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IN THE
COURT OF APPEALS OF INDIANA

R.M.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A03-0903-JV-119
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Thomas J. Alevizos, Judge
Cause No. 46C01-0808-JD-487

March 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

R.M. appeals his juvenile delinquency adjudication for what would be Class A misdemeanor battery if committed by an adult. R.M. was originally charged with Class C felony battery resulting in serious bodily injury. R.M. and his father informed the juvenile court that R.M. wished to proceed without court-appointed counsel during his delinquency proceedings. R.M.'s non-lawyer father then acted as defense counsel during the delinquency fact-finding hearing. We hold that R.M. was not denied his constitutional and statutory rights to counsel because he and his father waived the rights in accordance with Indiana Code section 31-32-5-1. We further hold that the juvenile court did not err by entering judgment on a factually lesser included battery charge which was not alleged in the delinquency petition. We affirm.

Facts and Procedural History

R.M. and his brother C.M. were involved in an altercation with another boy T.L. following a youth basketball game. C.M. hit T.L. in the eye. Coach Michael Lark stepped in and attempted to break up the fight. At some point R.M. approached T.L. and struck him in the mouth. T.L. fell to the ground. The blow allegedly "pushed [T.L.'s] teeth back" and "ripped [his teeth] out of the root." Tr. p. 127.

The State filed a delinquency petition charging R.M. with Class C felony battery and Class B misdemeanor disorderly conduct. The battery count alleged that "R.M. did knowingly or intentionally, in a rude, insolent, or angry manner touch [T.L.], resulting in serious bodily injury, that is: [R.M.] walked up and punched [T.L.] in the mouth." Appellant's App. p. 8.

R.M. did not have an attorney, so the State moved for appointment of pauper counsel. The juvenile court convened a hearing. R.M.'s father ("Father") appeared with R.M. at the hearing and objected to the State's motion. Father argued that the motion for appointment of counsel "violates the Constitution. It violates the rights that you gave us in the beginning of all our hearings." Tr. p. 5-6. He told the juvenile court, "I'm [R.M.'s] father representing him." *Id.* at 7. The court then questioned Father on his qualifications to represent R.M. in the proceedings:

> COURT: . . . [D]o you have any, um, authority, um, legal or otherwise that states that you have the ability to represent, uh, your child throughout these proceedings.
>
> [FATHER]: I'd like to call [R.M.] to the stand. . . .
>
> COURT: Well, I'm- I'm not asking you if we can talk to [R.M.] through testimony. I'm asking if you have any legal authority, case law, statutes, or otherwise that state that you can represent [R.M.] in this case.
>
> [FATHER]: The Advisement of our Rights. The form that we sign at the beginning of all hearings.
>
> COURT: Yes.
>
> [FATHER]: In this room. We don't have to have an attorney. If we chose to have one represent us, we have that right. It's in- it's in that form.
>
> COURT: That is- -
>
> [FATHER]: So the law that- that- that- the authority that I must cite-cite now is the- the Court document that you give us- give every juvenile before the hearing and we both sign it. You did sign it, didn't you, [R.M.]?
>
> [R.M.]: Yeah.
>
> [FATHER]: And I think it would be inappropriate for us not to have testimony from [R.M.] at this time. Um, the Prosecutor- the State of Indiana also- -
>
> COURT: . . . [W]hy don't you proffer to the Court what the purpose of the testimony is before I allow it.
>
> [FATHER]: The testimony will say that [R.M] is aware of the- the phrase of ineffective assistance of counsel. That's some- an issue that (sic) always brung (sic) up on direct appeal. In fact, ninety-five percent (95%) of the arguments that come out of LaPorte County is ineffective assistance of counsel. The other five-percent (5%) will be, uh, Prosecutor misconduct. So even if he had a lawyer that can, uh, is so called licensed, that doesn't mean he's gonna receive adequate- he gonna receive adequate, uh, um, adequate lawyer. It's not- that's not that case. But [R.M.] is well

> aware of his rights. He's also told this Court that he wants his father to represent him and we want to represent ourselves. When you- when you came in with the- the violation of this petition, it had both our names on it. We have a right to sit here and defend ourselves. If you want to get standby counsel and they want to standby, that's what the law can- I think that's all the law can do. Put standby counsel there.
>
> COURT: Well, I think the law is a little bit different when it comes to children, Um, certainly in the past we've had children in Court who have waived their right to counsel themselves after discussing it with their father. However, there was nothing whether their father, mothers, grandmother, grandfather, or anybody else who actually stood up, questioned witnesses, argued on their behalf, or presented evidence. Um, that would actually be the law for the layperson- the right to do that on their own. It's doesn't afford the layperson the right to represent another individual on their own. And I guess I'm looking for any authority from you that would allow you to give- as his so-called attorney without having a license to practice law in the State of Indiana.
>
> [FATHER]: I'm not acting as his attorney. I'm just acting as a person who's sitting here and we (sic) just giving the- the facts the way that we see it. We're just telling our side of the story. I'm not citing laws and all this other stuff that the State of Indiana is doing.
>
> This- if you, today, rule against us and- and- well, if you rule on behalf of the State, this advisement of the constitutional rights of a juvenile- every case that's involving juveniles they have a right to come back before this Court and have their cases reversed because of that rule. Once a child is interrogated, which [R.M.] was, my other kids was (sic). They gave statements. They- I shouldn't be able to waive my child's right. I shouldn't be able to, and if you do that you open up a can of worms. These- that (unintelligible) where [R.M.] was interrogated, just because I was there, his statement is invalid because he didn't have a lawyer there. We can't have it- this- this- the State wants it to be Burger King. This is not a drive-up thru window. They can't have it their way. This is not the Arby's. . . .

