IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

APPELLATE DOCKET NOS. 668 MDA 2005 & 669 MDA 2005

IN THE INTEREST OF D.A.S., A MINOR

APPEAL OF D.A.S.

Appeal from the Order of the Honorable Louise O. Knight of the Union County Court Of Common Pleas, 17th Judicial District, Juvenile Division Entered March 22, 2005
In Juvenile Docket Nos. 040JV04 & 041JV04

BRIEF OF APPELLANT, D.A.S.

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Dated: *August 19, 2005*

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STATEMENT OF JURISDICTION

The Superior Court has jurisdiction to review a final order of the Court of Common Pleas adjudicating a child delinquent pursuant to 42 Pa. C.S. § 742. The Court of Common Pleas had jurisdiction under 42 Pa. C.S. § 6301 *et seq*. to hear this matter. D.S. timely filed a notice of appeal on April 15, 2005.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The decision to admit or to exclude evidence, including expert testimony, lies within the discretion of the trial court. In re C.M.T., 861 A.2d 348, 355 (Pa. Super. 2004). This Court will review a trial court's evidentiary rulings for abuse of discretion; where an evidentiary ruling turns on a question of law, however, this Court's review is plenary. Id.; Zieber v. Bogert, 773 A.2d 758, 760 n.3 (Pa. 2001).

ORDERS IN QUESTION

ORDERS #1 & #2 (Filed September 29, 2004)

IN THE COURT OF COMMON PLEAS 17TH JUDICIAL DISTRICT
UNION COUNTY, JUVENILE DIVISION

ADJUDICATION ORDERS [PETITION NOS. 40JVO4 & 41JV04]

And now, this 28th day of September 2004, notice having been given to the parents, and after a hearing pursuant to Section 6341 of the Juvenile Act, the Court finds on proof beyond a reasonable doubt that the child committed [ten enumerated felony, misdemeanor and summary offenses in the Crimes Code] …. the child is in need of treatment, supervision and rehabilitation and is hereby adjudicated delinquent.

See Appendix A, attached, for the unedited adjudication orders.

ORDER #3 (Filed March 22, 2005)

IN THE COURT OF COMMON PLEAS 17TH JUDICIAL DISTRICT
UNION COUNTY BRANCH, JUVENILE DIVISION
NO. 40JV04, NO. 41JV04

ORDER UPON MOTION FOR RECONSIDERATION

AND NOW, March 21, 2005, for the reasons stated in the Opinion of the Court filed this same date, it is hereby ORDERED that the Court's original decisions in this case are affirmed.

See Appendix D, attached, for the Order and Opinion affirming Orders Nos. 1 & 2.

STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the delinquency adjudication of D.S., an 11-year-old with an autism spectrum disorder, should be reversed as a matter of law because the lower court erred by denying D.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 matter of law because the lower did not admit or consider relevant evidence regarding D.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 lower court did not admit or consider relevant evidence that would have established D.S. acted in self-defense? [Suggested Answer: Yes]

STATEMENT OF THE CASE

Procedural History

This is an appeal of the delinquency adjudication of D.S., an 11-year-old boy diagnosed with Asperger's Syndrome, a form of autism spectrum disorder, based on his commission of felony, misdemeanor and summary offenses at his elementary school in February and March 2004. D.S. appeals the Juvenile Court's refusal to admit or consider exculpatory evidence presented at trial, and evidence discovered after trial but timely presented in a post-verdict motion.

Law enforcement involvement in this matter began on February 24, 2004 when Lewisburg police officers were summoned by elementary school officials to remove D.S. from his special education classroom for D.S.'s behavior in that classroom. Reproduced Record (R.) at 453a, ¶ 17. The police released D.S. to the custody of his parents and he returned to school following a brief suspension. R. at 248a, 474a. One month later, on March 30, 2004, police officers again removed D.S. from school for his behavior in the school principal's office, and again released him to the custody of his parents. R. at 178a-186a.

On March 29, 2004, before the second contact with law enforcement, D.S.'s family filed an administrative Special Education Due Process hearing request against the Lewisburg School District (School District) with the Pennsylvania Department of Education (PDE), alleging that school officials had failed to provide D.S. with adequate behavior supports as required by federal and state law. R. at 448a, 475a. On April 12, 2004, shortly after the family filed its hearing request, the Juvenile Division of the Union County Court of Common Pleas received two separate delinquency petitions against D.S.

(Nos. 040JV04 & 04IJV04) for each of the incidents described above. Each petition charged D.S. with multiple counts of Aggravated Assault, Simple Assault, Harassment, Criminal Mischief and Disorderly Conduct.[1] Id.

The Juvenile Court held two evidentiary hearings on the delinquency petitions in July and September of 2004. Eight of the nine Commonwealth witnesses were school personnel at the time of the incidents. At the September 28th hearing, after the Commonwealth's case-in-chief, defense counsel moved for a directed verdict. R. at 271a. The Juvenile Court dismissed Count 1—Aggravated Assault (18 Pa. C.S. § 2702(a)(5)) in Petition 40JVO4 and preserved the other six counts. The seven counts in Petition 41JV04 were also preserved. R. at 282a-283a.

At the same hearing defense counsel commenced its case-in-chief by presenting testimony of Richard Dowell, Ph.D., a neuropsychologist who had evaluated D.S. at the school district's request, about D.S.'s disability and its effect on his emotional and mental condition during the charged offenses. R. at 283a. Defense counsel also sought the admission of Dr. Dowell's written neuropsychological evaluation for the same purpose.[2]

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[1] Petition 40JV04 charged D.S. with seven offenses defined in the Crimes Code for conduct that occurred on March 30, 2004: Count One—Aggravated Assault (18 Pa. C.S. § 2702(a)(5))(F2), Count Two—Harassment (18 Pa. C.S. § 2709(a)(1))(S), Count Three—Criminal Mischief (18 Pa. C.S. § 3304(a)(2))(S), Count Four—Disorderly Conduct (18 Pa. C.S. § 5503(a)(1))(M3), Count Five—Disorderly Conduct (18 Pa. C.S. 5503(a)(2))(M3), Count Six—Disorderly Conduct (18 Pa. C.S. 5503(a)(3))(M3), and Count Seven—Disorderly Conduct (18 Pa. C.S. 5503(a)(4))(M3). See R. at 22a for Petition 40JV04.

Petition 41JV04 charged D.S. with seven offenses defined in the Crimes Code for conduct that occurred on February 24, 2004: Count One—Aggravated Assault (18 Pa. C.S. § 2702(a)(5))(F2), Count Two—Aggravated Assault (18 Pa. C.S. § 2702(a)(5))(F2), Count Three—Simple Assault (18 Pa. C.S. § 2701(a)(1))(M2)), Count Four—Simple Assault (18 Pa. C.S. § 2702(a)(1))(M2), Count Five—Simple Assault (18 Pa. C.S. § 2702(a)(3)(M2), Count Six—Harassment (18 Pa. C.S. § 2709(a)(1))(S), and Count Seven—Harassment (18 Pa. C.S. § 2709(a)(1))(S). See R. at 28a for Petition 41JV04.

The Commonwealth and counsel for D.S. agreed to treat the two matters as one "because the witnesses and fact circumstances are all in the same location." Sept. 28, 2004 Hearing, R. at 212a.

[2] Neuropsychological Assessment prepared by Richard Dowell, PhD, [hereinafter Neuropsychological Evaluation]. See Volume 2 of Reproduced Record at 435a.

R. at 284a. However, the Juvenile Court excluded Dr. Dowell's written and oral testimony, stating "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." R. at 289a. The defense presented no additional evidence at that time.

