

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-648

Filed: 17 July 2018

Buncombe County, No. 16 JB 315

IN THE MATTER OF: T.T.E.

Appeal by juvenile from adjudication and disposition entered 27 February 2017 by Judge Susan M. Dotson-Smith in District Court, Buncombe County. Heard in the Court of Appeals 13 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Janelle E. Varley, for the State.

Morgan & Carter PLLC, by Michelle F. Lynch, for juvenile-appellant.

STROUD, Judge.

Juvenile appeals adjudication and disposition orders for disorderly conduct and resisting a public officer. Because there was insufficient evidence to support the adjudication for either offense, we vacate the juvenile court's adjudication and disposition orders.

I. Background

On 8 November 2016, a JUVENILE PETITION (DELINQUENT) was filed alleging juvenile had engaged in disorderly conduct and resisting a public officer. The

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State called two witnesses to testify. The primary witness was the school resource officer, Mickey Ray. Officer Ray testified he saw the juvenile throw a chair in the cafeteria. No one was hit with the chair and the officer testified “I didn’t see anybody, you know, around that could have been hit by the chair.” After throwing the chair, juvenile ran out of the cafeteria; the officer followed and without calling out to juvenile, grabbed him from behind. Juvenile initially cursed when Officer Ray caught him and then told him he was playing with his brother. The district court adjudicated the juvenile as delinquent for disorderly conduct and resisting a public officer. Juvenile appeals.

II. Petition for Disorderly Conduct

Juvenile first contends that his petition for disorderly conduct under North Carolina General Statute § 14-288.4 was defective because it is not clear which subsection of this statute he violated. The State contends it is “clear” it was proceeding under North Carolina General Statute § 14-288.4(a)(1): “Because the charging language so closely tracks the statutory language of § 14-288.4(a)(1), the petition was sufficiently clear and provided the juvenile with adequate notice of the charged offense and the conduct which was the subject of the allegation.” We need not address juvenile’s argument regarding the petition because he will prevail on his second argument regarding his motion to dismiss. But we also note that based upon the State’s argument that only North Carolina General Statute § 14-288.4(a)(1)

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applies, we will analyze the motion to dismiss for disorderly conduct under the elements of that subsection only.

III. Motion to Dismiss

Juvenile argues the trial court erred in denying his motion to dismiss both of the charges against him due to the insufficiency of the evidence.¹ “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’s being the perpetrator of such offense.” *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (citation, quotation marks, ellipses, and brackets omitted).

In reviewing a challenge to the sufficiency of evidence, it is not our duty to weigh the evidence, but to 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.

Id. at 29, 550 S.E.2d at 819.

A. Disorderly Conduct

Juvenile contends the trial court erred in denying his motion to dismiss due to the insufficiency of the evidence. North Carolina General Statute § 14-288.4(a)(1) provides that “[d]isorderly conduct is a public disturbance intentionally caused by

¹ The State contends juvenile did not preserve his argument to challenge the disorderly conduct adjudication when his motion to dismiss was for “no evidence of a disruption caused by” juvenile. We disagree because the sufficiency of the evidence was plainly raised in juvenile’s attorney’s motion despite use of the word “disruption” instead of “disorderly conduct.”

any person who . . . [e]ngages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence.” N.C. Gen. Stat. § 14-288.4(a)(1) (2015). The State’s argument focuses on the general definition of a “public disturbance” in North Carolina General Statute § 14-288.1:

- (8) Public disturbance.-- Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

N.C. Gen. Stat. § 14-288.1(8) (2015).

The State does not cite any cases interpreting or discussing North Carolina General Statute § 14-288.1(8) or -288.4(a)(1). Not surprisingly, the issue in several of the cases addressing the specific subsections of North Carolina General Statute § 14-288.4 is whether the statute is unconstitutionally vague as many things could be considered “annoying, disturbing, or alarming” by one person but not by another. *See, e.g., State v. Orange*, 22 N.C. App. 220, 223, 206 S.E.2d 377, 379 (1974) (“Defendant does contend that G.S. 14—288.4(a)(2) is unconstitutionally vague under the First Amendment.”); *State v. Clark*, 22 N.C. App. 81, 87, 206 S.E.2d 252, 256 (1974) (“Defendant also argues that section (a)(2) of G.S. 14—288.4, as amended in 1971, is

unconstitutionally vague and overbroad.”). But in *State v. Strickland*, 27 N.C. App. 40, 42-43, 217 S.E.2d 758, 759-60 (1975), this Court determined that although North Carolina General Statute § 14-288.1(8) -- the definition of “public disturbance” -- may be unconstitutionally vague standing alone, it must be read in conjunction with the specific acts which constitute a “public disturbance” under North Carolina General Statute § 14-288.4, and when considered together, the statute is not unconstitutionally vague:

