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NO. COA06-1155

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

IN THE MATTER OF:

M.B.B.

Beaufort County
No. 05 JB 85

Appeal by juvenile respondent from order entered 5 May 2006 by Samuel G. Grimes in Beaufort County District Court. Heard in the Court of Appeals 21 March 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kimberly D. Potter, for the State.

Jeffrey Evan Noecker, for respondent-juvenile-appellant.

JACKSON, Judge.

On 15 February 2006, Ronnie Hall ("Hall") was dining in a restaurant in Chocowinity, North Carolina. M.B.B. ("the juvenile") also was in the restaurant with two of his friends. As Hall was eating, he noticed that a little ball of paper suddenly had dropped onto his plate of food. When he looked up, he saw the juvenile and the juvenile's friends seated across the restaurant, holding straws in their hands. Hall testified he did not see who shot the ball of paper at him, and that he was not hit by the paper.

Alan Jordan ("Jordan"), the Beaufort County Sheriff, also was in the same restaurant as Hall and the juvenile on this date. Although he did not see the paper ball land in Hall's food, nor did he see the juvenile or the other boys shoot paper balls out of their straws, he did see Hall confront the juvenile as the juvenile passed Hall's table and was leaving the restaurant. Jordan followed the juvenile out of the restaurant and questioned him. Jordan testified that the juvenile admitted that he had been shooting spitballs, but that the juvenile did not say at whom he had been shooting the spitballs.

On 7 March 2006, a juvenile petition was filed alleging that the juvenile had committed the offense of simple assault based upon the incident on 15 February 2006. Following an adjudication hearing on 7 April 2006, the trial court adjudicated the juvenile as delinquent, and found that beyond a reasonable doubt he had committed the offense of simple assault. Disposition in this case was continued until a later date.

On 23 March 2006, a teacher at the juvenile's school saw the juvenile walk up to C.P., another juvenile, and strike C.P. in the face with his fist. Based upon this incident, a juvenile petition alleging that the juvenile had committed a simple affray was filed on 31 March 2006. Following an adjudication hearing held 5 May 2006, the juvenile was found delinquent, and to have committed the offense of simple affray.

On 16 May 2006, the trial court entered a disposition order for both offenses. The juvenile was placed on twelve months of

probation, and, among other things, was ordered to cooperate with several treatment programs, if ordered to do so by the Court Counselor. The juvenile appeals from the disposition order and the order adjudicating him delinquent for the offense of simple assault.

The juvenile first contends the trial court erred in denying his motion to dismiss the charge of simple assault, based upon an insufficiency of the evidence to prove all of the elements of the offense.

"To withstand a juvenile's motion to dismiss based on an insufficiency of the evidence, the State must present substantial evidence of each element of the offense alleged." *In re S.R.S.*, __ N.C. App. __, __, 636 S.E.2d 277, 281 (2006). "'Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005)). "In ruling upon a motion to dismiss, the trial court considers the evidence in the light most favorable to the State, and affords the State the benefit of every reasonable inference of fact which may be drawn from the evidence." *Id.* at __, 636 S.E.2d at 281-82.

"There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules." *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). Our Supreme Court has defined the common law offense of assault as

> "an overt act or 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."
>
> This common law rule places emphasis on the intent or state of mind of the person accused. The decisions of the Court have, in effect, brought forth another rule known as the "show of violence rule," which places the emphasis on the reasonable apprehension of the person assailed. The "show of violence rule" consists of a show of violence accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed.

Id. (citations omitted).

In the instant case, the State's evidence showed that Hall neither saw the juvenile shoot the spitball nor was he hit by the spitball. Hall simply saw the paper ball land in his plate of food. At no time did Hall state that he was in fear of bodily harm. Moreover, no evidence was presented showing that the juvenile intended to cause fear of physical injury in Hall or anyone else in the restaurant that day. The juvenile told Jordan that he had been shooting spitballs, but there was no evidence showing that the juvenile caused the spitball to land in Hall's plate, or that the juvenile intended, through force or violence, to cause physical injury to Hall.

As such, there was insufficient evidence of each element of simple assault, and the juvenile's motion to dismiss should have been granted. The juvenile's adjudication of delinquency for simple assault is thus vacated.

Finally, the juvenile contends his juvenile petition alleging delinquency for simple affray was fatally defective, in that it failed to set forth all essential elements of the offense charged.

We decline to address the juvenile's final assignment of error, as he has failed to comply with our Rules of Appellate procedure, thus preventing this Court from obtaining jurisdiction to hear this portion of his appeal. The juvenile's Notice of Appeal and Appellate Entries form states only that he appeals from the order in which he was adjudicated delinquent on the charge of simple assault, and the subsequent disposition order. There is no Notice of Appeal from the adjudication order filed 16 May 2006 adjudicating him delinquent for the charge of simple affray, nor did the juvenile give oral notice of appeal following his adjudication. "[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005); *see also Sillery v. Sillery*, 168 N.C. App. 231, 234, 606 S.E.2d 749, 751 (2005); *State v. McMillian*, 101 N.C. App. 425, 427, 399 S.E.2d 410, 411 (1991).

During oral arguments, counsel for the juvenile made an oral motion seeking to have this Court treat his brief as a petition for a writ of *certiorari*, thus enabling this Court to address the merits of this issue. Rule 21 of our appellate rules provides that "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute

an appeal has been lost by failure to take timely action, ..." N.C. R. App. P. 21(a) (2006). Rule 21 goes on to specify the requirements for a petition seeking a writ of *certiorari*:

> The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

N.C. R. App. P. 21(c) (2006). Our granting of counsel's oral petition or motion for writ of *certiorari* would constitute a clear violation of our appellate rules. *See McCoy*, 171 N.C. App. at 638, 615 S.E.2d at 321 (holding that a footnote in an appellate brief was insufficient to request writ of *certiorari* because it "clearly does not meet the requirements set forth in Rule 21(c)"). As we have noted on numerous occasions, "[t]he North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.'" *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

Therefore, we must dismiss this assignment of error, as we are without jurisdiction to hear the juvenile's appeal from his adjudication on the charge of simple affray.

Reversed in part; Dismissed in part.

Judges HUNTER and TYSON concur.

Report per Rule 30(e).