IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-279

Filed: 20 September 2016

New Hanover County, No. 15 JB 78

IN THE MATTER OF: M.A.P.

Appeal by juvenile from adjudication and disposition orders entered 9 November 2015 by Judge J.H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 22 August 2016.

Roy Cooper, Attorney General, by Gerald K. Robbins, Special Deputy Attorney General, for the State.

Blass Law, PLLC, by Danielle Blass, for juvenile-appellant.

DAVIS, Judge.

M.A.P. ("Marty"),[1] a juvenile, appeals from the trial court's (1) order adjudicating him delinquent for committing the offense of simple affray; and (2) dispositional order placing him on supervised probation for nine months. On appeal, Marty contends that the trial court erred by finding him delinquent based on the offense of simple affray where the juvenile petition only alleged he had committed the

[1] Pseudonyms are used throughout this opinion to protect the identities of the juveniles and for ease of reading.

offense of assault inflicting serious injury. After careful review, we vacate the trial court's orders.

Factual Background

On 10 March 2015, L.R. ("Leonard") who was 13-years-old at the time, was walking home from school with two friends and came upon a crowd of about twenty of his classmates. Marty, who was twelve-years-old at the time, along with D.T ("Daisy") and U.P. ("Ulrich") — who were also juveniles — were a part of the crowd.

Leonard's classmates circled around him and several of them told him that Marty wanted to fight him. One of Leonard's classmates threatened Leonard that if he did not fight Marty, they would "jump [him]."

Marty and Leonard exchanged combative words, and Leonard then proceeded to punch Marty in the face. After some sparring, Marty and Leonard stopped fighting, and then Ulrich suddenly attacked Leonard and began hitting him in the face.

Leonard attempted to escape and ran across the street. However, Ulrich chased him and hit him again, knocking him to the ground. After Leonard fell, other students surrounded him and began kicking him in the back and head. Leonard was able to identify Daisy and Ulrich as two of the assailants, but was unable to discern the identities of the other students who were battering him. Leonard did note,

though, that Marty did not hit him again after their initial fight on the other side of the street.

The incident ended when a friend of Leonard's father saw what was going on as he was driving by in his car. He broke up the fight and drove Leonard back to school.

Leonard had bruises on his back, scrapes on his knees and elbows, scratches on his arms and neck, and five to nine bumps on the back of his head. Leonard developed headaches and nausea shortly thereafter. His mother took him to the hospital later that day after picking him up from school where he was diagnosed with a "severe concussion."

On 30 March 2015, a juvenile petition was filed alleging that Marty was delinquent on the basis of having committed an assault inflicting serious injury. An adjudication hearing was held on 9 June 2015 before the Honorable J.H. Corpening, II in New Hanover County District Court.

Marty made a motion to dismiss at the close of the State's evidence, arguing that the State produced insufficient evidence of assault inflicting serious injury given that the evidence did not show that Marty had any further physical contact with Leonard after their initial confrontation. The trial court stated the following regarding Marty's motion:

> There is not enough evidence to -- to believe, even taking the evidence in the light most favorable to the State, that

> [Marty] was -- is -- could be found or adjudicated for assault, inflicting serious bodily injury. There is enough evidence to, I believe, that he could be adjudicated delinquent for simple affray.

The trial court subsequently adjudicated Marty delinquent for having committed the offense of simple affray.

That same day, a disposition hearing was held, wherein the trial court ordered that Marty be placed on supervised probation for nine months. The trial court entered its adjudication and disposition orders on 9 November 2015.

Analysis

I. Appellate Jurisdiction

As an initial matter, we must address whether we have jurisdiction over the present appeal. N.C. Gen. Stat. § 7B-2602 governs the appeal procedure in juvenile delinquency cases and provides, in pertinent part, that "[n]otice of appeal shall be given in open court at the time of the hearing or in writing within 10 days after entry of the order." N.C. Gen. Stat. § 7B-2602 (2015).

Here, despite the trial court disposing of the case at the 9 June 2015 adjudication and disposition hearings, the trial court did not actually enter its adjudication and disposition orders until 9 November 2015. Marty, however, filed a written notice of appeal on 12 August 2015 — approximately three months *before* entry of the trial court's orders. He did not file a subsequent notice of appeal after

the court entered its orders on 9 November 2015. Nevertheless, we conclude that Marty's written notice of appeal was proper.

