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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-485

Filed: 15 November 2016

Cabarrus County, No. 11 JB 76

IN THE MATTER OF: J.M.C.

Appeal by Juvenile-Appellant from orders entered 11 September 2015, 25 September 2015, and 8 February 2016 by Judge D. Brent Cloninger in Cabarrus County District Court. Heard in the Court of Appeals 19 October 2016.

*Attorney General Roy Cooper, by Special Deputy Attorney General Stephanie A. Brennan, for the State.*

*Geeta N. Kapur, for the Juvenile-Appellant.*

HUNTER, JR., Robert N., Judge.

The trial court adjudicated Juvenile-Appellant (“James”)<sup>1</sup> delinquent on 11 September 2015. The trial court entered its disposition and commitment order on 25 September 2015. On 26 January 2016, James filed a petition for a writ of certiorari, seeking review of his adjudication and disposition. This Court granted James’ petition on 3 February 2016. The trial court entered an order denying James’ release pending his appeal on 8 February 2016.

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<sup>1</sup> “James” is the pseudonym used by the parties to protect the identity of the juvenile-appellant.

On appeal, James contends the trial court erred by: (1) denying his motion to dismiss the assault with a deadly weapon inflicting serious injury charge; (2) failing to make findings of fact in compliance with N.C. Gen. Stat. § 7B-2501 in its disposition order; and (3) failing to address James’ release pending appeal, as mandated by N.C. Gen. Stat. § 7B-2605.

We affirm the trial court’s denial of James’ motion to dismiss. Because we agree with James’ second assignment of error—that the trial court failed to make the required findings of facts—we remand to the trial court for further findings of fact as to disposition. We need not reach the merits of James’ third assignment of error and dismiss that part of his appeal.

### **I. Factual and Procedural History**

On 4 February 2015, the Department of Juvenile Justice and Delinquency Prevention (“the Department”) filed a juvenile petition against James, alleging James willfully injured the personal property of another. On 12 March 2015, the Department filed another petition against James, alleging James assaulted Patrick<sup>2</sup> with a deadly weapon inflicting serious injury.

On 11 September 2015, the trial court held an adjudication hearing for the allegations against James. The State dismissed the injury to personal property charge. James pled not guilty to the assault with a deadly weapon inflicting serious

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<sup>2</sup> It is unclear from the record whether the victim is a juvenile. Regardless, “Patrick” is the pseudonym used by the parties to protect the victim’s identity.

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injury charge. The State proceeded with the assault with a deadly weapon inflicting serious injury charge against James. The State's evidence tended to show the following.

First, the State called Chris Smith, a detective with the Concord Police Department. Detective Smith was working off-duty at the emergency department of CMC NorthEast on 14 February 2015. After Patrick arrived at the emergency room, Detective Smith spoke with Patrick. Patrick, through his family members, informed Detective Smith the stabbing occurred at Sabor Latino, a bar. Then, Detective Smith sent officers to the bar. Officer Hancock brought a videotape from Sabor Latino to Detective Smith at the hospital. Detective Smith viewed the videotape and recognized James as the attacker. Based on his identification, Detective Smith sought a juvenile petition against James.

On 13 March 2015, Detective Smith spoke with James. Detective Smith read James his rights, and James signed a statement waiving said rights. James' signed statement disclosed James was at Sabor Latino "about a month" before the stabbing but was kicked out of the bar for being too young.

The State next called Patrick as its witness. Patrick stated he was at Sabor Latino the night of 14 February 2015. Patrick arrived around nine o'clock that evening and drank "a few" beers and did "about three" tequila shots. Around 2:30 the next morning, Patrick went outside to use the restroom. As Patrick tried to re-enter

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the bar, he touched James' arm. When Patrick touched James' arm, James became upset and "attack[ed]" Patrick with a knife. James stabbed Patrick on Patrick's head and back. After the stabbing, Patrick went to CMC NorthEast, where he stayed for about four to five hours. At the hospital, officers showed Patrick the videotape from Sabor Latino, and Patrick identified James as his attacker.

