NO. COA06-638

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

IN THE MATTER OF:
T.K., III

Davie County
No. 05 J 71

Appeal by juvenile from order entered 27 September 2005 by Judge Charles M. Neaves, Jr. in Stokes County District Court and from order entered 30 November 2005 by Judge James M. Honeycutt in Davie County District Court. Heard in the Court of Appeals 10 January 2007.

Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman, for the State.

Michelle FormyDuval Lynch, for juvenile-appellant.

TYSON, Judge.

T.K., III ("the juvenile") appeals from order entered on 27 September 2005 that adjudicated him to be delinquent for having committed simple assault and from order entered on 30 November 2005 which: (1) ordered a Level 1 disposition; (2) placed him on twelve months probation; and (3) required him to perform seventy-five hours of community service. We affirm.

I. Background

A. State's Evidence

The State's evidence tended to show the complainant, J.S.F., attended summer camp at Camp Hanes in June 2005. J.S.F. shared a cabin with the juvenile and two of the juvenile's cousins.

One of the juvenile's cousins told J.S.F. that on the evening of 29 June 2005, he and the juvenile's other cousin had given J.S.F. a "Hitler." A "Hitler" was described as wiping feces on someone's upper lip. The juvenile's cousin told J.S.F. about the incident during breakfast the following morning.

After being told of the incident, J.S.F. smelled excrement on his upper lip and noticed brown spots on his sleeping bag. J.S.F. informed his counselor about the incident. The camp counselor investigated and learned the juvenile "had watched" as one of his cousins smeared feces on J.S.F.

J.S.F. testified one of the juvenile's cousins threatened him after he reported the incident to the camp counselor. J.S.F. also testified this was not the only time "they" had picked on him during the week at camp. The juvenile and his two cousins were expelled from camp. The juvenile apologized to J.S.F. prior to being expelled from camp. J.S.F. also received letters of apology from the juvenile and one of the juvenile's cousins. The letter to J.S.F. from the juvenile was introduced during the hearing and stated, "I'm very sorry for doing those horrible things to you."

J.S.F.'s father was also called to testify. J.S.F.'s father testified J.S.F.'s pillow smelled like "a bowel movement" and had light brown smears on it. J.S.F.'s sleeping bag also smelled like "a bowel movement."

The State rested its case after this testimony. The juvenile's attorney moved to dismiss the petition. In response, the State's attorney argued the juvenile and his two cousins "acted in concert to perpetrate this act." The trial court denied the juvenile's motion to dismiss.

B. The Juvenile's Evidence

The juvenile testified and presented other evidence in his defense. The juvenile testified he learned of his cousin's plan to give J.S.F. a "Hitler" that night when one of his cousins asked him if he would "come and watch." The juvenile testified one of his cousins smeared feces across J.S.F.'s face and that the juvenile witnessed the incident "four or five feet" from J.S.F.'s bedside. The juvenile wanted to watch one of his cousins smear feces across J.S.F.'s face because he thought it was "amusing." The juvenile acknowledged having called J.S.F. names during the week.

Robert John Kahle ("Kahle"), the camp's executive director, testified he investigated the incident. Kahle questioned the juvenile and his two cousins and asked who among the three smeared feces across J.S.F.'s face. The juvenile and his cousins first responded "we" smeared feces across J.S.F.'s face. Kahle explained to the juvenile and his cousins they were being expelled from camp. One of the juvenile's cousins eventually admitted committing the assault. Kahle also requested the juvenile and his cousins apologize to J.S.F. The juvenile renewed his motion to dismiss at the close of all the evidence. The trial court denied the juvenile's motion.

On 27 September 2005, the juvenile was adjudicated delinquent in the Stokes County District Court. The trial court found beyond a reasonable doubt that the juvenile and his two cousins had acted in concert to assault J.S.F. The trial court concluded, as a matter of law, the juvenile was "subject to the court's dispositional authority for having committed an offense classified under G.S. 7B-2508(a) as minor, [Class 2 misdemeanor simple assault]." The trial court ordered the case to proceed to disposition and transferred the case to Davie County.

On 30 November 2005, the Davie County District Court ordered a Level 1 disposition, placed the juvenile on twelve months probation, and required him to perform seventy-five hours of community service. The juvenile appeals.

II. Issues

The juvenile asserts the trial court: (1) lacked jurisdiction to adjudicate him a delinquent; (2) committed prejudicial error by denying his motions to dismiss; (3) erred in finding he had acted in concert to commit an assault; and (4) violated N.C. Gen. Stat. § 7B-2506(6) (2005) in ordering him to perform seventy-five hours of community service.

