

## RECORD IMPOUNDED

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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4891-14T3

STATE OF NEW JERSEY  
IN THE INTEREST OF G.M.,

A Juvenile.

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Argued November 30, 2016 – Decided March 13, 2017

Before Judges Alvarez and Manahan.<sup>1</sup>

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Camden County,  
Docket No. FJ-04-998-15.

Ruth E. Hunter, Designated Counsel, argued the  
cause for appellant G.M. (Joseph E. Krakora,  
Public Defender, attorney; Ms. Hunter, on the  
brief).

Maura G. Murphy, Assistant Prosecutor, argued  
the cause for respondent State of New Jersey  
(Mary Eva Colalillo, Camden County Prosecutor,

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<sup>1</sup> Hon. Carol E. Higbee was a member of the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal remains one that shall be decided by two judges. Counsel has agreed to the substitution and participation of another judge from the part and to waive reargument.

attorney; Ms. Murphy, of counsel and on the brief).

PER CURIAM

G.M. appeals from an adjudication of delinquency for conduct which, if committed by an adult, would constitute the crime of third-degree aggravated assault against a teacher, N.J.S.A. 2C:12-1(b)(5)(d), and simple assault, a disorderly persons offense, N.J.S.A. 2C:12-1(a)(1). We affirm in part and reverse in part.

We derive the following facts from the hearing record. At approximately 8 a.m. on October 22, 2014, D.B., the juvenile victim, was in the cafeteria at Glen Landing Middle School in Gloucester Township. G.M. approached D.B. and asked, "Did you say my girlfriend looks like an alien?" D.B. responded, "What?" G.M. then hit D.B. on the right side of his jaw. D.B. responded with a closed-fist hit to G.M.

Donna Clark, a health and physical education teacher at Glen Landing, was assigned to breakfast duty in the cafeteria that morning. Clark noticed that the other teacher on duty, Hilary Vilary, had a "look of panic on her face" and then observed "two students physically . . . going at it." Clark immediately approached G.M. and D.B. and said, "Stop. Cut it out," as she attempted to separate them with Vilary's help.

After Vilary "contained" D.B., "[h]e didn't continue to pursue the fight." However, after Clark had G.M. "back in the corner and kind of . . . contained," he "pushed through [her]" to continue the fight. G.M. pushed Clark's left arm and shoulder down and went after D.B. again as he was being escorted out of the cafeteria. This time, Clark "bear hug[ged] him and rip[ped] him away from [D.B.]" According to Clark, this took "all [of her] might, basically, to rip him off of [D.B.]"

Clark noted that she felt no pain the first time G.M. pushed her. However, she was exhausted after the fight since she "had to use all of [her] energy and force to contain [G.M.]" The only physical mark on Clark after the fight was a scratch on her arm, which she said she did not have prior to the fight. After watching the surveillance video, Clark testified that she could not see, and did not know, who scratched her arm. Clark further stated that G.M. neither punched nor struck her during either the initial or second interaction.

On October 27, 2014, a Camden County juvenile complaint charged G.M. with third-degree aggravated assault against a teacher, N.J.S.A. 2C:12-1(b) (5) (d) (amended count one), and a disorderly persons simple assault, N.J.S.A. 2C:12-1(a) (1) (count two). A bench trial was held on February 24, 2015. At trial, G.M. argued that he was acting in self-defense when he slapped

D.B. and afterward, a mutual fight ensued. G.M. further argued that if the judge did not find the initial slap was self-defense, the resulting fight should be viewed as a mutual fight. Furthermore, G.M. argued that he never assaulted Clark.

The judge found D.B.'s testimony regarding the fight credible and that he was struck in the face by G.M. without justification. G.M. was adjudicated delinquent based upon the finding that he committed a simple assault. Regarding the teacher, the judge held:

[T]he [t]eacher is trying to break up the fight. The [t]eacher is trying to avoid additional injury from either party. She was not taking sides in defending one side or the other side.