During Patrick's testimony, the trial court admitted the videotape from Sabor Latino solely for the purpose of illustrating Patrick's testimony. In court, Patrick showed scars on his head and right shoulder blade from the stabbing. Patrick stated the knife used was about a foot long. Additionally, Patrick identified James in court as the person who stabbed him.

The State rested its case, and James moved to dismiss the charge, claiming the identification of James as the perpetrator was insufficient. Specifically, James' attorney focused on "unreliable witness testimony" due to Patrick's drinking the night of the stabbing and the inconsistencies in Patrick's testimony. Additionally, James' attorney contended Patrick's identification of James was unreliable, as Patrick had not seen James before the stabbing and was not given an opportunity to identify James as his attacker until court. Counsel also contended Detective Smith's identification of James was insufficient and argued the identification was unreliable because it was from a video. Counsel summed up his argument for dismissal as "I think in the light most favorable to the State, they haven't met their burden of being

able to identify [James] as the person who committed this crime.” The trial court denied James’ motion.

James called four alibi witnesses.

First, James called Arlet Andaya, James’ brother’s girlfriend. Andaya testified she was at home with James’ brother, Christian Herrera, on the evening of 14 February 2015. The doorbell woke up both Andaya and Herrera. Herrera’s mother, Felicitas Calleia, told Christian someone at the door looking for him. Andaya heard Herrera speak with Edward Medina<sup>3</sup> and then Herrera came back in the room and got dressed to leave. Andaya stated James was home on the evening of 14 February 2015. Andaya was sleeping in Herrera’s room, but had left in the late evening to use the restroom. When Andaya walked to the restroom, she saw James sleeping in his bed in the living room.

James next called his mother, Felicitas Calleia. On 14 February 2015, Calleia was at home sleeping. In the early morning of 15 February 2015, she awoke to go use the restroom and heard the doorbell ring. On her way to the front door, she saw James sleeping in the living room.

Christian Herrera, James’ brother, also testified on James’ behalf. On 14 February 2015, Herrera was at home. Herrera saw James go to bed around ten or eleven that evening. Around three or four o’clock in the morning, a close friend,

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<sup>3</sup> The witnesses and counsel also referred to Edward Medina as “Edwin Medina” at the hearing. Medina did not testify at the hearing.

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Edward Medina, came to Herrera's home and woke Herrera up. When Herrera went to see his friend at the door, Herrera saw James still sleeping in the living room. James also woke up to see who was at the door. Thereafter, Herrera spoke with Detective Smith and informed Smith that Medina attacked Patrick, not James. Medina had confessed to Herrera, and Herrera saw blood on Medina's hands when Medina visited Herrera's home.

Lastly, James testified as to the events on 14 February and 15 February 2015. James went to bed around ten or eleven o'clock on 14 February 2015. Around three a.m. on 15 February 2015, James woke up to "a lot of banging and ringing [of] the door[bell]." James looked up from his bed and saw Medina at the door. Medina had blood in his hands, and also left blood on the door. James heard a conversation between Herrera and Medina, but James did not know what happened after the conversation because he went back to sleep. James did not leave the house from ten or eleven p.m. on 14 February 2015 to three a.m. on 15 February 2015. Further, James did not go to Sabor Latino at all on 15 February 2015. James also testified he did not know Patrick, and had never seen Patrick before. Although James visited Sabor Latino before, the visits were only to purchase food.

The defense rested and renewed its motion to dismiss. James' counsel again argued the State could not prove James was the person who stabbed Patrick. Counsel argued Patrick's testimony was unreliable and inconsistent. Counsel further argued

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Detective Smith's identification was insufficient since it was based off of a videotape that does not even show the attacker's face. Counsel focused on James' four alibi witnesses, all of whom placed James at home sleeping during the attack. In conclusion of the motion to dismiss, James' counsel said, "[W]e're not contesting that this person or the victim was stabbed, that a crime was committed. I'm just saying that I don't think that the State has proven beyond a reasonable doubt that this is the person who did it."