The statute, G.S. 14—288.4(a), initially defines disorderly conduct in general terms as a public disturbance and then sets forth in subsequent subsections specific examples of conduct which is prohibited as disorderly conduct. It is a rule of construction, that when words of general import are used, and immediately following and relating to the same subject words of a particular or restricted import are found, the latter shall operate to limit and restrict the former. *In order to ascertain what actions are violative of the statute as constituting disorderly conduct, one must look, not to the general definition of public disturbance, but to the specific examples of prohibited conduct as set forth in the subsections of the statute itself.*

Id. at 43, 217 S.E.2d at 760 (emphasis added) (citations and quotation marks omitted). In fact, the State focuses on the portion of the definition in North Carolina General Statute § 14-288.1(8) which the *Strickland* Court “assum[ed] *arguendo*” was “unconstitutionally vague” and ignores the part of the statute which renders it constitutional, which is the additional detail regarding prohibited acts provided in North Carolina General Statute § 14—288.4(a)(4). *Id.*

Here, under North Carolina General Statute § 14-288.4(a)(1) the State must present evidence that the juvenile engaged in:

1. “fighting *or*”
2. “other violent conduct *or*”
3. “conduct creating the threat of imminent fighting or other violence”

N.C. Gen. Stat. § 14-288.4(a)(1). There was no evidence that the juvenile was “fighting” with anyone, so the only question before this Court is whether there was evidence of “other violent conduct or . . . conduct creating the threat of imminent fighting or other violence.” *Id.* The State argues based almost entirely on the language of the general definition of “public disturbance” in North Carolina General Statute § 14-288.1(8) that “throwing a chair at another student is arguably an alarming act that exceeds the bounds of what is normally tolerated in a school cafeteria.” The State contends the evidence shows “arguably violent conduct” because *if* the juvenile had thrown the chair at another student and *if* it hit them, “it presumably would have hurt them.”

Although we view the evidence in the light most favorable to the State, *see Heil*, 145 N.C. App. at 29, 550 S.E.2d at 819, we do not go so far as to come up with hypothetical events that could have happened if juvenile actually did something in addition to what the actual evidence shows. Since the State does not address the elements of North Carolina General Statute § 14-288.4(a)(1) directly, it does not note

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any evidence which shows “violent conduct” or “conduct creating the threat of imminent fighting or other violence[,]” but that omission is likely because there is no such evidence. N.C. Gen. Stat. § 14-288.4(a)(1). In fact, the officer was specifically asked if he thought juvenile “was playing, or did it seem like something that was a little more violent?” to which he responded, “I couldn’t really tell[.]” The State simply asks we infer too much from the evidence it presented.

The evidence was not sufficient to show that the juvenile fought, engaged in violent conduct, or created an imminent risk of fighting or other violence. *See id.* Although there were other students in the cafeteria – a very large room – when the juvenile threw a chair, no other person was nearby, nor did the chair hit a table or another chair or anything else. Juvenile then ran out of the cafeteria. This is not “violent conduct or . . . conduct creating the threat of imminent fighting or other violence.” *Id.* No one was hurt or threatened during the event and juvenile did not escalate the situation by yelling, throwing other things, raising fists, or other such conduct that along with the throwing of the chair could be construed to indicate escalating violent behavior. Throwing a single chair with no other person nearby and without attempting to hit another person and without hitting even any other item in the cafeteria is not disorderly conduct as defined by North Carolina General Statute § 14-288.4(a)(1). We vacate juvenile’s adjudication and disposition for disorderly conduct.

B. Resisting a Public Officer

Juvenile also contends there was insufficient evidence he resisted a public officer. To adjudicate a juvenile for resisting a public officer there must be evidence:

- (1) that the victim was a public officer;
- (2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
- (3) that the victim was discharging or attempting to discharge a duty of his office;
- (4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
- (5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Dammons, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (2001); see N.C. Gen. Stat. § 14-223 (2015).

