IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

No. 8-034 / 97-0717
Filed April 24, 1998

IN THE INTEREST OF P.A.A., Minor Child,

P.A.A., Minor Child,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Alan D. Allbee, Associate Juvenile Judge, and James D. Coil, District Associate Judge.

A juvenile appeals from the adjudicatory and dispositional orders entered by the court. **AFFIRMED.**

Kellyann M. Lekar of Randall, Nelson & Hawbaker, P.L.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Mary K. Wickman, Assistant Attorney General, and Steven Halbach, Assistant County Attorney, for appellee-State.

Considered by Cady, C.J., and Huitink and Streit, JJ.

STREIT, J.

A juvenile appeals the trial court's finding he committed the delinquent act of assault and the trial court's dispositional order. Because there was sufficient evidence the juvenile committed assault without justification and the dispositional order was reasonable under the circumstances, we affirm.

I. Background & Facts.

In July 1996, Parrish, age thirteen, attended a baseball game at Riverfront Stadium in Waterloo with some friends. While at the game, Parrish and his friends attacked M. Jennings, another juvenile, in the picnic area near the first base line. Jennings suffered facial cuts and bruises. His glasses were knocked off, stomped on, and destroyed.

Jennings' friend, Tradis, a witnesses to the incident, left the scene to get the stadium security guard. Waterloo police sergeant Tim Pillack was working as a security officer for the stadium. When Pillack arrived at the scene, he saw a group of boys around Jennings and saw Parrish hit Jennings in the face. Jennings had his hands over his face to protect himself. Pillack detained Parrish, but the other boys fled. Parrish told Pillack he did not know why he had hit Jennings and said he was sorry. Parrish was charged with assault in violation of Iowa Code sections 708.1(1) and 708.2(4)(1995).

After adjudicatory hearing, the court concluded the State had met its burden of proving the elements of assault. It also found Parrish was not justified in his actions.

On April 11, 1997, the court entered a dispositional ruling ordering Parrish to pay victim restitution of $184 and successfully complete the Bremwood Anger Management Program. If Parrish successfully completed the program and payment of the restitution, the court would order the matter dismissed. If Parrish failed to comply with the dispositional ruling, he would be placed on formal probation. Parrish appeals from the adjudicatory and dispositional orders. On September 2, 1997, the supreme court stayed the dispositional order pending appeal.

II. Standard of Review.

"Juvenile delinquency proceedings are not criminal prosecutions, but are special proceedings that serve as an ameliorative alternative to the criminal prosecution of children." *In re S.D.L.*, 568 N.W.2d 41, 42 (Iowa 1997). Our scope of review is de novo. *In re C.S.*, 516 N.W.2d 851, 857 (Iowa 1994). We review both questions of law and fact. *Id.*; Iowa Code § 232.133(1). We give weight to the fact-findings of the trial court, especially when considering credibility of witnesses, but are not bound by them. *In re D.L.C.*, 464 N.W.2d 881, 882 (Iowa 1991); Iowa R. App. P. 14(f)(7).

III. Sufficiency of Evidence.

Parrish contends there was not sufficient evidence he committed assault upon Jennings. Under Iowa Code section 708.1(1) a person commits assault when "without justification . . . the person does . . . [any] act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act." Iowa Code § 708.1(1) (1995). Parrish was charged with simple misdemeanor assault pursuant to section 708.2(4) of the Iowa Code.

After de novo review, we have found sufficient evidence Parrish committed the delinquent act of simple misdemeanor assault. Witness testimony at the adjudicatory hearing established all elements of assault. Tradis, a friend of the victim, Officer Pillack, and David, a witness not acquainted with any of the persons involved, saw Parrish attack Jennings. Parrish's attack on Jennings resulted in Jennings suffering facial injuries and cuts. Parrish's attack was clearly intended to cause pain or injury to Jennings.

Parrish argues his actions were justified because Jennings started the fight. "A person is justified in the use of reasonable force when he or she reasonably believes that such force is necessary to defend himself or herself or another from any imminent use of unlawful force." *State v. Delay*, 320 N.W.2d 831, 834 (Iowa 1982); Iowa Code § 704.3 (1995). Parrish's friend, Curtis, testified Jennings started the fight. David, on the other hand, testified Jennings was not the initial aggressor, had tried to avoid

contact with Parrish and his friends, but was approached by Parrish who attempted to provoke an altercation. Curtis's testimony was less credible than David's. Curtis was one of the boys involved in the altercation with Parrish. David did not know any of the people involved, but witnessed the events from the bleachers. The trial court determined David's testimony was more credible than Curtis's and, under these circumstances, we will defer to the trial court's judgment. *See In re D.L.C.*, 464 N.W.2d at 882 (Iowa 1991). David's testimony proved Parrish was not acting with justification. A person who provokes an altercation with another when the other is trying to avoid an altercation does not act with justification.

