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

STATE OF OHIO,	:	APPEAL NO. C-220480 TRIAL NO. B-2105026
Plaintiff-Appellee,	:	
	:	*O P I N I O N.*
vs.	:	
WALTER THURMOND,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 14, 2023

Melissa A. Powers, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Angela J. Glaser, for Defendant-Appellant.

BERGERON, Judge.

{¶1} Following a shoot-out with his neighbors, defendant-appellant Walter Thurmond fled the scene in an attempt to reach a public phone to call the police. On the way, Mr. Thurmond crossed through a school zone with firearms still in his possession. A police officer stopped and arrested him in the school parking lot, and he was later indicted on two counts of felonious assault, one count of carrying a concealed weapon, and one count of possession of a deadly weapon in a school safety zone. After a jury trial, he was acquitted of the first three counts but found guilty of the fourth count for possession in a school zone. On appeal, he challenges the sufficiency of the evidence and the denial of his right to the effective assistance of counsel. However, our review of the record compels us to overrule both assignments of error and affirm the trial court's judgment.

I.

{¶2} In September 2021, after dropping his daughter off at school, Mr. Thurmond arrived home only to stumble upon an argument raging between his girlfriend, Tashawn Philpot, and their next-door neighbor, Ronisha Anderson. The women's relationship had deteriorated for a while, progressing from mere verbal exchanges to physical threats and then to brandishing weapons at one another. This situation, too, escalated quickly as both Ms. Anderson and Ms. Philpot reached for firearms. Mr. Thurmond removed the weapon from Ms. Philpot's possession and disassembled it, but seeing that Ms. Anderson still had a firearm in hand, he grabbed his own gun from his truck parked in the driveway. Ms. Anderson woke her partner, Benjamin Nettles, who also armed himself. As Mr. Nettles stepped out of his front door carrying a gun, Mr. Thurmond took cover behind his truck. The men exchanged

gunfire until Mr. Thurmond retreated from behind his truck into his home. Mr. Thurmond testified that Mr. Nettles fired the first shot, while Mr. Nettles, during his testimony, claimed the opposite.

{¶3} Mr. Thurmond knew that he needed to call the police to report the exchange, but unfortunately, his cell phone battery was dead. He decided to head to a nearby public phone at Beekman Market, about a block or so from his home. As Mr. Thurmond knew he would have to pass through the parking lot of Ethel M. Taylor Academy (the school his daughter attended) to get to the market as fast as possible, he paused to unload his firearms before leaving his home. Mr. Thurmond then dashed towards the market, but an officer intercepted him in the school parking lot and arrested him. Mr. Thurmond was cooperative and immediately notified the arresting officer that he had been involved in a self-defense shooting and was on his way to access a public phone to summon the police.

{¶4} Following the arrest, Mr. Thurmond was indicted on four counts: (1) felonious assault with respect to Mr. Nettles; (2) felonious assault with respect to Ms. Anderson; (3) carrying concealed weapons; and (4) illegal conveyance or possession of a deadly weapon or dangerous ordinance in a school safety zone. Counts (1), (2), and (4) carried firearm specifications. Mr. Thurmond explained to the police that he did carry concealed weapons through the school parking lot as he made his way to the market, but he advanced a self-defense theory at trial. The jury acquitted Mr. Thurmond on the first three counts but found him guilty for possessing a gun in a school safety zone in violation of R.C. 2923.122(A). The trial court sentenced Mr. Thurmond to an 18-month confinement period. He now appeals his conviction,

contesting the sufficiency of the evidence underpinning his conviction and asserting that he was deprived of his right to the effective assistance of counsel.

II.

{¶5} In his first assignment of error, Mr. Thurmond attacks the sufficiency of the evidence supporting his conviction for possessing a deadly weapon in a school zone. Specifically, he asserts that the state failed to adduce sufficient evidence for the factfinder to reasonably conclude that the location of the offense—Ethel M. Taylor Academy—was in Hamilton County, Ohio.

