

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P.65.37

IN THE INTEREST OF: D.A.S., : IN THE SUPERIOR COURT OF  
A MINOR : PENNSYLVANIA  
:  
APPEAL OF: D.A.S., A MINOR : No. 668 MDA 2005

**Appeal from the Order entered March 22, 2005  
In the Court of Common Pleas of Union County  
Criminal Division at No. 40 JV 04**

IN THE INTEREST OF: D.A.S., : IN THE SUPERIOR COURT OF  
A MINOR : PENNSYLVANIA  
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APPEAL OF: D.A.S., A MINOR : No. 669 MDA 2005

Appeal from the Order entered March 22, 2005  
In the Court of Common Pleas of Union County  
Criminal Division at No. 41 JV 04

BEFORE: JOYCE, ORIE MELVIN and TAMILIA, JJ.

MEMORANDUM:

FILED: April 4, 2006

D.A.S. appeals from the order entered March 22, 2005, in the Court of Common Pleas of Union County, Pennsylvania, Juvenile Division, affirming the disposition order of December 17, 2004. Upon review, we affirm.

This appeal involves two separate juvenile petitions filed against D.A.S. for offenses occurring on February 24, 2004<sup>1</sup>, and March 30, 2004<sup>2</sup>. An evidentiary hearing on both petitions commenced on July 29, 2004 and concluded on September 28, 2004. The evidence adduced at these hearings revealed the following. On February 24, 2004, while physically restrained by a social worker, D.A.S. kicked the social worker in the leg and another teacher in the chest. On this same date, D.A.S. held a chair over another student's head.

The evidence further established that on March 30, 2004, D.A.S. called a teacher obscene names, poured water out of an electric pot and flower vase and disrupted students taking the PSSA test in an adjoining conference room. Furthermore, while in the principal's office, D.A.S. removed various items and threw them around the office, used a key to scratch the wall, and threw a trash can at the school principal.

During his case-in-chief, D.A.S. attempted to introduce the expert testimony of Richard E. Dowell, Jr., Ph.D. In an offer of proof, D.A.S. stated Dr. Dowell's testimony would consist of the following:

Richard Dowell at the insistence of the school district or the retention of the Lewisburg School District, has evaluated [D.A.S.] with regard to his special education needs.

Dr. Dowell will opine that the behaviors undertaken by the child in the circumstances that have been outlined in this presentation are consistent with manifesting his disability. He does not intend to cause harm. He is incapable of producing the intent to cause harm. There is no malicious [*mens rea*] in our language.

Dr. Dowell has prepared for the school district a 12- page clinical neuropsychological evaluation establishing [D.A.S.'s] disability and his inability to establish intent as a motive.

N.T. Evidentiary and Disposition Hearing, 9/28/04, at 167-168.

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<sup>1</sup> Docket 41 JV04.

<sup>2</sup> Docket 40 JV04.

After the offer of proof, the trial court precluded D.A.S. from introducing this evidence during the adjudication phase, but allowed it for dispositional purposes, only. *Id.* at 170.

At the conclusion of the evidentiary hearing on September 28, 2004, D.A.S. was adjudicated delinquent at docket 41 JV 04 of two counts of aggravated assault<sup>3</sup>, one count of simple assault<sup>4</sup>, and two counts of harassment<sup>5</sup>. At docket 40 JV 04, Appellant was adjudicated delinquent of one count of harassment<sup>6</sup>, one count of criminal mischief<sup>7</sup> and three counts of disorderly conduct<sup>8</sup>. A disposition hearing was held on September 28, 2004 and concluded on December 17, 2004, whereby the trial court placed D.A.S. on probation.

On January 14, 2005, D.A.S. filed a motion for reconsideration and notice of appeal. On January 18, 2005, the trial court granted the motion pursuant to Pa.R.A.P. § 1701 (b) (3) (i, ii). On March 22, 2005, the trial court affirmed the adjudication of delinquency and probation disposition.

D.A.S. filed a timely appeal and on May 2, 2005, filed his Pa.R.A.P. 1925 (b) Statements. On May 25, 2005, the trial court filed its Pa.R.A.P. 1925 (a) opinion and incorporated its earlier March 22, 2005 opinion.

On appeal, Appellant raises the following issues for our review:

1. Whether the delinquency adjudication of [D.A.S.],

an 11-year old with an autism spectrum disorder, should be reversed as a matter of law because the [trial] court erred by denying [D.A.S.] his federal and state constitutional rights to due process at his adjudication hearing, when it did not admit or consider relevant evidence regarding his disability, including expert testimony and two administrative agency decisions, where that evidence is probative of intent, an essential element of the underlying offenses?

