

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Walsh County District Court No. 09-R-90
Supreme Court No. 20100267

In the Interest of T.B., a Child)
-----)
State of North Dakota,)
)
Petitioner and Appellee,)
)
v.)
)
T.B., said child,)
G.B., father of said child,)
C.W., mother of said child,)
R.W., guardian of said child,)
)
Respondents,)
-----)
T.B., said child,)
)
Respondent and Appellant.)

BRIEF OF APPELLANT T.B.

Appeal from Findings and Order of Juvenile Court Referee
Dated April 5, 2010, and the De Novo Review of the
Adjudicatory Proceedings and Order Adopting Findings of
District Court Referee, Dated June 10, 2010

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1. STATEMENT OF PROCEEDINGS:
2. On December 15, 2009, a Petition was filed in Walsh County Juvenile Court against T.B., alleging the delinquent acts of Burglary, Aggravated Assault and Robbery.
3. On March 25, 2010, an Amended Petition was filed, alleging the same delinquent acts.
4. On April 1, 2010, a disposition hearing was held on the petition, before the Juvenile Court Referee, the Honorable Dale A. Thompson. Referee Thompson entered his Findings and Order, finding that T.B. had committed only the delinquent act of Aggravated Assault-Accomplice.
5. On April 12, 2010, T.B. filed a Request for Judicial Review. On June 10, 2010, the Honorable M. Richard Geiger, District Judge, issued his De Novo Review of Adjudicatory Proceedings and Order Adopting Findings of District Court Referee.
6. On August 1, 2010, T.B. filed a Notice of Appeal to the North Dakota Supreme Court.
7. STATEMENT OF FACTS:
8. On November 27, 2009, Wayne Skaro ("Skaro") was at the home of Brad and Greg Reilly in Grafton, North Dakota. (Tr.p. 4, ll. 3-24). Skaro and the Reilly's had been drinking earlier in the evening of November 26 and had retired early. (Tr.p.5, ll 18-25). Skaro slept on the couch in the living room. (Tr.p. 6, ll. 3-6). Greg was in the bedroom and Brad was in the basement bedroom. (Tr.p. 6, ll. 7-10).

9. Around midnight on November 27, there was a knock at the door. (Tr.p. 6, ll. 17-20). A knock occurred on the window. Skaro got up, looked outside, and saw Judd Welsch. (Tr.p. 6, ll. 22-25; p. 7, l. 1). Judd and two others, unknown to Skaro, entered the house. (Tr.p. 7, ll. 3-11). One of the others went into the bedroom with Greg. Greg called out for Brad. (Tr.p.7., ll 18-22). After some small talk, Skaro went back into the kitchen and saw that “Judd was beating Brad, and this guy was holding his legs down.” (Tr.p. 8, ll. 1-3). The other guy was “on Brad’s legs, holding his legs down, because Brad was trying to kick.” (Tr.p. 8, ll. 19-20). He identified T.B. as the “other guy.” (Tr.p. 9, l. 1). T.B. got up when Skaro walked back into the living room. T.B. and he got into a pushing match in the kitchen. T.B. and Judd Welsh left the house. (Tr.p. 9, ll 5-16).
10. Upon cross-examination, Skaro testified that, after letting the visitors in, Skaro went into the kitchen. When he returned to the living room, T.B. and Judd were there. The third person had gone into the bedroom. (Tr.p. 24, ll. 19-24). He did not see how the fight involving Brad started. (Tr.p. 30, ll. 1-4). T.B. was trying to keep Skaro out of the fight. (Tr.p. 32, ll. 22-24).
11. Brad Reilly testified that he saw T.B. coming towards him as he was fighting with Judd. Brad “struck T.B. with the stick.” (Tr.p. 45, ll. 5-11). He also clarified that he did not believe that T.B. intended to assault him. T.B. was “just helping his brother (Judd).” (Tr.p. 68, ll. 1-13). The extent of T.B.’s involvement was to hold Brad’s arms. (Tr.p. 69, ll. 10-13).
12. T.B. did not participate in any conversations between Judd Welsh and Jamie

Jerome on the way to the Reilly residence. (Tr.p. 118, ll. 3-10). T.B. never assisted Jamie Jerome in his fight with Greg Reilly. (Tr.p. 125, ll. 17-18). T.B. was “just standing there.” (Tr.p. 126, ll. 18-22).

13. T.B. testified that he, Jamie and Judd went for a walk “to get weed.” (Tr.p. 137, ll. 6-13), He testified that he did not help Judd fight with Brad or hold down Brad. (Tr.p. 145, ll. 19-22).
14. ISSUES:
15. Was sufficient evidence introduced to prove, beyond a reasonable doubt, that T.B. Had committed the delinquent act of aggravated assault?
16. Was sufficient evidence introduced to prove, beyond a reasonable doubt, the alleged delinquent act of aggravated assault?
17. LAW AND ARGUMENT:
18. The juvenile court erred when it determined that there was sufficient evidence, beyond a reasonable doubt, to support a finding that T.B. committed the delinquent act of accomplice to aggravated assault.
19. T.B. , by his former counsel, acknowledged that there were sufficient facts shown that an aggravated assault occurred. T.B. contests the findings that he was an accomplice.
20. N.D.Cent.Code 12.1-03-01, provides a definition of accomplice:

12.1-03-01. Accomplices.

1. A person may be convicted of an offense based upon the conduct of another person when:

- a. Acting with the kind of culpability required for the offense, he causes the other to engage in such conduct;
- b. With intent that an offense be committed, he commands, induces, procures, or aids the other to commit it, or, having a statutory duty to prevent its commission, he fails to make proper effort to do so; or
- c. He is a coconspirator and his association with the offense meets the requirements of either of the other subdivisions of this subsection.

