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NO. COA01-1053

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

IN THE MATTER OF:

NICHOLAS MATASICH

Pender County
No. 99 J 61

Appeal by juvenile from adjudication and disposition orders entered 16 April 2001 by Judge Elton G. Tucker in Pender County District Court. Heard in the Court of Appeals 8 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

R. Kent Harrell for the respondent-appellant.

TYSON, Judge.

Nicholas Matasich ("respondent") was charged on 22 March 2001 in a juvenile petition with violation of N.C. Gen. Stat. § 14-277.1, communicating threats. The matter was heard on 16 April 2001.

The State presented evidence at the hearing which tended to show the following: The respondent was a thirteen-year old student at Topsail Middle School. He is classified as B.E.D., which means he is behaviorally and emotionally handicapped, and has been placed in a special classroom known as the resource class. On 14 February

2001, while in class, respondent suddenly blurted out "Bang, bang, bang, I'm going to shoot you and you and you and you." Respondent also stated "I'll blow up the school." According to respondent's teacher, Joyce Bowman ("Bowman"), she did not believe respondent could carry out the threats, so she ignored him, and respondent was not punished for his outburst. Bowman explained that respondent "has trouble controlling himself, but . . . he's B.E.D. and it's expected." However, two students mentioned the outburst to Sherry Broome ("Broome"), the school's principal, and Broome decided further action should be taken.

On 16 April 2001, respondent was adjudicated a delinquent juvenile by reason of disorderly conduct. A disposition order was entered placing respondent on supervised probation for six months and ordering him to complete an "Ethics & Choices" class, participate in the "Big Buddy" program, and to undergo psychological evaluation and comply with all recommendations. Respondent appeals.

Respondent argues that the trial court did not have the authority to adjudicate him delinquent by reason of disorderly conduct because he was not charged with the offense in the petition and it is not a lesser offense of the charge of communicating threats, the offense alleged in the petition. We agree.

First, disorderly conduct is not a lesser included offense of communicating threats. See *State v. Smith*, 139 N.C. App. 209, 216, 533 S.E.2d 518, 521, *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000). Second, the offense of disorderly conduct was not alleged

in the delinquency petition, and the petition was not amended to allege disorderly conduct. The trial court erred by adjudicating respondent delinquent by reason of disorderly conduct. Accordingly, the orders of adjudication and disposition are vacated.

Respondent additionally argues that the trial court erred by denying his motion to dismiss for insufficiency of the evidence on the allegation of communicating threats. However, the trial court did not adjudicate respondent delinquent by communicating threats, so respondent's argument is moot.

Vacated.

Judges GREENE and HUDSON concur.

Report per Rule 30(e).