Id. at 7-10. Later in the hearing, the court spoke to R.M. to confirm that he was voluntarily waiving his right to counsel:

> COURT: . . . [A]re you in school?
> [R.M.]: Yes.
> COURT: And what grade are you in?
> [R.M.]: Eleventh.
> COURT: Do you read, write, and understand English?
> [R.M.]: Yes.

> COURT: And when you were first in Court, there was juvenile rights form that was given to you, explaining your right to remain silent, your right to a trial, your right to an attorney, do you remember that?
> [R.M.]: Yes.
> COURT: Are you at this point, um, are of the opinion that you do not want to proceed with an attorney?
> [R.M.]: Yes.
> COURT: You do not want to have an attorney appointed for you?
> [R.M.]: Yeah.
> COURT: Do you know that I would appoint one to you without cost to you?
> [R.M.]: Yeah.
> COURT: And do you want to proceed as you have been proceeding now, is that what you're telling me?
> [R.M.]: Yes.
> COURT: You do not want to have a lawyer licensed by the State of Indiana sitting next to you?
> [R.M.]: No.
> COURT: You want to proceed forward without that?
> [R.M.]: Yes.

Id. at 15-16. The court nonetheless concluded that R.M. was not entitled to lay representation by his father, so the court granted the State's motion to appoint counsel. The court appointed the public defender's office to represent R.M. For reasons unknown, however, appointed counsel never entered an appearance in the case.

At some point the original juvenile magistrate recused himself and a new judge was assigned to preside over R.M.'s fact-finding hearing. The fact-finding hearing lasted two days. R.M. was not present. Father appeared on the first day and indicated to the court that he was representing R.M. The court told Father, "You cannot represent your son. You can represent yourself as a party, but you can't represent your son, because that's practicing law without a license." *Id.* at 30. Father proceeded to raise objections, argue motions, and cross-examine witnesses.

The juvenile court initially adjudged R.M. a delinquent for what would be Class C felony battery if committed by an adult. The court did not enter a true finding with respect to disorderly conduct. Father argued at the dispositional hearing that there was insufficient evidence R.M. had caused serious bodily injury to the victim. The juvenile court agreed and could not recall whether R.M. or C.M. had caused the injury to T.L.'s teeth. But instead of vacating the delinquency finding completely, the court reduced the finding to Class A misdemeanor battery. R.M. now appeals.

Discussion and Decision

R.M. raises two issues: (1) whether he was denied his constitutional and statutory rights to counsel when a public defender failed to appear in his case and (2) whether the juvenile court erred by adjudicating R.M. a delinquent on the lesser included battery offense not alleged in the delinquency petition.

I. Denial of Right to Counsel

R.M. first argues that the failure of court-appointed counsel to appear and defend him constituted a violation of his constitutional and statutory rights to counsel.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Article 1, Section 13 of the Indiana Constitution likewise provides that "[i]n all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . . ." The constitutional rights to counsel apply to both adult trials and juvenile delinquency proceedings. *N.M. v. State*, 791 N.E.2d 802, 805 (Ind. Ct. App. 2003). The Indiana Code also expressly provides that a child charged with

a delinquent act is entitled to representation. *See* Ind. Code §§ 31-32-4-1(1), -2-2. "A juvenile facing a delinquency proceeding, like any adult criminal defendant, is entitled to the assistance of counsel 'to cope with the problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him.'" *J.W. v. State*, 763 N.E.2d 464, 467 n.1 (Ind. Ct. App. 2002) (quoting *In re Gault*, 387 U.S. 1, 36 (1967)).

