

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-504
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

IN THE MATTER OF:

J.B.

Durham County
No. 09 JB 356

Appeal by juvenile from order entered 10 November 2010 by Judge Marcia H. Morey and from order entered 23 November 2010 by Judge William A. Marsh, III in Durham County District Court. Heard in the Court of Appeals 7 November 2011.

Roy Cooper, Attorney General, by Charlene Richardson, Assistant Attorney General, for the State.

Reece & Reece, by Mary McCullers Reece, for juvenile-appellant.

MARTIN, Chief Judge.

On 10 November 2010, juvenile J.B. was adjudicated delinquent for having committed the offense of attempted common law robbery. The matter was continued for disposition. On 23 November 2010, the juvenile was sentenced to a Level 2 disposition and placed in secure custody for up to fourteen

days. The juvenile appeals.

The State's evidence at the adjudication hearing tended to show that on or about 4 September 2010, the victim was walking to her house with her friend when J.B. and another boy came up behind them. J.B. asked the victim, "[W]here my money? Where my five dollars at?" The victim had previously told J.B. that she would give him five dollars as a gift for his birthday. The victim told J.B. she did not have any money. J.B. then picked up a stick and would not let the victim pass by. J.B. then proceeded to "pop" the victim with the stick three or four times. J.B.'s friend then put the victim in a headlock and she fell to the ground. J.B. began checking her pockets while she was on the ground. J.B. and his friend found no money on the victim and let her go. The victim went to her grandmother's house where the victim's grandmother called the police.

The juvenile's sole contention on appeal is that he was denied effective assistance of counsel by the failure of his trial counsel to make a motion to dismiss at the close of the State's evidence. To succeed on a claim of ineffective assistance of counsel, the juvenile must first show that "counsel's performance was deficient," which "requires showing that counsel made errors so serious that counsel was not

functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* To satisfy this requirement, a defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* This determination must be based on the totality of the evidence before the finder of fact. *Id.* at 695, 80 L. E. 2d at 698. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697, 80 L. E. 2d at 699. In *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985), our Supreme Court recognized, "[i]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient."

Specifically, J.B. argues the State did not present sufficient evidence of each element of attempted common law robbery and therefore a different result would have been reached had his counsel made a motion to dismiss. Attempted common law

robbery consists of (1) defendant's specific intent to commit the crime of common law robbery, and (2) a direct but ineffectual act by defendant leading toward the commission of this crime. *State v. Whitaker*, 307 N.C. 115, 118, 296 S.E.2d 273, 274 (1982). Common law robbery is defined as "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363, 368 (1988) (quoting *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982)). The force element required for common law robbery requires violence or fear "sufficient to compel the victim to part with his property," *State v. Williams*, 201 N.C. App 161, 183, 689 S.E.2d 412, 424 (2009) (quoting *State v. Sipes*, 233 N.C. 633, 635, 65 S.E.2d 127, 128 (1951)), or "to prevent resistance to the taking." *Id.* (quoting *State v. Sawyer*, 224 N.C. 61, 65, 29 S.E.2d 34, 37 (1944)). The act of violence must precede or be concomitant with the taking in order for the robbery to be committed. *State v. Porter*, 198 N.C. App. 183, 186, 679 S.E.2d 167, 170 (2009).

In this case, the victim testified that when she saw the juvenile approach, she attempted to run but could not due to the slippers she was wearing. She testified that the juvenile

picked up a large stick and then proceeded to check the victim's pockets for money, using an act of violence or fear towards the victim while attempting to take money from her. The victim asked J.B. to stop, told J.B. she had no money, and tried to get around J.B. three or four times. Each time she tried to move around him, J.B. "popped" the victim on the hand with the stick. J.B.'s actions with the stick and its use to restrain the victim while asking her for money constitute an attempted taking of the victim's property by force or violence. Taking the evidence in the light most favorable to the State, there was sufficient evidence presented that the juvenile had the specific intent to deprive the victim of her property and there was a direct act and use of force by the juvenile to overcome resistance to the taking on the part of the victim. Therefore, the juvenile cannot establish that, if a motion to dismiss at the close of evidence had been made, a different result would have occurred. J.B.'s claim for ineffective assistance of counsel is meritless and the adjudication of delinquency is affirmed.

Affirmed.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).