III. Assault Indictment

The juvenile asserts the petition is fatally defective and the trial court lacked jurisdiction over him. We disagree.

An indictment must allege all of the essential elements of a criminal offense. *State v. Thomas*, 153 N.C. App. 326, 335, 570

S.E.2d 142, 147 (citation omitted), *disc. rev. denied*, 356 N.C. 624, 575 S.E.2d 759 (2002). This Court has stated:

> [A] petition in a juvenile action serves essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged.

In re Griffin, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004).

The juvenile petition alleged simple assault pursuant to N.C. Gen. Stat. § 14-33(a), in that the juvenile struck J.S.F. "by inserting his own finger into his own anus and wip[ing] feces on [J.S.F.'s] face." The juvenile asserts the petition is fatally defective because it does not sufficiently allege the elements of assault because it "fails to allege that J.S.F. was put in apprehension of harmful or offensive contact."

Our Supreme Court has stated:

> There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules. G.S. 14-33 does not create a new offense . . . , but only provides for different punishments for various types of assault.
>
> This Court generally defines the common law offense of 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.
>
> 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 . . . . Thus, there are two rules under which a person may be prosecuted for assault in North Carolina.

State v. Roberts, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967) (citations and quotations omitted) (emphasis supplied).

This Court has stated:

> [I]t is . . . not necessary that the victim be placed in fear in order to sustain a conviction for assault. All that is necessary to sustain a conviction for assault is evidence of an overt act showing an intentional offer by force and violence to do injury to another sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm.

State v. Musselwhite, 59 N.C. App. 477, 481, 297 S.E.2d 181, 184 (1982).

The juvenile petition is not facially defective for failure to allege J.S.F. was put in apprehension of harmful or offensive contact. The petition alleged that the juvenile assaulted J.S.F. "by inserting his own finger into his own anus and wip[ing] feces on [J.S.F.'s] face." The petition sufficiently alleged "an overt act showing an intentional offer by force and violence to do injury to another sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm." *Id.* at 481, 297 S.E.2d at 184. This assignment of error is overruled.

IV. Motions to Dismiss and Insufficient Evidence

A. Standard of Review

A juvenile is entitled to have evidence evaluated by the same standards as those that apply in criminal proceedings against adults. *In re Dulaney*, 74 N.C. App. 587, 588, 328 S.E.2d 904, 906 (1985); N.C. Gen. Stat. § 7B-2405 (2005).

The juvenile assigns error to the trial court's denial of his motions to dismiss. The juvenile presented evidence after moving to dismiss at the close of the State's evidence. The juvenile renewed his motion to dismiss at the close of all the evidence. This Court has stated:

> By presenting evidence at trial [defendant] waived his right to assert the denial of his motion for dismissal made at the close of the State's evidence as error on appeal. However, his motion to dismiss at the close of all the evidence draws into question the sufficiency of *all* the evidence . . . . The evidence is considered in the light most favorable to the State, with the State being entitled to every reasonable inference therefrom. If there is substantial evidence, irrespective of whether it is direct or circumstantial or both, that the crime charged was committed by the defendant, then a motion to dismiss is properly denied.

State v. Upright, 72 N.C. App. 94, 99, 323 S.E.2d 479, 483 (1984) (internal citations omitted) (emphasis supplied), *disc. rev. denied*, 313 N.C. 513, 329 S.E.2d 400 (1985). Substantial evidence is relevant evidence sufficient to persuade a rational fact finder to accept a conclusion. *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899 (citation omitted), *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000).

The juvenile argues insufficient evidence was presented to prove beyond a reasonable doubt that he acted in concert with his cousins to commit an assault. "In reviewing a challenge to the sufficiency of evidence, we must determine whether there was substantial evidence to support the adjudication, viewing the evidence in the light most favorable to the State and giving it the benefit of all reasonable inferences." *In re D.D.*, 146 N.C. App. 309, 324, 554 S.E.2d 346, 356 (citing *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000)), *disc. rev. denied*, 354 N.C. 572, 558 S.E.2d 867 (2001). The same standard of review applies for both the juvenile's second and third assignments of error.

B. Acting in Concert

The juvenile asserts the trial court erred by denying his motions to dismiss and finding beyond a reasonable doubt he acted in concert to commit an assault because insufficient evidence was presented to prove he acted in concert with his cousins to spread feces on J.S.F. We disagree.

