K. committed the robbery. We presume that a trial judge in a bench trial does not consider such evidence. Additionally, other evidence supported the trial court's delinquency finding, including the testimony of the two other juveniles who implicated B.K. in the robbery. Because B.K. has not shown prejudice, he has failed to demonstrate that he received ineffective assistance of counsel. *See State v. Betts*, 4th Dist. No. 02CA26, 2004-Ohio-818, ¶ 25 (rejecting claim that law enforcement officer's opinion of a defendant's guilt was "so prejudicial * * * that the jury would not have convicted * * * but for the testimony.")

{¶ 20} For these reasons, we overrule B.K.'s two supplemental assignments of error.

IV. Conclusion

{¶ 21} Having overruled all of B.K.'s assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

Judgment affirmed.

BRYANT and FRENCH, JJ., concur.