There is no dispute that Officer Ray was a public officer discharging a duty of his office. But the evidence does not support the remaining elements of North Carolina General Statute § 14-223. See generally *Dammons*, 159 N.C. App. at 294, 583 S.E.2d at 612. Officer Ray testified he never told juvenile to stop before he grabbed him by the shirt from behind. Officer Ray specifically testified that he “kind of, snuck up on him” and then grabbed juvenile by his shirt. Officer Ray was cross-examined on this point:

Q. Deputy Ray, in your earlier testimony, you say that you snuck up on . . . [juvenile], correct?

A. I was, kind of, being sleek about it.

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Q. And you did so, because you didn't want him to not come with you, correct?

A. Yes, ma'am.

Q. So at any point before you decided -- before you grabbed him by the shirt, did you talk to him and explain to him why you were behind him?

A. No, ma'am.

Officer Ray never asked the juvenile to stop and intentionally snuck up on juvenile; the uncontroverted evidence shows juvenile was suddenly grabbed without any way of knowing who was grabbing him. Thus, the juvenile did not know or have "reasonable grounds to believe that the victim was a public officer" until *after* Officer Ray stopped him and he saw that it was a police officer who grabbed him, not another student. *Id.*

There is also no evidence that juvenile "resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office[.]" *Id.* After juvenile saw that Officer Ray was the person who grabbed him, he did not hit, fight, or physically engage with the officer. While the State focuses on the fact that the juvenile yelled "no" and cursed when the officer grabbed him, his language does not rise to the level of a violation of North Carolina General Statute § 14-223, particularly as his statements appear to have been made when he was grabbed and before he knew who was grabbing him from behind:

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Merely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer;

Vague, intemperate language used without apparent purpose is not sufficient.

The Supreme Court of the United States has said that:

Although force or threatened force is not always an indispensable ingredient of the offense of interfering with an officer in the discharge of his duties, mere remonstrances or even criticisms of an officer are not usually held to be the equivalent of unlawful interference.

State v. Allen, 14 N.C. App. 485, 491–92, 188 S.E.2d 568, 573 (1972) (citations, quotation marks, ellipses, and brackets omitted).

In addition, the evidence does not show that by saying “no” and cursing, juvenile “acted willfully and unlawfully, that is intentionally and without justification or excuse.” *Dammons*, 159 N.C. App. at 294, 583 S.E.2d at 612. Most people would probably have some sort of similar reaction if grabbed from behind without knowing who was grabbing them. The State’s other witness, Mr. Tate McQueen – teacher and soccer coach at the school – testified that during the ordeal,

there was a lot of adrenaline, and you know, after things settled down into the conference room, *he was remarkably calm at that point. And he was very respectful in the conference room*, once everything calmed down. I think in the moment with everybody watching him, and how that can play a role in the way young people behave, I think once he was calming down in that environment, it settled down. It was between the point of where I came around the corner

and saw that part, *it was probably, maybe a minute-and-a-half, maybe.*

(Emphasis added.) Within less than two minutes after being “snuck up on” and grabbed from behind, juvenile was “remarkably calm” and “very respectful[.]” Again, even considering the evidence in the light most favorable to the State, *see Heil*, 145 N.C. App. at 29, 550 S.E.2d at 819, the facts do not indicate resisting an officer. We vacate juvenile’s adjudication and disposition for resisting a public officer.

IV. Conclusion

Because the State did not present sufficient evidence of disorderly conduct and resisting a public officer, we vacate the adjudication and disposition orders.

VACATED.

Judge ZACHARY concurs.

Judge ARROWOOD concurs in part and dissents in part.

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ARROWOOD, Judge, concurring in part and dissenting in part.

I concur in the majority’s opinion that there was insufficient evidence to support juvenile’s adjudication for resisting a public officer. However, I respectfully dissent from the majority’s holding that there was insufficient evidence to support the adjudication for disorderly conduct.

At the outset, juvenile argues that his petition for disorderly conduct under N.C. Gen. Stat. § 14-288.4 was defective because it is not clear which subsection of the statute he was charged with violating. The majority did not address this argument because it held that juvenile prevailed on his second argument – that there was insufficient evidence of disorderly conduct. Because I disagree with this holding, I address the jurisdictional argument.

