NO. COA01-294

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

IN THE MATTER OF
RODNEY WAYNE JOHNSON

Alamance County
No. 90 J 113

Appeal by petitioner from order entered 6 September 2000 by Judge Bradley Reid Allen, Sr., in District Court, Alamance County. Heard in the Court of Appeals 13 February 2002.

Attorney Roy Cooper, by Assistant Attorney General Angel E. Gray, for the State.

John W. Cox, for respondent-appellant.

WYNN, Judge.

This appeal arises from an adjudication of delinquency based on an alleged assault that occurred during a pickup basketball game, and threats communicated by the respondent who was thirteen years old at the time of the incidents. We reverse in part; affirm in part and remand for disposition.

The evidence supporting the adjudication of delinquency based on the assault shows that during a pickup basketball game on 6 July 2000, the respondent shoved his seven-year-old friend to the ground. Our courts have defined assault as an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of

another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm. *See State v. Sawyer*, 29 N.C. App. 505, 225 S.E.2d 328 (1976).

Respondent argues that within the game of basketball, there are many physical contacts, which outside of the context of the game could be considered assaults. He argues that certain physical contacts are permitted, customarily and implicitly consented to, within the context of the game of basketball. We acknowledge that the game of basketball involves some physical contact; however, intentionally shoving a player on the ground outside the context of the game is not an accepted part of the game.

Nonetheless, the record in the present case fails to show that respondent's act of pushing his friend to the ground was outside the context of the basketball game. For instance, the record does not indicate whether the act occurred during an attempt by the respondent to gain a tactical advantage in the game, or whether it occurred during a time period in which the play of the game had been suspended. Moreover, the record indicates that while the friend was offended by the push, no verbal altercation had occurred during the ballgame and the seven-year old boy suffered no physical injury. Under the particular facts of this case, we reverse the finding that the evidence was sufficient to establish an assault. Minor incidents of pushing and shoving that occur during physical games are not normally subjects that should become matters of concern for our juvenile courts.

As to the charge of communicating threats under N.C. Gen. Stat. § 14-277.1(a) (1999), the elements are:

> (1) [When a person] willfully threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threatens to damage the property of another;
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> (2) The threat is communicated to the other person, orally, in writing, or by any other means;
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> (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
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> (4) The person threatened believes that the threat will be carried out.

In the present case, the juvenile court found that the respondent threatened the seven-year-old by stating on or about 17 May 2000: "I'll stomp your ass in front of your mother"; and by stating on 24 July 2000: "I'm going to beat your fucking ass and go get [your father]." The record shows ample evidence to support the determination that the respondent willfully communicated a threat. The seven-year-old boy testified that on two occasions respondent threatened to beat him; the father also testified that he heard respondent say he was going to beat up his son. Moreover, the record shows that both threats were made in a manner and under circumstances that would cause a reasonable person to believe the threats were likely to be carried out and that the person threatened believed that the threats were likely to be carried out. *See State v. Cunningham*, 344 N.C. 341, 474 S.E.2d 772 (1996). Under the circumstances of this case in which the respondent was

thirteen-years old at the time he communicated the statements to a seven-year-old boy, we hold that viewed in a light favorable to the State, there was sufficient evidence to permit a trial court to find the respondent was guilty of communicating threats.

In sum, we reverse the finding of assault and affirm the determination that the respondent communicated two threats. We therefore remand this matter to the juvenile court for modification of the adjudication order and reconsideration of the dispositional order.

Adjudication Order--reversed in part; affirmed in part.

Disposition Order--vacated and remanded.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).