

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE: K.E. : APPEAL NO. C-150020
TRIAL NO. 14-7230X
: *JUDGMENT ENTRY.*

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

This is an appeal of an adjudication of delinquency for complicity to commit aggravated robbery with a firearm specification. K.E. contends that his adjudication was against the weight of the evidence, that he was denied the effective assistance of counsel and that the court erred when it allowed testimony of the victim's identification of him. We affirm the judgment of the juvenile court.

Adam Lambert was on a street corner when two young black males on bicycles began circling him and asked him for cash and credit cards. Mr. Lambert attempted to walk away from the pair, but one of them hit him in the head with a gun. Mr. Lambert fell to the ground. The person with the gun rummaged through Lambert's pockets, taking his phone, headphones, wallet and a pen. The other person looked through binders that Lambert had been carrying and took those. The two then took off on their bikes.

Officer Eric Renner responded to a 911 call reporting the incident. He found K.E. in the woods behind a house about a mile from where the robbery had occurred. Officer Renner informed K.E. of his *Miranda* rights and asked him why he was in the

woods. According to Officer Renner, K.E. responded that he was running because he had stolen a bike. Two bikes—one red, the other green—were recovered about a quarter- to a half-mile from where K.E. was found. Officer Renner returned with K.E. to the scene of the crime. Officer Brian Huntington removed K.E. from the police cruiser and showed him to Lambert, who identified K.E. as one of his assailants. During a trial before a juvenile court magistrate, Mr. Lambert again identified K.E., saying that he was not the person with a gun. He also stated that the red bike that had been found by the police was the one that K.E. had been riding at the time of the robbery. He did not recall seeing the green bike during the robbery.

For his part, K.E. denied involvement in the robbery. He claimed that he was riding his bike home from his cousin's house when he saw police lights. K.E. insisted that he had run into the woods because he had an open warrant and did not want to get caught and miss school the next day. He was also adamant that he had been riding the green bike, not the red one. At the conclusion of the testimony, the magistrate adjudicated K.E. delinquent. The trial court adopted the magistrate's decision over K.E.'s objection.

K.E.'s first assignment of error is that his delinquency adjudication was against the manifest weight of the evidence. He points out that no property belonging to Lambert was found on him, no forensic evidence connected him to the crime, and the show-up identification procedure was inherently unreliable. He also challenges the credibility of Lambert, who was a convicted felon. But the magistrate was in the best position to determine the credibility of the evidence, particularly with regard to the witnesses' testimony. *See State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 116; *State v. Williams*, 1st Dist. Hamilton Nos. C-060631 and C-060668, 2007-Ohio-5577, ¶ 45. The magistrate found that K.E.'s story was not credible and that Mr. Lambert's version of events, including his identification of K.E., was credible. Based upon our review of the record—including

a weighing of the evidence and all reasonable inferences, and consideration of the credibility of the witnesses—we cannot conclude that the magistrate so clearly lost her way as to create a manifest miscarriage of justice. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We overrule first assignment of error.

K.E. protests in his second assignment of error that he was denied a fair trial because his counsel was ineffective. Specifically, he argues that his counsel should have filed a motion to suppress Lambert’s identification of him during the show-up at the crime scene.

Failure to file a motion to suppress “is ineffective assistance of counsel only when the record establishes that the motion would have been granted.” *In re M.E.*, 1st Dist. Hamilton No. C-140586, 2015-Ohio-3663, ¶ 7, citing *State v. Riley*, 7th Dist. Mahoning No. 13MA180, 2015-Ohio-94, ¶ 17. Here, K.E. has not demonstrated that a motion to suppress would have been successful. At trial, Mr. Lambert confirmed that he had gotten a good look at both people’s faces during the incident, which lasted, in his estimation, about four minutes. During the show-up, which happened within an hour and a half of the robbery, he was able to identify K.E. by his facial features, hair and clothing. Given the totality of the circumstances, we cannot conclude that Lambert’s identification was unreliable. *See State v. Ward*, 1st Dist. Hamilton No. C-140721, 2015-Ohio-2260, ¶ 19. K.E. has not demonstrated that his counsel was ineffective. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The second assignment of error is overruled.

The final assignment of error is that the court committed plain error by admitting evidence of the show-up identification. As discussed, K.E. has not shown that the identification procedure was unreliable. The court did not commit error—plain or otherwise—when it admitted testimony about the identification. *See Crim.R. 52(B)*. The third assignment of error is overruled.

Therefore, we affirm the trial court’s judgment.

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A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., DEWINE and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on September 30, 2015
per order of the court _____.

Presiding Judge