

IN THE COURT OF APPEALS OF IOWA

No. 8-576 / 07-1998
Filed July 30, 2008

**IN THE INTEREST OF D.L.,
Minor Child,**

D.L., Minor Child,
Appellant.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor (adjudication) and John G. Mullen (disposition), Judges.

D.L. appeals from his adjudication as a delinquent following a finding he committed first-degree robbery. **REVERSED AND REMANDED.**

Derek G. Jones, Davenport, for minor child.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Michael J. Walton, Acting County Attorney and Robert Cusack and Jay Sommers, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Mahan and Vaitheswaran, JJ.

VAITHESWARAN, J.

Sixteen-year-old D.L. was adjudicated a delinquent based on a finding that he committed first-degree robbery. He was committed to the State Training School in Eldora, Iowa. He appeals, contending the record lacks a factual basis to support the robbery finding. He also takes issue with his commitment to the training school. We find it unnecessary to reach the second issue, as the first issue requires reversal.

I. Background Facts and Proceedings

The State's complaint and affidavit alleged that D.L. and two others stopped a bike rider in an alley. According to the affidavit, D.L. struck the rider, went through his pocket, and took his property. The affidavit stated D.L. "removed a handgun from his waistband, putting the barrel to the victim's head and threatening to shoot him."

D.L. agreed to admit to the allegations in the petition. Iowa Code § 232.43(2) (2007) ("The county attorney and the child's counsel may mutually consider a plea agreement which contemplates entry of the plea admitting the allegations of the petition"). Following a hearing, the district court found a factual basis for the plea and adjudicated D.L. a delinquent child. See Iowa Code § 232.43(5)(a) ("The court shall not accept a plea admitting the allegations of the petition without . . . [d]etermining that there is a factual basis for the plea."); Iowa Code § 232.2(12)(a) (defining "delinquent act" as "[t]he violation of any state law or local ordinance which would constitute a public offense if committed by an adult except any offense which by law is exempted from the jurisdiction of this chapter").

II. Analysis

Robbery is defined as follows:

A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:

1. Commits an assault upon another.
2. Threatens another with or purposely puts another in fear of immediate serious injury.
3. Threatens to commit immediately any forcible felony.

Iowa Code § 711.1. Robbery is classified as first-degree when, “while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury or is armed with a dangerous weapon.” Iowa Code § 711.2.

D.L. contends “the factual basis statement provided by [him] in this case fails to satisfy either the serious injury prong or the dangerous weapon prong of the definition of Robbery 1st Degree and the juvenile court erred in accepting [his] guilty plea.” In assessing this issue, we review the record de novo. *In re S.M.D.*, 569 N.W.2d 609, 610 (Iowa 1997). We may consider the issue for the first time on direct appeal. See *In re C.G.B.*, 643 N.W.2d 208, 210 (Iowa Ct. App.2002).

“Serious injury” means any of the following: (1) disabling mental illness, (2) bodily injury which creates a substantial risk of death, (3) bodily injury which causes serious permanent disfigurement, and (4) bodily injury which causes protracted loss or impairment of the function of any bodily member or organ. Iowa Code § 702.18. “Dangerous weapon” includes “any offensive weapon, pistol, revolver, or other firearm” Iowa Code § 702.7.

When the district court asked D.L. what happened, he stated:

We got to chasing him, and once he stopped, I seen it wasn't Lewis [], I was going to let him go. Darvill got to chasing him—well, after I let him go, Darvill hit him, and then he got off the bike. He thought I hit him. He got to charging at me, and me and him got to wrestling in the grass, and then I got to holding him, and then my cousin and Darvill, they got to beating him up and kicking him and stomping on him and stuff, and then afterwards—after I got up off the ground and they got to fighting him and stuff and they went in his pockets and took his stuff, and then I seen it wasn't Lewis, so then I got to standing in the alley. I was watching out for 'em and then when—

Seeking clarification on whether a gun was involved, D.L.'s attorney engaged him in the following exchange:

[Defense Counsel]: Maybe I should ask, Somebody [sic] had a gun, didn't they, or something that was supposed to look like a gun?

[D.L.]: Didn't nobody have a gun. They said that somebody had a gun, but didn't nobody have no gun that I know of.

[Defense Counsel]: But there may have been a gun. If another witness would testify that there was a weapon involved, you might not have been aware of who that someone else was?

[D.L.]: When I was on the ground—

[Defense Counsel] Let me finish. It's possible that someone else had a gun that you didn't see, is that correct?

[D.L.]: Nobody had no gun that I knew of.

[Defense Counsel]: Well, that's not what I asked you. It's possible someone did that you didn't see, is that correct?

[D.L.] Probably so.

After listening to this testimony, the district court summarized it as follows and asked D.L. whether the summary was accurate:

What I heard you saying is that you are all after this guy, once you figured out it was the wrong guy, you didn't leave, you held on to him. The other guys were punching him and kicking him, hurting him pretty bad, and then they stole his stuff, correct—doesn't need to be a dangerous weapon—and then you were watching out while they were stealing the stuff, right?

D.L. responded, “Yeah. Basically, yeah.”

On the “serious injury” prong, the record establishes that the bike rider was kicked, stomped, and beat up and that D.L. and the others hurt him “pretty bad.” There is no indication that the bike rider was at a “substantial risk of death,” sustained “serious permanent disfigurement,” or experienced “protracted loss or impairment of the function of any bodily member or organ.” Iowa Code § 702.18(1)(b)(1), (2), (3). Accordingly, we conclude the record does not contain a factual basis for the “serious injury” prong of first-degree robbery.

Turning to the “dangerous weapon” prong, D.L. was adamant that neither he nor his associates had a gun. At best, D.L. acknowledged there was a possibility that someone might have had a gun that he didn’t see. In our view, that acknowledgement is insufficient to establish a factual basis for the presence of a gun at the scene.

Based on this record, we conclude a factual basis for first-degree robbery was lacking.

We turn to the State’s alternate argument that, even if the record lacked a factual basis for first-degree robbery, there was a factual basis for second-degree robbery. See Iowa Code § 711.3 (defining second-degree robbery as all robbery that is not first-degree robbery). We are not convinced that this argument comports with the statutory requirement to establish a factual basis for the plea “admitting the allegations of the petition.” Iowa Code § 232.43(2). The petition made no mention of second-degree robbery. Accordingly, we conclude the delinquency adjudication cannot be affirmed on this basis.

Because there was not a factual basis for D.L.’s plea to first-degree

robbery, we reverse the delinquency adjudication. We remand to give the State an opportunity to establish a factual basis. *State v. Schminkey*, 597 N.W.2d 785, 792 (Iowa 1999).

REVERSED AND REMANDED.