In *State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012), our Supreme Court analyzed N.C.R. App. P. 4(a), which addresses the timeframe for giving notice of appeal in criminal cases and — like N.C. Gen. Stat. § 7B-2602 — provides for oral notice of appeal at trial or notice of appeal in writing after entry of a judgment or order. *Id.* at 268, 732 S.E.2d at 574. The Court held that "written notice may be filed at any time between the date of the rendition of the judgment or order and the fourteenth day after entry of the judgment or order." *Id.*

While *Oates* involved a criminal case rather than a juvenile delinquency proceeding, this Court often looks to criminal law to determine procedural issues in juvenile delinquency cases. *See In re P.Q.M.*, 232 N.C. App. 419, 423, 754 S.E.2d 431, 434 (2014) ("This Court has compared and analogized criminal statutes with juvenile statutes to resolve procedural issues."). Given that the present case was disposed of at the hearings held on 9 June 2015, Marty had from that date until ten days after the adjudication and disposition orders entered on 9 November 2015 in which to file a written notice of appeal. *See* N.C. Gen. Stat. § 7B-2602. As a result, his 12 August 2015 written notice of appeal was timely.[2]

[2] Out of an abundance of caution, Marty has filed a petition for writ of *certiorari* contemporaneously with the filing of his brief as an alternative basis for our review of his case. Given our conclusion that his notice of appeal was, in fact, proper, however, we deny his petition for writ of *certiorari* as moot.

II. Subject Matter Jurisdiction

Marty's sole argument on appeal is that the trial court lacked subject matter jurisdiction to adjudicate him delinquent based on the offense of simple affray where the juvenile petition only alleged assault inflicting serious injury. The State concedes the validity of Marty's argument, and we agree that the trial court's orders must be vacated.

A trial court gains subject matter jurisdiction through a valid indictment or juvenile petition, and a challenge to the court's jurisdiction may be raised for the first time on appeal. "[I]t is well established that fatal defects in an indictment or a juvenile petition are jurisdictional, and thus may be raised at any time. . . . Because juvenile petitions are generally held to the standards of a criminal indictment, we consider the requirements of the indictments of the offenses at issue." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 279-80 (2006) (citation and quotation marks omitted). "In order to sustain a conviction, an indictment needs to give [the] defendant sufficient notice of the charge against him, to enable him to prepare his defense, and to raise the bar of double jeopardy in the event he is again brought to trial for the same offense." *State v. Hutchings*, 139 N.C. App. 184, 190, 533 S.E.2d 258, 261 (citation and quotation marks omitted), *disc. review denied*, 353 N.C. 273, 546 S.E.2d 381 (2000); *see also In re Jones*, 135 N.C. App. 400, 403, 520 S.E.2d 787, 788 (1999) ("Notice must be given in juvenile proceedings which would be deemed

constitutionally adequate in a civil or criminal proceeding[.]" (citation and quotation marks omitted)).

An indictment must allege every element of an offense in order to confer jurisdiction on the court, and jurisdiction is conferred only over the crime charged or a lesser included offense. *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007), *disc. review denied*, 362 N.C. 367, 663 S.E.2d 432 (2008).

> [A]ll of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a definitional, not a factual basis.

State v. Weaver, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982) (emphasis omitted), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). Where a defendant is found guilty of a crime for which he was not charged, and which is not a lesser included offense of a crime actually charged, judgment must be arrested as no subject matter jurisdiction was conferred on the trial court. *Kelso*, 187 N.C. App. at 722, 654 S.E.2d at 31.

The elements of assault inflicting serious injury pursuant to N.C. Gen. Stat. § 14-33(c)(1) (2015) are: "(1) the commission of an assault on another, which (2) inflicts serious bodily injury." *In re C.B.*, 187 N.C. App. 803, 805, 654 S.E.2d 21, 23 (2007) (citation and quotation marks omitted). The offense of simple affray is defined by common law as (1) a fight between two or more persons, (2) in a public place, (3) so

as to cause terror to members of the public. *In re May*, 357 N.C. 423, 426, 584 S.E.2d 271, 274 (2003).

In the present case, it is apparent that all of the essential elements of the offense of simple affray are not essential elements of the offense of assault inflicting serious injury. As a result, Marty could not be adjudicated delinquent for having committed the offense of simple affray without a juvenile petition having been filed alleging that he committed that offense. No such juvenile petition was filed charging him with having committed the offense of simple affray, and the trial court therefore lacked subject matter jurisdiction to adjudicate him delinquent for committing that offense. By the same token, without a valid adjudication of delinquency, the trial court could not have entered a dispositional order on that basis. Therefore, because jurisdiction over the subject matter of a proceeding "cannot be conferred upon a court by consent, waiver or estoppel," the trial court's 9 November 2015 adjudication and disposition orders must be vacated and judgment arrested. *In re Peoples*, 296 N.C. 109, 144, 250 S.E.2d 890, 910 (1978), *cert. denied*, 442 U.S. 929, 61 L.Ed.2d 297 (1979); *Kelso*, 187 N.C. App. at 722, 654 S.E.2d at 31.

Conclusion

For the reasons stated above, we vacate the trial court's 9 November 2015 adjudication and disposition orders and arrest judgment.

VACATED.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).