[Suggested Answer: Yes]

2. Whether the delinquency adjudication of an 11-year old with autism spectrum disorder should be reversed as a matter of law because the [trial] court did not admit or consider relevant evidence regarding [D.A.S.'s] disability and its effect on the behavior with which he was charged, where that evidence is probative of voluntariness, an essential element of the underlying offenses?

[Suggested Answer: Yes]

3. Whether the delinquency adjudication should be reversed and remanded for a new trial because the [trial] court did not admit or consider relevant evidence that would have established [D.A.S.] acted in self-defense?

[Suggested Answer: Yes]

D.A.S.'s Brief, at 3.<sup>9</sup>

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<sup>3</sup> 18 Pa.C.S.A. § 2702 (a) (5).

<sup>4</sup> 18 Pa.C.S.A. § 2701 (a) (3).

<sup>5</sup> 18 Pa.C.S.A. § 2709 (a) (1).

<sup>6</sup> 18 Pa.C.S.A. § 2709 (a) (1).

<sup>7</sup> 18 Pa.C.S.A. § 3304 (a) (2).

<sup>8</sup> 18 Pa.C.S.A. § 5503 (a) (1), (2), and (3), respectively.

<sup>9</sup> In August of 2005, the Pennsylvania Protection and Advocacy, Inc. filed an *Amicus Curiae* brief on behalf of D.A.S.

“The decision to admit or to exclude evidence, including expert testimony, lies within the sound discretion of the trial court. Generally, we review a trial court’s evidentiary rulings for abuse of discretion; where an evidentiary ruling turns on a question of law, however, our review is plenary.” *In re CMT*, 861 A.2d 348, 355 (Pa. Super. 2004) (citations omitted).

In his first issue, D.A.S. contends the trial court erred in not admitting or considering expert testimony and two administrative agency decisions that were probative of his intent to commit the aforementioned offenses. D.A.S.’s Brief, at 17. As to the expert testimony, D.A.S. contends this evidence would describe his affliction with Asperger’s Syndrome<sup>10</sup> and its impact “on his ability to understand and control his behavior during the incidents in question”. *Id.* at 18. Furthermore, D.A.S. avers this evidence was relevant as to whether he “understood the act and its wrongfulness.” *Id.* at 20. In support of his argument, D.A.S. discusses *In re G.T.*, 597 A.2d 638 (Pa. Super. 1991) (*en banc*), where our Court held that the “common law presumptions regarding a child’s capacity to commit a criminal act are irrelevant to a determination of delinquency.” *Id.* at 639.

In the case of *In re G.T.*, the trial court precluded evidence that a 13 year old had a mental age of a 9 \_ year old and concluded that the Juvenile Act, 42 Pa.C.S.A. § 6301, *et. seq.*, abolished the infancy defense<sup>11</sup>. *Id.* In affirming the trial court’s refusal to admit the evidence, our Court discussed the distinct concepts of *mens rea* and capacity as the following:

. . .the term *mens rea* refers to a mental state, often an element of an offense, which expresses the intentionality necessary for an act to constitute a crime. Capacity, in terms of the infancy defense, refers, not to the ability to formulate *mens rea*, as argued by appellant, but to the ability to appreciate the criminality and wrongfulness of one’s acts. It is this capacity, and not the ability to formulate the necessary intention, that is the subject of the common law presumptions regarding children. . .

*Id.* at 640-641 (internal citations omitted).

Our Court concluded that the infancy defense was supplanted by the Juvenile Act and stated:

The purpose of determining delinquency under the Juvenile Act is to identify those children who have committed an act which would be a crime if it had been committed as an adult and who are, therefore, in need of special treatment, supervision, and rehabilitation. Delinquency proceedings are not criminal in nature but are intended to address the special problems of children who have engaged in aberrant behavior disclosing a need for special treatment. Therefore, the defense of infancy, created to protect children from retribution in recognition of their inability to differentiate right from wrong, is irrelevant to a determination regarding a juvenile’s amenability to treatment, rehabilitation and supervision. Indeed, the Act provides that, in some instances where it is determined that rehabilitative goals cannot be met, the court may rule that the offense should be prosecuted, and transfer the matter to criminal proceedings. To permit the infancy defense in proceedings under the Juvenile Act would operate to remove some juveniles from both the adult and the juvenile systems, and prevent the child from receiving the care and rehabilitation that our Legislature has deemed appropriate. We are not inclined to interpret and apply the Juvenile Act in such a way as to frustrate what we perceive to be its purpose.