- 21. The district court, in its review of the referee's findings, stated:
- 22. "In order to adopt the referee's findings, this court must be satisfied that all of the elements of *accomplice to aggravated assault* have been established by proof beyond a reasonable doubt to this court's own satisfaction. Those elements include first that the offense of aggravated assault was committed by another individual. That is acknowledged by the juvenile respondent in the request for review. Further, that is substantiated as it relates to the nature of injury suffered by the undisputed testimony by Brad Reilly that he suffered a broken cheek bone and nose. That constitutes serious bodily injury as defined by N.D.C.C. 12-1.01-04(29). The second element that must be established by proof beyond a reasonable doubt is that the juvenile willfully intended that the offense be committed. See N.D.C.C. 12.1-17-02(1). The third element that the state must establish under 12.1-03-01.1(1)(b) is that the juvenile induced, procured, or aided

another, in this case Judd Welsh, to commit the offense of aggravated assault or under 12.1-03-01.1(1)(c) was otherwise a co-conspirator in it.”

23. The district court erred when it concluded that the State must prove that T.B. willfully intended that the offense be committed. He found that T.B. was an accomplice under Section 12.1-03-01(2) by aiding and abetting Judd Welsh in committing the offense of aggravated assault. The true culpability under subsection 2 is intentionally. The evidence does not support a finding of intent.
24. The court seems to have concentrated on T.B.’s aiding both attacks on Brad and Greg Reilly. He talks of the “substantial amount of blood in Greg’s bedroom,” that corroborates that testimony regarding the attack on Greg. T.B. was not charged with the delinquent act of accomplice to assault on Greg. There was no evidence that T.B. aided in Jamie Jerome’s assault on Greg. Therefore, there was insufficient evidence to support a finding of a delinquent act committed upon Greg Reilly.
25. The trial court found that “Skaro testified that when he attempted to intervene, [T.B.] pushed him away and threatened him.” However, Wayne Skaro’s testimony failed to establish that fact.

Q. Okay. Right. Okay. And then after that T.B. saw you? Is that your testimony? That he saw you, and then he backed away?

A. He stood up.

Q. Okay, and then what did he do?

A. He stood there.

Q. He just stood by the door?

A. Right.

Q. Okay, then what?

A. And then I pushed Judd off of Brad.

Q. Okay.

A. And then, he's a pretty big guy, he just fell back down, and that is when this gentleman came around the couch and the coffee table and got into a pushing match, he pushed me into the kitchen. And I pushed him back out, and it was over. The fight was over.

26. (Tr.p. 32, ll. 4-18).

27. Skaro had already intervened in the fight between Judd Welsh and Brad Reilly. It was a mutual scuffle and there were no threats. Therefore, there was insufficient evidence to support a finding of accomplice liability from any threats.

28. The other basis for the court's finding was that T.B. aided and abetted aggravated assault by restraining Brad Reilly and holding his (Reilly's) legs down during the assault.

29. Wayne Skaro never saw how the fight started. (Tr.p. 30, ll 1-4). When he came out of the kitchen, he saw that "Judd had Brad down on this couch up here." (Tr.p. 30, ll. 11-12). He also testified that "this guy (T.B.) was holding his legs and when I came into the living room, this guy got up and stood by the door." (Tr.p. 30, ll 19-20).

30. Even assuming that T.B. was holding down the legs of Brad Reilly, such conduct

did not “aid or abet” Judd Welsh in assault. Judd was “on top of him (Reilly) beating him.” (Tr.p. 30, ll 16-17). The fight was over shortly after Skaro entered the room. (Tr.p. 32, ll. 14-18). The damage had already occurred to Brad Reilly. The injuries were already sustained.

31. Under an accomplice liability theory, there can be no criminal responsibility for anything not fairly within the common enterprise of crime anticipated at the beginning, and which might be expected to happen if the occasion should arise for anyone to do it. See *People v. Robinson*, 715 N.W.2d 44, 49-50 (Mich. 2006).
32. The intent of the three individuals - T.B., Jamie Jerome, and Judd Welsh - in coming to the Reilly home was to purchase marijuana and steal money. There was no evidence of a plan or “common enterprise” of assault or the infliction of injury to either Reilly. See *Zander v. S.J.K.*, 256 N.W.2d 713 (N.D. 1977)(absence of any predesign or preconcert).
33. The evidence of accomplice liability was insufficient. The finding of a delinquent act of accomplice to aggravated assault must be reversed.
34. There was insufficient evidence to sustain the charged conduct of Aggravated Assault.
35. The petition in juvenile court alleged the delinquent act of Aggravated Assault, in violation of Section 12.1-17-02. Even though an Amended Petition was filed, it alleged the same delinquent act. It does include a reference to Section 12.1-03-01(1)(b)(c), N.D.C.C. (Accomplice) and some reference to “aiding and abetting,” but never charged or alleged the act of accomplice.

36. There was no evidence that T.B. ever assaulted, much less struck or touched Brad Reilly, in order to constitute aggravated assault. (Tr.p. 69, ll 5-6).
37. There was insufficient evidence to support the delinquent act of Aggravated Assault.
38. CONCLUSION:
39. There was insufficient evidence introduced to prove, beyond a reasonable doubt, that T.B. committed the delinquent act of aggravated assault.
40. There was insufficient evidence introduced to prove, beyond a reasonable doubt, the alleged delinquent act of aggravated assault.
41. The findings of the court should be reversed.

Dated this 1st day of November, 2010.

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CERTIFICATE OF SERVICE BY ELECTRONIC MAIL ONLY

I hereby certify that on the 1st day of November, 2010, a true and correct copy of the foregoing Brief and Appendix to Brief was served by electronic mail upon:

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/s/ Kent M. Morrow

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