NO. COA13-1251
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

IN THE MATTER OF:
J.W.

Cumberland County
No. 13 JB 09

Appeal by Juvenile from orders entered 31 July 2013 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Court of Appeals 4 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General Brian D. Rabinovitz, for the State.

Mary McCullers Reece for Juvenile-Appellant.

McGEE, Chief Judge.

Juvenile J.W.[1] appeals from orders adjudicating her delinquent for committing the Class A1 misdemeanor offense of assaulting an employee of the State and sentencing her to one year of probation, subject to various conditions. We vacate the

[1] We refer to the juvenile as "J.W." throughout the opinion in order to protect her identity.

order of the trial court.

The evidence in the record tended to show that, on the morning of 10 September 2012, J.W., then an eight-year-old second grader, was skipping down one of the hallways in her elementary school in Fayetteville, North Carolina, when she was instructed by several adults to go to her classroom. J.W. had "a history of being assaultive/aggressive towards her peers, grandmother [— with whom she lived —] and teachers[.]" J.W. had been suspended from school the prior year for "head butting" her teacher, and had a "history of disruptive and defiant behaviors at school" that caused her to be held back to repeat the second grade. Because J.W. was "very argumentative" and would not heed instructions to go to her classroom on the morning of 10 September, the school's principal, Jacqueline Packer Smith ("Principal Smith"), who was familiar with J.W.'s history, was called to the hallway to help address the situation.

Principal Smith testified that, although J.W. started to walk alongside her towards the principal's office, as they got closer to the front door of the school, J.W. "decided to bolt" and started running towards the front door. In order to prevent J.W. from running out the door and into "the middle of morning traffic," Principal Smith "grabbed" J.W. around her midsection

and lifted her off the ground. J.W. then began kicking and "continued to kick and kick and kick" and "flail[ed]" like "a two-year-old." As Principal Smith held J.W., she repeatedly kicked Principal Smith in the shin until Principal Smith carried J.W. into the guidance office and sat her in a chair.

A juvenile petition was filed on 11 January 2013 alleging that J.W. was a delinquent juvenile for committing an assault on a government employee in violation of N.C. Gen. Stat. § 14-33(c)(4). At the hearing before the trial court, J.W. moved to dismiss the charge at the close of the State's evidence on the grounds that the State "fail[ed] to show that the actions on behalf of the juvenile was [sic] intentional," which motion was denied. Although J.W. offered evidence on her own behalf, she did not renew her motion to dismiss the charge at the close of all of the evidence. The trial court adjudicated J.W. delinquent and entered a Level I disposition order on 31 July 2013. J.W. appeals.

J.W. contends her trial counsel's failure to renew the motion to dismiss at the close of all of the evidence constituted ineffective assistance of counsel. Specifically, J.W. asserts that the State did not offer sufficient evidence to support a determination that J.W. "intentionally kicked her principal after her principal lifted her off the ground," or

that there was sufficient evidence that J.W. understood that Principal Smith was a government employee when she kicked her.

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984)), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *Id.* (internal quotation marks omitted). "[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (internal quotation marks omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (internal quotation marks omitted). Nonetheless, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*,

312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (citing *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698). "This determination must be based on the totality of the evidence before the finder of fact." *Id.* (citing *Strickland*, 466 U.S. at 695, 80 L. Ed. 2d at 698).

"Generally, a juvenile in an adjudication hearing has [a]ll rights afforded adult offenders," *In re B.E.*, 186 N.C. App. 656, 658, 652 S.E.2d 344, 345 (2007) (alteration in original) (internal quotation marks omitted), which "include the right to have the evidence evaluated by the same standards as apply in criminal proceedings against adults." *Id.* (internal quotation marks omitted). Therefore, "in order to withstand a motion to dismiss the charges contained in a juvenile petition," *id.* (internal quotation marks omitted), as with an adult offender, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65–66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 66, 296 S.E.2d at 652. "In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to

the State." *Id.* at 67, 296 S.E.2d at 652. "In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence[.]" *Id.* at 67, 296 S.E.2d at 653. "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *Id.*

"The essential elements of a charge of assault on a government official are: (1) an assault (2) on a government official (3) in the actual or attempted discharge of his duties." *State v. Noel*, 202 N.C. App. 715, 718, 690 S.E.2d 10, 13, *disc. review denied*, 364 N.C. 246, 699 S.E.2d 642 (2010); *see* N.C. Gen. Stat. § 14-33(c)(4) (2013). While "[t]here is no statutory definition of assault in North Carolina, . . . the crime of assault is governed by common law rules," *State v. Mitchell*, 358 N.C. 63, 69, 592 S.E.2d 543, 547 (2004) (internal quotation marks omitted), which define 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.

Id. at 69–70, 592 S.E.2d at 547 (internal quotation marks omitted). In order to obtain a conviction under N.C. Gen. Stat.

§ 14-33(c)(4)[2], "the burden is on the State to satisfy the jury from the evidence and beyond a reasonable doubt that the party assaulted was a . . . [government employee or] officer performing the duty of his office, and that the defendant knew his victim was a . . . [government employee or] officer." *See State v. Rowland*, 54 N.C. App. 458, 462, 283 S.E.2d 543, 546 (1981).

In the present case, although the record contains evidence tending to show that J.W. repeatedly kicked and "flail[ed]" while Principal Smith held J.W. around her midsection and off the ground, and that J.W. repeatedly kicked Principal Smith in the shin as she was being held, the record does not provide a basis for concluding that J.W. intentionally kicked Principal Smith. The evidence did not establish whether J.W.'s "flailing" kicks were done to procure her release from Principal Smith's hold, to attempt to make contact with the ground below, or to cause physical injury to Principal Smith. J.W. testified that she "didn't mean to kick her in the shin," that she was not

[2] The defendant in *Rowland* appealed from a conviction under N.C. Gen. Stat. § 14-33(b)(4), which was repealed and replaced by N.C. Gen. Stat. § 14-33(b)(8), *see* 1991 N.C. Sess. Laws 1076, 1076–77, ch. 525, § 1, which was later repealed and replaced by N.C. Gen. Stat. § 14-33(c) and its subparts, *see* 1995 N.C. Sess. Laws 1525, 1630–31, ch. 507, § 19.5(b), which included subsection (c)(4) — the cited statutory subsection in the present case.

angry with Principal Smith, and that she was trying to get her feet back down on the ground. More importantly, when asked whether she thought J.W. intentionally kicked her, Principal Smith testified: "It's kind of like when you pick up a two-year-old and they are flailing." Therefore, we conclude that the State did not present substantial evidence to establish the essential element of intent that is required in order to obtain a conviction on the charge of assault on a government official or employee. Because J.W. has established that her trial counsel failed to make a motion that would and should have resulted in a dismissal of the sole charge against her, we hold that such failure prejudiced J.W. and, thus, established that her representation at trial was constitutionally inadequate. J.W. is thus entitled to relief from her conviction for misdemeanor assault on a government official or employee on the grounds of ineffective assistance of counsel, and the trial court's 31 July 2013 orders adjudicating J.W. delinquent must be vacated.

In light of our determination that the State did not present substantial evidence that J.W. intentionally kicked Principal Smith, we decline to consider the merits of J.W.'s alternative assertion on appeal, which was raised for the first time in her brief, that the State presented insufficient

evidence to establish that J.W., then an eight-year-old, knew that Principal Smith was a government employee when she kicked Principal Smith.

Vacated.

Judges STEELMAN and ERVIN concur.

Report per Rule 30(e).