*Id.* 641-642 (internal citations omitted).

In the present case, the trial court concluded, subsequent to the offer of proof, that Dr. Dowell’s testimony was not relevant for adjudication purposes. In support, the trial court discussed the capacity issue in *In re G.T.* and

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<sup>10</sup> In *In re C.M.T.*, our Court discussed this syndrome as follows:

Asperger’s Syndrome is a high-functioning form of autism that affects a person’s social interactions and ability to understand instructions. Among its many symptoms are a failure to develop peer relationships, a lack of social reciprocity and significant impairment of social and occupational functioning.

*In re C.M.T.*, *supra* at 351 (citations omitted).

<sup>11</sup> An infancy defense entailed a presumption that a child between the ages of 7 and 14 lacked the capacity to commit crimes.

found it applicable to D.A.S.'s case because "it deals with whether a juvenile has the mental capacity to commit a crime and I think diminished capacity could fall in that same category . . ." N.T. Evidentiary and Disposition Hearing, 9/28/04, at 173. The trial court further reasoned that "diminished responsibility and any of those kinds of defenses are not relevant to a juvenile proceeding insofar as they determined whether there is to be a finding of commitment of a delinquent act." *Id.* at 173.<sup>12</sup>

D.A.S. attempts to distinguish *In re G.T.* and avers the purpose of introducing Dr. Dowell's testimony differs from evidence used to "relieve a juvenile defendant of criminal responsibility based on the common law presumptions of infancy." D.A.S.'s Brief, at 20. D.A.S. contends he attempted to present Dr. Dowell's testimony on the issue of *mens rea* and the trial court improperly commingled the concepts of capacity and *mens rea* when it excluded the evidence. *Id.* at 18. In response, the Commonwealth asserts that D.A.S.'s argument involves a capacity argument and not a *mens rea* argument.

Upon close examination, we agree with the Commonwealth and find that D.A.S.'s argument focuses on his capacity to understand and control his actions, rather than the intent to commit the offenses. In arriving at this conclusion, we are mindful that during his offer of proof, D.A.S. averred that Dr. Dowell's testimony would establish that he was incapable of producing intent to cause harm. Furthermore, D.A.S. frames the issue as involving intent. However, D.A.S.'s argument centers upon his affliction with Asperger's Syndrome and its impact on his ability to understand his actions and wrongfulness, along with his inability to control his behavior. D.A.S.'s Brief, at 18, 20. As noted by our Court in *In re G.T.*, capacity refers to the ability to appreciate one's actions and should not be confused with *mens rea*. Accordingly, D.A.S. actually presents a capacity argument and fails to establish how the expert testimony and accompanying report are probative of intent.

In regards to the administrative agency decisions, D.A.S. contends the trial court erred in not admitting or considering an October 11, 2004 decision of a Special Education Hearing Officer and December 20, 2004 decision of a Special Education Due Process Appeals Review Panel. D.A.S. avers both documents were relevant to his actions and state of mind during the occurrences and should have been admitted during the evidentiary hearing. D.A.S.'s Brief, at 23. Specifically, D.A.S. argues that the "school district's failure to provide [him] an appropriate education placement and program, and the impact of that failure on [D.A.S.] were clearly relevant to the [trial] court's determination as to whether [D.A.S.] had the requisite *mens rea*." *Id.* at 24. Furthermore, D.A.S. avers both decisions were relevant because they reveal "the school district's contributory negligence in [D.A.S.'s] allegedly delinquent behavior" and that the "school district's improper program triggered the behavior that [D.A.S.] was unable to control. . . ." *Id.* at 26. In support of his argument, D.A.S. relies upon *In re C.M.T.*, 861 A.2d 348 (Pa. Super. 2004), where our Court held that evidence concerning a juvenile's affliction with Asperger's Syndrome and its connection with absenteeism from school, together with evidence surrounding the availability of special school services, were relevant in a dependency proceeding. *Id.* at 356.

At the outset, we note that both administrative decisions post-date the July 29, 2004 and September 28, 2004 evidentiary hearings and D.A.S. contends the court excluded this evidence on the basis of relevance and not timeliness. D.A.S.'s Brief, at 23 n. 16. D.A.S. infers these decisions constitute "post verdict evidence" and should be admitted as such.