The other side stopped fighting. [D.B.] picked up his book bag and was summoned to the principal's [o]ffice. Sounds appropriate. So, the one [t]eacher who remains here is the [t]eacher by the name of Donna Clark. And she is attempting to prevent [G.M.] from returning to this altercation.

That, to me, is an extremely obvious bit of testimony that he was attempting to get [loose] from [Clark] to continue [] the altercation. That, to me, is the only clear resolution of the facts in this case.

Based upon these findings, the judge held that by pushing and shoving Clark, G.M. "certainly not purposely, or maybe not knowingly; but, recklessly cause[ed] or attempt[ed] to cause . . . bodily injury." The judge found that Clark's physical

exhaustion after restraining G.M. demonstrated his attempt to cause her bodily injury. Accordingly, the judge determined that G.M. committed an assault of a teacher, and that since Clark's scratch constituted bodily injury, his conduct constituted a crime of the third-degree.

After a disposition hearing, G.M. was sentenced to two years' probation. In addition to complying with all standard conditions of probation, G.M. was ordered to complete thirty hours of community service, have no contact with D.B., attend an anger management class, and write an apology to the victims. A fourteen-day plan was established by the judge to determine whether G.M. needed additional counseling.

A motion for reconsideration was filed and scheduled for 12:30 p.m. on April 30, 2015. When neither defense counsel nor G.M. appeared after an hour-and-a-half beyond the scheduled time, the State moved for dismissal. The judge instead denied the motion, holding that, contrary to G.M.'s assertion, the matter was distinguishable from In re S.B.<sup>2</sup> and that here, "[t]he child was grabbed by the [] [t]eacher. The [t]eacher dragged him across the [c]afeteria to get him away from the other child that he was

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<sup>2</sup> In re S.B., 333 N.J. Super. 236 (App. Div. 2000).

involved with in . . . a fight of some nature. At that juncture, the child resisted, causing the [teacher] some injury."

Shortly after the decision, G.M.'s counsel appeared in court and requested to be heard on the motion, which the judge allowed. Counsel argued that S.B. was directly controlling in this matter. The judge disagreed and, again, denied the motion for reconsideration. This appeal followed.

G.M. raises the following points on appeal:

POINT I

THERE WAS NO CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT THE COURT'S DISPOSITION OF THE JUVENILE AS GUILTY OF THIRD-DEGREE AGGRAVATED ASSAULT AGAINST A TEACHER AND THEREFORE THE DISPOSITION ON COUNT ONE MUST BE VACATED.

POINT II

THERE WAS NO CREDIBLE EVIDENCE TO SUPPORT THE COURT'S DISPOSITION OF THE JUVENILE AS GUILTY OF ANYTHING MORE THAN A PETTY DISORDERLY PERSONS OFFENSE ON COUNT TWO BECAUSE THE RECORD CLEARLY INDICATED THAT IT WAS A MUTUAL FIGHT.

POINT III

THE SENTENCE MUST BE VACATED AND THE MATTER REMANDED FOR A RESENTENCING HEARING.

A trial court's factual findings are "binding on appeal when supported by adequate, substantial, credible evidence." State In re W.M., 364 N.J. Super. 155, 165 (App. Div. 2003). Our deference to those findings "is especially appropriate 'when the evidence

is largely testimonial and involves questions of credibility.'" Cesare v. Cesare, 154 N.J. 394, 412 (1998) (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). However, where the issue presented is one of law, "our review is 'de novo and we owe no deference to the trial [judge]'s interpretation of the law and the legal consequences that flow from established facts.'" State v. Stalter, 440 N.J. Super. 548, 553 (App. Div.) (alteration in original) (quoting State v. Bradley, 420 N.J. Super. 138, 141 (App. Div. 2011)), certif. denied, 223 N.J. 355 (2015).