Thereafter, the Juvenile Court dismissed Count 7—Disorderly Conduct (18 Pa. C.S. § 5503(a)(4)) in Petition 40JV04 and Counts 3 & 4 (Simple Assault - 18 Pa. C.S. § 2701(a)(1)) in Petition 41JV04, but found that the Commonwealth had proved beyond a reasonable doubt that D.S. committed ten of the various felony, misdemeanor and summary offenses; adjudicated him delinquent because the court found he required treatment, supervision and rehabilitation; and permitted Dr. Dowell to testify that day for the limited purpose of disposition. R. at 291a-295a. After permitting direct and cross-examination of Dr. Dowell (R. at 316a-368a), the Juvenile Court continued its disposition until December 17, 2004. R. at 384a.

In November 2004, one month before the December disposition hearing, D.S.'s family obtained a decision against the school district from the Special Education Hearing Officer assigned by the PA Department of Education (PDE) to hold a hearing and to resolve D.S.'s complaint.[3] The Hearing Officer held that the school district, including some of the Commonwealth's witnesses from D.S.'s school, had failed to provide D.S. with appropriate behavior supports during the 2003-2004 School Year (which included the period of the incidents in February and March 2004). R. at 470a-471a. The school

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[3] Due Process Hearing Officer Decision of Anne Carroll, Esq. (November 11, 2004) [hereinafter Hearing Officer Decision]. See Volume 2 of Reproduced Record at 447a.

district immediately appealed the Hearing Officer's decision to a state administrative appeals panel. R. at 475a.

At the beginning of the December 2004 disposition hearing, D.S. urged the Juvenile Court to reconsider its finding that the Commonwealth had proved that D.S. committed the offenses for which he was charged, R. at 388a, and sought the admission of the Hearing Officer Decision against the school district. R. at 391a. The Juvenile Court denied D.S.'s request for reconsideration, but admitted into evidence the Hearing Officer Decision and Dr. Dowell's neuropsychological evaluation, again for the limited purpose of determining an appropriate disposition. R. at 425a, 428a. On that same day, the Juvenile Court issued its disposition order placing D.S. on probation for an indefinite period of time while the school district conducted an evaluation of his behavioral needs stemming from his disability (called a "functional behavior assessment") and developed a new Individualized Education Program (IEP).[4] See December 17, 2004 Disposition Order of Juvenile Court, attached herein as Appendix B.

In late December 2004 the PA Special Education Due Process Appeals Panel appointed by PDE rejected the school district's appeal and affirmed the Hearing Officer's grant of relief, agreeing with the Hearing Officer that the school district had violated D.S.'s rights under federal and state special education laws.[5] Appeals Panel Decision, R. at 476a, 482a-483a. The Appeals Panel increased the amount of compensatory education awarded by the Hearing Officer. Id.

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[4] An IEP refers to the "Individualized Education Program," which public schools must prepare for each child who receives special education. See Brief of *Amicus Curiae* Pennsylvania Protection & Advocacy.

[5] *In Re T*he Educational Assignment of David S., Special Educ. Op. No. 1555 (Spec. Educ. Due Process Appeals Review Panel, Dec. 20, 2004) (final administrative review) [hereinafter Appeals Panel Decision]. See Volume 2 of Reproduced Record at 472a.

In January 2005 D.S. filed a timely motion with the Juvenile Court seeking reconsideration of its determination that he had committed the offenses for which he was charged, and requesting the admission of the Appeals Panel Decision (as well as again requesting that the court admit the Hearing Officer Decision and the expert testimony of Dr. Dowell) for adjudicatory purposes.[6] The Juvenile Court granted D.S.'s Motion for Reconsideration,[7] and ordered the Commonwealth to reply. See January 18, 2005 Order of the Juvenile Court, attached herein as Appendix C. On March 21, 2005, the Juvenile Court denied D.S.'s request for relief and affirmed its delinquency adjudication. See March 21, 2005 Order & Opinion of the Juvenile Court [hereinafter Juvenile Court Opinion], attached herein as Appendix D. D.S. filed a timely notice of appeal, R. at 484a, and has moved to consolidate these matters into a single appeal.

Substantive History

D.S. began the 2003-2004 School Year in fifth grade; he has considerable neurological and emotional disabilities and was diagnosed with Asperger's Syndrome, a form of autism spectrum disorder, in September 2004. See Hearing Officer Decision, R. at 449a-450a. Some of D.S.'s disabilities have been known to school district officials

[6] Specifically, the January 18, 2005 Motion requested that the trial court (1) admit D.S.'s school records, including Dr. Dowell's neuropsychological assessment of D.S. and the decisions of a special education hearing officer and the appeals panel; and either (2) vacate its delinquency adjudication because the Commonwealth did not establish the requisite *mens rea* or establish that D.S's conduct was "voluntary"; or (3) vacate its *finding* that D.S. is a delinquent child because D.S. receives adequate care and is pursuing appropriate remedies to address his education needs, thus the delinquency intervention will not remedy D.S.'s autism spectrum disorder. See docket entries in lower court at R. 8a, 18a.

[7] D.S. simultaneously filed a Notice of Appeal from the December 17 Final Order. However, as stated above, the lower court expressly granted reconsideration *within* the 30-day time prescribed for filing the notice of appeal. Pennsylvania Rule of Appellate Procedure 1701(b)(3)(i, ii) permits a trial court to grant reconsideration of an order that has been appealed if two conditions are met: first, application for reconsideration is timely filed, and second, the trial court order expressly granting reconsideration is entered within the time prescribed for filing the notice of appeal. See G. Ronald Darlington, PENNSYLVANIA APPELLATE PRACTICE (2nd Edition) § 1701:23 (2002).

since his placement in a first grade, full-time, special education emotional support classroom.[8] But by the fourth grade D.S. was successfully participating in a regular education classroom with minimal supports. Hearing Officer Decision, at 448a.

In fifth grade D.S.'s behavior began to deteriorate. In the middle of the 2003-2004 School Year (*i.e.*, January 2004), the school district moved D.S. from his regular fifth grade classroom, where he had been given minimal support services, to a full-time, emotional support classroom. This placement by the school district was inappropriate for D.S.'s unique educational and emotional needs. See Hearing Officer Decision and Appeals Panel Decision. After the move D.S.'s behavior deteriorated immediately, culminating in the February and March 2004 arrests that are the subject of this appeal. Prior to these contacts with law enforcement, D.S. had never been involved with the juvenile justice system.

D.S.'s first contact with law enforcement was February 24, 2004. As noted above, D.S. had been in his new classroom for approximately one month and was not adjusting well. Hearing Officer Decision, at 454a. That afternoon he was prevented from going home at the end of the school day following an incident with a classmate where he allegedly raised his chair in a threatening manner. R. at 242a. A few hours later a school social worker who was not scheduled to work with D.S. that day entered the classroom to confront him about the earlier incident. D.S. became extremely agitated and the social worker used a physical restraint.[9] R. at 232a. This further agitated D.S. and caused him

[8] An emotional support class is a type of special education placement designed for students with disabilities whose primary learning barrier is behavioral in nature.

[9] Dr. Richard Dowell, an expert in adolescent neuropsychology, testified at the September 28, 2004 disposition hearing that tactics such as physical restraint are inappropriate given D.S.'s medical condition. Exposure to threatening situations exacerbates the "fight or flight" responses in children with Asperger's Syndrome. Dr. Dowell opined that D.S. should have instead been given a 20-30 minute cooling off period

to try to escape from the restraint; the police were called and eventually delinquency petition number 41JV04 was filed. Again, Dr. Dowell's testimony at the disposition hearing was that a "fight or flight" response is typical behavior for a child like D.S. with autism spectrum disorder who feels threatened. R. at 326a.