{¶6} To determine the sufficiency of the evidence to support a criminal conviction, we consider whether, after viewing the evidence in the light most favorable to the state, any reasonable trier of fact could have found all the essential elements of the offense proven beyond a reasonable doubt. *State v. MacDonald*, 1st Dist. Hamilton No. C-180310, 2019-Ohio-3595, ¶ 12, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). We review sufficiency determinations de novo, *State v. Dent*, 163 Ohio St.3d 390, 2020-Ohio-6670, 170 N.E.3d 816, ¶ 15, and we must not weigh the evidence. *MacDonald* at ¶ 12. When the evidence is subject to more than one possible interpretation, we must adopt the interpretation consistent with the trial court's judgment. *In re J.C.*, 1st Dist. Hamilton No. C-180493, 2019-Ohio-4027, ¶ 20.

{¶7} " 'Under Article I, Section 10 [of the Ohio Constitution] and R.C. 2901.12, evidence of proper venue must be presented in order to sustain a conviction for an offense.' " *State v. Foreman*, 166 Ohio St.3d 204, 2021-Ohio-3409, 184 N.E.3d 70, ¶ 13, quoting *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 20. "[V]enue must be proved beyond a reasonable doubt in a criminal case."

State v. Robinson, 1st Dist. Hamilton No. C-180153, 2018-Ohio-4433, ¶ 4, quoting *State v. Gardner*, 42 Ohio App.3d 157, 158, 536 N.E.2d 1187 (1st Dist.1987). To prove venue, the state must submit sufficient evidence to justify a "reasonable inference" that the violation occurred in the county alleged in the indictment. *State v. Tapke*, 1st Dist. Hamilton No. C-060494, 2007-Ohio-5124, ¶ 59. It is well-established in Ohio that the state need not prove venue in " 'express terms' "; venue is sufficiently proven " 'so long as it is established by all the facts and circumstances in the case.' " *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 149, quoting *State v. Headley*, 6 Ohio St.3d 475, 477, 453 N.E.2d 716 (1983).

{¶8} From our review of the record, we hold that a reasonable jury could have concluded that the offense occurred in Hamilton County, Ohio.[1] Mr. Thurmond contends that the only indicator of the location of the school at which he was arrested was the presence of an officer of the Cincinnati Police Department ("CPD") at the scene. But he himself testified that the school was just a short walk from his Millvale Court residence—and location of the shoot-out—in Hamilton County, Ohio. Therefore, at trial it was undisputed that the residence was situated in Hamilton County, Ohio.

{¶9} On the day in question, Mr. Thurmond traveled between his home and the school (by foot) within a ten-minute window. The ShotSpotter software places him at Millvale Court at 8:21 a.m. As he testified, he exchanged shots, retreated into his house, unloaded his gun, and *then* ran towards the market. At 8:31 a.m., a CPD officer spotted Mr. Thurmond in the school parking lot. Given the close proximity between

[1] Of course, this review would be unnecessary had the state explicitly established venue at trial, as is best practice.

the residence and the school, circumstantial evidence suggested that the school likewise fell within the county.

{¶10} Moreover, the DNA samples which were taken from Ms. Philpot, Ms. Anderson, Mr. Thurmond, and Mr. Nettles at Millvale Court were sent to the Hamilton County Crime Laboratory, and their collection containers are marked with a 45225 zip code (within Hamilton County). The officer also confiscated Mr. Thurmond's guns when he arrested him at the school. Those guns were recorded with the school's location, an identical 45225 zip code. *See State v. Hinkston*, 1st Dist. Hamilton Nos. C-140448 and C-140449, 2015-Ohio-3851, ¶ 13 (where the court concluded that lab reports and police documents sufficed to prove venue). Finally, the CPD officers that were dispatched to Millvale Court and the school were all from the same precinct, Cincinnati Police District 3, and testified to this affiliation. Only officials from Hamilton County and the city of Cincinnati reviewed the scene, suggesting no reason to believe the offense occurred in a different city, county, or state.

{¶11} Mr. Thurmond muses, however, that the location could have been at a different city named "Cincinnati" in another state. This point is entirely speculative and inconsistent with the record before us.