“[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.” *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 279-80 (2006) (citations omitted). “When a petition is fatally deficient it . . . fails to evoke the jurisdiction of the court.” *Id.* at 153, 636 S.E.2d at 280 (citations and internal quotation marks omitted). A juvenile petition in a juvenile delinquency 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.” *Id.* (citation and internal quotation marks omitted).

The petition at issue alleged juvenile violated N.C. Gen. Stat. § 14-288.4 when he “did intentionally cause a public disturbance at Clyde A. Erwin High School, Buncombe County NC, by engaging in violent conduct. This conduct consisted of throwing a chair toward another student in the school’s cafeteria.” Because this language closely tracks the statutory language of N.C. Gen. Stat. § 14-288.4(a)(1), “[d]isorderly conduct is a public disturbance intentionally caused by any person who . . . [e]ngages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence[,]” and the petition lists the offense as N.C. Gen. Stat. § 14-288.4, I would hold that, based on the totality of the circumstances, the petition averred the charge with sufficient specificity that juvenile was clearly apprised of the conduct for which he was charged. *See State v. Simpson*, 235 N.C. App. 398, 402-403, 763 S.E.2d 1, 4-5 (2014) (holding an indictment was not fatally defective even though it did not list which subsection of a statute the defendant was charged with violating because it was clear from the indictment which subsection was charged). Therefore, the petition was not fatally defective, and the trial court had jurisdiction to enter the adjudication and disposition orders against juvenile.

Next, juvenile argues, and the majority opinion agrees, that the trial court erred by denying juvenile’s motion to dismiss the charge of disorderly conduct for insufficiency of the evidence. I disagree.

ARROWOOD, J., concurring in part and dissenting in part

“We review a trial court’s denial of a [juvenile’s] motion to dismiss *de novo*.” *In re S.M.S.*, 196 N.C. App. 170, 171, 675 S.E.2d 44, 45 (2009) (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’s] being the perpetrator of such offense.” *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (citation and internal quotation marks omitted) (alterations in original). “The evidence must be such that, when it is viewed in the light most favorable to the State, it is sufficient to raise more than a suspicion or possibility of the respondent’s guilt.” *In re Walker*, 83 N.C. App. 46, 48, 348 S.E.2d 823, 824 (1986) (citation omitted).

Here, the State’s evidence tended to show that juvenile lifted a chair and threw it across the cafeteria at his brother and then fled the scene. Despite this evidence, juvenile argues that the State did not put forth sufficient evidence of disorderly conduct because it did not present substantial evidence (1) that he caused a public disturbance or (2) that he engaged in “fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence[.]” as required under N.C. Gen. Stat. § 14-288.4(a)(1). A public disturbance under N.C. Gen. Stat. § 14-288.4(a)(1) is:

Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect

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persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

N.C. Gen. Stat. § 14-288.1(8) (2017). The statute does not define “violent conduct.”

See N.C. Gen. Stat. § 14-288.1.

Here, the State’s evidence that juvenile threw a chair at another student was substantial evidence of a public disturbance under the statute as an act that was alarming or exceeded the bounds of social toleration. However, “[i]n order to ascertain what actions are violative of the statute as constituting ‘disorderly conduct,’ one must look, not to the general definition of ‘public disturbance,’ but to the specific examples of prohibited conduct as set forth in the subsections of the statute itself.” *State v. Strickland*, 27 N.C. App. 40, 43, 217 S.E.2d 758, 760, *appeal dismissed*, 288 N.C. 512, 219 S.E.2d 348 (1975). Therefore, at issue here is whether the State put forth substantial evidence that juvenile engaged in violent conduct. The majority agrees with juvenile that this evidence was not sufficient to show that juvenile engaged in violent conduct under N.C. Gen. Stat. § 14-288.4(a)(1). Therefore, the majority vacated the adjudication and disposition order as to this charge. I disagree.

I would hold that, viewing this evidence in the light most favorable to the State, the safety resource officer’s testimony that juvenile threw a chair, which the juvenile admitted he was throwing at another student, his brother, provided substantial

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evidence of violent conduct, from which the trial court could reasonably determine that juvenile's act of throwing a chair at another student amounted to violent conduct. Accordingly, I would find no error in the trial court's denial of juvenile's motion to dismiss the disorderly conduct charge.