Following the February 2004 incident the school district did not make an effort to reassess D.S.'s new placement or address his deteriorating behavior through a review or revision of his Individualized Education Program (IEP), as was required by state law.[10] After a brief suspension from school, D.S. returned to the emotional support classroom. R. at 248a.

On March 30, 2004 D.S. was forced to participate in organized recess with students from the emotional support classroom, even though his Individualized Education Program specified that he should continue to have recess with his former class. R. at 197a. After D.S. resisted this change, D.S.'s teachers physically forced him off the playground; he was then moved into the nurse's office. R. at 126a, 163a. Finally, as D.S. continued to demonstrate agitated behavior, he was moved into the principal's office.

All of these moves by the school district were inconsistent with the recommended approach for de-escalating the behavior of a child with autism spectrum disorder, which

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in a safe place. See R. at 329a. See also Brief of *Amicus Curiae* Pennsylvania Protection & Advocacy for more information on children with autism spectrum disorder and the recommended approaches for preventing and de-escalating the behaviors associated with this disability.

[10] 22 Pa. Code § 14.133(c) ("The use of restraints to control the aggressive behavior of an individual student shall cause a meeting of the IEP team to review the current IEP for appropriateness and effectiveness"). Moreover, the Special Education Hearing Officer found that the school district violated D.S.'s right to an appropriate education when it "[did] not recognize its obligation to seriously re-consider the appropriateness of the full-time emotional support setting when it became very obvious that such change was even more seriously failing to meet [D.S.]'s needs." See Hearing Officer Decision, at 462a; see also id. at 469a (concluding that when he was moved to the emotional support classroom, "[D.S.]'s behaviors worsened even more clearly indicating that the change in placement was inappropriate for him.").

is to move the child into a safe place to give him time to cool off.[11] As D.S. was moved from room to room and essentially subjected to inappropriate physical restraint, his disability caused him to become increasingly agitated. R. at 126a, 153a. Unable to calm D.S. without appropriate interventions, the school district called the Lewisburg Police Department which later filed delinquency petition 41JV04. Some of the disruptive behavior alleged in that petition included turning lights on and off and knocking over flowers on the secretary's desk.

Shortly before the March 2004 school-based incident, D.S.'s parents filed a Special Education Due Process Hearing request pursuant to the federal Individuals with Disabilities and Education Act (IDEA), 20 U.S.C. §§ 1400, *et seq*., alleging various violations of state and federal education law. In November 2004 an impartial Special Education Hearing Officer found that the Lewisburg Area School District had failed to re-evaluate D.S. and to provide him with necessary special education supports and services, including appropriate behavior supports, from January 20, 2004 to the close of the 2003-2004 School Year (which includes the time frame for the alleged delinquent acts).

The Hearing Officer further found that the school district had not provided necessary supports for D.S. in the regular classroom (where he had previously been successful), but rather had moved him into a segregated special education program in an emotional support classroom—a change of placement that exacerbated his escalating behavior problems. See Hearing Officer Decision, at 469a. The Hearing Officer ordered the

[11] A Special Education Appeals Panel emphasized that because D.S. has a disability that impedes his ability to control his behavior, it is the responsibility of the school district to "teach [D.S.] how to interact appropriately with peers and adults in varying school contexts *and not simply punish him for failing to act appropriately*." See Appeals Panel Decision, at 482a (emphasis added).

school district to complete its evaluation report of D.S., to complete a functional behavior assessment, and to provide compensatory education. The school district appealed the decision to a Special Education Due Process Appeals Panel, which affirmed in pertinent part the Hearing Officer's grant of relief, agreeing that the school district violated D.S.'s rights under state and federal laws. The Appeals Panel also increased the award of compensatory education. See Appeals Panel Decision, at 482a.

SUMMARY OF ARGUMENT

The matter before this Court involves the delinquency adjudication of D.S., an 11-year-old with a neurological disability, Asperger's Syndrome, whose classroom conduct, a manifestation of that disability, was the subject of fourteen criminal offenses brought in two delinquency petitions. The failure of D.S.'s school to meet its legal obligations to educate him and address his behaviors of concern as an education matter is undisputed and the backdrop against which this Court should reverse the adjudication.

Due process requires that in delinquency matters an accused juvenile be protected "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Under Pennsylvania's Crimes Code the Commonwealth bears the burden of proving the defendant's intent, 18 Pa. C.S. § 302, and that his conduct was voluntary. 18 Pa. C.S. § 301. Due process principles and the Juvenile Act give juvenile defendants—like D.S.—the right to put forth evidence to disprove the elements of the crime(s) charged as long as that evidence is relevant. Significantly, when the underlying offenses occur at a defendant's school, Congress and this Court have directed law enforcement, including juvenile courts, to consider relevant the defendant's disability and his school's efforts to provide special education.

In the case herein, D.S. sought to admit evidence about the effects that his Asperger's Syndrome had on his ability to understand and control his behavior; and the school district's failure to meet its legal obligation to provide him with appropriate special education services as well as the consequences of this failure. This testimony was D.S.'s rebuttal of the Commonwealth's circumstantial case that D.S. possessed the requisite

mens rea and that his acts were voluntary; a case the Commonwealth established from the statements of school district personnel that D.S. physically committed certain acts. Moreover, the expert and documentary evidence D.S. proffered supported his claim of self-defense, and should have been admissible for that purpose. Accordingly, the lower court erred as a matter of law when it refused to admit or consider the evidence offered by D.S. Had the lower court understood that it had the authority to admit this crucial and highly relevant evidence the result would have been a dismissal of both delinquency petitions. Appellant D.S. therefore requests that this Court vacate his delinquency adjudication in the lower court, and, at a minimum, remand with an instruction that the court admit and consider this evidence for adjudication purposes.

ARGUMENT

I INTRODUCTION

Before a court can adjudicate a child delinquent, the Commonwealth bears the burden of producing sufficient evidence on each element of the crime charged to establish beyond a reasonable doubt that the child committed a crime. In re Winship, 397 U.S. 388 (1970) (the prosecution must prove every element of each charge beyond a reasonable doubt in delinquency proceedings); 42 Pa. C.S. § 6341(b) (codifying the reasonable doubt standard). An equally fundamental principle of our jurisprudence is that a defendant must be allowed to present reliable and relevant evidence in his defense. Chambers v. Mississippi, 410 U.S. 284, 285 (1973) (absent a strong showing of justification by the state, refusing a defendant the right to rebut the state's evidence against him is a denial of due process); Commonwealth v. McGowan, 635 A.2d 113, 115 (Pa. 1993) (same); 42 Pa. C.S. § 6338 (recognizing an accused child "is entitled to the opportunity to introduce evidence").

The delinquency adjudication before this Court requires, at a minimum, reversal and remand because the lower court believed that it did not have the authority to admit, and in fact did not admit or consider, essential exculpatory evidence offered by D.S. That evidence was offered to establish that, because of his disability, D.S. did not have the essential *mens rea* to be convicted of a delinquent act; that his actions were not "voluntary"; and that he acted in self-defense. This evidence consisted of a) expert testimony and the expert's evaluation report to explain the nature of D.S's Asperger's Syndrome and its impact on the events alleged in both delinquency petitions; and b) decisions from a Special Education Hearing Officer and PA Department of Education

Appeals Panel for the purpose of showing that D.S.'s school district had not met its legal obligation during the essential time period to provide D.S. with the special services needed for him to control the symptoms of his disability.