The trial court adjudicated James delinquent in regards to the assault with a deadly weapon inflicting serious injury charge. That same day, the trial court entered an adjudication order for the charge. James orally gave notice of appeal.

On 25 September 2015, the trial court held a commitment hearing. Both sides presented arguments concerning disposition, and the Department submitted a recommendation. The trial court asked James' counsel if counsel had discussed the length of commitment with James. James' counsel replied, "I have, Your Honor, and I've told him, you know, the positive and the negative with regards to the outcome depends a lot on his behavior. I think he's understanding that more[,] and I think you'll see that from the report you just got." The court accepted the recommendations of the Department and ordered secure detention.

That same day, the trial court entered a disposition and commitment order. In that order, the trial court checked a box indicating it found "juvenile has been

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adjudicated for a violent or serious offense and Level III is authorized . . . .” The trial court also checked boxes indicating it received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment. Those reports were not attached to the disposition and commitment order. The written order provided James was to be confined to a youth development center for an indefinite commitment.

James’ initial notice of appeal from the adjudication and disposition and commitment orders was deficient. On 26 January 2016, James filed a petition seeking a writ of certiorari for appellate review of the adjudication and disposition and commitment orders. On 3 February 2016, this Court granted the writ of certiorari. The order stated “The petition for writ of certiorari . . . is allowed for the purpose of reviewing the ‘Juvenile Adjudication Order’ and ‘Juvenile Level 3 Disposition and Commitment Order’ entered by Judge D. Brent Cloninger on 11 and 25 September 2015.” This Court directed the trial court to determine whether James was “entitled to appointment or reappointment of counsel and to release pending appeal pursuant to N.C. Gen. Stat. [§] 7B-2605 (2013).”

On 8 February 2016, the trial court entered its appellate entries. On the appellate entry form, Box Two indicates the juvenile should be released pursuant to N.C. Gen. Stat. § 7B-2605. Box Three indicates release of the juvenile is denied, and there is a blank for the court to list compelling reasons for the denial of release. The



trial court did not check either box. James did not file a notice of appeal or a petition seeking a writ of certiorari from the appellate entries.

## II. Standard of Review

First, regarding the motion to dismiss, “[t]his Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). “Where the juvenile moves to dismiss, the trial court must determine ‘whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile] being the perpetrator of such offense.’” *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). “Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion.” *In re S.R.S.*, 180 N.C. App. 151, 156, 636 S.E.2d 277, 281 (2006) (citation omitted). “When reviewing a motion to dismiss a juvenile petition, courts must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference of fact that may be drawn from the evidence.” *In re S.M.S.*, 196 N.C. App. 170, 172, 675 S.E.2d 44, 45 (2009) (citing *In re Brown*, 150 N.C. App. 127, 129, 562 S.E.2d 583, 585 (2002)).

Second, in regards to the statutory mandates, “failure to follow a statutory mandate is a question of law.” *In re G.C.*, 230 N.C. App. 511, 516, 750 S.E.2d 548, 551 (2013) (citing *State v. Ashe*, 314 N.C. 28, 29, 331 S.E.2d 652, 659 (1985)).

“Conclusions of law are reviewed de novo and are subject to full review.” *Id.* at 516, 750 S.E.2d at 551 (citation omitted).

### **III. Analysis**

We review James’ contentions in three parts: (A) the motion to dismiss; (B) findings of fact required by N.C. Gen. Stat. § 7B-2501(c); and (C) release pending appeal.

#### **A. Motion to Dismiss**

On appeal, James contends the trial court erred by denying his motion to dismiss the juvenile petition for insufficient evidence. We disagree, as there was ample evidence in the record to support a finding James perpetrated the attack on Patrick.

A motion to dismiss should be allowed if the evidence is sufficient only to raise a suspicion or conjecture as to the identity of the juvenile as the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citation omitted). Upon a motion to dismiss, “the trial court does not resolve issues of witness credibility, but is only concerned with the sufficiency of the evidence.” *State v. Burton*, 224 N.C. App. 120, 125, 735 S.E.2d 400, 405 (2012) (citing *State v. Ellis*, 168 N.C. App. 651, 657, 608 S.E.2d 803, 807 (2005)).