A new trial is granted on the basis of after-discovered evidence where the evidence: 1.) is discovered after trial and could not have been obtained prior to the conclusion of trial by the exercise of due diligence; 2.) is not merely corroborative or cumulative; 3.) will not be used solely for impeachment purposes; and, 4.) is of such a nature and character that a different verdict will likely result if a new trial is granted. *Commonwealth v. Figueroa*, 859 A.2d 793, 799 (Pa. Super. 2004); *Commonwealth v. Wright*, 832 A.2d 1104 (Pa. Super. 2003).

In the case at bar, we find that D.A.S. has only satisfied the first three prongs. As discussed *infra*, the administrative decisions are not relevant to the issue of *mens rea*.

Turning to the issue on appeal, *In re C.M.T.* involved a dependency hearing where the trial court adjudicated C.M.T. dependent for habitual truancy. On appeal, C.M.T. argued the trial court erred in requiring her to prove that her absences from school were justified. *Id.* at 351. C.M.T. further alleged the trial court erred in excluding evidence concerning the causes for her absences. C.M.T. claimed this evidence would have shown that her absences were due to her Asperger's Syndrome and "the school district's failure to provide services that would enable her to overcome the effects of her disabilities." *Id.* at 355.

<sup>12</sup> In its March 22, 2004 opinion, the trial court also noted that none of the charged offenses were "specific intent" crimes and "psychiatric testimony is admissible only to negate the specific intent required to establish first degree murder." *Id.*, citing *Commonwealth v. Garcia*, 479 A.2d 473 (Pa. 1984). Furthermore, the trial court found that a mental disability does not suggest absence of *mens rea*. *Id.* (citations omitted).

On appeal, the court concluded that the trial court erred in excluding evidence concerning the relationship between C.M.T.'s disabilities and her absenteeism. *Id.* Specifically, the court held that "evidence concerning the relationship between C.M.T.'s disabilities and her absenteeism, including evidence as to the availability of services that would facilitate her ability to attend school, are not only relevant but necessary to any determination of dependency". *Id.* at 356. In arriving at this decision, the court discussed the following:

One of the stated goals of the Juvenile Act is to provide for the care, protection, and wholesome mental development of children. The purpose of juvenile proceedings is to seek treatment, reformation and rehabilitation, and not to punish. To this end, the juvenile court system was designed to provide a distinctive procedure and setting to deal with the problems of youth. At the same time, this Court has recognized the seriousness of the nature of these proceedings and the potential harm that could result from adjudicating the merits of a dependency petition without a proper evidentiary foundation. For these reasons, the juvenile court in a dependency proceeding both can and must conduct a comprehensive inquiry into the circumstances of the matter. In the course of conducting this inquiry, the court should of course receive evidence from all interested parties. In addition, the judge should receive, and if necessary should seek out, evidence from objective, disinterested witnesses, e.g., neighbors, teachers, social workers, and psychological experts.

*Id.* (internal quotations, citations and emphasis omitted).

Instantly, D.A.S. contends that "a comprehensive inquiry that considers all relevant evidence" has greater significance in a delinquency proceeding. D.A.S.'s Brief, at 28. Furthermore, D.A.S. argues that a student's disability and school experience, as found relevant in *In re C.M.T.*, are also relevant to show whether D.A.S. had the requisite *mens rea*. *Id.*

The trial court noted the differences between the dependency proceeding in *In re C.M.T.* and a delinquency proceeding. Trial Court Opinion, 3/22/05, at 5-6. As noted by the trial court, *In re C.M.T.* involved whether C.M.T.'s Asperger's Syndrome constituted "justification for absenteeism within the context of a dependent child." *Id.*, citing *In re C.M.T.*, at 356. Furthermore, the trial court noted that the instant case involved a determination of delinquency.

Upon close examination, we find the trial court did not err in determining that the administrative decisions were not relevant for adjudication purposes. *In re C.M.T.* is clearly distinguishable from the instant case and we see no connection between the school district's "purported failure" to implement an individualized educational plan and whether D.A.S. had the requisite *mens rea* to commit the aforementioned offenses. Because D.A.S. fails to describe how these administrative decisions contributed to him forming the intent to commit the offenses, let alone adequately discuss exactly how the school district's purported failures caused him to commit the offenses, this argument fails.

In his second issue, D.A.S. avers the trial court erred in not admitting or considering evidence probative of his voluntariness to commit the underlying offenses. Specifically, D.A.S. avers the trial court erred "by ruling that the written and oral testimony of Dr. Dowell was inadmissible for the purposes of showing that [D.A.S.] suffered from Asperger's Syndrome and that, under all the circumstances of the case . . . he did not voluntarily commit the conduct that forms the basis of the charges in the delinquency petitions." D.A.S.'s Brief, at 31. Furthermore, D.A.S. contends the two administrative decisions were relevant on the issue of voluntariness. *Id.*, at 32.

