

[Cite as *In re B.S.*, 2009-Ohio-4952.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

IN RE: B.S. :
 : C.A. CASE NO. 23485
 : T.C. CASE NO. JC08-8212
 : (Criminal Appeal from
 : Juvenile Court)

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O P I N I O N

Rendered on the 18th day of September, 2009.

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GRADY, J.:

{¶1} This is an appeal from a judgment of the juvenile court that adjudicated B.S. a delinquent child.

{¶2} On July 31, 2008, at 6:00 p.m., M.T. and his friend D.G., rode their bicycles to the Food 4 Less grocery store at 3100 East Third Street in Dayton. On the way back to M.T.'s house they encountered B.S. and another boy, who

stopped them and demanded M.T.'s bike. When M.T. refused to give over his bike, B.S. and the other boy kicked its wheels, damaging the spokes. B.S. then used a hammer to break the handlebars on M.T.'s bike.

{¶3} When M.T. returned home he told his stepfather, Vernon Griffitts, what had happened. Griffitts called the police. Officer Glass of the Dayton Police Department investigated the incident. M.T. told Officer Glass that two boys had grabbed him, pulled him off his bike, and bent the handlebars. After B.S. was identified as a perpetrator, B.S. was charged in juvenile court with delinquency, R.C. 2152.02(F)(1), by reason of having committed the offenses of menacing, R.C. 2903.22(A), and criminal damaging, R.C. 2909.06(A)(1).

{¶4} Following a trial before a magistrate, B.S. was adjudicated a delinquent child by reason of having committed the offense of criminal damaging. The menacing charge was dismissed for insufficient evidence. The magistrate ordered B.S. committed to the Montgomery County Juvenile Court Corrections Center for a term of ten days, which was suspended, placed B.S. on probation, and ordered B.S. to perform sixteen hours of community service and to pay \$37.44 in restitution. B.S. timely filed written

objections to the magistrate's decision, claiming it is against the manifest weight of the evidence.¹ The juvenile court overruled B.S.'s objections and adopted the magistrate's decision as its own judgment.

{¶ 5} B.S. timely appealed to this court from his delinquency adjudication.

ASSIGNMENT OF ERROR

{¶ 6} "JUDGE CAPIZZI'S DECISION AND JUDGMENT OF FINDING [B.S.] GUILTY OF CRIMINAL DAMAGING SHOULD BE OVERRULED AS BEING AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 7} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 8} "[t]he court, reviewing the entire record, weighs

¹The manifest weight of the evidence standard is a standard of appellate review that affords discretion to the decision of a lower court. A magistrate is not likewise independent of the court that appointed the magistrate. And, the court must review objections to its magistrate's decisions de novo, which does not afford discretion to the decision the magistrate filed. Therefore, the manifest weight of the evidence standard has no application to objections filed pursuant to Civ.R. 53(D)(3)(b).

the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶ 9} B.S. argues that the juvenile court's finding that he is a delinquent child by reason of having committed the offense of criminal damaging is against the manifest weight of the evidence because of inconsistencies in the testimony of the State's witnesses regarding (1) the lack of any mention to the investigating officer of a hammer being used to damage the victim's bicycle, (2) the color of the hammer used, (3) whether the hammer bent or broke the handlebars of the bicycle, and (4) whether B.S. briefly left the scene of the incident to retrieve the hammer.

{¶ 10} B.S. was adjudicated a delinquent child pursuant to R.C. 2152.02(F)(1) on a finding that he committed the offense of criminal damaging, which required the State to prove that B.S. knowingly, by any means, caused physical harm to the property of another without the other person's consent. R.C. 2909.06(A)(1).

{¶ 11} The investigating police officer, Dustin Glass, did not mention a hammer, and testified during the trial that the victim, M.T., told him that two individuals, B.S. and another boy, had bent the handlebars of his bicycle. Both M.T. and his best friend, D.G., who was with M.T. and witnessed this incident, testified at trial that B.S. used a hammer to hit and break the handlebars on M.T.'s bicycle. Although the testimony of M.T. and D.G. was inconsistent as to the color of the hammer B.S. used to damage M.T.'s bicycle, their testimony was consistent on the critical point that B.S. used a hammer to break the handlebars of M.T.'s bicycle.

{¶ 12} B.S. argues that the testimony was inconsistent as to whether the hammer was used to break or merely bend the handlebars. M.T. testified that the other boy sat on the handlebars and used his weight to try and break them, but only succeeded in bending them. At that point, B.S. repeatedly hit the handlebars with a hammer, breaking them. D.G. corroborated the fact that B.S. broke the handlebars with a hammer.

{¶ 13} B.S. claims that the testimony of M.T. and D.G. was inconsistent as to whether B.S. briefly left the area to get the hammer, or whether he already had it in his

possession when he confronted M.T. While the testimony of M.T. and D.G. was inconsistent on that point, their testimony was consistent on the critical point that B.S. did, in fact, use a hammer to damage M.T.'s bicycle.

{¶ 14} We agree with the juvenile court that while there are some inconsistencies in the testimony of M.T. and D.G., those inconsistencies are not material to the finding that B.S. is a delinquent child by reason of having committed the offense of criminal damaging. On the pivotal issue of whether B.S. knowingly caused physical harm to M.T.'s bicycle by repeatedly hitting the handlebars with a hammer, the evidence is consistent in showing that B.S. did. The juvenile court did not lose its way in the case merely because it chose to believe the State's witnesses, which it had a right to do. *State v. DeHass* (1967), 10 Ohio St.2d 230.

{¶ 15} Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the juvenile court lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred. B.S.'s delinquency adjudication for having committed criminal damaging is not against the manifest weight of the evidence.

{¶ 16} The assignment of error is overruled. The judgment of the juvenile court will be affirmed.

DONOVAN, P.J., And FAIN, J., concur.

Copies mailed to:

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Hon. Anthony Capizzi