At the hearing, the State presented the following evidence in support of James being the perpetrator. After viewing videotape from Sabor Latino, Detective Smith

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recognized James as the attacker. Patrick also viewed the videotape from Sabor Latino and identified James as his attacker. Additionally, Patrick identified James in court as his attacker. James presented alibi evidence and testified he was at home the night of the attack. However, in a motion to dismiss, all contradictions are resolved in favor of the State.

As such, we conclude there was sufficient evidence to show James was the perpetrator. Accordingly, the trial court did not err in denying James' motion to dismiss.

**B. N.C. Gen. Stat. § 7B-2501(c) Findings of Fact**

James also argues the trial court failed to enter its disposition in accordance with N.C. Gen. Stat. § 7B-2501 because the trial court did not address certain factors required by the statute. We agree and remand to the trial court for further findings of fact as to disposition.

After an adjudication, the trial courts are tasked with “select[ing] the most appropriate disposition both in terms of kind and duration for the delinquent juvenile.” N.C. Gen. Stat. § 7B-2501(c) (2015). Specifically, “the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile . . . .” N.C. Gen. Stat. § 7B-2501(c). When selecting a disposition, the trial court shall base its decision upon the following factors:

- (1) The seriousness of the offense;
- (2) The need to hold the juvenile accountable;

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- (3) The importance of protecting the public safety;
- (4) The degree of culpability indicated by the circumstances of the particular case; and
- (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c).

“At the conclusion of the dispositional hearing, the trial court must enter a written dispositional order that ‘shall contain the appropriate findings of fact and conclusions of law.’” *In re J.J.*, 216 N.C. App. 366, 373, 717 S.E.2d 59, 64 (2011) (quoting N.C. Gen. Stat. § 7B-2512 (2009)). This Court in *In re Ferrell*, 162 N.C. App. 175, 177, 589 S.E.2d 894, 895 (2004), held the trial court is required to make findings demonstrating that it considered the section 7B-2501(c) factors in a dispositional order entered in a juvenile delinquency matter. *See also In re V.M.*, 211 N.C. App. 389, 391-92, 712 S.E.2d 213, 215-16 (2011). “[I]n determining compliance with [section 7B-2501(c),] our review is not limited to the findings of fact on the pre-printed AOC form, but rather we may look, in addition, to reports and assessments incorporated by reference in the order and statements and testimony at the hearing.” *In re T.L.M.*, 787 S.E.2d 464, 2016 WL 2648510, at \*5 (2016) (unpublished).

James does not challenge the appropriateness of the disposition imposed on him by the trial court. James simply contends the trial court failed to enter appropriate written findings of fact in its dispositional order.

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The State argues the trial court properly considered the section 2501(c) factors for the following reasons: First, in the disposition and commitment order's pre-printed fields, the trial court found James was adjudicated delinquent for assault with a deadly weapon inflicting serious injury, a class E felony. Second, the trial court made specific findings regarding James' prior juvenile adjudications. Third, "[t]he trial court indicated that it had received and considered a predisposition report, risk assessment, and needs assessment for the juvenile, and these reports were incorporated into the trial court's order by reference." Fourth, the trial court made comments in open court regarding James' opportunity to pursue an educational program.

In the present case, the trial court's dispositional order does not contain findings exactly addressing the section 7B-2501(c) factors. As highlighted by the State, in the pre-printed portions of the dispositional order, the trial court found the following: (1) James committed assault with a deadly weapon inflicting serious injury; (2) James had been adjudicated delinquent three times prior; (3) the Court received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment; and (4) James had been adjudicated for a violent or serious offense and was a Level III offender.