In regards to the expert testimony and report, D.A.S.'s offer of proof specified that this evidence would encompass the issue of intent and whether D.A.S. was capable of forming intent to commit the offenses. *See*, N.T. Evidentiary and Disposition Hearing, 9/28/04, at 167-168. Absent from this offer of proof is any inference that Dr. Dowell would discuss the voluntariness of D.A.S.'s actions. Despite this omission, D.A.S. contends he sought to admit this evidence through his motion for reconsideration and that the trial court acknowledged the claim in its March 22, 2004 opinion. D.A.S.'s Brief, at 31, n. 20.

In *Commonwealth v. Gibson*, 400 A.2d 221 (Pa. Super. 1979), our Court stated:

[a]n offer of proof must be sufficient to alert the trial judge of the purpose for which the evidence is being offered, and a trial court's exclusion of evidence must be evaluated on appeal in the contents of the offer at the time it was made. A party specifying the purpose for which evidence is admissible cannot later complain on appeal that the evidence was admissible for still another purpose.

*Id.* at 222.

At the evidentiary hearing, D.A.S. attempted to introduce the expert testimony solely on the issue of intent and, therefore, is precluded from challenging its admissibility on different grounds, i.e. whether D.A.S.'s actions were voluntary. Because the expert testimony was available to D.A.S. at the time of the evidentiary hearings, this evidence is not admissible as after-discovered evidence. Accordingly, we are precluded from addressing this issue.

In regards to the administrative agency decisions, D.A.S. avers that "the school district's failure to provide [D.A.S.] with necessary services, and its staff's failure to use professionally acceptable methods to prevent and de-escalate [D.A.S.'s] behavior during the incident that led to this adjudication, were clearly relevant to whether his conduct was voluntary." D.A.S.'s Brief, at 32. (citations omitted). This is the extent of D.A.S.'s argument and he fails to further develop any discussion on this issue or reference any relevant legal authority. Accordingly, we are precluded from addressing this issue. *See Commonwealth v. Snyder*, 870 A.2d 336 (Pa. Super. 2005) (undeveloped claims are waived on appeal).

In his third issue, D.A.S. avers the trial court erred in not admitting or considering relevant evidence that established he acted in self-defense. This evidence included Dr. Dowell's testimony and two administrative decisions. D.A.S.'s Brief, at 36. According to D.A.S., Dr. Dowell's testimony would show that D.A.S. reasonably believed he was in immediate danger at the time of the occurrences. *Id.* Furthermore, D.A.S. contends the administrative decisions "speak to the reasonableness" of a belief that he was in immediate danger and "suggest the school district's improper program, including the use of physical restraints, triggered [his] self-defense response." *Id.*

At the outset, we note that D.A.S. failed to incorporate this issue in his 1925 statement. The only reference to a "defense" was in his second issue, where he phrased the issue as follows:

The [trial court] erred as a matter of law by irrebuttably presuming that [D.A.S.] possessed the requisite mens rea to commit the alleged criminal acts, and denying [D.A.S.] the opportunity to present a defense to the Commonwealth's circumstantially supported claim that [D.A.S.] intended the consequence of his actions; specifically, a defense that included expert testimony about D.A.S.'s impairments, the degree to which these impairments impede his ability to act intentionally, and the School District's failure to meet [D.A.S.'s] needs and the effect of that failure on his ability to form intent.

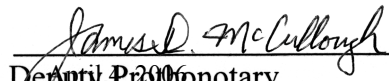
Appellant's Pa.R.A.P. 1925 (b) Statement, Certified Record.

Because D.A.S. failed to preserve this issue in his 1925 (b) statement, we find the issue waived. *See Commonwealth v. Snyder*, 870 A.2d 336 (Pa. Super. 2005).

Assuming, *arguendo*, D.A.S. included the issue in his 1925 (b) statement, we would find this issue waived on other grounds. First, D.A.S. failed to discuss in his offer of proof that the expert testimony would encompass the issue of self-defense. As such, D.A.S. is precluded from challenging on other grounds that the trial court erred in not admitting this evidence. *See Gibson, supra.* Furthermore, D.A.S. fails to develop any discussion on this issue or reference any relevant legal authority. Therefore, D.A.S. waived this issue. *Snyder, supra.*

Order affirmed. Jurisdiction relinquished.

Judgment Entered:

  
Deputy Prothonotary

Date: \_\_\_\_\_