Appellant contends that, had the lower court admitted this crucial and highly relevant evidence, the result would likely have been a dismissal of both delinquency petitions. Appellant is entitled to a reversal of the adjudication and a remand with a direction to the lower court to admit and consider the excluded evidence.[12]

II THE DELINQUENCY ADJUDICATION MUST BE REVERSED BECAUSE THE LOWER COURT DID NOT ADMIT OR CONSIDER ESSENTIAL EXCULPATORY EVIDENCE PROBATIVE OF D.S's INTENT TO COMMIT THE UNDERLYING OFFENSES

It is axiomatic that in a criminal matter the Commonwealth has the burden of proving beyond a reasonable doubt *mens rea*, or criminal intent, on all counts against a defendant. That these offenses are heard in juvenile court does not relieve the Commonwealth of this burden. In the seminal case on intent in delinquency proceedings, an *en banc* panel of this Court plainly stated that *mens rea* is an essential element of a crime which must be proved by the Commonwealth even when the defendant is a juvenile. In re G.T., 597 A.2d 638, 640 (Pa. Super. 1991) (the Commonwealth is not relieved of proving *mens rea* "merely by virtue of proceeding in a juvenile court").

[12] At a minimum appellant seeks a reversal and remand. However, if this Court finds that the lower court's evidentiary rulings were an error of law because such evidence is probative of essential statutory elements, *i.e.*, *mens rea* and voluntariness, D.S. invites this Court to preclude a new trial because the evidence, when properly considered, was insufficient as a matter of law. To determine whether the evidence at trial was legally sufficient to sustain a guilty verdict, this Court can evaluate the entire trial record and consider all evidence actually received, whether or not the trial court's rulings thereon were correct. Commonwealth v. Davis, 799 A.2d 866 (Pa. Super. 2002). If this Court determines the evidence is insufficient to support a verdict, a new trial is not only inappropriate, but constitutionally impermissible, since the Due Process Clause of the Fifth Amendment of the United States Constitution precludes a retrial. Commonwealth v. Whiteman, 485 A.2d 459 (Pa. Super. 1984).

In this matter the lower court reviewed two delinquency petitions alleging violations of five different criminal statutes for incidents in February and March of 2004.[13] Each of these offenses has a separate intent requirement.[14] As discussed below, the lower court erred by excluding two types of evidence—expert testimony about D.S.'s disability and administrative agency decisions about the failure of D.S.'s school to provide him with the services needed for him to control the symptoms of his disability—each probative of D.S.'s intent, a requisite element of each offense. Its refusal to admit or consider each matter is reversible error.

A. The Lower Court Erred When It Refused to Admit or Consider Expert Testimony About D.S.'s Autism Spectrum Disorder and Its Effect on D.S.'s *Mens Rea*

1. The lower court erred when it held, citing *In re G.T.*, that it did not have the authority to admit evidence concerning D.S's disability and its impact on the behavior that resulted in the delinquency adjudication.

During the adjudicatory hearings and in its opinion the lower court relied on In re G.T., 597 A.2d 638 (Pa. Super. 1991) (*en banc*) to exclude from the adjudicatory hearing a written neuropsychological evaluation prepared by Richard Dowell, Ph.D., and testimony of Dr. Dowell about the effect of an autism spectrum disorder on D.S.'s ability to understand and control his behavior at the time of the offenses. In response to D.S.'s efforts to introduce this evidence at the September 2004 adjudicatory hearing the lower

[13] The behavior D.S. exhibited on February 24, 2004 occurred in his special education classroom (Petition 41JV2004). The behavior D.S. exhibited on March 30, 2004 occurred in the school's administrative offices (Petition 40JV2004). See footnote 1, *supra*, reviewing the specific charges in each petition against D.S.

[14] Generally, a person is not criminally culpable unless he acted intentionally, knowingly, recklessly or negligently with respect to each element of an offense. See 18 Pa. C.S. § 302 (defining each of the four states of criminal culpability). On the most serious charge in this matter, aggravated assault, the Commonwealth must prove D.S. *intentionally* or *knowingly* caused bodily injury to an employee of an elementary school, 18 Pa. C.S. § 2702(a) (5), and on the least serious charge, disorderly conduct, the Commonwealth must prove D.S.'s "intent to cause public inconvenience, annoyance or alarm, or *recklessly* creating a risk thereof." 18 Pa. C.S. § 5503(a).

court opined that In re G.T. instructed it to exclude Dr. Dowell's written and oral testimony because

> the defense of infancy, and I would argue that the same kind of *mens rea* defense is involved here, is irrelevant to a determination regarding a juvenile's amenability to treatment, rehabilitation, and supervision … so what I find is that diminished responsibility and any of those kinds of defenses are not relevant to a juvenile proceeding in so far as they determined whether there is to be a finding of commitment of a delinquent act.

R. at 287a-290a; See Juvenile Court Opinion, at 3-4.

In re G.T. eliminated the infancy defense in juvenile court. 597 A.2d at 643. In the case herein, however, D.S. sought to admit expert testimony on an entirely different point. D.S. sought to admit expert evidence of his Asperger's Syndrome (a form of autism spectrum disorder); the impact of Asperger's Syndrome on his ability to understand and control his behavior during the incidents in question; and the failure of the school district to meet its legal obligation to provide him special services and the consequences of this failure. This testimony was crucial to D.S.'s rebuttal of the Commonwealth's circumstantial *mens rea* case, which was based exclusively on proof that D.S. physically committed certain acts. By commingling the entirely different concepts of capacity and *mens rea*, and thereby misreading In re G.T., the lower court excluded relevant evidence offered by D.S. This decision prevented any meaningful scrutiny of the Commonwealth's contention that D.S. had the necessary *mens rea* to commit delinquent acts.

In In re G.T. this Court, sitting *en banc*, considered whether the General Assembly's passage of the Juvenile Act eliminated the common law presumption that children between the ages of seven and fourteen lack the capacity to commit crimes. Id. at 639.

The Court held that "the infancy defense, created to protect children from being punished as criminals is irrelevant in determinations of delinquency in our juvenile justice system." Id. at 643.

In that case a 13-year-old was arrested for possessing two vials containing cocaine. In subsequent juvenile proceedings, after the Commonwealth established G.T.'s physical possession of cocaine, the defense offered a stipulation that a court psychologist had examined G.T. and was of the opinion that G.T. possessed the mental capacity of a nine-and-one-half-year-old child. The trial court refused to admit the evidence and adjudicated G.T. delinquent.

On appeal this Court stated, "in adjudicating G.T. delinquent, Judge McCabe concluded the common law concept of capacity is irrelevant to a determination of whether a juvenile's conduct amounts to an act of delinquency…. We agree." Id. at 641. The Court explicitly recognized the distinction between *mens rea* and capacity determinations as applied to delinquency proceedings. Capacity, it explained, was a distinct legal finding required by common law, "a general determination that the individual understood the act and its wrongfulness." Id. at 641. The Court expressly overruled Commonwealth v. Durham, 389 A.2d 108 (Pa. Super. 1978) (*en banc*), an earlier case which permitted the infancy defense in a proceeding under the Juvenile Act. The G.T. Court rejected those "common law presumptions" as "'inapplicable to juvenile proceedings which were created in order to protect children from the harsh punishments of the adult criminal system.'" Id. at 642 (quoting from the dissent in Durham).

However, the Court left intact the requirement of *mens rea*, defined as intent at the time of the offense. It held that *mens rea* remains an element of the crime that the

prosecution must prove beyond a reasonable doubt. In re G.T. thus reaffirmed the rule that proof of any crime, except a strict liability offense, requires a showing of a mental element. The Court explicitly held that *mens rea* remains an essential element of a crime which must be proved by the Commonwealth, even when the defendant is a juvenile. Id. at 640 (stating the Commonwealth is not relieved of proving *mens rea* "merely by virtue of proceeding in juvenile court.").

In re G.T. thus presents no bar to the admission of evidence about a juvenile's mental and emotional disabilities when introduced to prove that defendant did not have the requisite intent. Indeed, in re G.T. requires the admission of such evidence. The use of expert testimony for this purpose is entirely different from the use of such testimony to relieve a juvenile defendant of criminal responsibility based on the common law presumptions of infancy discussed above. In re G.T. does not exclude the admission of the evidence proffered by D.S., and the lower court committed reversible error by holding that it did.

2. The expert testimony and expert report were relevant to D.S.'s state of mind and it was an error of law for the lower court to have refused to admit or consider such evidence.

Certainly, had the lower court believed it had the authority to consider this evidence, it would have had to admit it as relevant to D.S.'s *mens rea,* that is, whether D.S. "understood the act and its wrongfulness."[15] In re G.T., at 641. Although the lower court permitted Dr. Dowell to testify as an expert for disposition purposes, his testimony and his neuropsychological evaluation should have been admitted at adjudication as

[15] D.S. does not suggest that mere testimony of his diagnosis with Asperger's Syndrome should decide *mens rea*. Rather the expert testimony helps the trial court decide the legal question, whether *mens rea* was formed in fact, and can provide the fullest, richest, most textured description possible of D.S.'s mental and emotional state at the time of the offense.

probative of D.S.'s limited ability to control his behavior at the time of the offenses. Dr. Dowell's assessment was commissioned by the school district in the summer of 2004 "to assist in identification of potential factors contributing to [D.S.'s] ongoing problems within the school environment" and to aid the school "in the development of an intervention program to address his needs." Neuropsychological Evaluation, R. at 436a.

After reviewing prior evaluations and teacher reports, performing neuropsychological tests, and interviewing D.S.'s parents, Dr. Dowell concluded that D.S. met the existing diagnostic criteria for Asperger's Syndrome, a form of autism spectrum disorder. Id. at 442a. Individuals with Asperger's Syndrome have

> marked deficiencies in social skills, have difficulties with transitions or changes and prefer sameness. They often have obsessive routines and may be preoccupied with a particular subject of interest. They have a great deal of difficulty reading nonverbal cues (body language) and very often the individual with AS has difficulty determining proper body space. . . . Therefore, many behaviors that seem odd or unusual are due to those neurological differences *and not the result of intentional rudeness or bad behavior* . . . .

R. at 441a (emphasis added) (citation and internal quotation marks omitted). For additional information on children with autism spectrum disorder and Asperger's Syndrome, see Brief of *Amicus Curiae* Pennsylvania Protection & Advocacy.

Dr. Dowell testified that children with Asperger's Syndrome—like D.S.—have a heightened limbic system, which is responsible for controlling the "fight or flight response." See R. at 325a. Because their limbic systems run at exceptionally high levels, exposure to even a "rather minute stimulus" can trigger "primitive" behaviors in these children, including: hitting, kicking, spitting and biting. R. at 325a-326a, 332a. Asperger's Syndrome is a "disinhibition syndrome," meaning that the frontal lobe of the brain, which controls the understanding of social rules and inhibition of primitive

behaviors, is disconnected from the limbic system. R. at 321a-322a. This problem is caused "by a breakdown and malformation of the white matter which connects one brain area to the next." R. at 337a.

Thus, when a child with Asperger's Syndrome believes that he is threatened, his fight or flight response may "click in," causing him to try to escape and to respond aggressively to defend himself. R. at 326a. While an unaffected individual's frontal lobe inhibits the primitive responses associated with the limbic system, the frontal lobe of a child with Asperger's Syndrome is less effective and the child must be given about twenty minutes in a safe place to exit from the fight-or-flight response to a perceived threat. R. at 325a-326a, 329a-331a, 347a. Importantly, Dr. Dowell noted that many parents report that it is easy to recognize when a child with Asperger's Syndrome has entered the fight-or-flight mode, cuing the parent to respond by offering a safe place. R. at 330a.

Dr. Dowell also testified about the appropriate ways a school district, using trained staff, can prevent the disruptive behavior of a child with autism spectrum disorder, or can de-escalate the behavior if it has occurred. The record of this case makes clear (as did Dr. Dowell's testimony) that the school district in this case did not use the correct strategies, which led inevitably to the agitation and outbursts that resulted in this delinquency adjudication. This evidence was relevant to D.S.'s *mens rea*, and the lower court's failure to admit or consider this evidence was reversible error.

B. The Lower Court Compounded Its Error by Refusing to Admit or Consider at the Adjudicatory Stage Evidence of the School District's Failure to Provide D.S. With Mandated Services, Evidence that is Probative of Whether D.S. Had the Necessary *Mens Rea*

D.S. consistently urged the lower court to view his school-based and disability-related outbursts against the backdrop of the school district's denial of his right to receive an appropriate education, and sought the admission of two special education records obtained after the lower court's finding that D.S. committed the underlying offenses: (1) the October 11, 2004 decision of a Special Education Hearing Officer upholding D.S.'s parents' claims that the Lewisburg Area School District failed to provide him with an appropriate education during the 2003-2004 School Year; and (2) the December 20, 2004 decision of a Special Education Due Process Appeals Review Panel, which affirmed and enlarged the relief given D.S.'s parents by the Hearing Officer. Both documents contain material relevant to D.S.'s actions and state of mind on February 24 and March 30, 2004.

The lower court refused to consider any of these records. In response to D.S.'s efforts to introduce this evidence the court held that because its "duty was to determine whether the child had committed the delinquent acts of which he was accused … we did not find relevant to that determination all the proffered information about the results of the child's IEP." Juvenile Court Opinion, at 6 (emphasis added).[16]

The lower court erred by refusing to admit or consider that the Lewisburg Area School District failed to educate D.S., or that school personnel did not address D.S.'s

[16] The lower court's exclusion of these decisions was based on relevance, not timeliness. As noted above, the trial court received both decisions when it granted D.S.'s Motion for Reconsideration. Moreover, post verdict evidence merits a new trial where four prongs are met: (1) the evidence was discovered after trial and could not have been obtained at or before trial by the exercise of reasonable diligence; (2) the evidence is not merely corroborative or cumulative; (3) the evidence will not be used solely to impeach the credibility of a witness; and (4) the evidence is of such a nature and character that a different verdict would likely result if a new trial is granted. See Commonwealth v. Wilson, 649 A.2d 435, 448 (Pa. 1994). As discussed above, D.S. satisfies all four prongs.

behaviors through a comprehensive special education program as is legally required. The school district's failures to provide D.S. an appropriate education placement and program, and the impact of that failure on D.S., were clearly relevant to the court's determination as to whether D.S. had the requisite *mens rea*—and its refusal was thus reversible error.

1. Evidence of D.S.'s school district's failure to meet its legal obligations to him is clearly relevant to whether he could understand and control his behavior, and thus whether he had the necessary *mens rea*.

The Commonwealth has never challenged D.S.'s claim that the Lewisburg School District failed to educate D.S. appropriately during the 2003-2004 School Year (which includes the time frame for the alleged delinquent acts). The veracity of this information is undisputed, and a court may judicially notice an indisputable fact. See, *e.g.* In Interest of D.S., 622 A.2d 954, 958 (Pa. Super 1993).[17]

The November 11, 2004 decision of an impartial Special Education Hearing Officer concluded that the Lewisburg Area School District violated D.S.'s rights under the IDEA during the 2003-2004 School Year. Prior to and during the alleged delinquent acts the school district failed to provide required special education services and support. The Hearing Officer held that the school district's response to D.S.'s behavioral problems—placing him in an emotional support classroom from mid-January 2004 to April 1, 2004—constituted a distinct IDEA violation. Hearing Officer Decision, at 462a.

[17] Moreover by statute, a trial court can treat as evidence a factual proposition that is supported by reference to an appropriate government publication. 622 A.2d at 958-59 (citing 45 Pa. C.S. § 506). The Appeals Panel decision in this matter, In re the Educational Assignment of David S., Special Educ. Op. No. 1555 (Spec. Educ. Due Process Appeals Panel Review, Dec. 20, 2004), is available through the website of the Pennsylvania Office of Dispute Resolution (ODR) http://www.pattan.k12.pa.us/ODR. ODR coordinates and manages the Pennsylvania Department of Education's and the Pennsylvania Department of Public Welfare's special education due process system.

The school district continued its non-compliance by "not recognize[ing] its obligation to seriously re-consider the appropriateness of the full-time emotional support setting when it became very obvious that the change was even more seriously failing to meet [D.S.]'s needs." Hearing Officer Decision, at 463a; see also id. at 469a (concluding that, when he was moved to the emotional support classroom, "[D.S.]'s behaviors worsened even more, clearly indicating that the change in placement was inappropriate for him").

This sequence of events, constituting a series of IDEA violations, provides the proper context for evaluating D.S.'s allegedly delinquent conduct. The school district placed D.S. in an inappropriate classroom that exacerbated his behavioral problems, without first conducting a psychological evaluation or considering additional special education supports and services that could have been provided to D.S. in his regular classroom. Not surprisingly, the school district's improper conduct correlated with D.S.'s increasingly problematic behavior. When D.S. misbehaved as expected, the school district initiated juvenile court proceedings, essentially punishing D.S. for its own failures.

After the Hearing Officer issued her decision the Lewisburg Area School District appealed the decision to a Due Process Appeals Panel. On December 20, 2004 the Appeals Panel affirmed the Hearing Officer's conclusion that the school district violated D.S.'s right to receive a free appropriate public education during the 2003-2004 School Year. Appeals Panel Decision, at 478a. In addition, the Appeals Panel agreed with the Hearing Officer that the school district owed compensatory education to D.S., but held that the award ordered by the Hearing Officer was too limited—and ordered more. R. at 480a, 482a.

The Appeals Panel took the unusual step of laying out (in a section labeled "Dicta") a series of directives for the school district. First, the Appeals Panel advised the district that "it may not institute rules and procedures that restrict the educational rights of a student entitled to special education and related services" and "may not fail to provide specially designed instruction or related services that are required by law." R. at 481a. Second, it urged the district "to obtain technical support and in-service training for its supervisors, administrators, and support staff in order to assure that students like [D.S.] are provided with appropriate educational programs." R. at 482a (emphasis added).

Finally, and most tellingly for this Court's purposes, the Appeals Panel emphasized that, because D.S. has a disability that impedes his ability to control his behavior, it is the responsibility of the school district to "teach [D.S.] how to interact appropriately with peers and adults in varying school contexts *and not simply punish him for failing to act appropriately*." Id. at 482a (emphasis added).

In summary, both special education decisions are relevant because they reveal the school district's contributory negligence in D.S.'s allegedly delinquent behavior. These decisions demonstrate that the school district's improper program triggered the behavior that D.S. was unable to control yet made him the subject of delinquency petitions.

2. Federal law and a recent decision of this Court instruct law enforcement to consider whether the child's disability or inappropriate school program led to court proceedings.

Federal special education law requires that when a student with a disability is referred to law enforcement, the school district must forward his special education and discipline records to those authorities. Specifically, 20 U.S.C. § 1415(k)(9)(B) provides that the referring education agency must "ensure that copies of the special education and

disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime." This provision is intended to ensure precisely the kind of consideration D.S. sought to achieve by separately submitting these records to the Court, but was stymied when the lower court found them not to be relevant.

The importance of the kind of evidence at issue here, a decision about D.S.'s disabilities and the underlying delinquency conduct, was recognized by this Court in In re C.M.T., 861 A.2d 348 (Pa. Super. 2004). In re C.M.T. also concerned a youngster with Asperger's Syndrome. Her symptoms included anxiety, panic attacks and an obsessive-compulsive disorder for which she had been prescribed multiple medications. Id. at 351. These disabilities entitled her to special education programming under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400, *et seq*.

Because of her absenteeism, the school referred C.M.T. to the county District Attorney's office, which filed a petition to adjudicate C.M.T. a dependent child under Section 6302 of the Juvenile Act. In re C.M.T., 861 A.2d at 351. During the adjudicatory proceedings the juvenile court ruled that the family could not introduce evidence that C.M.T.'s disabilities were responsible for her poor school attendance or that her local school district had failed to meet her special education needs. Id. at 355. At the conclusion of the hearing the lower court adjudicated C.M.T. dependent, placed her under the supervision of the County Juvenile Probation Office, and ordered her to attend school regularly and on-time.

This Court, in a unanimous opinion, reaffirmed that it is the juvenile court's responsibility to ensure that the record represents a comprehensive inquiry, with the court receiving and, if necessary, seeking out evidence.

> We conclude that the hearing court erred as a matter of law in excluding evidence bearing on the relationship between C.M.T.'s disabilities and her absenteeism. We recognize that the hearing court was, quite properly, attempting to distinguish between those issues that must be addressed by the parties within the context and framework of the IDEA, and those that were relevant to the dependency determination. However, it is clear that such issues have the potential to overlap in the case of an IEP student who is facing dependency hearings based on habitual truancy.

Id. at 355.

To the extent that C.M.T. correctly holds that an adjudication under the Juvenile Act requires a comprehensive inquiry that considers all relevant evidence, this principle holds greater significance in delinquency adjudications where accused youth—like D.S.—facing the loss of liberty and institutional confinement, are entitled to proof beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364 (1970) ("[T]he reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."). Just as the C.M.T. Court recognized that a student's disability and school experience are relevant to whether the child's absenteeism was "without justification," here, in the delinquency context, it is relevant to whether the child had the requisite *mens rea*.

Significantly, the C.M.T. Court noted that schools, not courts, are the "vehicle[s] for resolving these specialized and sensitive issues." Id. at 356. The Court criticized the District Attorney's Office for aggressively pursuing the case: "[W]e question whether the Commonwealth properly exercised its prosecutorial discretion to litigate this matter." Id. at 355.[18] A similar admonition would be appropriate in this case.

[18] In C.M.T. the family sought to introduce evidence they believed would establish the school district's failure. The lower court refused to admit that evidence because the family had never challenged the child's IEP through the hearing and appeal process. Id. 355-56. In this case D.S.'s family used the special education due process system, and sought to introduce the decisions of the state administrative bodies finding the school district in default.

Congress directed school districts referring students with disabilities to law enforcement to transfer the students' special education and discipline records to those authorities. Congress' purpose is obvious. While it recognized that students with disabilities who commit crimes are subject to referral to law enforcement, it intended that law enforcement, including the courts, have access to and consider information regarding the child's disability, the needs resulting from that disability, and the extent to which the local educational agency has met those needs. This Court's decision in C.M.T. is equally "common sense" and directed to the same end—clearly a juvenile court in a dependency proceeding involving a child with Asperger's Syndrome should inform itself about the disability and the school district's efforts to provide special education.