However, the trial court's order contains no additional findings of fact regarding the section 7B-2501(c) factors. Notably, the trial court left the "Other

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Findings” section in the pre-printed order blank. The “Other Findings” section includes the following instructions tailored to the section 7B-2501(c) factors: “*State any findings regarding the seriousness of the offense(s)[,] the need to hold the juvenile accountable, the importance of protecting the public, the degree of the juvenile’s culpability[,]* the juvenile’s rehabilitative and treatment needs and available and appropriate resources.” Also at the hearing, the trial court and counsel discussed a juvenile detention center behavioral report. However, neither that report, nor the reports and assessments incorporated by the trial court, were supplied in the record on appeal.

We find evidence of the trial court properly considering the first section 7B-2501(c) factor, the seriousness of the offense. In the disposition and commitment order, the trial court found the following: James committed assault with a deadly weapon inflicting serious injury, and “[t]he juvenile has been adjudicated for a violent or serious offense . . . .”

However, the order is void of any findings regarding to the second section 7B-2501(c) factor, the need to hold James accountable. Although the order discusses James’ prior adjudications, the discussion does not constitute a finding by the trial court that James needs to currently be held accountable. The disposition and commitment order also lacks findings addressing the third and fourth section 2501(c) factors, the importance of protecting the public safety and degree of culpability

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indicated by the circumstances of that particular case. Lastly, there are no findings addressing the fifth section 2501(c) factor, the rehabilitative and treatment needs of the juvenile. Although the trial court discussed James' involvement in an educational program at the hearing, the open court discussion fails to meet the requirement of section 7B-2501(c), which requires *written* findings for the factors.

In sum, the findings in the disposition and commitment order are insufficient to meet the requirements of N.C. Gen. Stat. § 7B-2501(c), which requires findings to allow this Court to determine whether the trial court considered *all* of the section 7B-2501(c) factors. The only section 7B-2501(c) factor addressed in the disposition and commitment order is the first factor. The trial court failed to address factors two through five.

Although the trial court incorporated other reports, which may have included the required findings, those reports were not supplied to our Court. Thus, we are unable to discern the findings in those reports. Further, the trial court's comments at the hearing regarding James' educational program do not salvage the deficient order, as the Juvenile Code requires section 2501(c) factors to be included in the written order. Accordingly, we hold the trial court erred in failing to include the requisite findings of fact in its disposition and commitment order and remand to the trial court for further findings of fact as to disposition.

**C. Release Pending Appeal**

James contends the trial court failed to either release James pending appeal or enter compelling reasons for denying release.

N.C. Gen. Stat. § 7B-2602 governs the appeal procedure in juvenile delinquency cases and provides, in pertinent part, “[n]otice of appeal shall be given in open court at the time of the hearing or in writing within 10 days after the entry of the order.” N.C. Gen. Stat. § 7B-2602. “It is well established that ‘[f]ailure to give timely notice of appeal . . . is jurisdictional, and an untimely attempt to appeal must be dismissed.’” *In re A.L.*, 166 N.C. App. 276, 277, 601 S.E.2d 538, 538 (2004) (quoting *In re Lynette H.*, 323 N.C. 598, 602, 374 S.E.2d 272, 274 (1988)).

Before we can address the merits of James’ argument, this Court must have jurisdiction. The trial court entered its appellate entries order on 8 February 2016. There is neither notice of appeal from the appellate entry in the record, nor was there notice of appeal in open court. Although James successfully petitioned this Court for a writ of certiorari, the order granting certiorari stated “The petition for writ of certiorari . . . is allowed for the purpose of reviewing the ‘Juvenile Adjudication Order’ and ‘Juvenile Level 3 Disposition and Commitment Order’ entered by Judge D. Brent Cloninger on 11 and 25 September 2015.” Thus, the grant of certiorari did not extend to the appellate entries.



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Since nothing in the record indicates the order was properly appealed, we must conclude we have no jurisdiction to review this matter. Accordingly, we dismiss this issue on appeal.

**IV. Conclusion**

For the foregoing reasons, we affirm the trial court's denial of James' motion to dismiss. We agree with James' second assignment of error and remand to the trial court for further findings of fact as to disposition. We dismiss James' argument pertaining to his release pending appeal because he failed to give proper notice of appeal.

AFFIRMED IN PART; REMANDED IN PART; DISMISSED IN PART.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).