On appeal, G.M. contends that there was no testimony or credible evidence presented at trial that he assaulted Clark and, therefore, the judge erred in finding that a third-degree assault occurred. A person is guilty of aggravated assault if they "[c]ommit[] a simple assault as defined in paragraph (1), (2)[,] or (3) of subsection a. of this section upon . . . [a] teacher . . . while clearly identifiable as being engaged in the performance of his duties[.]" N.J.S.A. 2C:12-1(b)(5)(d). Simple assault is defined as an "[a]tttempt[] to cause or purposely, knowingly or recklessly caus[e] bodily injury to another[.]" N.J.S.A. 2C:12-1(a)(1). Bodily injury is defined as "physical pain, illness or any impairment of physical condition." N.J.S.A. 2C:11-1(a). Aggravated assault under N.J.S.A. 2C:12-1(b)(5)(d) is a third-degree crime "if the victim suffers bodily injury,

otherwise it is a crime of the fourth degree." N.J.S.A. 2C:12-1(b). "Not much is required to show bodily injury." S.B., supra, 333 N.J. Super. at 244 (citing N.B. v. T.B., 297 N.J. Super. 35, 43 (App. Div. 1997)).

Here, the judge focused on G.M.'s actions after he was initially restrained by Clark. The judge noted that Clark was attempting to prevent G.M. from reengaging D.B. in a fight. As the judge noted, "[G.M.] was attempting to get [loose] from [Clark] to continue [] the altercation." The judge found that this struggle could have led to the bodily injury, thus elevating the aggravated assault to a third-degree aggravated assault. Clark specifically testified that she did not have the scratch prior to the fight and that she engaged almost exclusively with G.M. while Vilary was engaged with D.B. Given our review of the hearing record and in accord with the deference we afford to the judge, we are satisfied there was sufficient credible circumstantial evidence for the judge to conclude that G.M. committed a third-degree aggravated assault against Clark by causing bodily injury while she was acting in the performance of her duties as a teacher.

G.M. next argues that he was erroneously adjudicated delinquent as he and D.B. engaged in a mutual fight. We disagree. "Simple assault is a disorderly persons offense unless committed in a fight or scuffle entered into by mutual consent, in which



case it is a petty disorderly persons offense." N.J.S.A. 2C:12-1(a).

It is unrefuted that G.M. instigated the "fight" by approaching and striking D.B. As Vilary testified, G.M. approached D.B. and slapped him. D.B. ceased any physical contact with G.M. after the teachers intervened; indicating that he was not a willing participant in a fight, but only defending himself. Again, given our review of the hearing record, we are satisfied there was sufficient credible evidence to support the judge's adjudication of G.M. based upon his assaultive conduct.

Finally, G.M. asserts that the judge failed to consider the appropriate factors outlined in N.J.S.A. 2A:4A-43(a) when determining the disposition. The statute requires that a court shall weigh enumerated factors in determining an appropriate disposition of a juvenile:

- (1) The nature and circumstances of the offense;
- (2) The degree of injury to persons or damage to property caused by the juvenile's offense;
- (3) The juvenile's age, previous record, prior social service received, and out-of-home placement history;
- (4) Whether the disposition supports family strength, responsibility and unity and the well-being and physical safety of the juvenile;

(5) Whether the disposition provides for reasonable participation by the child's parent, guardian, or custodian, provided, however, that the failure of a parent or parents to cooperate in the disposition shall not be weighed against the juvenile in arriving at an appropriate disposition;

(6) Whether the disposition recognizes and treats the unique physical, psychological, and social characteristics and needs of the child;

(7) Whether the disposition contributes to the developmental needs of the child, including the academic and social needs of the child where the child has intellectual disabilities or learning disabilities;

(8) Any other circumstances related to the offense and the juvenile's social history as deemed appropriate by the court;

(9) The impact of the offense on the victim or victims;

(10) The impact of the offense on the community; and

(11) The threat to the safety of the public or any individual posed by the child.

Here, the judge did not reference these factors "that the court must weigh when determining the appropriate disposition." In re C.V., 201 N.J. 281, 295 (2010) (emphasis added). In the absence of those required findings, we are constrained to remand for a new disposition hearing.

Affirmed in part, reversed in part and remanded for re-disposition. We do not retain jurisdiction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION