NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

C.M.,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D16-5068
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

Opinion filed January 5, 2018.

Appeal from the Circuit Court for Polk County; Mark H. Hofstad, Judge.

Howard L. Dimmig, II, Public Defender, and Matthew D. Bernstein, Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Johnny T. Salgado, Assistant Attorney General, Tampa, for Appellee.

BLACK, Judge.

C.M. challenges the order withholding adjudication of delinquency but finding C.M. guilty of affray and placing her on probation for one year. C.M. contends that the court erred in denying her motion for judgment of dismissal of the affray charge

based on the State's failure to present evidence rebutting her theory of self-defense. We agree and reverse and remand for entry of judgment of dismissal.

C.M. was charged with disorderly conduct and affray as the result of a physical altercation between C.M. and another juvenile, S.J., on the juveniles' high school campus. At the adjudicatory hearing, the State's only witness was the high school's dean of students. The dean testified that C.M. and S.J. were involved in a "disturbance" outside of the school's cafeteria. The dean watched S.J. walk to a group of students S.J. "normally hangs with," which included C.M. He saw S.J. and C.M. talking; after he had looked away and continued to talk to another administrator, he heard students yelling and turned around to see C.M. and S.J. "punching each other" and "striking each other." The dean yelled for the students to "stop fighting"; however, C.M. and S.J. only stopped fighting after they were physically separated. Although the dean testified that the fight appeared mutual, he also testified that he did not see who threw the first punch or how the fight started.

Following the dean's testimony, the State rested and C.M. moved for judgment of dismissal. C.M. argued that the State had not presented a prima facie case of disorderly conduct or affray because the dean had not seen how the fight started: "[I]t could have been self-defense, . . . a full defense of the case." The State responded that the testimony established the altercation was mutual—there was no indication that either student was the aggressor—and that despite being told to disengage, the students continued to fight. The court denied the motion for judgment of dismissal as to both charges.

The defense called T.J., a student who witnessed the fight. T.J. testified that she, C.M., and another student were walking out of the cafeteria when they were approached by S.J. S.J. began "cussing" at the third student, "just trying to fight, basically." According to T.J., S.J. was aggressive. T.J. testified that after C.M. said "nobody's going to fight, we aren't doing this today," the third student walked away and then S.J. "started going at" C.M. and punched C.M. "in the face just out of nowhere." T.J. stated that she did not hear the dean command the students to stop fighting.

C.M. also testified. C.M. saw S.J. walking toward her and could tell S.J. was angry. S.J. asked the third student if they were going to fight, and C.M. said, "No, we can't be doing this." C.M. testified that S.J. punched her in the face and that she defended herself by punching S.J. C.M. also testified that she did not hear the dean tell them to stop fighting.

Following C.M.'s testimony, the defense renewed its motion for judgment of dismissal. Counsel argued that the undisputed evidence established that C.M. had acted in self-defense and that the State had failed to rebut the defense with any evidence. In support of the argument, counsel pointed to two cases discussing the applicability of self-defense to the charge of disorderly conduct. The State responded that the court should find T.J.'s and C.M.'s testimony less credible than the dean's. The State represented that the dean's testimony was that S.J. was not acting aggressively and therefore T.J.'s and C.M.'s testimony that S.J. approached them in an aggressive manner should not be believed. The court indicated that it would "reserve on that argument" and asked the parties for closing argument.

In closing argument, counsel reiterated that C.M. was acting in self-defense and that the undisputed evidence established that S.J. threw the first punch. Addressing the unresolved motion for judgment of dismissal, the court stated: "Based on the case law and the facts that are virtually identical to what we have here today as to the charge of disorderly conduct, which is the only thing that has been argued to this point in time, I find the defendant not guilty of disorderly conduct." However, the court found C.M. guilty of affray and placed her on one year of probation.

C.M. subsequently filed a written renewed motion for judgment of dismissal, arguing that she had moved for judgment of dismissal as to both charges on the basis that the State had failed to rebut her defense of self-defense. C.M. contended that justified use of force is applicable in cases of affray just as it is in cases of disorderly conduct. The renewed motion was denied in an order containing no findings or conclusions.

We review the trial court's ruling on a motion for judgment of dismissal de novo. G.T.J. v. State, 994 So. 2d 1182, 1184 (Fla. 2d DCA 2008) (citing E.A.B. v. State, 851 So. 2d 308, 310 (Fla. 2d DCA 2003)). On our review of the record, it appears that the trial court denied the motion for judgment of dismissal not because it found that self-defense is not a defense to the charge of affray but because it did not realize that both affray and disorderly conduct were the subject of the motion. The court ruled: "Based on the case law and the facts that are virtually identical to what we have here today as to the charge of disorderly conduct, which is the only thing that has been argued to this point in time, I find the defendant not guilty of disorderly conduct." (Emphasis added.) C.M.'s written motion for judgment of dismissal established that C.M. also understood

the court's ruling to be a misapprehension that the argument encompassed only the disorderly conduct charge. However, regardless of the reason, the court erred in denying the motion for judgment of dismissal.