The C.M.T. Court further cautioned that juvenile courts should be sensitive that it is the education system that has the mandate and the capacity to meet the needs of students with autism spectrum disorders. Appellant contends that this wise counsel should extend to the lower court in this delinquency proceeding.

III THE DELINQUENCY ADJUDICATION MUST BE REVERSED BECAUSE THE EVIDENCE DOES NOT ESTABLISH THAT D.S. ACTED VOLUNTARILY

Section 301(a) of the Pennsylvania Crimes Code states that a defendant is not culpable and therefore "is not guilty of an offense unless his liability is based on conduct which includes a voluntary act . . . ." 18 Pa. C.S. § 301(a). Thus, the Commonwealth bore the burden of proving that D.S.'s conduct, which formed the basis of the charges in the delinquency petitions, was voluntary.[19]

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[19] Under 18 Pa. C.S. § 305(a)(1), the *mens rea* and voluntary act requirements of Sections 301 and 302 do not apply to "summary offenses, *unless* the requirement involved is included in the definition of the offense or the court determines that its application is consistent with effective enforcement of the law defining the

As a corollary, precedent from this Court indicates that D.S. should have been afforded an opportunity to rebut the Commonwealth's evidence on this point through either expert or lay testimony. In re G.T. does not bar the admission of expert testimony to rebut that an alleged delinquent act was voluntary.

In Commonwealth v. Fierst, 620 A.2d 1196 (Pa. Super. 1993), the defendant was convicted of, *inter alia*, third-degree murder and aggravated assault arising out of a car accident where he drove into the oncoming lane of traffic and struck another vehicle, injuring the driver and causing the death of a passenger. Evidence presented at trial suggested that the defendant was suffering from a seizure during the accident. On appeal the defendant argued that his counsel had been ineffective for failing to present expert testimony concerning the alleged seizure in support of the defense that his act — striking the other vehicle — was involuntary. Id. at 1202.

Although this Court noted that "[n]o case of this Commonwealth has discussed the need for expert medical testimony to support a defense theory that certain acts were involuntarily committed," id. at 1204, it nevertheless found that the ineffectiveness claim was arguably meritorious, id. at 1205. It held that expert testimony explaining how the seizure affected the defendant's ability to control the automobile would have been probative of his state of mind and of the voluntariness of his actions at the time of the accident. Id. Additionally, the Court found that the defendant's counsel was ineffective in not requesting a jury instruction explaining that the defendant "could be exonerated of

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offense" (emphasis added). The statutory definition of each charge brought against D.S. includes a specific culpability requirement, *i.e.*, intentional, knowing, or reckless conduct. See Delinquency Petitions at R. 22a & 28a. Therefore, unlike strict liability summary offenses that might not require voluntary conduct, the summary offense charges in the delinquency petitions filed in this case cannot be sustained without proof that D.S.'s conduct was voluntary.

the charges of third degree murder and aggravated assault relating to the automobile collision if it found that [his] actions were involuntary." Id. at 1205-06.

Fierst instructs that the involuntariness of one's actions is a valid defense in adult criminal proceedings. Under In re G.T., adult criminal defenses apply to juvenile delinquency proceedings. See 597 A.2d at 640. Thus, the lower court erred by ruling that the written and oral testimony of Dr. Dowell was inadmissible for the purposes of showing that D.S. suffered from Asperger's Syndrome and that, under all the circumstances of the case (including the school district's failures), he did not voluntarily commit the conduct that forms the basis of the charges in the delinquency petitions.[20] See R. at 283a-290a.

The lower court *did* permit Dr. Dowell to testify as an expert in the area of clinical neuropsychology with a specialization in pediatrics for disposition purposes. R. at 318a. Portions of that testimony (the same portions discussed *infra* in Argument II.A.2.), demonstrate that Dr. Dowell could have provided information probative of the question whether D.S.'s allegedly delinquent actions were voluntary. According to Dr. Dowell, children with Asperger's Syndrome have a heightened limbic system, which is responsible for controlling the "fight or flight response." See, *e.g.*, R. at 321a-322a, 325a-326a, 329a-331a, 337a, 347a.

Although not questioned for this purpose, Dr. Dowell's testimony suggests that D.S.'s actions may not have been voluntary. When pressed by the prosecutor, Dr. Dowell opined that while D.S. "certainly has lots of voluntary behavior," R. at 348a, after he

[20] In his Motion for Reconsideration D.S. sought the admission of expert testimony as relevant to whether he acted voluntarily as required under 18 Pa. C.S. § 301(a). The trial court's affirming opinion and order acknowledged this claim, Juvenile Court Opinion, at 2, but does not address whether D.S. acted voluntarily.

experiences a triggering event (*e.g.*, "being removed from a preferred activity," or being subject to a "perceived threat," R. at 349a) or series of events, his limbic system may take over. See R. at 351a ("I think he has voluntary actions along the way that he does things. I think at some point in time he clicks in and loses it and he's no longer really running the show").[21] Therefore, under the logic of Fierst and In re G.T., the lower court erred in ruling that Dr. Dowell's testimony was irrelevant at the adjudication stage of the delinquency proceedings. Dr. Dowell's neuropsychological evaluation of D.S., as well as his testimony at the disposition hearing, cast doubt on the Commonwealth's circumstantial evidence that D.S.'s allegedly delinquent conduct was voluntary.

Finally, the Hearing Officer and Appeals Panel decisions should also have been admitted and considered for this purpose. As those opinions and Dr. Dowell's testimony further establish, the school district's failure to provide D.S. with necessary services, and its staff's failure to use professionally acceptable methods to prevent and de-escalate D.S.'s behavior during the incidents that led to this adjudication, were clearly relevant to whether his conduct was "voluntary." Since the Commonwealth bore the burden of

[21] At disposition, Dr. Dowell's testimony regarding the voluntariness of D.S.'s actions was merely illustrative in nature and responded to questions about D.S.'s conduct in holding a chair in a threatening manner above Kane Stiffler on February 24, 2004. See, *e.g.*, R. at 349a-350a (noting that Kane testified that he saw that D.S. was in an aroused state and explaining that D.S. was probably in the "fight-or-flight" mode and merely responding to perceived threats). Had Dr. Dowell been permitted to testify at adjudication, he would have been able to provide an expert opinion on the voluntariness of D.S.'s actions during the incidents underlying the other delinquency charges. The fact that Dr. Dowell had information relevant to these charges is clear from a perusal of the record. For example, when asked to explain how a child with Asperger's Syndrome might react if someone grabbed his or her arm, Dr. Dowell opined that the limbic system would interpret the action as a threat and the fight-or-flight responses that this would trigger include kicking, biting, hitting, and spitting. R. at 331a-332a. The testimony of Erin Butler and Sue Weisen suggests that D.S.'s conduct, which forms the basis of the two aggravated assault charges, was a limbic system response to the perceived threat he experienced when Erin Butler first grabbed his arm and then physically restrained his upper torso. See R. at 244a-245a (Erin Butler's testimony); R. at 218a-219a (Sue Weisen's testimony). Consistent with Dr. Dowell's interpretation of D.S.'s behavior, D.S. reacted to this threat by struggling to escape from Erin Butler's grasp, kicking her in the leg, and pushing Sue Weisen away with his legs as she approached him. See R. at 245a-246a, 218a-219a. Moreover, Erin Butler testified that D.S. returned to a calm, non-aggressive state after approximately ten to fifteen minutes of restraint, R. at 247a, which is consistent with Dr. Dowell's explanation that it takes nearly twenty minutes for a child with Asperger's Syndrome to regain frontal lobe control over his behavior, R. at 330a-331a.

establishing this fact at trial, this Court should reverse the adjudication decision, and at a minimum, instruct the lower court to admit the special education decisions and allow Dr. Dowell to provide an expert psychological opinion regarding whether D.S.'s allegedly delinquent conduct, under all of the circumstances, was voluntary.