The trial court correctly found Parrish had committed the delinquent act of simple misdemeanor assault.

IV. Admissibility of Parrish's Statements to Officer Pillack.

Parrish argues Officer Pillack's testimony of Parrish's statements were inadmissable because he was not informed of his right to counsel or to remain silent by Pillack. Although Parrish cites no authority, the gist of his argument is his statements are inadmissable because he was not advised of his rights pursuant to the dictates of *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966). Concern over the need to give *Miranda* warnings—or the sufficiency of a defendant's waiver of them—arises only upon proof of both custody and interrogation. *State v. Kasel*, 488 N.W.2d 706, 708 (Iowa 1992). An interrogation under *Miranda* refers to any express questioning as well as those

practices that police should have known were reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301-02, 100 S.Ct. 1682, 1690, 64 L.Ed.2d 297, 308 (1980). Parrish did not allege his *Miranda* rights were violated or object to Officer Pillack's testimony at the adjudicatory hearing. Because he did not, this issue is waived. Issues not raised before the trial court, including constitutional issues, cannot be raised for the first time on appeal. *State v. Wages*, 483 N.W.2d 325, 326 (Iowa 1992).

Parrish also alleges Officer Pillack's testimony was inadmissable under the provisions of Iowa Code section 232.47(6)(a)–(h). Under that section, a statement made by a child to a law enforcement officer while in custody without the presence of counsel is admissible only after the court determines whether the child has voluntarily waived his right to remain silent. Iowa Code § 232.47(6) (1995). The factors to consider in determining whether a juvenile has waived his or her right to remain silent are:

a. Opportunity for the child to consult with a parent, guardian, custodian, lawyer, or other adult.
b. The age of the child.
c. The child's level of education.
d. The child's level of intelligence.
e. Whether the child was advised of the child's constitutional rights.
f. Length of time the child was held in shelter care or detention before making the statement in question.
g. The nature of the questioning which elicited the statement.
h. Whether physical punishment such as deprivation of food or sleep was used upon the child during the shelter care, detention, or questioning.

Iowa Code § 232.47(6) (1995).

Application of these factors to this case leads to the conclusion Parrish voluntarily waived his right to remain silent. Parrish is a thirteen-year-old boy of average intelligence and education. His statements to Officer Pillack were that he did not know why he hit Jennings and that he was sorry. These statements were in response to Pillack's questioning why he hit Michael. Pillack asked the question immediately after he stopped Parrish's attack on Jennings. Parrish had not been detained for any significant amount of time before making the statements. He was not physically punished or deprived of food or water. The nature of Pillack's question was not threatening. Pillack was not investigating when he asked Parrish why he hit Jennings. Rather, his question was reactionary to the altercation he had just witnessed. In this circumstance, the fact that Pillack did not advise Parrish of his constitutional rights or give him an opportunity to consult with his parent before asking him why he hit Michael are outbalanced by the nonthreatening nature of Pillack's question and the surrounding circumstances.

Parrish alleges his counsel was ineffective for failing to object to and preserve the *Miranda* issue. To establish an ineffective assistance of counsel claim Parrish must show: (1) counsel's performance was deficient; and (2) prejudice resulted because of counsel's deficiency. *In re A.R.S.*, 480 N.W.2d 888 (Iowa 1992). Even if Parrish's counsel was deficient in not objecting to Pillack's testimony on the basis of a *Miranda* violation, no prejudice resulted to Parrish because of the deficiency. Officer Pillack's testimony was not needed to find Parrish had committed the

delinquent act of assault. David's testimony established all the evidence needed to find Parrish assaulted Jennings without justification. Parrish's ineffective assistance of counsel claim is denied. The dispositional order requiring Parrish to pay Jennings $184 for his destroyed glasses and requiring him to attend the Bremwood Anger Management program is reasonable in light of the circumstances of this case.

AFFIRMED.