Section 870.01, Florida Statutes (2015), Affrays and riots, does not provide a definition of affray; it provides only that "persons guilty of an affray shall be guilty of a misdemeanor of the first degree." § 870.01(1). Because the statute does not define affray, courts have resorted to the common-law definition: "the fighting of two or more persons in a public place, to the terror of the people." O.A. v. State, 312 So. 2d 202, 203 (Fla. 2d DCA 1975) (quoting Carnley v. State, 102 So. 333, 334 (Fla. 1924)); accord D.L.B. v. State, 707 So. 2d 844, 844 (Fla. 2d DCA 1998). Therefore, "an affray by fighting . . . necessarily includes assault and battery." O.A., 312 So. 2d at 203 (quoting Carnley, 102 So. at 334); see also D.L.B., 707 So. 2d at 845 (utilizing the dictionary definition of affray as "a public fight or brawl"). Although O.A. was decided when "assault and battery" was a single offense, the analysis remains valid: an affray requires two or more people to engage in batteries. See § 784.03, Fla. Stat. (1973). And self-defense is a defense to battery. S.J.C. v. State, 906 So. 2d 1115, 1115 (Fla. 2d DCA 2005); see § 776.012, Fla. Stat. (2015); cf. M.L.J. v. State, 93 So. 3d 348, 349 (Fla. 2d DCA 2012) ("When charged with disorderly conduct, a defendant who does not initiate the fight and acts to protect himself or herself from the attacker may assert self-defense." (citing S.D.G. v. State, 919 So. 2d 704, 705 (Fla. 5th DCA 2006))).

We note that while there is an absence of Florida case law on the issue, other states have expressly held that self-defense is a defense to the charge of affray. See, e.g., Commonwealth v. Nee, 985 N.E.2d 118, 126 n.8 (Mass. App. Ct. 2013)

("Nothing in the definition of affray precludes a defendant so charged from asserting self-defense or defense of another in justification of his conduct."); Dashiell v. State, 78 A.3d 916, 920 (Md. Ct. Spec. App. 2013) ("To begin with, self-defense, in our view, may be invoked as a defense to affray. An affray, by its very definition, involves 'fighting.' And . . . 'the simple and frequently neglected larger truth is that the defense of self-defense applies to assaultive crimes generally.' " (quoting Bryant v. State, 574 A.2d 29, 33 (Md. Ct. Spec. App. 1990))); In re B.R.-D., 620 S.E.2d 320, *2 (N.C. Ct. App. 2005) (table decision) (holding that "to defeat a charge of affray based on self-defense, a juvenile must be 'without fault in provoking, engaging in, or continuing a difficulty with another,' and must retreat from any non-felonious assault if she has the means to do so" (quoting In re Wilson, 568 S.E.2d 862, 863 (N.C. Ct. App. 2002))); cf. State v. Bea, 254 P.3d 948, 951 (Wash. Ct. App. 2011) (stating that "one who provokes an affray cannot invoke the right of self-defense" (citing State v. Wingate, 122 P.3d 908, 911 (Wash. 2005))). "If, in prosecuting two defendants for an affray, it appears that one was acting in self-defense, having been attacked by the other, there is no affray; the attacker is guilty of a battery, and the other person is guilty of no crime at all." 4 Charles E. Tortia, Wharton's Criminal Law § 536 (15th ed. 2017).

"[W]hen [a] defendant presents a prima facie case of self-defense, the State's burden includes 'proving beyond a reasonable doubt that the defendant did not act in self-defense.' " G.T.J., 994 So. 2d at 1184 (quoting Fowler v. State, 921 So. 2d 708, 711 (Fla. 2d DCA 2006)). "This means the State must overcome the defense by rebuttal or by inference in its case in chief." Id. Here, C.M. presented unrebutted testimony that S.J. was the aggressor, initiating the altercation and throwing the first

punch. The evidence established that C.M. did not provoke the fight. Cf. M.L.J., 93 So. 3d at 349. C.M. presented a prima facie case of self-defense. The State presented no rebuttal witnesses or evidence, and no evidence contradicted T.J.'s or C.M.'s testimony. The dean did not see who initiated the physical contact. As a result, the State failed to prove beyond a reasonable doubt that C.M. was not acting in self-defense. The State's evidence was legally insufficient, and a judgment of dismissal should have been entered. See G.T.J., 994 So. 2d at 1184.

Accordingly, we reverse the order withholding adjudication and remand with instructions to dismiss the State's petition for delinquency.

Reversed and remanded.

CASANUEVA and LUCAS, JJ., Concur.