Our Supreme Court has stated:

> *To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose.* These terms mean the same in the law of crimes as they do in ordinary parlance.
>
> Where the state seeks to convict a defendant using the principle of concerted action, that this defendant did some act forming a part of the crime charged would be strong evidence that he was acting together with another who did other acts leading toward the crimes' commission. That which is essentially evidence of the existence of concerted action

> should not, however, be elevated to the status of an essential element of the principle. Evidence of the existence of concerted action may come from other facts. It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle *so long* as *he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime*.

State v. Joyner, 297 N.C. 349, 356-57, 255 S.E.2d 390, 395 (1979) (internal citation omitted) (emphasis supplied).

Reviewed in the light most favorable to the State, the evidence presented was sufficient for the trier of fact to find beyond a reasonable doubt that the juvenile acted in concert with his cousins. The evidence presented showed: (1) one of the juvenile's cousins asked the juvenile to "come and watch" him smear feces on J.S.F.; (2) the juvenile stood four or five feet from J.S.F; (3) the juvenile was present at the scene of the assault; (4) the juvenile had picked on J.S.F. during the week at camp; (5) the juvenile testified he thought it would be "amusing" to watch his cousin smear feces across J.S.F.'s face; (6) when confronted about the incident, the juvenile and his cousins stated "we" smeared feces on J.S.F.'s face; and (7) the juvenile stated in his apology letter, "I'm sorry for doing those horrible things to you."

Substantial evidence was presented tending to show the juvenile acted together with his cousins to assault J.S.F. *Id.* The juvenile was present during the assault and acted pursuant to a common plan or purpose to assault J.S.F. with a "Hitler" in order

to "amuse" themselves. *Id.* at 357, 255 S.E.2d at 395. The juvenile admitted to the camp counselor "we" smeared feces on J.S.F.'s face and in his apology letter to doing "horrible things" to J.S.F. This evidence supports the trial court's conclusion the juvenile acted in concert with his cousins to assault J.S.F. *See In re Gordon*, 352 N.C. 349, 354, 531 S.E.2d 795, 798 (2000) (An admission constitutes substantial evidence to support findings of fact and conclusions of law.).

Viewing all the evidence in the light most favorable to the State, substantial evidence supports the adjudication that the juvenile acted in concert with his cousins to assault J.S.F. The trial court did not err by denying the juvenile's motions to dismiss and finding beyond a reasonable doubt that he had acted in concert to commit an assault.

V. N.C. Gen. Stat. § 7B-2506(6)

The juvenile argues the trial court erred by ordering him to perform seventy-five hours of community service and asserts the trial court's dispositional order violated N.C. Gen. Stat. § 7B-2506(6). We disagree.

N.C. Gen. Stat. § 7B-2506 (2005) states:

> The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives in accordance with the dispositional structure set forth in G.S. 7B-2508:
>
> (6) Order the juvenile to perform up to 100 hours supervised community service consistent with the juvenile's age, skill, and ability, specifying the nature of the work and the number of hours required. The work shall be related to the seriousness of the juvenile's

> offense and in no event may the obligation to work exceed 12 months.

The trial court ordered the juvenile to perform seventy-five hours of community service "through the Project Challenge Program." Forty-three hours of the juvenile's community service were "restitution hours" to reimburse J.S.F.

The juvenile argues the trial court did not specify the nature of his community service work. The trial court specified the nature of the juvenile's community service when it ordered him to perform seventy-five hours "through the Project Challenge Program."

The juvenile also argues the trial court violated N.C. Gen. Stat. § 7B-2506(6) because it did not state the community service work would be consistent with his age, skill, and ability. N.C. Gen. Stat. § 7B-2506(6) does not require the trial court to state how the community service work would be consistent with the juvenile's age, skill, and ability. N.C. Gen. Stat. § 7B-2506(6) only requires the trial court to, "specify[] the nature of the work and the number of hours required." The trial court specified the nature of the work and the hours required. This assignment of error is overruled.

VI. Conclusion

The juvenile petition sufficiently alleged the juvenile assaulted J.S.F. Substantial evidence supports the adjudication that the juvenile acted in concert with his cousins. The trial court did not err by denying the juvenile's motions to dismiss and finding beyond a reasonable doubt he had acted in concert to commit an assault.

The trial court did not err by ordering the juvenile to perform seventy-five hours of community service. The trial court's dispositional order specified the nature of the juvenile's community service and the number of hours as required by N.C. Gen. Stat. § 7B-2506(6).

Affirmed.

Judges STEPHENS and STROUD concur.

Report per Rule 30(e).