FILED
DEC 28 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

In the interest of)
STEVE BERCH, A child born July 21, 1960)
Appellant)

Filed December 28, 1977

289
3-60372

Appeal from Madison District Court - Robert O. Frederick, Judge.

Appeal from an adjudication of delinquency, chapter 232, based on assault with intent to inflict great bodily injury. - Affirmed.

Richard C. Turner, Attorney General of Iowa, George Cosson, Assistant Attorney General and Jerrold B. Oliver, Madison County Attorney, for Appellee.

Chet R. Chickering, of Winterset, for Appellant.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This is an appeal from a finding by the trial court that Steve Berch is a delinquent child as defined by § 232.2(12), The Code, for the reason that he is guilty of the offense of assault with intent to inflict great bodily injury in violation of § 694.6, The Code. The petition alleging delinquency was filed January 17, 1977; a hearing was held and the trial court entered its order on January 24, 1977, finding appellant delinquent under § 232.2(12). A dispositional hearing was held on February 22, 1977, at which time the court committed appellant to the custody of the Commissioner of the Iowa Department of Social Services for placement at the Boys' Training School at Eldora or such other place as the Commissioner deemed advisable.

At the time of the incident involved herein, Steve Berch was 16 years old. On December 17, 1976, Berch was driving a vehicle south of Winterset, Iowa. Two of his friends were in the pickup with him. James Wilson, a student at Winterset High School, as was Berch, was driving another car with his girlfirend and two other students as passengers. Berch and Wilson engaged in a passing and tailgating contest on the highway. At a time when Wilson was behind Berch's pickup, Wilson pulled off the road into the private drive leading to the residence where his girlfriend lived. Berch proceeded down the road between an eighth and a quarter of a mile, turned around and came back. He drove into the private drive where Wilson had gone. Berch was not able to pull into the drive immediately because another car was coming and he waited for it to pass. He parked his pickup ten to twenty yards behind Wilson's car, got out and proceeded to walk toward Wilson and his girlfriend. Wilson's girlfriend was yelling and screaming at Berch to leave. A fight ensued between Berch, Wilson and Wilson's girlfriend. The fight was short and ended when Berch knocked Wilson to the ground. Wilson suffered a shattered tooth and a broken jaw in two places which had to be wired closed by an oral surgeon.

The instant case involves the second petition alleging delinquency filed against Steve Berch. On August 17, 1976, a petition alleging delinquency was filed based on the charge of assault with intent to commit great bodily injury. Hearing was held on this charge and on August 26, 1976, the court entered a decree which

did not include a finding that Berch was delinquent but placed him on probation, ordered restitution and continued the case for a year. The criminal charge was based on a fight between Berch and another juvenile which resulted in the other juvenile suffering a broken jaw.

Appellant initially asserts that the court erred as a matter of law in ordering restitution, placing him on probation and continuing the proceedings for a year where there was no finding of delinquency. This court order involved the first petition alleging delinquency and was entered by the trial court August 26, 1976. No appeal was taken from this order. Appellant attempts to include this issue in his appeal from the adjudication on the second petition alleging delinquency.

Appeals to the supreme court must be taken within thirty days from the entry of the order. Rule 5(a), Rules of Appellate Procedure. There is no jurisdiction to entertain this issue on appeal for failure to comply with the aforesaid rule. See Lundberg v. Lundberg, 169 N.W.2d 815 (Iowa 1969). Appellant argues that the second case is merely a continuation of the first and thus bears the alleged infirmity of the first. However, we find a separate petition alleging delinquency was filed in the second case and therefore consider it separately. Appellant's contention that the trial court erred as a matter of law in placing him on probation and continuing the proceedings where there was no finding of delinquency is also without merit under § 232.67, The Code.

Appellant complains next that the court committed error in combining both delinquency petitions in the same file. Appellant's brief states that counsel orally requested the court to docket the second petition separately. We find no other record made on this issue. Accordingly, the error is not preserved. Questions not presented to and not passed upon by the trial court cannot be raised or reviewed on appeal. See Schnabel v. Display Signs Service, Inc., 219 N.W.2d 546 (Iowa 1974). See also In Interest of Meek, 236 N.W.2d 284, 290 (Iowa 1975): ("Even assuming, arguendo, that the hearings were adjudicatory in nature, the mere fact the court had before it the challenged materials, would not automatically require a reversal.")