IV THE DELINQUENCY ADJUDICATION MUST BE REVERSED AND REMANDED BECAUSE THE EVIDENCE ESTABLISHED D.S. ACTED IN SELF-DEFENSE

Both delinquency petitions against D.S. allege crimes against school personnel, and during the two evidentiary hearings in both matters D.S. affirmatively raised the claim of self-defense to these charges. D.S. also attempted to introduce evidence, discussed above, relevant to his state of mind, specifically his belief that when restrained by school personnel, resistance was necessary to protect him from harm. In this instance the lower court's refusal to admit or consider self-defense and evidence relevant to that claim was reversible error.

Pennsylvania law recognizes self-defense to criminal offenses against other persons. Self-defense is defined by statute as:

> The use of force upon or toward another person is justifiable *when the actor believes* that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such person on the present occasion.

18 Pa. C.S. § 505(a) (emphasis added).[22] When a defendant raises the issue of self-defense, the Commonwealth bears the burden to disprove such a defense beyond a reasonable doubt. Commonwealth v. Torres, 766 A.2d 342, 345 (Pa. 2001).

[22] The use of force is limited by Section 505(b)(3) which prohibits its use except under circumstances where "a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act which he has no legal duty to do or abstaining from any lawful action." 18 Pa. C.S. 505(b)(3). Those limits are not applicable in this instance. See Commonwealth v. Pollino, 467 A.2d 1298, 1301 (Pa. 1983)

Section 501 of the Crimes Code defines "belief" as meaning "reasonable belief," and the fact finder must use this standard to evaluate whether a person is under a reasonable belief that he is in immediate danger. 18 Pa. C.S. § 501; see Commonwealth v. Light, 326 A.2d 288, 292 (Pa. 1974). To determine whether the use of force was justified, *i.e.*, reasonable, the fact finder must determine first whether the defendant acted out of an honest, bona fide belief that he was in imminent danger and second whether this belief was reasonable in light of the facts as they appeared to him. Id.

This Court, describing the issue of self-defense for the fact finder, cited to standard jury instructions explaining,

> a defendant's right of self-defense depends upon what he reasonably believes. Thus the right of self-defense may be available not only to a person who is in actual danger of unlawful attack but also to one who mistakenly believes that he is. A defendant is entitled to estimate the necessity for the force he employs under the circumstances as he reasonably believes them to be at the time. In the heat of conflict, a person who has been attacked ordinarily has neither time nor composure to evaluate carefully the danger and make nice judgments about exactly how much force is needed to protect himself. Be realistic; consider the limitations of human nature when judging what the defendant believed and whether his beliefs were reasonable.

Commonwealth v. Mayfield, 585 A.2d 1069, 1074 (Pa. Super. 1991) (citing Standard Jury Instructions promulgated by the Pennsylvania Bar Institute, 9.505(2)). The Court further explained that a fact finder is "permitted to consider those characteristics of the defendant which would lead to a conclusion, not that the defendant was in fact in danger, but rather that he reasonably believed himself to be in danger. Such factors, as the physical stature of the defendant versus the victim, or the prior relationship between the

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(holding that the defendant, charged with aggravated and simple assaults, who produced evidence of self-defense was entitled to an instruction that "force may be met with force so long as it is only enough to repel the attack").

defendant and the victim, or the defendant's state of mind at the time of the incident can all figure into the [fact finder's] assessment of reasonableness." Id.

Before the issue of self-defense may be submitted to a fact finder for consideration, a valid claim of self-defense must be made out as a matter of law, and this determination must be made by the trial judge. Commonwealth v. Mayfield, 585 A.2d 1069, 1071 (Pa Super 1991). Such a claim may consist of evidence from any source.

> Such evidence may be adduced by the defendant as part of his case, or conceivably, may be found in the Commonwealth's own case in chief or be elicited through cross-examination.…Our case law makes it crystal clear that the charge of self-defense must be given upon request where the jury would have a possible basis for finding it.… Thus, if there was evidence which would have supported the claim of self-defense, *it was for the trier of fact to pass upon that evidence and improper for the trial judge to exclude such consideration by refusing the charge*.

Id. (citations omitted) (emphasis added).

In this matter counsel for D.S. asserted self-defense during the evidentiary hearings on each petition. At the July 2004 hearing during his cross-examination of the Commonwealth's first witness, Angela Shively, D.S.'s emotional support teacher, D.S.'s counsel stated,

> Your Honor, we believe that the child in his mind thought that he was being assaulted and that his behavior with regard to behavior of the school employees set him up to where he had in his mind a reasonable assumption that he was under attack.

R. at 80a. Then at the September 2004 hearing, during cross-examination of Erin Butler, D.S.'s social worker, the victim of an aggravated assault finding in Petition 41JV04, D.S.'s counsel again stated,

> In a very limited sense, your Honor, I think even children have a right of self-defense, and the perception of the child as to the attack as to his status within that circumstance would allow him to flail, to propel things, so people would get away from him

R. at 204a. Finally, in his motion for a directed verdict counsel for D.S. also asserted self-defense stating,

> The only testimony with regard to contact in this whole mater, your Honor was the lady who was kicked in the chest, which the two witnesses said looks like he was trying to keep her from approaching him, he was defending his space.

R. at 274a. Thus, D.S. clearly and appropriately raised a self-defense claim.

In this matter, evidence relevant to D.S.'s state of mind should have been admitted to show that he reasonably felt he was in immediate danger. Psychiatric testimony is always admissible as to the accused's subjective state of mind and bona fide belief. Commonwealth v. Pitts, 740 A.2d 726, 733-734 (Pa. Super. 1999) (psychiatric testimony "is a type of evidence which may be introduced on the question of the reasonable belief requirement of self-defense").[23] That Dr. Dowell had information relevant to D.S.'s self-defense claim is clear from the record. For example, when asked to explain how a child with Asperger's Syndrome might react if someone grabbed his or her arm, Dr. Dowell opined that a child like D.S. would interpret the action as a threat and would kick, bite, hit, and spit. R. at 326a, 331a-332a.

The special education decisions against the school district also speak to the reasonableness of D.S.'s belief that he was in immediate danger. Several of the charges against D.S. resulted from incidents during which he was unexpectedly physically restrained by school staff. The Hearing Officer and Appeals Panel decisions both suggest the school district's improper program, including the use of physical restraints, triggered D.S.'s self-defense response.

[23] While Commonwealth v. Pitts, and the cases it cites for authority, involved the use of deadly force, Pennsylvania courts have not expressly limited the use of this evidence in determining reasonableness of non-deadly force.

Since the Commonwealth bore the burden of disproving self-defense, at a minimum this matter should be remanded for consideration of whether—given his disability and its symptoms—D.S. reasonably believed himself at physical risk, and whether the actions that were the basis for the delinquency conviction were actions reasonably taken to repel the danger.

CONCLUSION

WHEREFORE, for the above reasons, appellant D.S., by his attorneys, respectfully requests that this Honorable Court vacate the delinquency adjudication in the lower court.

Respectfully submitted,

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