{¶12} Accordingly, our review reflects that the state sufficiently established venue by all the facts and circumstances in the case, *see Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, at ¶ 149, quoting *Headley*, 6 Ohio St.3d at 477, 453 N.E.2d 716, and the record is bereft of any evidence that would lead a jury to reasonably conclude otherwise.

III.

{¶13} In his second assignment of error, Mr. Thurmond contends that his trial counsel was ineffective in failing to request a jury instruction on duress. According to him, the evidence at trial supported providing a duress instruction, and therefore counsel's failure to request such an instruction constituted deficient performance that prejudiced the defense.

{¶14} " 'In criminal proceedings, a defendant has the right to effective assistance of counsel under both the United States and Ohio Constitutions.' " *State v. Solorio*, 1st Dist. Hamilton No. C-210526, 2022-Ohio-3749, ¶ 33, quoting *State v. Evick*, 12th Dist. Clinton No. CA2019-05-010, 2020-Ohio-3072, ¶ 45, citing the Sixth Amendment to the United States Constitution, and Article I, Section 10, Ohio Constitution. While a properly licensed attorney is presumed competent, *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988), counsel's conduct is ineffective when it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶15} To prevail on an ineffective assistance of counsel claim, the defendant must demonstrate that (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Id.* at 687. To show prejudice, an appellant "must prove 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*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989). And "[t]o justify a finding of ineffective assistance of counsel, the appellant must overcome a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy."

State v. Carter, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995), citing *Strickland* at 689.

{¶16} "A trial court should confine its instructions to the jury to the issues raised by the pleadings and the evidence." *Southside River-Rail Terminal Inc. v. Crum & Forster Underwriters*, 157 Ohio App.3d 325, 2004-Ohio-2723, 811 N.E.2d 150, ¶ 53 (1st Dist.). And failure to properly instruct a jury on an affirmative defense (like duress) when there is sufficient evidence to support the instruction violates the defendant's rights to due process as well as the right to present a complete defense. *See Taylor v. Withrow*, 288 F.3d 846, 851-852 (6th Cir.2002), citing *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

{¶17} Duress constitutes an affirmative defense to a criminal charge, and the defense is limited and applicable only when " 'imminent, immediate danger or threat of danger prevents the actor from exercising his own will, and * * * there is no alternate path to take.' " *City of Cincinnati v. White*, 1st Dist. Hamilton No. C-190262, 2020-Ohio-1231, ¶ 16, quoting *State v. Cross*, 58 Ohio St.2d 482, 483, 391 N.E.2d 319 (1979). And " '[t]he force used to compel the actor's conduct must remain constant, controlling the will of the unwilling actor during the entire time he commits the act, and must be of such a nature that the actor cannot safely withdraw.' " *Id.* at ¶ 18, quoting *State v. Getsy*, 84 Ohio St.3d 180, 199, 702 N.E.2d 866 (1998).

{¶18} From our review of the record, the purported pressure on Mr. Thurmond to cross through the school zone carrying arms was neither constant nor controlling. *See id.* He was alone at the time of his arrest in the school parking lot, and he made no mention of being chased or followed by Mr. Nettles. The video footage of Mr. Thurmond in the parking lot corroborates the absence of any controlling threat

forcing him to be in the school zone with guns in his possession. While Mr. Thurmond testified that Mr. Nettles chased him into the house, he also explained that he chose to stop, unload both of his guns, and then hurry towards the market after retreating into his home. And there is no evidence in the record that Mr. Nettles issued any threats of serious bodily harm or death after he departed for the market. Accordingly, the evidence in this case fails to establish a constant force controlling his will and compelling him to enter and remain in a school zone carrying firearms.

{¶19} Without sufficient evidence to support the giving of a duress instruction, the trial court presumably would not have issued the instruction even if counsel had requested it. Accordingly, there does not exist a reasonable probability that the outcome of Mr. Thurmond's trial would have differed had counsel requested a duress instruction, and it cannot be said that counsel's actions constituted ineffective assistance.

* * *

{¶20} In light of the foregoing analysis, we overrule both of Mr. Thurmond's assignments of error and affirm the judgment of the trial court.

Judgment affirmed.

CROUSE, P.J., and **WINKLER, J.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.