Appellant also argues error was committed when the county attorney, in his

closing argument, commented on the previous petition for delinquency and the facts involved therein. Again, we note that no objection was made by appellant at the time and there is, therefore, nothing to review. "The question should have been brought to the trial court's attention if defense counsel wanted to properly raise the issue of want of fair trial." State v. Schmidt, 259 Iowa 972, 980-81, 145 N.W.2d 631 (1966).

The next assignment of error is the trial court erred as a matter of law in ruling that lies told under oath by two key witnesses for the state were not material. In a juvenile court proceeding review by the appellate court is de novo. Rule 4, R. App. P. We give weight to the findings of the trial court, but are not bound by them. Rule 14(f)(7), R. App. P. Proceedings of this nature are neither criminal nor penal in nature but rather are special proceedings with the best interest of the child as the objective. See In re Henderson, 199 N.W.2d 111, 116 (Iowa 1972).

In Interest of Wheeler, 229 N.W.2d 241 (Iowa 1975), noted that irrespective of the court's ambivalence as to the exact nature of litigation under chapter 232, it nevertheless is not a law action. Thus, an appellate court may arrive at a new or modified determination based on admissible evidence only and disregard any evidence to which an objection was good. **Henderson**, supra at 123.

The false statements related to where Wilson and his girlfirend had been and what they were doing prior to the fight. Although these statements bear on the credibility of the witnesses, we find they are not so material in themselves as to destroy the factual basis for the trial court's findings. Applying the above criteria we consider whether other evidence is sufficient to support those findings.

The final assignments of error are that the trial court erred as a matter of law in ruling the juvenile was the aggressor because he came on private land and was yelled at to leave, and the court abused its discretion in finding the offense was proved beyond a reasonable doubt. The quantom of proof required where a juvenile is charged with an act which would constitute a crime if committed by an adult is that the offense must be proved beyond a reasonable doubt. In re Winship, 397 U.S. 358, 359; 90 S. Ct. 1068, 1069; 25 L.Ed.2d, 368, 372; In Interest of Wheeler,

229 N.W.2d 241, 243 (Iowa 1975). After elimination of consideration of inadmissible evidence, the question is whether, under the record, the state proved beyond a reasonable doubt that Berch intended to inflict great bodily injury on Wilson. If in our de novo review, admissible evidence satisfies the reasonable doubt standard, we need not reverse. Interest of Thompson, 241 N.W.2d 2 (Iowa 1976).

The crime charged is not susceptible of exact definition. It is difficult to define with exactness just what a great bodily injury is. The supreme court has said at different times it is an injury to the person of a more grave and serious character than an ordinary battery, but it cannot be definitely defined.

> The gist of the offense is the intent, which is seldom capable of direct proof and ordinarily is disclosed by all the circumstances attending the assault, together with all relevant facts and circumstances as disclosed by the evidence. The extent of the injury, if any, although not in itself determinative of the intent, may be considered as bearing thereon. * * * ... we refer to the well-established principle that a person is presumed to have intended the natural result of his intentional act.

State v. Schmidt, 259 Iowa 972, 977, 145 N.W.2d 631 (1966).

The undisputed facts establish that Berch, after traveling an eighth to a quarter of a mile down the road, turned his car around and came back seeking out Wilson and his girlfirend. It was made abundantly clear that he was not welcome and should leave. Nevertheless, he advanced ten to twenty yards to where Wilson and his girlfriend were standing and the fight ensued. It is also clear that at no time did Berch retreat until he had knocked Wilson to the ground breaking his jaw. Sufficient evidence is present to establish beyond a reasonable doubt the intent to do great bodily injury, thus providing the basis for the delinquency adjudication.

Judgment affirmed.

Oxberger, J. specially concurs.

OXBERGER, J. (specially concurring)

We review this case de novo. We must be convinced beyond a reasonable doubt. It was necessary for the State to establish that the injury intended was of a more grave character than an ordinary battery. State v. Sommer, 249 Iowa 160, 86 N.W.2d 115 (1957).

The majority cites no facts to show Berch had the specific intent to inflict great bodily injury. I believe the State failed to establish such a specific intent. I would find Berch delinquent on the basis of battery, not assault with intent to inflict great bodily injury.