Nonetheless, a juvenile may waive his rights to counsel if certain statutory requirements are met. *See* Ind. Code § 31-32-5-1. Indiana Code section 31-32-5-1 provides that any rights guaranteed to a child under the United States Constitution, the Indiana Constitution, or any other law may be waived only:

> (1) by counsel retained or appointed to represent the child if the child knowingly and voluntarily joins with the waiver;
> (2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:
> (A) that person knowingly and voluntarily waives the right;
> (B) that person has no interest adverse to the child;
> (C) meaningful consultation has occurred between that person and the child; and
> (D) the child knowingly and voluntarily joins with the waiver; or
> (3) by the child, without the presence of a custodial parent, guardian, or guardian ad litem, if:
> (A) the child knowingly and voluntarily consents to the waiver; and
> (B) the child has been emancipated under IC 31-34-20-6 or IC 31-37-19-27, by virtue of having married, or in accordance with the laws of another state or jurisdiction.

Subsection (1) is inapplicable here because R.M. was not represented by an attorney at the motion hearing. Subsection (3) is inapplicable because R.M. had not been emancipated. R.M. could therefore only waive his right to counsel by satisfying the

criteria listed in subsection (2). In other words, (A) Father must have knowingly and voluntarily waived the right, (B) Father must have had no interest adverse to R.M., (C) meaningful consultation must have occurred between Father and R.M., and (D) R.M. must have knowingly and voluntarily joined the waiver.

The above-cited colloquy shows that all four requirements were met in this case. Father acknowledged R.M.'s right to an attorney but repeatedly invoked the right to decline appointed counsel. Father had no apparent interest adverse to his son's case. Father and R.M. had the express opportunity for meaningful consultation, evidenced by their presence together at the motion hearing. And R.M. knowingly and voluntarily waived his counsel rights in his dialogue with the juvenile court. We find that R.M. waived his constitutional and statutory rights to counsel in accordance with Section 31-32-5-1.

We should observe that the juvenile court permitted Father to represent himself at the fact-finding hearing. A child's parent is in fact a party to the proceedings described in the juvenile law and has all rights of parties provided under the Indiana Rules of Trial Procedure. Ind. Code § 31-37-10-7; *K.S. v. State*, 849 N.E.2d 538, 542 (Ind. 2006). For this reason we cannot say the juvenile court erred by allowing Father to question witnesses, raise objections, and argue motions. To the extent that Father may have crossed the line and also acted as counsel for R.M., we note that this was improper. But R.M. had waived his right to counsel altogether, and he failed to attend his own fact-finding hearing either to represent himself or object to his father's lay representation.

In conclusion, R.M. was not denied his rights to counsel when the public defender failed to represent him in the delinquency proceedings.

II. Delinquency Finding on Lesser Included Offense

R.M. next argues that the juvenile court erred by convicting him of a lesser included battery offense which was not alleged in the delinquency petition.

A fact-finder may find the commission of a lesser included offense if the lesser offense is inherently or factually included in the charged greater offense. *J.M. v. State*, 727 N.E.2d 703, 705 (Ind. 2000). To determine whether an offense is inherently included in a charged crime, the court compares the elements of the two relevant statutes. *Hauk v. State*, 729 N.E.2d 994, 998 (Ind. 2000). A lesser included offense is inherently included in the charged crime if (a) the parties could establish commission of the claimed lesser included offense by proof of the same material elements or less than all of the material elements of the charged crime or (b) the only feature distinguishing the claimed lesser included offense from the charged crime is that a lesser culpability is required to establish commission of the lesser included offense. *Id.* Even if it is not inherently included, it is possible for the lesser offense to be factually included in the charged offense under specific circumstances. *Wright v. State*, 658 N.E.2d 563, 566-67 (Ind. 1995). A factually included offense is found when the charging information alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense. *Id.* at 567.

Indiana Code section 35-42-2-1 provides that

> (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:
>
> (1) a Class A misdemeanor if:
>
> (A) it results in bodily injury to any other person;
>
> * * * * *
>
> (3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon[.]

Class A misdemeanor battery is not inherently included within Class C felony battery. *Simmons v. State*, 793 N.E.2d 321, 327 n.7 (Ind. Ct. App. 2003). Class C felony battery requires that the act result in serious bodily injury or that it be committed by means of a deadly weapon. *Id.* Class A misdemeanor battery requires bodily injury. *Id.* As it is possible to inflict a rude, insolent or angry touch with a deadly weapon in a manner that does not produce bodily injury, it is possible to commit Class C felony battery, the greater offense, without having committed the lesser offense of Class A misdemeanor battery. *Id.* Thus, Class A misdemeanor battery is not inherently included in Class C felony battery. *Id.*

Here, however, the delinquency petition alleged that "R.M. did knowingly or intentionally, in a rude, insolent, or angry manner touch [T.L.], resulting in serious bodily injury, that is: [R.M.] walked up and punched [T.L.] in the mouth." Because the petition specifically charged Class C felony battery resulting in serious bodily injury, Class A misdemeanor battery resulting in bodily injury was in this case a factually included lesser offense. The juvenile court was thus warranted in entering judgment on the Class A misdemeanor.

Affirmed.

RILEY, J., and CRONE, J., concur.